

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA664/2022  
[2024] NZCA 276**

BETWEEN NELSON HONEY & MARKETING (NZ)  
LIMITED  
Appellant

AND PUREALITY TRADING COMPANY  
LIMITED  
First Respondent

GRACE GU  
Second Respondent

Hearing: 25 September 2023

Court: Cooper P, Palmer and Jagose JJ

Counsel: J T Burley and M C Staines for Appellant  
G D Pearson and J K Holt for First and Second Respondents

Judgment: 27 June 2024 at 11.00 am

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by Cooper P)

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### Introduction

[1] Nelson Honey & Marketing (NZ) Ltd (NHM) appeals against a judgment of Associate Judge Johnston granting summary judgment to Pureality Trading Company Ltd (Pureality) and Ms Grace Gu (together, the respondents), the defendants in the High Court.<sup>1</sup>

[2] NHM appeals on the basis that the Judge erred in concluding that the respondents had satisfied the requirement of r 12.2(2) of the High Court Rules 2016 to demonstrate that none of the causes of action in NHM’s statement of claim could succeed.

### Background facts

[3] NHM is a manufacturer and supplier of honey and related products in New Zealand and overseas. In April 2013, NHM sought to market its products in the People’s Republic of China (China). For that purpose, it engaged the services of Ms Gu, a Chinese national who moved to Nelson in 2009, and lived in both Nelson

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<sup>1</sup> *Nelson Honey & Marketing (NZ) Ltd v Pureality Trading Co Ltd* [2022] NZHC 2995 [High Court judgment].

and Shanghai between 2011 and 2019, before relocating to Shanghai. Ms Gu knew Mr Paul Le Gros, a lawyer practising in Nelson, having worked with him in connection with her business exporting wine to China. Mr Le Gros was the chairperson of NHM and introduced Ms Gu to the company. The Judge found that, as a consequence of the introduction, a complicated business relationship developed between NHM and Ms Gu.<sup>2</sup>

[4] NHM engaged Ms Gu to provide it with advice and assistance to facilitate its entry into the Chinese market. The Judge observed that it appears Ms Gu incorporated Pureality intending it to be the vehicle through which those services would be provided. He also found that the terms of this consultancy agreement were never formalised.<sup>3</sup> The parties had initially discussed the possibility of a joint venture for the marketing of NHM's products in China, and for that purpose Ms Gu incorporated a company in China by the name of Beijing Kiwibird International Co Ltd (Kiwibird). Although it was initially intended that Kiwibird would sell NHM's products, and that NHM would hold shares in the company, that arrangement did not come to fruition. The evidence does not show to what extent, if at all, Kiwibird traded and if so, what role it played in the parties' business relationship.<sup>4</sup>

[5] Ms Gu introduced NHM to Mr Jack Wang, who was a director and shareholder of a company based in China called Horizon Co Ltd (Horizon). The Judge found that there was a proposal that NHM engage Horizon as its exclusive agent for the marketing and sale of NHM's products in China.<sup>5</sup> He continued:<sup>6</sup>

Lengthy negotiations followed. However, while these continued, NHM and Horizon put agency arrangements in place. In evidence, is what the parties both identify as the last iteration of a draft agency agreement originally prepared by NHM's advisers.

[6] We interpolate here to note that NHM alleges that in or about March 2017, following detailed discussions between the parties, an agreement was reached (the Horizon Supply Agreement), whereby NHM was to supply products to Horizon who

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<sup>2</sup> At [4].

<sup>3</sup> At [5].

<sup>4</sup> At [6].

<sup>5</sup> At [7].

<sup>6</sup> At [7].

would then on-sell them in China. A written contract was prepared but not executed. The respondents contended that the unexecuted Horizon Supply Agreement and anything done in respect of it were the actions of NHM and Horizon and not them.

[7] NHM says that, in December 2014, Horizon became an authorised distributor of NHM's products. From then on, orders for products were placed with NHM on the trading accounts of Horizon and Pureality from time to time at the direction of Ms Gu. NHM claims it regarded Ms Gu, Pureality and Horizon as effectively one and the same.

[8] The Judge found that Horizon marketed and sold NHM's products in China through an online trading platform called Vipshop International Holdings Ltd (Vipshop). Ms Gu gave evidence that she allowed Horizon to use Pureality's account with Vipshop to sell products that Horizon had purchased from NHM. Ms Gu claimed that all of the money from the sale of products through the Vipshop account was paid to Horizon. This arrangement was governed by the Vipshop Supply Agreement.

[9] The Judge found that:

[9] Between 2014 and 2018, orders were placed with NHM by Mr Wang and Horizon both directly and through Ms Gu and [Pureality]. NHM received and filled orders for a substantial amount of product — as I understand the evidence, to the value of \$8,733,094.61. The invoices issued by NHM were addressed to Horizon.

[10] NHM claimed that by March 2018, Horizon owed \$1,745,873.29 in respect of products which had been supplied to the respondents, who sold the products in China between 2014 and 2018. NHM had not received payment for the supply of these products. The total sum was comprised of \$1,687,619.66 recorded in NHM's records on Horizon's trading account, and \$58,253.63 recorded on Pureality's trading account. Horizon disputed its liability for any of the amount claimed and NHM did not proceed against it, instead suing Pureality and Ms Gu. On the assumption the amount was outstanding, the issue raised on the respondents' summary judgment application was whether Ms Gu or Pureality, or both of them, were liable for the sum owed.

## High Court judgment

[11] NHM commenced its proceeding against Pureality and Ms Gu in the High Court on 23 December 2021. It pleaded six causes of action against both respondents, either jointly or severally, alleging: breach of contract, breach of agency obligations, a claim for money had and received, breach of obligations as a bare trustee of a constructive trust, unjust enrichment and negligence. In respect of each cause of action, damages were sought against the respondents, jointly or severally, in the sum of \$1,745,873.29.

[12] The Judge took the view that all the claims but breach of contract and negligence effectively covered the same ground.<sup>7</sup> Consequently, in assessing the application for summary judgment, the Judge analysed the claim under three heads. He considered the issues to be:<sup>8</sup>

- (a) first, whether there was a contract between NHM and Ms Gu, Pureality or both, pursuant to which NHM was entitled to recover the sum of \$1.745 million from them;
- (b) second, even if there was no such contract, whether NHM had a restitutionary claim against Ms Gu and Pureality for the same amount; and
- (c) third, whether one or both of Ms Gu and Pureality had acted negligently, thus entitling NHM to recover damages in that amount.

### *Breach of contract*

[13] NHM's pleaded claim breach of contract included the following:

27. The principal contractual arrangement pleaded in paragraphs 4 to 16 above [the contract between NHM and Horizon] was, in substance, between the Plaintiff and the Defendants ... and comprised the following documents:

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<sup>7</sup> At [19].

<sup>8</sup> At [20].

- 27.1 The Horizon Supply Agreement between the plaintiff and the Second Defendant [the unexecuted agreement] to manage the Plaintiff's business in China pleaded in paragraph 13.
- 27.2 The First Defendant's invoices for managing the Plaintiff's business in China pleaded in paragraph 20.
- 27.3 The emails from the Second Defendant to the Plaintiff in relation to the orders for products, for delivery of those products to China and in relation to payment pleaded in paragraph 20.
- 27.4 The VIPShop Supply Agreement pleaded in paragraphs 23 and 24 [an agreement between Pureality and Vipshop].
- 28. The salient provisions of the Contract included the following express terms:
  - 28.1 That the Plaintiff was to pay the First Defendant a monthly fee for managing its business in China.
  - 28.2 That the First Defendant would manage the Plaintiff's business in China.
  - 28.3 That the Second Defendant would assist with the setup and management of the Plaintiff's business in China.
- 29. The Contract also included the implied term that payments received by VIPShop for the Plaintiff's products sold/delivered on the VIPShop online platform would be paid to the Plaintiff by the First Defendant direct or through Horizon directly or on instruction of Horizon.

[14] The Judge was critical of the way in which the claim for breach of contract was pleaded for a number of reasons:<sup>9</sup>

- (a) First, the basic allegation in para 27 of its pleading was that the contract between NHM and Horizon (the Horizon Supply Agreement) was "in substance" between NHM and Pureality. The contention that the Horizon Supply Agreement established the basis for the alleged contractual liability of the respondents could not take NHM very far.
- (b) Second, NHM's reference in para 28 of its pleading to a consultancy agreement between NHM and Ms Gu and Pureality, was distinct from the Horizon Supply Agreement.

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<sup>9</sup> At [27].

- (c) Third, NHM’s allegation that an implied term existed in para 29 of its pleading did not identify expressly the agreement or contract into which the term was to be implied.

[15] However, as a consequence of submissions made by Mr Burley for NHM, the Judge proceeded on the basis that NHM’s essential allegation was that, in the course of dealings between NHM and the respondents, Ms Gu and Pureality had agreed to assume liability for any debt owed to NHM by Horizon arising under the Horizon Supply Agreement essentially as guarantors of Horizon’s obligations.<sup>10</sup>

[16] The Judge then analysed each of the bases upon which an agreement was alleged in the statement of claim, finding in each case that they were unsupported by the evidence.<sup>11</sup> First, he noted it was common ground that the Horizon Supply Agreement, relied on in para 27 of the statement of claim, had never been executed. In any event, there was no evidence suggesting that Ms Gu or Pureality were ever intended to be parties to it: the Horizon Supply Agreement produced in evidence was between NHM and Horizon. A further difficulty was that the Horizon Supply Agreement relied on was apparently created in 2018, suggesting that its terms were still being negotiated at a time when most of the debt which was the subject of the claim had already been incurred.<sup>12</sup> The Judge concluded the Horizon Supply Agreement “could not conceivably give rise to contractual arrangements of the sort contended for by NHM, so as to hold Ms Gu or [Pureality] liable for Horizon’s debt”.<sup>13</sup>

[17] Insofar as NHM sought to rely on invoices rendered by the respondents, in para 27.2 of its statement of claim, the Judge found that there was only one invoice issued by Ms Gu, and that related to her consultancy agreement, a separate contract only tangentially related to the Horizon Supply Agreement.<sup>14</sup> There was nothing in the invoice which could support NHM’s contractual claim against the respondents.<sup>15</sup>

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<sup>10</sup> At [28].

<sup>11</sup> At [29]–[35].

<sup>12</sup> At [30].

<sup>13</sup> At [31].

<sup>14</sup> At [32].

<sup>15</sup> At [33].

[18] As to a further allegation in para 27.3 of the statement of claim based on correspondence between the parties, the Judge noted that counsel had not pursued the allegation to any significant extent in argument. But in any event, having reviewed the correspondence relied on, there was nothing which would support the existence of a contract as alleged.<sup>16</sup>

[19] Finally, as to the Vipshop Supply Agreement, that was an agreement between Pureality and Vipshop of which NHM admitted it was unaware at the time it claimed Ms Gu and Pureality had guaranteed Horizon's obligations.<sup>17</sup>

### *Restitutionary claims*

[20] As to the restitutionary claims, the Judge observed they shared a common thread — a claim by NHM that Ms Gu and Pureality had received the funds in circumstances in which they were obliged to pay them to NHM.<sup>18</sup> He described NHM's pleading in relation to this as "tentative at best":<sup>19</sup>

It was the Plaintiff's understanding that VIPShop paid money to Horizon for the product sold (less commission), who [sic] then forwarded the money to the First Defendant for payment to the Plaintiff.

[21] The Judge found there was no evidence that Ms Gu or Pureality were entitled to or did receive those monies. There was evidence that Horizon paid "some money" to Ms Gu or Pureality for on-payment to NHM on a "small number of occasions". However, he accepted Ms Gu's evidence that when this did occur, these funds were in fact paid to NHM.<sup>20</sup>

### *Negligence*

[22] Finally, in relation to the cause of action based in negligence, specifically "professional negligence", the Judge accepted a submission made by Mr Pearson for the respondents that the statement of claim contained "no recognisable allegation as to the existence of a duty of care". Further, no particulars were given of the

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<sup>16</sup> At [34].

<sup>17</sup> At [35].

<sup>18</sup> At [37].

<sup>19</sup> At [38].

<sup>20</sup> At [39].



circumstances allegedly giving rise to such a duty and there was no affidavit evidence which would support such an allegation.<sup>21</sup>

[23] The Judge acknowledged NHM had filed some affidavit evidence asserting the existence of commitments by Ms Gu and Pureality.<sup>22</sup> However, he rejected the evidence on the basis that the witnesses were describing events which occurred up to nine years earlier and the evidence was not supported, and in fact contradicted, by the contemporaneous documentation to which the Judge had referred.<sup>23</sup>

[24] The Judge also referred at this point to a letter written to Horizon by NHM's then solicitors, Morrison Mallet, dated 31 August 2020. He noted that the letter had contained a "careful and comprehensive" description of the basis for NHM's claim against Horizon.<sup>24</sup> Although the letter acknowledged the roles played by Ms Gu and Pureality, significantly, it made no suggestion that they were liable, whether jointly with Horizon or otherwise, for the outstanding debit balance.<sup>25</sup> The letter concluded with a demand for payment of the sum of \$1.745 million, stating that NHM had engaged lawyers in China who would proceed to enforce the debt against Horizon unless the outstanding sum was paid within 10 days.<sup>26</sup>

[25] The Judge considered that Morrison Mallet's analysis of the situation was entirely consistent with the contemporaneous documentation which he had reviewed.<sup>27</sup> In short, it appeared that facing the very real difficulties of litigating with a party in China, NHM had turned its attention to Ms Gu and Pureality because they were more accessible targets.<sup>28</sup>

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<sup>21</sup> At [40].

<sup>22</sup> At [41].

<sup>23</sup> At [42].

<sup>24</sup> At [43]–[44].

<sup>25</sup> At [44].

<sup>26</sup> At [45].

<sup>27</sup> At [46].

<sup>28</sup> At [46].

### *Outcome*

[26] The Judge concluded that Ms Gu and Purity had demonstrated to the necessary standard that none of the causes of action pleaded by NHM was reasonably arguable. He entered summary judgment for the respondents accordingly.<sup>29</sup>

### **The appeal**

[27] A judge may grant summary judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.<sup>30</sup>

[28] NHM's argument on appeal was that summary judgment should not have been granted on the merits and also that the judgment had been given without regard to significant procedural irregularities on the basis of which the application for summary judgment should have been declined.

### *Procedural issues*

Was leave required because the application was out of time?

[29] The first complaint was that the onus should have been on the respondents to demonstrate to the High Court that they should be permitted to file their application for summary judgment after the filing of the statement of defence and the commencement of the case management process. Mr Burley submitted that the onus was not discharged, and further that the Judge had failed to consider whether or not leave should be granted.

[30] Referring to the approach adopted in cases such as *Craig v New Zealand Guardian Trust Co Ltd*,<sup>31</sup> Mr Burley submitted the Judge should have considered whether there was a satisfactory explanation for the delay in making the application, the merits of the case for summary judgment, and whether there was any risk of

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<sup>29</sup> At [47].

<sup>30</sup> High Court Rules 2016, r 12.2(2).

<sup>31</sup> *Craig v New Zealand Guardian Trust Co Ltd* [2023] NZHC 2058.

miscarriage of justice as a result of determining the application at the later point in time.

[31] In addressing these considerations, Mr Burley noted that the respondents' affidavits had not addressed why the application for summary judgment was filed out of time — the only explanation advanced was in the notice of application for summary judgment which asserted that the respondents required time to investigate NHM's claims, including NHM's relationship with parties independent of the respondents. Mr Burley complained that there was no witness or documentary evidence to support that assertion.

[32] Mr Burley also contended the respondents and the Judge had failed to address the criteria for leave. While the question of whether leave should be granted was inevitably bound up with the merits of the application, the issue of leave should not be treated as a formality. Turning to the risk of miscarriage of justice, Mr Burley submitted that discovery had not yet taken place, making any application for summary judgment premature, and that NHM had already incurred costs in relation to the case management process.

[33] In sum, Mr Burley submitted that because the respondents had not discharged their onus to demonstrate why leave ought to have been granted, and the Judge erred in failing to address and make a determination in respect of these issues, there had been a miscarriage of justice.

[34] In our view, the first procedural argument is without merit and does not reflect the procedural history of the case after the proceeding was commenced in the High Court. Mr Pearson provided us with more context as to the procedural background to the application:

- (a) The statement of claim was filed on 23 December 2021 and the statement of defence on 14 March 2022. NHM then sought an extension of time to file a reply to the statement of defence.

- (b) On 25 March 2022, Mr Pearson agreed to the extension. At the same time, he noted that Pureality and Ms Gu might apply for summary judgment, but before taking that step some evidential matters needed to be clarified.
- (c) There was then a case management conference, after which Associate Judge Johnston directed a timetable for the respondents to file and serve the application for summary judgment. The date fixed, by consent, was 31 May 2022.
- (d) On the same day as the case management conference, Mr Pearson advised counsel for NHM and the Court that there would be a short delay in filing the application. NHM took no issue with this.
- (e) The application was then filed on 3 June. It included an application for leave but, given the circumstances described above, the delayed making of the application had already been contemplated by the Judge in establishing the timetable.
- (f) When NHM filed its notice of opposition, on 1 July 2022, it raised the issue of delay without acknowledging its consent to the original timetable order.

[35] The Judge assessed the merits in the course of dealing with the substantive application and, in the circumstances, they did not require any separate consideration. We also reject any suggestion that the procedural course followed gave rise to an injustice. Having regard to the order establishing the agreed timetable, we consider a separate formal grant of leave was not required. Leave was implicit in the timetable order made.

Were the affidavits non-compliant?

[36] The next procedural issue is a claim that in the High Court the respondents purported to rely on unsigned and unsworn affidavits in support of their application for summary judgment. Mr Burley submits that the affidavits did not comply with

r 9.73(2) and (3) of the High Court Rules and s 11 of the Oaths and Declarations Act 1957.

[37] There was evidently no attempt to raise this issue in the High Court. In fact, the Judge specifically stated that “sworn affidavits” had been filed and served in support of the application.<sup>32</sup> It is surprising that the issue is raised now.

[38] Although the six affidavits supporting the application were apparently originally provided in unsworn form, they were sworn before the hearing in the High Court. Mr Pearson pointed out that sworn copies of three of the affidavits were included in the agreed High Court bundle of documents: Ms Gu’s second affidavit and two of Mr Le Gros.

[39] Mr Pearson addressed the affidavits alleged to be unsworn. In respect of the affidavit of Ms Helen McEwan, Mr Pearson noted that the affidavit had been sworn on 2 June 2022, but that he had filed the unsworn copy in the High Court electronic bundle because it was a clearer image and would be searchable. In respect of Ms Gu’s first affidavit and Mr Wang’s affidavit, Mr Pearson submitted that the only irregularity with the affidavits was that they were affirmed remotely and scanned and emailed to New Zealand, due to COVID-19 restrictions in China at the time. He noted the issue was raised in the High Court hearing, and the Judge had found there was no substance to the point.

[40] We note that there were sworn copies of four of the relevant affidavits in this Court’s electronic case file, prepared by NHM’s solicitors, but that the index of the case on appeal misleadingly described three of these as “undated”. It appears that Mr Burley wished to argue that the High Court should have given the affidavits less weight because they were originally provided in unsworn form. That is an argument totally without merit given that it seems, from the record before us, that the sworn affidavits were in fact before the Judge. This Court should not have been troubled with this issue.

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<sup>32</sup> High Court judgment, above n 1, at [21].

*(1) Breach of contract*

[41] With respect to the claim based on contract, Mr Burley accepted that the pleaded cause of action would require “amendment and refinement” were the substantive proceeding to take place. We are unclear as to what these amendments and refinements might be. Mr Burley merely contended there needed to be further clarity on the relationships and interactions between the various parties before the statement of claim could be reframed. He also emphasised that there had not been discovery.

[42] Mr Burley did not confront the Judge’s analysis of the contractual claim as it had been pleaded — as the Judge noted, this pleading was based on the Horizon Supply Agreement to which Pureality and Ms Gu were not parties. However, Mr Burley submitted that the relationship between NHM and the respondents was not governed by one all-encompassing written agreement. Regardless of the inadequacies in NHM’s pleading, Mr Burley submitted that the Judge erred in finding there could not be any contract between NHM and the respondents. Rather, the evidence was consistent with the existence of one or more contracts which were partially oral and partially written. This he said was consistent with decisions taken by the parties in a meeting in June 2016 where it had been agreed that NHM would sell its products to Pureality, and Pureality would in turn on-sell products to Horizon (the 2016 meeting).<sup>33</sup>

[43] In our view, the Horizon Supply Agreement has no bearing on the relationship between NHM and the respondents. The parties under it are NHM and Horizon. Horizon was appointed as the “distributor” of NHM’s products in China. NHM would supply its Royal Nectar range of products to Horizon and invoice Horizon accordingly. Horizon agreed to distribute the products and, subject to a dispute resolution provision, to pay for it, by either irrevocable bank letter of credit, or cash paid to NHM at the time of the order and before dispatch of the products.

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<sup>33</sup> The meeting took place in Nelson on 3 June 2016 attended by Mr Wang, Ms Gu, Mr Cropp, Mr Le Gros and others. Ms Gu was bracketed with Mr Wang as an attendee from Horizon. Among the matters discussed at the meeting was what was described as the “existing debt” owed to NHM (an amount of \$270,000) and Horizon’s plans to pay it off by the end of the year.

[44] Clearly, no obligations were assumed under the Agreement by Ms Gu or Pureality. In fact, as alluded to by the Judge,<sup>34</sup> cl 3.4 of the Horizon Supply Agreement provided that during the term of the agreement, Horizon would “not enter into any contract, engage in any transaction, or otherwise have any dealings, directly or indirectly, with [Pureality] in relation to this Agreement (without obtaining the prior written consent of [NHM])”.

[45] This was clearly a draft agreement between NHM and Horizon, and in our view its terms are inconsistent with the idea that obligations were assumed under the agreement by either Ms Gu or Pureality. It does not matter for present purposes that the agreement was not executed, since NHM pleaded it as representing the Agreement reached. And to the extent that, as the Judge observed, it was still in draft by the time most of the invoices the subject of the claim had been issued to Horizon, it must be assumed that it was relied on by NHM as representing the Agreement it had with Horizon.

[46] We have already described, above at [14]–[19], the way in which the Judge dealt with each of the allegations made in NHM’s pleading. We do not consider that Mr Burley made a real attempt to demonstrate that the Judge was wrong. He was left with what was, in effect, a fallback position that the agreement between NHM and the respondents was not governed by one all-encompassing written agreement.

[47] The difficulty with that argument is that it is completely inconsistent with the Horizon Supply Agreement, which was produced after ongoing discussions and dealings, and relied on in the statement of claim. Whatever was discussed between parties in the 2016 meeting does not appear to reflect the position later agreed to, nor the arrangements actually implemented.

[48] We emphasise that the Horizon Supply Agreement was relied on in NHM’s statement of claim “as if set out in full”. There is no reason to assume that it does not represent what the parties in fact agreed. And, it is difficult to see how “part oral, part written contracts” between NHM and the respondents, if providing for a party other

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<sup>34</sup> High Court judgment, above n 1, at [30].

than Horizon to be responsible for paying for NHM's products, could have been consistent with the Horizon Supply Agreement as pleaded.

[49] The possibility that there were other agreements providing for a party other than Horizon to be responsible for paying for NHM's products is also difficult to reconcile with the fact that Horizon was the party invoiced by NHM for almost all of the debt sought to be recovered in the claim. Mr Burley endeavoured to argue that a contract between Pureality and NHM was established by the fact that \$58,235 of the \$1.745 million claim had been invoiced to Pureality. Ms Gu claimed that no invoice had been received in this amount.

[50] Mr Matthew Gibson, an accountant retained by NHM, provided a report headed "Summary of Outstanding Debt for Horizon Co Limited", a full copy of which was attached to Ms Gu's first affidavit. Mr Gibson's report listed invoices from 18 December 2015 to 3 May 2018, with a total value of \$1,687,619.66. Each of the invoices was addressed to Horizon. Based on these invoices, in a paragraph headed "Summary", Mr Gibson wrote "[b]ased on a reconciliation of data available, we believe that core debt of \$1,687,619.66 is outstanding between Horizon and [NHM]". In that report, he contended that, although he did not appear to have a full summary of the information, he believed that Pureality had received payment either on behalf of Horizon or NHM. But, in his second affidavit, Mr Gibson referred to "a statement extracted from [NHM]'s accounting system" which, he said, together with supporting invoices showed the outstanding balance owed under Pureality's separate account with NHM — a sum of \$58,523.63.<sup>35</sup>

[51] The respondents accept that Pureality did purchase some relatively small volumes of products from NHM, but that these transactions were separately documented from NHM's transactions with Horizon.

[52] In respect of the allegation Pureality owed NHM a sum of \$58,523, the respondents submitted that proposition was wrong and wholly discredited by evidence. In his affidavit, Mr Cropp, NHM's principal director and majority shareholder, said that Pureality's debt to NHM had been paid as at 9 September 2016.

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<sup>35</sup> The statement is dated 27 May 2021, so is not a contemporaneous document.



This directly contradicts the evidence of Mr Gibson of the outstanding debt owed by Pureality. They noted that the “statement extracted from [NHM]’s accounting system”, referred to in Mr Gibson’s second affidavit, comprised a statement referring to four sales, and two tax invoices, both dated 20 June 2016. Each of the invoices identifies the amount outstanding — respectively \$23,724.03 and \$34,529.60 — together \$58,523.63.

[53] We consider that there is no evidential basis for Pureality or Ms Gu owing NHM a sum of \$58,523.63, let alone the full \$1.745 million sum claimed. Mr Gibson’s evidence, which appears to be an after-the-event reconstruction, sits unhappily with Mr Cropp’s evidence that Pureality had cleared its debts with NHM as at 9 September 2016. As he was NHM’s principal at the relevant time, we prefer his evidence. In any event, it is clear from the statement of claim that the basis of NHM’s contractual claim against the respondents is the Horizon Supply Agreement. We consider that any separate supplies to Pureality could not have been within the ambit of that agreement. If there is an outstanding amount owing by Pureality, it could be the subject of a separate claim, not affected by summary judgment on the present claim as pleaded.

[54] The general position taken to determining summary judgment applications is that the Court will refrain from attempting to resolve genuine conflicts of evidence or assessing the credibility of the parties’ statements in their affidavits.<sup>36</sup> However, we do not consider this to be a material dispute of fact relevant to the pleaded contractual claim. If NHM has a claim against Pureality for \$58,523.63, it is not the claim alleged under Horizon Supply Agreement. We do not consider there is a hypothetical scenario in which the contractual claim as pleaded could be arguable.<sup>37</sup>

[55] In the circumstances, we reject the appeal insofar as it concerns the claim based on contract.

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<sup>36</sup> Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.2.08].

<sup>37</sup> See *Attorney-General v Jones* (2003) 16 PRNZ 715 (CA).

(2) *The “restitutionary” claims*

[56] The Judge dealt together with the second to fifth causes of action, which he said were all restitutionary in nature.<sup>38</sup> As noted above, they were based on allegations of breach of agency, money had and received, breach of constructive trust, and unjust enrichment. The common thread linking these claims was a contention that Ms Gu and Pureality had received \$1.745 million in circumstances that they were obliged to pay it to NHM. We note that Mr Burley stated the restitutionary claims were his “strongest suit”.

[57] The claim based on breach of agency obligations alleged that either or both of Pureality and Ms Gu were acting as NHM’s agents in respect of the supply of NHM’s products. This is plainly contrary to the documentary evidence discussed above, which shows that the relevant invoices were sent to Horizon, except in those few occasions where Pureality was buying the products for its own purposes.

[58] If Ms Gu had any involvement, it appears that it was limited to providing day-to-day support liaising over the placement of orders and communication with NHM’s Mandarin-speaking contacts, like Mr Wang from Horizon. She gave evidence that she was never given any authority or decision-making power concerning Horizon, nor was she part of the contract NHM negotiated with Horizon.

[59] Pureality also allowed Horizon to utilise Pureality’s Vipshop account, an arrangement necessary because Horizon did not satisfy Chinese regulatory controls to enable it to do so. Pursuant the Vipshop Supply Agreement, between Pureality and Vipshop, Horizon was able to affect sales of the NHM products — Vipshop would buy NHM’s products, which would be supplied by Pureality. Ms Gu gave evidence that all money from sales was due to Horizon.

[60] We consider that the Vipshop arrangement cannot establish any debt on behalf of Pureality or Ms Gu to NHM, nor did it affect any debt owed by Horizon in respect of its contract with NHM.

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<sup>38</sup> High Court judgment, above n 1, at [36].

[61] Mr Cropp said in his affidavit that even though the NHM “had one account for Horizon and another one for Pureality at the same time”, he understood that “the two companies were linked and working together to sell [NHM]’s products in China”. Later he said in his affidavit that NHM had a very busy year in 2016, and Horizon’s debt to NHM also increased significantly over the same period, but asserted he “still considered Horizon, [Mr Wang], and [Ms Gu] as part of the same arrangement”. Later again, he observed that although the distribution authority had been granted to Horizon, “[Ms Gu] definitely considered herself part of that company’s business”.

[62] We accept that the precise nature and extent of Ms Gu’s relationship with Horizon is not clear from the affidavits. Ms Gu stated that neither she nor Pureality had ever been a shareholder of Horizon; Mr Wang gave similar evidence. Mr Cropp claimed that Ms Gu told him that she had sold a shareholding in Horizon, but that is hearsay. In the end, we are not persuaded that it matters, in view of the clear evidence that Horizon, and not Pureality or Ms Gu, was the distributor and responsible for any sums due to NHM under the Horizon Supply Agreement.

[63] It is appropriate to emphasise that before the present proceeding was commenced, NHM claimed that the debt was the responsibility of Horizon. Not only was that the allegation “careful[ly] and “comprehensive[ly]” made in Morrison Mallett’s letter of 31 August 2020,<sup>39</sup> but it was also the stance NHM adopted in correspondence with Horizon. In his email, sent on 8 August 2017, Mr Wang sought compensation for trademark investments he claimed to have made, and for \$700,000 worth of marketing expenditure on the NHM brand name up to the end of 2016. In her reply of 10 August, Ms Berryman, who was NHM’s chief executive, wrote:

- [NHM] has continued to supply product on favourable financial terms. We’ve had substantial uncertainty of when payment for product sold to Horizon for VIP would occur and the old debt would be settled.
- We have been carrying unpaid accounts for over 18 months which have reached a very large amount of money (NZ\$1.6 million) and the interest on this money would be very significant if this was included as a cost.
- Both parties agreed almost a year ago that the deal outlined under the Trademark Assignment Agreement was a means to get historical debts paid (>NZ\$700,000). You told me that restrictions on acquiring

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<sup>39</sup> High Court judgment, above n 1, at [43].

- currency quotas was the reason that this outstanding debt had not been paid and that the buyback of the trademarks was a good solution.
- [NHM] has provided marketing support to Horizon and now for sales on VIP (however I am not aware of the \$700,000 you note below and what it represents).
  - It has been very challenging to get information about when and how much of the unpaid accounts will be settled for the VIP platform in particular. We agreed to specific promotions to support the Royal Nectar brand but until the last week we have no information or reporting on the costs incurred for each of these promotions. These were to be agreed on a case by case basis. We still don't know how much of the outstanding invoices relating to product sold to Horizon on VIP will be paid. While the current balance is >NZ\$900,000 I accept that some of this amount will be offset by promotion costs and returns – but how much based on what was agreed between us both?
  - When we discussed the two agreements as drafts in March, you agreed to the nature of the relationship moving forward being one of 'preferred distributor' in China. The agreement provides for preferential treatment on pricing, first right of supply into the China market, and support, as agreed, for promotion and marketing etc. The draft agreement was updated to more strongly reflect this. You could suggest changes to the most recent draft that would work for Horizon and this would help us understand what you are looking for.

This exchange, which was not copied to Ms Gu or Pureality, is inconsistent with NHM's present stance that the outstanding debt was owed by the respondents.

[64] Mr Cropp endeavoured to rely on the notes of the 2016 meeting, discussed above at [42]. However, the minutes of this meeting do not lead to conclusions different from those we have already expressed about the ongoing nature of the relationship between the parties. There is nothing in the minutes of the 2016 meeting which suggests that either Ms Gu or Pureality was regarded as owing a debt to NHM, or that the parties envisaged they would do so.

[65] Mr Burley submitted that there were disputes of material fact in relation to NHM's restitutionary causes of action which were simply not capable of determination only on the affidavit evidence before the Judge.

[66] We are satisfied on the evidence that the Judge was right to reject NHM's contention that Ms Gu and Pureality acted as agents for NHM in respect of the supply of its products into China. He was also right to reject NHM's claim that they had received and wrongly retained \$1,745,873.29 (the money had and received claim), held such a sum in trust for NHM, or had been unjustly enriched in that amount. All of

these claims were an apparent attempt to avoid the fact that NHM had entered into an agreement with Horizon by creating claims against Pureality and Ms Gu, but they related to the products supplied to and required to be paid for by Horizon under the Horizon Supply Agreement.

*(3) The negligence claim*

[67] NHM asserts that Ms Gu owed it a duty of care to use her best endeavours to ensure regular payments were made for NHM's products and the proceeds were regularly paid to NHM. The genesis of this duty of care is apparently Ms Gu's experience in carrying out business in China, and NHM's reliance on her to ensure that its products were marketed, sold and paid for in the Chinese market.

[68] The simple answer to this cause of action is once again the Horizon Supply Agreement. Under the Agreement, Horizon was NHM's chosen distributor, the party with the obligation to pay for the products sourced from NHM, and the party assuming all risk. Ms Gu had a consultancy agreement with NHM, but there is no basis on which she can be regarded as having a duty of care to NHM, under which she had a duty effectively to ensure Horizon met its obligations to NHM.

[69] For these reasons we are satisfied that the Judge correctly held that NHM's negligence claim against Ms Gu could not succeed.

**Result**

[70] The appeal is dismissed.

[71] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
McVeagh Fleming, Auckland for Appellant  
LegalFocus Ltd, Nelson for First and Second Respondents