



High Court of New Zealand

15 November 2016

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

***NZX LIMITED v RALEC COMMODITIES LIMITED & OTHERS***  
**[2016] NZHC 2742**

**MEDIA RELEASE**

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).**

The High Court has upheld civil claims brought by NZX Limited (NZX) against the former owners of an Australian on-line grain trading business, the assets of which it purchased in 2009. The judgment also upholds one of the vendors’ counterclaims against NZX.<sup>1</sup>

NZX, a listed company which operates New Zealand’s national stock exchange, claimed the vendors (now called Ralec) had misrepresented the businesses’ growth potential in the Australian grain sales market and that aspects of the transaction breached the Fair Trading Act 1986 (FTA).

Ralec had responded with a series of counterclaims, including a claim that the NZX had breached its own contractual obligations by failing to adequately resource the business.

In a reserved decision released today, Justice Dobson found the NZX had made out four of the five alleged misrepresentation claims against Ralec, but found no compensation was owed because the NZX could not demonstrate losses flowing from relying on the misrepresentations.

Similarly, although Ralec succeeded in its claim that the NZX had not met its contractual obligations with respect to resourcing, no damages were awarded because Ralec had been unable to demonstrate that better resourcing would have meant the vendors would have been able to meet their earn-out targets.

In his judgment Justice Dobson noted:

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<sup>1</sup> At the time the transaction took place the assets comprised two businesses, Clear Interactive Limited, which employed a “tech team” with expertise in designing and writing software for applications such as the operation of an electronic market for buying and selling commodities and Clear Commodities Limited, an embryonic electronic grain exchange.

Both sides were exceptionally keen to consummate a deal. It was a case of a very willing seller, and a very willing buyer. This probably contributed to both sides materially overstating their position in pre-contractual dealings with the other.

With respect to costs Justice Dobson expressed the provisional view that costs ought to lie where they fall, given the outcome on damages is in the nature of a “nil all draw”. Accordingly, neither side would be entitled to a costs order against the other.

### **Background**

In October 2009, NZX completed a sale and purchase agreement (SPA) to acquire the assets of two Melbourne-based businesses then owned by the first and second defendants in this case (Ralec). Those assets comprised an embryonic exchange for online trading of Australian grains, and a business for writing and upgrading computer software. The personnel in that business had been responsible for creating the software on which the electronic grain exchange relied.

The Court has found that both sides were extremely keen to complete the deal. From NZX’s perspective, its chief executive, Mr Mark Weldon, envisaged the grain exchange as a cornerstone of a much larger new venture for NZX in the provision of data and facilitation of trading in agricultural products.

In July 2011, NZX commenced these proceedings, which were heard over 10 weeks between May and July 2016. NZX claimed that the vendors had misrepresented the prospects for the grain exchange to increase the volume of grain that could be traded on it. Five types of misrepresentation were alleged, and the Court has found that four of those types of misrepresentation have been made out. They relate to the volume of grain that the vendors represented were likely to be traded on the exchange in the ensuing season, the extent of support the grain exchange enjoyed in the Australian grain industry, the positive features of an alliance that had been entered into with a company dominant on the Australian east coast in the bulk handling of grain, and representations on the level of expenses likely to be incurred by the businesses in the current financial year.

NZX also pursued claims that the same complaints amounted to misleading and deceptive conduct under the Fair Trading Act 1986, and breaches of contractual warranties.

NZX also sued director/shareholders of the vendor companies under guarantees they had given, and a wider group of shareholder/employees as assignees of the benefits provided for in the SPA.

Ralec pursued counterclaims against NZX alleging breaches of contractual obligations under the SPA as to how NZX would resource and finance the businesses after they were acquired. The terms of the SPA entitled the vendors to substantial additional consideration payments, in the event that the businesses reached certain targets. Ralec claimed that NZX’s alleged breach of the resourcing obligation caused it loss to the extent of the additional consideration payments that were not triggered, or alternatively the loss of the chance to qualify for those payments.

Ralec also claimed that NZX made pre-contractual representations about the extent of resources it would commit to the businesses that constituted misrepresentations

under the Contractual Remedies Act 1979 and misleading and deceptive conduct under the Fair Trading Act.

In addition to suing NZX, Ralec pursued counterclaims against NZX4, the wholly owned subsidiary of NZX that operated the businesses in Melbourne. Counterclaims were also pursued against Mr Weldon in his capacity as chief executive and a director of NZX attributed with personal responsibility for the financing and resourcing decisions of the businesses once they were owned by NZX.

The Court has found that NZX breached its contractual obligation to consider the resources required to commit to the businesses in order to afford them a reasonable opportunity of achieving the targets which would trigger the additional consideration payments. None of the other causes of action under the counterclaims against NZX, NZX4 or Mr Weldon were made out.

On the claims by each side for damages from the other, the Court has found, first, that NZX cannot make out recoverable loss flowing from the vendors' misrepresentations. Secondly, that Ralec cannot make out either quantifiable loss or damages assessed on the basis of loss of a chance to achieve further targets, as flowing from NZX's breach of the post-settlement contractual obligation to adequately resource the businesses.