IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-0828
[2015] NZHC 2312

BETWEEN	TEAK CONSTRUCTION LIMITED Plaintiff
AND	ANDREW BRANDS LIMITED Defendant

Hearing: 22 September 2015

Appearances: Ms J Lethbridge and Mr S Powrie for Applicant/Defendant
Mr K Gould for Respondent/Plaintiff

Judgment: 23 September 2015

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***23.09.15 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Introduction

[1] In April 2010 the plaintiff which is a construction company and the defendant which is a property developer entered into a contract to construct four retail units on the North Shore, Auckland. The parties executed a construction contract on 15 April 2010. The contract included by incorporation the provisions of the New Zealand Standard Construction contract, NZS 3910:2003 with the price being $1,015,900 plus GST.

[2] The parties agreed that the general conditions of contract contained in NZS 3910:2003 would be amended by specific agreed provisions which they adopted. Further reference will be made to the provisions of the contract subsequently.

[3] The parties have been in dispute since 2011 which is the approximate time when work ended on the contract. The plaintiff has issued summary judgment proceedings against the defendant to recover what it says are unpaid amounts owing to it under the contract. The defendant has filed a protest to jurisdiction and has applied for an order striking out the plaintiff's proceeding. The essential grounds upon which that application are based are that the parties agreed in their contract that they would arbitrate their differences and that therefore curial procedures for relief under the contract are contrary to what the parties agreed.

[4] The plaintiff's response is that there is no dispute between the parties and reliability of the defendant for the sum which the plaintiff claims; $129,669.37[1] together with interest cannot be defended, the defendant having no defence to the plaintiff's claim.

[5] The claim which the plaintiff has brought was based upon a final payment claim dated 17 June 2011 for the sum of $129,669.37. It is pleaded that the defendant has not submitted to the plaintiff a payment schedule disputing liability for the sum claimed as it would be required to do under clauses 12.4 and 12.5 of the NZS 3910:2003 and the Construction Contracts Act, which it would be required to do if it had wanted to dispute liability.

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[1] BD at 6.

[6] The dispute between the parties essentially concerns whether the plaintiff was entitled to issue the June 2011 final payment claim (June 2011 PC). The defendant contends that the plaintiff had earlier submitted its final payment claim on 30 October 2010 (October 2010 PC). The defendants say whether it is right or wrong in its contentions in itself is a relevant dispute that ought to be referred to arbitration. Before I consider these points I will make brief reference to the principles that are to be applied when the Court is considering protests to jurisdiction in circumstances such as the present.

Principles

[7] The parties were agreed that the principles which the Court takes into account were settled by the New Zealand Supreme Court decision of *Zurich Australian Insurance Limited T/A Zurich New Zealand v Cognition Education Limited.*[2] That was a case in which a stay of proceedings was sought in order to allow an arbitration to occur.

[8] As in the present case, the *Zurich* case raised for consideration the effect of Article 8 of Schedule 1 of the Arbitration Act 1996 which states:

> A Court before which proceedings are brought in a manner which is the subject of an arbitration agreement shall … stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred".

[9] In *Zurich* the issue which the Court was required to rule on was set out in the judgment:[3]

> [10] The question is whether the words "unless it finds … that there is not in fact any dispute between the parties with regard to the matters agreed to be referred" in art 8(1) mean that the court should grant a stay only where it is satisfied:
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> (a) that the defendant has a sufficient case to withstand a summary judgment application, that is, it has an arguable defence;

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2 *Zurich Australian Insurance Limited T/A Zurich New Zealand v Cognition Education Limited* [2014] NZSC 188.

3 At [10].

or alternatively,

(b) that it is not immediately demonstrable either that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute.

For ease of reference we describe these as the broad and narrow tests respectively.

[11] We will not outline the parties' arguments in detail but rather will provide a brief summary of their positions. If any elaboration is needed, we will mention it in the course of our discussion.

[12] Mr Galbraith QC for Zurich argued for the narrow test. He submitted that there was a tension between two relevant principles – party autonomy and preventing abuse of the court's process. Party autonomy requires that, where parties have chosen arbitration as the mechanism by which their contractual disputes will be resolved, they should be held to that choice. On the other hand, the court is entitled to prevent an abuse of its process, as would occur, for example, where a defendant facing court proceedings for the enforcement of a liquidated debt deploys delaying tactics by raising a plainly meritless defence and seeking a stay under art 8(1) to enforce an arbitration clause. Permitting the court to refuse a stay in circumstances of this type would resolve the tension in a way that was principled and consistent with the prevailing international approach. To go further and permit the court to examine the merits of the dispute in the way that it could on a plaintiff's application for summary judgment is inconsistent with international best practice and undermines party autonomy, particularly given that it is accepted in New Zealand that issues of contractual construction (being generally questions of law) can be determined on a summary judgment application.14

[13] For Cognition, Mr Ring QC supported the broad test. He relied particularly on the legislative history of art 8(1). He submitted that in 1991 the Law Commission recommended the inclusion of the added words, which were at that time in the equivalent United Kingdom statute, in order to ensure that the tests for a plaintiff's summary judgment application and for a stay to allow an arbitration were the same: whether the defendant had an arguable defence to the plaintiff's claim. The Law Commission's recommendation was, Mr Ring submitted, adopted by Parliament in enacting the 1996 Act. On this approach, where a defendant has no arguable defence to the plaintiff's claim, there is no dispute to be referred to arbitration. As Mr Ring put it, the broad "no arguable defence" approach "entitles a plaintiff to expose that there is in fact and/or in law no defence, even if this requires extensive affidavits and legal argument". Mr Ring submitted that, when the Law Commission reviewed the 1996 Act in 2003, it endorsed its earlier position and did not recommend any change to art 8(1). Mr Ring referred to a number of decisions in which this interpretation of the added words has been applied and submitted that it gives the parties precisely what they bargained for, namely the application of New Zealand law to their dispute.

[10] In the course of the *Zurich* judgment, the Court referred to the conceptual distinction which was noted in *Channel Tunnel Group Limited v Balfour Peatty Construction Limited*[4] policy considerations that underlie the power to grant a stay was described as being very useful in practice for protecting creditors with valid claims from being forced into unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. Lord Mustill also said:

> I believe however that care should be taken not to confuse the situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all.

[11] In the event the Supreme Court in *Zurich* adopted what it had described as the "narrow meaning":

> If it is clear that the defendant is not acting bona fide in asserting that there is a dispute, or it is immediately demonstratable that there is nothing disputable at issue, there is not in reality any "dispute" to refer to arbitration. In these circumstances, a stay could properly be refused and summary judgment would be available.[5]

[12] The Supreme Court concluded that even though it might have been possible for the Court if it had jurisdiction in the proceeding to reach a point where it concluded there was no arguable defence in cases such as a summary judgment application, nonetheless, that was not a ground for refusing a stay so that the proceeding could be referred to arbitration.[6] The Court also considered that where there is no dispute and the defendant is obviously:

> Simply playing for time – the bald assertion of a dispute is not enough to justify the granting of a stay, where it is immediately demonstratable that there is, in reality, no dispute.[7]

[13] In the present case, clause 13.1.4 which the parties included in their contract provided as follows:

> SECTION 13 DISPUTES

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4 *Channel Tunnel Group Limited v Balfour Peatty Construction Limited* [1993] AC 334 (HL) at 355-357 per Lord Mustill.

5 Zurich at [36].

6 Zurich at [38].

7 Zurich at [39].

13.1 General

13.1.4 Add the following clause:

> The parties acknowledge their intent to work constructively to resolve quickly any dispute or disagreement that may arise from time to time. In this regard should either party be dissatisfied with the Engineers decision or the Engineer fails to make a decision the parties agree to submit the dispute to a fast track Arbitration procedure.
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> The parties will establish a panel of Arbitrators or Experts that they agree to use to Arbitrate and settle disputes. The parties agree to present their case to Arbitration and settle disputes. The parties agree to present their case to Arbitration in a simplified form within 5 Working Days with a view to obtaining a binding decision from the Arbitrator within a period of not more than 5 Working Days.

[14] The above clause constituted an agreement to arbitrate disputes.

[15] While I will consider the details of the dispute between the parties further below, at this point it is necessary to outline what the differences between the parties were. There is no doubt that the plaintiff submitted the October 2010 PC but the question is whether it was a final payment claim pursuant to clause 12.4 of NZS 3910.

[16] In regard to final payment claims Clause 12.4.1 states:

> 12.4.1 Not later than two Months after the expiry of the Period of Defects Liability or within such further time as the Engineer may reasonably allow the Contractor shall submit to the Engineer a final account of all the Contractor's payment claims in relation to the contract. This account shall be endorsed "final payment claim" and signed by the Contractor, and shall:
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> ...

[17] Clause 12.4.3 states:

> 12.4.3 Submission of the final payment claim by the Contractor shall be conclusive evidence that the Contractor has no outstanding claim against the Principal except as contained therein, and except for any item which has been referred to arbitration under Section 13 or to Adjudication. The Principal shall not be liable to the Contractor for any matter in connection with the contract unless contained within the final payment claim but this shall not preclude the later correction of any clerical or accounting error.

[18] If the October 2010 PC was a final payment claim then it is the contention of the defendant that any rights that the plaintiff had to claim under the Construction contract were thereby exhausted and there was no contractual justification for the plaintiff to submit the June 2011 PC.

[19] The question is whether the principles relating to references to arbitration in these circumstances entitle the defendant to seek an order bringing to an end the claim brought in this Court on the ground that the dispute which it raises ought to have been dealt with by arbitration.

[20] As Mr Gould for the plaintiff made clear in the context of this case, the *Zurich* decision is accepted as being applicable. However, Mr Gould asserted that the plaintiff was not in fact acting bona fide in asserting that there was a dispute in the present case.

[21] The next issue to be considered therefore is whether there is a "dispute" which ought to be dealt with by an arbitrator and which would justify the Court staying the present proceedings.

A dispute?

[22] The key issue that is to be considered is whether the October 2010 PC was a final payment claim pursuant to 12.4 of the contract. The contract provides that:[8]

> After the expiry of the Period of Defects Liability the contractor is to submit to the engineer a final account of the contractor's payment claims in relation to the contract. The significance of whether the October 2010 PC was such a final account of all the contractors payment claims in relation to the contract is that submission of the final payment claim is conclusive evidence that the contractor has no outstanding claim against the principal other than what is contained in that claim.[9]

[23] Clause 12.4.3 exempts the later correction of any clerical or accounting error. That saving provision is not applicable, in my view, in this case because the later June 2011 PC was not restricted to correction of such an error. To the contrary, the June 2011 PC brought up for the first time substantial claims not previously raised.

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[8] At 12.4.1 NZS 3910:2003.
[9] At 12.4.3.

Further, there was no evidence that items included in the June 2011 PC were matters that had been omitted from the October 2010 PC by reason of one of the types of error mentioned above.

[24] It should be noted that a final payment claim is required in terms of the contract[10] to be endorsed "final payment claim and signed by the contractor". Ms Lethbridge drew my attention to the fact that the October 2010 PC was headed "FINAL ACCOUNT – PAYMENT". At the bottom of the document appear the words:

> THIS CLAIM $202,156.98

[25] On the other hand, the document also states that it covers, "Claim period: October-September". It also includes at the bottom of the document in small script, "Prog Claim Summary", although whether those words are intended to be part of the information that the plaintiff was communicating to the defendant or represented a note on the document for the plaintiff's filing or archival purposes is not clear.

[26] Rather than attempting to resolve the issue by confining attention to strictly verbal considerations, in my view a useful way of approaching the question is to look at the sequence of events that the contract envisages for completion of work and completion of the making of claims and payment of them.

[27] In this case there is evidence that the practical completion date was effectively determined by the engineers in an email issued 9 November 2010.[11] The contract also provided[12] that the contractor, the plaintiff, had two months, that is until 8 January 2011, to file a final payment claim. It is not clear whether the provisions of 12.4.1 constituted not only the latest date by which the final payment claim could be submitted but also established the earliest date so that no claim could be made before the period of Defects Liability had expired. In any event, it would seem that the October 2010 PC was not later than two months after the period of defects liability expired. On the other hand, there would be an argument available to

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[10] At 12.4.1.
[11] BD 170.
[12] 12.4.1 noted above

the defendant that the June 2011 payment claim was too late because that claim sought payment for matters not included in the final payment claim.[13]

[28] The timing of the October 2010 PC, of course, pre-dates the date of practical completion. But it seems clear that there is an argument available to the defendant that further progress payments would not be expected to be rendered after the work was completed, but with the exception of maintenance items that had to be attended to. More importantly, the issuing of the practical completion certificate caused time to start running for the plaintiff to make a final payment claim. It is arguable that rendering a claim in June 2011 was too late.

[29] I accept that there are some counter indications concerning whether the October 2010 PC was in fact the final payment claim that the contract envisaged, but I also agree with the submission which Ms Lethbridge made to the effect that it is not incumbent upon the defendant to affirmatively establish that it has a conclusive defence. It must only show that there is a dispute, excluding from that term the category of items which the Supreme Court referred to in *Zurich* which are not treated as being disputes and, broadly speaking, comprising contrived disputes, disputes which are not bona fide or disputes which amount to no more than the person against whom the claim was made baldly alleging that there is a dispute. Looking at it from the opposite perspective, I cannot agree that it is obvious that the plaintiff has an overwhelming argument which clearly rules out the existence of any basis upon which the defendant could argue that it is not liable under the June 2011 PC.

[30] It is necessary to also mention the matter of the counter claims which the defendant asserts that it wishes to bring against the plaintiff and which entitle it to an equitable set-off.[14]

[31] It was apparently to be alleged that the counter claim has the necessary close connection with the claim to qualify as an equitable set-off.[15]

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[13] 12.4.3.
[14] *Grant v NZMC* [1989] 1 NZLR 8.
[15] *Grant v NZMC* [1989] 1 NZLR 8.

[32] The counter claims involve allegations which the defendant makes that a vapour insulation mechanism required in the building as part of the resource consent was defectively constructed and as well there are claims that part of the concrete works were defectively built. Mr Gould, in the course of his lucid submissions, wished to canvas whether such claims amounted to arguable disputes. However, given the approach that I consider is mandated by the Supreme Court decision in *Zurich* I am not prepared to take the view that the matters which the defendant has put forward do not disclose a dispute which ought to go to arbitration.

Result

[33] The application to dismiss the proceeding is granted on the ground that the Court has no jurisdiction to hear and determine it because the parties had agreed to submit disputes to arbitration.

[34] The parties should confer on the question of costs and if they are unable to agree, are to file memoranda not exceeding five pages on each side within 10 working days of the date of this judgment.

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J.P. Doogue
Associate Judge