IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2006-404-882

BETWEEN	MADILL & SMEED LIMITED First Plaintiff
AND	HALLS REFRIGERATED TRANSPORT LIMITED Second Plaintiff
AND	EBERT CONSTRUCTION LIMITED First Defendant
AND	STILES & HOOKER LIMITED Second Defendant
AND	COWPERTHWAITE LIMITED Third Defendant

Hearing: 1 August 2006

Appearances: G P Blanchard for plaintiff
D J Parker for defendants

Judgment: 9 August 2006 at 4 p.m.

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on 09.08.2006 at 4 p.m., pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date……..…

Solicitors:
Kensington Swan, Private Bag 92101, Auckland
Parker & Associates, P O Box 23270, Wellington

[1] There are two applications by Ebert Construction Limited ("Ebert") before the Court. The first is an interlocutory application for a stay of the proceedings.

[2] The second application is an originating application for an extension of time to commence arbitration proceedings pursuant to the Arbitration Act 1996.

[3] The following statement of facts will suffice to provide the background.

[4] On or around 27 September 2000, Ebert entered into a contract with Halls Refrigerated Transport ("Halls") for the construction of an administration block, cool store and asphaltic concrete loading yard and trailer park at 1 Spartan Road, Takanini ("the Contract").

[5] The General Conditions of Contract were NZS3910:1998 Conditions of Contract for Building and Civil Engineering Construction ("NZS3910").

[6] The engineer under the contract was Stiles and Hooker Ltd ("Stiles"). Construction of the development took place between October 2000 and May 2002. Stiles issued a Final Payment Certificate in accordance with the Contract on 5 August 2002. The Final Payment Certificate was issued on the basis that all contract works and maintenance works had been completed.

[7] Halls sold the property to Madill & Smeed Limited ("Madill"), who assert that they also took an assignment of the benefit of the construction contract with Ebert.

[8] Ebert entered into a number of sub-contracts with, inter alia, Ultra Holdings Ltd, Profloors Ltd, Omega North Harbour Ltd, Cowperthwaite Ltd, and James Hardie Building Systems Ltd.

[9] On 21 February 2006 Madill and Halls filed proceedings against Ebert (and other defendants) alleging, inter alia, that in breach of (a) the express and implied terms of the Contract, and (b) a duty of care owed by Ebert to Madill/Halls, Ebert

caused or permitted the development to be constructed with various defects which have led to water ingress in the development causing Madill/Halls to suffer loss.

[10] Ebert has applied to stay the High Court proceedings to enable arbitration of the plaintiffs' claims. Ebert has also filed an originating application for an extension of time to commence arbitration proceeding.

[11] Both applications are opposed. Madill/Halls say that Ebert has not complied with the time-limits in the contract for commencing arbitration proceedings and that therefore a stay is not justified. As to the application to commence arbitration proceedings out of time, they say that Ebert cannot point to the existence of undue hardship to justify the Court in granting leave. Alternatively, Madill/Halls say that Ebert has been tardy in applying for leave so that the Court should decline to exercise its discretion in favour of granting the application.

Submissions

[12] Mr Parker submitted that there was no basis on which the dispute could now be submitted to arbitration. He said:

> 3. The necessary preconditions for referring the dispute to arbitration under the dispute section 13 of the contract (NZS 3910:1998) have not been met and cannot be met in future.
>
> 4. Under the contract there are only two ways a party can refer a dispute to arbitration. These are set out in clauses 13.4.1 and 13.3.5. Both options first require referral of the dispute to the engineer under clause 13.2.1 not later than one month after the final payment certificate. That time limit expired on 5 September 2002. The referral to the engineer under clause 13.2.1 must then be followed by either party being either dissatisfied with the engineer's formal decision under clause 13.2.4 or the engineer failing to provide a formal decision within 20 working days after receiving notice to do so. Only then does a right to refer the matter to arbitration arise under clause 13.4.1 or under clause 13.3.5 if the mediation path in clause 13.3.1-13.3.5 is chosen but does not resolve the dispute (clause 13.3.5).

[13] Mr Parker also referred to authority to reinforce his submission that unless there has been a timely reference of a dispute to the engineer, then submission to an arbitrator is not possible under the contract.

[14] Clause 13 of the NZS3910 contract provides for resolution of disputes. Clause 13.2 is headed 'Engineer's review'. It reads:

> Every dispute or difference under 13.1.2 shall be referred to the Engineer not later than one Month after the issue of the Final Payment Certificate….

[15] There follows clause 13.2.1 which requires that every dispute or difference shall be referred to the Engineer not later than one month after the issue of the Final Payment Certificate. Subsequent clauses provide for mediation (clause 13.3) and arbitration (clause 13.4).

[16] Clause 13.4.1 provides:

> If either: (a) the Principal or the Contractor is dissatisfied with the Engineer's decision under 13.2.4; or
>
> (b) no decision is given by the Engineer within the time prescribed by 13.2.4;
>
> then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

[17] There is no other provision in NZS3910 which constitutes a submission to arbitration.

[18] In the decision of *Con Dev Construction Ltd v Financial Shelves No 49 Ltd (*HC Christchurch, CP179/97, 22 December 1997), Master Venning was required to consider a provision contained in an earlier form of the standard form contract, namely NZS3910:1987. The relevant part of that version of the standard form contract, clause 12, was the same as the provision now under consideration.

[19] In that case no engineer had ever been appointed who could exercise the functions required by section 12. Master Venning recorded the submission of the plaintiff (who was contending for arbitration) as follows:

> Mr Matthews submitted that the failure to refer the dispute or difference in the first instance to the engineer was not fatal to plaintiff's application for the appointment of an arbitrator at this stage. He emphasised that it was the intention of the parties that their disputes would be referred to and determined by the arbitration process.
>
> However, in my view the failure to appoint the engineer and refer the dispute to him creates a fundamental difficulty in that reasoning which the plaintiff cannot overcome. The parties primarily agreed to be bound by the conditions of contract. Those conditions of contract require the appointment of an engineer. The plaintiff apparently took no steps to appoint an engineer and did not accept the engineer promoted by the defendant.
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> The standard NZS3910:1987 clearly contemplates that the appointment of an arbitrator only follows on the occurrence of one of two events – first, if one of the parties is dissatisfied with the engineer's decision or second, if the engineer fails to give a decision within 10 working days. It is not enough to say that failure to appoint an engineer is equivalent to the engineer failing to make a decision.

[20] Master Venning then referred to authorities which supported the view that an enforceable contractual right to arbitration could not arise unless there had been an appointment of an engineer. He referred to the judgment of Hardie Boys J in *Wellington Regional Council v Ireland* (HC Wellington, 289-81, 8 December 1981 Hardie Boys J) where problems had occurred in making a reference to an engineer of a matter in dispute. In that case, there was a concession that the contractor's right to arbitration depended on timeous observance of the procedure provided by the contract. That was implicitly accepted as being correct in the judgment.

[21] After referring to the *Wellington Regional Council* case Master Venning said:

> For the above reasons I conclude that as the parties had not appointed an engineer and referred their dispute to the engineer there was no contractual right on the Plaintiff's behalf to seek arbitration…

[22] I agree with the conclusions in the *Con Dev Construction Limited* case. I do not believe that it is distinguishable. Mr Blanchard did not suggest that it was wrongly decided. It is my view that before a party such as Ebert can insist on an

arbitration, there must first of all be timeous performance of the prior steps specified by section 13 of the contract. That has not occurred.

[23] Mr Blanchard submitted that in any event, a term could be implied into the contract which would enable Ebert to avoid the difficulty that has arisen.

[24] As finally formulated the implied term would be inserted into clause 13.2.1 (with the additional words highlighted):

> Every dispute or difference under 13.1.2 shall be referred to the Engineer not later than one Month after the issue of the Final Payment Certificate **unless it relates to a latent defect that did not manifest itself until after that time.**

[25] Mr Blanchard said that implication of such a term can be justified on the authority of *Vickery v Waitaki International Limited* [1992] 2 NZLR 58 (CA).

[26] As I understand it, the effect of that authority was that a condition may be implied in a contract either on the grounds of business efficacy or satisfying the other criteria in *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 (CA), or as a matter of necessary construction of the contract. The basis upon which the latter type of term can be implied was described in *Vickery* at 67 by Gault J in the following way:

> Each case must turn on the proper construction of the contract in the circumstances. In this case I agree with the other members of the Court that it is implicit in the language of the contract that the appellant was entitled to expect the level of business he contracted for and in the absence of that should be compensated by the respondent.

[27] The first basis for implying terms, the *Devonport Borough Council* approach, recognises that there is a lacuna in the parties' contractual arrangements and decides for them what an appropriate term would be to give business efficacy to the contract.

[28] The alternative basis for implying a term, that referred to in *Vickery* as an interpretive approach, was considered afresh by the Court of Appeal in *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568, 579. Salmon J, giving the judgment of the court said:

> In *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58 this Court identified three broad classes of implication in contracts. They are: terms implied by rules of law in certain kinds of contract (eg sale of goods); terms deduced by implication or interpretation from the express terms of the contract; and terms held to be implied to give business efficacy to the contract. That was a case concerning a contract for a catering service for freezing workers. There were rights of renewal for successive periods of three years, up to 30 January 1989. Those rights were exercised. The works were closed at the end of the killing season in September 1986 and never reopened. The result was that the catering business was unable to continue. The Court held that on a true construction of the express terms of the contract, and having regard to its aim and object, it was implicit in the contract that the works remain open.
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> The Court relied upon the dictum of Cockburn CJ in *Stirling v Maitland* (1864) 5 B & S 840 at p 852 that:
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> > ". . . if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."
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> In our view that dictum applies with equal force in the present case.

[29] In the circumstances of the present case, there is arguable justification for the implication of a provision to cope with latent defects. By their nature, such defects will generally not be manifested early on in the life of the contract. The odds are against them showing up within the period of one month after the issue of the Final Payment Certificate.

[30] Against that, the proposed formulation would mean that in the case of any latent defect, a party could compel the other contractor to go straight to arbitration without first obtaining the ruling of the engineer – no matter how minor the latent defect might be.

[31] In *Vickery*, Cooke P noted that it has been said that there are varieties of implications in contract, that they are categories or shades in a continuous spectrum: see *Liverpool City Council v Irwin* [1977] AC 239, 253-254. Cooke P also was doubtful that implied terms could be rigidly classified as to category: 64. If there is some overlap between the various categories of implied term, then it should be permissible to test a proposed Vickery-type term against the yardstick of whether or not it is just and equitable to impose such a condition on the parties. Likewise

obviousness may be another useful touchstone. The fact that the proposed implied term would enable a party to by-pass the engineer in all cases involving latent defect does not seems to me to be just and equitable. Nor is it obvious that such a term is justified as a necessary implication from the terms of the contract considered as a whole.

[32] Implication of such a term may also founder on the consideration that it is not clear what is or is not a qualifying "latent defect".

[33] In my judgment, it would not be legitimate to imply a condition of the type sought. I would decline to imply a term of the kind that Ebert intends for. I do not overlook what Mr Blanchard has said about the general desirability of disputes arising out of construction contracts being dealt with by arbitration. That broad objective though cannot justify the Court in remaking the parties' contract for them to include an implied term of the kind sought. General observations about the desirability of alternative dispute resolution in contractual disputes in the construction industry cannot overbear the contractual wishes of the parties as expressed in their written document.

Application for extension of time for commencement of arbitration proceedings

[34] Mr Blanchard submitted:

> 37. Ebert has applied pursuant to Article 7 of the Second Schedule of the Arbitration Act 1996 for an order extending the time for referring a dispute concerning the contract to the Engineer and/or to Arbitration.
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> 38. The Court need only consider this application if the argument outlined above is not accepted. If the Court considers that the dispute must first be referred to the Engineer, Ebert seeks an extension of time to allow this to occur and for arbitration proceedings to be commenced. It also seeks a stay of the Court proceedings to allow this to occur, which should take no more than two months.

[35] Clause 7 of the Second Schedule to the Arbitration Act 1996 provides:

> (1) Where an arbitration agreement provides that no arbitral proceedings are to be commenced unless steps have been taken to commence the proceedings

> within the time specified in the agreement, the High Court or a District Court, as the case may be, may, notwithstanding that the specified time has expired, extend the time for such period as it thinks fit, if, in its opinion, undue hardship would otherwise be caused to the parties.
>
> (2) An extension may be subject to any such conditions as the justice of the case may require.

[36] Mr Parker accepted that it is possible by resorting to clause 7 to extend time to refer the dispute concerning the contract to the engineer. He did not accept, though, that the Court in its discretion ought to make such an order.

[37] There are two issues that need to be considered which relate to granting relief under clause 7. The first is that the discretion should only be exercised if in the Court's opinion undue hardship would otherwise be caused to the parties. The second requires an examination of the time sequence to see if the applicant has proceeded punctually to seek an extension of time.

[38] Mr Parker submitted as follows:

> 17 The leading case on this issue is *Fifield v W & R Jack Ltd* (Privy Council, 29/6/00) upholding the decision of the New Zealand Court of Appeal, *W & R Jack Ltd v Fifield* (CA 53/96, 11/06/98)**.** There the Court granted an extension of time under clause 7 of the Second Schedule to a tenant who had failed to seek arbitration of a rent review within the time limit of the lease. There had been dialogue between landlord and tenant in relation to a reviewed rental. In that case it was recognised that the tenant would suffer undue hardship by being denied the right to have a current market rent determined by arbitration which would be out of proportion with its fault. When considering the factors relevant to an extension of time the Court of Appeal referred to the summary in Mustill & Boyd, *Commercial Arbitration* (2nd ed 1989) 212-215:
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> 1) The substantial size of the sum in issue
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> 2) The existence of a misunderstanding about whether the time bar is being relied upon, more particularly if the defendant has contributed to or shared in that misunderstanding;
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> 3) The fact that the parties were in negotiation during the relevant period.
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> 18 At page 2 paragraph 3 The Privy Council noted that the remedy for extending time is discretionary and that once the party realises that he needs an extension of time, he must not delay in making his

application to the Court (the *Simonburn* (No.2) [1973] 2 Lloyds 145).

19 As to the meaning of "undue hardship" the Privy Council referred to Lord Denning in *Liberian Shipping v King* [1967] 2 QB 86 at p98 where he said:

> "Undue simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault"

…

25. It is submitted that Ebert would not suffer any undue hardship if refused the extension it seeks. Rather Ebert would have the matters in dispute determined by this Court with the other defendants, Stiles & Hooker and Cowperthwaite Limited and any third parties that may be joined.

26. Ebert's situation in the present case is quite different to the situation in *W & R Jack Limited v E & J Fifield* (Court of Appeal, 11 June 1998) Ebert, in the present case cannot be said to suffer any undue hardship or loss of rights by refusal of the extension of time and refusal of the stay to arbitration. Ebert will not lose any substantive rights if it has to contest the plaintiffs' claim or obtain proper determination of the dispute through this Court. The only difference will be that the dispute will be resolved in this Court rather than in arbitration.

27. Ebert will not suffer undue hardship if it seeks to join its subcontractors as third parties and they then seek a stay of such claims relying on arbitration provisions in the subcontracts. Even if Ebert's subcontractors do insist on staying claims by Ebert (which is yet to be seen) Ebert is not precluded from seeking recovery from those subcontractors in separate arbitration proceedings. At worst this could be termed inconvenience rather than undue hardship. It may be that Ebert's subcontractors will be quite content not to seek a stay but to remain in the High Court proceedings with the other parties to that proceeding. The third defendant, Cowperthwaite Limited (the roofing contractor) was a subcontractor of Ebert but has filed a defence to the plaintiffs' claim thereby submitting to these proceedings. There is therefore no undue hardship to Ebert, whether or not its subcontractors seek a stay of claims against them by Ebert.

[39] I should note that Mr Parker also made the submission that the plaintiffs contracted with one construction company, Ebert, and it is of some advantage to them to look to Ebert alone to meet any damages claims without the complicating feature of having numerous sub-contractors involved in the litigation. I agree that some weight needs to be given to this factor.

[40] Mr Blanchard, on the other hand, submitted that:

a) Ebert had entered into subcontracts with inter alia Ultra Holdings Ltd, Profloors Ltd, Omega North Harbour Ltd, Cowperthwaite Ltd; and James Hardie Building Systems Ltd.

b) If Ebert were compelled to continue to litigate this dispute in Court rather than at arbitration, Ebert would be unable to join its responsible subcontractors as third parties to the High Court proceedings. This is because of the existence of the arbitration clause in the subcontract which operates to stay any claim against them in the court jurisdiction.

c) Ebert submits that this would cause significant hardship to Ebert particularly given the amount in dispute and the fact that Ebert was not responsible for the works alleged by Halls/Madill to be defective. Ebert believes that, if there is any liability as alleged, such liability rests with the subcontractors who performed the work, not Ebert itself.

d) Ebert submits that the absence of the subcontractors responsible for the works alleged to be defective would also cause hardship to Halls/Madill. They would be denied the opportunity to hold those properly responsible liable.

[41] The only observation I make is that Mr Blanchard is right that would be convenient and desirable that all of the claims between the various parties should be litigated in one proceeding. That may happen if the proceedings are in the High Court but there is a risk that it will not. One or more parties may seek a stay to enable it to arbitrate. If leave was granted to Ebert to commence arbitration proceedings out of time, the certain result would be that all the proceedings would be determined in one arbitration (assuming consolidation of the various claims between the various parties before one arbitrator).

[42] However I do not believe that on balance Ebert can demonstrate undue hardship if the application were to be declined. That concept cannot be stretched to accommodate the circumstances in this case. Ebert's case really amounts to a plea based on the inconvenience that would follow from a refusal to grant leave, rather than undue hardship.

[43] That being my conclusion, there is no requirement for me to consider whether or not Ebert has applied sufficiently promptly for leave pursuant to clause 7 of the Second Schedule to the Arbitration Act 1996.

[44] That being my conclusion, I do not need to consider whether Ebert applied sufficiently promptly for leave.

Orders

[45] There will be an order dismissing the application for stay of proceedings. There will also be an order dismissing the application for order extending the time for commencement of arbitration proceedings. Madill & Smeed Ltd and Halls Refrigerated Transport Limited will have costs on a 2B basis on both applications.

[46] I direct that a conference is to take place by telephone **at 2.10 p.m. on 18 September 2006**. Counsel are required to file and serve a memorandum concerning matters to be considered at the next conference not later than 5 p.m. two working days before the conference. Within the same time period, counsel are also to send an electronic copy of the memorandum (in "Word for Windows" format) to my Associate, Nicola.Frame@justice.govt.nz)

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J.P. Doogue
Associate Judge