IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-004420
[2014] NZHC 847

BETWEEN	R T VINCENT LIMITED Plaintiff
AND	WATTS & HUGHES CONSTRUCTION LIMITED Defendant

Hearing: 25 February 2014

Appearances: C R Pidgeon QC for the Plaintiff
R E Kettelwell and R Catley for the Defendant

Judgment: 29 April 2014

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 29 April 2014 at 12.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Cargill Stent Law Limited, Taupo
Sharp Tudhope, Tauranga

Case officer: Wendy Pukeiti

Introduction

[1] The plaintiff, R T Vincent Limited, is a steel and building contractor. In this proceeding it seeks judgment on payment claims it has made under the Construction Contracts Act 2002 against the defendant, Watts & Hughes Construction Limited. It claims $244,169.44. This is the amount it says it is owed for the outstanding balance due on claims totalling $384,000 for labour only carpentry works that it carried out as a subcontractor to the defendant on the refurbishment of the AC Baths in Taupo, plus retentions and bank charges. It contends the defendant lacks any bona fide reason to withhold payment and has used payment schedules under the Act to stall payment.

[2] The proceeding was filed in the Auckland Registry of the Court on 10 October 2013.

[3] On 21 November 2013 the defendant filed a statement of defence in which it claims the payment schedules are valid and that they set out the reasons for certification of less than the amounts claimed. Contemporaneously, the defendant filed two applications.

Defendant's applications

[4] The applications seek orders:

a) Transferring the proceeding to the Rotorua Registry pursuant to r 5.1(5) of the High Court Rules; and

b) Staying the proceeding pursuant to art 8 of sch 1 of the Arbitration Act 1996 and High Court Rule 15.1(3) pending referral of the dispute over the payment claims to arbitration.

[5] When filing the applications and the statement of defence, the defendant also filed brief affidavits in support of each application, plus a supporting memorandum and covering letter of counsel. The covering letter states that the statement of defence is filed under protest to jurisdiction. The memorandum submits, in support

of the stay application, that the court lacks jurisdiction to determine the dispute in the proceeding because the parties' subcontract provides for an agreed method of dispute resolution, by arbitration or by adjudication under the Construction Contracts Act. The proceeding should therefore be stayed to allow referral to arbitration, or alternatively, adjudication. The memorandum also submits, in support of the transfer application, that the proceeding should be transferred to the Rotorua Registry as the appropriate registry to have carriage of the proceeding. The reasons given are, broadly speaking, reasons of convenience. Additionally it contends that though the Court does not have jurisdiction to determine the dispute, it must determine the application for a stay "and to that end Rotorua is the appropriate registry to have carriage of the matter".

[6] The plaintiff opposes both applications. In respect of each it has filed a notice of opposition with an affidavit in support of the grounds of opposition.

[7] I begin with the application for transfer.

Application for transfer

[8] High Court Rule 5.1(5) which the application relies upon states:

> (5) If it appears to a Judge, on application made, that a different registry of the court would be **more convenient to the parties**, he or she may direct that the statement of claim or all documents be transferred to that registry and that registry becomes the proper registry.
>
> [Emphasis added].

[9] The grounds relied on in the application to support a transfer under this provision are threefold: that the defendant operates primarily out of Tauranga which has its own High Court registry but lies within a one hour drive of the Rotorua High Court; that the plaintiff resides in Taupo which lies within the jurisdiction of the Rotorua Registry; and that the cause of action arose in Taupo.

[10] The supporting affidavit is a short affidavit of a Mr Michael, a quantity surveyor employed by the defendant. He touches briefly on factors of convenience. He mentions associations with Taupo: that the plaintiff's registered office and

operations base is in Taupo, and that the cause of action in the proceeding arose in Taupo, within the jurisdiction of the Rotorua Registry. He also mentions associations with Tauranga: that the defendant's witnesses primarily reside in the Bay of Plenty, and that its "regional office" in Tauranga is responsible for the administration of the contract for the refurbishment of the AC Baths and all works it undertakes from Wellington to the Bombay Hills. He does not however confirm the formal ground of opposition that the defendant operates primarily out of Tauranga. He acknowledges that the defendant's registered office is in Auckland.

[11] The plaintiff's notice of opposition relies on several grounds. Two are pursued.[1] First, that the Auckland Registry is the proper registry of the Court for the commencement of the proceeding in terms of r 5.1(1)(a) as it is nearest to the principal place of business and the registered office of the defendant. The second is in the alternative and is that the defendant is prevented from obtaining an order for transfer. Essentially, the contention is that if Auckland Registry is not the proper place to file the statement of claim (which the plaintiff does not concede) it is to be treated nonetheless as the proper registry, as any irregularity has been waived by the filing of a statement of defence.

[12] The plaintiff also relies on the short affidavit evidence of its director, Mr Vincent. He touches briefly on factors of convenience and factors relevant to the identification of the proper registry under r 5.1(1)(a). He deposes that the defendant's registered office and its principal place of business is in Auckland; that though the plaintiff's registered office is in Taupo and the contract in issue was performed in Taupo, it has most of its contracts in Taranaki and Auckland; and that Auckland would be its preferred venue for trial. By way of explanation he says some of the plaintiff's witnesses will be working in Auckland in 2014, its counsel will be Mr Pidgeon QC who is based in Auckland, and that its legal expenses would be reduced if the trial were in Auckland.

[1] A third ground based on a perceived difficulty in having a civil matter heard at an early date in Rotorua was expressly not pursued at the hearing.

[13] In evidence in reply, Mr Michael states in the negative that he does not consider Auckland to be the defendant's principal place of business, but as in his first affidavit, he does not confirm the ground set out in the application that the defendant operates primarily out of Tauranga. Nor does he explain where he or the defendant considers its head office in New Zealand is located. He deposes to his belief and the defendant's belief that the most appropriate registry for the proceeding is the Rotorua Registry. He explains that the Auckland office employs approximately 50 staff and the Bay of Plenty office approximately 70; that the defendant operates throughout New Zealand and its "primary areas of focus for its business" are Auckland, Waikato, Bay of Plenty, Gisborne, Wellington and Christchurch; that contracts for these areas other than Auckland and Christchurch are all administered from the Tauranga office; and that the Tauranga office lies within the Tauranga Registry of the High Court but within one hour of the High Court of Rotorua.

[14] In an attempt to reconcile the respective positions of its Auckland and Tauranga operations in the defendant's corporate structure, counsel for the defendant offered the explanation that the defendant operates a corporate structure that is "horizontal" as opposed to vertical. This accounts, she submitted, for Mr Michael's reference to the "regional office" at Tauranga and for his belief that Auckland is not the defendant's principal place of business.

[15] I come then to the question whether grounds are made out for an order for transfer. I accept counsel for the plaintiff's submission that the Auckland Registry of the Court is the proper registry for the purpose of commencing the proceeding, though not entirely for the same reasons that he submits. I agree with him that there are insufficient reasons of convenience to order a transfer of the documents filed in the proceeding to the Rotorua Registry.

High Court Rule 5.1

[16] I begin with High Court Rule 5.1. Rule 5.1 governs the identification of the proper registry of the court for the purpose of filing and commencing a proceeding

and the circumstances in which a transfer to a different registry may be ordered. Relevantly it states:

> **5.1 Identification of proper registry**
>
> (1) The proper registry of the Court, for the purposes of rules 5.25 and 19.7, is,—
>
> (a) when a sole defendant is resident or has a principal place of business in New Zealand, the registry of the Court nearest to the residence or principal place of business of the defendant, ...:
>
> (b) when no defendant is resident or has a principal place of business in New Zealand, the registry the plaintiff selects:
>
> (c) ...
>
> (4) If it appears to a Judge, on application made, that a statement of claim has been filed in the wrong registry of the Court, he or she may direct that the statement of claim or all documents filed in the proceeding be transferred to the proper registry.
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> (5) If it appears to a Judge, on application made, that a different registry of the Court would be more convenient to the parties, he or she may direct that the statement of claim or all documents be transferred to that registry and that registry becomes the proper registry.

[17] Rule 5.1(4) governs transfer where a proceeding has been filed in the wrong registry. In such cases the Court may in its discretion direct transfer of the statement of claim or the documents filed in the proceeding to the proper registry. An irregularity in the selection of registry does not nullify the commencement of a proceeding.[2] The statement of claim and other documents filed at the commencement of a proceeding remain in the registry where the proceeding was commenced unless and until an order for their transfer to a different registry is made.

[2] High Court Rule 1.5(1) makes clear that an irregularity does not nullify the proceeding or any step taken in the proceeding.

[18] Rule 5.1(5) deals with the Court's discretion to direct a transfer of the statement of claim or documents filed in the proper registry to a different registry where that would promote more convenience to the parties. If such a transfer is ordered the registry of transfer becomes the proper registry as if the proceeding were commenced there.

Proper registry

[19] Materially, the defendant's application does not challenge the plaintiff's decision to file the proceeding in the Auckland Registry as irregular or seek a direction for transfer on the basis that the proceeding has been filed in the *wrong* registry in reliance on r 5.1(4). The application states, as r 7 requires, the particular enactment relied upon. The only provision it relies on is r 5.1(5) which is concerned with questions of convenience. On that basis any perceived or actual irregularity in the plaintiff's registry of choice has been waived. I do not therefore treat Mr Michael's limited reply evidence on the subject of the defendant's principal place of business as sufficient to raise a belated claim that the plaintiff chose the wrong registry. If there has been any irregularity it is immaterial given the waiver. The result is that the Auckland Registry is to be treated as the proper registry, despite irregularity (if any). In finding such, I do not wish to be taken as accepting counsel's suggestion that the filing of a statement of defence contemporaneously with an application for transfer necessarily waives an irregularity in the registry selected for the commencement of the proceeding.[3]

[20] I am satisfied in any event that the plaintiff's identification of the Auckland Registry as the proper registry is appropriate on the evidence viewed overall and that Mr Vincent's unequivocal deposition that Auckland is the defendant's principal place of business is to be preferred to the evidence given on behalf of the defendant on the point. Conversely, I am satisfied that the evidence does not support the ground set out in the defendant's application that Tauranga is its primary place of business.

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[3] *NZ Food Group (1992) Ltd v Diverse Holdings Limited (*HC) Christchurch CP34/00, 27 June 2000.

[21] Relevantly, there is no evidence from a director or senior manager of the defendant to counter Mr Vincent's evidence on the point. If there was a serious challenge to Mr Vincent's evidence, I would expect such evidence, dealing with the question of the defendant's corporate structure and the relationship of its regional office in Tauranga and its Auckland office, and stating unequivocally where its principal place of business or head office in New Zealand is. There is only the evidence of Mr Michael, a quantity surveyor employed by the company. His evidence suggests that the defendant administers contracts from Tauranga and Auckland where its registered office also happens to be. Though Mr Michael does not consider that Auckland is the defendant's principal place of business, he does not say that Tauranga is that place. He does not seek to explain the relationship of the two in any detail. His description of the defendant's Tauranga office as a "regional office" is telling. It supports the inference that Tauranga is a branch office and Auckland is the head office, where there overall control of the company is exercised.

[22] Counsel's endeavour to counter that inference with the submission that the term "regional office" is suggestive of a horizontal corporate structure begs the question of where the overall control of the company is exercised and therefore where its principal place of business for its New Zealand-wide operation is located.

[23] Additionally, the defendant's own case, as developed in submissions, lends support for the plaintiff's choice of registry. In essence I was invited to rule on two opposing submissions on the issue of where the principal place of business is; the first being that it is Auckland (as the plaintiff contends), and the other being that it cannot be Auckland because the defendant operates under a horizontal corporate structure made up of several significant regional places of business (as the defendant contends).

[24] On either basis there can be no criticism of the plaintiff's selection of the Auckland Registry for the commencement of the proceeding. If the plaintiff's submission is right, it was required to file the proceeding in the Auckland Registry by r 5.1(1)(a). If the defendant's submission is correct then it has no principal place of business in New Zealand, operating as is does under a horizontal not vertical

corporate structure – in which case the plaintiff was entitled to select the proper registry of the Court for the proceeding under r 5.1(1)(b).

[25] As counsel submitted in the memorandum filed with the defendant's statement of defence the choice of the Auckland Registry "makes sense". It makes sense not merely because the defendant's registered office is in Auckland, as counsel for the defendant contends, but for the reasons I have discussed.

[26] It remains to consider whether there is a sound case under r 5.1(5) to order that the documents filed in the proceeding in the proper registry at Auckland be transferred to the registry at Rotorua.

Convenience

[27] The issue for determination is whether the Rotorua Registry is the "more convenient" registry for the parties and therefore the appropriate registry to have carriage of the proceeding.

[28] The onus is on the defendant to establish that another registry is more convenient.[4] The assessment that is required is of the physical, financial and other matters (if any) affecting convenience having regard to the case in all its bearings.[5]

[29] In the memorandum filed at the same time as the statement of defence, counsel submitted that the need to determine the stay application is a matter affecting convenience. He argued that though the court lacks jurisdiction in the proceeding it must of course determine the application for a stay "and to that end the registry at Rotorua is the appropriate registry". Self-evidently, any perceived advantage in having the application heard in Rotorua has been overtaken as the application has now been heard in Auckland.

[30] At the hearing counsel focused on the convenience to the parties of holding a trial in Rotorua as opposed to Auckland.

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[4] *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 7 October 2011.
[5] *Consumer Council v Pest Free Service* [1978]2 NZLR 15 (CA).

[31] Looking ahead to trial, it is difficult to predict accurately how long a trial will take (assuming the case does proceed to trial). Further, there is little in the way of in-depth supporting evidential material before the Court on other trial related factors to show that the balance of convenience for the parties clearly favours a trial in Rotorua. Defence counsel are from Tauranga, but whether out of town counsel will be instructed for trial was not mentioned. Mr Michael says, without elaboration, that the defendant's witnesses primarily reside in the Bay of Plenty. Arrangements needed for travel and accommodation are not touched upon. From the plaintiff's perspective Auckland would be the preferred venue for the trial. Its evidence is that some witnesses will be working in Auckland in 2014 and counsel for the plaintiff will be Mr Pigeon QC, who is based in Auckland. The plaintiff contends its legal expenses would be reduced if the trial were in Auckland. There is however no detailed evidence from either side dealing with the respective costs to the parties involved in having counsel and key witnesses at trial in either venue, or for that matter in Tauranga. Taking the evidence overall (limited as it is) it is not possible to conclude that the relevant associations for trial purposes are predominantly with Rotorua or that the financial implications of a trial held in Rotorua are more favourable than those of a trial in Auckland. Without such evidence, it is difficult to balance the factors of convenience for trial purposes in a meaningful way.

[32] If the case does proceed to trial it remains open to the defendant to put a more substantial case to the court to show that a trial in the Rotorua Registry would be more convenient in an overall way than a trial in Auckland,[6] but at this early stage it is simply too early to say that a trial in Rotorua will be more convenient to the parties than a trial in Auckland.

[33] Looking at the issue of convenience in terms of the proceeding generally, I am not persuaded that there is any other sufficient basis in the evidence for finding that the Rotorua Registry should at this early stage be regarded as the more convenient, and therefore the appropriate, registry to have carriage of the proceeding. There is insufficient evidence to enable an assessment of factual matters affecting the convenience of the parties and the overall justice of the case that might warrant such

[6] See *NZ Food Group (1992) Ltd v Diverse Holdings Ltd* at [25]; *Sangster v H & R Block the Income Tax People Ltd* (1990) 4 PRNZ 47 (HC); *McArdle v BNZ Finance Ltd* (1990) 4 PRNZ 653 (HC).

a finding. Mr Michael does point to the fact that the parties' dispute concerns a project undertaken at Taupo, which is within the jurisdiction of the Rotorua Registry, and he claims that the plaintiff operates primarily in Taupo where its registered office is. Neither factor however establishes that greater convenience to the defendant will likely result from a transfer to Rotorua, or outweighs the plaintiff's position that its convenience will be better promoted by leaving the proceeding where it is in the Auckland Registry. Mr Michael also deposes that the defendant's operations for all projects undertaken between Wellington and the Bombay Hills are administered from its regional office located in Tauranga, but I do not see how that factor necessarily makes Rotorua Registry a more convenient registry for the parties than the Auckland Registry.

[34] The result is that I am satisfied the defendant has not shown that Rotorua Registry is the registry that should have carriage of the proceeding or become the proper registry in substitution for the Auckland Registry. The application for transfer is declined.

[35] I deal next with the stay application.

Defendant's application for a stay of the proceeding

[36] The defendant applies for an order staying the proceeding on the basis that the Court lacks jurisdiction because arbitration, or adjudication under the Construction Contracts Act, is the parties' agreed method of dispute resolution. The provisions that the defendant relies on are twofold. The first is art 8 of sch 1 of the Arbitration Act 1996 which provides:

> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, **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.
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> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[37] The second is r 15.1(3) which sets out the Court's power to strike out a proceeding where the proceeding is an abuse of process. As the actual order sought is a stay, r 15.1 is also relevant. It sets out the court's discretion to stay a proceeding on such conditions as the court considers just instead of striking out the proceeding.

[38] If a party requests a stay in reliance upon art 8 the Court must so order if two preconditions are met:[7]

> a) There is a dispute and the subject matter of the proceedings is the subject matter of an operative arbitration agreement; and
>
> b) The request is made either before or when, but not after, the party submits its first statement on the substance of the dispute.

[39] The Court need not however order a stay if the duty to so order is negated by circumstances that come within the proviso set out in cl 1 of art 8.

Background and parties' positions

[40] Before turning to the question whether the preconditions for a stay are met, and (if met) whether the duty to order a stay is negated, it is necessary to expand briefly on the background and the respective positions of the parties.

[41] The refurbishment of the AC Baths was undertaken by the defendant as head contractor to the Taupo District Council. The work that the plaintiff carried out on the project was as a subcontractor to the defendant and was essentially of two kinds: steel work and labour only carpentry works. It is not in dispute that the steel work has been paid for in full and that such work:

a) Was governed by a subcontract made between the parties on about 27 September 2012 that incorporates the arbitration agreement set out in NZS 3910:2003;

b) Included remedial steel works undertaken pursuant to variations to that subcontract which were issued over a period commencing from 10 October 2012.

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[7] *The Law Connection Ltd v Roche* [2013] NZHC 1742 at [19].

[42] It is also not in dispute that the parties had appointed an engineer to the 27 September subcontract as required by the terms of the arbitration agreement.

[43] The parties' positions with respect to the labour only carpentry works by contrast are marred by controversy. Though the defendant has paid some of the plaintiff's payment claims for this work, it has paid part only or nothing on others. The parties agree on the overall amount that has been withheld but they part company over whether the defendant is obliged to pay it and how that question is to be resolved. The defendant says in each case it issued a valid payment schedule that explains the reason for non-payment is certification of less than the amount claimed and that its dispute about liability is genuine. Additionally, it says that all the labour only carpentry work was agreed and undertaken pursuant to variations to the 27 September subcontract, and the parties are bound to follow the dispute resolution procedures set out in NZS 3910:2003. Counsel argues that documentary material that has been produced supports its position. He points to a standard form document the defendant issued when it accepted the plaintiff's quotation for the first round of the labour only works. It is headed "Notice to Subcontractor" and contains a printed reference to NZS 3910:2003 that states "You are instructed as follows in accordance with NZS 3910:2003". The defendant also points out that its request for a stay was made by application filed contemporaneously with the filing of its statement of defence and its application for transfer. The defendant maintains that on these bases the preconditions for a stay are met and that it is entitled to insist that the plaintiff take the necessary steps to refer the dispute to the engineer in order to initiate the arbitration in accordance with NZS 3910:2003.

[44] The plaintiff on the other hand says that the preconditions for a stay are not met. Its reasons are essentially threefold. The first is that there is no tenable or plausible dispute about its entitlement to the unpaid amount. It points out that the defendant agreed on 25 October 2012 to pay $62,994.20 plus GST for the initial round of labour only carpentry works that were carried out before then, between 16 and 24 October, and it paid in full. This was the quoted price the plaintiff put to the defendant on 19 October. It was only later in respect of additional labour only

carpentry works, requested over the period November 2012 to March 2013, that the defendant declined to accept the plaintiff's claims for payment and issued payment schedules. It is clear the defendant lacked proper cause, the plaintiff contends, as the labour only works were signed off each day by the parties and by the Council. The plaintiff also points to the defendant's statement of defence as being devoid of particulars that might justify the payment schedules, arguing that the use of payment schedules that rely on cursory reference to the lack of certification is not sufficient.

[45] Secondly, the plaintiff contends that the labour only carpentry works are covered by a separate subcontract that has no agreed dispute resolution procedures. It says that the defendant requested the initial round of labour only carpentry works by email of 9 October 2012, and that the request had nothing to do with the 27 September subcontract. It was made and quoted upon as an independent subcontract. The email of 19 October contains no reference to the 27 September subcontract. Counsel submits that the printed reference to NZS 3910:2003 set out in the Notice to Subcontractor that was given after the work was done cannot be treated as an agreement to proceed with the works as a variation to the 27 September subcontract, given that the works were not requested or quoted for as a variation, and the belated notice of 25 October could not in any event retrospectively impose terms when the work had already been done by that date. Later rounds were, counsel agrees, requested as variations, but to this new subcontract and not to the 27 September subcontract.

[46] The third reason is that the defendant has taken a first step in the substance of the dispute by filing a statement of defence which does not plead the arbitration agreement.

[47] The plaintiff also argues that even if the preconditions for a stay are met on a prima facie basis (which it does not concede) the duty to order a stay cannot be invoked as the claimed arbitration agreement is inoperative. Counsel submits essentially that the defendant has not complied with the preconditions for arbitration in a timely way and has failed to refer any dispute to the Engineer. A further reason, counsel submits, is that the defendant adopts inconsistent approaches to the question of the court's jurisdiction by arguing for a transfer of the proceedings on the grounds

of convenience and at the same time arguing that the court must order a stay of the proceeding, suggesting submission to the Court's jurisdiction.

Discussion - Are the preconditions for a stay met? Has the duty to order a stay (if invoked) been negated?

[48] I do not accept the plaintiff's third reason for its contention that the preconditions for referral to arbitration are not met. It lacks substance, as the defendant made clear that it was requesting a stay in the memorandum and the application for a stay filed contemporaneously with the statement of defence. The request was therefore made in compliance with cl 1 of art 8. However, I think there is room for argument about whether the defendant has demonstrated that other preconditions are met. My reasons may be stated briefly.

[49] There is an initial obligation on the party applying for a stay to establish the existence of a dispute.[8] The onus is therefore on the defendant. The Court of Appeal's decision in *Zurich Australian Insurance Ltd v Cognition Education Ltd* [9] is also apposite. It holds that a stay will be granted and referral to arbitration ordered only where there is an arguable defence to the alleged dispute.[10]

[50] I am not satisfied that there is a dispute in this sense. It is not clear on the material before the court that there is a genuinely arguable defence to the plaintiff's claim for the outstanding amount of its invoices. The defendant has not explained in other than cursory terms why it issued its payment schedules or why it is challenging liability for the unpaid amounts of the payment claims. Counsel for the defendant submits that the fact that it has served payment schedules which rely in the most economical terms on certification of less than the amount claimed, is enough to show that there is in fact a genuine dispute; and that it should not have to set out detailed particulars of its defence to each of the payment claims in its statement of defence or in its evidence to demonstrate that it has a genuinely arguable defence. Counsel also

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[8] *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd* HC Auckland CIV-2002-404-1747, 27 May 2003.

[9] *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2013] NZCA 180; [2013] 3 NZLR 219.

[10] At [5].

submits that as the decision in *Zurich* is under appeal it can be treated with circumspection. I do not accept the submission. I am satisfied that as the law stands presently, I must treat the Court of Appeal's decision as binding. Though I do not wish to be seen to express a view on whether the defendant might (if allowed further opportunity) have a basis in fact to overcome the shortcomings in its evidence and to demonstrate an arguable defence, on the material presently before the court I am satisfied it has not discharged the onus it bears to demonstrate that. It is on that material that I must determine the stay application. For present purposes I am therefore not satisfied that the precondition that there is a dispute to be referred to arbitration has been met.

[51] Even if I am wrong in this finding, the defendant has not established with a sufficient measure of certainty that the parties intended the 27 September subcontract would govern the first labour only works and therefore that the dispute falls within the arbitration agreement that the parties adopted for the purpose of that subcontract. Central to this uncertainty is that the defendant's email request for the first round of the labour only carpentry work on 9 October has not been produced in evidence. The email may well shed light on whether the defendant was proposing the labour only works as a variation to the 27 September subcontract or pursuant to a new subcontract. The plaintiff's email of 19 October contains no indication of the former and is consistent with a simple contract for a labour only agreement for works that were well underway. The apparently belated reference to NZS3910:2003 put to the plaintiff by delivery of the Notice to Subcontractor on 25 October, after the work was completed, may be suggestive of the parties' intention but it is not determinative as counsel for the defendant appeared to recognise.[11] Counsel for the defendant argues that if this reference is not sufficient to indicate a variation under the 27 September subcontract, it nonetheless shows the defendant accepted the quotation as being in accordance with NZS3910:2003. Counsel submitted the consequence would be that the parties' agreement to the arbitration agreement in NZS3910:2003 must be inferred albeit pursuant to a new subcontract. Counsel may be right, but the submission is conclusory. For such an agreement to be operative the

[11] On the same basis, a cost recovery reference "B" in the notice suggesting the defendant treated the work as a variation is not determinative.

parties would have to have appointed an engineer to the new subcontract that is required by NZS3910:2003.[12] There is no suggestion that they did.

[52] Counsel also referred to the standard form printed document the parties signed on 27 September, entitled "Subcontract Pre-letting Interview". Though this document expressly covers steel work, the same cannot be said of carpentry work. Indeed the contents of the document, read a whole, suggest otherwise. The standard printed text states that producer statements are required for eight categories of work, seven of which are set out in a standard printed list. The eighth is a handwritten addition and is for "steel work". Carpentry work seems to have been foreshadowed as a possibility, as each side's copy of the document is notated with Mr Michael's handwritten comment *"12 carpenters on go"* above the standard printed text. Materially, however, there is no addition to the list for carpentry works, and questions remain unanswered. There is no evidence that the parties ever agreed that the list of work categories covered by the requirement for producer statements in the 27 September document would be expanded to include labour only carpentry works.

[53] The defendant's claim that the 27 September subcontract applies to such works is key to its claim that the pre-conditions for arbitration are met. It has not established such. On the evidence as it stands, the question whether or not the parties intended the 27 September subcontract to govern the labour only carpentry works remains a matter of speculation. Therefore even assuming the existence of a genuine dispute about liability for the cost of those works, it would not be safe to find it falls within the arbitration agreement imputed into that subcontract.

[54] I pause to mention a further argument counsel for the defendant relied upon. It was made in submissions in reply and is that the plaintiff's position seems hardly consistent with the sequential numbering on its own invoices for both steel and labour only works. This submission is, again, conclusory, and is not determinative on the incomplete evidence that is presently before me.

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[12] See *Con Dev Construction Ltd v Financial Shelves No. 49 Ltd* HC Christchurch, CP179/97. 22 December 1997.

[55] Much uncertainty might have been removed if all of the key documents had been produced. The defendant might also have included in its evidence any documents that explain the significance of the reference to the "Contract No 1647" in the Notice to Subcontractor which does not appear on the document called the "Subcontract Pre-letting Interview". Without these and other key documents the uncertainty cannot be resolved determinatively in the context of the present application.

[56] In these circumstances I am not satisfied that the preconditions to an entitlement to arbitration are satisfied. It is unnecessary therefore to consider counsel's further submission that if the preconditions are found to be satisfied, any arbitration agreement is inoperative and the entitlement to arbitration has been lost. Nonetheless, for completeness I refer briefly to his submission the defendant has adopted inconsistent approaches to the Court's jurisdiction, as I consider these approaches establish determinatively the defendant has conceded the jurisdiction of the Court, and therefore the application for a stay cannot succeed.

[57] An arbitration agreement may become inoperative in circumstances of the kind considered in *Stockco Ltd v Denize,*[13] where the Court had endorsed a passage from *McGechan on Procedure* as follows:[14]

> If a defendant takes a step that is necessary or useful only if jurisdiction is conceded, then by that step a defendant submits to New Zealand jurisdiction: *Equiticorp Industries Group Ltd* (in stat man) v *Hawkins (No 2)* [1991] 3 NZLR 700 (HC), at 715-717. This includes taking a step in response to a summary judgment application: *Advanced Cardiovascular Systems Inc v Universal Specialities Ltd* [1997] 1 NZLR 186; (1996) 9 PRNZ 632 (CA) yet appointed an arbitrator in accordance with clause 12.1 of the agreement.

[58] I am satisfied that the defendant took such a step when it decided to proceed with its transfer application after the Court had directed on 13 December 2013 that the stay application was to be allocated a fixture for a defended hearing in Auckland. The only live purpose for seeking a transfer after that point was to determine where the more convenient location would be for trial, related pre-trial steps and any interlocutory issues that might arise. However expedient that step might have been,

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[13] *Stockco Ltd v Denize* HC Auckland CIV-2010-404-5668, 22 February 2011.
[14] At [13].

it did not need to be taken and it was not useful unless jurisdiction was conceded. While I accept that an application for transfer is not an inevitable submission to jurisdiction, in the circumstances of this case it was.

[59] In making this finding, I do not wish to be seen as expressing a view on whether the filing of an application for transfer for reasons other than irregularity in the selection of the proper registry amounts to a submission to jurisdiction. But when the purpose for seeking transfer is the convenience of the parties in relation to steps to be taken in the proceeding up to and including trial, then I consider it is clear that the application for transfer amounts to a concession as to jurisdiction and the concession renders any arbitration agreement inoperative.

[60] I am satisfied that there are no grounds for a stay.

Result

[61] The defendant's application for transfer and a stay are declined.

[62] As the plaintiff has been successful, under the statutory costs regime it is entitled to costs. There will be an order for costs in favour of the plaintiff against the defendant on a 2B basis, plus disbursements to be fixed by the Registrar.

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Associate Judge Sargisson