IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-2103
[2013] NZHC 1742

	BETWEEN	THE LAW CONNECTION LIMITED Plaintiff
	AND	JOHN ROCHE and WAYNE DOUGLAS Defendant

Hearing: 6 June 2013

Appearances: R. Laurenson and S. Tomlinson - Counsel for Plaintiff
J.D. Haig - Counsel for Defendant

Judgment: 12 July 2013

JUDGMENT OF JUSTICE D.I. GENDALL

This judgment was delivered by me on 12 July 2013 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: .....

Introduction

[1] The plaintiff applies for summary judgment as to liability only against the defendants. The defendants oppose the application, and apply for this proceeding to be stayed in order to remove this litigation to arbitration. That stay application is also opposed.

Background

[2] The plaintiff is a company which operates a legal practice at Raumati Beach. In 2002 the plaintiff engaged the defendants to provide its information technology (IT) services. The plaintiff would pay the defendants a fixed monthly fee and the defendants would provide specified IT services, including the monitoring and maintenance of the plaintiff's computer backup system. In 2007, the parties agreed the defendants would upgrade the plaintiff's IT system and would arrange for the installation of a new server (with a dual hard drive system) to protect the plaintiff's electronic data. The plaintiff also maintained an in-house backup system, which I understand was to insert a tape drive into the server at the end of each business day to back up the whole system. The parties entered into a specific contract for all the upgrade and ongoing work. A number of other general service level contracts it is said had been entered into over this time period, in 2007, 2008, 2009 and finally a new contract in 2010. The 2010 contract purported to supersede all earlier agreements.

[3] Around 20 September 2011 the plaintiff's server crashed and the plaintiff could not access it. It transpired that the first hard drive had failed earlier (the exact date is in dispute), and the second hard drive on 20 September 2011, meaning that no data on either hard drive could be recovered. The backup tapes had also failed as, when the new server was configured in 2007, there was apparently an exclusion of crucial data. Some data was able to be retrieved but not business data including critical Lawbase, PC Banking and Payroll. Data was able to be restored it is said purely by chance up to 1 September 2009 but not from then. The plaintiff maintains that the computer crash has caused enormous difficulties for it and the operation of its legal practice. The effect on the practice it is said has been disastrous.

[4] In the present proceeding, the plaintiff seeks damages claiming the defendants breached their contract with the plaintiff and they were negligent.

Application for summary judgment

[5] The first application before me is the plaintiff's seeking summary judgment. It is brought pursuant to r 12.2(1) of the High Court Rules which provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[6] The principles of summary judgment have been summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26]:

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried*: Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[7] The plaintiff's statement of claim alleges what are effectively five causes of action:

(a) Breach of the upgrade contract in December 2007 for failing to include the LawBase data and files linked to it in the backup tapes.

(b) Breach of the second contract in 2007, the new Service Level Agreement by failing to notice the omission of the LawBase data and other files after the upgrade.

(c) Breach of the 2008 Service Level Agreement for the same reason as (b).

(d) Breach of the 2010 Service Level Agreement for:

(i) Failing to notice the omission of the LawBase and other applications from the backup tape system.

(ii) Failing to monitor the system so as to identify the first disk failure on 27 July 2011.

(e) Negligence relating to the combination of the above failures by the defendants.

[8] Specifically and for its application for summary judgment, the plaintiff says the defendants have no defence to:

(a) Failing to include the LawBase data in the backup tape system at the time of the 2007 upgrade in breach of the 2007 upgrade contract.

(b) Thereafter failing to identify that omission in undertaking the ongoing services provided by the defendants under the Service Level Agreements.

(c) Failing to identify by its monitoring under the 2010 Service Level Agreement the first disk failure on 27 July 2011.

[9] And, the plaintiff says importantly, had the hard drive failure on 27 July 2011 been identified in a timely way there was no need to rely on the backup tape system. The cause of the loss is indifferent but certainly the failure to identify the 27 July 2011 failure meant that any existing deficiency with the system (that existing deficiency was the omission of LawBase to backup) was not protected.

[10] The defendants oppose summary judgment here and contend they have good arguable defences to the claims against them:

a. They point to Lawbase data being found on one of the hard drives, and say they did configure this but it was moved by a third party between 2007 and 2011. Evidence would be required about this suggested third party intervention for the defendants to show they

were not responsible for any causation of the loss the plaintiff says it has suffered.

b. The defendants say the application in question was a third party one for which there is an exclusion in the last Service Level Agreement at least and that in any event they did not receive any alerts as to the failures and were properly monitoring the plaintiff's system. The evidence the plaintiff relies on here accordingly needs to be thoroughly tested.

c. Furthermore, the defendants contend they were not required to back up third party applications, and so they were not required to ensure the Lawbase system was captured in the backup.

[11] On all of this, the defendants maintain they will be seeking leave to file a further affidavit disclosing an email from the defendants to the plaintiff providing further explanation for the server crash. That leave application is to be opposed, but I leave that matter on one side however. It will not impact on the decisions that follow.

[12] The defences advanced here arise primarily from the facts and from an interpretation of the various contracts and involve a clear dispute that the defendants were responsible for the alleged failures. As I see the position, there are conflicts and gaps in the evidence which is before the Court. A third party (Lexis Nexis) apparently performed work involving the computer systems on-site and remotely at various times over the years. The defendants maintain that the intervention of Lexis Nexis and possibly other third parties, who they say undertook installations, upgrades and modifications of the plaintiff's server without the knowledge of the defendants, must be fully tested to properly resolve this entire proceeding with evidence and cross-examination. They say also that there is evidence before the Court that the defendants themselves carried out reboots of the system which might have erased earlier hardware failure alerts. The defendants contend therefore that it is quite unsafe here to resolve the question of liability at this early summary judgment stage.

[13] Furthermore, even if the defendants might have breached their contract or duties of care, they may well be limited in accordance with their standard contractual terms of trade which appear to contain an exclusion of liability clause.

[14] Clearly, the summary judgment procedure is not appropriate where there are material conflicts of evidence, and a proper hearing and testing of all the evidence is required to safeguard the interests of the defendants as well as the plaintiff. In H*arry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21, Blackburn CJ said that the summary judgment procedure will usually not be suitable for the determination of issues of fact, although it is always possible that a plaintiff might succeed in showing that a defendant's allegations were utterly baseless.[1]

[15] Here in my view the summary judgment procedure is not appropriate. I cannot be satisfied there is no arguable defence, as the issues involved in this case require clear findings of fact, and the facts here are both substantially disputed and the defendants maintain they are quite incomplete. Summary judgment is therefore refused.

Application for stay

[16] Turning now to the second application which is before the Court, in this the defendant applies for the proceeding to be stayed in the face of an arbitration clause (the arbitration agreement) which forms part of the 2010 contract. That arbitration agreement says:

> If a dispute arises out of or related to this agreement (the "dispute") a party to the agreement may not commence any court or arbitration proceeding relating to the dispute unless it has complied with the following paragraphs of this clause except where a party seeks interlocutory relief. A party claiming the dispute has arisen under or in relation to this agreement must give written notice to the other party specifying the nature of the dispute. On receipt of that notice, the parties will use all reasonable endeavours to resolve the dispute by discussion, consultation, negotiation or other informal means of mediation.
>
> If the dispute is not resolved within 14 days of the notice being given pursuant of the paragraph above (or within such further period agreed in writing by the parties) either party may, by giving written notice to the other party, require the dispute to be determined by the arbitration of a single arbitrator. The arbitrator will be appointed by the parties or, failing agreement within seven days of the notice requiring

[1] Similar observations were made by Greig J in *A-G v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 and by Somers J in *Pemberton v Chappell* [1987] 1 NZLR 1, (1986) 1 PRNZ 183.

arbitration, by the president of the New Zealand Law Society on application of either party. The arbitration will be conducted as soon as possible and in accordance with the provisions of the Arbitration Act 1996.

[17] That application is brought by the defendants in reliance on r 15.1 High Court Rules which deals with striking out or staying a proceeding. Rule 15.1(3) addresses specifically applications for stay and provides:

> "**15.1 Dismissing or staying all or part of proceeding**
>
> …
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just. "

[18] Article 8(1) of Schedule 1 to the Arbitration Act 1996 provides:

> "**8 Arbitration agreement and substantive claim before court**
>
> (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. "

[19] It follows that, if a party requests a stay, the court must order a stay if two pre-conditions are met. They are:

(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 the party submits its first statement on the substance of the dispute. The request cannot be made after submission of the party's first statement.

Submissions

[20] The defendants argue here that the summary judgment application and this proceeding generally should be stayed until the process set out in the arbitration agreement has been followed. They contend that summary judgment is not "interlocutory relief" and thus not excluded by the clause. That wording is meant to capture applications for injunctions and other true interim applications.

[21] Neither party here it seems has followed strictly the conditions precedent required in the arbitration agreement. The parties have however endeavoured to resolve matters, according to the defendants so the next step must be arbitration. The plaintiff cannot rely on its own failure to formally initiate the process as grounds to avoid the operation of the clause, as it should have been the party to notify the defendants of the dispute.

[22] The plaintiff in turn argues that the Arbitration Act 1996 does not apply here as there is no "dispute", for the reasons set out in its summary judgment application. Furthermore, the arbitration agreement does not apply to the current scenario as it says an application for summary judgment is an application for interlocutory relief. The defendant it is suggested has also waived the application of the clause. Furthermore, the clause is not an arbitration agreement because there is a precondition and this is also null and void and incapable of being performed.

[23] The plaintiff also maintains a stay could only apply to one cause of action, that relating to the 2010 contract, as the previous contracts did not include an arbitration clause. This would lead to an unreasonable result.

[24] And finally, the defendants it is said have also not complied with the requirements of the Arbitration Act 1996 by not applying for a stay at the same time as submitting their first statement on the substance of the dispute.

Analysis

[25] Based on the parties' submissions, there are four issues to be determined:

a) Is a summary judgment proceeding excluded because it is interlocutory relief?

b) Is there an arbitration agreement for the purposes of art 8?

c) Does that arbitration agreement apply to all the causes of action here? and

d) Was the request made before or when the defendant submitted its first statement on the substance of the dispute?

Is a summary judgment proceeding excluded because it is interlocutory?

[26] The arbitration agreement excludes interlocutory relief from its ambit. Thus the plaintiff argues a stay of the summary judgment application here cannot be ordered as there is no relevant arbitration agreement affecting the application. But all this in my view is superseded by the recent Court of Appeal decision in *Zurich Australian Insurance Limited v Cognition Education Limited* [2013] NZCA 180.

[27] And, in any event, considering summary judgment has been declined in this case as I have noted above, this issue does not need to be resolved here. The stay, if granted, would not be of the summary judgment application. It would be of the substantive proceeding itself.

Is there an arbitration agreement for the purposes of article 8?

[28] The arbitration agreement sets up the following procedure:

- The party claiming a dispute has arisen out of or related to that contract gives written notice specifying the nature of the dispute;
- On receipt of that notice, the parties must use reasonable endeavours to resolve the dispute informally;
- If it is not resolved within 14 days of the notice (or a further period as agreed in writing) either party may by giving written notice, require arbitration.
- Thereafter, arbitration must be conducted as soon as possible.

[29] The plaintiff endeavours to argue here that the preconditions to arbitration (notice, dispute resolution) mean that the clause in question here is not an arbitration agreement.

[30] In my view, this is incorrect. In *Opus International Consultants Ltd v Projenz Ltd* HC Auckland CIV-2003-485-1387, 17 March 2004 a clause that provided for

reference to arbitration when other dispute resolution methods failed was held to be an arbitration clause for the purposes of art 8:[2]

> It is correct that, in terms of clause 20, the parties are not directed to go to arbitration first. However, if the dispute is not resolved by agreement (including agreement as to the dispute resolution process), then the clause allows a party to terminate the dispute resolution procedure, and in that event, the party must refer the dispute to arbitration. The effect of the clause is that disputes go to arbitration but there is a pre-condition that the parties must attempt dispute resolution by an agreed process first.
>
> It is only where a party fails to comply with the dispute resolution procedure that the other has the option of referring the dispute to court proceedings instead of arbitration.
>
> I consider therefore that it is not possible to read clause 20 as anything other than a dispute resolution agreement, ultimately providing for arbitration.

[31] In *Sure Care Services Ltd v At Your Request Franchise Group Ltd* HC Auckland CIV-2008-404-5112, 31 July 2009 the clause in question said that disputes "may" be referred to arbitration. The party opposing stay said this meant article 8 did not apply as arbitration was not mandatory. The court held however that once one party decides to refer a dispute to arbitration, both are bound by that course. It was an arbitration agreement.

[32] Therefore the fact that permissive wording is used, and that there are preconditions to arbitration, does not mean article 8 does not apply. However, the effect of these preconditions existing, and whether failure to comply with them means there is no contractual right to arbitration, needs to be considered here.

[33] On this aspect, as I see the position, it is useful to consider three cases which are relevant here. The first is *Con Dev Construction Ltd v Financial Shelves No 49 Ltd* HC Christchurch CP179/97, 22 December 1997 which started as an application for summary judgment to appoint an arbitrator under a building contract. The contract contained provisions requiring a preliminary decision by an engineer, with reference to arbitration afterwards by a dissatisfied party or if the engineer failed to complete his duties timeously. In that case, no engineer was ever appointed by the parties. Relying on established authorities, the Court held that the parties could not refer their disputes to arbitration at least until an engineer had been appointed and completed the preliminary duties required by the contract. In doing so the Court said:

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[2] At [30].

> 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.
> ...
> 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 and accordingly the Plaintiff cannot rely on the general provisions of clause 11 of the first schedule to provide for appointment of an arbitrator. The parties agreed upon procedure. The Plaintiff, who failed to comply with that appointment procedure, cannot not now be entitled to insist upon the appointment of an arbitrator by the Court.

[34] In the second case, *On Line International Ltd v On Line Ltd* HC Christchurch CP2/00, 11 April 2000, Master Venning confronted a similar issue where an arbitration agreement had pre-conditions. In the event of controversy, claim, or breach the parties were directed to try to resolve the matter amicably themselves. If the discussions failed to resolve the controversy, claim or breach within 30 days then the aggrieved party could seek arbitration. The Master said:

> The article is a dispute resolution clause that directs how the parties are to resolve their disputes. By the clause, the parties submit to arbitration, but there is a pre-condition that they must meet first.
> I did not understand Ms Montgomery to suggest that the Defendants were not entitled to go to arbitration because the preliminary process had not yet been undertaken. A party would not be able to avoid going to arbitration by refusing to seek to have the matter amicably settled. I find article 20 is a valid arbitration agreement.

[35] Finally, in *B J Pye Sheetmetal 2009 Ltd v Forsman* [2012] NZHC 472, the contract provided for an "Engineer" to be appointed. All disputes had to be referred to the Engineer before they could go on to arbitration. The parties executed the contract naming an individual in that role. They did so despite being advised by him that he would not accept the role. The Judge said:

> It will be seen there are some key points of distinction between the contract and the circumstances in *Con Dev Construction* and those applying in this case. First, the contract in *Con Dev Construction* provided for ex post facto appointment of an arbitrator. There was no agreement as to the identity of the arbitrator in that case. There was no one to whom the dispute could be referred. Secondly, in the present case, however, the parties had purported to appoint Mr Black. They agreed in the contract entered on 2 June 2010 to appoint him to that role, despite knowledge that he would not accept or perform the role. I will discuss, shortly, the significance of that and how as a matter of law it is to be regarded. Thirdly, in *Con Dev Construction* the builder (the party seeking to refer the dispute to arbitration) had completely failed to engage on the question of who should be appointed as Engineer. The owners had proposed Mr Bluck. The builder neither agreed to Mr Bluck nor proposed someone else, nor yet engaged on the appointment process. Despite that it sought to bypass that stage and arbitrate. No such criticism can be pointed at the

builder in this case. For those reasons, the *Con Dev Construction* case is somewhat different to the present case.

How then should the law look at an agreement where (1) the terms of that agreement require nomination of an Engineer (who is not to be party to the contract); (2) the Engineer is integral to the dispute resolution process in cl 13 of the contract (as well as undertaking other tasks provided by the contract); and (3) the parties know in advance of entering into the contract that their joint nominee is unwilling to accept appointment?
....

To give any sensible effect to the contract within this factual matrix, either of two possibilities must apply. The first possibility is that Mr Black was indeed the Engineer for the purposes of the contract — in the sense that the parties agreed that reference could be made to him. If he accepted reference, contrary to his prior intimation otherwise, the substantive provisions of cl 13.2 would apply. If not (and clearly the parties could not compel him to perform the role as he was not a party to the contract), then no decision would be made by the nominated Engineer within the time required in cl 13.2.4. The parties would then be free to proceed either to mediation or arbitration in accordance with cls 13.3.1(b) or 13.4.1(b).

The alternative option is that there is no Engineer for the purposes of the contract at all. But in that case the formal expression of the contract will need to be rectified. It provides for an Engineer. There is no Engineer. The Court would need to consider carefully how to go about the exercise of rectifying the contract. I received no submissions on that possibility and I forbear from undertaking the exercise even indicatively. However the object of any rectification is to revise the defective written form to best achieve the presumed mutual intent of the parties. In doing so there is no reason apparent to me why the consequence would be to remove cl 13 — the dispute resolution provisions — altogether. More likely cl 13.2 only would fall away. The rest would be revised modestly to reflect the absence of the Engineer wrongly provided for.
...

I have little difficulty in concluding that the former position — i.e. in [31] — is the correct interpretation of the contract. First, it gives as much effect as possible to the parties' joint decision to nominate Mr Black as Engineer despite his unwillingness to perform the role. As I have already said, they could not compel him to perform the role. But nominating him left open a mechanism to bring back into the role the engineer most familiar with the project — if he later changed his mind and was prepared to act. Secondly, it appears that Mr Black's stance may not have been one of outright rejection. I have set out at [9] what he said when the dispute was referred to him in November 2010. It appears that he was at least willing to undertake a limited review. And, as the evidence shows, Mr Forsman continued to hold out hope that Mr Black could be prevailed upon to undertake the cl 13.2 review in December 2010, and again in March 2011. Thirdly, the Courts are reluctant to conclude that the parties will have erred in expressing their contractual bargain if an objectively logical and attractive alternative meaning can be found. One which is at least consistent with the apparent intent of the parties to provide for alternative dispute resolution in the terms provided in cl 13, regardless of their preferred nominee's reluctance to participate.

[36] The Judge also considered a time limit in the clause that had not been complied with, and said.

Clause 7(1) of the Second Schedule of the Arbitration Act 1996 provides: “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. "

[37] The Judge did extend the time as it had only been seven weeks, he found it was a justifiable delay due to the other party's insistence on an unreliable legal position, and no prejudice from such an extension could be identified.

[38] The conclusions I take from this line of authorities is that pre-conditions in an arbitration clause do need to be satisfied for there to be a contractual right to arbitration (*Con Dev*). However, there are exceptions: if one party is deliberately avoiding fulfilling their obligations to avoid arbitration (*One Line*), or if the parties actually intended that the precondition would not apply (*B J Pye*).

[39] In the case before me, it is necessary to examine the course of events relating to dispute resolution to see if the preconditions of the arbitration agreement were met. The chronology of events at the relevant time would seem to be:

- On 23 September 2011 the plaintiff via email expressed it was unhappy with the situation to the defendants.

- On 26 September 2011 the defendants told the plaintiff they were trying to fix the situation, and refused to give the plaintiff "error logs".

- On 30 September 2011 the plaintiff sent a letter to the defendants, saying it needed to get the business back up and running before their dispute was sorted out. The defendants agreed to hold dispute resolution in abeyance.

- According to the plaintiff, from 20 September 2011 to mid November 2011 the parties had meetings and correspondence.

- On 18 October 2011 the parties had a without prejudice meeting, to discuss a pre prepared agenda of the issues. No resolution was arrived at.

[40] As I see it, there are two ways to interpret this sequence of events. First, the plaintiff accepted there was a dispute, but gave no notice to the defendants of this dispute. This is the interpretation the defendants rely on. If this was the case, the

plaintiff cannot rely on its own failure to comply with their contractual obligations to avoid the operation of the arbitration clause.[3]

[41] The second interpretation is that the plaintiff gave notice of the dispute to the defendants either on 23 September 2011 or 30 September 2011. The parties then entered into dispute resolution, including the meeting on 18 October 2011. The question then becomes whether a notice of arbitration needed to be given by the defendants, and if so, within what time limit.

[42] The defendants argue the parties had agreed to waive the 14 day time requirement through the agreement reached on 30 September 2011 to delay the dispute resolution process until the business was back up and running. And, if the Court did find that the time limit had not been waived, that it should exercise its discretion here under clause 7(1) of the Second Schedule to extend the time limit.

[43] In response, the plaintiff would argue that, as there has been no notice of arbitration given within the time limit, there is no contractual right to arbitration, and thus no basis for a stay.

[44] Unfortunately, there is at this point insufficient clear evidence before the Court to determine exactly what may have happened between the parties here. And, as I have outlined above, the defendants here have shown they have an arguable defence to the plaintiff's claim which, as outlined in *Zurich Australian Insurance Limited v Cognition Education Limited* [2013] NZCA 180, is enough to meet the test under Article 8 for stay and referral to arbitration. In the circumstances I think the fairest and proper option is to grant a conditional stay – a stay to commence the process envisioned by the arbitration agreement without delay, and then to proceed to arbitration if resolution is not reached within the specified period of 14 days. Either party would then have leave to apply for directions from the court to have the stay lifted or otherwise if the process was not being complied with in a proper and speedy manner.

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[3] *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1; *Scott v Rania* [1966] NZLR 527. See *On Line International Ltd v On Line Ltd* HC Christchurch CP2/00, 11 April 2000 at [34] above.

[45] On this basis, I am satisfied that the stay sought by the defendants should be granted, but on the conditions specified in [44] above. An order to this effect is to follow.

Does that Arbitration Agreement apply to all the causes of action here?

[46] There is an Entire Agreements clause in the 2010 contract between the parties. The clause in question provided:

> This agreement constitutes the entire understanding of the parties and supersedes all prior agreements and understandings, whether written, oral or otherwise, between the parties. Any contract review or change does not invalid this contract but rather will be treated as an amendment for the purpose of this agreement. The rights, powers and remedies of this agreement are cumulative and are not exclusive of any rights powers or remedies provided by law.

[47] I am not convinced this excludes any of the plaintiff's causes of action, as is contended here. It is clear that the 2010 agreement supersedes all prior agreements. Even if it did not, I would use my inherent jurisdiction to stay the proceeding here, for the same reasons as were expressed in *Heli-Flight New Zealand v Massey University* HC Auckland CIV-2005-404-4855, 30 November 2005. There, five out of seven causes of action arose relating to the arbitration agreement but two did not. The Court said:

> After giving this issue careful consideration, I am satisfied that it would be appropriate to stay the first and second causes of action also. I am most influenced by these factors. First, the agreement contains an entire agreement clause:
>
> > "3.2 These Terms and Conditions, Part A attached, together with the Memorandum of Understanding, constitute the entire agreement between the Parties and contains all of the representations, undertakings, warranties, covenants and agreements of the Parties. This Agreement supersedes all prior negotiations, contracts, arrangements, understandings (except the Memorandum of Understanding) and agreements including any negotiations, arrangements, understandings or agreements between Massey and Heli-flight. "
>
> It is significant that the agreement expressly supersedes all "prior negotiations, contracts, arrangements … and agreements … ". A question may well arise at an arbitral hearing about whether this provision reaches previous contractual arrangements between the parties. As noted, on Heli-Flight's pleading, they date back to late 1999. Within the scope of his or her reference, the arbitrator may be required to determine the validity or effect of these arrangements. It does strike me as unusual that Heli-Flight is now pursuing a claim or claims for damages, arising from alleged breaches of duties pre-dating the execution of a formal contract between the parties. In the normal course the existence of those rights would be

> disclosed and resolved within the terms of a complex agreement designed to govern future relationships. Doubtless an issue will arise about the tenability of the claims represented by the first and second causes of action in these circumstances.
>
> Second, the parties will be required to incur two sets of costs if their disputes continue in different jurisdictions. Theoretically, of course, Heli-Flight could argue that the claims, and thus the costs, relate to distinctly different times, places and circumstances, and that separate expenditure on each will be necessary in any event. However, in my judgment, based on experience in this area, there would be a significant degree of duplication. An arbitral hearing of the more substantial claims, represented by the third and sixth causes of action particularly, would necessarily traverse within the background narrative the history of the relationship represented by the claims embodied in the first and second causes of action. Duplication of this expenditure should be avoided if at all possible.
>
> Third, the commonality of the claim for wasted expenditure of $600,000 raises the prospect of conflicting findings in separate forums. This claim is the second largest item of loss pleaded in Heli-Flight's third cause of action (para 72). It is the largest item in the first and a significant item in the second. I can only assume that Heli-Flight will lead the same evidence on loss on all causes of action. Massey will do likewise in response. It would be wasteful to repeat those costs in separate hearings.

[48] The answer to this issue does not assist the plaintiff's position here.

Was the request made before or when the defendants submitted their first statement on the substance of the dispute?

[49] The first statement of the substance of the dispute from the defendants was their notice of opposition to summary judgment on 21 November 2012. In that notice they requested a stay. There can be no dispute on this aspect. The answer to this question must be yes.

Conclusion

[50] For all the reasons I have outlined above, I am satisfied a stay must be granted here, albeit a conditional one.

[51] An order is now made staying the plaintiff's claim against the defendants and referring this claim to arbitration pursuant to the arbitration agreement outlined at [16] above, conditional upon:

(a) the plaintiff by 19 July 2013 giving written notice to the defendants specifying the nature of the dispute between them, and a direction of this Court is now made that this notice is to be properly given by 19 July 2013; and

(b) the parties then by 2 August 2013 using all reasonable endeavours to resolve the dispute as outlined in the arbitration agreement; and

(c) if the dispute is not resolved by 2 August 2013 (or within such further period as may be agreed in writing by the parties) either party may, by giving written notice to the other party, require the dispute to be determined by the arbitration of a single arbitrator on the terms outlined in the arbitration agreement; and

(d) the arbitration is then to be conducted as soon as possible with the full and prompt co-operation and assistance at all times of the plaintiff and the defendants, and in accordance with the provisions of the Arbitration Act 1996.

[52] Leave is reserved for the parties or either of them at any time on 72 hours notice to apply to the Court for further assistance or directions or for orders lifting the stay or otherwise if the arbitration process outlined at [51] above is not being complied with in a proper and speedy manner.

Costs

[53] As to costs, the defendants have been successful here first, in opposing the plaintiff's summary judgment application and secondly, in obtaining a conditional order staying this proceeding to arbitration.

[54] I see no reason why costs here should not follow the event on the stay application in the usual way. Costs are awarded to the defendants on this stay application on the usual 2B basis together with disbursements as fixed by the Registrar.

[55] Costs on the plaintiff's unsuccessful summary judgment however are reserved, to await the final outcome of the substantive proceeding – r 14.8(3) and *NZI Bank Ltd v Philpott* [1990] 2NZLR 403.

'Justice D.I. Gendall'

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