IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-003195
[2014] NZHC 436

BETWEEN	ONNO SIJBRANDUS URSEM Plaintiff
AND	DESMOND FRANK CHUNG First Defendant
AND	GEOFFREY REYNOLD KNIGHTS Second Defendant
AND	PAUL JOSEPH RYAN Third Defendant

Hearing: 4 November 2013

Appearances: J D McBride for Plaintiff
K C Francis for Defendants

Judgment: 12 March 2014

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 12 March 2014 at 3.30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Bell Gully, Auckland
Meredith Connell, Auckland

[1] This case essentially concerns a dispute as to the existence of a partnership for the ownership of land in Ohakune.

[2] The plaintiff (Mr Ursem) contends that he and the defendants agreed orally in 1997 to form a partnership to purchase the land for use as a ski lodge, with a view to future development. He says that they operated the partnership until relationships broke down a couple of years ago. He has applied for a declaration that the land is partnership property, and for appointment of a receiver to sell it.

[3] The defendants agree that there were discussions between the parties to that effect in 1997, and that they entered into an interim written agreement on 6 July 1997 to put their understanding into effect, but say that the partnership did not eventuate as Mr Ursem could not fund his share of the proposed purchase. The defendants say that only the three of them entered into the partnership and purchased the land.

[4] The defendants have filed a protest to jurisdiction, alleging that the agreement of 6 July 1997 contained an agreement to refer all disputes to arbitration, which applies to the parties' present dispute.

[5] Mr Ursem has applied to dismiss the protest, saying that the agreement of 6 July 1997 was merely to establish rules for the already existing partnership. He says that that agreement, by its express terms, fell away on 10 July 1997 but in any event the arbitration clause does not extend to the question of whether a partnership was formed.

[6] The defendants oppose Mr Ursem's application to dismiss and, in addition, have applied themselves for stay of this proceeding.

[7] For the reasons that I will now give, I find that this proceeding should be stayed while the questions as to whether there is a binding agreement arbitrate, and as to whether the dispute as to the existence of a partnership comes within such agreement, are determined by an arbitral tribunal.

Background

[8] Mr Ursem and the defendants (Mr Chung, Mr Knights and Mr Ryan) were friends. In early 1997 they began to discuss the possibility of a joint purchase of land in or near Ohakune. In mid 1997 they identified a suitable block of land. On 11 June 1997 Mr Ryan entered into a conditional agreement to purchase it, on behalf of all four. Settlement date appeared to be 1 August 1997 (it is difficult to be certain because of the poor quality of the agreement produced in evidence). The agreement was conditional on the parties being satisfied with a feasibility study by 27 June 1997.

[9] A draft partnership agreement was drawn up, but was not signed. Instead, on 6 July 1997, the four parties signed a short written agreement under which they formally agreed to proceed with the purchase of the property subject to the terms of a draft partnership agreement that was attached. That agreement reads:

> We, the undersigned, agree to proceed with the purchase of LOT 5, MIRO STREET, OHAKUNE ("The Property). The feasibility study requirement of the offer made by Paul Ryan on behalf of the undersigned has been completed to our satisfaction.
>
> Further to this, we agree that this purchase is subject to the draft Partnership Agreement until 10 July or prior if a final Partnership Agreement is available.
>
> The undersigned are aware that by proceeding with the purchase and confirming with the vendor that the offer presented by Paul Ryan on behalf of the partnership is unconditional, each of the undersigned are individually and collectively parties to the purchase of the property.

[10] The draft partnership agreement that was attached to that agreement contained the following:

> 1. THE parties hereto will become and be partners in the business of the ownership, development, subdivision and eventual sale of a property at Miro Street, Ohakune …
>
> 2. THE partnership shall be deemed to have commenced on the 1st day of August 1997 and shall continue until the sale of the property is completed and the proceeds distributed between the parties or earlier as determined in accordance with the provisions hereunder contained.

[11] It also contained an arbitration clause:

> [18] All differences and disputes in relation to the partnership affairs shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1908 and its amendments.

[12] Minutes of a meeting on 7 July 1997 (attended by all four) recorded that Mr Ryan was "to action URGENTLY 'Partnership agreement'". A final partnership agreement as contemplated in the 6 July 1997 agreement was not signed by all of the parties prior to 10 July 1997, or at any time afterwards.

[13] The parties continued to meet, and to discuss arrangements for settlement of the purchase. The proposed arrangements included arranging finance for at least part of the purchase price. It appears that the parties also discussed an early subdivision and sale of a couple of sections, with the proceeds of sale effectively repaying the contributions to the purchase price. On the evening of Tuesday 29 July 1997, Messrs Chung, Knights and Ryan met (the minutes record an apology from Mr Ursem). The minutes refer to progress on plans for development of the land, and state that Mr Knights was "to approach [Mr Ursem] for signature on the partnership agreement" (and that he was to give copies to all). They also record a report by Mr Ryan that he had had no luck securing a finance package, and that all four needed to provide $10,000 to settle the purchase before Thursday afternoon (which would have been 31 July 1997, the day before settlement).

[14] There is no written record before the court as to what followed, leading up to settlement of the purchase. However, it is common ground that Mr Ursem was told of the need to come up with $10,000, and that he told the others (apparently through Mr Ryan) that he did not have the money to make a cash contribution towards the purchase price. (Mr Ursem says that the only way he could have found the money was by raising a loan on the security of his house).

[15] At this point there is a sharp divergence of views as to what happened. Mr Ursem says that Mr Ryan and Mr Knights agreed to pay Mr Ursem's share of the purchase price on his behalf (to be repaid out of his share of the proceeds of the planned development), and that the partnership continued. The defendants deny this and say that the three of them proceeded to purchase the property in partnership.

[16] It is not in dispute that the three defendants became the registered owners of the property, or that they alone signed a partnership agreement in the form of the draft attached to the agreement of 6 July 1997 (Mr Ursem's name remained on the signed agreement, although he did not sign it). Mr Ursem says that he did not learn that his name was not on the title until some five years later, when he was doing further work on subdivision, and that he was not concerned at that time as he had repeated assurances from the others that he was an owner of the property.

[17] The defendants say they continued to contemplate that Mr Ursem would join the partnership as a fourth partner once he paid his share (with the amount to be agreed at the time of payment, to take account of the overall amount invested at that point). They rely on minutes of a meeting between the three of them on 1 September 1997 that record that they agreed to meet with Mr Ursem "re explanation [sic] of position" and that some compensation should be given to him for his services, and that Mr Ryan wished to increase the number of partners to four.

[18] Notwithstanding the fact that Mr Ursem was not a registered owner, he continued to be involved in discussions about the property. There was a meeting of all four on 20 April 1998. The minutes record that Mr Ursem was taking an active part in the arrangements for a planned sale, and that "[Mr Ursem] advised that he can now fund his share". It seems to be common ground that advice was being sought at that time about forming a company for the development, that any payment by Mr Ursem was deferred until decisions were made on that, and that the company was never formed. Mr Ryan has produced an "options paper" that he says he tabled at that meeting. That paper appears to provide some support for Mr Ursem's argument, in that it refers to the defendants having purchased the land because "a fourth partner" was unable to fund his share, and that the partners were contemplating the creation of a company to purchase the property, with all parties having a 25 per cent shareholding.

[19] In 2003 – 2004 the property was subdivided into three sections, and two of the sections were sold. Again, it is not in dispute that Mr Ursem assisted with the subdivision and personally paid part of the expenses of it. There is a dispute,

however, as to whether Mr Ursem was reimbursed for his expenses from the proceeds of sale (it is not in dispute that he did not receive any profit from it).

[20] In 2010 the parties other than Mr Knights agreed to relocate a house onto the remaining land. The parties differ as to the terms on which they went into this project. It is common ground that Mr Knights was not required to contribute towards any of the expenses of the project, and was not to share in any profit. However, the defendants say that it was agreed that the project was separate to the land holding partnership but was to be governed by the terms of the draft partnership agreement, whereas Mr Ursem contends that it was a continuation of the partnership that commenced in 1997, but with a separate accounting for the costs of the relocation project as between Mr Ursem, Mr Ryan and Mr Chung only.

[21] The relocation project was costly, and ran into legal difficulties with the local Council. It is not in dispute that Mr Ursem contributed significant amounts of time and money to that development, or that relationships between the parties broke down after Mr Ursem sought but was denied an accounting for all aspects of the property development.

The pleadings

[22] Before turning to the specific issues raised by the opposing applications, I will address the substantive matters in dispute as identified in the statement of claim and the respective applications, and as clarified in the parties' submissions.

[23] Mr Ursem pleads that he and the defendants formed a partnership during the course of a ski trip to Ohakune. Although this is not pleaded explicitly in the statement of claim, the defendants accept that he is alleging an oral agreement. In support of this claim Mr Ursem:

(a) pleads that the partnership was formed before Mr Ryan entered into the agreement to purchase the Ohakune property (and that he entered into the agreement as agent for the partnership), and thus the

partnership was in existence before the parties signed the agreement of 6 July 1997;

(b) refers to a meeting held on 17 June 1997 (ahead of the condition date) to discuss the feasibility of development, at which the parties agreed to have a formal partnership agreement drawn up to provide for the development and for an even mechanism for spreading the costs; and

(c) relies on the specific terms of the agreement of 6 July 1997 that state that Mr Ryan presented the offer "on behalf of the partnership" and record that each signatory was individually and collectively a party to the purchase.

[24] In his application to set aside the defendants' appearance under protest, Mr Ursem focuses on the lack of particulars as to the dispute to be referred to arbitration, but in his notice of opposition to the defendants' application for stay (by which time the defendants had spelt out the dispute from their perspective), Mr Ursem expressly pleads that he relies on an oral partnership agreement preceding the agreement of 6 July 1997, and as support for that oral agreement he relies on various documents (minutes and correspondence) in which the defendants have referred to him as a partner (in addition to the references in the agreement of 6 July 1997 to an existing partnership).

[25] The defendants have not yet filed a statement of defence. Their view of the dispute is to be found in their appearance to protest jurisdiction, their notice of opposition to Mr Ursem's application, and in their application for stay:

(a) In their appearance, the defendants made what can now be seen to be an incorrect assumption that the plaintiff was asserting a partnership formed by the agreement of 6 July 1997 (incorporating, by reference, the draft partnership agreement).

(b) In their notice of opposition they merely refer to a dispute existing between the parties relating to the agreement of 6 July 1997, "particulars of the dispute have been notified".

(c) In their application for stay, the defendants recognise that the plaintiff is alleging an oral partnership agreement. They deny that oral agreement, and that the land was purchased by that alleged partnership. They admit that the parties intended to form a partnership, and signed the 6 July 1997 agreement with that intention, but deny that the partnership was formed (because Mr Ursem could not fund his contribution and did not participate in the purchase). They say that no agreement was ever reached for the plaintiff to become a member of the defendants' partnership or to acquire an interest in the land. They say that there was a separate partnership in relation to the proposal to relocate a house on the land, and that that partnership was governed by the terms of the draft partnership agreement attached to the 6 July 1997 agreement.

[26] It can be seen from this that the key substantive dispute between the parties is whether there was ever a partnership between them. If so, there are further disputes, of particular relevance to the present applications, as to whether the terms of the draft partnership agreement apply and, if so, whether cl 18 covers the dispute as to whether a partnership exists between the four parties.

Legal principles in relation to the applications to set aside and to stay

[27] The defendants have filed their protest to jurisdiction in reliance on r 5.49 of the High Court Rules. The plaintiff has applied under the same rule to set aside the appearance. The material parts of the rule for present purposes read:

> **5.49 Appearance and objection to jurisdiction**
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> (1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.

(2) The filing and serving of an appearance does not operate as a submission to the jurisdiction of the court.

(3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.

(4) The court hearing an application under subcl (3) must,—

(a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; but

(b) if it is satisfied that it has jurisdiction to hear and determine the proceeding, dismiss the application and set aside the appearance.

(5) At any time after an appearance has been filed, the plaintiff may apply to the court by interlocutory application to set aside the appearance.

(6) The court hearing that application must,—

(a) if it is satisfied that it has jurisdiction to hear and determine the proceeding, set aside the appearance; but

(b) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss both the application and the proceeding.

[28] The defendants applied for stay under both rr 5.49 and 15.1, as well as art 8(1) of sch 1 to the Arbitration Act 1996. Rule 15.1 reads:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subcl (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subcl (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

[29] Rules 5.49 and 15.1 overlap where there is a challenge to the court's jurisdiction on the basis the parties to the proceeding have agreed to refer the dispute to arbitration. If there is such an agreement, art 8.1 of sch 1 to the Arbitration Act applies, and requires the court to stay the proceeding:

> **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.

[30] The objective of the Arbitration Act is to encourage the use of arbitration in New Zealand to resolve domestic and international disputes.[1] This objective accords with the general principle that the courts should adopt a broad interpretation of the language used in arbitration clauses so as to give effect to the intention of parties to submit disputes to arbitration, and should not allow any inconsistencies or uncertainties in the wording of the clause to thwart that intention.[2]

[31] Article 8(1) does not, however, provide any guidance on how far a court should go, on an application for stay, in determining whether there is an agreement to arbitrate, and, if so, whether the dispute or disputes in the court proceedings are matters that the parties have agreed to refer to arbitration.[3]

[32] There is a range of views in the various jurisdictions that have adopted the Model Law as to whether a court faced with an application for stay should adopt a

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1 See Arbitration Act, s 5(a); Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) 2.

2 *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000)15 PRNZ 608 (HC) at [61]; *Allan Scott Wines and Estates Ltd v Eurowine Fine Wines (1990) Ltd* HC Wellington CIV 2007-485-1728, 30 January 2008 at [35]; *Sure Care Services Ltd v At Your Request Franchise Group Ltd* [2010] 3 NZLR 102 (HC) at [65]-[66].

3 Article 8(1) (and indeed the Arbitration Act as a whole) is based on the *UNCITRAL Model Law on International Commercial Arbitration*, although art 8(1) differs from the Model Law by the addition of the last phrase as a further ground for stay: "or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred".

"full review" approach and rule on the jurisdiction challenge in detail, or should refer the issue to the arbitral tribunal for determination (having regard to art 16 of sch 1 which gives the arbitral tribunal power to rule on its jurisdiction), or should refer the issue to the arbitral tribunal if it finds a prima facie case for the existence of a valid arbitration agreement (the "prima facie review" approach).[4] Common law countries historically have adopted a "full review" approach, but in recent time there has been a shift towards the "prima facie review" approach.[5]

[33] The point has not been addressed directly in New Zealand, although a similar question has arisen in relation to cross applications for summary judgment and for stay on the grounds that the parties have referred the dispute to arbitration. The Court of Appeal has determined that in such cases the test for determining whether there is in fact a dispute for the purposes of art 8(1) is whether the party resisting summary judgment and seeking arbitration has an arguable defence to the claim.[6] That finding is more consistent with a prima facie review approach than a full review approach on an application for stay.

[34] However, case authority in other common law jurisdictions where the prima facie review approach has been applied to disputes about whether there is a binding agreement to arbitrate between the parties to the court proceeding, or a dispute as to the scope of that agreement (whether a dispute falls within it), still appears to leave open the court's power to determine the point in clear cases:

(a) In *Gulf Canada Resources Ltd v Arochem International Ltd,*[7] the British Columbia Court of Appeal held that it was not enough for a party seeking a stay to point to an arbitration agreement and assert that the parties to the proceeding were parties to that agreement and the dispute was within its terms. It said that the court had a residual

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4 See A Kawharu "Arbitral Jurisdiction" (2008) 23 NZULR 238, particularly at 243.

5 *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2d) 113 (BCCA); *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] 4 All ER 951 (HL); and see the review of New Zealand cases in Kawharu "Arbitral Jurisdiction" at 257 – 258.

6 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2013] NZCA 180 at [5]; an appeal against this decision has been heard by the Supreme Court but its decision has not yet been released.

7 See above n 5.

jurisdiction not to grant a stay where it was clear that the dispute falls outside the agreement:[8]

> 43 Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for stay of proceedings.
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> 44 Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

(b) In *Fiona Trust & Holding Corporation v Privalov,*[9] the House of Lords had to determine a request by charterers of ships to grant a stay of a proceeding by the owners of the ships (seeking a declaration that the charters had been validly rescinded for bribery) on the basis of a clause in the charterparties that provided "any dispute arising under this charter" could be referred to arbitration. The Court considered first, whether as a matter of construction the arbitration clause was apt to cover the central question in the proceeding (whether the contract had been procured by bribery), and secondly, (assuming that the owners had an arguable case for rescission of the charters) they also had an arguable case for rescission of the arbitration agreement (having regard to a severability provision in the UK Arbitration Act). The House of Lords upheld the finding of the Court of Appeal that the disputed arbitration clause was clearly separable.[10]

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8 At [43] and [44] per Hinkson JA.

9 Above n 5.

10 The House of Lord's decision is noteworthy for the opinion of Lord Hoffmann that a fresh approach should be taken to the construction of arbitration cls, and the court should start from an

[35] I adopt the "prima facie review" approach, as better reflecting the policy that the courts will endeavour to give effect to the intention of parties to refer their disputes to arbitration but still recognising the Court's ability to assume jurisdiction in clear cases.

The respective arguments

[36] If there is a binding agreement to refer to arbitration the dispute or disputes raised by this proceeding, art 8(1) requires this Court to grant the defendants' application for stay.

[37] Mr Ursem's case is that the essential dispute is whether the parties entered into a partnership. His counsel argued that as the defendants are saying that there was no partnership at any time, there cannot be a dispute "in relation to the partnership affairs" (as required by cl 18 of the draft partnership agreement). Further, his counsel submitted that although clearly an agreement was reached on 6 July 1997, it was merely confirmatory of the oral partnership already in place, and to establish specific rules for the partnership in substitution for the default rules under s 27 of the Partnership Act 1908. He argued that the application of the new rules was limited in time by that agreement, and when that agreement fell away, the partnership continued under the default rules of s 27.

[38] Counsel for Mr Ursem also added that the defendants were estopped by their words and conduct from denying the existence of the partnership, arguing that Mr Ursem continued to meet expenses and undertake work on the land in reliance on repeated representations by the defendants (both before and after the purchase of the land) that he (Mr Ursem) was a partner. In addition he argued that the defendants had already submitted the dispute to the jurisdiction of the Court, as part of a defamation claim brought by Mr Ryan against Mr Ursem in which Mr Ryan claimed

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assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship into which they had entered or purported to enter was to be decided by the arbitral tribunal unless the arbitration agreement clearly excluded the dispute raised in the proceeding (in that case over the validity of the agreement due to bribery) and that severability depended on whether the alleged bribery necessarily impeached the arbitration agreement. On severability and arbitration cls see also the decision of the Court of Appeal in *Gallaway Cook Allan v Carr* [2013] NZCA 11, [2013] 1 NZLR 826.

that Mr Ursem was not an owner but had made defamatory statements about the defendants in relation to the distribution of proceeds of sale of the sub-divided sections in 2004.

[39] The defendants' case is that there was no oral partnership agreement, and that the agreement of 6 July 1997 merely recorded the terms on which the parties intended to form a partnership. Their counsel submitted that it was not necessary for the purpose of the present applications for the court to determine whether that agreement was a partnership agreement or merely an agreement in anticipation of forming a partnership. He argued that the court had only to determine what the terms of that agreement meant, and particularly what the parties intended by incorporating the draft partnership agreement containing cl 18. He submitted that the intention of the parties in importing the draft agreement and cl 18 was clear, namely that all disputes arising out of their relationship were to be referred to arbitration. He submitted that in the absence of any evidence or argument which impeached the arbitration clause,[11] the parties should be taken to have intended that all questions, including whether or not a partnership had been formed, were to be covered by the clause.

[40] As I understand his submissions, counsel for the defendants also argued that if the agreement of 6 July 1997 was properly construed as a partnership agreement, it was a partnership that continued past its fixed term (10 July 1997) either under s 30(1) of the Partnership Act or at common law,[12] and the agreement, including cl 18, ran on at least until Mr Ursem advised the others that he was unable to meet his share of the cost to purchase the land. He also submitted that the parties clearly agreed to operate under the draft partnership agreement, and hence cl 18, in 2010 when agreeing to the project to put a house onto the remaining land.

[41] Counsel for the defendants also submitted that the alleged representations and estoppel largely rely on words and conduct that are referable to the house relocation project, but in any event are merely part of the dispute between the parties and are

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11 Referring to Lord Hoffmann's approach to construction in *Fiona Trust & Holding Corp,* above n 5.

12 *Gillett v Thornton* (1875) LR 19 Eq 599.

capable of being advanced in the arbitration. He said that the defamation proceeding is not a clear waiver of the arbitration clause (it is quite a different matter), and in any event Mr Ursem has put the potentially overlapping matters before the Court in that proceeding. He submitted that the defendants also had an argument that Mr Ursem had already acknowledged the application of the arbitration clause by himself proposing arbitration.

[42] I will first address the question whether there is a clear enough case for the Court to assume jurisdiction on the question whether it is clear that the parties have agreed to arbitrate the substantive dispute as to whether they have entered into a partnership for the ownership and development of the land. I will then turn to the other grounds advanced in support of the respective applications.

Discussion

[43] I do not accept the argument for Mr Ursem that cl 18 cannot apply simply because the defendants deny that there was a partnership. There can be no question that there was a business relationship between the parties and that relationship led them to enter into the written agreement of 6 July 1997. Although the terms of that written agreement support Mr Ursem's case that the parties had already made an oral agreement to purchase the land in a partnership, I do not regard that to be a question that I can or should determine on this application for stay.

[44] The critical question for determination is what the parties' intended by the agreement of 6 July 1997, and particularly the reference to the draft partnership agreement and cl 18. This is a matter of construction of both the agreement and cl 18 in the context of the parties' existing and on-going relationship. This encompasses the express reference to Mr Ryan having signed the agreement to purchase the land on behalf of the partnership, regardless of whether that was an existing partnership or a partnership still to be formed. Viewed in that context the very broad wording of cl 18 is arguably wide enough to encompass a dispute as to whether a partnership had been formed at that time, or was formed by that agreement.

[45] Further, I am not persuaded by the argument of counsel for Mr Ursem that the agreement of 6 July 1997 was limited to establishing rules for the partnership for the four days until 10 July 1997. The evidence indicates that the parties did not regard the date of 10 July 1997 as a watershed in their relationship: even 10 years later both sides continued to treat the draft partnership agreement as having some application. Of equal significance, there is nothing in the evidence or in the arguments advanced for Mr Ursem which could impeach the agreement to arbitrate contained in cl 18 in the event that the agreement of 6 July 1997 did come to an end on 10 July 1997, and arguably the clause can continue even if the rest of the agreement came to an end.

[46] I also take into account that Mr Ursem's claim will require an examination of the parties' conduct over some 15 years of their relationship, and will inevitably require the same inquiry into respective expenditure on the property as will be needed in the event that a partnership is found to exist and a taking of accounts is required.

[47] In summary, and applying the prima facie review approach, I am not persuaded that the dispute over the existence of the partnership is clearly outside the terms of the arbitration agreement. On this basis, and subject to the matters I have still to consider, I consider that the stay should be granted and the question of whether there was a partnership should be left to the arbitral tribunal.

[48] Counsel for Mr Ursem placed considerable emphasis on the apparent ambivalence of the defendants' case in their continuing assertion that there is no partnership, yet contending that the agreement of 6 July 1997 continued to apply "to the relationship" either by application of s 30(1) of the Partnership Act or under the common law. There is more than a little merit to these arguments, given that s 30(1) only applies where there is a partnership for a fixed term, and the common law relied on by the defendants appears to be predicated on the existence of a partnership which has come to an end. However, I make no finding on either of these points. There is a similar curiosity in Mr Ursem's argument that the agreement of 6 July 1997 came to an end on 10 July 1997, notwithstanding that the parties' relationship clearly did not. There has been no clear explanation as to why the parties would agree to be

bound for four days only. I consider that all of these matters are disputes that, on the prima facie review approach, fall within cl 18.

[49] I also accept that Mr Ursem appears to have an arguable case for an estoppel arising out of the defendants' words and conduct, particularly from April 1998 onwards. The defendants say that there is an explanation consistent with their view of the dispute. Whether that explanation will answer the documentary record of the meeting on 20 April 1998, email correspondence in 2004, and one specific email from Mr Ryan on 24 May 2010 which Mr Ursem relies on in particular, is not a matter for me to determine. The outcome is not so clear as to say that it must result in a determination in Mr Ursem's favour. I regard this as another aspect of the dispute arising out of the parties' relationship, and a matter for arbitration.

[50] Counsel for Mr Ursem also placed significant emphasis on the defamation proceeding commenced by Mr Ryan in the District Court, contending that he (Mr Ryan) had submitted "partnership affairs" to the jurisdiction of the Courts. I am not persuaded that the bringing of that claim constitutes a waiver of the agreement to arbitrate a dispute over the existence of a partnership. First, the defamation proceeding was commenced after this proceeding. Secondly, even if the allegedly defamatory statements could turn on whether or not there is a partnership agreement between the parties, that is not enough to constitute an unequivocal waiver of the agreement to refer "partnership disputes" to arbitration. The disputes are of a completely different nature, with one being agreement based and the other tort based. Having said that, there may well be a question for the District Court as to whether the defamation proceeding can be determined before the question of whether a partnership exists has been determined in the arbitration. Although I see it as unsatisfactory for Mr Ryan to pursue his defamation proceeding before the issue over the existence of a partnership is determined, that is ultimately a matter for the District Court.

[51] The last matter to address, briefly, is the defendants' argument that Mr Ursem has already accepted arbitration, by asking for the dispute to be referred to arbitration in 2012. This does not influence me one way or the other. I accept the argument for

Mr Ursem that his proposal to arbitrate was predicated on the assumption that the defendants accepted that there was a partnership. He has taken his present stance only because of the defendants' position that there is in fact no partnership. There is perhaps more in the argument for Mr Ursem that the defendants rejected that proposal, but that too does not alter my view that there remains a prima facie case for the agreement to arbitrate.

Decision

[52] For the reasons I have given I find that there is arguably an agreement to arbitrate the question of whether there is a partnership between the parties (the subject of this proceeding), and a sufficient basis for saying that the parties should refer all disputes to arbitration (including the dispute as to whether there is an agreement to arbitrate).[13] For that reason, Mr Ursem's application to dismiss the defendants' protest to jurisdiction is itself dismissed, and the defendants' application for stay is granted. The stay is to remain in force at least pending a determination by the arbitral tribunal as to whether or not there is a binding agreement to arbitrate and, if so, whether the dispute as to whether the parties entered into a partnership falls within that agreement.

[53] Although the defendants have been successful, I consider that the circumstances of this case warrant a departure from the usual principle that the unsuccessful party on the application should meet the costs of the successful party. The reason for this is that although I have found in favour of the defendants, the law as to the test to apply is changing, and it could not be said that the outcome was self-evident. Further, the defendants' contentions in relation to the primary question of whether the parties entered into a partnership agreement has only emerged clearly through the course of the various applications and in the submissions for the hearing. Lastly, both parties have used these applications at least in part as "a dry run" of the substantive arguments, and the ultimate merit of the substantial arguments has yet to be determined.

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[13] Which the arbitral tribunal can determine under art 16 of sch 1 to the Arbitration Act 1996.

[54] My preliminary view is that costs should lie where they fall. However, if there is agreement between the parties, I will reserve costs until the substantive questions have been determined. If the parties wish to have that outcome, they may inform the Court by joint memorandum to be filed within five working days. If no such memorandum is filed, costs are to lie where they fall.

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Associate Judge Abbott