IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

CIV-2010-435-253

BETWEEN	EDWARD BRIAN GAWITH First Plaintiff
AND	EDWARD BRIAN GAWITH, PETER NEVILLE PUMPHREY AND JOSEPHINE ANNE GAWITH Second Plaintiffs
AND	KEVIN JAMES LAWSON AND ROSEMARY LYNN LAWSON Defendants

Hearing: 4 April 2011
(Heard at Wellington)

Counsel: G.A. Paine - Counsel for Plaintiff
K. Johnston - Counsel for Defendant

Judgment: 4 May 2011 at 3:30 PM

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge D.I. Gendall on 4 May 2011 at 3.30 pm under r 11.5 of the High Court Rules.

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Introduction

[1] Before me are two applications. The first is an application by the plaintiffs, Edward Brian Gawith and the trustees of the Uwhiroa Trust for summary judgment against the defendants, Kevin James Lawson and Rosemary Lynn Lawson. The second is an application by the defendants for a stay and dismissal of this proceeding on the basis that the Deed of Lease between the parties in issue contains a submission to arbitration providing for the resolution of disputes by arbitration.

[2] The plaintiffs are owners of several separate parcels of farm land (the land) leased by the defendants, who operate a dairy farm there. A Deed of Lease (the Lease) was entered into between the plaintiffs and the defendants for the land on 19 March 2004. The lease was for an initial period of six years (from 1 June 2004 to 31 May 2010) and provided for two rights of renewal each for periods of six years. The total possible lease of the land with all renewals was therefore eighteen years from 1 June 2004.

[3] On 25 November 2009 the defendants endeavoured to exercise their right of renewal under clause 1.5 of the Lease. However, the plaintiffs sought to issue a default notice in December 2009 for alleged breaches of covenant under the Lease. On 26 February 2010 the defendants provided a comprehensive response to the plaintiff's allegations that the lease had been breached including two detailed reports from farm consultants which appeared to support the defendants' position. Nevertheless, the plaintiffs continued to assert that the alleged breaches existed and had not been remedied, and so, on 4 October 2010 the plaintiffs issued a Notice to Quit to the defendants. The plaintiffs now seek by way of summary judgment orders for possession of the leased property, a re-transfer of certain Fonterra Dairy Company shares back to the plaintiffs and orders requiring restoration of the farm land to the condition it was in at the start of the Lease.

[4] Before proceeding to consider the plaintiff's present application for summary judgment, however, a preliminary issue as to how the applications before me should be dealt with, was raised by counsel.

Preliminary

[5] Turning to that preliminary issue, like the present case, this Court has been faced on other occasions with a summary judgment application and a cross-application for a stay on the basis of an arbitration clause where one of the issues between the parties was whether a "dispute or difference" existed under the documents in question. Since the passing of the Arbitration Act 1996, two different approaches have emerged to this issue of what is a proper process to follow in considering such applications.

[6] In one line of cases such as *Fletcher Construction New Zealand v South Pacific Co-Operative Dairies Ltd* (High Court, New Plymouth, CP 7/98, 27 May 1998), Master Kennedy-Grant) the Court applied the same test in deciding the stay application as is applied in summary judgment applications – whether there is an arguable defence to the claim. In other words, the Court looked to the chances of success of the summary judgment application first. If there was no arguable defence to the summary judgment application, those cases determined there were no grounds for a stay, as it followed that the claim was "indisputable" and there could be no "dispute" that could be referred to arbitration under the arbitration clause.

[7] In the other line of cases, such as *Todd Energy Limited v Kiwi Power (1995) Limited* (High Court, Wellington, CP 46/01, 29 October 2001) and *Alstom New Zealand Limited v Contact Energy Limited* (High Court, Wellington, CP 160/01, 12 November 2001), both decided by Master Thomson, the Court rejected that approach, and held that the stay application should be dealt with first. Master Thomson preferred an approach whereby the Court would not entertain a summary judgment application where there was an arbitration clause in an agreement unless (a) the claim was admitted or (b) if the issue was a point of law, the Court could see at once that the point was misconceived.

[8] On this question, although generally I would tend to favour the approach adopted by Master Thomson noted at [7] above, whichever test is applied in the circumstances of the present case makes little difference here, as in my view the

overall result would be the same. That said, I turn now to consider the defendant's stay application.

The Stay Issue

[9] The application for stay of this proceeding is brought pursuant to Article 8(1) of Schedule 1 to the Arbitration Act 1996 which 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.

[10] Article 8 requires an application for stay to be made not later than when an applicant party submits its first statement on the substance of the dispute. Here, the defendants' response to the plaintiff's statement of claim filed on 9 December 2010 was to file the present application for stay on 24 February 2011. No statement of defence was filed. This aspect of Article 8 has been complied with on the part of the defendants.

[11] In the present case, clause 12.3(a) of the Lease provides:

> 12.3 **Arbitration**
>
> (a) If any dispute or difference shall arise between the parties as to:
>
> (i) the meaning or application of any part of this Lease; or
>
> (ii) any other matter in connection with or which may have an effect on this Lease
>
> the dispute or difference ("the Issue") shall be referred to the award of a single arbitrator to be agreed upon between the Lessor and the Lessee.
>
> (emphasis added)

[12] By s 10 of the Arbitration Act 1996, any dispute which falls within an arbitration clause may be arbitrable so long as the arbitration agreement is not contrary to public policy or the dispute is not capable of determination by arbitration. Section 10 provides:

> **10 Arbitrability of disputes**
>
> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.
>
> (2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

[13] Before me, none of the parties pointed to any fundamental reason why this dispute which is essentially for possession of the land is not arbitrable. In response to the defendants' application, the plaintiff's principal argument is that there is no lease currently operating between the parties. That is because the plaintiffs submit that a valid notice to quit was served on the defendants and thus the Lease has terminated. It follows according to the plaintiffs that, as the Lease is no longer currently operating, this dispute cannot be said to be in connection with the Lease and the arbitration clause does not apply.

[14] It is clear that the Lease would have certainly expired on 31 May 2010 but for the defendants' attempts to renew it under the right of renewal. The current proceedings are essentially for possession of the land. The plaintiffs therefore bring these proceedings on the premise that the defendants have no lawful basis on which they may remain on the land. Thus, as I have noted, the plaintiffs assume that the Lease is no longer valid. However, if there is a valid continuing lease between the parties, proceedings for possession are inappropriate. The dispute would then be focussed on whether the Lease was complied with. The issue as to whether this dispute is in connection with the Lease therefore hinges on whether a valid Lease still continues.

[15] The initial term of the Lease expired on 31 May 2010. However, clause 1.5 of the Lease provides for rights of renewal in the following terms:

1.5 **Right of Renewal**

> Provided the Lessee has requested in writing at least six calendar months prior to the expiry of the current lease period in each case and provided all the provisions herein have been complied with, the Lessor grants to the lessee two further rights of renewal of six years each with a total possible period during which the land may be leased inclusive of the initial term and all renewals being not more than 18 years, expiring on 31 May 2022.

[16] By letter dated 25 November 2009 (in compliance with the six calendar months requirement), sent by their solicitors to the plaintiffs' solicitors, the defendants purported to exercise the initial right to renew. On 16 December 2009 the plaintiffs replied by letter, sent by their solicitors, noting that:

> Our client will not accept your client's election to renew in the face of well documented breach of covenant.

[17] Where the lessor and lessee have agreed to a term of renewal which is conditional on covenants in the lease being complied with and the lessee is in breach of the condition, s 261 of the Property Law Act 2007 (the Act) applies. Section 261 provides for the lessee to apply to the court in accordance with s 262 for relief under s 264 of the Act. Such an application for relief by a lessee may be brought where a lessor has brought a proceeding such as the present one seeking an order for possession of leased land. A s. 262 pre-condition for any such application is that it is made not later than 3 months after the date on which a notice setting out the following matters in s 263 is served by a lessor on a lessee:

> (a) that the lessor refuses to extend or renew the lease, or enter into a new lease, or transfer or assign the reversion, as the case may be; and
>
> (b) that the lessee, mortgagee, or receiver may apply to a court for relief against the refusal; and
>
> (c) that the right to apply for such relief lapses if the application is not made to the court within 3 months of the date of service of the notice; and
>
> (d) that it is advisable for the lessee, mortgagee, or receiver to seek legal advice on the exercise of the right to apply to a court for relief against the refusal.

[18] Those requirements and in particular a notice including the matters listed at s 263(b), (c) and (d) were not adhered to by the plaintiffs here. However, merely

because the plaintiffs did not comply with those requirements may not mean that the refusal was ineffectual. Adherence to s 263 merely provides a gateway for access to relief for the lessee under ss 261-264. The wording of these sections does not appear to require that all refusals of renewal are contingent on notice setting out the matters in s 263 being served. Of course, by s 262, the effect of the lessor not serving such notice, however, is that it could not seek an order for possession which it is endeavouring to do here. And indeed, as no compliant Notice under s 262 has been issued by the plaintiffs, the plaintiffs as lessees are not yet out of time to bring an application for relief. In any event, it would seem at the very least that as the defendants remain in possession of the land here, even if the lease had expired, an implied term of lease under s 210 of the Act must arise. On this, s 211 of the Act provides that where a term of lease has expired all the obligations of the lessee under the lease that are consistent with the lease being terminable at will remain in force until the time that the lease is terminated. An arbitration clause is not, prima facie, inconsistent with the lease being terminable at will. Therefore, it must still operate.

[19] Alternatively, I note that Art 8 of Schedule 1 of the Arbitration Act 1996 requires a stay unless the court *finds* that the arbitration agreement and presumably also on the facts of this case the Lease itself, is inoperative or incapable of being performed. In the present case, I am not prepared to make such a finding. In my view, as will appear later, the appropriate course here is for this dispute to be referred to arbitration as the parties agreed to do when they entered into the Lease.

[20] The plaintiffs further argue here that they have already validly cancelled the Lease. However, by s 243 of the Act a lease may only be cancelled in accordance with ss 244 to 252 of the Act. Section 246 provides for cancellation of a lease for breach of covenants. That section provides:

> **246 Cancellation of lease for breach of other covenants**
>
> (1) A lessor may exercise a right to cancel a lease because of a breach of a covenant or condition of the lease (except the covenant to pay rent) only if—
>
> (a) the lessor has served on the lessee a notice of intention to cancel the lease; and
>
> (b) at the expiry of a period that is reasonable in the circumstances, the breach has not been remedied.

> (2) The notice required by subsection (1)(a) must adequately inform the recipient of all of the following matters:
>
> (a) the nature and extent of the breach complained about:
>
> (b) if the lessor considers that the breach is capable of being remedied by the lessee doing or stopping from doing a particular thing, or by the lessee paying reasonable compensation, or both,—
>
> (i) the thing that the lessee must do or stop doing; or
>
> (ii) the amount of compensation that the lessor considers reasonable; and
>
> (c) the consequence that, if the breach is not remedied at the expiry of a period that is reasonable in the circumstances, the lessor may seek to cancel the lease in accordance with section 244:
>
> (d) the effect of section 247(1) and (2):
>
> (e) the right, under section 253, to apply to a court for relief against cancellation of the lease, and the advisability of seeking legal advice on the exercise of that right.

[21] On 17 December 2009 the plaintiffs sent to the defendants a Notice of Breach of Lease (the Notice). The Notice set out:

> a) the nature and extent of numerous alleged breaches of covenant on the part of the defendants;
>
> b) the remedy demanded; and
>
> c) the fact that if the breaches are not remedied within three months the plaintiffs may terminate the lease and apply to the court for possession.

[22] On 4 October 2010 the plaintiffs' solicitors wrote to the defendants' solicitors advising that the breaches had not been remedied and that as no renewal had been agreed to on the basis that there had been breaches of covenants in the Lease, one month's notice to vacate the property was issued. However, in neither of those notices did the plaintiffs inform the defendants of the matters outlined at paragraphs (d) or (e) of s 246(2). Neither of those paragraphs are provided for under s 247 as defects that may not invalidate a notice. Therefore, in my view, the notice of intention to cancel was invalid for failure to comply with s 246(d) and (e) and a Lease remains – see *Netherland Holdings v Mannering*, High Court, Christchurch, 26 June 2009, CIV-2008-404-524, Associate Judge Christiansen at [146].

Conclusion

[23] In summary, I am not satisfied that the Lease and its arbitration clause is null and void, inoperative, or incapable of being performed. Further, as I see it, this dispute does fall under the arbitral clause of the Lease. For those reasons I order that these proceedings are stayed and I refer the parties to arbitration in accordance with Art 8 of Schedule 1 to the Arbitration Act 1996.

[24] I further record that had I not been so minded to stay these proceedings, I would have taken the view that these proceedings are not, in any event, appropriate for summary judgment, primarily because I am not satisfied that the Lease had been validly cancelled, nor that the plaintiffs have done enough to show they acted validly in refusing to grant the defendants their right to renew in accordance with the provisions of the Act.

[25] As to costs, the defendants have been successful in their application for a stay and are entitled to costs in the usual way. Costs are therefore awarded to the defendants here on a category 2B basis together with disbursements as fixed by the Registrar.

‘Associate Judge D.I. Gendall’