IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2012-406-000136
[2012] NZHC 2590

IN THE MATTER OF	the Arbitration Act 1996
AND	
IN THE MATTER OF	an application for a determination under Article 16 of the Act
BETWEEN	HIGHGATE ON BROADWAY LIMITED Applicant
AND	ARTHUR LAWRENCE MICHAEL DEVINE Respondent

Hearing: 3 October 2012 at Wellington

Counsel: D J Clark for Applicant
L P Radich for Respondent

Judgment: 16 October 2012

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 3.00pm on the 16th day of October 2012.

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] The applicant is a landlord. The respondent was a tenant of the landlord. The landlord asks me to declare that an arbitrator has no jurisdiction to hear and determine a dispute between the landlord and the tenant which the tenant has referred for arbitration. The landlord also asks me to quash a preliminary decision of the arbitrator or, in the alternative, stay the arbitration.

[2] In this judgment I rule against the landlord. I have concluded there is no legal impediment to the arbitrator hearing and determining the dispute between the parties. There may, however, be an issue as to when the arbitrator should undertake his task. However, I am not prepared to stay the arbitral proceeding.

Background

[3] The background to the parties' dispute is fully traversed in reserved judgments delivered by:

(1) MacKenzie J on 10 November 2011; and

(2) Kós J on 10 September 2012.

The first of these judgments is subject to an appeal. The second judgment dealt with security for costs in relation to the proceeding that I have to determine. Kós J found in favour of the tenant.

[4] The tenant leased premises in the landlord's building in High Street, Blenheim from which the tenant conducted a hairdressing business. The lease was for a five year period from 1 September 2006 with a right of renewal for a further five year term.

[5] In November 2010 there were discussions between the landlord and tenant over renewal of the lease. Those discussions appeared to have resulted in agreement to renew the lease. However, the landlord prepared a new lease on terms that were different from the existing lease. No new lease was finalised.

[6] The tenant fell behind in paying his rent. The landlord gave notice that if the outstanding rent was not paid within ten working days the lease would be cancelled. That notice did not comply with the requirements of s 245[1] of the Property Law Act 2007 (the Act). A second notice was sent that gave the tenant until 4 August 2011 to pay the rent arrears. The rent arrears were paid to the landlord's then solicitors at

[1] Which concerns the cancellation of a lease for breach of the covenant to pay rent.

9.30am on 4 April 2011. However, on 5 August 2011 the landlord cancelled the lease and took possession of the premises.

[7] On 7 August 2011 the tenant was allowed to enter the premises and retrieve his fittings.

[8] On about 12 August 2011 the landlord's then solicitors realised the rent arrears had been paid on 4 August 2011. The landlord's then solicitors then made a payment of $20,000 to the tenant, apparently, on account of any losses the solicitors might be liable for.

[9] The tenant applied for relief against forfeiture of the lease which expired on 31 August 2011. The tenant sought an order under s 256 of the Act that he was entitled to possession of the premises from 5 August 2011 to 31 August 2011. He also sought an order that the landlord was required to reinstate the premises to the condition they were in before the landlord took possession of the premises. In his application to the High Court the tenant sought:

(1) relief under s 253 of the Act (against cancellation of the lease);

(2) relief under s 261 of the Act (against the landlord's refusal to enter into a renewal of the lease);

(3) a claim for damages for loss of profit; and

(4) a claim for damages for stress, hurt and humiliation.

[10] The landlord's former solicitors were joined as a third party to this proceeding.

[11] Before the tenant's claim was heard the tenant realised that there was no jurisdiction for the Court to consider the tenant's claims for damages referred to in [9(3) and (4)] above. Thus, when MacKenzie J heard the tenant's application for relief under the Act his Honour was only seized of the claims for relief set out in [9(1) and (2)] above.

[12] The landlord submitted to MacKenzie J that there was no jurisdiction to grant relief under s 253 of the Act. His Honour rejected that submission and held that the tenant had been the lawful lessee of the premises throughout the relevant period. His Honour also held that the purported cancellation of the lease before its expiration on 31 August 2011 was unlawful and that the tenant was entitled to a renewal of lease from 1 September 2011.

[13] In the penultimate paragraph of his judgment MacKenzie J said that he did:[2]

> ... not consider that any further relief, by way of damages as claimed in ... the application, is appropriate in these proceedings. The question of other damages resulting from the landlord's wrongful cancellation of the lease should be determined (if the parties are unable to resolve matters in the light of the findings in this judgment) in an action for damages. As counsel for the [tenant] acknowledges, that cannot be done in these proceedings.

[14] I am advised that the landlord's appeal from MacKenzie J's judgment is scheduled to be heard in May 2013.

[15] Two days after MacKenzie J's judgment was delivered the tenant gave notice under the arbitration clause in the lease of his request to appoint an arbitrator to determine the landlord's liability for its breaches of the lease and its failure to renew the lease on 1 September 2011. Mr John Marshall QC was appointed arbitrator.

[16] On 9 December 2011 the tenant gave notice of cancellation on the basis of the landlord's repudiation of the lease. The notice of cancellation contained the following paragraphs:

> 5. As a consequence of the [landlord's] repudiatory conduct the business of the [tenant] which operated from the leased premises has been destroyed. The [tenant] now intends to seek damages caused by the respondent's conduct including the loss of the business.
>
> 6. The matter of damages will be referred to the arbitration to be conducted by John Marshall QC.

[17] The landlord applied to the arbitrator for:

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[2] *Arthur Devine Ltd v Highgate on Broadway Ltd* HC Blenheim CIV-2011-406-185, 10 November 2011 at [33].

(1) a determination there was no jurisdiction under the Arbitration Act 1996 for the tenant to commence and continue the claim before the arbitrator;

(2) in the alternative, a stay of the arbitral proceedings.

[18] The landlord took the view that:

(1) There was no longer an operative arbitration agreement between the parties; and

(2) The dispute was beyond the terms of the arbitration agreement.

In essence, the landlord's argument was that by commencing the proceedings heard by MacKenzie J the tenant had elected not to opt for arbitration, and that having made that election the tenant could not now revert to arbitration.

[19] In a ruling dated 22 March 2012 Mr Marshall concluded that he did have jurisdiction to proceed with the arbitration and that it would not be appropriate to stay the arbitral proceeding. Mr Marshall noted, however, that it would be sensible to wait until the Court of Appeal's judgment was delivered before proceeding with the arbitration hearing.

[20] On 30 May 2012 the landlord applied to this Court for orders that the arbitrator has no jurisdiction to hear and determine the dispute between the parties and for an order quashing the decision of Mr Marshall dated 22 March 2012. Alternatively, the landlord seeks a stay of the arbitration proceedings.

[21] In the following paragraphs I will explain:

(1) the terms of the arbitration agreement; and

(2) why the arbitration agreement continues to apply to the dispute between the parties.

The arbitration agreement

[22] The arbitration clause in the lease is very broad. It provides:

> Arbitration
>
> 45.1 UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision that relates to arbitration.
>
> 45.2 ...
>
> 45.3 THE procedure prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other moneys payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default prescribed in clauses 28.1 and 29.1 hereof.

[23] Mr Marshall formed the view that the tenant's claim for damages arising from the landlord's breach of the lease, and its failure to renew the lease on 1 September 2011 came within the words "any dispute or difference" found in cl 45.1 of the arbitration provisions in the lease.

[24] I agree with Mr Marshall's assessment. The dispute between the parties is clearly encompassed by the words "any dispute or difference".

Why does the arbitration agreement continue to apply to the dispute between the parties?

[25] In answering this question I will first, explain in broad terms the matters which the parties accept and then identify the matters about which there is no agreement before explaining my reasons for finding in favour of the tenant.

Matters not in dispute

[26] Both parties accept:

(1) that an arbitration agreement is a distinct and enforceable contract in itself;[3]

(2) that an arbitration agreement can cease to bind the parties if there is waiver, termination, abandonment, repudiation, variation or cancellation;[4]

(3) that this Court has jurisdiction to determine de novo whether or not the arbitrator has jurisdiction to hear and determine the dispute between the parties.

Matters in dispute

[27] The principal issue in dispute is best explained in the following question:

> Was the arbitration agreement brought to an end when the tenant commenced the proceedings heard by the High Court?

This in turn raises three sub-questions:

(1) Did the tenant place before the High Court the matters which are the subject of the dispute before the arbitrator?

(2) Could the matters determined by the High Court have been referred for arbitration?

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3 *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 (HL), D Sutton and J Gill *Russell on Arbitration* (22nd ed, Butterworths, London, 2003) at 296 and M Mustill and S Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, London, 1989) at 459.

4 *Paal Wilson & Co A/S v Blumenthal* [1983] 1 All ER 34 (HL) at 47, *Bremer Vulkan (supra), La Donna Pty Ltd v Woolford* [2005] VSL 359 and *Russell on Arbitration* (22nd ed, Butterworths, London, 2003) at 296 and M Mustill and S Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, London, 1989) at 79.

(3) Does the role of the landlord's solicitors as a third party in the High Court proceeding impact on the principal issue?

Was the arbitration agreement brought to an end when the tenant commenced his proceedings in the High Court?

[28] The landlord argues that where parties are subject to a mandatory agreement to arbitrate:[5]

> ... but where one party issues proceedings in the courts that party gives up its right to require the matter to proceed to arbitration because instituting curial proceedings relating to the substance of the dispute is inconsistent with the exercise of the right to arbitration.

[29] In essence the landlord argues that the tenant cannot "blow hot and cold".[6] Having elected to file proceedings in the High Court in which it, inter alia, sought damages for the landlord's breaches of the lease, the tenant cannot now be permitted to revert to arbitration. The landlord argues that:

(1) one party to an arbitration agreement cannot be permitted to subdivide a dispute or difference into component parts and seek to have some parts decided by the courts and some by arbitration;

(2) the arbitration agreement in this case is an all or nothing provision;

(3) the parties have by their conduct reached the point where the arbitration agreement has been brought to an end by consensus;

(4) the tenant ought to have arbitrated the matters determined by the High Court;

(5) as both parties agreed to the matters under the Act being determined by the High Court, there has been a consensual abandonment of the arbitration agreement.

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5 Applicant's submissions at [68].

6 *The Law Debenture Trust Corporation v Elekrim Finance BV* [2005] EWHC 1412 (Ch) at [42].

[30] In assessing the general approach advocated by the landlord, regard has to be had to the effect of art 8 of the First Schedule of the Arbitration Act 1996. That Act aimed to:

(1) encourage the use of arbitration as an agreed method of resolving disputes;

(2) provide consistency between New Zealand's arbitral regimes and their international counterparts based upon the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985; and

(3) clarify the scope of judicial review of arbitral proceedings and awards.[7]

[31] Article 8 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 proceeding 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.
>
> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[32] Article 8(2) recognises that the issuing of court proceedings does not automatically prevent a party from pursuing arbitration. Article 8(2) reflects earlier case law in which it had been held that the issuing of proceedings in court did not automatically bring pre-existing arbitration proceedings to an end.[8]

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7 See *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC) at [21].

8 See *Lloyd v Wright* [1983] 2 All ER 969 (CA).

[33] It may be that art 8(2) addresses the friction of one party wishing to arbitrate and the other wishing to litigate in court, as opposed to what the landlord complains about in this case where it believes the tenant has attempted to both litigate and arbitrate.

[34] However, in my assessment, I do not have to determine the perimeters of art 8(2). The answer to this case is able to be resolved by focusing on whether in fact the tenant has endeavoured to litigate the dispute that is currently before the arbitrator.

Did the tenant place before the High Court the matters which are the subject of the dispute before arbitration?

[35] The answer to this question is a qualified no. The qualification arises because when commencing proceedings under the Act the tenant mistakenly included a claim for damages which could in fact not be determined within the ambit of the application under the Act. The tenant promptly advised the landlord and the Court that it could not pursue his claim for damages in the High Court proceedings once that error was discovered.

[36] The landlord now attempts to argue that the tenant's error when filing his proceeding in the High Court automatically prevents the tenant from invoking the arbitration clause in the lease to claim damages that could not be sought as part of the High Court proceeding. In my assessment the landlord's approach is misconceived for the following reasons:

(1) The tenant did not make a valid election to forego arbitration proceedings when he inadvertently claimed damages in the proceeding brought under the Act.

(2) The parties' dispute over damages was not in fact litigated before the High Court.

(3) The High Court recognised the parties' dispute in relation to damages had to be resolved in a different forum/proceeding.

(4) The tenant's claim for damages should not be stymied by the landlord's unmeritoriously tactical approach.

Could the matters determined by the High Court have been referred for arbitration?

[37] The landlord submits that from the outset the tenant should have submitted all aspects of the dispute between the parties to arbitration. The landlord says the tenant cannot be permitted to dissect the dispute into parts and choose different fora to resolve each component of the dispute.

[38] The tenant responds to the submission by saying that as a matter of law, the issues under the Act could only be resolved by a court. The tenant supports the submission by referring to the following provisions of the Act:

(1) Section 243(2) which provides that relief against:

(a) the actual or proposed cancellation of a lease; or

(b) the refusal to extend or renew a lease

may only be given by exercising the powers conferred by ss 253 to 264 of the Act.

(2) Sections 253 to 264 all refer to relief being granted by "a court" or "the court".

The term "court' is defined in s 4 of the Act to mean "... the court before which the matter falls to be determined".

[39] In my assessment there is merit in the approach taken by the tenant. I do not accept that an arbitrator panel is a court for the purposes of the Act. When passing the Act Parliament drew a clear distinction between arbitral proceedings and court proceedings. Thus, whereas ss 253 to 264 of the Act refer to issues arising under those sections being determined by a court, Schedule 3, Part 2, cl 4(5) of the Act

refers to disputes arising under that clause[9] being referred to arbitration under the Arbitration Act 1996. Parliament would not have referred to court proceedings in relation to disputes under ss 253 to 264, and arbitration proceedings in relation to disputes under Schedule 3 if the two fora were synonymous.[10]

[40] If, however, my understanding of this aspect of the case is wrong then I record that I would still have found in favour of the tenant because in my assessment the tenant should not be prevented from pursuing his claim for damages before the arbitrator on the grounds that it is possible that the proceedings under the Act might have been capable of being dealt with by the arbitrator. In this case the tenant has proceeded on the understandable basis that only a court could grant the relief he sought under the Act. His claim for damages could not have been considered within the ambit of that proceeding. That means that the tenant's claim for damages could only be considered by other court proceedings or by arbitration. The landlord should not, in my assessment, avoid arbitration by arguing that the tenant is debarred from pursuing damages before an arbitrator because he might have also been able to pursue relief under the Act before an arbitrator.

Does the role of the landlord's solicitors impact on the outcome of my judgment?

[41] I agree with the tenant when he submits that the role of a third party cannot prevent arbitration of a dispute that is governed by an agreement to arbitrate between the parties. The landlord's former solicitors cannot be compelled to participate in the arbitration and issues relating to the proportion of responsibility for the tenant's losses as between the landlord and its former solicitors cannot be resolved by the arbitration. However, that factor in itself cannot impact on the principal issue which is whether the agreement to arbitrate was brought to an end when the tenant sought and obtained relief under the Act in the High Court.

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9 Concerning covenants, conditions and powers implied in all leases of land.

10 See also *R H Page Ltd v Hitex Plastering Ltd* HC Auckland CP428/97, 2 April 1998 at 3 and *Crutch v Flag Inns Ltd* (1993) 4 NZELC 98,219 (ET) at 2-3.

Timing of the arbitration hearing

[42] Mr Marshall recognised that it would be wise for the substantive arbitration hearing to be deferred until after the Court of Appeal determines the landlord's appeal. The rationale for this approach was the pragmatic concern that if the tenant was not entitled to relief under the Act then his claim for damages would disappear. However, while I agree waiting for the Court of Appeal's judgment is sensible, the parties should diligently conduct all preliminary steps required by the arbitrator so that if the landlord's appeal fails then the arbitrator can expeditiously discharge his task.

Outcome

[43] For the reasons set out above there is no legal impediment to the arbitrator hearing and determining the dispute between the parties.

[44] There is no basis to stay the arbitral proceedings.

[45] The landlord's application is dismissed.

Costs

[46] The tenant is entitled to costs. I am inclined to award costs on a scale 2B basis. I will give the parties five working days from the date of this judgment to file any submissions they wish to file in relation to the issue of costs.

D B Collins J

Solicitors:
Wisheart Macnab & Partners, Blenheim for Applicant
Radich Law, Blenheim for Respondent