IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2013-425-339
[2014] NZHC 1101

BETWEEN	QUEENSTOWN MINI GOLF LIMITED Plaintiff
AND	BRECON STREET PARTNERSHIP LIMITED Defendant

Hearing: 7 May 2014

Appearances: R T Chapman for Plaintiff
D M Lester for Defendant

Judgment: 22 May 2014

JUDGMENT OF MANDER J

Introduction

[1] The plaintiff seeks an interim injunction restraining the defendant from pursuing arbitration proceedings in respect of a rental dispute relating to a renewed lease.

[2] The application arises out of proceedings commenced by the plaintiff seeking a declaration that the defendant is not entitled to review the rental payable under the renewed lease, and for specific performance of an agreement for sale and purchase in respect of the business carried out on the property the subject of the lease. Those proceedings were commenced in response to the defendant instituting a rent review process and its subsequent reference of the resulting dispute between the parties to arbitration.

Factual background

[3] The plaintiff company runs a miniature golf business in Queenstown. The miniature golf course was constructed in 1995 on property which was reserve land leased from the Crown. The lease was for an initial term of 14 years commencing in December 1993 with a right of renewal for a further 12 years. The lease restricted the use of the land *"solely for the purpose of the operation of a miniature golf course and ancillary services incidental thereto"*.

[4] Clause 2 of the lease provided for the calculation of the rental:

> 2. THAT the annual rent shall be assessed as the greatest of the following amounts:
>
> (a) five per cent (5%) of the gross annual income excluding GST of the Lessee being the gross revenue excluding GST attributable to the Lessee's activities pursuant to this Lease; or
>
> (b) the sum of **FIVE THOUSAND DOLLARS ($5,000.00)**

[5] Clause 26(a) of the lease made provision for a right of renewal for a further term of 12 years.

> 26 (a) If the Lessee during the said term pays the rent hereby reserved and observes and performs the covenants conditions and agreements on the part of the Lessee herein contained and implied up to the expiration of the term to the satisfaction of the Lessor and gives notice to the Lessor at least three (3) months before the expiration of the term of the Lessee's desire to take a renewal of this Lease and if the Lessor is satisfied that some sport game or recreational activity should not have priority and that the trade business or occupation specified in Clause 4 hereof is still needed to enable the public to obtain the benefit and enjoyment of the reserve or for the convenience of persons using the reserve THEN the Lessor shall (at the cost of the Lessee) grant to the Lessee a renewed Lease of the Land for a further term of 12 years.

[6] The rent of the renewed lease was to be as mutually agreed between the lessor and the lessee. In the absence of agreement the rent was to be fixed by arbitration. Clause 26(b) provides:

> (b) The rent of the renewed Lease shall be as mutually agreed between the Lessor and the Lessee if they can so agree. If they cannot agree then at a rent to be fixed by arbitration in

> the usual manner but in no case at a rent less than the existing rent payable hereunder during the last year of the term of this Lease and otherwise upon and subject to such covenants conditions and agreements as the Lessor specifies except this present covenant for renewal.

[7] In 2000 the reserve status of the land was revoked and the land transferred to Ngai Tahu as part of a treaty settlement. In May 2005 the defendant purchased the property and became the lessor under the lease.

[8] Prior to the purchase of the land, in March 2004 a shareholder of the defendant company, Mr Noel Fitzgerald, entered into an agreement with the plaintiff for the sale and purchase of the mini golf business for $1 million. The agreement became unconditional in May of that year and a deposit of $100,000 was paid by Mr Fitzgerald to the plaintiff. The parties to the sale of the business agreed that the plaintiff could continue to operate the mini golf business and that settlement of the sale would be two months after notice was given by either party.

[9] In late 2007 and notwithstanding the yet to be settled sale of the business, the plaintiff gave notice that it wished to renew the lease prior to its expiry on 12 December of that year. On 2 November 2007 the plaintiff and the defendant signed a written lease variation instrument prepared by the defendant's solicitors renewing the term of the lease to 2019.

[10] The lease variation instrument provided under the heading "*Variation of Lease*" that "*the term of the lease is renewed to 12 December 2019*". No other covenants, conditions, or restrictions contained in the lease were varied.

[11] On 18 September 2008 the plaintiff agreed to the defendant company taking over the rights and obligations of Mr Fitzgerald under the earlier agreement for sale and purchase of the business. The condition relating to settlement of the purchase agreement was varied to take place six months after either party gave written notice.

[12] On 11 January 2010 the plaintiff instructed its solicitors to give notice to the defendant requiring settlement within six months. Settlement was scheduled for 12 July 2010, however the defendant failed to settle on that date and despite the

service of a settlement notice it remains in default of its settlement obligations. It is uncontested between the parties that the defendant company is insolvent and that Mr Fitzgerald who remains personally liable under the agreement for sale and purchase has been adjudicated bankrupt.

[13] After the renewal of the lease in December 2007, the plaintiff continued to pay rental based on the formula provided by clause 2 of the original lease. The defendant invoiced the plaintiff in June and December 2009 for sums that accorded with the rental provided for under that clause.

[14] No rental has been paid by the plaintiff since 2012. This rental has been retained by the plaintiff in purported offset against the amount claimed by the plaintiff in respect of the agreement for sale and purchase of which the defendant is in default.

[15] In June 2013 the plaintiff received written advice from the defendant of an increased annual rental of $317,500 to be applied back to the renewal date of 13 December 2007. Reference was made to the arbitration clause in the lease should the plaintiff not agree with the assessment. In August 2013 the plaintiff received a rental adjustment statement for the period from 2007 to 2013 seeking $2,052,750 including GST in unpaid rental. In response the plaintiff formally advised it did not accept the defendant's assessment of the market rent, that the defendant had no grounds to institute rent review proceedings and that the defendant was estopped from retrospectively determining the rent for the renewed term.

[16] In late September 2013 the defendant commenced steps to have the dispute resolved by arbitration and gave notice requiring the plaintiff to accept the proposed appointment of a named arbitrator. The dispute which the defendant required to be determined by arbitration was identified as the defendant's entitlement to the right to review the rental, the fixing of the rental in the event the lessor/defendant was so entitled, and determination from when the reviewed rent must be paid.

[17] The plaintiff in response advised of its intention to commence proceedings and requested that any arbitration proceedings be stayed pending the determination

of that litigation. It gave notice that it would seek an interim injunction staying the arbitration pending the Court's substantive determination of the issues. Upon receipt from the defendant of a default notice under article 1(4) of the Second Schedule of the Arbitration Act 1996, the plaintiff confirmed its intention to seek an interim injunction to stay the arbitration pending determination of its claim for declaratory relief and specific performance.

The plaintiff's argument

[18] The plaintiff's position is that the rental for the renewed term from 13 December 2007 was agreed between the parties at the time of the renewal. The rent was to be calculated on the same basis as for the previous term as described in clause 2 of the lease.

[19] Mr Chapman on behalf of the plaintiff submitted that the parties signed a lease variation instrument which provided that the covenants, conditions or restrictions contained or implied in the lease which included the rental payable under clause 2 would for the purposes of the renewed term remain unchanged. As this constituted a written agreement between the parties which complied with s 24 of the Property Law Act 2007, the rental for the renewed term was to remain as provided in clause 2 of the lease. Agreement having been reached between the parties and the lease having been renewed on that basis, there was no further right to review the rental. Mr Chapman submitted that if there was to be any change to the rental at the time the renewal was negotiated, clause 2 would have been amended to reflect that change. Alternatively, the lease variation instrument would have expressly reserved the right to review the rent in the future.

[20] As an alternative argument, Mr Chapman submitted that the defendant is estopped by its conduct from now exercising the right to review the rental. Mr Chapman acknowledged that the lease conferred a right on the defendant to review the rental on the renewal of the lease. While there was no time limit for doing that and time was not of the essence, the defendant had agreed not to change the rental when the lease was renewed. Mr Chapman placed reliance on the fact that the defendant company instructed its solicitors to prepare a lease variation instrument

which recorded no other variation to the lease other than to the renewed term. The lease variation instrument did not reserve the right to subsequently review the rental, and the defendant subsequently issued six monthly invoices after the renewal requiring payment calculated in accordance with clause 2 of the lease. The defendant did not seek to exercise the right to review the rental until 28 June 2013, some five and a half years after the execution of the lease variation instrument.

[21] Since renewal of the lease in November 2007, the plaintiff has continued to operate the mini golf business, basing its charging and cost structure on the unchanged rental arrangement. The annual rental of $317,500 per annum is approximately twice the total annual turnover of the business and has been set without apparent regard to the limited use to which the land can be put under the terms of the lease. The increase is sought to be backdated to the time of renewal in December 2007, yet the plaintiff company has now lost the opportunity to make any changes to its business or to the permitted use of the land which may have allowed it to respond to an increased rental.

[22] Mr Chapman submitted that the Court's jurisdiction to determine whether the defendant is entitled to review the rental remains despite the defendant's commencement of the arbitration process. He referred to different rights of appeal arising and cost implications, depending upon which course was adopted. In his submission the plaintiff was entitled to have the issue dealt with by the Court alongside its claim in respect of the defendant's contractual breach of the agreement for the sale and purchase of the business. The rental issue is, in the plaintiff's view, linked with the defendant's failure to settle this agreement and that having regard to the insolvency of the defendant company the plaintiff is unlikely to be able to recover the costs associated with participating in an arbitration.

Defendant's position

[23] In response to the plaintiff's first argument that the lease variation instrument constituted an agreement not to review the rent, the defendant submits that such argument must fail on the face of the terms of that document. Mr Lester submitted that the only agreed variation to the lease was to its term and that no other particulars

of the lease were varied apart from the right to renew which, having been exercised by the plaintiff was now extinguished. The right to review however remained as an extant power which continues to apply. The lessor/defendant at renewal did not have to specify that either the rent review process or the arbitration clause continued to apply because that was the default position pursuant to clause 26(b) of the lease. The agreement to renew the lease and the execution of a document giving effect to the plaintiff's right of renewal did not result in any implicit abandonment of the defendant's right to review the rent which was preserved by the terms of the lease variation document itself.

[24] In relation to the plaintiff's estoppel argument, Mr Lester submitted that the lease variation instrument did not have to expressly reserve the right to subsequently review the rental and the absence of such an explicit term cannot amount to a representation or encouragement of a belief on the part of the plaintiff that such review would not occur. The issuing of six monthly invoices after the renewal of the lease was, it was submitted, no more than "business as usual" and cannot be elevated to an assumption or belief that the contractual right to review the rent would not be exercised. Mere inaction by a lessor does not found an estoppel.

[25] The reference by the plaintiff to the elapse of five and a half years, it was submitted by Mr Lester, is no more than a complaint of delay and that of itself cannot preclude a lessor from exercising a contractual right to invoke rent review provisions. The plaintiff acknowledged that there was no time limit for the lessor to exercise the rent review in the absence of an estoppel. Either party could have commenced the rent review in order for the matter to be addressed earlier, including the issuing of a notice by the plaintiff to make time of the essence.

[26] Mr Lester submits that notwithstanding how seriously arguable the question sought to be tried, the jurisdiction of the Court to injunct an arbitral process is severely limited. It was submitted that the High Court will only restrain an arbitration where there is a risk of abuse of process and that none is apparent in the present case. The breadth of the arbitration clause is a matter for the arbitrator to decide who, pursuant to art 16 in Schedule 1 to the Arbitration Act 1996, may rule on its own jurisdiction. Further, that the plaintiff's objection to the issue being referred

to arbitration, pursuant to clause 26(b) of the lease, can be determined as a preliminary question by the arbitral tribunal.

[27] Finally, Mr Lester submitted that the application is unnecessary and premature. He suggested it was motivated more out of concern regarding how the defendant may act if it obtains a favourable rent review and the spectre of possible enforcement action by the defendant when it remains in breach of its contractual obligations under the sale and purchase agreement. The defendant submits that there would be remedies available to the plaintiff should any anticipated wrongful or inequitable act on the part of the defendant come to pass. The obligation to pay rental under the lease however is currently an obligation independent of the agreement for sale and purchase and subject to a discrete arbitration clause in the lease.

Is there a serious question to be tried?

[28] The plaintiff accepts that there is no time limit for reviewing the rent and that time was not of the essence. Absent estoppel, delay will not therefore be material, although a Court may imply that a right of review should have been exercised within a reasonable time. The exercise of that right outside such an implied reasonable period may give rise to possible loss or damage if suffered as a consequence of the lessor's breach.[1]

[29] In this case the plaintiff argues that an agreement as to the rental for the renewed term was reached when the renewal variation was signed. The defendant's position is that such a conclusion is not available upon a proper construction of the lease variation instrument. I have outlined the competing submissions of the parties based upon the terms of the lease variation document and the undisputed facts and chronology.

[30] Mrs Nola Pratt who is now the sole director and shareholder of the plaintiff company came to Queenstown in 1993 with her late husband to establish the miniature golf business in Queenstown. She has deposed of her belief that there was

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1 *Tournament Parking Limited v The Wellington Company Limited* [2010] ANZ ConvR 10-038, (2011) 11 NZCPR 779 at [64].

an agreement that the rental at the time the lease was renewed in 2007 would remain unchanged. Mr Graham Wilkinson, sole director of the defendant company, disputes Ms Pratt's belief that there was an agreement that the rent would not be reviewed. He refers to the interpretation of the variation document but does not expressly opine any view as to his personal understanding as to what the parties intended at the time of the execution of the lease variation instrument. Beyond those statements of belief there appears to presently be no evidential contest at least as to the bare facts giving rise to the dispute, however there has, not unsurprisingly at this stage, been no cross-examination of the deponents, nor further evidence regarding the circumstances and intentions of the parties, particularly in regard to the other extant contractual arrangements in place at the time of the renewal.

[31] The merits of an applicant's claim requires careful consideration, particularly if there is a discrete legal issue involved and it is apparent on the argument that the law cannot provide the applicant with a remedy. In the present case Mr Chapman on behalf of the plaintiff does not seek to dispute the applicable legal principles as they relate to a landlord's right to review the rent. He maintains however that they do not on the facts of this case have application to this lease because the terms of the variation instrument conclusively establish agreement was reached regarding the rental upon the renewal of the lease. Alternatively that the available evidence provides an arguably sufficient foundation to invoke the doctrine of estoppel notwithstanding the ordinary principles that might otherwise apply.

[32] In *Shotover Gorge Jet Boat Ltd v Marine Enterprises Ltd*,[2] Hardie Boys J observed that where a plaintiff has established that there is a serious question to be tried, the relative merits of the parties cases ought not to assume prominence in a consideration of where the balance of convenience lies. The Court otherwise runs the risk of effectively trying the substantive action on the usually limited material available for an interlocutory order.

[33] For the purposes of this part of the argument I am prepared to accept that there is a sufficiently serious argument raised by the facts which ordinarily would be

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2 *Shotover Gorge Jet Boat Ltd v Marine Enterprises Ltd* [1984] 2 NZLR 154 (HC); (1983) 4 IPR 516.

sufficient to pass the first threshold of an entitlement to interim relief. That conclusion however remains subject to whether injunctive relief is appropriate if the lease provides for arbitration of what is effectively the same disputed issue. The potential involvement of an arbitrator who may be required to consider these same matters, and which the defendant has urged is a course I should allow to be followed, has also given me reason to pause before examining the strength or merits of the plaintiff's case in any further detail than is necessary at this point.

The issue of arbitration

[34] The lease provided for the rent to be fixed by arbitration "in the usual manner" in the event of the parties not being able to agree. While I have accepted that the contest between the parties is capable in the circumstances of giving rise to a serious triable question, the Court is being asked to intervene to prevent an arbitrator from considering the rental issue notwithstanding an arbitration clause designed to provide a mechanism of resolution in the absence of the parties being able to agree.

[35] I accept Mr Lester's submission that the estoppel argument advanced by the plaintiff must be premised on an extant right of review which ordinarily would be within the compass of an arbitration to fix the rent in the absence of agreement. The doctrine of estoppel is to be used as a shield in respect of a liability which would otherwise attach and its potential application cannot of itself prevent the matter being the subject of an arbitration.

[36] The more fundamental issue is whether the limited arbitration clause provided in the lease is sufficient to cover the question of whether the variation instrument determined and thereby extinguished the right to review the rental. If so, whether the defendant should be prevented from insisting the matter be referred to arbitration to (at least initially) the exclusion of this Court. Article 16 of Schedule 1 of the Arbitration Act 1996 provides as follows:

> **16 Competence of arbitral tribunal to rule on its jurisdiction**
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> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the

> other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* (necessarily) the invalidity of the arbitration clause.
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> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that that party has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
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> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within 30 days after having received notice of that ruling, the High Court to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[37] The defendant's position is that the arbitral tribunal has the ability to make a determination as to its jurisdiction. The issue of jurisdiction turns on whether agreement had been reached at the time of the renewal about the rent for the extended period of the lease. In oral argument, Mr Chapman accepted that an arbitrator would be competent to determine that issue insofar as the answer to such a question would determine the arbitrator's jurisdiction to fix the rental. The plaintiff's point however was that in the absence of any "general" arbitration clause the Court should not be excluded, in the factual setting of this case and the limited parameters of the arbitration clause, from determining whether an agreement had been reached between the parties about rent at the time of the execution of the renewal instrument.

[38] Article 16 provides that the arbitral tribunal *"may rule on its own jurisdiction*". On its face that does not oust the jurisdiction of the Court to determine whether agreement had been reached by the parties about the rent for the period of renewal. Moreso in the context of this arbitration clause which appears limited to providing an efficient means to determine the level of rent that should apply in the absence of such agreement. That said, the issue of the arbitral tribunal's jurisdiction under the arbitration clause turns on whether the parties have mutually agreed on the rent. Determining whether such agreement was reached decides the issue of

jurisdiction. In the absence of any pre-existing agreement there remains a dispute as to the level of the rent for the period of the renewal and such issue was of the type contemplated by the arbitration clause.

[39] The plaintiff has acknowledged and I have accepted that whether the parties had agreed on the rent at the time of the renewal will determine whether the arbitrator has jurisdiction. It must therefore follow that it is a matter upon which the arbitrator can rule pursuant to art 16. The submission on behalf of the defendant was that having regard to the injunction in art 5 of Schedule 1 to the Arbitration Act 1996, the Court may only intervene in the arbitration process where the continuation of the process itself would constitute an abuse of process. Reliance was placed on the judgment of Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd* which examined the issue of "parallel" proceedings in a Court and an arbitral tribunal against the articles of Schedule 1.[3]

[40] The referral to arbitration by the defendant does not constitute an abuse of process of the Court, nor could the continuation of the arbitration notwithstanding the plaintiff's proceeding regarding the failure of the defendant to settle the sale and purchase agreement be categorised as such. While Randerson J's analysis in *Carter Holt Harvey*[4] may be capable of supporting an argument that a residual discretion to intervene in an appropriate case remains even in the absence of an abuse of process, I heard no specific submission that the present case was an example of that type of exceptional situation which might require or permit the Court to intervene.

[41] The plaintiff however did submit that if the matter is referred to arbitration it will suffer irreparable harm. If the rental is increased as a result of a separate arbitration and recovery enforced prior to determination of its claim arising out of the failure by the defendant to settle the sale and purchase contract, it will, it was submitted, be unfairly prejudiced. The defendant is insolvent and the issues would potentially be determined in isolation.

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3 *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 at [33].

4 Above n 3.

[42] In mitigation of that concern however is the undertaking of the defendant not to take enforcement action for a period following the release of any decree by the arbitrator that is adverse to the plaintiff. The defendant also has the right to access this Court upon the determination of the jurisdiction issue as a preliminary issue by the arbitrator. The question of jurisdiction can be ruled upon by the arbitral tribunal as a preliminary question and the defendant has offered to proceed to arbitration on that basis. A party may, after the arbitrator has ruled on the jurisdiction issue, request this Court to decide the matter.[5]

[43] The plaintiff's concern regarding the costs of an arbitration, as outlined in Ms Pratt's affidavit which refers to the engagement of a valuer, appears premised on the arbitral tribunal proceeding to make an award on the merits without first determining the preliminary question. As I understand the position that is not what is contemplated and such costs ought not be incurred for the purpose of the preliminary determination.

[44] In terms of where the balance of convenience lies, Mr Chapman stressed that the defendant company if it ultimately succeeds will not be disadvantaged by any delay as it will have the same rights to pursue the rent review which will remain unaffected. The plaintiff's financial position will not deteriorate in the interim, and there is no risk of such delay affecting its ability to pay any increased rental awarded. Conversely, it is submitted that if the plaintiff ultimately succeeds but no injunction granted, the plaintiff will have incurred the cost of an arbitration unnecessarily and will not be able to recover the legal and arbitration costs from the defendant because of its insolvency.

[45] This analysis however does not address where the balance of convenience may lie should, as is proposed by the defendant, the issue be resolved by the arbitrator as a preliminary question with the plaintiff retaining the right to have the High Court decide the matter. I also note that while the Court's ability to intervene to stay an arbitral proceeding is significantly limited, the arbitrator is not so

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5 Arbitration Act 1996, Sch 1, art 16(3).

constrained. In *Carter Holt Harvey Ltd v Genesis Power Ltd*, Randerson J acknowledged the wide power of an arbitrator:[6]

> [47] I accept Mr Williams' submission that unless the parties agree otherwise, an arbitrator has implied power to stay or adjourn arbitral proceedings where the interests of justice so require. The existence of such a power was recognised by Paterson J in *McConnell Dowell Constructors Limited v Pipeflow Technology Limited* HC AK M2029/98 25 March 1999 at 9 and in my view, such a power must follow from the authority conferred on the arbitral tribunal under Article 19(2) to "conduct the arbitration in such a manner as it considers appropriate".

[46] The argument that the rental and the claim arising out the sale and purchase agreement should not be separated is one which can be pursued before the arbitrator presumably again as a preliminary matter.

[47] Concerns regarding costs also arise in the context of defended Court proceedings. The impecuniosity of the defendant and persons related to it, while of understandable concern to the plaintiff and to the way it seeks to approach this litigation, does not provide sufficient justification to avoid the effect of the arbitration clause to which the plaintiff is a party.

Conclusion

[48] The Court must make an overall assessment as to whether or not to intervene on an interim basis.[7] The question for me is whether I should take what would in the circumstances be the exceptional step to prevent the matter being decided as a preliminary question by the arbitrator. I have concluded that I should not do so.

[49] Firstly, and it is not disputed by the plaintiff, the arbitrator is competent to determine the issue, it being a matter that goes to jurisdiction which is contemplated as being an issue that an arbitral tribunal is competent to rule upon pursuant to art 16. The contractual agreement contained in the original lease to resolve a rental dispute arising on renewal applies.[8]

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6 *Carter Holt Harvey*, above n 3 at [77]..

7 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142, per Cook J.

8 *Pupuke Service Station Ltd v Caltex 0i1 (NZ) Ltd* Appeal No 63/94, 16 November 1995, reported as an appendix to *Gold & Resource Developments (New Zealand) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (PC) at 388, per Lord Mustill.

[50] Secondly, the circumstances in which this Court might injunct an arbitral process are, post the Arbitration Act 1996, extremely limited and simply not made out in the circumstances.

[51] Thirdly, the concerns of the plaintiff which are considered to justify interim relief have largely dissipated. The identified issue can be determined as a discrete preliminary issue by the arbitrator. In the event of an adverse preliminary ruling, art 16(3) provides the plaintiff with access to this Court. The plaintiff may also pursue in front of the arbitrator its current argument that the rental issue should not be severed from the defendant's failure to settle the sale and purchase agreement and that both matters should be dealt with in the same forum.

[52] Fourthly, concerns regarding possible liability for increased rental will not arise before the plaintiff has the benefit of this Court's ruling in the event of an adverse ruling by the arbitrator on the preliminary issue. Similarly, the defendant has acknowledged that the plaintiff will be afforded the opportunity to take formal steps to have the Court intervene before enforcement action is taken in respect of any arrears resulting from the rent review in the event that should come to pass. I view that as an acknowledgment by the defendant that it would be inequitable to pursue such arrears while it remains in breach of its contractual obligations under the sale and purchase agreement.

[53] The application for an interim injunction is therefore declined.

[54] The defendant is entitled to costs on a 2B basis. If the parties cannot agree to arrangements regarding costs, leave is reserved to file written submissions which have been previously exchanged in draft.

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