**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2010-404-8250**
**[2012] NZHC 1402**

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| BETWEEN | TTAH LIMITED<br>First Plaintiff |
| AND | TT INVESTORS LIMITED<br>Second Plaintiff |
| AND | KONINKLIJKE TEN CATE N.V.<br>First Defendant |
| AND | ROYAL TEN CATE USA INC<br>Second Defendant |
| AND | TEN CATE UK LIMITED<br>Third Defendant |

Hearing: 18 June 2012

Counsel: D Salmon and E D Nilsson for Plaintiffs
G K Holm-Hansen for Defendants

Judgment: 18 June 2012

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**ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL**

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Solicitors:
LeeSalmonLong (D Salmon) P O Box 2026 Auckland 1140, for Plaintiffs
Email: davey.salmon@lsl.co.nz / Daniel.Nilsson@lsl.co.nz
Simpson Grierson, Private Bag 92518 Auckland 1140, for Defendants
Email: glen.holm-hansen@simpsongrierson.com

*Copy for:*
Alan R Galbraith QC, P O Box 4338 Auckland 1140
Email: argalbraith@shortlandchambers.co.nz

*Case Officer*: Peter.Gayaman@justice.govt.nz

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[1] The defendants apply for orders striking out or staying the proceeding. The plaintiffs oppose and cross-apply for summary judgment. This decision deals with both applications. Both applications have been heard in court, as the plaintiffs have applied for summary judgment.

[2] The plaintiffs started this proceeding in December 2011 but filed their application for summary judgment on 5 June 2012. Under r 12.4(2), they need leave to apply for summary judgment. The defendants oppose leave being granted.

**The acquisition agreement**

[3] The proceeding arises out of an acquisition agreement of 4 February 2009. The plaintiffs are the vendors and the defendants are the purchasers. The first and second plaintiffs are New Zealand holding companies. The first defendant is a holding company based in Almelo, The Netherlands. The second defendant is a Delaware corporation with its offices in Georgia, Atlanta, United States. The third defendant is a British company based in Hertfordshire, England. I will refer to the plaintiffs as "TigerTurf" and the defendants as "Ten Cate".

[4] Until 31 March 2009 the plaintiffs were 100 per cent owners of shares in various TigerTurf operating companies: TigerTurf NZ Ltd, a New Zealand company, TigerTurf (UK) Ltd, a company registered in the United Kingdom, and TigerSports Americas Inc, a United States corporation. TigerTurf NZ Ltd, in turn, owned 100 per cent of the shares in TigerTurf Australia Pty Ltd. These operating companies were also parties to the acquisition agreement. Other parties to the acquisition agreement were trustees of the G and H Vivian Family Trust (shareholders of the holding companies) and Graham Vivian and Helen Vivian, directors of the holding companies.

[5] Up until March 2009 the vendors and the operating companies together operated as the TigerTurf Group in New Zealand, Australia, the United Kingdom and

the United States in designing, developing, manufacturing and selling artificial turf products, including playing surfaces for sports fields and for landscaping applications. Apparently the playing surfaces for sports fields included grounds for American football.

[6] The acquisition agreement provided for Ten Cate to buy 49 per cent of the shares in each of the issued share capital in TigerTurf NZ, TigerTurf UK, and TigerSports Americas Inc for the sum of $NZ27,225,000. The initial settlement date was 31 March 2009.

[7] The acquisition agreement contained two call and put options for the purchase and sale of the remaining shares in the operating subsidiaries. Clause 17 dealt with the Option I shares, being a further 31 per cent of each class of the issued share capital in the three operating companies. TigerTurf exercised the put option for the Option I shares. In April 2010 Ten Cate paid TigerTurf the sum of $NZ13,746,716 subject to certain adjustments.

[8] Clause 18 gave a further call/put option for the purchase and sale of Option II shares, which were the final 20 per cent of each class of the issued share capital in the operating companies. Clause 18.7 of the acquisition agreement provides for delivery of the shares and payment of the price on the Option II settlement date, which is defined as 10 working days after the exercise of the call/put option or following the determination of EBITDA (a matter covered in clause 19).

[9] On 31 March 2011 TigerTurf gave notice of its intention to exercise the put option to sell the Option II shares for a price of $NZ7,715,000 which was the minimum purchase price under clause 18. I record that there was no dispute as to the amount payable subject to the matter of set-off for breach of warranty. The settlement date under clause 18.7 was 14 April 2011.

[10] Under clause 4.3, Ten Cate is required to pay amounts due under the agreement, immediately, free of any restriction or condition, free of any deduction and without any deduction or withholding on account of any other account, whether by way of set-off, counterclaim or otherwise. But there is an express reservation:

Subject only to clause 30 or any other express right of set-off conferred by this agreement.

[11] Under clause 20, clause 4.3 applies to payment obligations under clause 18.7 for the Option II shares.

[12] Clause 30 is a warranty set-off provision. It comes in Part 6 of the acquisition agreement which is headed "Warranties". Clause 27 provides warranties and indemnities. There are further warranties recorded in other parts of the agreement, especially Schedule E. Under clause 28 there are warranty limitations. Clause 29 sets thresholds for warranty claims, both a minimum and a maximum.

[13] Clause 30 says:

> **30 Warranty Claim Setoff**
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> 30.1 *Request to setoff:* Subject to the provisions of this clause, if a Warranty claim ("Warranty Claim") is made by the Purchaser prior to the Option II Settlement Date, the Purchaser may make a request in writing to the Vendor that 50% of the amount of the Warranty claim be deducted from the unpaid Option I Share price or the unpaid Option II Share price ("Request to Setoff") and paid into a stakeholder's trust account until such time as the claim is finally settled or determined.
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> 30.2 *Vendor's response:* Within 10 working days of receipt of a Request to Setoff, the Vendor will:
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> 30.2.1 advise the Purchaser in writing that it does not accept the Request to Setoff, in which case clause 30.3 shall apply; or
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> 30.2.2 advise the Purchaser in writing that it accepts the Request to Setoff, in which case clause 30.4 shall apply.
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> 30.3 *Action if dispute:* If the Vendor advises the Purchaser in writing that it does not accept the Request to Setoff (or the Vendor does not respond to such request within the stated time period) then:
>
> 30.3.1 the Vendor and the Purchaser shall negotiate in good faith for five (5) working days to try and agree the Request to Setoff, and if it is agreed, clause 30.4 shall then apply; or
>
> 30.3.2 if the Warranty Claim is not agreed by negotiation within that time, then an expert shall be appointed to determine whether the Warranty Claim is bona fide and has a reasonable chance of success. The expert shall be a qualified barrister or solicitor experienced in commercial/corporate private practice in Auckland of not less than 7 years. If the parties are unable to agree on the appointment of an expert

or one party fails to act, then the expert shall be appointed on the request of either party by the President of the New Zealand Law Society. The expert shall determine all matters of process and procedure, shall determine the costs to be paid by each party in relation to this proceeding and his or her decision shall be final. When the expert has made his or her determination, clause 30.4 shall then apply.

30.4 *Action on agreement or determination by expert:* If the ~~Purchaser~~[1]Vendor has agreed to the Request to Setoff or the expert appointed pursuant to clause 30.3.2 has ruled that the Warranty Claim may be deducted by the Purchaser from the unpaid Option I Share price or the unpaid Option II Share price on condition that it is paid directly and immediately on the relevant Settlement Date into the stakeholder's trust account until such time as the claim is finally settled or determined. In all other circumstances unless expressly provided by this agreement, the Purchaser shall not be permitted to make any deduction or claim any right of setoff from the unpaid Option I Share price or the unpaid Option II Share price.

30.5 *Stakeholder*: The stakeholder must be a reputable firm of solicitors practising in Auckland. If the parties are unable to agree on the appointment of a stakeholder or one party fails to act, then the stakeholder shall be appointed on the request of either party by the President of the New Zealand Law Society. The stakeholder shall hold the amount paid to it on account of the Warranty Claim in an interest bearing trust account with a registered bank, in the name of the stakeholder.

30.6 *Claim abandoned or not upheld*: If and to the extent that the Warranty Claim:

30.6.1 is abandoned by the Purchaser; or

30.6.2 is dismissed by a Court of Law (and all rights of appeal are exhausted or not pursued within the statutory time limits); or

30.6.3 is not actively pursued by the Purchaser lodging Court proceedings for its determination within three (3) months of the Request to Setoff being agreed or determined by the expert, or if those proceedings are not actively and diligently pursued by the Purchaser in a timely and efficient manner; or

30.6.4 is not able to be pursued because this agreement has been cancelled as a result of the Purchaser's default,

then the Vendor will be entitled to immediate payment of the amount of the Warranty claim held by the stakeholder together with interest accrued thereon (if any) less withholding tax and the stakeholder's commission.

[1] The agreement says Purchaser, but it is common ground that Vendor is meant.

30.7 *Claim upheld:* to the extent that the Warranty Claim is upheld by a Court of Law (and all rights of appeal are exhausted or not pursued within the statutory time limits), then the Purchaser will be entitled to immediate payment of the amount of the Warranty Claim held by the stakeholder together with interest accrued thereon (if any) less withholding tax and the stakeholder's commission.

30.8 *No prejudice to either party*: This clause and any determination by the expert as to the merits or otherwise of a Warranty Claim shall be without prejudice to any subsequent court or dispute resolution proceedings in relation to the Warranty Claim.

[14] I summarise. The clause provides a detailed process for Ten Cate to assert a breach of warranty by way of set-off. If the request to set-off cannot be resolved by agreement or by negotiation, there is to be an expert's determination whether the claim is bona fide and has a reasonable chance of success. If the expert so finds, 50 per cent of the unpaid share price found to be arguable by the expert is paid to a stakeholder and held pending the outcome of proceedings in a court of law. The proceedings must be started within three months of the determination and must be pursued actively and diligently in a timely and efficient manner. If the claim is abandoned or not upheld, TigerTurf is entitled to payment of the funds held by the stakeholder. If the claim for breach of warranty succeeds, Ten Cate is entitled to the funds held to the extent of its success.

[15] There are certain other relevant provisions in the acquisition agreement.

[16] Clause 34 sets a disputes procedure. Clause 34.1 provides that if a dispute arises a party may give written notice to the other side specifying the nature of the dispute. Under clause 34.2, no disputing party may commence any proceeding on the dispute unless it has first complied with the clause. Under clause 34.3 the parties are to nominate representatives, and the representatives are to enter into negotiations in good faith to attempt to resolve the dispute within five working days of the date of the dispute notice. Under clause 34.4, unresolved negotiations are to go to mediation. The mediation is to be conducted in terms of the LEADR New Zealand Inc standard mediation agreement. The clause preserves the right of any party to take immediate steps to seek urgent interlocutory relief.

[17] Under clause 41.1 the agreement is governed by and construed according to the laws of New Zealand. Under clause 41.2, subject only to the dispute resolution clauses, the parties submit to the non-exclusive jurisdiction of the High Court of New Zealand.

[18] Clause 4.4 provides for payment of interest in default of payment.

[19] Clause 16.4 provides among other things for Ten Cate to indemnify TigerTurf for costs and expenses incurred as a result of any default by Ten Cate under the agreement.

**Facts**

[20] On 1 April 2011, Ten Cate made a request to set-off under clause 30.1 of the acquisition agreement. It put the amount of its warranty claim as at least USD$12,118,441. Fifty per cent of that sum is USD$6,059,220.50. It says that that converts to NZ$7,965,750.77, which exceeds the amount it would have to pay for the Option II shares.

[21] On 12 April 2011, lawyers for TigerTurf gave notice that TigerTurf did not accept the request to set-off. The parties have negotiated in good faith under clause 30.3.1, but that negotiation was not successful. Under clause 30.3.2 an expert determination was required.

[22] In August 2011 the parties agreed to appoint the Hon. Robert Fisher QC as the expert under clause 30.3.2. An expert determination under clause 30.3.2 has followed.

[23] There was a hearing before Mr Fisher QC on 23 May 2012. Mr Fisher has not yet given his decision although TigerTurf expresses confidence that his decision will not be far off.

[24] In the meantime, on 9 December 2011, Ten Cate filed a proceeding for breach of warranty. It issued its proceeding in the District Court of the United States for the Western District of Texas, Austin Division. The plaintiffs in that proceeding are the

defendants in this proceeding and the defendants in that proceeding are the plaintiffs in this proceeding. The claim is for damages for breach of warranty. The complaint - which I understand serves the purpose of a statement of claim - contains a pleading intended to show that the court in Texas has personal jurisdiction over the defendants in that proceeding. It is also pleaded that the court has subject matter jurisdiction because the amount in controversy is more than USD$75,000. The venue is said to be proper because a substantial part of the events or omissions giving rise to Ten Cate's claims are said to have occurred in the District and a substantial part of the property, the asset comprising TigerSport, is said to be situated is in the District.

[25] TigerTurf has contested the jurisdiction of the District Court to hear the proceeding. For that dispute as to jurisdiction, one of Ten Cate's New Zealand lawyers has given a declaration. That declaration includes this:

> In any event, the breach of warranty claims raised in this case are not raised and will not be raised in the High Court proceeding as pleaded by TTAH Trust[2] and TTI.

[26] Ten Cate's lawyers have since explained that if the District Court declines jurisdiction, Ten Cate reserves the right to claim for breach of warranty in this proceeding. I am advised that although papers have been filed in the District Court setting out the arguments on jurisdiction, a decision has not been given. I am also advised that that decision may be made on the papers.

[27] TigerTurf began this proceeding on 22 December 2011. It claims $7,715,000 as the amount payable under clause 18.7 of the acquisition agreement, interest at the default rate, and indemnity costs under clause 16.4. Ten Cate has not filed a statement of defence but has filed an application for strike-out or stay. It has not contested this court's jurisdiction to hear the case and has not proposed that this court should decline jurisdiction for forum non conveniens. In essence, it says that this court is precluded from determining TigerTurf's claim while the expert determination under clause 30 is still in process. The proceeding is said to be an abuse of process, it is premature and ought to be stayed.

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[2] The first plaintiff has since been identified as TTAH Ltd.

[28] TigerTurf applied for summary judgment in response to the declaration made in the Texas proceeding that Ten Cate would not raise breach of warranty in this proceeding. TigerTurf says that because of that stance Ten Cate can have no defence to TigerTurf's claim for payment.

[29] Before addressing those applications directly, it may be useful to set out a number of questions and provide answers to them, as a guide to how the applications should be resolved:

(a) Can Ten Cate start a proceeding for breach of warranty before the expert gives his determination?

(b) Is Ten Cate required to go through the dispute procedure under clause 34 before starting a proceeding for breach of warranty under clause 30?

(c) Is Ten Cate entitled to begin a proceeding for breach of warranty in a court outside New Zealand?

(d) Does TigerTurf have a cause of action to require payment?

(e) Can TigerTurf demand payment of the purchase price under Option II before the expert gives his determination under clause 30.4?

(f) Is TigerTurf entitled to bring a proceeding to enforce its claim for payment independently of Ten Cate's claim against it for breach of warranty?

(g) Is TigerTurf required to go through the dispute procedure in clause 34 before issuing its proceeding?

(h) In TigerTurf's claim for payment, is it fatal to Ten Cate's case that it will not raise a claim for breach of warranty in this proceeding?

*Can Ten Cate start a proceeding for breach of warranty before the expert gives his determination?*

[30] Ten Cate has started its proceeding before the expert has given his determination. TigerTurf objects that the proceeding by Ten Cate is premature. In response, Ten Cate refers to clause 30.6.3. That provides a deadline of three months after the request to set-off is agreed or determined by the expert under clause 30.4. However, clause 30.6.3 does not set any time before which Ten Cate may not begin its proceeding. Ten Cate apparently anticipates a favourable ruling by Mr Fisher and is apparently keen to pursue its claim for breach of warranty in a timely manner under clause 30.6.3. While it might be premature for Ten Cate to issue its proceeding ahead of the negotiation step under clause 30.3.1, I do not see anything within clause 30 that stands in the way of Ten Cate beginning a proceeding for breach of warranty under clause 30 ahead of the expert's determination. In my judgment, it can file a warranty claim ahead of the expert's determination.

*Is Ten Cate required to go through the dispute procedure under clause 34 before starting a proceeding for breach of warranty under clause 30?*

[31] Clause 34.2 says:

> 34.2 *Process first*: No disputing party may commence any proceedings on the dispute (except where the disputing party seeks urgent interlocutory relief) unless it has first complied with this clause.

[32] Clause 34 is a general provision for dispute procedures. The acquisition agreement also has procedures for particular disputes. There is an example in clause 19.7 for disputes as to the calculation of EBITDA. There has to be a negotiation in good faith followed by expert determination. Clearly, clause 19.7 governs disputes about EBITDA calculations, not clause 34. Clause 30 is in the same category. It is a particular provision for the determination of warranty set-off claims. It includes a requirement to negotiate in good faith and then an expert determination which can lead to proceedings being issued within three months of the expert's determination.

[33] Those provisions do not square with the mediation provision in clause 30. A requirement to mediate under clause 34 could get in the way of Ten Cate starting its proceedings on time under clause 30.6.3. In other words, clause 30 stands aside

from clause 34. A proceeding by Ten Cate, directed at upholding its set-off claim for breach of warranty, comes under clause 30. It is common ground that it has followed the steps under clause 30. It is not required to go through mediation under clause 34 as well. TigerTurf did propose to Ten Cate to go to mediation. Ten Cate declined to do so. TigerTurf's proposal to mediate is relevant to other issues, but for the present question I do not regard Ten Cate as in breach for its refusal to participate in mediation. It was entitled to issue its proceeding when it did.

*Is Ten Cate entitled to begin a proceeding for breach of warranty in a court outside New Zealand?*

[34] Clause 41.2 is a non-exclusive jurisdiction provision. It does not prevent the parties bringing proceedings in other courts, including courts outside New Zealand. There is another question whether courts outside New Zealand can accept those proceedings under their jurisdiction rules. Foreign courts will decide that by applying their own jurisdiction rules. The District Court in Texas is still to determine whether it has or will take jurisdiction of Ten Cate's proceeding. This decision does not deal with the powers of the federal courts of the United States to hear cases under the agreement. I am addressing only the contractual effect of clause 41.2.

*Does TigerTurf have a cause of action to require payment?*

[35] This question goes to pleading. TigerTurf's statement of claim pleads its case for payment under clause 18.7. Although it has not filed a statement of defence, Ten Cate says that it can resist TigerTurf's claim because it has invoked the warranty set-off provisions under clause 30. If Ten Cate were to plead to the statement of claim, it would set out that position as an affirmative defence. The fact that it may have an affirmative defence to TigerTurf's claim does not mean that TigerTurf does not have a tenable cause of action. TigerTurf has a prima facie right to be paid under clause 18.7. Ten Cate's objection is a matter of defence which it must plead and prove. So far as strike-out issues are concerned, TigerTurf's pleading is in order even if Ten Cate may have a defence which it can plead.

*Can TigerTurf demand payment of the purchase price under Option II before the expert gives his determination under clause 30.4?*

[36] Whereas the last question went to pleading, this question goes to substantive rights. TigerTurf relies on clause 18.7 for its right to be paid for the Option II Shares. By virtue of clause 20, the right to be paid under clause 18.7 is subject to the payment provisions under clause 4.3 and the payment provision under clause 4.3 is expressly subject to the provisions of clause 30. Clause 30, as I have said, is a detailed procedure under which a set-off for breach of warranty may be invoked. Under that detailed provision, there is no requirement for Ten Cate to pay until the point in clause 30.4 has been reached. Under clause 30.4, if the expert holds for Ten Cate, 50 per cent of the disputed amount of the warranty claim (to the extent upheld by the expert) is deducted from the price payable under clause 18.7, on condition that it is paid to a stakeholder under clause 30.5. The balance of the unpaid purchase price must be paid immediately to TigerTurf. Until the expert makes his determination, it cannot be established what or how much Ten Cate has to pay TigerTurf. In this case, for example, Ten Cate has asserted that 50 per cent of the disputed amount of its claim entirely exceeds the amount payable for the Option II shares. It cannot be in default of its obligations under clause 30 to pay until the expert has made a determination, from which it can be established how much, if anything, it has to pay to a stakeholder and how much, if anything, it has to pay to TigerTurf. It is apparent from the scheme of clause 30 that when Ten Cate invokes its provisions and the parties follow its procedures, TigerTurf's right to be paid under clause 18.7 is modified. In so far as Ten Cate is able to pursue its claims under clause 30, TigerTurf cannot claim payment under clause 18.7.

[37] At this stage, where there has not been a determination by the expert, TigerTurf cannot say unequivocally that Ten Cate does not have an arguable defence to its claim for payment.

*Is TigerTurf entitled to bring a proceeding to enforce its claim for payment independently of Ten Cate's claim against it for breach of warranty?*

[38] TigerTurf began its present proceeding after Ten Cate launched its proceeding in Texas. TigerTurf has taken a cross demand proceeding, that is, a proceeding on

the agreement in issue in Ten Cate's proceeding, but as a separate proceeding rather than by way of counterclaim or set-off. Apparently it wants to assert its claim for payment, notwithstanding the warranty claim made against it, while at the same time refusing to submit to the jurisdiction of the District Court in Texas. It wants to use the available jurisdiction of this court under clause 41.2. Again, subject to any questions of forum non conveniens and lis alibi pendens, it cannot be required to run its case by counterclaim and set-off rather than by cross demand proceeding. It is entitled to file a cross demand proceeding in this court under clause 41.2.

*Is TigerTurf required to go through the dispute procedure in clause 34 before issuing its proceeding?*

[39] Two points arise here. The first is that the correspondence shows that TigerTurf proposed during May 2012 to Ten Cate to go through a mediation procedure in terms of clause 34 to see if matters could be resolved. Ten Cate replied that it was not interested in taking up that offer. Given that Ten Cate was not interested in May 2012 in taking up the offer of mediation, it can hardly complain that TigerTurf ought to have offered to mediate before it launched its proceeding.

[40] The other aspect is that Ten Cate has properly started its proceeding under clause 30 without having to go through mediation under clause 34. TigerTurf's claim is another proceeding, based on claims for payment but touching on the same issues, although in the reverse direction, as Ten Cate's claim. TigerTurf has simply continued the litigation by its proceeding, but doing so by a cross-demand proceeding rather than responding to the issue directly in Texas. The cross-demand proceeding no more requires TigerTurf to submit to mediation than it would be required to if it had pleaded a set-off or counterclaim in the Texas proceeding.

*In TigerTurf's claim for payment, is it fatal to Ten Cate's case that it will not raise a claim for breach of warranty in this proceeding?*

[41] TigerTurf relies on the declaration made by Ten Cate's lawyer in the Texas proceeding that Ten Cate will not raise its warranty claim in this proceeding. As I have set out, Ten Cate has qualified that statement by saying that it will not run a claim for breach of warranty in this proceeding unless it fails in its jurisdiction argument in Texas. Ten Cate has decided to run its claim for breach of warranty in

Texas. It expects to win the jurisdiction argument there. Its pleading in Texas refers to relevant connections with the District of the federal court in that state.

[42] TigerTurf claims that Ten Cate has in effect burnt its boats by not raising the breach of warranty claim in this case. It says that in the absence of any pleading or intention to file a pleading based on breach of warranty by Ten Cate, it is entitled to immediate judgment. However, with respect, that misunderstands the way that Ten Cate is running its case. In this proceeding Ten Cate will rely on the provisions of clause 30 to resist TigerTurf's claim for payment. It will say that it is following the procedures under clause 30. If the expert finds in its favour, it will not be required to pay TigerTurf unless its claim is abandoned or not upheld under clause 30.6. It can run that defence restricted to following the procedures under clause 30, without also running the substantive warranty claim in this court. Instead, it can point to its proceeding in Texas and say that it is actively and diligently pursuing the warranty claim in Texas in a timely and efficient manner. It does not need to run the warranty claim in this proceeding to maintain an arguable defence to TigerTurf's claim here.

**TigerTurf's summary judgment application**

[43] Ordinarily I would dismiss TigerTurf's summary judgment application, but for case management purposes it may be desirable to reserve TigerTurf's position that it should be able to apply for summary judgment in the future. I would not allow the summary judgment application because Ten Cate has arguable defences. Those defences are that the time for payment under clause 30 has not yet arisen and that it may succeed in its warranty claim for an amount that equals or exceeds the amount it must pay for the Option II shares. To run those defences Ten Cate is not required to sue for breach of warranty in this proceeding, but may take a proceeding in a court of law outside New Zealand.

[44] If I were to dismiss the application for summary judgment, the accepted view is that there can only be one application for summary judgment in the course of a single proceeding: see *Braid Motors Ltd v Scott*.[3] This proceeding may serve a

[3] *Braid Motors Ltd v Scott* (2001) 15 PRNZ 508; McGechan on Procedure (looseleaf ed., Brookers) at HR12.4.01.

useful purpose as a means for TigerTurf to monitor Ten Cate's compliance with clause 30. It may be useful in ensuring that Ten Cate applies itself diligently to its obligations under clause 30 for TigerTurf to be able to bring this proceeding back on for hearing by a summary judgment application.

[45] Accordingly, I will deal with this matter by adjourning the leave application and leaving it open to TigerTurf to amend its application for summary judgment at a later time if it wishes.

**Ten Cate's strike out application**

[46] Ten Cate applies to strike out for abuse of procedure on the grounds that it has a watertight defence under clause 30 of the agreement and that TigerTurf's proceeding is premature. Ten Cate, in oral submissions, also says that the statement of claim does not disclose a reasonably arguable cause of action.

[47] For the reasons I have given, I hold that TigerTurf does have a tenable cause of action. Instead, Ten Cate's case really goes to defences that it can raise. Cases such as *Matai Industries v Jensen*[4] show that defences such as limitation may provide grounds for strike-out on the basis that the statement of claim is vexatious, frivolous or an abuse of process. But that decision makes it clear that a statement of claim will be struck only in clear cases, where it is obvious and inevitable that the claim will fail. The power to strike out is discretionary. While Ten Cate has shown an effective defence to TigerTurf's claim, strike-out does not necessarily follow. The defence is provisional. Mr Holm-Hansen describes the claim by TigerTurf as "hopeful". But claims are not struck out because they are hopeful – they are struck out because they are hopeless.

[48] Events may show later that TigerTurf is entitled to payment. Under the test in *Matai Industries Ltd v Jensen* it is not obvious and inevitable that TigerTurf will fail. TigerTurf should be entitled to show that Ten Cate's defence is no longer available. While it could be open to strike-out with leave reserved to start again, it

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4 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 531-532.

may be just as useful to leave the present proceeding on foot, even though it may not need to be actively pursued in the short term. I come back to the point that this proceeding may serve as a useful mechanism to monitor Ten Cate's exercise of its rights under clause 30.

[49] One factor that inclines me not to strike out is that such an order might be cited in the Texas proceeding as a reason for that court to assume jurisdiction. At this stage it is an open question whether the dispute between the parties should be litigated in New Zealand or Texas, or both. I have not been asked to decide questions of forum non conveniens or lis alibi pendens. This judgment should not be used to influence any decision where the dispute should be heard. A strike-out order creates a risk that this court might be seen to be turning the parties away. I do not want to give that impression.

**Ten Cate's stay application**

[50] Ten Cate says in the alternative that the proceeding should be stayed on the ground that clause 30 provides an alternative dispute procedure which should be allowed to run without court proceedings at the same time. It invokes the analogy of arbitration. Strictly, clause 30 is not an arbitration provision. It provides for determination by an expert. Whereas the Arbitration Act 1996 provides a mandatory stay when there is a dispute which is the subject of an arbitration agreement,[5] a stay of proceedings outside the Arbitration Act is discretionary only. It needs to be borne in mind that the expert determination under clause 30.4 is a filter on Ten Cate's assertions that its warranty claims are valid. The filter is to make sure that claims for warranty are not raised frivolously without a proper basis. During the process of the expert's determination Ten Cate has a substantive defence to the claims that it should pay. Its interests are adequately protected by its pleading that defence. It is not necessary to stay the proceeding. Again, if I were to stay the proceeding, I am concerned that there is a risk that a stay might be misconstrued in the Texas proceeding. My preference is to leave this proceeding on foot, but requiring the parties to take few steps pending the outcome of the expert's determination. One

[5] Arbitration Act 1996, Sch 1, Article 8.

reason is to leave open the question of the appropriate jurisdiction to hear the dispute.

[51] I emphasise that I have not been asked to address the question of parallel litigation on the same subject matter in different jurisdictions. The difficulties and expense of running concurrent proceedings in different countries on the same subject matter are well-known. It is an open question whether the dispute should be heard in Texas or New Zealand or both. This judgment is intended to leave that question open.

[52] By their applications each side has tried to obtain an immediate finding in its favour in the hope of short-circuiting the steps being taken by the other side. These attempts to find a shortcut through the problem of concurrent proceedings have been unsuccessful, but I do urge the parties to consider confronting that issue directly.

**Disposition**

[53] I make these orders:

(a) I adjourn TigerTurf's application for leave to apply for summary judgment while reserving leave to bring that matter on for hearing. I also grant leave to amend that application in the light of further developments under clause 30.

(b) I dismiss Ten Cate's application for strike-out and stay.

(c) I order Ten Cate to file and serve a statement of defence within 15 working days.

(d) I do not direct any further steps in this proceeding and do not direct a case management conference, but I reserve leave to the parties to seek a case management conference or to apply for further orders.

[54] Neither party has succeeded fully in its applications and it is appropriate that costs lie where they fall. I make no order as to costs.

.....

**R M Bell**

**Associate Judge**