IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-03143
[2013] NZHC 3246

BETWEEN	ANTHONY RUSSELL WILES and BRONWYN ANNE WILES and MURRAY GORDON WELLS Plaintiffs
AND	BRANT HOMES LIMITED First Defendant
	SLAB SPECIALISTS LIMITED Second Defendant
	BARRY HOBMAN Third Defendant

Hearing: 1 November 2013

Appearances: H P Holland for plaintiffs
D M Law and T J P Bowler for defendants

Judgment: 6 December 2013

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***6.12.13 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Background

[1] This judgment is concerned with an opposed application for an order pursuant to r 5.49 High Court Rules setting aside a protest to jurisdiction which the first and third defendants have filed. Alternatively, the first defendant seeks leave to amend the pleadings to apply for a stay while mediation takes place between the parties.

[2] The protests to jurisdiction are based upon an arbitration clause contained in the building contract which is at the heart of the dispute between the parties. The plaintiffs entered into a building contract with the first defendant for the construction of a residence at Remuera in Auckland. Part of the construction involved building a concrete slab which was subcontracted by the first defendant to the second defendant. Engineering work relating to the concrete slab was subcontracted to the third defendant. The plaintiffs claim that the slab failed and had to be removed and replaced giving rise to loss on their part. They have brought proceedings alleging breaches of contract by all defendants, of both express and implied terms.

[3] Mr Bowler told me that the third defendant did not intend to make separate submissions in support of the protest to jurisdiction.

[4] The relevant provisions of r 5.49 are as follows:

> (1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.
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> (2) The filing and serving of an appearance does not operate as a submission to the jurisdiction of the court.
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> (3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.
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> (4) The court hearing an application under subclause (3) must,—
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> (a) If it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; but

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

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

(6) The court hearing that application must,—

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

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

(7) To the extent that an application under this rule relates to service of process effected outside New Zealand under rule 6.27 or 6.28, it must be determined under rule 6.29.

(8) The court, in exercising its powers under this rule, may do so on any terms and conditions the court thinks just and, in particular, on setting aside the appearance it may extend the time within which the defendant may file and serve a statement of defence and may give any directions that appear necessary regarding any further steps in the proceeding in all respects as though the application were an application for directions under rule 7.9.

[5] The building agreement contained dispute resolution provisions in the following terms:

DISPUTES

Mediation

74 If any dispute or difference between the Owner and the Registered Master Builder arises out of or in connection with the Building Contract or the Works (the Dispute), a party to the Building Contract may not commence arbitration proceedings relating to the Dispute unless the party has complied with the following paragraphs of this clause:

a. a party must give written notice to the other party to the Building Contract specifying the nature of the Dispute.

b. on receipt of the notice by the other party, the parties must endeavour, in good faith and expeditiously, to resolve the Dispute by mediation.

c. if the parties do not agree within five (5) Working Days of receipt of the notice (or any further period as is agreed in writing by them) as to:

i. the timetable for all steps in the mediation; and

ii. the selection and compensation of the mediator; then the parties must mediate the Dispute using the services of a mediator nominated by the President of the Arbitrators and Mediators Institute of New Zealand Inc.

d. If no agreement has been reached in mediation within twenty (20) Working Days of the request for mediation, or within such further time as the parties may agree, then either party may refer the Dispute to arbitration.

Arbitration

75 Subject to clause 74, either party may, by written notice to the other party, ask that the Dispute be referred to arbitration. Such notice shall specify the matter or matters at issue and give detailed particulars of the Dispute. If both agree then the arbitration shall be by a single arbitrator in accordance with the Arbitration Act 1996.

[6] After filing the proceedings in this matter, the plaintiff and the other parties agreed to mediation which is to occur this month. However, it is common ground that no steps had been taken to refer the substantive dispute between the parties to alternative dispute resolution ("ADR") of any kind before the proceedings were commenced.

[7] The grounds upon which the plaintiff seeks to set aside the protests to jurisdiction which are dated 19 July 2013 (the first defendant) and 23 July (the third defendant) are that:

a) the High Court of New Zealand has jurisdiction to hear and determine the proceeding;

b) there is no arbitration agreement in the contract between the parties which would support the protest to jurisdiction.

[8] The grounds in the third defendant's notice of opposition are essentially the same as those relied upon by the first defendant – that the head contract includes an arbitration agreement which precludes the plaintiffs from filing proceedings in this Court.

[9] The issues in the case are therefore as follows:

a) did clause 75 contain a compulsory arbitration clause?

b) if the answer to that question is no, what effect does that have on the protest to jurisdiction?

Interpretation of the arbitration clause

[10] The doubt about the meaning of the arbitration clause arises from the use of the word "agree" in clause 75. The provision in its entirety reads as follows:

> 75 Subject to clause 74, either party may, by written notice to the other party, ask that the Dispute be referred to arbitration. Such notice shall specify the matter or matters at issue and give detailed particulars of the Dispute. If both agree then the arbitration shall be by a single arbitrator in accordance with the Arbitration Act 1996.

[11] What the parties meant by their contract is to be determined with regard to the language used by the parties which, "appropriately interpreted, is the only source of their intended meaning",[1] and:[2]

> The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties minds.

[12] The key question in this case concerns whether the background facts and circumstances known to the parties cast any light on the issue of whether they did or did not intend that the reference to arbitration should be obligatory.

[13] The parties agreement provided additionally:

> 76 The parties have the right to refer a dispute to adjudication under the Construction Contracts Act 2002 and may exercise that right even though the dispute is the subject of arbitration or court proceedings.

[14] Clause 76 reflected the provisions of the CCA which gives a party the unilateral right to refer a construction contract dispute to adjudication under s 25 of the Act. Such a right of adjudication could be invoked by one party without the

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[1] *Vector Gas v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].
[2] At [19].

consent of the other – certain exceptions which are set out in s 25 of the Act not being relevant in the circumstances of the present case.

[15] The language of the agreement therefore suggests that the intention is that a party to the contract should be able to obtain a binding determination (as opposed to having to take part in a consensual process of mediation). The compulsory adjudication would either take the form of an arbitration or an adjudication under the Act. However, before a party could invoke a right to arbitration, clause 74 required that he/she must first have taken the dispute to a mediator. The language of clause 74 suggests that, subject to the last proviso mentioned, the mediation requirement, it was intended that one party ought to be able to refer the dispute to arbitration. That interpretation is reinforced by the phraseology used in clause 74(d) which appears to impose a further proviso to arbitration. The effect of clause 70(d) is that assuming the parties have been through the mandatory pre-arbitration mediation process, the agreement contemplates a pause of not less than 20 working days following which "either party may refer the Dispute to arbitration."

[16] Clause 75 then dealt with the issue of arbitration. Notably, clause 75 opens with words that make it clear that that provision is subject to the provisions of clause 74. That could amount to an intention that the requirements of clause 75 are without prejudice to clause 74. That would indicate that clause 75 was not to be read in a way which would derogate from or obstruct the stated objective of clause 74.

[17] For clause 75 to be read consistently with the objective of clause 74 would require that it be interpreted if possible consistently with the apparent right in clause 74 of a party to commence arbitration proceedings. The wording of clause 74, speaking as it does of an entitlement to "commence arbitration proceedings" does not naturally suggest that what is being referred to is limited to seeking the agreement of the other party to refer the dispute to arbitration.

[18] Therefore when it comes to resolving an uncertainty in clause 75 about whether arbitration can be commenced unilaterally by one party or the other, the clause should be interpreted in such a way that it does not obstruct the apparent

objective of clause 74 if such an approach can be achieved without doing violence to the text of clause 74.

[19] The first of the two indicators which might suggest that clause 75 contemplates consensual reference to arbitration rather than a unilateral requirement, is to be found in the expression used:

> … either party may, by written notice to the other party, **ask** that the dispute be referred to arbitration.
>
> (Emphasis added)

[20] The argument is that the use of the word "ask" references a request to direct the dispute to arbitration and that it does not contemplate the exercise of a right to a mandatory unilateral entitlement to require arbitration.

[21] The second point concerns the expression in the second part of clause 75 which reads:

> If **both agree** then the Arbitration shall be by a single arbitrator and in accordance with the Arbitration Act.
>
> (Emphasis added.)

[22] The point is made that the agreement which is referred to is an agreement to arbitrate rather than being limited to the form that the arbitration is to take. There is some force on the point particularly when it is borne in mind that unless the parties agree otherwise the default procedure under the Arbitration Act is for a single arbitrator. Further, if the agreement that is referred to is an agreement of the parties that there should be a single arbitrator, what is the position if they find themselves unable to agree on that point? In the event of such an occurrence how is the forum of the arbitration to be constituted?

[23] Dealing with the first argument, my assessment is that the use of the word "ask" is not a weighty consideration. It is true that the use of the term conventionally conveys a request that someone do something but the context can blend at the colouring of a mandatory requirement such as where, for example, a

police officer giving evidence that he "asked" a motorist to provide a breath sample in circumstances where it was not open to the latter to decline.

[24] As to the second point, I accept that the use of the term ask in the first sentence preceding reference to the agreement in the following sentence could be viewed as suggesting that the agreement in the latter is responsive to the request in the former. I also agree that an interpretation which suggests that the agreement contemplated in the second sentence has to do with the form of the arbitration would not be entirely satisfactory because it is inconsistent with the default provisions under the Arbitration Act 1996[3] where the parties are free to determine the number of arbitrators "but failing such determination" the number of arbitrators is one. Because the arbitration in this case would be in New Zealand then s 6 of the Act applies in which case the provisions of Schedule 1 are obligatory.

[25] The statutory provision therefore provides for arbitration by a single arbitrator in circumstances where the parties are unable to agree on how many arbitrators there should be. The second sentence of clause 75 is to the reverse effect: that is, it is only if the parties do agree that such a provision would apply. It would further mean that if the parties did not agree there would be no effective machinery for carrying into effect the intention to arbitrate. If the matter about which the parties are to "agree" is not a logical fit in the second sentence then there is an argument that it must be taken to refer back to and relate to the request referred to in the first sentence. So that when the parties speak of agreement in the second sentence, the agreement is on the part of party B to what he/she was asked to do by party A in the first sentence. This would require taking the first sentence as meaning that in order for the dispute to be referred to arbitration, which party A is entitled to ask for because of the first sentence, there must be an agreement reached with party B that such a course be followed.

[26] Having in mind the primacy of clause 74 which contains an explicit right to a single party to be able to refer the dispute to arbitration, I consider that clause 75 must be read in such a way as possible that harmonises it with the former clause.

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[3] Arbitration Act 1996, Schedule 1, cl 10.

[27] The conclusion I reach is that one party has the right to refer the dispute to arbitration and that it is not necessary for both to agree on that course. The reference to both agreeing holds open the possibility that if the parties do not agree to a single arbitrator then they can agree to some other number of arbitrators. It follows that if the parties concur that there should be more than one arbitrator then they are not agreed on a single arbitrator. The purport of the provision then is that it means that in the absence of agreement to the contrary, the arbitration is to be conducted by one arbitrator.

[28] Read in that way, it is possible to harmonise the provisions of clause 75 with those of clause 74. My conclusion therefore is that there is a binding arbitration agreement.

Effect on the protest to Jurisdiction

[29] Before I deal with this part of the dispute between the parties I need to note that Ms Law sought to orally amend the notice of opposition which her client had filed. She sought to include a ground of opposition to the effect that because the plaintiffs had not first undertaken alternative dispute resolution, they were not entitled to commence proceedings. Such an amendment was opposed and I decline to permit it because it may be a matter on which evidence could have had a bearing and which might have been filed if the ground was one expressly stated in the notice of opposition.

[30] For the plaintiff, Ms Holland made reference to the decision of *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd*.[4]

[31] In that case an application was made for summary judgment. The contract between the parties contained a submission to arbitration. The applicant sought to stay the summary judgment proceeding in reliance on the arbitration clause in the contract which was a contract of insurance. The applicant, Cognition was unsuccessful in seeking a stay.

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[4] *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd* [2013] NZCA 180, [2013] 3 NZLR 219.

[32] Article 8(1) of the First Schedule of the Arbitration Act 1996 provided that a stay of court proceedings on the grounds that the parties had agreed to submit the dispute to arbitration was mandatory unless the court found that the agreement was null and void, inoperative or incapable of being performed, or that there was not in fact any dispute between the parties. The last phrase had been added by amendment to the statute in 1996. The court came to the view that whether there was in fact a dispute raised the question of whether the party seeking arbitration had an arguable defence to the claim. If there was no arguable defence, then there was no dispute. The court affirmed that the same arguable defence test applied to applications for stays as for summary judgment and it therefore followed that there was no dispute if the defendant did not have an arguable basis for disputing the plaintiff's claim. Therefore if the court was able to conclude that there was no arguable defence, which was a requirement that had to be satisfied before summary judgment could be entered, then the court was empowered to refuse an application for a stay.

[33] However, the application to set aside the protest to jurisdiction which was filed in this case did not raise the question of whether there was an arguable defence. A fair reading of the application conveys that the ground upon which the plaintiff relied was that the building contract between the parties did not contain a binding submission to arbitration. That is the issue upon which I have found against the plaintiff.

[34] There are no other matters that need to be considered and accordingly my decision is that the application to set aside the protest to jurisdiction should be dismissed.

[35] The parties should confer on the question of costs and if they are unable to agree they are to file memoranda within 10 working days of the date of this judgment.

[36] They should similarly confer about progressing the matter from this point. Specifically, they should discuss the issue of discovery, if they have not already done so, whether it is expected that any additional parties will be joined, finalisation of pleadings, close of pleadings date and other matters. In the meantime, the

proceeding is to be listed for call in my Chambers list on **28 February 2014 at 2:15 p.m**. for review to occur.

[37] I should add that the first defendant has sought as part of its submissions an order for stay of the proceedings while the parties mediate their dispute. The requirement for such an order are said to be based upon the requirement in the contract that the parties "must" mediate their disputes. Quite apart from the fact that no application has been made for such an order, I am confident that an order is not required because the parties have in fact agreed to mediate and will be embarking on that course shortly.

[38] The parties should confer on the matter of costs and if they are unable to agree are to file submissions not exceeding five pages on each side within 10 working days of the date of this judgment.

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J.P. Doogue
Associate Judge