IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-004390

	BETWEEN	LUXOR VENDING LIMITED Plaintiff
	AND	THE WAREHOUSE GROUP LIMITED Defendant

Hearing: 29 July 2011

Appearances: D J Chisholm for Plaintiff
M J Sumpter for Defendant

Judgment: 29 July 2011

ORAL JUDGMENT OF WHATA J

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[1] Luxor Vending Ltd ("Luxor") entered into an agreement on 1 November 2010 to supply crane type vending machines to The Warehouse Group Ltd ("The Warehouse").

[2] That agreement was subject to various terms, including the following clause:

> **23. ASSIGNMENT**
>
> The Supplier shall not assign, transfer or otherwise dispose of (including by way of subcontract) any of its rights or obligations under this Agreement except with the prior written consent of the Company, such consent not to be unreasonably withheld.

[3] On 14 June The Warehouse wrote to Luxor complaining that Luxor was franchising the vending opportunities at The Warehouse in breach of clause 23.

[4] The Warehouse was not satisfied with the response to its concerns and on or about 20 July instructed its stores to unplug the machines without further reference to Luxor.

[5] This judgment responds to the application by Luxor for an interim injunction directing The Warehouse to reconnect the vending machines.

[6] I deliver this judgment under urgency given the immediate impact of termination and the need for both parties to organise their affairs.

Facts

[7] From 1 November 2010 Luxor agreed to supply crane type vending machines to The Warehouse. The agreement was subject to various terms and conditions which are self explanatory. Key among them and relevantly for the purpose of this proceedings include:

> **2.2** This Agreement shall commence on **1 November 2010** and shall continue until **1 November 2013** or until earlier terminated in accordance with this Agreement.
>
> …
>
> **3. SUPPLY OF GOODS AND SERVICES**

3.1 The Supplier shall supply the Goods and Services described in the **First Schedule** at the prices described in the **Second Schedule** and specifications as per the **Fifth Schedule**.

3.2 The Supplier shall ensure that its employees, agents, invitees and sub-contractors supply the Goods and Services with all reasonable care, skill and diligence and in a proper and professional manner.

…

5. PRICE AND PAYMENT

…

5.1 Subject to clause 5.3, the Company shall pay the Supplier by the twentieth (20) day of the month following the month the Goods were delivered or the Services were performed.

…

6. RIGHT TO RENEGOTIATE

6.1 …

6.2 …

6.3 The relationship between the Company and the Supplier shall be that of company and independent supplier.

Unless expressly stated in the Agreement (and then only to the extent so specified) the Supplier shall not act as agent of the Company nor shall the Supplier hold itself out as agent of the Company nor shall the Supplier contract on behalf of the Company or pledge the Company's credit.

…

13. DISTURBANCE

The Supplier shall ensure that in the supply of the Goods and Services neither it nor its employees, agents, contractors, subcontractors, invitees, franchisees, visitors or licensees shall unreasonably interfere with or hinder the operations of the Company or the activities of any of the Company's employees … and the Supplier shall at all times comply with the reasonable directions of the Company's site managers.

14. CONFIDENTIALITY

14.1 The Supplier shall at all times keep confidential and not directly or indirectly make or allow any disclosure or use to be made of any oral or written information relating to the Company or the existence or subject matter of this Agreement or the orders it places except to the extent;

(a) required by law or stock exchange listing rules and then only after advising the Company of that requirement; or

(b) necessary to obtain the benefit of, or to carry out obligations under, this Agreement but for no other purpose whatsoever; or

(c) that the information is or becomes available in the public domain without breach by the Supplier of its confidentiality obligations under this clause or at law; or

(d) that the Company otherwise agrees in writing.

…

20. RESOLUTION OF DISPUTES

20.1 In the event of any dispute arising between the parties concerning this Agreement (including its breach, validity or termination), the parties shall in good faith endeavour to resolve the dispute by consultation and negotiation between each party's Relationship Manager or by using appropriate alternative dispute resolution techniques, but without prejudice to any other right or entitlement they may have pursuant to this Agreement or otherwise.

20.2 In the event the dispute is not resolved within 10 working days of written notice by one party to the other of the dispute (or such period agreed in writing between the parties), either party may refer the dispute to the arbitration of a single arbitrator. … Other than as provided in this clause 20, the arbitration shall be conducted in accordance with the provisions of the Arbitration Act 1996 and the parties expressly include the provisions of the Second Schedule of the Act and reserve the right of appeal to the High Court on any question of law arising out of an award.

…

21. TERMINATION

…

21.2 Either party may terminate this Agreement forthwith by notice if:

(a) the other party is in breach of clause **14**;

(b) the other party commits or allows to be committed any breach of the other terms of this Agreement which is not rectified within a period of ten (10) working days following receipt of notice of such breach from the Company.

…

23. ASSIGNMENT

> The Supplier shall not assign, transfer or otherwise dispose of (including by way of subcontract) any of its rights or obligations under this Agreement except with the prior written consent of the Company, such consent not to be unreasonably withheld.

[8] The Fifth Schedule provides, among other things:

> **QUALITY SPECIFICATIONS**
>
> The Supplier (Luxor Vending) and the Warehouse:
>
> 1. The Cane Vending Machines (rights title & interests of Machines) remain at all times the property of the supplier.
>
> 2. the Supplier accepts all responsibility for the machines re: ongoing presentation and maintenance.
>
> 3. The appearance of all machines will be consistent with the agreed colour & branding choice (picture attached).

[9] In a letter dated 13 June 2011, Mr Silver, non-trade procurement and compliance manager for The Warehouse, wrote to Ian Henry a director and shareholder of Luxor making the following complaint:

> Recently I have become aware that The Warehouse vending agreement has been put up for what appears to be a franchise opportunity.
>
> I have not been advised that this was the case in any formal capacity – and as such, Luxor Vending is now in breach of Clause 23 of our Supplier Agreement. Clause 23 states:
>
> *The supplier shall not assign, transfer or otherwise dispose of (including by way of subcontract) any of its rights or obligations under this Agreement except with the prior written consent of the Company …*
>
> Other than this clear breach, I have additional concerns around how these machines would be maintained and how our present agreement would continue. According to our agreement, Luxor Vending has 10 days to remedy this situation, and provide conclusive proof that no part of this business has been "franchised" off. It is my understanding that some sales have already taken place on an internet auction site, which I have been provided screenshots of.\
>
> After taking advice, I also believe that you have breached Clause 6.3, 14.1 and 15.2. A fundamental breakdown of good faith and trust also exists and The Warehouse Limited will be taking further action on our obligations under the present agreement.
>
> … If the situation is not rectified by cob June 24, The Warehouse Limited intends to exit the agreement.

[10] Mr Henry responded in a detailed fashion seeking to address the concerns raised. He makes the point that Luxor in no way sells the franchise business units off on behalf of The Warehouse. He says:

> The Warehouse contract, its rights and obligations sit with Luxor Vending including monthly payments totalling a yearly sum of at least $200,000. **Luxor Vending is not for sale and has not been sold off piece-meal**.

[11] Mr Henry then provides more detail on the background. He observes:

> Due to the nature of a nationwide contract and the relevant geographical spread of machines (both The Warehouse and the generic yellow machines) – Luxor employs business partners that service and maintain machines in the relevant geographical regions.
>
> My two main South Island business partners have a combined working relationship with Luxor Vending of over 15 years – Between them they cover a large portion of the South Island.

[12] Mr Henry then deals with the concerns about use of an internet auction site in the following terms:

> As part of Luxor Vending standard day to day operations – I utilise a 3rd party agency to help source business relationships. Their responsibilities include relevant advertising & publishing work.
>
> …
>
> The medium they use has been "Trade me" and the "New Zealand Herald classifieds".
>
> The agency generally phone interviews prospective interested parties, emails information and filters on any business clientele who maybe interested in utilising Luxor Vending services for whatever means.
>
> I recently became aware of puffery advertising through this company approximately 4 or 5 weeks or more ago where the image of a Warehouse Machine was used on Trade Me to stimulate a lot more interest from prospective business clientele than perhaps that would be considered normal over a generic yellow crane machine.
>
> Luxor Vending instructed the removal of The Warehouse Imagery immediately. To my knowledge (and confirmation) this had been done. The imagery would have been up for a day approximately.
>
> …
>
> Luxor Vending no longer retains this 3rd party service. I sincerely apologise for the detrimental effect this may have had on our business relationship.

[13] There then ensued a flurry of correspondence and response with the result that arbitration was not pursued or for that matter considered by The Warehouse and an instruction was given to Warehouse store managers to unplug the machines without further reference to Luxor.

The plaintiff's claim

[14] The nub of the plaintiff's claim is that The Warehouse wrongfully repudiated the agreement. The plaintiff denies any suggestion that it was in breach of the agreement by using subcontractors. Mr Henry deposes that their use of relationship partners to assist in the operation of the vending machines was well known to The Warehouse prior to and at the time the agreement was executed. This is supported by evidence from Mr Rodney Barry Jurgens, who was until November 2010 employed by The Warehouse. Mr Jurgens says:

> 7. The Warehouse knew from before the contract between the Warehouse and Luxor was executed that Luxor would be contracting and/or licensing contractors to undertake the operation of vendor machines if those machines were outside of the Auckland area.

[15] Mr Henry also deposes that to the extent that there was any breach in terms of the advertising on the Trade Me website, this was rectified as soon as it was made known to them. Further, when The Warehouse complained about it, the relationship with the third party undertaking such advertising was terminated. Luxor therefore says that it has complied in every respect with the requirements of the agreement and in particular the ten day requirement for correcting a breach.

[16] Mr Henry also avers to the significant harm that is and will be caused by the repudiation if it is allowed to continue in the interim. He says:

> 55. Luxor and its operators will suffer considerable damage if it is not able to continue to operate the vending machines pending resolution of the dispute. Luxor will arguably be in breach of its obligations to its third party operators who may in turn seek their own relief against Luxor. In the meantime, no income will be earned from the machines.
>
> 56. While Luxor is looking for other opportunities, it simply does not have the ability to locate alternative sites for the machines. They would also need to be re-branded in any event.

[17] Mr Chisholm says further that The Warehouse exacerbated wrongful repudiation with ineffective notice of termination and by failing and/or refusing to respond to Luxor's repeated requests to initiate the dispute resolution procedures under clause 20 of the agreement. Luxor rejected this repudiation and maintains all rights and entitlements under the agreement. As evidence of this, it has continued to pay the commission owing under the agreement.

[18] Luxor has also provided an undertaking as to damages.

The defendant's position

[19] The Warehouse says there really is no serious issue here. The agreement is clear on its terms. Luxor was prohibited from sub-contracting to third parties without the express approval of The Warehouse. Luxor undertook to retain property in the vending machines.

[20] In addition, The Warehouse was deeply concerned that Luxor was leveraging The Warehouse brand name and doing so in a way that could be potentially damaging to it. Mr Silver deposes on behalf of The Warehouse that The Warehouse has acted responsibly in this matter. It put Luxor on notice on 14 June that it should make arrangements to come and collect its machines. The machines are in safe storage. He says that if it turns out that The Warehouse has improperly ended the supply agreement, The Warehouse is able to meet any damages.

[21] There is a further affidavit in support of The Warehouse by Mr Andrew Karl Parker. He is the manager of operations at The Warehouse. He signed the supply agreement with Luxor. He says in response to Mr Jurgens' allegations or evidence:

> 11. It never entered my mind at the time I signed the Supply Agreement with Luxor that Luxor would try to sell the benefit of that contract to third parties. We would never have licensed the use of our brand to individual machine franchisees or owner/operators. That is not how we do business. We contract with suppliers on a national basis to ensure commercial certainty and to drive efficiencies in our supply chain.

[22] There is also an affidavit from Kerry Ann Nickels setting out details in relation to The Warehouse and noting that The Warehouse Group made a net profit

after tax excluding unusual items of $83.2 million on sales of $1.67 billion to the 52 weeks ended 1 August 2010. She says she is familiar with the facts and allegations in this proceeding. The Warehouse, she says, denies all liability to Luxor. If, however, an arbitral award were to find that The Warehouse was in breach of an obligation to Luxor she confirms The Warehouse could meet any conceivable award of damages.

[23] In reply, Mr Jurgens observes:

(a) Ian Henry told him it would be necessary to find new contractors to own and service machines outside Auckland.

(b) Branding of the vending machines using Warehouse logos was a requirement of The Warehouse.

(c) Damages will be difficult to assess given the variable catchments for the machines.

[24] Mr Henry confirms also that the need to use third party contractors was discussed with The Warehouse.

Assessment

[25] The jurisdiction to grant an interim injunction is well settled. I must be satisfied of the following:

(a) There is a seriously arguable case; and

(b) The balance of convenience favours the grant, as do the overall interests of justice.

[26] In my view it is also appropriate to preface the analysis by examining whether the injunction is in fact necessary.

Necessity

[27] It is readily apparent that the plaintiff has altered its position in reliance on the agreement. It has:

(a) Paid commission, and continues to do so.

(b) Contracted with third parties to assist in the performance of the contracts.

(c) Obtained or acquired additional vending machines that it cannot easily distribute elsewhere.

[28] I note that given its purported termination, the payment of the commission cannot be compelled by The Warehouse in this interim period (but Luxor may well consider it prudent to do so in order to demonstrate that the agreement is not cancelled). I also acknowledge that the third party liability may arguably arise from the breach, and therefore is a problem of Luxor's own making.

[29] Nevertheless, I consider that an injunction is necessary insofar as Luxor will suffer loss and potentially incur additional liability if it is not allowed to operate the vending machines. I proceed with my substantive analysis on that basis.

Serious issue

[30] Mr Sumpter helpfully referred me to Wild J's decision in *Todd Taranaki Ltd v Energy Infrastructure Ltd*,[1] wherein he defines seriously arguable as follows:

> [28] … It does mean and require that Todd has a cause(s) of action capable of serious argument before the arbitrator i.e. a cause(s) which is neither patently meritless nor frivolous.
>
> [29] I mention two other helpful definitions of what constitutes a serious case for trial. The first is that the plaintiff must have a "real prospect of obtaining permanent injunction": *Re Lord Cable (deceased) v Waters* [1976] 3 All ER 417 per Slade J. The second formulation is "a tenable combination

[1] *Todd Taranaki Ltd v Energy Infrastructure Ltd* HC Wellington CIV-2006-485-2372, 26 January 2007.

> of arguments on which the law and the facts on which the plaintiff could succeed": *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 at 311 per Lush J. As Eichelbaum J pointed out at p 6 in his unreported judgment in *Ansell v NZI Finance Ltd* HC WN A434/83 30 November 1983, it is not sufficient for a plaintiff merely to establish that it has a tenable cause of action and that there exists a dispute between plaintiff and defendant as to the facts.

[31] The nub of the dispute (aside from misuse of branding) relates to the use or subcontracting of third parties. The Warehouse referred to this as "franchising" the vending opportunities. On its face, without the written approval of The Warehouse, this breached clause 23 of the agreement. The Warehouse was entitled to terminate the agreement if the problem was not rectified within ten days. The Warehouse may have another claim relating to breach of clause 14, confidentiality, but the primary dispute relates to the apparent subcontracting or "franchising".

[32] Luxor raises two basic claims in response:

(a) The Warehouse knew about the need to subcontract and retain third parties to own and operate the vending machines, and is estopped from denying that fact.

(b) The Warehouse was obliged to engage in the dispute resolution process and did not (until after the instruction was given to pull the plugs).

[33] I consider that Luxor raises a seriously arguable case of repudiation based on the affidavit evidence. Mr Jurgen, formerly with The Warehouse and instrumental in the negotiation deposes:

> 3. In relation to paragraph 8.1 Ian Henry told me it would be necessary to find new contractors to own and service machines outside Auckland and areas that, pre-October 2010, did not have a resident Luxor contractor. This included new operators for the Wellington, Te Awamutu, Masterton and Dannevirke regions.

[34] In light of *Vector Gas Ltd v Bay of Plenty Energy Ltd,*[2] it is at least arguable that these pre-negotiation discissions are admissible and probative of the factual

[2] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 at [119], [124]-[127], [142].

matrix. They (at least) appear to support the contention that both parties must have known that the contract could not be performed without retaining third parties, and that clause 23 could not be interpreted or applied to prevent that outcome. A letter between the parties nearly 12 months prior specifically refers to the use of local contractors. Indeed, if the negotiations did occur in the way Mr Jurgen says they did (and he had ostensible or actual authority at the time to negotiate on behalf of The Warehouse), it is at least seriously arguable that The Warehouse could not unreasonably refuse subcontracting. Legitimate issues of estoppel are also established to the extent that they are seriously arguable.

[35] McGrath J described estoppel in the following terms:[3]

> [68] The essence of estoppel by convention and its distinguishing characteristic is that there is mutual assent or a common assumption as to the relevant fact:
>
> > … both parties are thinking the same; they both know that the other is thinking the same and each expressly or implicitly agrees that the basis of their thinking shall be the basis of the contract.
>
> [69] The effect of the estoppel is to prevent a party from going back on the mutual assumption if it would be unjust to allow him to do so. (Footnotes omitted)

[36] The concepts of "common assumption" and "unjust" have some obvious relevance if Mr Jurgen's evidence is to be accepted. I am not in a position to test his veracity, but his evidence corroborates and is corrobotated by Mr Henry's testimony. Mr Parker strongly disagrees, but the underlying issue is more than simply a real or tenable cause of action. The evidence raises a serious issue.

[37] I bear in mind that the agreement in fact contemplates the possibility of franchisees at clauses 9 and 13. So that prospect cannot be said to be untenable.

[38] Balanced against this, clause 23 is clear on its terms – approval was required. Clause 1 of the Fifth Schedule states that the vending machines shall remain the property of the supplier (Luxor Vending).

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[3] Ibid.

[39] A plausible middle point is that The Warehouse wanted surety around who was in fact subcontracted given its reasonable concerns about brand association. It was entitled to cancel if subcontracting or franchising continued without its approval. In Mr Sumpter's words, the advertising of passive income opportunities to use vending machines at The Warehouse stores was a "fundamental" departure from the agreement.

[40] But I come back to the threshold test. Does Luxor have a seriously arguable case? It does. It is an orthodox dispute between contracting parties that will need to be resolved on the facts at trial. The apparent refusal to go to dispute resolution and the alleged issues with the termination notice are also seriously arguable – but by themselves would not be sufficient to warrant an injunction – though as I will now address, those matters go to the balance of convenience.

Balance of convenience

[41] Mr Sumpter also relies on Wild J's approach on the balance of convenience, and refers to the matrix that he employes. He submits that if there is an adequate remedy in damages, this prevails. I adopt this as an appropriate reference point. But this requires some care in understanding the true impact on a plaintiff without an injunction. Ultimately, it is about "balancing" the interests of the parties.

[42] Luxor has made a very substantial commitment to The Warehouse. A "back of the envelope" analysis reveals that about 20-30 per cent of Luxor business is tied to the agreement if I apply 2009 activity levels. Mr Chisholm from the bar indicated it could now be as much as 70 per cent. By any measure that is a very significant exposure for a business (in undoubtedly tough times). I was also taken to evidence that Luxor had subcontracted to 12 parties, with agreement that those parties would retain 65 per cent of turnover from the vending machines. Luxor therefore potentially faces the immediate prospect of damages claims from those parties if it cannot continue to operate under the agreement. By contrast The Warehouse is a large business. As Ms Nickel avers, The Warehouse achieved sales of $1.67 billion to the year ended 1 August 2010. I have every confidence that it can meet any damages claim. I am equally confident that the presence of the vending machines

would barely register as a ripple on The Warehouse's sales performance. The Warehouse would also be receiving, in effect, rental and commission in the interim. I equally acknowledge, however, the strong point made by Mr Sumpter that from The Warehouse's perspective, the behaviour of Luxor was an egregious breach of a fundamental tenet of the agreement, namely that Luxor and Luxor alone contracted with the Warehouse. This had the key purpose of securing the protection of The Warehouse brand.

[43] As foreshadowed, however, I also consider that clause 20 implores good faith negotiation and contemplates ongoing performance by the supplier while there is a dispute. I see the continued supply of the vending services, on continued payment of the commission, as consistent with the resolution procedures envisaged by the agreement. It seems consistent also with the concept of good faith negotiation inherent in the clause. In terms of the balance of convenience, ongoing operation is favoured by the agreement itself while arbitration is pursued.

[44] Mr Chisholm also makes the point that quantifying damages could be very problematic when dealing with circa 85 vending locations within different catchments. I acknowledge this point, but it really is a minor consideration only. The more fundamental impact is the scale of the disruption to the Luxor business.

[45] On that basis I am going to grant an injunction. Nevertheless, I am concerned that The Warehouse's legitimate concerns about indiscriminate subcontracting should be addressed. Luxor should be proactive in meeting these concerns.

[46] In addition, Mr Sumpter raises the reasonable concern that arbitration could be allowed to lag unless I provide some form of guidance to the parties in terms of dealing with this.

[47] On the basis of those concerns I propose to grant the injunctions as sought at 1(a) and (b) of the interim application filed by the plaintiff, but subject to the following conditions:

(a) Luxor must supply a list of subcontractors that own or operate the vending machines under the agreement and seek the approval for those subcontractors from The Warehouse within 14 days.

(b) The Warehouse shall have the opportunity to identify the subcontractors that do not meet its approval within a further 14 days and may apply to the Court for amendment to the injunction to enable The Warehouse to exclude those subcontractors from the injunction (detailed grounds will need to be provided).

(c) The Warehouse shall have leave at any time to seek to have the injunction rescinded on the basis that the arbitration proceedings have not proceeded with all due speed.

[48] I note for completeness the indication by the plaintiff that it will in fact proceed as is normal in an injunction context with all due speed. However, we are all familiar with issues regarding delay that can arise after an injunction is granted. On that basis it is my expectation that the arbitration and any associated mediation should proceed and be completed within three months. There will need to be good reason why matters have been delayed beyond that period. Obviously, however, if The Warehouse is the cause of delay then that will tell against any rescission of the injunction.

[49] I also note for completeness that any identification (or not) by The Warehouse in terms of condition (b) above shall not in any way prejudice any future claim by The Warehouse in relation to any subcontractor or in relation to any alleged breach by the plaintiff.

[50] Luxor's undertaking as to damages must, of course, include any damage caused by any subcontractor.

Costs

[51] Costs shall be granted to the plaintiff on a 2B basis, together with reasonable disbursements.

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Whata J