IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2012-485-2675
[2012] NZHC 3549

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an arbitration
BETWEEN	DISCOVERY GEO CORPORATION Applicant
AND	STP ENERGY PTE LIMITED Respondent

Hearing: 18 December 2012

Counsel: H N McIntosh with M F Mabbett for Applicant
D R Kalderimis for Respondent
M J Andrews for Minister of Energy (Intervener)

Judgment: 19 December 2012

JUDGMENT OF THE HON JUSTICE KÓS

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[1] A petroleum exploration permit about to be transferred. Unless interim orders were made by 5.00 pm yesterday, the day of the hearing, the Minister of Energy proposed to consent to the transfer. The Minister is not a party subject to this Court's jurisdiction. The orders sought by the applicant are directed at the proposing transferor only. They would require it to withdraw its transfer application, or request the Minister not to determine it, pending determination of an arbitration, to be conducted in London, under the International Chamber of Commerce Commercial Arbitration Rules.

[2] The application was entered in the duty list, for hearing yesterday morning. Optimistically, an indication had been given to the registry that it might all be

disposed of by 11.00 am. Realistically, we finished a little before 3.00 pm. By then I had formed a clear view on the merits of the application.

[3] To enable parties to know where they stood by 5.00 pm I dismissed the application, with reasons to follow.

[4] These are my reasons.

Background

[5] The present application is brought under Articles 9(2), 17A and 17B of the First Schedule of the Arbitration Act 1996 (the Act). So far as relevant, these provide:

> **9** ***Arbitration agreement and interim measures by court***
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> ...
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> (2) For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under article 17A for the purposes of proceedings before that Court, and that article and article 17B apply accordingly subject to all necessary modifications.
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> **17A** ***Power of arbitral tribunal to grant interim measure***
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> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant an interim measure.
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> **17B** ***Conditions for granting interim measure***
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> (1) If an interim measure of a kind described in subparagraph (a), (b), or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that—
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> (a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and
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> (b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
>
> (c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

[6] The applicant, Discovery Geo Corporation (DGC), is a registered overseas company. It is headquartered in Texas. The respondent STP Energy Pte Ltd (STP) is

a company incorporated in Singapore. Together they are parties to an agreement dated 18 April 2000. It is known as the "Definitive Agreement". The Definitive Agreement relates to petroleum exploration permit PEP38479 (the permit). It covers an area of 411km^2 in the Awakino area, in the Taranaki Basin. It straddles the 12 mile limit, but is wholly within the country's Exclusive Economic Zone.

[7] DGC's president and chief operating officer, the rather colourfully named Vanessa Gayle Black White, has sworn an affidavit. She is not the only colourful aspect of this application. A memorandum filed by STP informs me that company's sole director and shareholder, Mr Jimmy Seah, is "presently on a dog sled expedition in the hinterlands of northeastern Ontario and can be contacted, weather, signal and batteries permitting, only by satellite phone".

[8] Ms White refers in her affidavit to a press release issued by STP. It states that within the permit area there is an estimated 25.9 bcf of gas and 1.7 million barrels of condensate. Also, to the application for appraisal permit submitted by STP to the Minister. That estimated the total project revenue for the Mangahewa formation, located in the permit area, at approximately USD$607 million.

[9] The permit was first granted in February 2002 to DGC and associated companies of the applicant. In April 2008 DGC and Scorpius Holdings Pte Limited entered into the Definitive Agreement. That agreement was novated two months later, in June 2008, to STP. All Scorpius' rights were thereby assumed by STP. A further month later an operating agreement was also entered. Little attention was given to it in the hearing before me.

[10] The Definitive Agreement provides that, subject to governmental consents, DGC conveys to [STP] the "Assigned Interest". That comprises 100 per cent of the permit and associated assets "but excluding the Retained Interest". The "Retained Interests [sic]" are defined as "Overriding Royalty Interest" and a "25 per cent working interest" in wells drilled or proposed to be drilled in the permit area. STP is to pay 100 per cent of the costs relating to drilling and testing of what is called the "Obligation Well", through to "temporary suspension" of that well. That is, I am informed, through to the point of commercial exploitation. Costs subsequent to

temporary suspension of the well, or its plugging and abandonment, are to be borne "in accordance with the respective working interests, to wit: [STP] 75 per cent working interest and [DGC] 25 per cent working interest". Clause 5.5 then provides:

> Upon payment by [DGC] of its proportionate share of the Completion Costs[1] on the Obligation Well, [STP] will re-assign or cause to be reassigned to [DGC] or its nominee a 25 per cent (25%) interest in the permit subject to the consent of the Minister pursuant to s 41 of the Crown Minerals Act ...

[11] The Definitive Agreement provides for dispute resolution, ultimately arbitration, in London, under English law, in accordance with the Commercial Arbitration Rules of the International Chamber of Commerce (ICC).

[12] In 2009 a dispute arose between DGC and STP. Ms White deposes that DGC claimed that STP had failed properly to test the Obligation Well. A reference and counter reference were filed with the ICC. Those proceedings were settled by execution of a release in September 2010.

[13] That release has now given rise to the present dispute. It suffices for present purposes to quote what Ms White says about that:

> 2.23 [DGC's] interpretation of the release (and its intention when it signed that document) is that the release settled the arbitration and any actionable claims between the parties that existed *at that time*. However, the Release did not extinguish [DGC's] interest in the permit, or any of the collateral rights that accrued or continued to accrue under the Definitive Agreement or Operating Agreement.
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> 2.24 It appears that STP now takes the position that the release settled existing *and any future claims*, with the effect that [DGC] can never enforce its various rights in relation to the permit (ie, without saying so, the release effectively terminated the Definitive Agreement and Operating Agreement and ended all of [DGC's] interest in the permit). [DGC] considers that interpretation to be not only wrong, but specious. It is also completely inconsistent with subsequent statements made by STP to us in an operating committee meeting in October 2011, as I explain further below.

[14] The minutes of that October 2011 operating committee meeting appear to have been prepared by STP. They record:

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[1] Defined to mean all costs and expenses incurred with respect to the well after the point of temporary suspension.

> In accordance with the documents governing the parties relationship (the Definitive Agreement dated April 18 2008 and the joint operating agreement executed by the parties in July 18 2008 ... [DGC] has agreed to make a decision concerning the level of its participation of the STP and the programme presented at this OCM ... on or before December 1 2011.[2]
>
> …
>
> [DGC] will endeavour to provide to STP evidence of [DGC's] authority to represent and make binding decisions on all of the parties whose interests are subsumed in the 25 per cent identified in the Governing Documents *and held beneficially by STP on behalf of [DGC] and its partners*.[3]
>
> …
>
> Upon [DGC's] election to participate up to 25 per cent in the Program and the payment of [DGC's] proportionate share of the past costs, STP will agree, subject to existing rules and regulations of the New Zealand government, to assist [DGC] in being placed as a legal owner of up to 25 per cent interest in the permit.[4]

[15] Ms White deposes that in April 2012 DGC became aware, from public announcements made by Loyz Energy Limited (Loyz), a Singaporean company listed on that country's stock exchange, that STP was "purporting to sell its interests in the permit to Loyz". On 7 June 2012 DGC served notice of dispute under the Definitive Agreement. It alleged repudiation of that agreement by STP. In part because STP had expressly asserted that DGC had "no rights and/or has released whatever rights it may have held" in the permit. Relief sought in the notice included:

> An injunction requiring [STP] to procure the recording of [DGC's] 25 per cent interest on the permit.

[16] Ms White suggests that Loyz is an associated company of STP. There is support for that in the evidence. STP's three representatives at the October 2011 operating committee meeting are all also senior employees of Loyz. Ms White also claims that Loyz was aware of the dispute over DGC's permit rights when it entered into the transfer agreement in August 2012. It would not, therefore, be a bona fide transferee for value without notice.

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2 At [2].
3 At [4]. (Emphasis added).
4 At [6].

[17] Ms White then deposes that "we later discovered that on 6 August 2012 Loyz Energy had announced that Loyz had entered into an agreement to acquire a 90 per cent interest in the permit". That statement is ambiguous. However it appears DGC became aware of the transfer agreement in August or early September 2012. The announcement by Loyz stated:

> ... Loyz NZ Ventures Limited, a subsidiary of Loyz Oil [itself a subsidiary of Loyz] has on 6 August 2012 entered into a farm-in agreement ... with STP in relation to the acquisition of certain interests in [the] permit.

[18] Section 41(2) of the Crown Minerals Act 1991 requires an application for consent to a transfer of a permit or any interest in a permit to be made within three months of that agreement. It follows from this that DGC should have been aware that Loyz (or its New Zealand subsidiary) would make an application to the Minister not later than 6 November 2012. Logically, it was likely to make application well before then.

[19] On 13 September 2012 DGC's New Zealand solicitors wrote to STP stating that DGC had recently become aware that STP had purported to enter into an agreement with Loyz to transfer the permit. The letter alleges that to be repudiation of the Definitive Agreement, seeks a copy of the agreement and seeks "confirmation" that STP will not apply for transfer of the permit pending resolution of the disputes already notified. Failing that:

> Our client may without further prior notice duly applies to the High Court of New Zealand for an injunction preventing STP from dealing with PP38479 in any manner pending resolution of the disputes in the notices.

[20] In fact Loyz NZ had already made application: on 3 September 2012. DGC did not know that at the time. But, in the circumstances, such action could hardly have surprised it.

[21] A further letter was sent on 23 September 2012 seeking a formal undertaking, by 26 September 2012. Absent such undertaking, however, "[DGC] will proceed as previously advised".

[22] On 26 September 2012 STP declined to give the undertaking. It noted what it perceived to be DGC's failure to commence ICC arbitration proceedings. It also insisted that any injunction proceedings take place on an on notice, rather than on a without notice basis.

[23] On 9 October 2012 DGC's United States counsel referred the dispute to the International Court of Arbitration in Paris. The reference asserts that DGC is the owner of a 25 per cent beneficial working interest in the permit, and that the release of the previous arbitration resolved only that arbitration and did not affect the substantive rights of DGC in the permit. It also alleges:

> STP Energy has wrongfully repudiated the Definitive Agreement and the operating agreement and has wrongfully transferred [DGC's] working interest in the permit.

It is quite clear that the reference as drafted by DGC's United States counsel proceeds on the basis that there had been already an "illegal transfer" of its interests in the permit. Also that the STP/Loyz agreement had "wrongfully transferred" DGC's interests.

[24] Relief requested of the arbitration tribunal is as follows:

> 21. [DGC] requests that this Tribunal declare the following:
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> (a) That the discharge agreement entered into by [DGC] and [STP] did not and does not affect [DGC's] ownership interest in the permit;
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> (b) The Definitive Agreement and the operating agreement are in full force and effect.
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> (c) [STP] breached the Definitive Agreement and the operating agreement by repudiating same.
>
> (d) STP [conspired with Loyz Energy and Loyz NZ to wrongfully transfer [DGC's] working interest in the permit.
>
> (e) [DGC] has suffered damages.
>
> (f) The value of the permit according to [STP] is not less than $607 million USD.
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> 22. [DGC] requests that the Tribunal award [DGC], as damages, $151 million for [DGC's] 25 per cent working interest in the permit.

[25] The arbitration tribunal, which will comprise three members, has not yet been established. Pending receipt of STP's formal arbitral answer, DGC had obtained an extension from the ICC for the payment of its $147,000 setting down fee. Absent payment, the tribunal will not be constituted. STP's answer was received only after the present application was filed.

[26] On the following day, 10 October 2012, DGC wrote to New Zealand Petroleum & Minerals (NZP&M). That is the division of the New Zealand Ministry of Business Innovation and Employment that deals with Crown minerals issues. The letter noted DGC's awareness of the agreement between STP and Loyz. It noted DGC's claimed interest in the permit. It went on to request that NZP&M "suspend approval" of transfer of any interest in the permit until the dispute had been resolved.

[27] On 23 October 2012 NZP&M wrote to STP, following DGC's letter of 10 October 2012. A copy of the letter was sent to DGC. The letter refers expressly to "the application for Ministerial consent to the transfer of [the permit] from STP to Loyz NZ". DGC should have been aware from this letter that such an application had been made. Indeed Ms White drew exactly that inference. In her affidavit she says:

> The reference in that letter to STP's application for consent was the first time that [DGC] became aware that an application had been made. However, we still did not know *when* the application had been made, and therefore how long NZP&M had already had to consider it.

[28] Nor, though, does it appear DGC actually asked the question of NZP&M. An Official Information Act request not directed to that issue elicited, on 4 December 2012, that an application for s 41 transfer consent had been filed on 3 September 2012. In my view, given what had gone before, that should not have been a surprise to DGC.

Application for interim measures

[29] On Friday 14 December 2012 DGC filed an originating application for interim measures under Articles 9(2) and 17 of the First Schedule of the Act. The memorandum filed in support of the application seeks urgency. It states that the

interim measures are sought because, if consent were to be granted, "it is possible that could have the effect of extinguishing or seriously compromising [DGC's] rights in respect of the permit that are the subject to the arbitration, such that a subsequent arbitration award in [DGC's] favour could practically be rendered pyrrhic." The memorandum goes on to seek "an urgent preliminary hearing ... if necessary on a *Pickwick* basis".

[30] The orders sought are as follows:

(a) an order directing STP immediately to withdraw its currently outstanding application dated 3 September 2012 to the Minister of Energy under s 41 of the Crown Minerals Act 1991 for consent to transfer PEP38479;

(b) an order prohibiting the respondent from making any further s 41 application; or alternatively

(c) an order prohibiting the respondent from completing the transfer of, and otherwise transferring, the permit.

In each case, "pending the outcome of the arbitral proceeding described below or further order of this Court".

[31] Two changes to the application were made when the hearing commenced. The first is that DGC has produced an undertaking as to damages. Secondly, more nuanced relief is now sought. Rather than seek an order that STP withdraw its application for transfer, DGC now seeks instead:

> Orders [that] the respondent ... immediately request that the Minister of Energy (or his delegate) takes no further steps in relation to the respondent's application ... pending substantive hearing of this application.

Respondent's position

[32] On Monday 17 December 2012 STP's counsel filed a seven page memorandum. It contends that STP does so under protest (in particular, as to

jurisdiction), on a *Pickwick* basis only, and that the application, to the extent that relief is granted, must be treated as a without notice application. I accept that that characterisation is appropriate. Indeed it was anticipated by DGC's counsel, as I have noted at [29].

[33] The respondent's memorandum takes seven points by way of opposition to the application. First, in terms of Article 17B(1)(a) – whether harm is adequately reparable by damages – STP takes the point that the London ICC arbitration seeks damages only, and not specific performance or other injunctive or restitutionary relief. On that basis the present application is not for interim measures supporting relief sought in the arbitration. Mr Daniel Kalderimis, for STP, suggested it was not so much to assist the arbitration as to "mount a collateral attack" on it. Secondly, STP contends that the High Court lacks jurisdiction to make ex parte (i.e. without notice) orders under Articles 9 and 17 of the Act (due to amendments made in 2007). Thirdly, STP wishes to protest jurisdiction. It is entitled to file a protest, and need not do so, under the rules, until three working days before a hearing date. It has been denied that entitlement. But there is no question that its wish to protest forum is legitimate. I will discuss that contention further later. Fourthly, in terms of Article 17B(1)(b) - the balance of harm - STP complains of the absence of evidence of financial probity to support the undertaking given as to damages. Mr Kalderimis submitted it was "worthless" without that supporting information. Fifthly, STP submits that the effect of the relief sought initially, withdrawing the s 41 application, would be that the agreement between STP and Loyz could be denied legal effect. The effect of s 41(2) would mean that withdrawing the application would necessitate STP and Loyz having to renegotiate a new agreement to fit within the statutory three-month timeframe in that provision. Sixthly, STP submits there has been here egregious delay: DGC became aware of agreement in principle to transfer the permit in April 2012. It became aware of the agreement proper in August or September. It indicated, twice, in September its intention to seek injunctive relief. But then it did nothing about it until the last minute - when it should have been aware that time was likely running for ministerial consideration of the application. Seventhly, in terms of Article 17B(1)(c) – reasonable prospect of success – STP submits two things:

(a) assignment rights have never been triggered, so that DGC has no entitlement to re-transfer; and

(b) any claim DGC has in relation to rights in the permit was extinguished by the release in 2010, following the 2009 arbitration initiative.[5]

The Minister intervenes

[34] The Minister applied to intervene in relation to the question of what relief might be granted. There was no protest to that intervention. The Minister is not of course a party to these proceedings. Nor is Loyz. These proceedings are brought under the Arbitration Act 1996. Neither the Minister nor Loyz enjoy any arbitral nexus with the parties to this proceeding. No application for judicial review has been brought against the Minister. No proceedings for unlawful interference with contractual relations have been brought against Loyz in these or the Singaporean courts.

[35] The Minister has made clear through counsel that NZP&M is required to process the application in a timely way, absent special circumstances. It does not consider such circumstances exist. Whether a dispute might constitute special circumstances was considered by the Court of Appeal, in the context of judicial review, in *GXL Royalties Ltd v Minister of Energy*.[6] It is clear that consideration has been given to that decision by officials. NZP&M's online permit register closed at 4.30 pm yesterday. It will not reopen until 16 January 2013. NZP&M considers it is duty-bound to make its decision before close of business this year.

Discussion

[36] It was convenient to consider this application under six headings:

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5 See [12] above.
6 *GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185.

(a) jurisdiction;

(b) whether the interim measures are supportive of any relief sought in the arbitration;

(c) whether harm not adequately reparable by an award of damages is likely to result if interim measures are not granted;[7]

(d) whether that harm substantially outweighs the harm likely to result to STP if the interim measures are granted;[8]

(e) whether there is a reasonable possibility that DGC will succeed on the merits of the claim;[9] and

(f) whether there are any other factors militating for or against interim measures.

Jurisdiction

[37] I do not accept Mr Kalderimis' submission that the Court lacks statutory authority under the Act to grant without notice orders under Article 9(2). That submission is said to flow from amendments made to the Act in 2007. In Dicey Morris & Collins, *Conflict of Laws*,[10] the editors note that Article 9(2) now provides that the Court has the same powers as an arbitral tribunal to grant interim measures. They go on to say that the New Zealand Courts "apparently do not have the power to grant ex parte relief in aid of arbitration". The proposition is the subject of more detailed discussion in *Williams & Kawharu on Arbitration.*[11] The authors of that work note that, prior to the 2007 amendment, Article 9(2) provided that the High Court had the same power as it has for the purpose of proceedings before the Court

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7 Art 17B(1)(a).
8 Art 17B(1)(b).
9 Art 17B(1)(c).
10 Dicey Morris & Collins, *Conflict of Laws* (14 ed, 4th supplement, Sweet & Maxwell Ltd, United Kingdom 2011) at 16.085.
11 *Williams & Kawharu on Arbitration* (LexisNexis, Wellington 2011) at 9.5.1.

to make orders, including an interim injunction or other interim orders. The result was that the Court had all the powers it had in relation to ordinary civil proceedings. The amendment to Article 9(2) provided the Court had only "the same powers as an arbitral tribunal to grant an interim measure under Article 17A ...". As they then note, tribunals do not have the power to act without notice under Article 17A, although they may make preliminary orders in that way under Article 17C. Having set up the proposition, *Williams & Kawharu* then demolish it. First, s 12 (which provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal "may award any remedy or relief that could have been awarded by the High Court") effectively restores the pre-2007 position. Article 17A need not be relied on, or treated as excluding that power. Secondly, Article 17C provides expressly for without notice preliminary orders. It would, they say, be surprising to conclude that a Court cannot grant without notice interim measures. With that analysis I agree. The construction suggested by *Williams & Kawharu* ensures that the Act remains consistent with the UNCITRAL Model Law on which the Act was based.

[38] Moving however beyond the question of whether the Court has statutory authority in principle, to whether it has jurisdiction in fact in this case, I find Mr Kalderimis' alternative argument as to jurisdiction compelling. There are two aspects to it.

[39] First, jurisdiction at heart is dependent on valid service on the defendant.[12] DGC was here entitled to issue proceedings as of right against STP. Leave was not required under High Court Rule 6.28. But it has not actually served STP in the manner required by the Rules. It has emailed copies to STP's director, Mr Seah (the gentleman dog sledding in the northern wastes) and to a Ms Tan. It is not entirely clear who she is. Of course, Mr Kalderimis has received copies of the application and was able to file a comprehensive response, albeit under protest. But that is not service in terms of the Rules. Where service offshore is involved, some rectitude is required. It involves, as has often been said, an exercise of sovereignty within the

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12 *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243 (**HC**).

country in which service is effected.[13] The more concessionary approach taken to service in *Argyle Estates Ltd v Bowen Group Ltd*,[14] a purely domestic proceeding, is not I think appropriate in a case involving extraterritorial service. Of course in some circumstances, involving true urgency, formal service by means of substituted service might be permissible. That much is contemplated by the English Court of Appeal decision in *Bayat v Cecil.*[15] However, no application for substituted service was made in this case.

[40] Secondly, even if I am wrong in the first respect, a more fundamental problem looms. If a foreign defendant has indeed been served, the Court has provisional jurisdiction. It is subject to any protest as to jurisdiction. In the present case such a protest is foreshadowed. STP makes these points: it is a Singaporean company, over which the New Zealand Courts have no personal jurisdiction. The ICC arbitration is taking place in London, where the English Courts have supervisory jurisdiction pursuant to the Arbitration Act 1986 (UK). The interim measures application does not concern an asset located in New Zealand (although that is debateable). No relief or order has been sought against the New Zealand decision-maker, and the only measures sought are orders that a Singaporean company with no presence in New Zealand takes steps to seek to influence that process.

[41] There is some debate in the authorities as to the extent to which a Court should resolve a protest application before granting interim orders. The authorities begin for present purposes with the decision of the Court of Appeal in *Advanced Cardiovascular Systems Inc v Universal Specialities Ltd.*[16] There the Court of Appeal held that any protest to jurisdiction must be considered and determined before dealing with an interlocutory application for summary judgment. In *Rimini Ltd v Manning Management & Marketing Pty Ltd*[17] Randerson J applied *Advanced Cardiovascular Systems* to conclude that a protest of jurisdiction must be considered

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13 *Afro Continental Nigeria v Meridian Shipping Co SA (The Vrontados)* [1982] 2 Lloyd's Rep 241 (CA) at 245 per Lord Denning MR.

14 *Argyle Estates Ltd v Bowen Group Ltd* (2003) 17 PRNZ 57 (HC).

15 *Bayat v Cecil* [2011] EWCA CIV 135 at [68].

16 *Advanced Cardiovascular Systems Inc v Universal Specialities Ltd* [1997] 1 NZLR 186 (CA).

17 *Rimini Ltd v Manning Management & Marketing Pty Ltd* [2003] 3 NZLR 22 (HC).

and determined before any step is taken in the proceedings, including the granting of interim relief. Randerson J said:[18]

> If the Court is satisfied it has no jurisdiction to hear and determine the proceeding, then it is obliged to dismiss it. If the Court were to entertain an interlocutory application, it would necessarily be accepting jurisdiction to hear and determine the proceeding. As the Court of Appeal points out, it would be difficult in those circumstances to see how the Court could, thereafter, logically decide that it had no jurisdiction.

[42] That approach was taken also by Heath J in *Hamilton v Infiniti Capital Andante Ltd.*[19] In that case the plaintiff Hamilton sought an interim injunction to restrain the defendants (all Cayman Islands companies) from preventing him from exercising managerial functions. They protested jurisdiction. Heath J said:[20]

> In my view no real distinction can be drawn between a summary judgment application of the type to which the Court of Appeal referred in *Advanced Cardiovascular Systems* and an interim injunction application of the type in issue in this case. Both are interlocutory in nature. Further, it seems to me that nothing can turn, in substance, on whether the choice of law and forum clause refers to New Zealand or some overseas law or Court. In my view, *Advanced Cardiovascular Systems* is indistinguishable on the facts of this case and is the controlling authority.

So Heath J ruled that the protest must be determined first. In doing so he left open of the correctness or otherwise of an earlier High Court decision, *Dale v Jeffrey.*[21] That is a case on which DGC seeks to rely. It is however a case on its own particular facts. The defendants were New Zealand residents. As was noted in that case, it would be surprising if a New Zealand resident sued in New Zealand in relation to a contract formed in New Zealand could in fact raise *forum non conveniens* as a basis for precluding the Court taking interim steps. As the Court went on to say:[22]

> In this case the defendants are resident in New Zealand and have been served in New Zealand. There is, prima facie, jurisdiction. In the cases relied on by the defendant the companies were overseas entities served overseas and there was not, prima facie, jurisdiction. Given that there is a prima facie jurisdiction, I will proceed.

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18 At [39].

19 *Hamilton v Infiniti Capital Andante Ltd* HC Auckland CIV 2008-404-2304, 7 May 2008.

20 At [14].

21 *Dale v Jeffrey* HC Auckland CIV 2007-404-2015, 24 April 2007.

22 At [12].

[43] Even if that position were correct, the case is plainly distinguishable. I do not accept that in this case there is prima facie jurisdiction, even if that is a relevant concept. Mr McIntosh for DGC pointed to the existence of the statutory framework in the Arbitration Act, Article 9(2) in particular. But that can be said of many jurisdictions. There is a distinction between authority and jurisdiction. It cannot be said, as Mr McIntosh properly acknowledged, that the *forum non conveniens* argument foreshadowed by STP will fail. The Court is not today in a position to determine that application. Nor is it fair to STP that it should do so. STP must have the right to file a proper protest, and evidence in support of it. The Court will then consider whether it has jurisdiction. It should not now proceed on the basis that it should make interim orders, however innocuous they perhaps might be, on the basis it *might* have jurisdiction.

Whether interim measures are supportive of any relief sought in the arbitration?

[44] A further difficulty standing in the way of DGC is that the application for interim measures in this case goes well beyond the scope of relief sought in the ICC arbitration.

[45] Article 9(2) authorises the High Court to exercise the same powers as the arbitral tribunal (extended it may be by s 12, as I have discussed). But its purpose in doing so is to support the arbitral process. It is not to grant relief of a kind not contemplated in that distinct proceeding. Or, at least, not essential to protect the integrity of the arbitral process. As Asher J said in *Safe Kids & Daily Supervision Ltd v McNeill:*[23]

> The Court will consider the grant of interim measures on the basis they should complement and facilitate the arbitration.

[46] The original notice of dispute, as I have mentioned at [15], foreshadowed injunctive relief. But that indication was not carried through in the reference drafted and filed by DGC's United States counsel. Mr Kalderimis was minded to describe the present application as, in effect, an application for a freezing order. I think that

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[23] *Safe Kids & Daily Supervision Ltd v McNeill* [2012] 1 NZLR 714 (HC) at [18]. See also, generally, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL).

characterisation is correct. But it is clear that the ICC arbitral reference filed by DGC proceeds on the basis that transfer has occurred, albeit unlawfully, and that apart from declaratory relief, what really is sought is damages. No injunctive relief is sought. I am informed that the ICC Commercial Arbitration Rules permit the granting of injunctive relief. There seems no reason therefore why that could not have been sought. The arbitration, in its present form at least, is confined in terms of active relief to damages.

[47] I conclude that the relief here sought lies beyond the scope of the relief sought in the arbitration, and is not essential to protect the integrity of that process. The latter conclusion draws in part on the next consideration.

Whether harm not adequately reparable by an award of damages is likely to result if interim measures are not granted?

[48] This question – arising under Article 17B(1)(a) – raises similar questions to the preceding topic. First, if the point of the arbitration is to obtain damages for an unlawful transfer said already to have occurred, and no injunctive relief is sought, it follows that in the arbitration at least an award of damages must be adequate.

[49] Secondly, DGC advances its case as to irreparable harm with a measure of diffidence. It is said that if ministerial consent were granted "it is possible that it could have the effect of extinguishing or seriously compromising DGC's rights". It is not clear to me that that is necessarily the case, inasmuch as Loyz (as Ms White herself deposes) appears to be an associated company of STP, shares common executives, and cannot be a bona fide transferee for value without notice. It is true that s 92(1) of the Crown Minerals Act 1991 provides:

> A permit is neither real nor personal property.

That provision has not yet been the subject of judicial comment. However the same formulation is found, in relation to resource consents, in s 122(1) of the Resource Management Act 1991. It does not mean the permit is not a tradable asset, or

incapable of protection against predators.[24] It does not for legal purposes have the ordinary status of realty or personalty. But I would take some convincing that the effect of the provision would be to prevent a party A, claiming a beneficial interest under a permit held by B, from claiming those rights as against a knowing transferee, C. If the rights exist, they can be protected. If they do not, because of s 92(1), then no harm is done. And nor does that provision prevent an action for interference with contractual relations being brought, in a qualifying jurisdiction, against C.

Whether that harm substantially outweighs the harm likely to result to STP if interim measures are granted?

[50] In the balance of harms consideration under Article 17B(1)(b), two points appear to me to be important.

[51] First, because of the ex parte procedure in this case, it is not possible to examine the reality as to relative balance of harm. In particular, it is not possible to ascertain the effect of the granting of the measures sought on STP. When the application was for orders that it withdraw its application, clear potential prejudice arose from the fact that it would then need to renegotiate the underlying agreement with Loyz. Whether that would have been a demanding exercise or not is not clear.

[52] The position is ameliorated to some extent by the more nuanced relief now sought by DGC. It seeks an order that STP request delay by the Minister. The Minister accepted through counsel that that was a request he could dutifully meet. He owes no legal duty to anyone for present purposes but the applicant. That would perhaps have the effect of limiting the rigour of s 41(2). But the fact remains that we do not know the conditions in the agreement between STP and Loyz. And I do not think that STP can in present circumstances be criticised for that absence of information. Had this proceeding been conducted in a more orderly manner, the

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[24] See e.g. *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC); *Armstrong v Public Trust* [2007] 2 NZLR 859 (HC); Toomey *It's Not Yours, It's Mine! The Security Interest Holder, The Mortgagee and Fixtures – A Powerful Cocktail* (2010) 12 Otago L Rev 369 at 386-389.

Court might have been able to insist on it being put before the Court. The balance of harms could then have been weighed properly.

[53] Secondly, where interlocutory orders sought are in effect injunctive, High Court Rule 7.54 requires the filing of an undertaking as to damages. That in my view applies equally to an application for interim measures under Article 9(2) in support of an arbitration, the effect of which would be injunctive. Further, where the nature of the interim measure is effectively to impose a freezing order, then by parity of reasoning to the approach taken under Rule 32.2 the undertaking must offer real protection, must be one with substance behind it, and evidence (and if need be, security) must be given. There is nothing on the evidence before me to suggest that DGC is a company of real and extensive substance. It may have spent a substantial amount of money in the past on exploration activities (as Ms White deposes), but that says nothing about the state of its coffers now.

Whether there is a reasonable possibility that DGC will succeed on the merits of the claim?

[54] Relatively little argument was addressed to this issue, which arises under Article 17B(1)(c). In *Safe Kids & Daily Supervision Limited v McNeill*,[25] Asher J considered the "reasonable possibility of success" threshold to be equivalent to the usual interim injunction test of "serious question to be tried". I agree.

[55] STP does not stake its defence on this ground. Its argument that the 2010 release (following the 2009 arbitration in issue) excludes any proprietary or other interests in the permit on the part of DGC is plainly difficult to reconcile with the 1 October 2011 operating committee minutes cited earlier.[26]

[56] I accept for present purposes that there is a reasonable possibility that DGC will succeed in the ICC arbitration.

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25 *Safe Kids & Daily Supervision Limited v McNeill* [2012] 1 NZLR 714 (HC).
26 At [14].

Delay

[57] It is not clear where in the overall range of considerations under Article 17B, delay fits. But it is plainly a material consideration in relation to the granting of interim relief. Mr Kalderimis characterised the delay in this case as "egregious". It should be made clear that no criticism of Mr McIntosh can be made: he was re-engaged in this matter only a few days ago.

[58] It is clear from the narrative given earlier that DGC became aware of the agreement in principle to the permit transfer in April 2012. It issued notices of dispute in June 2012. These foreshadowed the seeking of injunctive relief. It became aware, probably in August 2012 but certainly no later than early September, of the agreement made on 6 August 2012 for transfer of the permit to Loyz or its New Zealand subsidiary. DGC should therefore have been aware that an application for transfer would likely follow under s 41(2). Such application could be made no later than 6 November 2012, but was likely to be made well before then in accordance with usual commercial practice. Urgent ex parte injunction proceedings were threatened on 13 and 23 September 2012, but not pursued. The existence of the transfer application was plain from NZP&M's letter of 23 October 2012, and DGC itself drew that inference from the letter. It is not satisfactory in these circumstances for Ms White to depose that no steps were taken at that point because DGC did not know when the application had been made and how long NZP&M had already had to consider it.

[59] Where discretionary relief is involved, whether in equity, judicial review or under Article 9(2), delay may be defeating. In this case the extent of delay is profound. Its consequence is quite unsatisfactory. The Court is thereby asked to take shortcuts on jurisdiction and each of the considerations under Article 17B, other perhaps than Article 17B(1)(c). That in itself is reason to deny the interim measures sought.

Conclusion

[60] Despite the quality of Mr McIntosh's advocacy, this is not a case in which he has persuaded me to see in his client's application a silk purse. Jurisdiction, the absence of injunctive relief sought in the arbitration and delay are all in combination fatal to the application. Nor am I satisfied that DGC has discharged the burden incumbent on it in Article 17B(1)(a) and (b) of the First Schedule of the Act.

Result

[61] For these reasons the application for interim measures was dismissed.

[62] If costs cannot be agreed, I will receive memoranda.

[63] I thank counsel very much for their assistance.

Stephen Kós J

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