IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009 409 000307

BETWEEN	JAMES GEORGE TURNER AND ANNETTE MAREE TURNER Plaintiffs
AND	BODY CORPORATE 361510 First Defendant
AND	GAVIN RICHARD JONES AND LOIS MAY JONES Second Defendants

Hearing: 12 August 2009

Appearances: G Slevin for Plaintiffs
S W Rollo for First Defendants

Judgment: 12 August 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to a stay of Proceedings

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[1] Mr and Mrs Turner in 2005 became the managers of the Yaldhurst Courts, which is a retirement village. At the same time they purchased the managers' unit within the complex.

[2] The defendant is the Body Corporate ultimately responsible for the ownership of common areas and the management of the complex. In 2008 the Body Corporate took steps to cancel its management agreement with Mr and Mrs Turner and on 3 September 2008 purported to do so by letter. Mr and Mrs Turner had in the meantime entered contracts with Mr and Mrs Jones, the second defendants, for the assignment of the management contract and for the sale of the managers' unit to the Joneses. The cancellation by the Body Corporate has meant that the Turners have not been able to complete the sale and assignment.

[3] In February Mr and Mrs Turner issued this proceeding. It is as against the Body Corporate for damages and extinguishment of a covenant that requires sale of the managers' unit to a new manager and as against the Joneses it is for relief under the Frustrated Contracts Act.

The issues

[4] The Body Corporate asks for a stay of the proceeding against it on the basis of an arbitration clause (clause 15) within the management agreement. The arbitration clause is part of a broader dispute resolution clause which deals with disputes concerning or touching the management agreement. Arbitration is required where such disputes are not resolved by negotiation within a stated period.

[5] The Turners accept that the management agreement was subject to the arbitration agreement. The Turners further accept that an arbitration clause generally survives the cancellation of the contract containing it. What the Turners say is that the arbitration agreement in this case no longer operates because:

(a) The Body Corporate repudiated the arbitration agreement, thereby rendering it inoperative; and

(b) The arbitration agreement is not capable of being performed because the Turners' dispute with the Body Corporate also involves the Joneses who are not party to the arbitration agreement.

Did the Body Corporate repudiate the arbitration agreement?

[6] Repudiation as a matter of law is the conduct of a party to a contract by which the party evinces an intention no longer to be bound by the contract.

[7] For the Turners Mr Slevin characterised the course of conduct of the Body Corporate between 2 August and 17 September 2008 as clearly repudiatory. Mr Slevin links a good faith negotiation requirement of clause 15 with the arbitration

requirement as constituting together the arbitration agreement of the contract. I do not find the linking concept of particular assistance in the analysis I have to make of repudiation. The question is did the conduct of the Body Corporate with regard to any part of the contract evince an intention not to be bound by the contract?

[8] The starting date of Mr Slevin's analysis is in my view not a particularly promising starting point for the Turners argument. His analysis started at 2 August 2008, the date on which the Body Corporate's lawyers gave the Turners notice of breaches. Mr Slevin in his submissions referred to aspects of the letter which gave the Turners notice of alleged breaches which involved interpretations of the management agreement. The thrust of Mr Slevin's further argument as developed orally was to emphasise that the Body Corporate was disputing previously accepted interpretations of the management agreement.

[9] The Body Corporate's 2 August letter does not itself raise issues of interpretation of the agreement as such. Rather it alleges, as the breach provisions of the management contract provide, breaches which are required to be remedied within 30 days. The letter importantly in terms of my later assessment of any argument as to repudiation is very clear in its repeated references to the management agreement in a manner which can only indicate that on 2 August the Body Corporate was asserting the ongoing force of the management contract.

[10] Mr Slevin next relies on an exchange of letters between the Turners' solicitors, Anne Holloway Law, writing on 25 August 2008 and the Body Corporate's solicitors replying on the same day. Mr Slevin characterises the exchange as involving the Body Corporate's ignoring the Turners' solicitor's reference to the agreement provisions for negotiation and arbitration. In my view, the correspondence itself does not support that submission. Ms Holloway makes a very general reference to the earlier letter from Lane Neave. It is so vague as to not even be clear that the Turners had provided Ms Holloway with a copy of the 2 August letter. Ms Holloway then goes on to refer to the provisions of clause 15 of the management agreement. In my view, Mr Rollo is correct to note that Ms Holloway's letter does not raise a specific dispute or refer it to resolution. Mr Holloway quite simply refers to the dispute resolution procedure. The Body Corporate for its part had given notice of breaches under the agreement and had

invoked the requirements for remedy within 30 days. So faced with the 25 August letter the Body Corporate's solicitors, Lane Neave understandably responded on the same date stating quite simply that remedy of the breaches was awaited. Again, in that context the Body Corporate was clearly asserting the ongoing effect of the management agreement.

[11] There is then something of a gap in the written record in that it became clear through Mr Slevin's submissions that some appreciable reliance was placed upon a meeting between Mrs Turner and the chairperson of the Body Corporate on 26 August 2008. In his submissions, in response to questions from the Bench as to where the Turners were said to have defined a dispute which they required referred to dispute resolution, Mr Slevin suggested that references in later correspondence to the 26 August meeting indicated that that was a meeting at which such definition of dispute may have occurred. The difficulty with that arises at a number of levels. Mrs Turner who gave the evidence for the plaintiffs in relation to this application did not refer to 26 August as a date of significance. Secondly, there was no contemporaneous documentary record of what occurred on 26 August provided to the Court. Thirdly, and perhaps more importantly, to the extent the meeting is referred to around the same time it is referred to in Ms Holloways' next letter of 28 August 2008. The only reference to the 26 August meeting states that "Mrs Turner met with the chairperson of the Body Corporate on 20 August 2008". I do not find that the meeting of 26 August 2008 on the evidence provided to the Court provided any further definition of a dispute on the part of the Turners.

[12] Then coming back to Mr Slevin's submissions in relation to the sequence of correspondence, I reach the Anne Holloway Law letter which I have referred to of 28 August 2008 and the Lane Neave letter of cancellation of 3 September 2008. Mr Slevin correctly notes in relation to the 28 August letter that there was a request by Ms Holloway for confirmation that the Body Corporate "accepted the disputes resolution procedure as outlined in my letter of 25 August 2008". Mr Slevin notes that in purportedly cancelling the agreement the Lane Neave 3 September letter made no reference to the dispute resolution procedure.

[13] Again, I find nothing in this exchange to evince an intention by the Body Corporate not to be bound by the contract. The Body Corporate was clearly acting

on a view that it had given notice of breaches and that those had not been remedied. The 3 September letter repeatedly refers to the agreement as the source of the Body Corporate's rights in this matter. It is apparent on reading the letter of 3 September that the Body Corporate regarded the agreement as operating. There is no indication in my view that the Body Corporate was evincing an intention not to be bound by the dispute resolution clause which would, as the parties agree, usually continue in force after cancellation. It is implicitly obvious from the Lane Neave letter that the Body Corporate was acting on a view that the dispute procedure was irrelevant in the circumstances given the breaches and the Body Corporate's view as to the Turners' failure to remedy the breaches.

[14] Mr Slevin next relies upon a letter from Anne Holloway Law in immediate reply to Lane Neave on 3 September 2008. Mr Slevin notes that the Turners made it clear that they did not accept the purported termination and sought to invoke the arbitration agreement. Those two points are covered in the letter, but the letter is at least equally significant in the present context for two other features. First, Ms Holloway stated ten areas of breach relied on by the Body Corporate which she said had "been attended to". It is not clear why such statement had not been made before the 30 day period expired. Secondly, the letter contained for the first time an express requirement for a dispute, namely a dispute as to the interpretation of the requirements of the management agreement to be referred to arbitration. Again, it stands in stark contrast to the absence of any such request before the cancellation had actually occurred. In any event, this letter post dates cancellation. To the extent subsequent responses or otherwise of the Body Corporate are relied on they are in my judgment no evidence of the Body Corporate's intention.

[15] Similar in my view is the last letter relied upon by Mr Slevin in his written submissions, which is a letter of 17 September 2008 from Anne Holloway Law to Lane Neave. The letter essentially reminds the Body Corporate that there is a procedure under the agreement for dispute resolution. Mr Slevin relies on the response to this letter as evidencing the Body Corporate's repudiation. It does not.

[16] Furthermore, even had there been a Body Corporate's repudiation, the Turners were as late as 25 September 2008 affirming and not cancelling the contract.

[17] Wynn Williams & Co., took over the conduct of the Turners' file and wrote to Lane Neave on 25 September 2008. In that letter, which is somewhat ambiguous as to what is said to be the repudiatory conduct of the Body Corporate, Wynn Williams asserted that there had been repudiatory breach but the Turners affirmed the agreement pursuant to their election. That affirmation was "without prejudice to any rights and remedies they may have as a result of the Body Corporate's breaches". Although Mr Slevin's submissions hinted that there was some right of cancellation preserved for matters up to that date, it is clear that any right of cancellation (for the Body Corporate's repudiation) was lost at that date through affirmation and that all that was being reserved were rights to damages for breach. Accordingly, through this period to the end of September I find no evidence of either repudiation by the Body Corporate or effective cancellation by the Turners.

[18] Mr Rollo, with some justification in my view, suggested in his submissions that paragraphs in a subsequent letter from Lane Neave dated 30 September essentially captured the true position relating to what had happened and these are paragraphs (2) (3) and (4) of a letter dated 30 September 2008. It is unnecessary for me to set them out verbatim but they reflect in my view accurately an analysis that there had been no invocation of the dispute resolution mechanism by the Turners in the period prior to Body Corporation cancellation.

[19] The first ground of opposition to the stay application raised by the Turners, namely that there had been a repudiation followed by cancellation of either the dispute resolution mechanism or indeed the contract as a whole, fails. Nothing in the evidence establishes a repudiation on the part of the Body Corporate.

Is the arbitration agreement capable of being performed?

[20] Although the notice of opposition posed this issue upon the basis that the agreement was not capable of being performed, in his submissions Mr Slevin made it clear that the issue was perhaps equally framed as whether the Turners' claims against the Body Corporate could be fairly resolved through an arbitration.

[21] As I followed the submissions the Turners have six principal points under this head.

[22] First, the Turners face a claim from the Joneses for default on their contracts which will if the Turners' frustration arguments are unsuccessful likely result in damages awards against the Turners.

[23] Secondly, the Turners will then have quantification of all their damages and will be able to pursue indemnity from the Body Corporate. That is not possible before the outcome of the Jones litigation.

[24] Thirdly, Mr Slevin suggests that these matters go beyond convenience and efficiency. His submission is that if the claims are not heard together it will be impossible for the Turner/Body Corporate claim to be determined without compromising substantive legal rights of one or both of the parties.

[25] Fourthly, Mr Slevin refers to authorities indicating the importance of a party pursuing in a single arbitral process all issues arising from the same cause of action.

[26] Finally, Mr Slevin refers to a likelihood in this case of a three stage process –

- The cancellation issues at arbitration between the Turners and the Body Corporate

- A Court process by which the Turner/Jones issues are resolved, and

- By a resumed arbitration the Turners' damages flowing from the Jones outcome.

Such hearings, as Mr Slevin says, involve a multiplicity of proceeding.

[27] Finally Mr Slevin refers to an intention of the Turners to join members of the Body Corporate's management committee in tort as an example of a further inconvenience if all matters are not dealt with in the same proceeding.

[28] The starting point for this Court in its consideration of those issues has to be the agreement which the Turners and the Body Corporate entered into. Their

contractual commitment to dispute resolution and to arbitration is expressed in clause 15. That clause is unequivocal. I will come back later to a suggestion which Mr Slevin made as to how the clause must be interpreted.

[29] The Arbitration Act 1996, Schedule 1, Article 8 provides the basis upon which the Body Corporate brings this stay application. Article 8(1) reads:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

[30] An important aspect of Article 8, and indeed the whole Act is that it reflects New Zealand's commitment to the UNCITRAL model law of arbitration. The New Zealand Courts recognise the desirability of and need for uniformity in relation to arbitration, both domestically and internationally by applying the UNCITRAL model law. Thus the Court of Appeal in *Worldsites International Incorporated v Korving* CA220/01 13.12.01, grounded its discussion of the situation of multiple parties on Canadian authority and in particular the decision of Alberta Court of Appeal in *Kaverit Steel and Crane Limited v Kone Corporation 87* (1992) DLR 4th ed. 129. I refer particularly to the judgment of the Court delivered by Gault J at paragraph [19] where His Honour stated:

> We accept the general propositions advanced by Mr Bos. If there is a submission to arbitration the courts will, indeed must, ensure that the method of dispute resolution agreed upon is followed. The fact that there are multiple parties and some only are parties to the agreement, or that only some of the matters in dispute are covered are not sufficient reasons to avoid arbitration.

[31] Mr Rollo referred also to what is in a sense the parallel decision of William Young J (as he then was) in *Montgomery Watson NZ Limited v Milburn NZ Limited* HC Christchurch CP 86/00 6.9.00, decided a year previously. His Honour with similar issues involved stated the law in a directly parallel way to that of the Court of Appeal a year later, see [28] – [30] of the judgment. Again, *Kaverit Steel* was applied. His Honour observed that Article 8 does not permit the Courts to apply a *forum conveniens* test. He further observed that an arbitration clause may not operate conveniently but that does not mean it is inoperative. I view the dispute

resolution and arbitration clause (clause 15) in this case as unambiguous notwithstanding Mr Slevin's invitation to the Court to a view that one might imply a limitation on the clause to recognise that the parties could not have intended that a multi-faceted set of claims with more than two parties would be resolved in different fora. One might put such an implied term in a more elegant way than I have stated it, but I believe that is the thrust of Mr Slevin's submission. I reject the invitation to embark upon such an exercise. Nothing in the textual material of the contract leads me to depart from the clear provisions of the dispute resolution clause. The clause should be given its obvious meaning.

[32] Therefore, I conclude that the plaintiffs' second ground of opposition fails.

[33] I make the following orders:

(a) There will be a stay of the proceeding against the first defendant on condition that the first defendant co-operate with the plaintiffs to ensure the expedition of the arbitration process which the plaintiffs may commence; and

(b) Leave is reserved to either party on 3 days notice to apply to the Court for further direction or indeed the revocation of the stay if issues arise between the parties which necessitates that course.

Costs

[34] Counsel have addressed me briefly and helpfully on the issue of costs. Mr Rollo seeks a measure of increased costs. His specific suggestion is that the costs should be on a 2B basis with a 50% uplift. Mr Rollo refers to what was essentially in the costs setting a letter before action written by Lane Neave referring to the imminent application for a stay of proceedings and warning of a consequential application for costs.

[35] Mr Slevin submits that this is an appropriate case for the application of the normal principles as to costs. He rejects the suggestion that the plaintiffs have

unnecessarily added to the costs of this step and he emphasises their entitlement to come to the Court to have the Court determine the issue.

[36] I am not persuaded that this is a case for departure from scale costs. I direct that the plaintiffs pay in any event the costs of and incidental to this application on a 2B basis, together with disbursements to be fixed by the Registrar.

Solicitors
Wynn Williams, Christchurch for Plaintiffs
Lane Neave Lawyers, Christchurch for the Defendants