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Healthlink Ltd v Orion Systems International Ltd - [2013] NZCCLR 15

High Court Auckland
CIV-2012-404-1167; [2013] NZHC 594

18 March, 27 March 2013
Associate Judge Doogue

Stay of proceedings -- Arbitration clause -- Effect on other litigants -- High Court Rules, r 15.1.

Healthlink Ltd and Orchestral Developments Ltd were parties to a software licencing contract (the contract). Over a number of years, an informal arrangement developed under which Orion Systems Ltd and Orion Health Ltd (the Orion companies) performed the obligations owed by Orchestral Developments under the contract and received from Healthlink the payments due under the contract.

The Orion companies were not parties to the contract, which contained a clause requiring all disputes to be submitted to arbitration. Healthlink alleged that it had overpaid money due under the contract and issued proceedings seeking restitution from both Orchestral Developments and the Orion companies. All of the defendants applied for a stay of proceedings.

Held: (granting the application)

Orchestral Developments was contractually entitled to a stay of proceedings pending the outcome of the arbitration. Although the Orion companies did not have a contractual entitlement to compel Healthlink to engage in arbitration, the contract between Healthlink and Orchestral Developments formed an essential part of Healthlink's claim against the Orion companies, so it was appropriate for the court to grant the Orion companies a stay of proceedings terms until further order of the court. (see [32], [33], [34], [35]).

Cases mentioned in judgment

Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40, [2007] 4 All ER 951.

Heiber v Commissioner of Inland Revenue (2002) 20 NZTC 17-774 (HC).

Marnell Corrao Associates Incorporated v Sensation Yachts (2000) 15 PRNZ 608 (HC).

Montgomery Watson NZ Ltd v Milburn NZ Ltd HC Christchurch CP86/00, 9 October 2000.

Robinson Industries Ltd v NZ Controls Ltd HC Auckland A1/86, 31 March 1988.

Tito v Waddell (No 2) (1977) Ch 106, [1977] 2 WLR 496.

Application

This was an application for a stay of proceedings under the High Court Rules and the inherent jurisdiction of the Court.

Mr Blanchard for the plaintiff.

Mr Flanagan for the defendants.

ASSCIATE JUDGE DOOGUE.

[1] This dispute arises out of a software licence agreement (the First Licence Agreement) which the parties entered into on 20 June 2001. The parties to that agreement were the plaintiff and the second defendant.

[2] The application for stay of proceedings is made pursuant to cl 8, sch 1, ch 2, Arbitration Act 1996; r 15.1 High Court Rules; and the inherent jurisdiction of the Court. The relevant provisions of art 8 provide:

> (1) 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 that 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.

[3] The arbitration clause is a brief one and is to the following effect:

> 13.2 Unless any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with The Arbitration Act 1996 and any amendments thereof or any other statutory provision relating to arbitration.

[4] The question is whether the proceeding between the plaintiff and the first and third defendants relates to a "matter which is the subject of an arbitration agreement". Such a matter may lie outside the parameters of an arbitration agreement for a number of reasons. It might be that the parties to the dispute may be found not be parties to the arbitration agreement. Or the subject matter of the Court proceedings may not be covered by the definition of matters which are required to be taken to arbitration, for example.

[5] I understand that the plaintiff originally took the position that because it was attempting to recover overpayments that had been made during the course of business arrangements between the two parties, the nature of its cause of action was in restitution. A dispute of that kind, the plaintiff contended, did not fall within the limits of the arbitration clause which the parties had included in their licensing contract. The plaintiff no longer takes that position and concedes that the dispute between the plaintiff and the second defendant, who are the only parties to the arbitration agreement, must now be stayed. However, there remains a dispute between the parties as to the effect of the submission to arbitration on the Court proceedings so far as they affect the non-parties, the first and third defendants. Does the arbitration agreement require that those proceedings, too, be stayed?

[6] The disputes between the plaintiff and the other defendants as I shall call them arise because the plaintiff alleges that over a period of years it dealt with those defendants, making payments to them as well. Because those parties were not executing parties of the original agreement, it would appear that if the business relationships between them and the plaintiff were based on contract at all, those contractual arrangements must have been separate ones from the contract which contains the arbitration agreement. It is not contended for any party that the arbitration agreement contained in the licensing agreement contained any provision which expressly applied it to disputes between the plaintiff and first and third defendants. The plaintiff therefore contends that because of the considerations mentioned in this paragraph, there is nothing to stop it from proceeding with Court proceedings against the other defendants. The defendants, on the

other hand, contend that they, in addition to the second defendant, are entitled to a stay of proceedings until the arbitral proceedings have been concluded.

[7] The possible bases upon which the first and third defendants could justify their application to stay would necessarily have to arise from one of the following sources:

(a) that the contractual language which the parties used was apt to extend the obligation to arbitrate to any parties related to the second defendant;
(b) that the contracts which the first and third defendant entered into contained implied provisions that disputes between them and the plaintiff would similarly be referred to arbitration; and
(c) that the arbitration clauses were extended to the first and third defendants' agreements by the common law or by statute.

[8] As will become apparent, the other defendants base their claim on the ground in paragraph "a)" alone.

Submissions for defendants

[9] Mr Flanagan submitted that the approach that the courts take to arbitration clauses is that the courts should uphold arbitration by striving to give effect to the intention of parties to submit disputes to arbitration.[1] Arbitration clauses, in his submission, ought not to be read down. He said that such an approach accorded with English authority and he included in his submission a citation from *Premium Nafta Products Ltd v Fili Shipping Co Ltd*[2] where the House of Lords noted the position in the United States was to the following effect:

> In *A T & T Technologies Inc v Communications Workers of America* (1986) 475 US 643 at 650 the United States Supreme Court said that, in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail. In *David L Threlkeld & Co Inc v Metallgesellschaft Ltd (London)* (1991) 923 F 2d 245 (2d Cir) the court observed that federal arbitration policy required that any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration and that arbitration clauses should be construed as broadly as possible.

[10] He concluded by saying that save where a dispute plainly does not fall within the ambit of an arbitration clause, the matter should proceed to arbitration.

[11] It was Mr Flanagan's primary contention that there was little doubt in this case that the dispute involving the first and third defendants was covered by the arbitration submission clause. He drew attention to the reference in the clause to "any dispute or difference" and said that that was an expression of sufficient words to embrace the type of factual situation that arose here where even though the second defendant was the only party that actually executed the contract, all three defendants performed its terms. In particular, not only the second defendant but the first and third defendants as well submitted invoices to the plaintiffs to recover charges which were calculated in terms of the contract and were referable to it. Those invoices were met by the plaintiff. He said that all three defendants would justify the charges which they made to the plaintiff by referring to the terms of the agreement.

[12] It was also contended for the defendants that by reference to the principle of law stated in cases such as *Tito v Waddell* that the party having received the benefits under a contract had to meet the burdens imposed by the contract.[3]Mr Flanagan referred to the dictum of Megarry VC, referred to by Sinclair J in his judgment in *Robinson Industries Ltd v NZ Controls Ltd*:[4]

> If you accept benefits you cannot escape the consequence that you have accepted what forms part of the benefit or is annexed to it ... (or) the burden may be that price the law compels you to pay for the benefit.

[13] He also referred to the statement of Baragwanath J in the case of *Heiber v Commissioner of Inland Revenue*:[5]

> The policy of the law [is] that the rind should accompany the fruit.

[14] Mr Flanagan made the additional supporting submission that as a matter of pleading, the plaintiff had made it clear that whether or not the charges invoiced were justified was not dependent upon the terms of the contract.

[15] Mr Flanagan pointed out that all the defendants were related companies integrated into a single group and treated as "one for various relevant purposes". They are all sued pursuant to the first licence agreement, he submitted. Consistently with that submission, he said, the pleadings allege that the plaintiff had paid the defendants:

> ... For invoices issued by the Orion Companies under a mistaken belief that the invoiced amounts represented what [the plaintiff] was contractually obliged to pay.[6]

[16] Further, para 16 of the statement of claim alleged that:

> The invoices issued by the Orion Companies were not calculated in accordance with the 2001 licence, which resulted in an overpayment to the Orion Companies.

[17] Mr Flanagan said that implicit in these pleadings were that the invoices in question were issued, and paid, pursuant to the obligations on all parties, pursuant to the First Licence Agreement. The dispute was one that arose out of the contract between the plaintiff and the second defendant. It was further alleged that the first and third defendants were bound by the terms of the First Licence Agreement as the second defendant was.

[18] For all of these reasons, the position of the defendants was that the matters in dispute between the plaintiff and the first and third defendants concerned "any dispute or difference" between the plaintiff and the defendants and that the dispute in its entirety ought to be referred to arbitration, and not just that part of the dispute that technically concerned only the plaintiff and the second defendant. As well, the defendants contended that it being clear that the dispute fell within the terms of the arbitration clause, the Court had no discretion but to order a stay so that arbitration could take place.

Submissions for the plaintiff

[19] Mr Blanchard stated that his client's main concern was that if there were to be a stay of the claims made against the first and third defendant in addition to a stay against the second defendant (the latter order not being opposed) there was a risk that the first and third defendants would find that they had lost substantive rights because of the expiry of time in the accrual of limitation defence to those two defendants. This would come about in the circumstance where the first and third defendants would be commencing a fresh proceeding in 2013 in respect of rights that were due to expire shortly. If the limitation point was taken, the claims against the first and third defendants might be defeated wholly or in part.

[20] He said that there would be no problem in the Court hearing the claims against the first and third defendants separately, leaving the claim against the second defendant to be dealt with at arbitration. His submission was, in effect, that the claims against the first and third defendants were capable of being disentangled from those against the second defendant.

[21] Mr Blanchard identified the key question as being whether there was a contract between the plaintiff, on the one hand, and the first and third defendants on the other. There was no dispute that there was a contract between the plaintiff and the second defendant. He submitted that that was a question of fact which could not be properly resolved on the

basis of an interlocutory application in the form of a stay order. He submitted further that the Court ought not to be misled by the fact that the plaintiff had made payments to the first and third defendants. The fact that the second defendant had authorised payments owing under the contract between itself and the second defendant to be made to the first and third defendants would discharge the second defendant to the extent of those payments. But it did not mean that there was a contract between the plaintiff and the first and third defendants. The latter entities were not parties to the contract and could not invoke any provision of the contract including the provision providing for arbitration.

[22] The ultimate issue in the case in his view was who the parties to the arbitration agreement were. He submitted that the contract could not be construed as having such a wide effect that a nonparty to it could invoke the arbitration clause.

[23] Mr Blanchard said that his client sought an interim stay so that if necessary it would be open to the plaintiff to revive the Court proceedings against the first and third defendants.

[24] He dealt with point arising from *Tito v Waddell* by noting that the claims against the third and third defendants are not brought in contract but in restitution. As well, while the doctrine of that case may apply so as to bind an unwilling party to obligations under a contract, the benefits of which that party had been content to accept, that did not follow that a plaintiff had to enforce the contractual obligation/s. It operated for the benefit of the plaintiff in the position of the plaintiff and not to its detriment.

[25] Referring to the argument that the first and third defendants were not opposed to a stay, he said that that was beside the point. The fact that the first and third defendants may agree with the second defendant that a stay was desirable was an entirely different thing from an agreement between those defendants and the plaintiff. It was not open to the defendants by agreement between themselves to extend the rights of the second defendant against the plaintiff in such a way that these first and third defendants could similarly invoke contractual rights.

[26] Mr Blanchard submitted that the Court should not come to a definite conclusion on what would necessarily be an interlocutory basis about what the contract meant. That was an extension of his argument that deciding what the terms of the contract between the parties was could only be resolved by way of coming to findings of fact. He considered that there was especially a requirement of caution in the circumstances of the present case because if the Court determined that the plaintiff was required to submit its claims against the first and third defendants to arbitration, there was a risk that in having to start fresh proceedings the plaintiff will expose itself to limitation arguments that would not be a problem for it if it continued against those parties in the High Court proceedings.

Discussion

[27] As Mr Flanagan pointed out, the plaintiff does not dispute that a stay of proceedings should be made in relation to the plaintiff's claim against the second defendant. While it agrees that a stay of execution should be made in relation to the proceedings as far as they involve the first and third defendants, the plaintiff argues that the terms of that stay would be in a different form. The stay in that case would be on terms that it was to have the effect "pending arbitration of the Plaintiff's claim against the Second Defendant". As Mr Flanagan goes on to say, that implies that the plaintiff's claims against the first and third defendants are not to be arbitrated, but merely put on hold until after the arbitration against the second defendant. Such an approach arises from the primary contention that the plaintiff makes that the first and third defendants are not parties to the arbitration agreement.

[28] I agree with the following summary of the principles which govern the interpretation of arbitration clauses which is to be found in *Chitty on Contracts:*[7]

> **Scope of the arbitration agreement.** The scope of an arbitration agreement is to be determined by reference to the precise wording of the agreement, construed according to its language and in the light of the circumstances in which it was made. But the court will endeavour to give a sensible and effective interpretation to the words used and will start with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.

[29] It is possible that the parties intended that their agreement would bind persons who were not parties to the contract. It is unlikely that they would have done so because at the root of enforceability of an arbitration award is the agreement

that the parties entered into. The contract is the source of the arbitrator's authority, in other words. In general terms, it would not seem possible for an arbitration agreement to be binding on a party, unless that party enters into an agreement to be bound by the outcome of the arbitration which can then be enforced on the application of the opposite party. There is no evidence that that is what happened here.

[30] While not doubting the principle in cases such as *Tito v Waddell*, I suggest that whether the principle applies depends very much on the facts of the case. In this case, the receipt of payments by the first and third defendants from the plaintiff does not give rise to an unequivocal inference that the defendants thereby adhered to and accepted the terms of the contract between the plaintiff and the second defendant. The actions of those defendants is just as readily explained by an informal delegation to them from the second defendant of the responsibility to perform certain areas of the second defendant's contractual obligations on its behalf and to accept payment in respect of the services provided. If such an analysis were correct, the omission of a dispute resolution mechanism between the plaintiff and the first and third defendants would be of no significance because the contracting party who retained overall contractual responsibility had the right to invoke the arbitration mechanism.

[31] The next point is that cases can be envisaged where there are several parties involved in disputes arising out of the same subject matter but in regard to which only some of the parties can be compelled to arbitrate, leaving the others to go to Court. The fact that this may have undesirable consequences in terms of potentially inconsistent judgments/decisions is not a reason for the Court declining to stay a proceeding for the purposes of arbitration.[8]

[32] I agree that consideration of the terms of the contract between the plaintiff and the second defendant will at the least be part of the background which the Court will need to consider when considering the merits of the claim for restitution because whether or not there was an overpayment will be measured against what the contractual entitlement was. The first and third defendants will no doubt say that by agreement with the second defendant, part of the consideration which was to move from the plaintiff to the second defendant was assigned to them and that the second defendant authorised them to accept payment directly from the plaintiff. The claims as proxy for the second defendant, though, could not justify them in claiming more than the second defendant was entitled to under the contract. The fact that the contract would be part of the essential facts of the case to be considered is not to be equated with viewing the first and third defendants as parties to the contract. The apparently informal arrangements that the defendants entered into also involve the plaintiff. The plaintiff concurred in the arrangements and it is not to be expected that any payment would have been made to the first and third defendants unless it had done so. But that state of affairs which reflects the practical dealings between the parties does not entail a conclusion that as a matter of legal analysis the first and third defendants became parties to the contract with the ensuing result that they became parties who became bound to perform the same obligations as the second defendant had assumed to the plaintiff.

[33] On the basis of the reasoning contained in the foregoing paragraph, I conclude that the defendants cannot compel the plaintiff to engage in arbitration with them.

[34] The parties agreed that there ought to be stay orders in respect of the plaintiff's claims against all of the defendants. The only issue separating them was the terms of the stay that ought to be ordered in respect of the claims against the first and third defendants. Mr Flanagan for those defendants submits that there ought to be a permanent stay and Mr Blanchard contended for a stay until further order of the Court. The plaintiff would acquiesce in a stay on the terms that MrBlanchard indicated. The plaintiff's position was said to be a recognition of the realities of the case and that deferring consideration of the claims against the first and third defendant pending arbitration of the plaintiff's claim made practical sense. Mr Blanchard did not put matters in those terms but I believe that states the essence of the position.

[35] Because I do not accept that the first and third defendants have any entitlement to a permanent stay, by elimination that leaves the position which the plaintiffs advanced in their submissions before me. Accordingly, there will be an order that the plaintiff's claim against the first and third defendants is stayed until further order of the Court.

[36] The parties should confer on the matter of costs and if they are unable to agree on the incidence and extent of any costs order required, they should file memoranda not exceeding five pages within 15 working days of the date of this judgment.

FOOTNOTES

1 *Marnell Corrao Associates Incorporated v Sensation Yachts* (2000) 15 PRNZ 608 (HC).

2 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2007] 4 All ER 951 at [31].

3 *Tito v Waddell (No 2)* (1977) Ch 106, [1977] 2 WLR 496.

4 *Robinson Industries Ltd v NZ Controls Ltd* HC Auckland A1/86, 31 March 1988.

5 *Heiber v Commissioner of Inland Revenue* (2002) 20 NZTC 17-774 (HC).

6 Counsel's emphasis.

7 HG Beale (ed) *Chitty on Contracts* (31st ed, Sweet & Maxwell, London, 2012) vol 2 at [32-030].

8 *Montgomery Watson NZ Ltd v Milburn NZ Ltd* HC Christchurch CP86/00, 9 October 2000.

Reported by: Louise Lyster