**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2006-404-007953**

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| BETWEEN | JULES AITKEN<br>First Plaintiff |
| AND | GOOD LOOK CO LIMITED<br>Second Plaintiff |
| AND | ISHIMARU LIMITED FORMERLY KNOWN AS CORNERSTONE GROUP LIMITED<br>Defendant |

Hearing: 14 September 2007

Appearances: M Keall for Plaintiffs
T Herbert for Defendant

Judgment: 14 September 2007

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**JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**
**Upon Application for Stay**

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[1] The defendant has applied for a stay of the plaintiffs' proceeding upon its claim for unpaid commission for services supplied in relation to the brokering of the sale of residential development units.

[2] The defendant claims the proceedings have been brought in a matter which is subject of an arbitration agreement.

[3] The question is whether the resolution procedure provisions of the parties' contract contains an arbitration agreement such that Article 8 of the Arbitration Act 1996 shall compel the parties to submit to arbitration process. An ancillary question

is that if it is established there is an arbitration agreement, should the Court in this case nevertheless use its discretion to refuse a stay of the plaintiffs' proceeding?

[4] The relevant provisions include clause 11.1 of the parties' contract, and Article 8 of the Arbitration Act 1996.

**Additional background detail**

[5] In a memorandum to the Court in relation to a telephone conference convened by this Court on 15 March 2007, Mr Keall advised the plaintiffs were not opposed to mediation or arbitration, provided the defendant committed to mediation in terms of the contract. That agreement was expressed to be conditional upon the defendant filing a statement of defence, the parties committing to a process of discovery, and the defendant committing to attend mediation.

[6] Later, by letter dated 10 May 2007, Mr Keall wrote to the defendant's solicitors detailing documents required for inspection.

[7] The defendants responded by letter dated 14 June 2007, advising that recovery of the requested documents would provide difficult and costly. The lawyer added:

> Our client is hopeful that the dispute may be resolved through mediation, which will avoid the need for exchange of documents. Accordingly our client will not provide the requested documents/categories of documents prior to any mediation.

[8] Until yesterday, by the affidavit of Mr Martin, apparently no reasons or details have been provided by the defendant in dispute of the plaintiffs' claims. Certainly there is no evidence of such before the Court.

[9] The defendant states that it has delivered written notice specifying the nature of the dispute and its intention to refer the dispute to mediation. The defendant's solicitor's letter of 14 June 2007 does not do that. Nor indeed does Mr Martin's affidavit, which provides only the barest of undetailed particulars.

## Clause 11

> **11.0 DISPUTES**
>
> **11.1 Resolution Procedure:** Every dispute which the Contractor may have with the Company shall be resolved by the following procedures.
>
> If any dispute or difference arises the parties in connection with or arising out of this Contract or its performance, any party may give written notice specifying the nature of the dispute and its intention to refer such dispute or difference, in the first instance, to mediation. If a request to mediate is made then the party making the request will invite the chairperson for the time being of the New Zealand Chapter of Lawyers Engaged in Alternative Dispute Resolution ("LEADR") to appoint a mediator to enable the parties to mediate and settle the dispute. All discussions in the mediation will be without prejudice and will not be referred to in any later proceedings. The parties will bear their own costs in the mediation and will equally share the mediator's costs.
>
> If a dispute or difference is unresolved after the parties have attended mediation, either party may thereafter by written notice to the other, require the matter to be determined by arbitration of a single independent arbitrator, if the parties can agree on one, or otherwise by an arbitrator appointed by the Company for the time being of the Auckland District Law Society, which shall be conducted as soon as practicable at Auckland in accordance with, and subject to, the Arbitration Act 1996.

## Article 8 of the Arbitration Act 1996

> **8. Arbitration agreement and substantive claim before court –** (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…

[10] Section 2 of the Act defines arbitration agreement:

> Arbitration Agreement means any agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

## Does Clause 11.1 require submission to Arbitration?

[11] In general the Courts will give effect to the intention of the parties to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording or operations of the arbitration clause to thwart that intention: *Marnell*

*Corrao Associates Incorporated v Sensation Yachts Limited* (2000) 15 PRNZ 608 at [61].

[12] It is the use of a particular word and the detail in some phrases contained within clause 11.1 which highlights the difference of approach between the parties in this case.

[13] In the second paragraph of clause 11.1 it states that if any dispute or difference arises, any party may give written notice specifying the nature of the dispute and its intention to refer such dispute or difference, in the first instance, to mediation.

[14] In the third paragraph of clause 11.1 it states that if any dispute or difference remains unresolved after mediation, either party may thereafter by written notice to the other, require the matter to be determined by arbitration.

[15] The defendant contends that notwithstanding the word "may", read as a whole the clause requires submission to the Arbitration Act process because:

a) The parties' dispute is a matter that is the subject of the arbitration agreement.

b) The first paragraph of clause 11.1 requires its procedures to be adopted.

c) Paragraphs 2 and 3 of clause 11.1 must in overview require referral of a dispute to mediation, and then, if must be, a referral to arbitration.

d) It is false to interpret the clause as providing an option about whether or not attendance was required at a mediation.

e) Therefore considered as a whole, clause 11.1 sets out a dispute resolution process that begins with a referral to mediation, and ultimately requires arbitration for unresolved disputes.

f) Alternatively, if there is any ambiguity in the drafting of clause 11.1, the defendant submits it ought be construed in favour of requiring the parties to attend arbitration. Otherwise a party could, merely by refusing to attend mediation, force a dispute through the Courts. That result would fail to recognise either the intention of the parties in providing for arbitration, or the policy in favour of promoting arbitration as a dispute resolution procedure. In brief it would allow a party to take advantage of its own default.

g) Alternatively it is submitted for the defendant that if the Court finds the mediation agreement is unenforceable then such a finding will not invalidate the entirety of clause 11.1, but only so much as is necessary to give effect to the Courts ruling. In the result, the requirement to attend mediation before arbitration would be removed, but would leave in place the requirement to attend mediation in the event of a dispute. In that instance the Court would be bound to order a stay.

**Considerations**

[16] I take a different view from the defendant regarding interpretation of clause 11.1. Although the clause commences with the exhortation that every dispute shall be resolved by the following procedure, the specific agreement to arbitrate under that procedure is at best contingent on both parties having attended a non-compulsory mediation. It appears undisputed that no such mediation had occurred or been requested at the time proceedings were served. Nor, as I have earlier noted, has there been any specific request for mediation since.

[17] The provision permits one party to give notice of its intention to refer a matter to mediation, but in contrast to the arbitration provisions there is no reciprocal obligation of participation on the other party.

[18] In this case clause 11.1 can be contrasted to the dispute resolution provisions in *Marnell*, where both parties unequivocally agreed to participate in a series of steps, including mediation, as a prelude to arbitration. I agree with Mr Keall's

submission that any general principle that the Courts should uphold arbitration by striving to give effect to the intention of the parties to submit disputes to arbitration (as *Marnell* suggests) cannot serve as a mechanism for rewriting the terms of a contract when no such intention exists.

[19] In my view the use of the word "may" was deliberate, and highlighted the difference between clause 11.1 in the parties' current contract and that of clause 17 in their previous contract. Clause 17 was much more prescriptive. It required the parties to meet and discuss the dispute in good faith, and if that did not resolve the dispute then it required submission to arbitration upon written notice being given by one party to the other. That is not what clause 11.1 says.

[20] The defendant submits that if it was to file a statement of defence then it would have submitted to the Court process and in the result would be precluded from making an application for stay. Article 8 can be read to preserve to the defendant a right to apply for a stay no later than when the defendant's "first statement on the substance of the dispute", ie its statement of defence, is filed.

[21] Instead, and apparently steadfastly, the defendant has offered (and then only very recently) the barest of detail that a dispute exists. Clearly it is not sufficient for a defendant merely to assert there is a dispute, for the Court is entitled to know more than that. I am inclined to the view that even if I should have considered clause 11.1 to be an arbitration agreement, the Court would be within its right to refuse an application for stay by reason of the fact there is no dispute between the parties. As stated in *Rayonier MDF New Zealand Limited v Metso Panel Board Limited* (HC AK CIV-2002-404-1747, 27 May 2007, Master Faire) it is insufficient for a party applying for a stay to dispute the claim in a perfunctory way without supplying reasons.

**Summary**

i) Clause 11.1 is not an arbitration agreement. It would be necessary to rewrite its terms in order to make it so. Its terms appear to have been deliberately written. That much can be

inferred from the changes made by clause 11.1 by contrast to the provisions of its predecessor, clause 17.

ii) The filing of a statement of defence does not necessarily preclude the right to apply for a stay.

iii) A defendant applying for a stay must be prepared to provide more than a bare claim that a dispute exists.

**Result**

a) The application for stay is refused.

b) The defendant is directed to file a statement of defence within 28 days of this decision.

c) Costs will be paid to the plaintiff calculated on a category 2B basis.

d) I direct the Registrar to schedule a telephone conference for this proceeding in approximately six weeks' time.

*Solicitors:*
*North Shore Law Practice, Milford*
*Michael Keall, Auckland*
*Lee Salmon Long, Auckland for Defendant*