IN THE DISTRICT COURT
AT AUCKLAND

CIV-2009-004-002845

WET & FORGET RETAIL LTD
Plaintiff

v

HORTIGRO HOME & GARDEN LTD
STEPHEN REYNOLD FORD
TONY KENNETH POTTON
CRAIG GREGORY BRICH
Defendants

Appearances: M Keall for the Plaintiff
S Neville for the Defendants

Judgment: 3 February 2010

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] The plaintiff as franchisor, by franchise agreement dated 11 December 2007, agreed to grant a franchise to the first defendant. The franchise fee was to be paid in two sums – the first was paid but the second was not. The plaintiff now seeks summary judgment for the outstanding balance of the initial franchise fee in the sum of $112,500 including GST which was due on 5 February 2008. The plaintiff also seeks penalty interest down to the date of judgment at the contract rate of 15 percent per annum, and indemnity legal costs as the franchise also provides.

[2] The defendants, who are sued firstly as the franchisee and secondly as the guarantors, defend the summary judgment application on the basis of an arbitration clause in the franchise agreement and they seek a stay of this proceeding and a reference to arbitration under the Arbitration Act 1996.

Background

[3] Pursuant to the franchise the first defendant has the exclusive right to sell a particular product range within a defined territory with unrestricted access to product information and the benefits of a steady stream of high profile advertising. The first defendant's shop is the second retail outlet for this product, which can loosely be called the Wet & Forget product range, and it is to be found in Pukekohe. The first such shop has operated from Mairangi Bay for some time. There are no other franchisees.

The dispute

[4] There are matters at issue between the parties. The question here is whether this Court must follow Court of Appeal authority stating that before a stay of a proceeding such as this should be granted under the Arbitration Act 1996 there needs to be an arguable dispute which is essentially the same test as in a summary judgment situation, or whether a different line of authority emanating more recently from the High Court, which construes the relevant provision of the Arbitation Act much more narrowly, should be applied in which case, in effect, any dispute at all should be referred to arbitration and a stay be granted by the Court.

[5] Naturally, the parties' respective positions are such that the plaintiff urges that I apply the Court of Appeal authority of *Royal Oak Mall Ltd v Savory Holdings Ltd* (CA 106/89, 2/11/09), in which case the plaintiff says that I would deny the application for stay and I would grant summary judgment or, with respect to the defendants, that I should follow a different approach which has been taken by the High Court, as far as I am aware in only three decisions, the first being that of Master Thompson in *Todd Energy Ltd v Kiwi Power Ltd*, (1995) HC Wellington, CP 46/01, 29 October 2001, the second being also Master Thompson in *Alstom New*

Zealand Ltd v Contact Energy Ltd, HC Wellington, CP 160/01, 12 November 2001, and the last being that of Dobson J in *Body Corporate v E-Gas Ltd*, HC Wellington, CIV 2007-485-2168, 23 September 2008).

[6] The reason that the differing approaches become vital to a determination of this case is that there is no evidence before the Court from the defendants of any loss. Thus, whilst they submit, argue and indeed proffer evidence of breach by the plaintiffs (which is contested by the plaintiffs) they do not provide any evidence of any loss that has occurred as a result of any such breaches.

[7] The plaintiffs' position is that without loss or evidence thereof, following the Court of Appeal's judgment in *Royal Oak* there is no arguable dispute: that it goes no further than a mere dispute. That is insufficient and a stay should not be granted, which is the same thing as saying that there is no arguable defence open to the defendants, excepting of course that the onus is on the plaintiff at all times in respect to both issues; therefore summary judgment should be granted.

The Law

[8] Rule 152(1) District Court Rules 1992 provides that:

> "the Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of the claim. "

[9] Article 8(1) Schedule 1 Arbitration Act 1996 provides that:

> "a court before which proceedings are brought in a manner which is the subject of an arbitration agreement shall, if the parties so request, not later than when submitting that party's first statement on the substance of a 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] In *Royal Oak Mall Ltd v Savory Holdings Ltd* the Court of Appeal, although in the context of the 1908 Arbitration Act, ruled that the same legal test applies to an application for summary judgment and to an application for stay. In that case, the Court held that a defendant must be able to point to some material demonstrating that

there is a real issue to be determined, and that the plaintiff opposing arbitration has the onus of satisfying the Court that there is no arguable defence to his claim.

[11] The Court followed an English decision *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1978) 1 Lloyds REP 33, citing this phrase from that judgment:

> "The ordinary practice is that there must be some real basis, not a shadowy basis, for showing that there is an issue where in the investigation by the Courts. The defendant's answer amounts to no more than "we dispute the claim". That is not enough."

[12] The words "there is not in fact any dispute between the parties with regard to the matter agreed to be referred" were contained in the United Kingdom legislation at the time that the English Court of Appeal decided *Ellis Mechanical Services*, but the interpretation of the English Court of Appeal in *Ellis Mechanical Services* was nevertheless favoured by the Court of Appeal in New Zealand, despite the fact that the words contained in the English legislation were different at that time from the relevant wording of the 1908 Arbitration Act. Yet, subsequently, the New Zealand Arbitration Act 1996 enshrined the same terminology as the equivalent English statute.

[13] Subsequent to the enactment of the New Zealand Arbitration Act 1996, the High Court adopted the *Royal Oak* decision in *Yawata Ltd and Orangi Ltd v Powell,* HC Wellington, AP 142/00, 4 October 2000, where the Court said:

> "Arising out of the statement of principle a number of propositions which are relevant to this case can be stated:
>
> (a) The same threshold test is applied to the application for summary judgment and the application for stay, namely, is there a dispute to be resolved or, put another way, is there a real issue to be decided?
>
> (b) The onus is the party who opposes the arbitration to satisfy the Court that there is no arguable defence to his claim.
>
> (c) A mere plea of "I dispute your claim" will not suffice for the party seeking arbitration. There must be a real basis for the plea or, as it has also been stated, not some shadowy or insubstantial basis."

[14] The *Royal Oak* approach was also adopted by the High Court in *Fletcher Construction New Zealand Ltd v South Pacific* after the 1996 Arbitration Act was enacted. The same occurred in *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd & Ors*, HC Auckland, 27 May 2003 in relation to an application for stay under the Arbitration Act 1996.

[15] The learned author of the High Court Rules, the former McGechan J, upholds the *Royal Oak* approach and confirms that a summary judgment and stay application should be heard together. In particular at his commentary on the High Court Rules 12.9.03 he says:

> "A denial of liability in general terms is unacceptable; where there is documentary evidence supporting the defence, this should be included: *Treeways 2000 Ltd v Ryan* (1995) 8 PRNZ 398 (CA). This is particularly important where the facts of the defence are peculiarly within the knowledge of the defendant (*Farmers Trading Co Ltd v Holdgate* (1986) 1 PRNZ 26, *Pemberton v Chappell* [1987] 1 NZLR 1."

[16] In this case, the plaintiff submits, and I concur, that a defendant who wishes to raise the possibility of a counterclaim or setoff as the basis of a dispute must quantify that loss and point to an evidential foundation for it. It is not enough to suggest that a breach of contract may have occurred as not every breach of contract results in a loss. Without raising an evidential foundation for some loss, how can it be said that there is the possibility of an arguable defence?

Todd Energy

[17] Master Thompson departed from the *Royal Oak* approach twice, as I have said, and his reasoning has been applied subsequently by Dodson J in the *Body Corporate* case. However, it has to be said that, with the greatest of respect to the High Court, the Master and Dodson J do not appear to have observed that the line of authority relied upon by the Court of Appeal in *Royal Oak* was relevant to an English statute which then contained the identical words as the now New Zealand Arbitration Act 1996. Thus, any likelihood (I would have thought) of the Court of Appeal departing from its previous approach in *Royal Oak*, if required to sit on a similar problem under the 1996 Arbitration Act as opposed to the 1908 Arbitration Act, is unlikely.

[18] I am inclined, with respect, to agree with Mr Keall when he submits that Master Thompson and Dodson J misdirected themselves in failing to follow the *Royal Oak* approach as stare decisis requires that they should do.

[19] Whatever the position in respect to the superior Court to this, I consider I am bound by current precedent, and current precedent is the Court of Appeal's determination in *Royal Oak.* That means, notwithstanding the sense and the practicality of the reasoning by both Master Thompson and Dodson J in *Todd Energy* etc, I consider that I would be misdirecting myself if I was to apply a narrow approach to Article 8(1) of Schedule 1 of the Arbitration Act.

Is there any arguable dispute between the parties?

[20] There may be a very real dispute, but for it to be arguable there has to be loss, and at the moment I have nothing but a statement on oath from one of the defendants to say that as a result of the various breaches alleged by the defendants of the plaintiff, the first defendant has suffered reduced profits. That is not even reminiscent of any loss at all.

[21] At the least, I would have expected the first defendant to have produced evidence from an accountant showing the financial position of the company. I would have expected evidence of what profits were expected on the basis of information supplied and perhaps representations made by or on behalf of the plaintiffs. I would have expected an expert accountant to give evidence of any loss if, in reality, one existed, or by what amount the first defendant company should have been in profit on the basis of forecasted figures – but is not. Instead I am met by chapter and verse of the failings of the plaintiff, but nothing at all beyond those words that I have cited as to the effect upon the defendant's performance that these breaches have had.

[22] Thus I am drawn irresistibly to the conclusion that the dispute/defence is shadowy and insubstantial. It is not real. I also note with interest that of the matters which the defendants argue to be breaches of the plaintiff, most were never complained of in writing until at least one year to 15 months after the franchise agreement was signed, and met the issue of a demand by the plaintiffs for the

outstanding part of the franchise fee. Thus I agree with Mr Keall that no evidence of quantum or evidence of loss is fatal to the application for stay.

[23] In saying this, I do not mean, of course, to indicate that there is any onus upon the defendants to prove an arguable defence or dispute. Quite obviously it is the other way round. Nevertheless, it is for the defendants to point to an evidential foundation for the loss that is alleged. Having said that, of course, there is not even a loss alleged as I have already said before. The allegation is one of reduced profits.

[24] In *Mary Gray, Paul Stevenson and Karen Gray*, HC Wellington, CIV 2008-485-1935, 15 October 2008, a case where the respondent resisted summary judgment on the basis of a counterclaim but without evidence of quantum, the High Court said:

> "The difficulty for the respondent is that there is simply no evidence of the quantum of any claim at all, nor any evidence that in fact he has currently suffered any loss. The potential damages could be very modest or they could be quite large. The respondent, therefore, has not yet established that he has a credible counterclaim. It may be that the appellant has breached the terms of the contract given the house was sold without a Code Compliance Certificate. However there is currently no evidence at all that the appellant has or will suffer any loss."

[25] That neatly sums up and encapsulates the present position. The difficulty for the defendants here is that there is simply no evidence of the quantum of any claim at all, nor any evidence that in fact the first defendant has currently suffered any loss. The defendant, therefore, has not yet established that it has either a credible counterclaim or a setoff. It may be that the plaintiff has breached the terms of the contract, but there is no evidence at all that the first defendant has or will suffer any loss.

Summary

[26] The stay application will not be granted. There is no issue but that there is a wide, almost all encompassing, arbitration clause in the franchise agreement between the parties, but in this instance preferring, indeed feeling obliged, to follow the *Royal Oak* approach, I consider that I should construe Article 8(1) of Schedule 1 of the Arbitration Act 1996 broadly, so that the words "there is not in fact any dispute between the parties with regard to the matters agreed to be referred" mean in fact

"any arguable dispute between the parties with regard to the matters agreed to be referred" (excepting of course that in present instance the matters have not yet been agreed to be referred).

[27] As to summary judgment, I do not consider there is an arguable defence open to the first defendant on the papers I have before me, there being an absence of an evidential foundation for any loss. I consider, applying all of the well-known authorities which have defined, interpreted and applied r 152 of the District Court Rules 1992, such as *Pemberton v Chappell*, that the plaintiff has discharged the onus upon it and there will be summary judgment against the first defendant for the plaintiff.

Second, Third and Fourth Defendants' positions

[28] These men are guarantors of the obligations of the first defendant under the franchise agreement. No defence has been raised, no ground of opposition that the contract of guarantee which was incorporated in the franchise agreement is in any way deficient. Having granted summary judgment against the first defendant, there is, therefore, no reason to deny summary judgment against the guarantors under all of the circumstances. Accordingly, there will be summary judgment against each of those defendants as well.

Quantum

[29] The substantive judgment sum against each defendant is $112,500. The contract provides for penalty interest at 15 percent per annum from 5 February 2008 down to 24 February 2009 which was the date of demand. That now amounts to $17,753.42.

[30] There will be judgment for penalty interest on $112,500 at 15 percent per annum pursuant to the franchise agreement for the period 25 February 2009 down to 3 February 2010, making a total of $15,856.89.

[31] There will be judgment for penalty interest on the substantive sum at 15 percent per annum for the period 3 February 2010 down to the date of judgment. The total penalty interest amounts to $33,610.31.

[32] The contract provides for solicitor/client costs. The billed legal fees up until 14 December 2009 amount to $7,875 including GST. The unbilled legal fees 14 December 2009 down to 2 February 2010 amount by way of an estimate to $5,625 including GST. Then of course the plaintiff seeks filing fees and service fees, so total costs and disbursements are $14,365 including GST.

[33] I prefer not to enter judgment for solicitor/client costs in an amount at this stage because there will be further legal fees for today's hearing and in any event the figure for unbilled work between 14 December 2009 and 2 February 2010 is an estimate only. Suffice to say for the purposes of this judgment that solicitor/client costs in the sum of $7,875 including GST will be permitted with additional solicitor/client costs once proved to the satisfaction of the Court up until and including today's hearing.

[34] There will of course be the filing and service fees included within the memorandum of quantum that has been filed.

M-E Sharp
District Court Judge