4 of 4 DOCUMENTS: New Zealand Law Reports/2002 Volume 3/Pathak v Tourism Transport Ltd - [2002] 3 NZLR 681 - 20 August 2002

Pages: 14

Pathak v Tourism Transport Ltd - [2002] 3 NZLR 681

High Court Auckland
CP 641-SW/01

12, 14, 20 August 2002
Heath J

Access Linxplus and NZ Unreported Judgments

Practice and procedure -- Stay of proceedings -- Arbitration agreement -- Whether seeking interim relief from Court and taking other procedural steps constituted submission to jurisdiction of Court -- Whether plaintiff had submitted its "first statement on the substance of the dispute" -- Whether Court proceedings should be stayed -- Arbitration Act 1996, First Schedule, arts 8 and 9.

The parties were in dispute in relation to a franchise agreement which contained an arbitration clause. The plaintiffs sought interim relief in the High Court, and that application was resolved as a result of undertakings given by the defendant. In making that application the plaintiffs referred to the arbitration clause in the agreement, and contemplated the use of arbitral proceedings to finally resolve the dispute. The plaintiffs then took further procedural steps in the Court proceedings, including seeking and providing further particulars, carrying out discovery and inspection of documents and attending a directions conference. They then filed an application for stay of the proceedings and for an order referring the dispute to arbitration in accordance with the arbitration clause. The defendant opposed the application on the grounds that the plaintiffs had submitted to the jurisdiction of the Court.

Article 8 of the First Schedule to the Arbitration Act 1996 provided that the Court shall stay proceedings "if a party so requests not later than when submitting that party's first statement on the substance of the dispute". Article 9 provided that it is not incompatible with an arbitration agreement to seek interim relief from a Court.

Held:

In making the application for interim relief, the plaintiffs had not been submitting the substantive dispute to the Court. The application was made with reference to the arbitration agreement and sought interim relief only. Had a stay been sought immediately after the resolution of the interim relief application, it would have been granted. However, an election to submit the substantive dispute to the Court could be inferred if after an interim application had been determined, the relevant party proceeded with the Court proceeding and therefore adopted the earlier statement as a statement on the substance of the dispute. The plaintiffs had done that in this case by not commencing arbitral proceedings immediately after interim relief was resolved but instead taking further significant steps in the proceeding. The plaintiffs had therefore submitted their first statement on the substance of the dispute and it was now too late to seek a stay (see paras [48], [49], [50], [52]).

Marnell Corrao Associates Inc v Sensation Yachts Ltd (2000) 15 PRNZ 608 applied.

The Property People Ltd v Housing New Zealand Ltd (1999) 14 PRNZ 66 distinguished.

Application refused.

Other cases mentioned in judgment

Anderson Switchboards & Electronics Ltd v Schneider Electrical (NZ) Ltd (High Court, Auckland, M 1215-IM00, 16 January 2001, Master Kennedy-Grant).

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 1 All ER 664.

Coastal Tankers Ltd v Port Wellington Ltd (High Court, Wellington, CP 32/99, 18 February 1999, Doogue J).

Downing v Al Tameer Establishment [2002] EWCA Civ 271.

Fisken & Associates Ltd v Frew (High Court, Dunedin, CP 33/01, 24 August 2001, Master Venning).

Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd [2000] 3 NZLR 318 (CA).

Hurihanganui v New Zealand Post Ltd (High Court, Auckland, M 653/98, 3 June 1998, Master Kennedy-Grant).

Roose Industries Ltd v Ready Mixed Concrete Ltd [1974] 2 NZLR 246 (CA).

Todd Energy Ltd v Kiwi Power (1995) Ltd (High Court, Wellington, CP 46/01, 29 October 2001, Master Thomson).

Application

This was an application by Mr A K Pathak, first plaintiff, and Inner City Service (88) Ltd, second plaintiff, for a stay of the proceedings they had filed against Tourism Transport Ltd and an order referring the dispute to arbitration in accordance with an arbitration clause in an agreement between the parties.

R J Katz QC for the plaintiffs.

M J Tingey for the defendant.

Cur adv vult

HEATH J.

[1] The issue for my determination in this case was whether a stay of curial proceedings should be ordered to permit the parties to go to arbitration. That issue turns upon the true construction of the phrase "if a party so requests not later than when submitting that party's first statement on the substance of the dispute [to a Court]" in art 8 of the First Schedule to the Arbitration Act 1996 (the Act).

[2] On 14 August 2002 I issued a judgment in which the following orders were made:

(a) The application to stay the proceeding was dismissed;
(b) costs, on a 2B basis, were awarded in favour of the defendant on the application, together with disbursements. Those costs and disbursements are to be fixed by the Registrar, after hearing from the parties. Should there be any disputes between the parties the Registrar is to refer those disputes to me for resolution; and
(c) the proceeding has been adjourned for mention before Master Faire at 11.45 am on 6 September 2002 in the Master's Chambers List. At that

time the Master will allocate a date for the hearing of the application for further and better discovery which remains extant.

[3] I indicated that reasons for that judgment would be given as soon as practicable. These are my reasons for judgment.

Background

[4] This proceeding was commenced on 28 November 2001. It concerns a franchise agreement (the agreement) relating to the operation of the "Super Shuttle" business. This is a business operated by various franchisees which (among other things) provides a service to transport members of the public to airports.

[5] The proceeding was commenced by the filing of a notice of proceeding statement of claim. Contemporaneously, an interlocutory application was made for the issue of an interim injunction. While no reference was made in that application for an interim injunction to art 9 of the First Schedule to the Act (which the plaintiffs now say was the source of jurisdiction for the Court to issue an injunction), reference was made, in Mr Pathak's affidavit in support of the application, to the existence of an arbitration clause in the agreement: that is, cl 12 of the agreement.

[6] There are no statements in Mr Pathak's affidavit to say that it was intended to refer the dispute to arbitration. But it is clear that Mr Pathak was under the impression, from advice received by him, that it was necessary to apply to the Court for interim relief as the arbitration procedure was not underway. In addition, Mr Pathak said that he was "quite content to have the dispute between [him], [his] company and Tourism Transport referred to arbitration". I refer to paras 57 - 59 of Mr Pathak's affidavit of 25 November 2001.

[7] The agreement is dated 25 September 1997. The franchisor is shown to be Nationwide Shuttles Ltd. The franchisee, in the particular agreement in issue in this case, is shown as "Inner City Services". It transpires that Mr Pathak operates his business under the name of Inner City Services (88) Ltd. Thus, a discrete question arises as to the appropriate plaintiff. Mr Pathak sues as first plaintiff. His company sues as second plaintiff.

[8] The agreement was for an initial term of three years commencing on 1 July 1997. It was due to expire on 30 June 2000. Thereafter, provided the franchisee honoured the terms of the agreement it was intended to be renewed at three-yearly intervals.

[9] At some time in September/October 1998 the business of Nationwide Shuttles Ltd was acquired by DK Group Ltd. After two changes of name, that company is now known as Tourism Transport Ltd.

[10] As indicated earlier, the agreement contains an arbitration clause. That clause is an "arbitration agreement" for the purposes of the Act: see the definition of "arbitration agreement" set out in s 2 of the Act. Clause 12 is the relevant contractual provision. It states:

> "**12.** In the event of any dispute or difference arising between the parties hereto, concerning the appointment then such dispute or difference shall be referred to arbitration, by a single arbitrator to be agreed upon between the parties hereto or failing agreement, by two arbitrators, (and in the case of their disagreement, to their umpire) one arbitrator to be appointed by the Company and the other to be appointed by the Contractor. The arbitration
>
> *[2002] 3 NZLR 681 page 684*
>
> shall be conducted under and in accordance with the provisions of the Arbitration Act 1908 or any re-enactment or modification thereof for the time being in force."

[11] Given that the agreement is dated 25 September 1997, it is clear that the reference to the Arbitration Act 1908 was an error. All parties agree that the Arbitration Act 1996 was then in force and applies in this case.

[12] Mr Pathak and Inner City Services (88) Ltd issued the current proceedings because they feared Tourism Transport Ltd intended to terminate the agreement. Correspondence had passed between solicitors representing the parties in which the solicitors for Tourism Transport Ltd, as a result of a complaint made by Mr Knox of the Bible College of New Zealand, complained in a letter dated 29 October 2002 about the conduct of Mr Pathak. Tourism Transport Ltd took the view that those complaints were such "as to cause the shuttle service to be held in disrepute by the customers" for the purposes of cl 17(e) of the agreement. It is unnecessary for me to address those underlying complaints in this judgment.

[13] As a result of undertakings given by Tourism Transport Ltd after the issue of the interim injunction application, the application for interim relief was resolved. The undertakings are recorded in a Minute made by Williams J on 5 December 2001 when the proceeding was called in the Duty Judge List. Leave was reserved to the parties to apply on three days' notice for variation or rescission of the undertakings.

Status of current proceedings

[14] Subsequent to the giving of the undertakings, the following significant steps have been taken by the plaintiffs in the proceeding:

(a) The plaintiffs sought further and better particulars of the defendant's statement of defence by a notice dated 15 January 2002;
(b) the plaintiffs provided further particulars of their statement of claim on 15 January 2002;
(c) a verified list of documents was sworn (on 30 April 2002);
(d) the plaintiffs filed a memorandum of counsel setting out a summary of the plaintiffs' claim and attended at a directions conference on Wednesday 29 May 2002 before the Master; and
(e) the plaintiffs inspected documents contained in the defendant's list of documents on 17 June 2002.

[15] Notwithstanding those developments, in their memorandum filed in anticipation of the directions conference on 29 May 2002, the plaintiffs signalled, through counsel, an intention to apply to this Court for an order staying the proceeding and referring the dispute to arbitration in accordance with the provisions of cl 12 of the agreement. They relied upon the terms of art 8 of the First Schedule to the Act.

The present application

[16] The Court's jurisdiction to stay proceedings so that they can be referred to arbitration is set out in art 8 of the First Schedule to the Act. Article 8 provides:

> **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*
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> *[2002] 3 NZLR 681 page 685*
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> *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.
> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court. (Emphasis added.)

[17] The Court is required to stay the proceeding under art 8 if the request to stay is made "not later than [the time that party's] first statement on the substance of the dispute" is made. No suggestion is made that the arbitration agreement contained in cl 12 of the agreement is null and void, inoperative or incapable of being performed. Neither is it suggested that there is no dispute between the parties with regard to matters agreed to be referred.

[18] The jurisdiction under art 8 is quite different from the jurisdiction to stay that existed under the earlier arbitration legislation: see s 5 of the Arbitration Act 1908. Section 5(1) of the 1908 Act provided:

> **5. Power of Court to stay proceedings where there is a submission** -- (1) If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings, may, at any time before filing a statement of defence or a notice of intention to defend or taking any other step in the proceedings, apply to the Court in which the proceedings were commenced to stay the proceedings; and that Court may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

[19] The fundamental difference between art 8 of the Act and s 5(1) of the 1908 Act is that while the 1908 Act gave a *discretion* to the Court to stay arbitral proceedings (as to the exercise of which see, for example, *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246 (CA) at p 249), art 8 is *mandatory* in its terms: the Court *shall* stay a proceeding if the party requesting a stay makes the request not later than when submitting that party's first statement on the substance of the dispute. For the reasons set out in para [17] above, there is no need, in the context of this particular case, to address the other circumstances in which a Court will refuse to make an order staying the curial proceeding.

[20] The question whether the Court is obliged to refer the dispute to arbitration turns on whether the plaintiffs, prior to the date on which an application for stay was made, submitted its first statement on the substance of the dispute to the Court.

Interpretation of art 8: what is meant by "submitting that party's first statement on the substance of the dispute"?

Introductory observations

[21] When the Act was passed in 1996 it signalled a change in attitude and approach to arbitration in New Zealand. For the first time there was a legislative statement of purpose which made it clear that the Act was passed (among other things):

(a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes;
(b) to promote consistency between international and domestic arbitral regimes in New Zealand;
(c) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
(d) to promote international consistency of arbitral regimes based upon the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985. Unlike international conventions which are negotiated by authorised government representatives and require legislative adoption in whole or with a reservation as to part, a "Model Law", is formulated after discussions among both governmental representatives and non-governmental organisations at meetings facilitated by UNCITRAL. The Model Law provides a series of provisions which can be adopted, adapted or not adopted in any jurisdiction (whether or not it has participated in the formulation process) in whole or in part.

See s 5(a), (b), (c) and (d) of the Act.

[22] The international origins of the Act were also acknowledged in s 3 of the Act. That section entitles a Court or an arbitral tribunal to refer to the travaux préparatoires of UNCITRAL or its working group on arbitration which formulated the Model Law. (The travaux préparatoires can be found at the UNCITRAL website (http://www.uncitral.org/en-index.htm) under "Travaux Préparatoires".) Section 3 of the Act provides:

> **3. Further provision relating to interpretation** -- The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law referred to in section 5(b) and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law.

[23] The Act adopted the Model Law as the foundation of New Zealand arbitration law. Its enactment followed a discussion paper and a later report issued by the Law Commission: see "Arbitration" (NZLC PP7, 1988) and "Arbitration" (NZLC R20, 1991). In some cases the words of a provision contained in the Model Law are adopted in whole. In other cases, the provisions have been specifically adapted to meet New Zealand needs.

[24] It is generally accepted that there are four principles which can be distilled from s 5 of the Act which articulate the philosophical bases upon which the Act is underpinned. Those four principles can be summarised as follows:

(a) *Party autonomy*

This principle emerges from s 5(a) of the Act. There are many provisions within the Act and the First and Second Schedules which provide default rules which may be ousted by agreement to the contrary by the parties. The overall intention is to provide a framework within which parties to a dispute can determine the most appropriate procedures for their arbitration. As D A R Williams QC and F J Thorp noted, in *Arbitration for the 21st Century - A Practical Guide* (New Zealand Law Society Seminar, September 2001) at p 5:

> "This freedom to choose creates enormous potential for arbitration under the Act to be a speedy and cost effective method of dispute resolution. Practitioners have the ability to create imaginative and innovative solutions tailored to the individual needs of their clients and the nature of the dispute."

The principle of party autonomy is reinforced by s 6(1) of the Act. The provisions of the First Schedule to the Act apply to all New Zealand domestic arbitrations. But, within the procedural rules set out in the First Schedule are many provisions which remain subject to variation by agreement between the parties: for example, arts 10, 11, 19, 20, 21, 23, 24, 25, 26 and 28. The procedural provisions set out in the Second Schedule of the Act apply unless expressly removed by the parties. Accordingly it is possible for parties to agree that none of the provisions contained in the Second Schedule shall apply to their arbitration. That includes the ability to exclude a right of appeal to this Court under cl 5 of the Second Schedule to the Act.

(b) *Equality of treatment*

Article 18 of the First Schedule to the Act requires each party to be treated with equality. Each party must also be given a full opportunity of presenting its case. The Law Commission described art 18 as "the cornerstone of the procedural provisions of the Model Law": (NZLC R20 at para 339).

(c) *Reduced curial involvement in arbitral process*

This principle springs from s 5(d) of the Act. Williams and Thorp at pp 6 - 7, helpfully refer to a number of specific provisions which reinforce the principle. As examples:

(i) First, art 5 of the First Schedule states:

> **5. Extent of court intervention** -- In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule.

(ii) Secondly, specific instances where powers of the Court had been circumscribed by the Act were identified: the learned authors referred, in particular, to arts 8, 9, 12, 13, 16 and 34 of the First Schedule to the Act.

These limitations on the Court's involvement in the arbitral process were also emphasised in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at pp 322 - 323 (paras [14] and [15]).

(d) *Increased powers for the arbitral tribunal*

This principle, like the principle of reduced curial involvement springs from s 5(d) of the Act and is reinforced by the party automony

principle. An arbitral tribunal now has power to award any "remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court": s 12(1)(a) of the Act. The arbitral tribunal is expressly empowered to rule on its own jurisdiction (art 16 of the First Schedule) with limited rights of recourse to this Court: see art 16(3). And, further, the arbitral tribunal itself can order interim measures with any such order being enforced as if an award: art 17 of the First Schedule.

[25] It is against that general background that the express provisions of art 8 fall for consideration.

Approach to interpretation of art 8

[26] Section 5 of the Interpretation Act 1999 requires a Court to ascertain the meaning of an enactment "from its text and in light of its purpose": s 5(1).

[27] In interpreting the Arbitration Act 1996, I note:

(a) there is a clear statement of purpose to be found in s 5;
(b) there are also the principles which underpin the Act to which I have referred in para [24] above; and
(c) there is the international origin of the Act which must be taken into account - as recognised by ss 3 and 5(b) and (c) of the Act.

[28] In approaching the interpretation of art 8 I remind myself that the part of art 8 with which I am concerned has been adopted verbatim from the Model Law. The only words which have been added to art 8(1) are the concluding words "or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred" which were inserted to maintain the integrity and efficiency of the summary judgment procedure used in this Court and the District Court for cases in which there was no arguable defence. Reference is made to that policy decision in the Law Commission report at para 309: NZLC R20 at p 167. However, practical difficulties with that addition have already been identified: see, for example, *Todd Energy Ltd v Kiwi Power (1995) Ltd* (High Court, Wellington, CP 46/01, 29 October 2001, Master Thomson).

[29] In interpreting art 8 it is important not to undermine the purpose of the provision by concentrating on the particular manner in which certain types of curial proceedings should be commenced: that is, whether the proceedings ought to be commenced by notice of proceeding and statement of claim, or alternatively, by originating application. The words of the Model Law have been adopted to ensure a consistency of approach throughout jurisdictions which base their arbitration law on the UNICTRAL Model Law. Those jurisdictions include both common law and civil law countries. Any approach to the interpretation of a provision such as art 8 which places too much emphasis on the domestic choices for commencement of curial proceedings has the potential to undermine the policy objective of consistency of approach internationally.

[30] In addition, I emphasise that the words which have been adopted from the UNCITRAL Model Law were used in the Model Law without any predisposition towards a particular system of law (that is, civil or common law) or case management practices in any particular jurisdiction.

The competing contentions

[31] Mr Katz QC began his submissions by drawing a distinction between the test set out in art 8 of the First Schedule and the test for a stay which has been enacted in the United Kingdom. The test adopted in the United Kingdom is, in truth, an *adaptation* of art 8 of the Model Law. Section 9 of the Arbitration Act 1996 (UK) (the UK Act) entitles a defendant to apply for a stay of curial proceedings. A plaintiff may not apply for a stay under the UK Act. The UK Act requires the Court to grant a stay "unless satisfied that the Arbitration Agreement is null and void, inoperative, or incapable of being performed": s 9(4) of the UK Act. A defendant becomes disentitled from seeking a stay if it has taken a procedural step in the curial proceedings which, in effect, is a submission to the jurisdiction of the Court: s 9(3) of the UK Act.

[32] Like the Model Law, art 8 of the First Schedule to the Act entitles either a plaintiff or a defendant to seek a stay. The phrase "if a party so requests not later than when submitting that party's first statement on the substance of the dispute" must, Mr Katz submits, be interpreted in that context.

[33] In Mr Katz's submission a stay should be granted unless I am satisfied that the plaintiffs have committed themselves to a trial on the merits of the dispute before the Court. Mr Katz submits that I am entitled to treat the original statement of claim in the current proceeding as a statement for the purposes of interim relief only; on that basis he submits that I should not treat it as a statement on the substance of the dispute. Mr Katz calls in aid observations made by Potter LJ in *Downing v Al Tameer Establishment* [2002] EWCA Civ 271. That case involved an appeal from the grant of a stay of proceedings under s 9 of the UK Act. In delivering the principal judgment of the Court of Appeal (with whom Keene LJ and Sumner J agreed) Potter LJ said at para 35:

> ". . . we consider (contrary to the view of the judge) that the position of a party issuing a writ following a repudiatory breach of the arbitration agreement is different from that of a person issuing proceedings simply to test the water. The question of whether or not the issue and service of proceedings is an unequivocal acceptance of the repudiation will depend upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings are commenced, the fact of the issue and service of the writ amounts to an unequivocal communication to the defendant that his earlier repudiatory conduct has been accepted, in the sense that it is clear that the issue of such proceedings (i) is a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflects a consequent decision on the claimant's part himself to abandon the remedy of arbitration in favour of court proceedings."

[34] The contractual analysis undertaken by Potter LJ is, in Mr Katz's submission, appropriate. An arbitral tribunal derives its jurisdiction from a contract entered into between the parties. Accordingly, the question whether the parties have agreed to depart from their original bargain should be considered on a contractual analysis.

[35] Mr Katz submits that there is nothing in the evidence to suggest that the plaintiffs have filed a statement on the substance of the dispute. In effect, Mr Katz submits that the first statement on the substance of a dispute does not necessarily equate to the first statement of claim filed in a Court proceeding. Accordingly, he submits that I am required to order a stay.

[2002] 3 NZLR 681 page 690

[36] Mr Katz also places some reliance on the fact that there are other arbitral proceedings in existence involving other franchisees. It is likely that an application would be made, if a stay was ordered, to consolidate the arbitral proceedings: see cl 2 of the Second Schedule to the Act. But the jurisdiction to consolidate is one vested in the relevant arbitral tribunal. Accordingly, I say no more about that subject.

[37] Mr Tingey's submissions are much less elaborate. He submits that when the statement of claim was filed the plaintiffs submitted their first statement on the substance of the dispute to the Court. That, he says, is sufficient to remove the jurisdiction of this Court to order a stay. Like Mr Katz, he submits that there is no general discretion to order a stay.

[38] In answer to the possible objection that it was necessary to issue Court proceedings to obtain interim relief (as arbitral proceedings had not been commenced at the relevant time) Mr Tingey points to the following factors which, he submits, militate against a conclusion that the first statement of claim should not be treated as a statement on the substance of the dispute:

(a) Interim relief under art 9 of the First Schedule to the Act can be sought by originating application to the High Court: see R 458D(1)(a)(xxiii) of the High Court Rules 1985. If relief had been sought in that way no statement of claim would have been required;
(b) Reliance was not placed on art 9 when interim relief was sought from the Court; and
(c) By their conduct, after interim relief was addressed by the Court, the plaintiffs effectively adopted the original statement of claim as their statement on the substance of the dispute.

The issue of interim relief

[39] The jurisdiction for this Court to grant interim relief in anticipation or in aid of an arbitral tribunal is set out in art 9 of the First Schedule to the Act which provides:

> **9. Arbitration agreement and interim measures by court** --
> (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.
> (2) For the purposes of paragraph (1), the High Court or a District Court shall have the same power as it has for the purposes of proceedings before that court to make -
> (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or
> (b) An order securing the amount in dispute; or
> (c) An order appointing a receiver; or
> (d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
> (e) An interim injunction or other interim order.
>
> (3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

[2002] 3 NZLR 681 page 691

[40] Article 9(1) of the First Schedule to the Act makes it clear that an application for interim relief from a Court is not to be regarded as incompatible with the arbitral process. In effect, the Court is requested to act in aid of and to assist the arbitral process by ordering interim measures of protection which an arbitral tribunal, cannot, for practical or legal reasons, order. I adopt, with respect, observations made by Wild J in *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 at pp 625 - 626. At para [74], p 625, Wild J said:

> "**[74]** I require no persuasion that the Court's jurisdiction under art 9 is limited to 'interim measures of protection' which the arbitral tribunal cannot take soon enough, ie cannot order in time to give necessary protection."

At p 626, also within para [74], Wild J noted that in his view:

(a) the Court's jurisdiction to grant interim relief is no greater, except in the case of third parties, than the powers conferred upon the arbitral tribunal by art 17 of the First Schedule; and

(b) the observations of Lord Mustill, delivering the leading speech of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at p 365 should be approved. His Lordship noted that the purpose of interim measures of protection was not to encroach on the procedural powers of an arbitral tribunal but, rather, to reinforce them and to render more effective the decision at which the arbitral tribunal ultimately arrives on the substance of the dispute.

With respect, I agree with Wild J's observations on those points.

The authorities

[41] There have been a number of cases in which art 8 has been interpreted by this Court. I now consider those decisions.

[42] In *The Property People Ltd v Housing New Zealand Ltd* (1999) 14 PRNZ 66, a defendant in curial proceedings sought a stay under art 8. The application was resisted by the plaintiff on the ground that the defendant had submitted to the jurisdiction of the Court. Salmon J concluded that in filing a response to an interim injunction application the defendant submitted to the jurisdiction of the Court. His Honour considered that certainty was desirable in matters of this type; he concluded that certainty was assured by giving the words of art 8(1) their ordinary meaning. Accordingly, Salmon J held that the notice of opposition to the interim injunction application and the affidavits filed in support did constitute a statement by the defendant on the substance of the dispute thereby depriving the defendant of the right to seek a stay. I refer in particular to para [24], p 71. At para [24] Salmon J said:

> "**[24]** It is desirable that there be certainty in these matters. Certainty is assured by giving the words of art 8(1) their ordinary meaning. In my view it is clear that the notice of opposition to the interim injunction application and the affidavits filed in support thereof did constitute a statement by the defendant on the substance of the dispute. *In order to be able to rely on art 8(1) the defendant should have applied for a stay at least prior to the hearing of the interim injunction application*. Its failure to do so means that it cannot rely on art 8." (Emphasis added.)

[43] Master Kennedy-Grant considered the issue in the context of a curial proceeding in which an amended statement of claim had been filed. In *Hurihanganui v New Zealand Post Ltd* (High Court, Auckland, M 653/98, 3 June 1998) Master Kennedy-Grant said at p 3:

> "I have no doubt that, whether or not the plaintiff's original statement of claim filed at the same time as his application for an interim injunction should be regarded as his first statement on the substance of the dispute, his amended statement of claim filed on 7 May 1998 clearly should be regarded as that statement. That being so, his application for a stay is made later than when submitting his first statement on the substanceof the dispute and thus is out of time."

[44] In *Coastal Tankers Ltd v Port Wellington Ltd* (High Court, Wellington, CP 32/99, 18 February 1999) Doogue J considered an application by a defendant to stay injunction proceedings which was made without prejudice to an appearance under protest to the jurisdiction of the Court. The protest had been entered because of the existence of an arbitration agreement. Doogue J was prepared to grant the application. The judgment was concerned mainly with the question whether the interim injunction application should succeed. Accordingly, with respect, there is little of assistance to be derived from that decision.

[45] In *Anderson Switchboards & Electronics Ltd v Schneider Electrical (NZ) Ltd* (High Court, Auckland, M 1215-IM00, 16 January 2001) Master Kennedy-Grant considered whether the existence of an arbitration agreement to deal with disputes arising between the parties was sufficient to defeat a statutory demand which the applicant sought to set aside. The Master held that it was not. In relation to art 8(1) of the First Schedule to the Act, the Master took the view that the affidavit filed on behalf of the applicant was the "first statement on the substance of the dispute"; accordingly, an application for stay was out of time. Responding to para [24] of Salmon J's judgment in *The Property People*

Ltd, Master Kennedy-Grant, at p 6, took the view that where a party filed a substantive affidavit in a proceeding of that type it was its first statement on the substance of the dispute for the purposes of art 8.

[46] Finally, I refer to the decision of Master Venning in *Fisken & Associates Ltd v Frew* (High Court, Dunedin, CP 33/01, 24 August 2001). The issue for the Master was whether Mr and Mrs Frew had lost their right to refer the dispute to arbitration by failing to request a reference to arbitration when responding to the application for an interim injunction brought by the plaintiff. The Master, following Salmon J's decision in *The Property People Ltd* held that the response was one which did deny Mr and Mrs Frew the right to seek a stay under art 8.

Conclusions

[47] In my view, a critical distinction is to be drawn between a party who initiates curial interim injunction proceedings in anticipation or in aid of arbitral proceedings and a plaintiff who does not. If proceedings are issued to seek an interim injunction without reference to the arbitration agreement, I am of the view that *The Property People Ltd* and the cases which follow apply to prevent a plaintiff who issues such proceedings from subsequently seeking a stay. Similarly, a defendant who opposes interim relief and fails to seek a stay (or protest jurisdiction) in respect of the substantive dispute will also be prevented from seeking a stay: see *The Property People* at para [24].

[48] This case is, however, different. The plaintiffs clearly contemplated the commencement of arbitral proceedings to resolve any disputes. If:

(a) the plaintiffs had relied expressly on art 9 of the First Schedule to the Act to justify the grant of an interim injunction; and
(b) the proceedings been initiated under the originating application procedure (as submitted by Mr Tingey),

the fact that the application for interim relief did not amount to a submission of the substance of the dispute to the jurisdiction of the Court would have been much clearer. But, in my view, the true test to be applied under art 8 is whether the plaintiffs submitted the substantive dispute to the jurisdiction of the Court. The reference to the "first statement on the substance of the dispute" (in art 8) must be read in that context.

[49] Had a stay been sought immediately after the resolution of the application for interim relief I would have been prepared to stay the curial proceedings.

[50] However, arbitral proceedings were not commenced immediately after the application for interim relief was resolved. Indeed, it is arguable that arbitral proceedings were not commenced until March 2002. During that time the plaintiffs had taken significant steps in the proceeding, including the seeking of further and better particulars of the statement of defence and providing further particulars of their statement of claim. In addition, a verified list of documents was sworn. It is no answer, in my respectful view, for Mr Katz to say that those steps were required by the case management process. If the plaintiffs wished to resolve matters by arbitration they were required to seek a stay. In my view, a stay should not be granted unless an application under art 8 is filed, at the latest, immediately upon resolution of interim relief issues.

[51] I have reached the view that art 8 of the First Schedule to the Act should be interpreted in the manner set out above because:

(a) An approach to the interpretation of art 8 which focuses on whether the documents filed in a curial proceeding have been filed for the purpose of interim relief under art 9 of the First Schedule:
    (i) promotes arbitration as an agreed method of resolving disputes (s 5(a) of the Act) because it treats the curial proceedings filed to seek interim relief as ancillary to the arbitral process: this also promotes the principle of party autonomy: see para [24](a) above;
    (ii) is consistent with the underlying principles of the Act which both reduce judicial involvement in the arbitral process and increase the powers available to the arbitral tribunal to undertake its task: see para [24](c) and (d) above.
    (iii) promotes international consistency with regard to the interpretation of provisions *adopted* (as opposed to *adapted*: cf s 9 of the UK Act) from the UNCITRAL Model Law by not focusing narrowly on domestic procedural rules when interpreting an instrument with international origins; see s 5(b) of the Act; and

(iv) is consistent with the approach to interim relief adopted by Wild J in *Marnell* with which I have expressed respectful agreement: see para [40] above.

(b) A test which disentitles a party from seeking a stay of the curial proceedings once it elects to use those proceedings to address the substance of the dispute is also consistent with the principles set out in para [24](a) above.

(c) None of the authorities discussed in paras [42] - [46] above require me to adopt a different approach. This is the first occasion on which the issue has arisen squarely for consideration. In *The Property People*, the question was not whether the plaintiff seeking interim relief was thereafter barred from relying on the arbitration agreement but whether a defendant who defended interim relief proceedings was barred if it did not either seek a stay or, at least, make it clear that it protested the Court's jurisdiction to determine the substantive dispute. See in particular paras [22] - [24] (inclusive) of *The Property People* at pp 70 - 71. While Salmon J (obiter) stated that a stay should have been sought prior to the *hearing* of the interim application (see *The Property People* at para [24]), I prefer an approach which leaves open the possibility of seeking a stay immediately after interim relief issues have been resolved. However, the precise timing of an application may be important in the context of a particular case. Best practice dictates that an application for stay should be made as soon as possible to avoid the possibility that a Court might hold that the party has submitted the substantive dispute to the jurisdiction of the Court.

(d) My approach also promotes a predictable response by the Courts to cases of this type. While I prefer the term "predictability" there is no material distinction between my view and Salmon J's emphasis on "certainty" in para [24] of *The Property People*.

[52] In determining whether there has been a statement on the substance of the dispute this Court should focus on whether a particular party has elected to submit the substantive dispute to the jurisdiction of the Court. In the context of an interim relief application such an election can be inferred if, after the application is determined, the relevant party proceeds with its curial proceedings and thereby adopts the earlier statement as a statement on the substance of the dispute.

[53] Accordingly, I hold that, by subsequent election, the plaintiffs adopted their initial statement on the substance of the dispute for substantive purposes by continuing to take steps in the proceeding after the interim relief application had been resolved.

Result

[54] For the reasons I have given I made an order on 14 August 2002 dismissing the application to stay the proceedings and awarded costs in favour of the defendant.

[55] I thank counsel for their considerable assistance at the hearing before me.Application refused.

Solicitors for the plaintiffs: *Gellert Ivanson* (Auckland).

Solicitors for the defendant: *Bell Gully* (Auckland).

Reported by: Graeme Palmer, *Barrister*