IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-5279
[2014] NZHC 2082

BETWEEN	JOHN TAMIHERE First Plaintiff
AND	CONSULTUS DOWN UNDER LIMITED Second Plaintiff
AND	MEDIAWORKS RADIO LIMITED Defendant

Hearing: 18 June 2014

Counsel: T J G Allan and J E M Lethbridge for Plaintiffs
J Miles QC and R J Hollyman for Defendant

Judgment: 1 September 2014

JUDGMENT OF SIMON FRANCE J

Introduction

[1] The plaintiffs have filed proceedings alleging a breach of contract. In addition the first plaintiff alleges that the defendant has defamed him.

[2] The defendant applies for a stay of these proceedings on the basis that the subject matter of the proceedings is covered by an arbitration clause in the contract between the parties that existed at the time the events in question occurred. The plaintiffs dispute that the arbitration agreement applies.

Facts

[3] Mr Tamihere co-hosted, with Mr Willie Jackson, a talkback radio show on the defendant's RadioLive network. Mr Tamihere had been a host at the station for many years.

[4] On 5 November 2013, the show focussed on a then topical issue. A group of young men who were called the Roastbusters were placing statements on social media claiming to have been engaging in various forms of sexual conduct with underage and intoxicated girls. Understandably this provoked considerable public reaction and prompted debates about the adequacy of the response by police and other officials to the situation.

[5] As part of their coverage of this issue the hosts interviewed, on air, a young woman called Amy who claimed knowledge of the young men and women involved. The nature of the interview, and comments made to her by the hosts of the show, also provoked a strong public reaction. Hundreds of complaints were made to the network, and businesses withdrew advertising from RadioLive. The defendant plainly needed to contain the situation.

[6] At a meeting on 10 November 2013 between the hosts and two RadioLive executives, it was determined that the show would be taken off air for the balance of 2014. The following day the two hosts read out what is said to be an agreed statement advising of the situation concerning the show, and confirming it would be off-air for the balance of the year. The statement was also placed on the defendant's website. The contents of this statement are the first alleged defamation.

[7] Mr Tamihere's contract expired on 31 December 2013. The defendant decided not to enter into a further arrangement. Instead, in mid-December it issued a press release announcing that a new host, Ms Alison Mau, would be joining up with Mr Jackson to host a show. The contents of this statement are the second alleged defamation.

[8] The alleged breach of contract arises from the 10 November 2013 meeting which concerned what to do about the fallout occurring from the show ([6] above). Mr Tamihere claims that at this meeting, at the time it was agreed the show would go off air, it was also agreed that he would return in 2014. It is said a contract was thereby formed. The subsequent decision to not offer him work in 2014 is the alleged breach.

[9] The defendant denies that any agreement was reached at this meeting. It says that subsequently it undertook its regular annual review of its shows and the decision not to continue with Mr Tamihere was made at that time.

Pleadings

[10] Concerning the breach of contract claim, the plaintiffs pleaded that an agreement was reached at the meeting of 10 November 2013 that:

(a) Mr Tamihere would return in 2014 and co-host the show with Mr Jackson;

(b) the term would be for 12 months from 1 January 2014, being the same period as the previous contract; and

(c) the fee was $10,000 per month.

[11] This pleading is found in what is the second amended statement of claim. In earlier iterations, the claim initially was that the 2013 contract had been "rolled over", and then that a "renewal" had been agreed to.

[12] The defamation claim concerns the two publications. There is an alternative pleading of injurious falsehood. At the hearing, Mr Allan for the plaintiffs said the primary focus of the defamation claim will be on the alleged innuendo underlying these publications. The innuendo is that Mr Tamihere was sacked for breaching broadcasting standards, and that the breaches were solely the responsibility of Mr Tamihere.

Existing Contract

[13] The contract existing in 2013 was between the second plaintiff, Consultus Down Under Ltd, and RadioWorks Ltd. Clause 1 of the contract provided that it was fundamental to the agreement that the services provided for in the contract were performed by Mr Tamihere.

[14] The contract covered the period 1 March 2013 to December 2013. Clause 4 of the contract identifies the services that the contractor is to provide. These relate to producing and presenting the show, and being available for promotional work. The contract stipulates the relationship to be one of independent contractor. There is a three month restraint of trade clause. The contract is governed by New Zealand law and it contained no renewal clause.

[15] The contract contained an arbitration agreement which is headed "Disputes" and provides:

> If a dispute arises between the Parties about interpreting or implementing this Agreement, or in relation to the provision of the services generally, the Parties agree to follow the process set out below:
>
> a) Negotiate: [omitted]; and
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> b) Mediation: If the dispute cannot be resolved by negotiation within twenty (20) working days of the dispute arising, the parties will refer the dispute to mediation … [omitted]; and
>
> c) Arbitration: If the dispute is not resolved within twenty (20) working days of the reference to mediation, then the Parties will refer the dispute to arbitration … [omitted];
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> d) [omitted];
>
> e) Neither party may require arbitration or issue legal proceedings (other than those for interlocutory relief) in respect of any such dispute unless that party has taken all steps to reasonably comply with this dispute resolution clause.

[16] This contract followed on from a similarly worded written contract that ran initially from 1 June 2010 to 1 June 2012, and was extended by written agreement to 31 December 2012. The present contract is worded to start as at 1 March 2013. There was, therefore, a two month period when Mr Tamihere continued to work without there being a written agreement expressly covering the situation.

[17] The parties are in dispute as to the extent to which the arrangements prior to 1 June 2010 were also the subject of written contracts. In his evidence Mr Tamihere said there was an informal arrangement. The defendant did not address this point in its evidence. Mr Miles QC, for the defendant, says, however, that it is factually incorrect to say the arrangements were informal and that written contracts were

entered into. Mr Miles advises the contracts can be made available. This had not been covered in evidence because it was not understood the topic would be relevant.

Correct approach to a stay application

[18] Article 8(1) of sch 1 to the Arbitration Act 1996 provides that where proceedings are brought in a matter that is subject to an arbitration agreement, the Court shall stay the proceedings and refer the parties to arbitration. The exceptions are where the arbitration agreement is null and void, inoperative or incapable of being performed; or where there is in fact no dispute that concerns matters agreed to be deferred to arbitration. The present dispute engages the second of these options, namely whether the subject matter of the claim is covered by the arbitration agreement.

[19] A tribunal is authorised to rule on its own jurisdiction. Accordingly, the issue arises as to how far into a dispute about whether the claim is covered by the agreement a Court should go before entering a stay.

[20] The authorities were recently reviewed in *Ursem v Chung*.[1] It seems there is support for three approaches, being immediate referral, a prima facie assessment of whether the arbitration agreement is valid or applies, or a full consideration of the issue. Associate Judge Abbott adopted the prima facie test, an approach I am content to follow for the reasons he gives.[2] It seems to best reflect the right of the arbitration tribunal to determine its own jurisdiction.

Interpretation of arbitration clause

[21] The parties were largely agreed on the correct approach to the interpretation of arbitration agreements. Two current themes were particularly identified. First, a generous interpretation is appropriate. Mr Miles emphasised this passage from *Fiona Trust Holding Corp* v *Privalov*:[3]

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1 *Ursem v Chung* [2014] NZHC 436.
2 At [32]–[35].
3 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 at [17] per Lord Longmore.

> … Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause.

[22] A similar approach is identified by Wild J in *Marnell Corrao Associates Inc v Sensation Yachts Ltd*.[4]

[23] The second principle is the "one stop" idea, which takes as a starting point that parties to a commercial contract would not ordinarily be expected to submit only some of their disputes to the jurisdiction they have selected:[5]

> [13] In my opinion the construction of an arbitration clause should start from 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. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

[24] Ultimately the task is to interpret the scope of the arbitration agreement contained within the parties' written contract. Consistent with my earlier conclusion, if there is a *prima facie* case to say the subject matter of these claims is covered by the agreement, a stay should be entered and the parties referred to arbitration.

(a) The breach of contract dispute

[25] The plaintiffs' submission is that neither side's position about the existence of a new contract supports the claim for arbitration. The plaintiffs' own argument is that a basic agreement containing only three clauses was reached. They do not contend that this new contract has an arbitration clause, so on their approach there is no basis to refer to arbitration a dispute about its existence. The well known

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4 *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 (HC) at [61]-[62]; see generally the discussions in David Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington 2011) at 4.10.

5 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 at [13] per Lord Hoffman.

principle of severability can not apply since if a contract does exist, it does not contain an arbitration clause.

[26] The plaintiffs' next note that the defendant's position is that there is no contract at all. It follows that the defendant cannot be asserting an arbitration agreement exists within a contract that it denies exists. Accordingly, on either version there is no available argument to say arbitration is required.

[27] I do not accept the plaintiffs' contention. Factually it is too narrow a summation of the defendant's argument. Mr Miles advises it will be the defendant's position that if an agreement was reached in 2014, it must have been a renewal of the existing contract. He notes that the defendant's initial two versions of the pleading spoke of rolling over, and then renewal of the existing contract. The defendant will say that if a contract was entered into, that is what happened. So on this approach there would be a severable arbitration agreement governing the dispute.

[28] More fundamentally, however, the plaintiffs' focus is on the wrong contract. The correct focus must be on whether the subject matter of the dispute falls within the terms of the arbitration agreement that existed in November 2013 when the disputed events occurred.

[29] In that respect, the dispute arises in the context of the parties resolving an issue about the provision of the contracted services, as that term is used in the arbitration agreement. The very purpose of the 10 November 2013 meeting was to discuss what to do about the immediate future of the show given the reaction of advertisers. The agreement reached was to suspend the show for the balance of the year. It is in that context that Mr Tamihere says an agreement was also reached that he would return the following year. The defendant disagrees and says no such agreement was reached. This is, in my view, a dispute arising about the way in which an issue concerning the provision of services under the contract was resolved, and is therefore covered by the arbitration agreement.

[30] The strongest argument for the plaintiffs is to classify the claim as being a dispute about whether the services will continue beyond the agreed life of the

contract, and therefore not a dispute about the services performed under the 2013 contract. Some support could also be taken from the absence in the existing contract of a renewal clause thereby emphasising the dispute is about a different contract.

[31] However, I prefer the approach that for the duration of the contractual relationship the parties agreed to refer disputes about the services to arbitration. Here the dispute is about what was agreed when resolving an issue about the services. One of the parties says the resolution involved a new agreement; the other disputes that. I consider there is at least a prima facie case to say that this falls within the arbitration agreement. If I am wrong about the standard to be applied, I would reach the same conclusion if the civil standard applied.

[32] For completeness I note the defendant counter claims with a breach of contract allegation. This was not the subject of separate focus, but the reasoning relating to the plaintiffs' breach of contract claim applies equally.

(b) The defamation claim

[33] Mr Miles, for the defendant, focuses on the subject matter of the claimed defamation. The contended innuendo is that Mr Tamihere was sacked for breaching his obligations to the radio station. This is a claim that is totally centred on the provision of services under the contract, and therefore falls within the arbitration agreement.

[34] Mr Miles rejects the plaintiff's proposition that the parties cannot have intended the arbitration agreement to cover defamation because arbitration lacks the public vindication component that is the essence of defamation proceedings. He submits it is open to an arbitrator to require payment of damages, and the making of a public apology. It is further submitted that the public vindication component of a defamation claim is being overstated. The vast majority of such claims are privately settled, with the only public face, if any, being a short retraction or apology. That can equally happen with arbitration so the public vindication point is submitted to be neutral from an interpretation viewpoint.

[35] The plaintiff submits that including a defamation claim is to stretch the scope of the arbitration clause beyond what is reasonable. The arbitration agreement covers disputes about services as defined in the contract. These are matters that Mr Tamihere has to do, namely produce and present a show. The defamation claim focuses on things the defendant has done, neither of which has been done pursuant to carrying out his obligations under the contract.

[36] Mr Allan contrasts the purposes of an arbitration agreement within a commercial contract with the purposes of a defamation claim. Defamation involves damage to reputation. Its processes, including uniquely a right to jury trial, are about public vindication of that reputation. By contrast, arbitration is about a speedy *and private* resolution of disputes between partners to a commercial relationship. Agreement to submit the latter to resolution by arbitration does not carry an inference that the former was likewise intended to be included.

[37] There are I consider two issues. First, whether the subject matter of the defamation claim appears to fall within the scope of the arbitration agreement. And second, if so, whether it was the parties' intention for the arbitration clause to cover a defamation claim.

[38] Turning to the first of these issues, the first impugned publication is a statement read out on the show by the show's hosts which announces why the show will not be broadcast for a nominated period. The second publication is a statement about the future of the show. The innuendo claimed by the plaintiff is that Mr Tamihere was sacked for breaching broadcasting standards when performing his obligations under the contract. Both publications, and the dispute which now arises in relation to them, self-evidently fall within the scope of the arbitration agreement. The challenged content is wholly about the provision of the services, as is the context in which the statements were made.

[39] The second issue falls to be considered against the interpretation principle that the parties to an arbitration agreement will generally not be thought to have intended to submit disputes to different tribunals. It is to be remembered, however, that this is a principle of interpretation and not a mandated outcome.

[40] I see no reason generally to consider that the parties intended the arbitration agreement to have a restricted scope. It relates to a one year contract for the provision of services that take place in the public eye, and where the hosts of the show are fairly described as public figures. Image and branding is a legitimate interest for both parties, and so it is reasonable to consider the parties were intending that any disputes between them be resolved privately.

[41] Nor is the mechanism for appointing the arbitrator inconsistent with the agreement having a broad scope. In the event of an impasse over who should be the arbitrator, the appointment is to be made by the President of the New Zealand Law Society. The constitution of the arbitration tribunal is therefore not a factor telling against a defamation claim being included. There is an ability to appoint someone with the appropriate skills.

[42] The plaintiff's argument that defamation proceedings should provide public vindication is the strongest matter favouring the plaintiff's position, but it is just one consideration. The same issue arose in *S Ltd v C Ltd* where Andrew Smith J observed:[6]

> 18. It also follows, it seems to me, that it is of secondary importance, although not entirely irrelevant, that the parties might have agreed by the arbitration agreement to forego the procedures which would govern a defamation claim in the English courts. That is a consequence of the clause rather than an aid to construction. That is so although it is rightly observed that a defamed party would on such a construction be taken to have foregone the right to clear his name in public proceedings. That does not seem to me a consequence manifestly and inherently improbable. It seems to me not necessarily improbable that a businessman, preferring arbitration to deal with standard and predictable contractual disputes, might be prepared to forego public vindication of a defamation against him, a risk that he might think when entering the contract to be small, as a price for resolving all disputes in one tribunal. I cannot accept that that consequence would defeat some commercial interest such that it would be an irrational agreement for a businessman to make.

[43] There is no doubt that a defamation dispute would not have been at the forefront of the parties' minds when the arbitration agreement was entered into. However, once it arises, I see no good reason why its nature should be thought to

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6 *S Ltd v C Ltd* [2009] EWHC B23 (Comm) at [18].

preclude submission to arbitration. Defamation proceedings can be resolved by a Judge alone if the parties choose, and so a choice of arbitration is simply an election in advance to forego one of the procedural options offered by resolution through the courts. As to the private nature of arbitration, as Mr Miles observed, many defamation claims are resolved that way.

[44] Accordingly, I am satisfied that the subject matter of the claim falls within the arbitration agreement and there is at least a prima facie case that the agreement covers a claim in defamation.

[45] I deal finally with Mr Allan's submission that the 2013 arbitration clause, if otherwise applicable, does not anyway require referral to arbitration. The relevant provision is cl 20(e) which provides:

> Neither party may require arbitration or issue legal proceedings (other than those for interlocutory relief) in respect of any such dispute unless that party has taken all steps to reasonably comply with this disputes clause.

[46] Mr Allan submits that this clause suggests that legal proceedings are a concurrent option to arbitration. As I understand it, the argument is that the obligation to take all reasonable steps extends only to negotiation and mediation, after which the parties may require arbitration or issue legal proceedings.

[47] I do not agree. Whilst not elegantly drafted, I am satisfied the clause carries its expected meaning of requiring a party to work through the three steps before commencing court action. The effect of cl 20(e) is merely to say that before embarking on step three (arbitration) or, subsequently issuing legal proceedings, a party must use best endeavours to avoid that step. There is nothing in the balance of the provision to support the proposition that arbitration and legal proceedings are options arising at the same point in time. The provision earlier states, for example:

> If the dispute is not resolved in twenty (20) working days of its reference to mediation, then the parties will refer the dispute to arbitration …

[48] The effect of the plaintiffs' submission would be to read into this clause "unless one of the parties instead choose to issue legal proceedings". That would be

wholly unexpected in this type of clause and is inconsistent with the general tenor of the wording.

Conclusion

[49] The stay of proceedings application is granted in relation to both causes of action. There is at least a prima facie case that the subject matter of both claims relates to the provision of services as defined in the contract. The arbitration agreement does not exclude any particular type of dispute, and a claim of defamation is capable of resolution through arbitration. In accordance with the parties' own agreement, the proceedings are therefore stayed and the parties referred to arbitration.

[50] The defendant/applicant is entitled to costs. Memoranda may be filed if agreement cannot reached.

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Simon France J

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