CASE IN BRIEF:
DRAKE CITY LTD V TASMAN-JONES [2016] NZHC 899

A recent case in which the High Court considered the effect of arbitration clauses on parties seeking relief in Court. The claimant sought summary judgment against the defendants for rent arrears as guarantors under a lease. The defendants argued the Court lacked jurisdiction to hear the claim, relying on an arbitration clause in the relevant lease.

Background & Facts

In 2011, the defendants guaranteed the performance of a lessee (**BMTJ**) for restaurant premises in Auckland's Victoria Park Market complex. In 2012, a new owner (**Drake**) became registered proprietor of the property and took a reversion of the lease. In the same year, the defendants, BMTJ and Drake collectively executed a variation to the lease relating to rental. In 2014, BMTJ fell into rent arrears payable under the varied lease, and BMTJ was placed into liquidation later the same year. The liquidators disclaimed the lease, at which point Drake re-leased the premises to new tenants and determined the existing lease on 1 January 2015.

In November 2015, Drake issued proceedings against the defendants, as guarantors, claiming rent and outgoings for the entirety of 2014.

The defendants sought to set-off the damages against Drake's claim for rent, arguing BMTJ sustained such damages as a consequence of misrepresentation and a breach of the lease by Drake.

As guarantors, the defendants were entitled to raise any defence a principal could have raised.[1] The defendants argued their claims constituted a 'dispute' which must be referred to arbitration in terms of the lease, which contained an arbitration clause.

In support of their argument to stay the plaintiff's claim for summary judgment, the defendants relied on the Supreme Court decision in *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd*,[2] where the Supreme Court upheld the principle of party autonomy and unanimously held that where parties have agreed to arbitrate disputes, there are only very limited circumstances in which a Court should hear a summary judgment application. Where there is an agreement to arbitrate for the pertinent type of claim or dispute, the Court must stay the (summary judgment) proceeding and refer it to arbitration.

Decision

While the Court's decision in *Zurich* is clear, whether proceedings should be stayed pending arbitration will ultimately depend on what the parties have agreed on a case by case basis. In the present case, the terms of the lease contained the following provisions:

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> Arbitration:
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> 44.1 UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall besubmitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment therefore or any other statutory provision then relating to arbitration.
> ...
> 44.3 THE procedures described in this clause shall not prevent the Landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default prescribed in clause 28.1 hereof.[3]

In considering the application for summary judgment and the relevant arbitration clauses in the lease, the Court dismissed the defendants' claim to have the application for summary judgment stayed. The Court found that the effect of the relevant lease provisions, particularly clause 44.3, preserved Drake's right as landlord to pursue separate legal proceedings for the recovery of any rent or other monies payable under the lease. The Court held that pursuant to the terms of the lease, the parties had expressly agreed to exclude claims for rent and other monies payable by the tenant (*ipso facto* the defendants as guarantors) under the lease from reference to arbitration. Consequently, there was no dispute capable of reference to arbitration by the Court in relation to Drake's claim for rent and other outgoings.[4]

The Court held that the defendants' reliance on *Zurich* was misconceived, as there was in fact no dispute to refer to arbitration concerning Drake's claim for rent and outgoings. While the defendants' claims of misrepresentation and purported lease breach by Drake were in fact disputes which should be referred to arbitration pursuant to clause 44.1, the fact those disputes should be referred to arbitration did not prevent Drake from taking the current separate proceedings to recover rent and outgoings.

Comment

This is an important decision, illustrating the application and potential limits of the Supreme Court's decision in *Zurich*. In the present case, the High Court acknowledged the principle of party autonomy in contracting with arbitration clauses unanimously endorsed in *Zurich*, but demonstrated that any such arbitration clauses will be strictly interpreted, and cannot be relied on to stay summary judgment proceedings outside of the precise category of disputes the parties have agreed to refer to arbitration.

Since *Zurich*, some have viewed the Supreme Court's decision as positive recognition from the Courts of arbitration as an alternative dispute resolution method, however others argue that referral to arbitration may cause some parties to be unnecessarily deprived

from the potential time and cost savings of summary judgment. Evidently, the Courts will uphold parties' arbitration clauses where appropriate, but such clauses will be subject to strict interpretation for referral to arbitration of only the disputes contracted for in the relevant arbitration clause(s).

Footnotes:

1 Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras [1978] EWCA Civ J0517-3, [1978] 2 Lloyd's Rep 502.
2 Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd [2014] NZSC 188, [2015] 1 NZLR 383.
3 Clause 28.1 of the lease provides for cancellation.
4 Drake City Ltd v Tasman-Jones [2016] NZHC 899 at [43].