CASE IN BRIEF

Savvy Vineyards 4334 Limited v Weta Estate Limited

-by Sarah Redding

Recent High Court decision confirms effect of clause 8(1), of the First Schedule of the Arbitration Act 1996: arbitration agreements will remain operative and binding following cancellation of main contract unless proved otherwise.

Background

Savvy Vineyards 4334 Limited and Savvy Vineyards 3552 Limited (together, the Plaintiffs) had entered into contracts with Weta Estate Limited and Tirosh Estate Limited (together, the Defendants).

Litigation between the Plaintiffs and Defendants over the contracts, specifically vineyard management agreements (VMAs) and grape supply agreements (GSAs), has been ongoing for some eight years. Earlier litigation determined that the Defendants had invalidly terminated the VMAs and GSAs and their notices of termination were of no effect. The Defendants were required to continue to perform their obligations pursuant to those agreements.

The present proceeding relates to the Plaintiffs' claims for damages under the GSAs for various harvest years, and claims for management fees and operations charges under the VMAs for breach of agreement and in *quantum meruit*.

Decision

The Defendants sought an order staying the Plaintiffs' causes of action relating to the VMAs and referring those claims to arbitration. In particular, the Defendants relied on clause 8(1) of Schedule 1 of the Arbitration Act 1996 (**Act**) and Article 16(1) of Schedule 1(1) of the Act, which provide as follows:

> **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.
>
> **16 Competence of arbitral tribunal to rule on its jurisdiction**
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. **For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.** A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* (necessarily) the invalidity of the arbitration clause.
>
> *(emphasis added)*

Photo by Amos Bar-Zeev

The Defendants argued that clause 8(1) made a stay of Court proceedings and referral to arbitration mandatory and that pursuant to Article 16(1) of Schedule 1(1) of the Act, the arbitration agreement survived the termination of the VMAs. The Plaintiffs agreed that in light of Article 16(1), the arbitration clause in the contract was to be considered as a separate contract which remained operative. However, the Plaintiffs argued that while the arbitration agreement might have survived, it did not encompass disputes being dealt with after the principal contract had come to an end and was therefore inoperative.[11]

The Plaintiff's relied on clause 25 of the VMAs which related to disputes and dispute resolution. Clause 25 included provision for cancellation specifically under clause 25.5. The Plaintiffs contended that their cancellation letter complied with clause 25.5 and therefore effected valid termination of the VMAs. However, the Defendants argued instead that the prerequisites of clause 25.5 had not occurred, and that the Plaintiffs were mistakenly relying on clause 25.5 when they were in fact relying on an alleged substantial breach under the Contractual Remedies Act 1979, meaning the VMAs remained operative.

In his decision to grant the stay, Associate Judge Osborne held that unless the Plaintiffs could establish the arbitration had in fact become *inoperative*, Article 8(1) of the Act meant that the Defendants were entitled to a stay of the Plaintiffs' claims and to have the disputes referred to arbitration.[12] Pursuant to Article 16(1), Schedule 1 of the Act, the arbitral tribunal has the power to rule on its own jurisdiction, including as to the existence or validity of an arbitration agreement.[13] The Plaintiffs failed to shift the burden of the proof. Associate Judge Osborne held that the Defendants had *established prima facie that the arbitration agreement remained operative in this case as the evidence indicates that the event which would have rendered the arbitration agreement inoperative...cancellation...did not occur*[14].

In reaching his decision to grant the stay to allow the arbitral tribunal to determine whether it has jurisdiction in relation to the dispute, Associate Judge Osborne relied on the approach applied in three recent cases,[15] as summarised by Simon France J in *Tamihere v Media Works Radio Ltd*:[16]

> *The authorities were recently reviewed in Ursem v Chung. 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. It seems to best reflect the right of the arbitration tribunal to determine its own jurisdiction.*
>
> *(footnotes omitted).*

Associate Judge Osborne also ordered security for costs of $12,800 (representing 80 percent of a 2B award) after balancing the respective interests of the parties, on the grounds that there were no considerations strongly weighing against requiring the Plaintiffs to provide security and there was a high degree of likelihood that the Plaintiffs will be without funds at the end of the litigation if it proves to be unsuccessful. He also dismissed the Defendants' application to strike out a number of the Plaintiffs' claims.

Comment

Associate Judge Osborne's decision confirms the operation of clause 8(1), Schedule 1 of the Act, namely that arbitration agreements are independent of the other terms of a contract and will survive termination of the primary contract unless it can be established that the arbitration agreement has been rendered inoperative, with the upshot being that parties who include provision for arbitration in their agreements will likely be bound by such a clause following termination or cancellation of the main agreement.

References

[8] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [2].

[9] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [4].

[10] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [16].

[11] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [26]-[27].

[12] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [39].

[13] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [39].

[14] *Savvy Vineyards 4334 Limited v Weta Estate Limited* [2017] NZHC 1111 at [39].

[15] *Ursem v Chung* [2014] NZHC 436, [2014] NZAR 1123, especially at [47]. See also, *Tamihere v Media Works Radio Ltd* [2014] NZHC 2082, [2014] NZAR 1113 at [20]; *Donaldson v Donaldson* [2015] NZHC 3093, [2016] NZAR 199 at [19].

[16] *Tamihere v Media Works Radio Ltd* [2014] NZHC 2082.

Sarah Redding

Sarah graduated from the University of Otago with a Bachelor of Laws. She then worked as a graduate law clerk at the New Zealand Dispute Resolution Centre, and now is a solicitor at Kensington Swan.