IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CIV-2019-044-001061
[2020] NZDC 14425

BETWEEN	HT 2017 LIMTIED Plaintiff
AND	HOSKING TRAILERS LIMITED First Defendant
AND	NICHOLAS JAMES JACKSON Second Defendant

Hearing: 16 June 2020

Appearances: T Bates for the First and Second Defendants/Applicant
R B Hucker, MW Swan for Plaintiff/Respondent

Judgment: 4 August 2020

RESERVED JUDGMENT OF JUDGE P A CUNNINGHAM
[Respondent's application to dismiss the proceeding because the Court has no jurisdiction]

Introduction

[1] In the application before the Court, the respondents' position is that there is no jurisdiction to hear the plaintiff's claim including an application for summary judgment. The plaintiff's claim is based on default under a loan agreement. The plaintiff sold its business to the first defendant. Vendor finance was provided by the plaintiff which was recorded in a loan agreement. The agreement for sale and purchase of the business contained a dispute resolution clause which enabled the parties to refer any dispute to an expert. The first defendant has raised issues of breach of warranty/misrepresentation. It is the defendants'/applicants' contention that the plaintiff/respondent is unable to bring the underlying proceeding because the parties agreed to refer any dispute to an expert.

Background

[2] On 20 April 2018 the plaintiff and first defendant entered into an agreement for sale and purchase of the plaintiff's then business. At that time the owner of the business was Hosking Trailers Limited (now HT 2017 Limited). The purchaser was Nicholas Jackson or nominee. The total purchase price was $800,000. The settlement date was 10 May 2018.

[3] A vendor loan agreement was entered into on 10 May 2018 (the settlement date). It recorded that $200,000 of the purchase price was to be funded by a vendor loan from the plaintiff. Repayment was to be by way of $5,555 per month from June 2018. Mr Jackson guaranteed the obligations of the first defendant under the loan agreement.

[4] It is not disputed that the first defendant stopped making payments under the loan agreement after 12 months. The reason for this was that the first defendant says it paid too much for the business because the plaintiff failed to disclose during negotiations that Rayglass, a customer of the trailer business was bringing its trading relationship with the first defendant to an end. A notice of dispute had been sent to the plaintiff in a letter from the first defendant's solicitors dated 19 March 2019, alleging breach of warranty/misrepresentaton.

[5] In a letter dated 3 April 2019 the plaintiff's solicitor replied saying that any alleged misrepresentation was denied. Further that the dispute resolution clause did not apply to the type of dispute raised by the first defendant. The first defendant's solicitors replied on 11 April 2019 proposing a solicitor, Mr Chris Darlow as an expert pursuant to clause 13.2 and 13.4 of the sale and purchase agreement. Another letter a week later to the Auckland District Law Society (ADLS) requested the president to appoint an expert. The ADLS appointed Mr Tim Jones as an expert.

The application

[6] The first defendant filed a notice of protest to jurisdiction and an application to dismiss the proceeding on the basis that the court has no jurisdiction because;

(a) The dispute (being non-payment of the instalment amounts under the loan agreement) is subject to its own dispute resolution clause that should be determined by the appointed expert;

(b) It is otherwise an abuse of process.

[7] The second defendant filed an affidavit in support of the application to dismiss or stay the proceeding. Mr Jackson states that on 6 June 2018 he was advised that Rayglass (a key customer) were taking their work away to another boat trailer business, advice he described as devastating. He started investigating how this had come about. Through non party discovery his solicitors had obtained a copy of a letter dated 28 November 2017 which established that the plaintiff was aware that Rayglass intended to reduce or cease using Hosking Trailers on a preferred basis. Information he says should have been disclosed to him prior to signing the sale and purchase agreement.

[8] At the time of negotiations to purchase the business Mr Jackson had been made aware there was litigation between the plaintiff and Fig Jam (from whom the plaintiff purchased the business) based on alleged breaches of warranty by Fig Jam. Attached to his affidavit is a letter from Buddle Findlay (which law firm acted for the plaintiff in this proceeding at the time) dated 28 November 2017. It set out in some detail a number of claims it had against Fig Jam. That included that there were significant and longstanding issues between Fig Jam and Rayglass. This included the possible loss of the Rayglass business, something that did not transpire during the time the plaintiff owned the business.

The notice of opposition

[9] The grounds of the plaintiff/respondent's opposition are:

(a) That the proceeding is based on the plaintiff's right to enforce the payment provisions in the loan agreement which are to be made without any deduction set-off or withholding. It precludes the ability of the defendants/applicants from being able to claim any set off or any claim

unrelated to the advancing of monies by the plaintiff under the loan agreement. Further that the loan agreement is governed by its own terms.

(b) The second defendant guaranteed the obligations of the first defendant and indemnified the plaintiff against any loss caused by the failure of the first defendant to comply with its payment obligations under the agreement.

(c) Any claim in misrepresentation or breach of warranty is not amenable to determination by an expert.

(d) There is no dispute that has arisen that applies to appointment of an expert under clause 13 of the agreement for sale and purchase. Clause 13 only applies to issues of a specialist or technical nature and does not apply to mixed matters of fact and law.

(e) The Court should not allow its jurisdiction to be ousted in relation to questions of whether there has been a breach of warranty or misrepresentation. This Court is bound by the decision of the High Court in *Archers Road Trust Company Ltd v JMR Business Ltd*[1]

[10] The plaintiff filed an affidavit of Drew French in support of the notice of opposition affirmed on 13 November 2019. He deposed that he was not privy to the letter of 28 November 2017. Mr French attached a letter dated 21 March 2018 from Rayglass "To whom it may concern" in which the Chief Executive of Rayglass said amongst other things that as at 21 March 2018 there was a strong relationship past and present between Rayglass Boats and Hosking Trailers. And that following a sale by the original owners of the business in February 2017 (to the plaintiff) there continued a strong relationship with Hosking Trailers. He had told Mr Greg Larsen (who introduced Mr Jackson as a potential buyer of the business) about this and assumed Mr Jackson was made aware of this by Mr Larsen. That the plaintiff was still doing

[1] *Archers Road Trust Company Ltd v JMR Business Ltd* [2016] NZHC 2987.

work for Rayglass right up to the point of settlement and did not believe the work would stop when the negotiations to sell to the first defendant occurred.

[11] Mr French also deposes that the issues raised by Mr Jackson are not subject to the dispute resolution clause in the sale and purchase agreement because what is sought is outstanding payments under the loan agreement. That the plaintiff would not have agreed to loan the $200,000 had it believed the Court did not have jurisdiction to determine disputes under it.

The issues

[12] I determine the issues I need to decide as follows:

(i) Does clause 13 apply to the dispute raised by the defendants?

(ii) If so, does clause 13 of the sale and purchase agreement ("the dispute resolution clause") raise a defence to the first defendant's payment obligations under the loan agreement?

(iii) If so, does that mean the Court has no jurisdiction in relation to either or both of:

(a) the dispute raised by the first defendant about alleged misrepresentation or breach of warranty; and

(b) non-payment by the defendant under the loan agreement.

The first issue

Does clause 13 apply to the dispute raised by the defendants?

[13] For the defendants it was submitted that the issues that have been raised in correspondence with the plaintiff should be referred to an expert. In support of that

submission were a number of cases relating to arbitration clauses in a contract, for example *Obenyd Ltd v Lawrence*[2] at para [49] per Clark J.

[14] In *Preyer Construction Wellington Ltd v Elizabeth Mary Cathie*[3] a dispute resolution clause in a building contract provided for the appointment and determination by an expert. The Court found that the language in the clause was wide enough to govern the current dispute which arose directly from the contract. The Court said it should not subvert the parties' clear contractual commitments (see para [26]) and upheld that the Court should not assume responsibility for the dispute.

[15] The dispute resolution clause in the sale and purchase agreement is set out in full:

> 13.0 **Dispute resolution**
>
> 13.1 Unless otherwise provided in this agreement, if a party considers that there is a dispute in respect of any matters arising out of, or in connection with it, then that party may give a dispute notice to the other party or parties to the dispute setting out details of the dispute.
>
> 13.2 The affected parties will then endeavour in good faith to resolve the dispute between themselves within five (5) working days of the receipt of the dispute notice, failing which the dispute will be resolved by an expert in accordance with the provisions below.
>
> 13.3 Except where there is no dispute, or in the case of urgent loc relief, such as an injunction, no party may commence legal proceedings against another party in respect of this agreement without first following the process set out in clause 13.
>
> 13.4 The expert will be a suitably qualified person agreed by the parties, but if within two (2) working days they cannot agree on the expert, the President for the time being of Auckland District Law Society Incorporated will do so on the application of any party.
>
> 13.5 The expert may determine the manner in which the determination proceeds and may, at their discretion, accept written and/or oral submissions from a party.
>
> 13.6 The expert will act as an expert and not as an arbitrator.
>
> 13.7 The expert must give his or her determination in writing, with reasons.

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[2] *Obenyd Ltd v Lawrence* [2019] NZHC 46.
[3] *Preyer Construction Wellington Ltd v Elizabeth Mary Cathie* [2019] NZHC 2881.

13.8 The parties will bear their own costs and expenses in respect of the determination. The expert's costs will be shared equally between the vendor and the purchaser.

13.9 The expert's determination will be final and binding upon the parties.

[16] In this case the dispute resolution mechanism has been triggered by the first defendant, which initially proposed Mr Chris Darlow, a commercial lawyer well known in Auckland legal circles. When the plaintiff declined to agree that such a process was appropriate, the first defendant asked the President of the ADLS to appoint an expert which it did, Mr Tim Jones who is a senior practitioner in the field of property law matters.

[17] The nature of the first defendant's concerns is not in the area of property, rather it is a claim in breach of warranty/misrepresentation pre-contract. Cases such as this would normally require:

(a) pleadings which identify the issues;

(b) accounting evidence establishing loss, it is usual that both parties will have an expert accounting witness;

(c) it is inevitable that each party will require legal advice and assistance;

(d) also inevitable will be discovery of documents including possibly non-party discovery in relation to Rayglass;

(e) interlocutory processes;

(f) the calling of viva voce witnesses including a witness from Rayglass.

(g) A litigation expert to adjudicate on the issues raised.

[18] In *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Incorporated & Ors*[4] the role of an expert was discussed by the Court of Appeal. Mr Gray QC had been appointed an expert to determine a dispute between Waterfront Properties as building manager of a residential apartment complex and the respondents who all supplied management services to the complex.

[4] *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Incorporated & Ors* [2015] NZCA 62.

[19] The expert had convened a conference with the parties where a timetable was agreed for the exchange of pleadings and a further conference scheduled. It was proposed there be a more detailed agreement for determination or arbitration. Ultimately that was not agreed to by the parties, nor was a proposal that there be oral evidence. The hearing took one day. The expert's preliminary determination was published. It contained references to matters the expert had not been able to resolve because of the fact there was no oral evidence and thus no ability to assess the witnesses on matters in dispute.

[20] The respondents filed a statement of claim in the High Court about the matters in dispute including a cause of action that the expert had misdirected himself, and they sought a declaration that his findings were not binding. There followed an application to dismiss the proceeding by Waterfront Properties because matters had been referred to an expert and the expert's determination should stand. The Court of Appeal upheld the decision in the High Court not to strike out the claim by the respondents.

[21] In discussing the expert's role, the Court noted that this was a factual dispute and, as a legal expert, Mr Gray was qualified to undertake the role which was that of an inquisitor. That the expert had not been able to resolve conflicts in the evidence. Either he was unaware of his inquisitorial powers or chose to remain passive. That it is the responsibility of an expert to ensure he has the necessary processes in place to do what he was mandated to do.

[22] The conventional approach was that where a dispute resolution clause says the decision of the expert is to be final and binding (as it does in this case), there are only limited grounds on which the determination may be challenged. It is not enough to show the expert has made a mistake or was negligent or even patently wrong. However in this case it was one of those rare cases where the setting aside of an expert determination was warranted. Thus even where the parties have agreed to resolve disputes by way of reference to an expert, in rare cases the court can intervene.

[23] In this case I am not having to review an expert's determination as none has been made. Indeed, the plaintiff declines to be bound to clause 13 in relation to the issues of breach of warranty and alleged misrepresentation. Failing the agreement of

the plaintiff to refer the dispute to an expert, the first defendant has chosen instead to stop paying the monthly instalments under the loan agreement. However the evidence contained an email exchange between counsel that makes it clear those payments are being held in a solicitor's trust account.

[24] I make the following observations about clause 13 in the sale and purchase agreement ("clause 13").

[25] I accept that the allegations of breach of warranty and misrepresentation arise out of the agreement for sale and purchase (clause 13.1). And that the first defendant has taken the appropriate steps of giving notice of a dispute.

[26] Clause 13.2 gives the parties five days to resolve the dispute, failing which it is to be resolved by an expert. It goes without saying that allegations of the type made by the first defendant could never be resolved by the parties within five days because establishing the breach requires a thorough enquiry involving third parties. If a breach is established then the enquiry into damages requires accounting expertise as determination. This takes time.

[27] Clause 13.4 requires the parties to agree on a suitably qualified expert within two days of being unable to resolve the dispute. That did not happen because the plaintiff would not engage with the dispute process, protesting it was not applicable to the issues raised.

[28] Clause 13.6 states the expert will act as an expert and not an arbitrator. One interpretation of this clause is that it supports the person being an expert in the area of law of the dispute, rather than an arbitrator whose functions are similar to those of a judge.

[29] I am concerned about the suitability of the lawyers proposed by the first defendant and the President of the ADLS. I mean no disrespect to either Mr Darlow or Mr Jones when I say that. Rather I refer to the fact that they are not litigation experts. A litigation expert is the best person to adjudicate on the first defendant's dispute.

[30] The five day period in clause 13.2 and the two day period in clause 13.4 suggest to me that the expert appointment process is a quick means of resolving any dispute arising out of or connected to the contract. It is a standard clause in the ADLS/REINZ printed form for the sale and purchase of a business where issues can arise which require a speedy determination such as the value of stock in trade which in this case was $204,000. Disputes of this nature need to be settled quickly because they can delay settlement occurring. A claim in misrepresentation will require a process very similar to a court civil process which can be lengthy. It requires all of the steps set out in para [17] herein and possibly others.

[31] There may be a need to require a witness from Rayglass to attend the hearing. Rayglass supplied a letter dated 18 March 2018 stating there was no issue with its relationship with the plaintiff, yet three months later it terminated its supply contract with the new owner, the first defendant. The reasons for that termination will be vital to the first defendant's case.

[32] Clause 13 contains no process for resolving disputes such as the first defendant has alleged here. This was the problem the expert faced in the *Waterfront Properties* case. It is apparent from that and other cases referred to in it that the expert can determine his/her own process, albeit in the absence of agreement by the parties to a suitable process. It is important to remember that these allegations have come about as the result of a discovery application by the first defendant as a non-party in litigation between the plaintiff and Fig Jam. Nothing except a court process could have achieved that. Given that the litigation between those two parties is ongoing, it is possible that further resort to issues in that litigation may be necessary. An expert has no power to do that.

[33] In *Archers Road Trust Company Ltd v Malcolm Hayward Udy & Ors*[5] Edwards J dealt with an application to stay a proceeding and referring it to an expert determination in relation to a clause in an agreement for sale and purchase of shares in a business. The clause was similar to the one in this case. A claim had been filed alleging breach of indemnity and warranty clause in the agreement including an

[5] *Archers Road Trust Company Ltd v Malcolm Hayward Udy & Ors* [2016] NZHC 2987.

alleged understatement of creditors and liabilities and a warranty relation to computer back up and date. The plaintiffs had pleaded that a dry boat storage stack was not fit for purpose and that there had been negligent building of the boat stack. The *Archers Road* case had more issues than in this case, but they were similar to some of the types of alleged legal wrongs here.

[34] Her Honour noted that the dispute resolution clause did not provide for the calling of witnesses or the application of the rules of evidence. And questioned whether it was suited to the expert determination process for this another reasons. Those included complex issues of law, the need for procedural fairness, the lack of scope to challenge the expert determination, including the lack of any right of appeal. The Court concluded the range of factual issues and the need for evidence to be called and the legal aspects of the claims made them ill-suited to expert determination.

[35] I am of the view that the dispute resolution process set out in s 13 was never intended to apply to the dispute raised by the first defendant. That is because as drafted it is more suited to resolving issues quickly rather than applying to issues of breach of warranty/misrepresentation and an assessment of damages, which take much longer to resolve. If I am wrong about that, then like Edwards J in the *Archers Road* case, I find that the first defendant's dispute is not amenable to reference to an expert for the reasons set out in the preceding eight paragraphs.

Does clause 13 of the sale and purchase agreement apply to the loan agreement?

[36] Here the defendants argue that the loan agreement arises out of the sale and purchase agreement and that therefore clause 13 applies to disputes under the loan agreement. Mr Bates described the dispute as being inherently entwined in the sale and purchase agreement itself. Further that the first defendant is able to raise its allegations of breach of warranty/misrepresentation to be considered at the same time.

[37] I accept that without the sale and purchase agreement, there would have been no loan agreement. However there are a number of factors that in my view mean that clause 13 does not apply to the loan agreement.

[38] The first is that I am not satisfied there is a "dispute" under the loan agreement. In this case the first defendant is simply refusing to pay. This is a breach of the agreement and I would not characterise it as a "dispute". The dispute is the alleged misrepresentation/breach of warranty and the plaintiff's denial there is any fault on its part. The first defendant has chosen not to continue to make payments under the loan agreement because the plaintiff will not agree to refer the first defendant's dispute to an expert. That is the only reason for non-payment.

[39] Clause 31 of sale and purchase agreement stated the following:

> VENDOR FINANCE
>
> It has been agreed by both parties that this agreement is conditional on the Vendor leaving $200,000.00 in the business as a vendor loan. This loan will be at NIL interest for a period of 3 years upon settlement of this agreement. The repayment terms of this loan will be the amount of $5,555.55 per month for 36 months, payable on or before the last day of each calendar month until fully settled. Upon mutual agreement of both parties the repayment terms may be altered at any time.

[40] Clause 32 provided that the purchaser Mr Jackson would provide a guarantee for the vendor finance.

[41] A separate agreement headed Vendor Loan Agreement ('the loan agreement"), was prepared and signed on the date of settlement. The parties were Hosking Trailer Manufacturing Limited (the borrower) and Hosking Trailers Ltd (the lender) and Nicholas James Jackson (Guarantor). The sale and purchase agreement stated Mr Jackson or nominee was the purchaser, that transpired to be Hosking Trailer Manufacturing. So the parties to the loan agreement do differ in that respect.

[42] The loan agreement contains a number of terms that are not provided for in the sale and purchase agreement. Those include:

(a) A default interest rate of 10% per annum (on overdue amounts);

(b) Clause 5 which provides for events of default (non-payment, order for bankruptcy, change of control in the borrower company, the winding up of the company).

(c) Detailed matters in clause 6 relating to the guarantee and indemnity.

(d) Representations of the borrower (clause 7).

(e) Miscellaneous matters relating to costs, notices, amendments to be in writing and signed, assignment, etc.

[43] Importantly, clause 4.5 provided:

> Free and clear payment: All sums payable by the Borrower under this Agreement shall be paid during normal business hours on or before the due date, into the bank account specified by the Lender from time to time, in cleared funds free and clear of any restriction or condition and (except to the extent required by law) without any deduction, set off or withholding.

[44] The Plaintiff says that the words in clause 4.5 mean that the defendants are not able to stop making payments under the loan agreement if there is some other dispute with the plaintiff because of the requirement to make payments "… without deduction, set off or withholding." In response the defendants say that those words do not include equitable set off, namely the claim in misrepresentation/breach of warranty. The plaintiff's response to that was to say that there is nothing to stop the first defendant bringing a separate claim for misrepresentation/breach of warranty, but it cannot be raised in the context of the plaintiff's proceeding as a defence or set off.

[45] Mr Hucker referred to *Grant v NZMC*[6] where the Court of Appeal held that contractual rights to equitable set off or even common law set-off of liquidated amounts could be contracted out of by the parties. In *Brown's Real Estate v Grand Lakes Properties Limited*[7] demand had been made by Grand Lakes for a lease of retail units. Brown's sought to set aside the statutory demand on the basis it had a counterclaim which exceeded the sum sought from it. The counterclaim was alleged misrepresentations about the quality and characteristics of the retail precinct made by the lessor. At first instance, Associate Judge Osborne held that a clause in the lease that said monies were to be paid "free of any deduction, withholding, set off or reduction on any account" precluded Brown's from raising a set off counterclaim or

[6] *Grant v NZMC* [1999] 1 NZLR 8 (CA).
[7] *Brown's Real Estate v Grand Lakes Properties Limited* [2010] NZCA 425.

cross demand as an excuse for not paying the rent. That finding was upheld in the Court of Appeal.

[46] In *Harcourts Group Limited v Grewal*[8] Associate Judge Bell said this at para [61].

> A contractual no set off clause is procedural. It suspends a party's right to raise a matter of opposition to a claim, as opposed to extinguishing those rights. A defendant barred from raising a cross-claim because of a no set off clause may run its claim later, as it is only barred from raising the matter in reduction of its liability to the plaintiff.

[47] I accept the plaintiff's submission that the loan agreement stands on its own terms. This is because although vendor finance was a condition of the agreement for sale and purchase, the loan agreement contains much more detail about the terms of that loan and the payments due under it. This includes a "no set off" clause which I accept is wide enough to prevent the first defendant from raising the misrepresentation/breach of warranty claim as a defence to the plaintiff's proceeding.

[48] Further, the dispute resolution clause in the sale and purchase agreement cannot be implied into the loan agreement. First, clause 13 was not a term of the loan agreement which was later in time. Although the loan agreement arises out of or is connected to the sale and purchase agreement, the terms and conditions of the loan agreement are not conducive with clause 13 applying. First, the loan agreement did not contain a clause referring disputes to an expert or anything that would oust the jurisdiction of the Court. Next, it contains clause 4.5 which is inconsistent with clause 13 applying.

The third issue

[49] I have held that the first defendant's dispute cannot be referred to an expert and that the defendants are not able to raise their dispute as a defence to the plaintiff's claim. That means that the plaintiff can continue with its claim for monies owed under the loan agreement and the defendants are not entitled to raise their dispute as a

[8] *Harcourts Group Limited v Grewal* [2018] NZHC 2983.

defence. However that does not prevent the defendants from prosecuting a separate claim, either pursuant to ss 35 and 37 of the Contracts & Commercial Law Act, or the Fair Trading Act.

Result

[50] The defendant's application to dismiss the proceeding fails.

Costs

[51] The plaintiff has been successful. Costs according to a 2B scale seem appropriate. If either party does not agree or the parties are unable to resolve issues of costs, then memoranda can be filed within 21 days. I will decide the issue of costs on the papers.

Next step

[52] I direct the registry to liaise with both parties as to what steps they next wish to take. The case is to be monitored in a registrar's list in September 2020 if no further steps have been taken by either party.

P A Cunningham
District Court Judge