Supreme Court of New Zealand
Te Kōti Mana Nui

19 December 2014

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

ZURICH AUSTRALIAN INSURANCE LTD T/A ZURICH NEW ZEALAND v COGNITION EDUCATION LTD

(SC 58/2013) [2014] NZSC 188

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Cognition Education Ltd (Cognition) had several contracts with the Abu Dhabi Education Council (the Council) for the provision of management services for public schools. It took out contract frustration cover with Zurich Australian Insurance Ltd (Zurich). The insurance policy contained an arbitration clause which stated that any dispute relating to the insurance policy would be settled by arbitration.

A dispute arose between Cognition and the Council over payments under the contracts. Cognition ultimately settled the dispute for less than its contractual entitlement. It sought to recover the shortfall under its policy with Zurich. Zurich denied the claim. Cognition then sued on the policy and sought summary judgment. Zurich objected to the Court's jurisdiction to grant summary judgment on the basis of the arbitration clause and sought a stay of proceedings under Article 8(1) of Schedule 1 of the Arbitration Act 1996 to allow arbitration to proceed. Article 8(1) relevantly provides that where proceedings are brought before a court in a matter which is subject to an arbitration agreement, the court shall stay those proceedings and refer the parties to arbitration unless it finds that there is not in fact any dispute between the parties with regard to the matters agreed to be referred. This is derived from the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration (the Model Law), although the Model Law does

not include the words “unless it finds … that there is not in fact any dispute between the parties with regard to the matters agreed to be referred” (the added words).

A dispute then arose as to the order in which the applications for summary judgment and a stay of the proceedings should be dealt with. Cognition said its application for summary judgment should be determined before, or at least in conjunction with Zurich’s stay application, arguing that if the Court was to find Zurich had no arguable defence to the claim and summary judgment could be granted, then there was no dispute between the parties to be referred to arbitration.

Zurich argued that its application for a stay should be determined first, because if there were matters between it and Cognition that were capable of dispute, the Court was obliged to stay the proceeding and allow an arbitration to occur regardless of whether it might ultimately be found that Zurich had no arguable defence to Cognition’s claim. Zurich argued that the added words had a limited meaning.

In the High Court, Associate Judge Bell found in favour of Cognition. Zurich appealed, unsuccessfully, to the Court of Appeal. The Supreme Court granted leave to appeal on the question of whether the Court of Appeal was correct to conclude that there will not be a dispute for the purposes of art 8(1) unless the defendant has an arguable basis for disputing the plaintiff’s claim sufficient to resist an application for summary judgment.

Zurich argued that the added words mean a court should grant a stay unless it is immediately demonstrable that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute. Zurich submitted this was consistent with the purposes of the Arbitration Act of promoting party autonomy, limiting judicial involvement in the arbitral process and achieving consistency with international arbitration regimes. To allow the courts to go further and examine the merits of disputes would undermine these aims, particularly given that it is accepted in New Zealand that questions of law and contractual construction can be determined on a summary judgment application.

Cognition argued that the added words mean a court should grant a stay unless it is satisfied that the defendant has a sufficient case to withstand a summary judgment application: that is, it has an arguable defence. Cognition submitted that this is the approach which the Law Commission contemplated when preparing its draft Arbitration Bill and Parliament accepted when it enacted in the Arbitration Act.

The Supreme Court has unanimously found in favour of Zurich and allowed the appeal.

The Supreme Court has found that the more natural meaning of the added words is the narrower meaning contended for by Zurich. If it is clear that the defendant is not acting bona fide in asserting that there is a dispute or that there is not, in reality, any dispute between the parties, a

court may refuse to grant a stay under art 8(1). In contrast, in other situations falling within the "no arguable defence" test applied on summary judgment, there will be what can properly be described as "disputes" even though they are ultimately capable of being determined by a summary process. In these cases, a stay should be granted to allow an arbitration to occur. The fact that one party's view on such a question is ultimately held to be incorrect does not mean there was no legitimate "dispute". It follows that an application for summary judgment and an application for a stay to permit arbitration to occur are not different sides of the same coin. In principle, the stay application should be determined first and only if that is rejected should the application for summary judgment be considered.

The Supreme Court considered that this is consistent with the Law Commission's recommendations that led to the Arbitration Act, with New Zealand's international obligations in the New York Convention, with the Model Law on which the Arbitration Act is based and with the purposes of the Arbitration Act, including promoting party autonomy and limiting the scope for judicial intervention in the arbitration process.

Although the parties settled their dispute after the appeal was heard, the Supreme Court decided, in the particular circumstances of the case, to deliver judgment. As a result of the settlement, the Court has made no order as to costs.

Contact person: Gordon Thatcher, Supreme Court Registrar
(04) 471 6921