IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009 409 002301

BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Plaintiff
AND	NEW ZEALAND WINDFARMS LIMITED First Defendant
AND	MURRAY FLETCHER Second Defendant

Hearing: 6 May 2009

Appearances: R G Smedley for First Defendant/Applicant
W Lawson for Plaintiff/Respondent

Judgment: 24 November 2009 at 3.30pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

Background

[1] Concrete Structures ("Concrete Structures") undertook civil engineering and construction work on the first defendant's ("Windfarms") wind farm development near Palmerston North in 2006. The contract incorporated the General Conditions of Contract, NZ 3910:2003. Concrete Structures sues Windfarms for $409,128.82 as damages for breaches of contract. The second defendant ("the engineer") is sued for the same sum – he was the engineer for the contract and he is alleged to have breached a duty of care in tort.

[2] Both defendants have entered appearances under protest to the jurisdiction.

[3] The application before me is an application by Windfarms to dismiss the proceeding as against the first defendant. Central to Windfarms' application are the dispute resolution provisions of the contract.

[4] This is not the first time the Court has dealt with the contract between Concrete Structures and Windfarms. Windfarms was plaintiff in earlier liquidation proceedings against Concrete Structures ("the Rotorua proceeding"). In the Rotorua proceeding the Court dismissed Concrete Structures' application to restrain the advertisement of the liquidation proceeding or to stay the proceeding. See *New Zealand Windfarms Limited v Concrete Structures (NZ) Limited* HC Rotorua CIV - 2008-463-566, 7 April 2009 Doogue AJ.

[5] The following summary of the contractual background, from the judgment of Doogue AJ in the Rotorua proceeding is a convenient introduction:

> [2] The parties entered into an agreement for the building of parts of windturbines on sites in the Manawatu. The plaintiff was the principal under the contract and the defendant the contractor. Their contract was entered into on 7 March 2006. The contract was in the standard form NZS 3910:2003. The firm of Connell Wagner was engaged to provide engineering services. Mr Murray Fletcher of that firm became the engineer to the contract.
>
> [3] After completion of construction the engineer issued a final payment schedule 26 October 2007 claiming that the defendant was required to pay to the plaintiff the sum of $109,522.78. That is to say, the contractor was required to pay money back to the principal. The defendant did not accept this state of affairs. A number of items of correspondence were exchanged which it is not necessary to repeat in detail. A meeting took place on 4 December 2007 at which the parties attempted to resolve their differences. The defendant eventually invited the engineer to issue a formal decision under clause 13.2.4 of the Contract. The engineer did this on 6 March 2008.
>
> [4] On 14 March 2008 the defendant sent a facsimile to the engineer advising that the final payment schedule was not accepted. The facsimile said that, in terms of the contract, the matter now had to be referred to mediation pursuant to clause 13.3. In the same facsimile, the defendant said that given that a 'quasi Mediation' had taken place in December 2007, it was the defendant's view that the parties could now proceed to arbitration. The letter concluded 'please advise whether you are in agreement with this or whether you wish to proceed to a formal Mediation'.
>
> [5] Clause 13.4 of the contract made provision for the parties to arbitrate disputes, including where either of them was dissatisfied with the formal decision of the engineer (as that term is defined in clause 13.2.4). A party

wishing to initiate arbitration is required to give notice to that effect. That notice 'shall be in writing and shall be given by the Principal or the Contractor to the other of them' within certain time limits. The relevant time limit in this case, the parties agree, was one month from the date when the engineer issued his formal decision on 6 March 2008.

[6] Section 15 of NZS 3910 contains the following provision:

> 15.1.2 Any document which is to be served upon the Principal, the Contractor or the Engineer under the contract shall be sufficiently served if it is handed to the Person, or to their appointed representative, or delivered to their address as stated in the Contract Document or as subsequently advised in writing. Except for payment claims, or for a notice given to the Principal under 13.3, 13.4 or 14.3.3, or any notice under the Construction Contracts Act 2002, every notice to the Principal shall be sufficiently given if it is given to the engineer.

[7] The notice here was one of those specifically mentioned in s 15.1.2. That is, it was a notice requiring arbitration and it therefore comes within s 13.4 of the contract.

[6] The Court gave its judgment dismissing Concrete Structures' application on 7 April 2009. At that point Windfarms was permitted to continue its liquidation proceeding. In the meantime, however, this proceeding had been issued. Furthermore, Concrete Structures had at the time of the hearing before me appealed the 7 April 2009 judgment. I am informed that that appeal has yet to be heard.

Windfarms' application

[7] The submissions of Mr Smedley for Windfarms reflected the grounds of opposition stated in Windfarms' notice of application and may be summarised as these:

(a) The Court has no jurisdiction to determine the Concrete Structure's claim against Windfarms because –

- There was no effective notice given by Concrete Structures requiring either mediation or arbitration because the 14 March 2008 facsimile was equivocal.

- The 14 March 2008 facsimile was given to the engineer and not to Windfarms.

- On 13 April 2008 the engineer's formal decision of 6 March 2008 became final and binding upon the parties to the contract.

- Concrete Structures is time barred from disputing any matters between the parties arising from the contract.

(b) Concrete Structures is estopped – per rem judicatam – from asserting this claim against Windfarms because the dispute resolution provisions of the contract have been exhausted.

(c) The present proceeding amounts to an abuse of process designed by Concrete Structures to justify a defence to a properly brought liquidation application in the Rotorua proceeding.

Concrete Structures' response

[8] The grounds of opposition as filed by Concrete Structures may be summarised thus:

(a) The Court has jurisdiction to determine Concrete Structures' claim in this proceeding.

(b) There is a genuine dispute between the parties.

(c) A proceeding in this Court is available to Concrete Structures for resolution of the dispute as –

- The contract provides an option for the parties to refer any dispute to mediation or arbitration.

- Concrete Structures attempted to refer the dispute to either mediation or arbitration but Windfarms refused to so participate.

- The contract does not mandatorily require arbitration and there is no separate agreement to arbitrate.

(d) Concrete Structures still prefers to have the issue between the parties referred to and resolved by arbitration.

Chronology

[9] I set out a chronology of events:

Date	**Event**
7.3.2006	Contract between Concrete Structures and Windfarms.
5.2.09	Date of practical completion.
19.5.09	Due date for completion.
26.10.2007	Engineer issues final payment schedule ($109,522.78 plus GST).
31.10.2007	Windfarms issues invoice on final payment schedule ($123,213.13 plus GST).
4.12.2007	Meeting of parties and engineer under cl 13.2.2 contract.
21.12.07	Concrete Structures requests cl 13.2. review of final payment schedule by engineer.
21.1.2008	Engineer confirms 26.10.2007 final payment schedule assessment.
25.1.2008	Concrete Structures by notice to the engineer presumes the engineer's notice of 21.1.2007 is a formal decision under cl 13.2.4, and says "this matter is in dispute" and that "the matter should now be referred to Arbitration" – "Accordingly

	notice is hereby served to the contractor's intention to refer this matter to Arbitration under the contract".
7.2.2008	The engineer notifies Concrete Structures that his 21.1.2008 notice had not been issued under cl 13.2.4 and stated that the issue could not be referred to arbitration as Concrete Structures had not followed the correct procedure.
15.2.2008	Concrete Structures requests the engineer to now issue a formal decision under cl 13.2.4 and withdraws any previous intention to refer the dispute to mediation or arbitration.
6.3.2008	The engineer issues a formal decision under cl 13.2.4, confirming his final payment schedule assessment of 26.10.07. (Decision to be issued by 14.3.2008).
14.3.2008	Concrete Structures by facsimile advises the engineer that the final payment schedule is not accepted and the matter is in dispute; that Concrete Structures is of the view that the matter should now be referred to arbitration; and asks whether the engineer is in agreement with that or whether the engineer wishes to proceed to a formal mediation.
13.4.2008	Expiry of one month period from expiry of time limit for formal decision.

Contractual provisions

[10] The contract between the parties incorporated the general conditions of contract NZ 3910:203 ("NZS 3910").

[11] Relevant provisions of NZS 3910 as to the role of the engineer include:

(a) 6.2 - 6.2.1

The dual role of the Engineer in the administration of the contract is:

(a) As expert advisor to and representative of the Principal, giving directions to the Contractor on behalf of the Principal and issuing payment schedules on behalf of the Principal at due times; and

(b) Independently of either contracting party, fairly and impartially to make the decisions entrusted to him or her under the Contract Documents, to value the work and to issue certificates.

(b) 13.1.2 Every dispute or difference concerning the contract which is not precluded by the provisions of 12.4, 12.6 or 13.1.1 shall be dealt with under the following provisions of this Section.

(c) 13.2.4…the Engineer, may at any time, in respect of any dispute or difference under 13.2.1 give a decision (in this Section called a "formal decision") which states expressly that it is given under subclause 13.2.4. The Engineer shall give a formal decision on the matter within 20 working days of receiving notice in writing from the Principal or the Contractor requiring him or her to give a formal decision and expressly referring to this subclause 13.2.4. Upon making a formal decision, the Engineer shall forthwith send copies of it to both the Principal and the Contractor. The Engineer's formal decision shall, subject to clause 13.3 and 13.4 or any Adjudication proceedings, be final and binding.

[12] Relevant provisions of NZS 3910 as to dispute resolution include:

Clause 13.3 (the mediation provision) which relevantly provides that:

13.3.1 If either:

(a) The Principal or the Contractor is dissatisfied with the Engineer's decision under 13.2.4...then either the Principal or the Contractor may by notice require that the matter in dispute be referred to mediation.

13.3.2 A notice requiring mediation shall be in writing and shall be given by the Principal or the Contractor to the other of them within one Month after the time prescribed for the giving of the Engineer's decision under 13.2.4.

Clause 13.4. (the arbitration provision) which relevantly provides that:

13.4.1 If either:

(a) The Principal or the Contractor is dissatisfied with the Engineer's decision under 13.2.4...then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

13.4.2 A Notice requiring arbitration shall be in writing and shall be given by the Principal or the Contractor to the other of them:

(a) Within one Month after the Engineer's formal decision under 13.2.4...

Striking out a claim – the principles

[13] The hearing of Windfarms' application proceeded under High Court Rule 15.1, which makes provision for orders striking out all or part of a pleading. In this case Windfarms invokes r 15.1(1)(a) (no reasonably arguable cause of action) and r 15.1(1)(d) (abuse of the process of the court). Alternatively, Windfarms relies on r 15.1(3) which allows the Court, instead of striking out the proceeding, to stay all or part of the proceeding.

[14] I adopt the following as principles applicable to the consideration of this application:

(a) The Court is to assume that the facts pleaded are true (unless they are entirely speculative and without foundation).

(b) The cause of action must be clearly untenable in the sense that the Court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, even if requiring extensive argument.

(e) The Court should be slow to rule on novel categories of duty of care at the strike out stage.

(See *Attorney General v Prince* [1998] 1 NZLR 262).

[15] I remind myself, as Mr Lawson for Concrete Structures urged me to do, that it is inappropriate to strike out a claim summarily unless the Court can be certain that the claim cannot succeed: *Couch v Attorney-General* [2008] NZSC 45 at [33].

The common ground

[16] There was no dispute between counsel as to the chronology of events. Nor was there any dispute as to the documentary trail which was before me in evidence. Against that background I turn to examine in more detail the grounds of the application.

Did Concrete Structures give effective notice requiring mediation or arbitration?

[17] On 6 March 2008 Mr Fletcher as engineer to the contract issued a letter in which he confirmed that his Final Payment Schedule assessment dated 26 October 2007 was not changed. He expressly stated that this was "a formal decision" in accordance with NZS 3910:13.2.4.

[18] As a consequence of that formal decision, Concrete Structures and Windfarms each had until 13 April 2008 to invoke either the mediation or arbitration provision under NZS 3910:13.3 and 13.4 (above at [12]).

[19] Clauses 13.3 and 13.4 speak in terms of a "notice requiring that the matter in dispute be referred to mediation (or arbitration as the case may be). The notice requiring mediation (or arbitration) must be in writing.

[20] Windfarms' case is that Concrete Structures gave no effective notice requiring mediation or arbitration because the only relevant document (the facsimile of 14 March 2009) was equivocal.

[21] In its notice of opposition, Concrete Structures referred to the disputes provisions of NZS 3910 as allowing an option for either party to refer any dispute to mediation or arbitration. It asserted that Concrete Structures had attempted to refer the dispute to mediation or arbitration but Windfarms refused to participate.

[22] His submissions at the hearing, Mr Lawson for Concrete Structures put the matter differently, submitting that:

> It is crucial that the notice dated 14 March 2008 made no reference to an intention to refer to arbitration but unequivocally stated that the matter should *be referred to arbitration*. It is submitted that this is taken to be a clear referral to arbitration. (My emphasis)

[23] Against that background, I now set out the content of the 14 March 2008 facsimile (without Concrete Structures' head note):

> FAX TRANSMISSION
>
> | | | | |
> |---|---|---|---|
> | Company: | Connell Wagner Ltd | Date: | 14 March 2008 |
> | Attention: | Murray Fletcher | Fax No: | 03 379 6955 |
> | From: | Kevin Badcock | Total Pages: | 1 |
> | Project: | NZ Windfarms Ltd – Te Rere Hau Windfarm Development Stage 1 – Palmerston North | | |
>
> Dear Sir,
>
> We refer your notice 6 March 2008, issued under 13.2.24 of NZS 3910, and advise that your assessment of the Final Payment Schedule is not accepted. Accordingly this matter is in dispute.
>
> NZS 3910 requires this matter now be referred to Mediation pursuant to clause 13.3.
>
> Given that a quasi Mediation took place in early December 2007, we are of the view that clause 13.2 has been satisfied and, as the parties were unable to reach an agreement, the matter should now be referred to Arbitration.
>
> Please advise whether you are in agreement with this or whether you wish to proceed to a formal Mediation.
>
> Yours Faithfully
>
> CONCRETE STRUCTURES (NZ) LTD
>
> Kevin Badcock
>
> Claimant's Representative

[24] Faced with the engineer's formal decision, both the Principal and Contractor had three choices:

(a) To accept the decision (which required no formal notice).

(b) To require mediation (which required a notice under cl 13.3.1).

(c) To require arbitration (which requires a notice under cl 13.4.1).

[25] I adopt Mr Smedley's characterisation of the 14 March 2008 letter as "equivocal". The letter does make plain that Concrete Structures is not accepting the formal decision. But what the letter does not do is indicate to the reader what (if anything) Concrete Structures now requires. The facsimile states (incorrectly) that NZS 3910 requires the matter now to be referred to mediation pursuant to cl 13.1. In fact, cl 13.3.1 allows either party to require the matter to be referred to mediation. In any event, the subsequent paragraph of the facsimile makes it clear that Concrete Structures does not wish to proceed to mediation having regard to what is referred to as "a quasi Mediation" which had taken place on 4 December 2007. This leads to Concrete Structures' proposition that the matter should now be referred to arbitration and Concrete Structures then asks whether the engineer is in agreement with that, or whether the engineer wishes to proceed to a formal mediation.

[26] Accordingly, the 14 March 2008 letter remains equivocal and does not state any particular requirement of Concrete Structures.

[27] It is therefore unnecessary to refer to other material in order to clarify any ambiguity in what Concrete Structures was intending to say in the 14 March 2008 facsimile. Had it been necessary to refer to other material I would have considered relevant on the facts of this case the facsimile of 30 June 2008 sent by Concrete Structures to the engineer in which (following up the facsimile of 14 March 2008) Concrete Structures inquired:

> Please advise whether you wish to proceed to a formal Mediation or whether we should now refer this matter to Arbitration.

[28] The 30 June 2008 facsimile thus reinforces the equivocality of the 14 March 2008 facsimile – Concrete Structures in June was looking to the engineer to decide which of mediation or arbitration to adopt.

[29] I conclude that Concrete Structures did not give a written notice that it required either mediation or arbitration.

Was the 14 March 2008 facsimile given to the required party?

[30] The 14 March 2008 facsimile was addressed to the engineer and there is no suggestion in it or in any accompanying document that it was copied to Windfarms.

[31] Clauses 13.3.2 and 13.4.2 expressly require mediation or arbitration notices to be given by the Principal or the Contractor to the other of them.

[32] Andrew Glenn Peterson, Concrete Structures' financial controller, provided an affidavit in opposition. He says that on 14 March 2008 Concrete Structures advised that it did not accept the "engineer's" formal decision and served a notice of dispute again referring the matter to mediation or arbitration. He says that the notice was served within the one month period and gave the "engineer" adequate time to advise Concrete Structures if he [the engineer] believed the notice was incorrectly served.

[33] The evidence of Mr Peterson implicitly accepts that the notice (or a copy of it) was not given to Windfarms.

[34] In his submissions, Mr Lawson referred to letters written by the engineer to Concrete Structures which had been copied to Windfarms between 21 December 2007 and 6 March 2008. He asked the Court to conclude from the copying of that correspondence that Windfarms was aware and therefore given notice of Concrete Structures' intention to refer the matter to arbitration, that is through the 14 March 2008 facsimile.

[35] There are a number of difficulties with Mr Lawson's proposition in that regard. First, there is no evidence to suggest that the 14 March 2008 facsimile received by the engineer was copied to Windfarms within the notice period. Secondly, the 14 March 2008 facsimile remains a letter as between Concrete Structures and the engineer rather than a letter or notice to Windfarms. Thirdly, the characterisation of the 12 March 2008 as a letter as a "reference to Arbitration" is not sustained for the reasons discussed above (at [17] – [29]).

[36] To meet the difficulty as to the lack of physical service upon Windfarms, Concrete Structures asserted that the engineer was acting as Windfarms' agent in relation to receipt of notices.

[37] There are two distinct points in Mr Lawson's agency argument and I deal with each of them in turn:

(a) *"Because the Engineer copied his correspondence with the plaintiff between 21 December 2007 and 6 March 2008 to the first defendant, that indicated that the Engineer was acting as the first defendant's agent"*: There is no merit in this point. The engineer cannot and does not purport to vest himself with authority to accept documents on behalf of one or other party to the contract – that is a matter for the parties themselves.

(b) *"At no stage did the first defendant give notice to the plaintiff that the Engineer was not authorised to accept notices or Mediation or Arbitration under the Contract as he was doing"*: Mr Lawson elaborated on this point by referring to items of the engineer's correspondence commencing with a 26 October 2007 letter which enclosed the Final Payment Schedule. Mr Lawson suggested that discussions contained in that and later letters indicated that the engineer was acting as the Principal's agent in relation to disputed issues. Mr Lawson submitted that this was the commencement of an understanding that it was appropriate for the engineer to receive

> notices of dispute. Mr Lawson referred to a subsequent facsimile from Concrete Structures to the engineer on 2 November 2007 in which Concrete Structures, in relation to its disagreement on the Final Payment Schedule said that pursuant to cl 13.2 it was referring the dispute to the engineer for his review. Mr Lawson's submissions in this regard missed the point that the review provisions under cl 13.2 provide for such disputes or differences to be referred to the engineer. It is the engineer not the other party who is to receive the notice under cl 13.2. Nothing in the involvement of the engineer under cl 13.2 in this case can be taken as any recognition by the engineer, let alone Windfarms, that notices required to be served on the Principal could be served on the engineer.

[38] Mr Lawson placed reliance on the decision of Venning J in *Winslow Properties Ltd v Wooding Construction Ltd* HC AK CIV 2006 404 4969, 4 April 2007. That decision does not advance Concrete Structures' position in the present case. In the *Winslow Properties* case (a case in which Venning J declined leave to appeal a High Court decision dismissing an appeal from a summary judgment entered in the District Court) the Court found that the intending appellant did not have a bona fide and serious argument that service of payment claims on the engineer to a construction contract based on NZS 3910 was ineffective. First, the provision of cl 15.1.2 as it then stood contained contractual provision for service on the engineer. Secondly, the parties' previous conduct precluded the intended appeal argument given that all previous payment claims had been sent to the engineer and were responded to with payment schedules and then payment. In other words, the very process of service being attacked had been permitted both by the terms of the contract and consistently through the contract in relation to the very same matter of payment.

[39] As was found by Doogue AJ in *New Zealand Windfarms Ltd v Concrete Structures (NZ) Ltd* (above at [4]) the notice in this case is one specifically covered by cl 15.1.2 because as a notice for either mediation or arbitration it is covered by clauses 13.3 and 13.4 respectively.

[40] Neither of the grounds justifying the form of service in the *Winslow Properties* case applies in the present case.

Relevance of judgment in the Rotorua proceeding

[41] I have referred (at [4] above) to the judgment of Doogue AJ in *New Zealand Windfarms Limited v Concrete Structures (N.Z.) Ltd* on 7 April 2009. In that case, in which Concrete Structures (N.Z.) Limited applied for orders restraining the advertising of Concrete Structures' liquidation application and staying the liquidation proceeding, Doogue AJ was called upon to deal with largely the same issues as raised in this case. Having regard to the manner in which Mr Lawson fully argued these same matters before me, I have set out above my own analysis and conclusions. Doogue AJ found that the Concrete Structures' notice was not sent to the required recipient, and I have reached the same conclusion for similar reasons. Doogue AJ also found merit in Mr Smedley's alternative submission that the notice sent to the engineer was equivocal. I have found that there is not only merit in that submission but the submission is correct.

[42] The conclusion reached by Doogue AJ – that the notice sent by Concrete Structures could not be treated as an effective notice for the purpose of the contract – is equally my conclusion. Although the two applications before Doogue AJ and myself have been interlocutory in nature, the first defendant in this case may well have been entitled to claim an issue estoppel in relation to this point already decided by this Court in the Rotorua proceeding. In the event, I have on the law and facts reached the same conclusion as that reached by Doogue AJ.

Did the engineer's formal decision of 6 March 2008 become final and binding upon the parties?

[43] The case for Concrete Structures is that the engineer's formal decision became final and binding on the parties when neither the mediation procedure under cl 13.3 nor the arbitration procedure under cl 13.4 was invoked. Concrete Structures

averted that the 14 March 2008 facsimile was an effective notice in relation to either cl 13.3. or 13.4. I have held that it was ineffective for the purposes of both cl 13.3 and 13.4.

[44] Concrete Structures as plaintiff brings this claim against Windfarms for breach of the contract between the parties. Mr Smedley for the first defendant submits that there is no jurisdiction for this Court to hear Concrete Structures' alleged dispute.

[45] The following contractual provisions stand in the way of Concrete Structures' claim:

(a) Clause 13.1.2 – Every dispute or difference concerning the contract (other than three specified situations which are inapplicable) shall be dealt with under the provisions of cl 13 which follow.

(b) Clause 13.2.1 – Every such dispute or difference shall be referred to the engineer not later than one month after the issue of the Final Payment Schedule.

(c) The engineer may in respect of the dispute or difference under cl 13.2.1 give a formal decision which shall, subject to 13.3 (mediation) and 13.4 (arbitration) or any adjudication proceedings be final and binding.

(d) As found above there was no effective invocation of cl 13.3 or cl 13.4. Similarly, there were no adjudication proceedings pending at the time the formal decision was given.

(e) Clauses 13.3.2 and 13.4.2 - notices requiring mediation or arbitration had to be given by 13 April 2008 (being one month time prescribed for the giving of the engineer's decision under 13.2.4).

[46] The notice of opposition of Concrete Structures did not suggest that the time limits within cl 13 were other than strict. I also note that in the proceeding before Doogue AJ, Mr Lawson did not dispute that the notices requiring referral of a dispute to arbitration (or mediation) had to be given timeously (see judgment at [10]). As Doogue AJ found, unless there is a clear and unambiguous procedure prescribed and followed the certainty which NZS 3910:2003 is designed to deliver will be absent.

[47] As an alternative to the submission that Concrete Structures had met the requirements of the contract, Mr Lawson submitted that Concrete Structures had attempted to refer the dispute to mediation or arbitration but that the first defendant refused to participate in such mediation or arbitration.

[48] Once it is found that there was no effective reference to mediation or arbitration, any criticism of Windfarms for not engaging in mediation or arbitration is beside the point. The contract provides what the parties must do. Windfarms was not required to engage in a process which Concrete Structures had not effectively commenced.

[49] An alternative expression of Concrete Structures' argument in its notice of opposition was that Concrete Structures is entitled to bring this proceeding against Windfarms on the basis of Windfarms' refusal to mediate or arbitrate the dispute. That argument is merely a reformulation of that just discussed – it takes Concrete Structures no further given that Concrete Structures had not effectively invoked either the mediation or arbitration process.

[50] Finally, the notice of opposition contained the assertion that the contract did not provide a requirement to arbitrate and Concrete Structures had not entered into any separate agreement to arbitrate with Windfarms. But cl 13 of NZS 3910:2003, as discussed above, contains a binding regime for the resolution of all disputes or differences under the contract. If a claim is to be made by one party against the other concerning the contract it is required to be dealt with under cl 13 within the time frames of the appropriate sub-clause of cl 13. In a sense, Concrete Structures is

correct – it is not mandatory that Concrete Structures arbitrate. But in the sense relevant to this application, Concrete Structures is incorrect – if it wished to pursue a monetary claim concerning the contract it had to do so (failing agreement) under the arbitration provisions in the contract.

Dismissal or stay?

[51] Windfarms' interlocutory application sought an order dismissing the proceeding.

[52] Mr Smedley appropriately in his submissions referred the Court to the alternative of an order staying the proceeding. Schedule 1, Article 8 Arbitration Act 1996 provides a mandatory regime for the stay of Court proceedings where the matter in question is the subject of an arbitration agreement. Article 8(1) provides for a stay of the Court proceeding and a reference of the parties to arbitration.

[53] In the circumstances of this case a stay is not the appropriate remedy. There is nothing to refer to arbitration because Concrete Structures did not avail itself of its right to arbitration.

[54] I am satisfied that in the circumstances of this case the pleading discloses no reasonably arguable cause of action and it is appropriate on that ground alone that the pleading be struck out in its entirety. I am also satisfied that it would be an abuse of the process of the Court to permit Concrete Structures' claim to proceed. The claim smacks of an endeavour to cut across Windfarms' proceeding to liquidate Concrete Structures in which, by interlocutory application, Concrete Structures has already pursued unsuccessfully the very arguments which it has again pursued in this application.

Orders

[55] I order that the statement of claim in this proceeding be struck out in its entirety.

[56] I order that the proceeding be dismissed.

Costs

[57] Costs are reserved.

[58] There appears to be no reason in this case that costs should not follow the event. The case also appears to be suitable for costs on a 2B basis. The parties ought to be able to reach agreement. If that is not the case the parties are to file submissions as to costs sequentially no more than 5 working days apart (four pages maximum).

Solicitors
L Lawson, Rotorua for Plaintiff
Anthony Harper, Christchurch for First Defendant