

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2009-485-2289

BETWEEN	ALCATEL-LUCENT NZ LTD Plaintiff
AND	JUNIPER NETWORKS AUSTRALIA PTY LTD First Defendant
AND	JUNIPER NETWORKS (HONG KONG) LTD Second Defendant

Hearing: 26 November 2009

Appearances: B Squire QC and C Abbott for the plaintiff
J Smith, J Bates and J Wass for the first and second defendants

Judgment: 1 December 2009

JUDGMENT OF CLIFFORD J

Introduction

[1] The second defendant, Juniper Networks Hong Kong Ltd (Juniper HK), with some limited support from the first defendant, Juniper Networks Australia Pty Ltd (Juniper Aus), supplies telecommunications products and services to the plaintiff, Alcatel New Zealand Limited (Alcatel NZ). Alcatel NZ in turn supplies those products and services to Telecom New Zealand Limited (Telecom).

[2] The relevant contractual arrangements between Alcatel NZ and Juniper HK were established at group level between Alcatel NZ's related entity, Alcatel-Lucent USA Inc (Alcatel USA), and Juniper HK's ultimate parent entity, Juniper Networks Inc (Juniper USA).

[3] Those contractual arrangements are, as relevant for these purposes, expressed to expire on 31 December 2009. Alcatel NZ's contract with Telecom does not expire until 31 December 2011 (with Telecom having a right of renewal of three years). It is, I think, accepted that if Alcatel NZ cannot continue after 31 December 2009 to procure telecommunications products and services from Juniper HK, Alcatel NZ will not be able to meet fully its contractual obligations to Telecom.

[4] Alcatel NZ and Alcatel USA say that the express expiry date of 31 December 2009 is a mistake.

[5] Alcatel USA has entered into dispute resolution procedures with Juniper USA intended, ultimately, to rectify (or, more accurately under applicable New York law, to reform) the contractual arrangements so that they would continue until 31 December 2011. This would, therefore, enable Alcatel NZ to continue to meet fully its obligations under its contract with Telecom.

[6] Alcatel NZ originally commenced proceedings in New Zealand against Juniper Aus, and subsequently Juniper HK, for rectification under New Zealand law of those contractual arrangements. Alcatel NZ has discontinued those proceedings.

[7] In what it terms its substantive proceedings, Alcatel NZ now applies for a permanent injunction in the following terms:

An Injunction restraining the First and/or Second Defendants from refusing or failing to permit the Plaintiff to purchase Juniper Products and Services from Juniper Networks to the extent such purchasers [sic] are required by the Plaintiff in order to fulfil its contractual obligations to Telecom pending resolution or mediation of the dispute referred to in Paragraph 23 hereof [see above [5]].

[8] As explained by Mr Squire for Alcatel NZ, Alcatel NZ bases its application for that permanent, albeit temporary, injunction on a substantive claim of anticipatory breach of contract. Alcatel NZ says that Juniper HK has made it clear it will not supply telecommunications products and services to Alcatel NZ following the current expiry of the contractual arrangements on 31 December 2009. On the basis that Alcatel NZ says that the expiry date is properly 31 December 2011, Alcatel NZ says that this is clear evidence of anticipatory breach.

[9] In this interlocutory proceeding, Alcatel NZ applies for interim relief pending the hearing of its claim for permanent temporary relief or the earlier resolution in its favour of the dispute resolution proceedings, or subsequent legal proceedings, between Alcatel USA and Juniper USA.

[10] The defendants apply under rules 6.29 and 15.1 of the High Court Rules for a stay or dismissal of Alcatel NZ's substantive proceedings. They argue that New Zealand is not the appropriate forum for this dispute. The appropriate fora are the Courts of either California or New Jersey, applying New York law, as explicitly provided for by the relevant contractual arrangements. They further argue, without prejudice to their protest to jurisdiction – which position has been accepted explicitly by Alcatel NZ – that even if the New Zealand Courts have jurisdiction, there is no basis upon which either interim or permanent temporary injunctive relief as applied for by Alcatel NZ should be granted.

Background

[11] On 23 April 2003 Lucent Technologies Inc, the predecessor to Alcatel USA, entered into a Global Resale Agreement (the GRA) with Juniper USA. The GRA is an umbrella agreement pursuant to which Lucent entities could purchase telecommunications products and services from Juniper entities. One of those Lucent entities was Lucent Technologies (NZ) Ltd.

[12] Lucent Technologies Inc was acquired by Alcatel interests in 2006, and became Alcatel USA. As a result of that change of control, Lucent Technologies (NZ) Ltd amalgamated with Alcatel New Zealand Ltd to form Alcatel NZ. For the sake of convenience, therefore, and as there is no dispute that this is now the relevant contractual position, I will simply refer to Alcatel USA and the relevant Alcatel subsidiaries and related entities, including Alcatel NZ, rather than to Lucent entities.

[13] Under the GRA, Alcatel NZ – as an Alcatel affiliate – received the right to re-sell Juniper products and services so as to be able to supply those products and services to its customers.

[14] Additionally, the terms of the GRA recognise Alcatel NZ as, in effect, being a party to that agreement. The definition of the term “Party” includes “the Lucent Affiliates”. A “Lucent Affiliate” means a corporation, partnership or venture over which Lucent directly or indirectly exercises control or that is under common control. Alcatel NZ is such a corporation. Furthermore, clause 2.1.1 of the GRA establishes direct contractual relationships between Alcatel NZ and Juniper HK in the following terms:

Approved Lucent Affiliates. Any contract or Purchase Order issued under this Agreement by an Approved Lucent Affiliate will be a contractual relationship between the Approved Lucent Affiliate and Juniper or the applicable Juniper Affiliate. Juniper or the applicable Juniper Affiliate shall only look to the applicable Approved Lucent Affiliate for performance of the applicable Approved Lucent Affiliate’s obligations under such contract or Purchase Order and Juniper shall look only to the approved Lucent Affiliate for performance of the applicable Approved Lucent Affiliate’s obligations under such contract or Purchase Order.

[15] Alcatel NZ’s contracts with Telecom require it to provide network management services in relation to Telecom’s wireline network throughout New Zealand and its two mobile wireless networks. As described in an affidavit sworn by a Telecom employee filed in support of Alcatel NZ’s claims, those services are described in the following way:

In simple terms, the effect of the above agreements is that Telecom has agreed with [Alcatel NZ] that [Alcatel NZ] will provide until 31 December 2011 an exclusive 7 day a week 24 hour a day end to end network management and support service for both its fixed and mobile networks. As a result of these agreements, [Telecom] relies on [Alcatel NZ] to manage, support, maintain and fix any part of our fixed and mobile networks irrespective of what technology is involved.

[16] That same affidavit describes the significant role that Juniper equipment plays in Telecom’s network and – in turn – that Alcatel NZ plays in managing and supporting Telecom’s networks. At the same time, and as evidenced by a letter of 21 October 2009 sent by Alcatel USA to Juniper USA (Exhibit “F” to the affidavit of Steven Lowe sworn on 10 November 2009), Alcatel NZ’s contracts with Telecom “cover a lot more than just Juniper support”.

[17] Juniper USA terminated the GRA with effect from 14 December 2008. It did so by reference to change of control provisions in the GRA, and the fact that Lucent

Technologies Inc had been acquired by the Alcatel group, considered by Jupiter to be its competitor, in 2006.

[18] Under a Memorandum of Understanding signed on 12 December 2008 (the MOU), and a letter from Juniper USA to Alcatel USA of the same date (the Exception Letter), Alcatel USA and Juniper USA confirmed temporary exceptions to the terminated relationship. Included in those excepted arrangements were the provision of products and services by Alcatel NZ to Telecom in New Zealand up until 31 December 2009.

[19] Around the time of those negotiations between Alcatel USA and Juniper USA, Alcatel and Telecom were in the process of concluding their negotiations to extend their agreements until 31 December 2011. Agreement to that effect was reached by Alcatel and Telecom on or about 19 December 2008.

[20] Mr Lowe states in his evidence that he first noticed in April 2009 that the MOU and Exception Letter extend Alcatel's rights only until 31 December 2009. He says that, since then, Alcatel USA and Alcatel NZ have engaged in discussions with Juniper USA, Juniper Aus and Juniper HK in an attempt to, in his words, "correct the erroneous termination date from 31 December 2009 to 31 December 2011". In the letter of 21 October 2009, Alcatel USA initiated the dispute resolution and mediation provisions found in clause 28 of the GRA. In that letter Alcatel USA records its contention that the Exception Letter "incorrectly" shows the end date of the relevant Telecom contracts. It requests that those dates be amended to read 31 December 2011.

[21] The evidence of Mr Havercroft, Chief Technology Officer at Telecom, was that Telecom became aware of Juniper USA's termination of the GRA on 18 November 2008 and, on the same date, was advised by the Juniper network that, in Mr Havercroft's words:

all existing support contracts would be honoured until expiry which was, according to Juniper, 30 June 2009 for the existing [Alcatel NZ] support contract for Telecom's Juniper equipment. Juniper indicated that no new support arrangements would be entered into with [Alcatel NZ] unless there was strong demand in an outsource operations situation.

[22] Consequently, Mr Havercroft states that Telecom decided it needed to be pragmatic and explore its options if the existing arrangements could not continue, and Telecom began working in early 2009 on finding an alternative to Alcatel NZ. It seems that Telecom was subsequently advised that an extension of the local support arrangement was possible. By 10 June 2009, however, it is clear that Telecom knew that the Juniper network would not extend its arrangements with Alcatel NZ beyond 31 December 2009 and that Telecom would need to make alternative arrangements. On 24 July 2009 Telecom sent out a Request for Proposal to various Juniper resellers (including Alcatel NZ) aimed at finding a “solution for support of Juniper Networks products” installed in its network.

[23] In terms of Juniper’s position, it is sufficient for current purposes to record that Juniper USA denies that the reference to 31 December 2009 is an error. Juniper USA says that that date was deliberately agreed.

Core issue

[24] As is well known, applications for interim injunctive relief are considered by reference to the questions of whether there is a serious issue to be tried and, if there is, where the balance of convenience lies. Here, the defendants’ protests to jurisdiction are formally required to be considered prior to those questions. A consideration of those protests, however, itself raises – see r 6.28(5)(b) High Court Rules – the question of whether “there is a serious issue to be tried on the merits”. This is in my judgment, and as was accepted by the parties to this proceeding, a similar test to the “serious question to be tried” test applied when considering applications for interim injunctive relief.

[25] Consideration of that issue is determinative of Alcatel NZ’s application.

[26] In presenting Alcatel NZ’s case, Mr Squire submitted that he did not need to argue whether or not Alcatel NZ, or other Alcatel entities, had a serious question to be tried as regards their application for rectification and/or reformation. He based that argument on the dispute resolution provisions of the GRA. Those provisions, he submitted, provide Alcatel NZ with the right at this point of the dispute to require

Juniper HK to go on supplying Juniper products and services because, and simply because, Alcatel NZ had raised the issue that the correct contract expiry date was not 31 December 2009 but 31 December 2011. For reasons I will set out later in this judgment, that in my view was not a correct interpretation of those provisions.

[27] Based on that approach, however, before me Alcatel NZ simply did not address the question of whether or not it had a serious question to be tried as regards its argument that the express expiry date of 31 December 2009 was a mistake, and that its contractual arrangements should be reformed so that they expired as at 31 December 2011.

[28] Therefore, and whether considered in the context of r 6.28(5)(b) or in the context of a traditional injunction analysis, Alcatel NZ did not establish that it has a serious question to be tried on that issue. There is, in my judgment, therefore no basis upon which this Court should now provide it with injunctive relief.

[29] Alcatel NZ, in support of its application, pointed to what it considered would be the serious adverse consequence for Telecom if Alcatel NZ was unable, as part of its overall support for Telecom, to go on providing Juniper products and services after the end of this year. Telecom (Mr Havercroft) filed an affidavit in support of Alcatel NZ's application. Alcatel NZ said that that issue was a relevant consideration in its favour, both in terms of the traditional analysis of an application for injunctive relief, and also in support of its argument that the New Zealand Courts had or should assume jurisdiction.

[30] I have given careful consideration to the extent to which Alcatel NZ established possible adverse consequences for Telecom. At the end of the day I was not satisfied that those possible adverse consequences were as significant as Alcatel NZ suggested. Moreover, even if Alcatel NZ had persuaded me that indeed the consequences for Telecom, and the important services it provides to customers in New Zealand, were materially adverse, that would not have helped Alcatel NZ in this case. Whatever the consequences may be for Telecom, this Court could only intervene – and in effect grant Alcatel NZ a mandatory injunction – where Alcatel

NZ had established a substantive legal claim sufficient to support such relief. That it did not do so was fatal to its application.

[31] I will now consider the case as it was argued before me by reference first to the defendants' protests to jurisdiction.

[32] I note that, in his written submissions, Mr Smith argued first that the GRA contained a submission to the exclusive jurisdiction of the Courts of New Jersey and California. He then argued that, even if that submission was not exclusive, nevertheless by reference to *forum non conveniens* arguments this Court should not assume jurisdiction over this dispute. I note that I have not found it necessary to consider the defendants' *forum non conveniens* arguments separately from my consideration of their protests to jurisdiction under the relevant High Court Rules. In my view, and as I understand was accepted by Mr Smith for the defendants, a consideration of the issues raised, by reference to the framework now provided by rr 6.27, 6.28 and 6.29, in this instance addresses relevant *forum non conveniens* considerations.

Protests to jurisdiction: the High Court Rules

[33] It is helpful first to consider how, under the High Court Rules, the defendants' protests to jurisdiction are to be considered.

[34] Service was validly effected on Juniper Aus within New Zealand. It argues under r 6.29(3) that New Zealand is not the appropriate forum for trial of this action. It applies for a stay or dismissal of these proceedings under r 15.1.

[35] Juniper HK was served in Hong Kong by fax and email. On 23 November 2009, at the time of filing its second amended statement of claim (which for the first time cited Juniper HK as a party), Alcatel NZ applied under r 6.1 for directions of service to that effect. Simon France J issued such directions later that day, on the papers as filed by Alcatel NZ and without hearing from the parties. Given the rule under which Alcatel NZ applied, it would not appear that issues relating to Juniper HK's protest to jurisdiction (as opposed to issues of substituted service) were drawn

to Simon France J's attention. On that basis, Mr Squire accepted that Juniper HK had been served outside New Zealand without leave.

[36] Mr Squire further argued that Alcatel NZ had been entitled, under r 6.27, to serve Juniper HK without leave. Juniper HK does not accept that contention. It is not, however, necessary to separately consider the merits of that dispute.

[37] Given Juniper HK's protest to jurisdiction under r 5.49, and given that as a matter of fact service of process on it was effected out of New Zealand without leave, r 6.29(1) applies.

[38] Rule 6.29(1) provides that, in those circumstances:

... the Court must dismiss the proceeding unless the party effecting service establishes—

(a) that there is—

- (i) a good arguable case that the claim falls solely within one or more of the paragraphs of r 6.27; and
- (ii) the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d); or

(b) that, had the party applied for leave under r 6.28,—

- (i) leave would have been granted; and
- (ii) it is in the interests of justice that the failure to apply for leave should be excused.

[39] Faced with Juniper HK's protest to jurisdiction, Alcatel NZ has two alternatives. Under r 6.29(1)(a) it may establish that there is a good arguable case that its claim falls within one of the paragraphs of r 6.27 that would have entitled it to serve its proceedings on Juniper HK without leave. It must then satisfy the Court that the Court should assume jurisdiction by reference to the matters set out in r 6.28(5)(b) to (d), namely:

(b) there is a serious issue to be tried on the merits; and

(c) New Zealand is the appropriate forum for the trial; and

(d) any other relevant circumstances support an assumption of jurisdiction.

[40] Alternatively, under r 6.29(1)(b), Alcatel NZ can resist Juniper HK's protest to jurisdiction by establishing that, had it applied for leave, leave would have been granted by reference to the matters set out in r 6.28(5)(a) to (d). By reference to r 6.28(5)(a), when that protest is being considered under r 6.29(1)(b), a consideration of whether Alcatel NZ's claim "has a real and substantial connection with New Zealand" displaces the consideration of whether there is a good arguable case that the claim falls solely within one or more of the paragraphs in r 6.27(2).

[41] Given the mutually exclusive relationship of r 6.27 and r 6.28 (*McGechan on Procedure* at para HR6.27.06), it is clear that the consideration of whether the claim "has a real and substantial connection with New Zealand" requires a consideration of different matters from the various factors set out in r 6.27(2). Neither the plaintiff nor the defendants, however, made anything of that point. Rather, Mr Squire relied on his argument as regards r 6.29(1)(a)(i) that there was a good arguable case that Alcatel NZ's against Juniper HK claim fell under either of r 6.27(b)(iii) (that Alcatel NZ's contract with Juniper HK was to be wholly or in part performed in New Zealand) or r 6.27(2)(d) (that Alcatel NZ's claim was for a permanent injunction to compel or restrain the performance of any act in New Zealand or was interim relief in support of judicial proceedings "to be commenced" outside New Zealand). I will consider Alcatel NZ's response to Juniper HK's protest to jurisdiction accordingly.

[42] As noted above, r 6.28(5)(c) raises the question, in considering Juniper HK's protest to jurisdiction, of whether New Zealand is the appropriate forum for the proceeding. Therefore, and although under r 6.29 Juniper Aus and Juniper HK's protests to jurisdiction raise a separately articulated series of questions, at the end of the day they both involve the same central issue, namely whether New Zealand is the appropriate forum for these proceedings. I will, therefore, consider them together.

[43] I record that Alcatel NZ did not frame its application as one under r 7.81. Under that rule a party may apply for interim relief in support of overseas proceedings. Such an application does not rely on the applicant, who is required to be a party or an intended party to those overseas judicial proceedings, having a substantive claim which it may bring in New Zealand. Rather, under r 7.81(4) "the court must be satisfied that there is a real connecting link between the subject matter

of the interim relief and the territorial jurisdiction of the court”. Rule 7.81 has not yet been considered by the Courts, as far as I am aware. Given that it was not relied on by Alcatel NZ, nor considered by the defendants, I do not propose to discuss it further. I do note, however, that it would appear to have been an alternative approach for Alcatel NZ to obtain relief in respect of proceedings insofar as they are “to be commenced” in the United States. Even if it had, however, the assessment of an application under r 7.81 would necessarily involve an assessment of the strength of the applicant’s case in the overseas proceeding relied on.

The defendants’ protests to jurisdiction

[44] Under r 6.29(1) and (2) the onus is on Alcatel NZ to satisfy the Court that appropriate grounds exist not to dismiss the proceeding. Under r 6.29(3), the onus is on Juniper Aus to satisfy the Court that New Zealand is not the appropriate forum. Given that Juniper HK is now the principal target of Alcatel NZ’s application for substantive and interim relief, the burden largely falls on Alcatel NZ to establish that – as regards its proceedings against Juniper HK – the Court should not dismiss those proceedings. If the defendants’ protests to jurisdiction succeed, then Alcatel NZ’s substantive proceedings would be dismissed and it would have no grounds for its application for interim relief (on the basis on which it has applied), which would fall away accordingly. In these circumstances, and given that at the hearing Mr Smith for the defendants argued their protests to jurisdiction first, I propose to consider those protests by reference to the various grounds raised by Mr Smith, and Alcatel NZ’s response to them.

[45] The defendants’ protests to jurisdiction rely first on an argument that, under the GRA, the parties have submitted to the exclusive jurisdiction of the State or Federal Courts in California and New Jersey. In terms of relevant authority, they say that given that submission Alcatel NZ must establish strong cause for not granting a stay or dismissal (*Society of Lloyd’s & Oxford Members’ Agency Ltd v Hyslop* [1993] 3 NZLR 135 (CA) at 142 per Richardson J). This, they say, Alcatel NZ has failed to do.

[46] This argument is based on the dispute resolution and choice of law clauses in the GRA. Clause 28 of the GRA provides for the settlement of disputes and mediation. Under clause 28.1 to 28.4 of the GRA all disputes are to be referred to internal, non-binding dispute resolution procedures and then to non-binding mediation or, at the option of a party, to binding mediation. It is those procedures which Juniper USA has invoked in the United States.

[47] Clause 28.5 goes on to state that:

Nothing in this section shall be construed to preclude any Party from seeking injunctive relief in order to protect its rights pending resolution or mediation. If the Parties are unsuccessful in resolving the dispute through the processes defined herein, either Party may proceed with legal action in a court of competent jurisdiction subject to Section 30.1 (the Choice of Law clause).

Clause 30.1 provides:

Choice of Law. The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the State of New York, United States of America, as if performed wholly within the state and without giving effect to the principles of conflicts of law. State and federal courts in the states of California and New Jersey shall have jurisdiction over any claim arising hereunder. Notwithstanding the foregoing, either Party may seek injunctive relief in any court of appropriate jurisdiction with respect to any alleged breach of such Party's proprietary rights (except for the following jurisdictions – Louisiana, Texas, Florida, Georgia, North and South Carolina, Oklahoma, Kansas). The Parties specifically disclaim the application of the UN Convention on Contracts for the International Sale of Goods to the interpretation or enforcement of this Agreement.

[48] Given the steps taken in the United States, it seems clear that Alcatel USA and Juniper USA accept that the effect of the second sentence of clause 28.5 is that those dispute resolution and mediation procedures must be undertaken, and completed, before legal action may be begun in Courts of competent jurisdiction. That appears to be the proper interpretation. The dispute here is about the significance of the first sentence of clause 28.5 and, in particular, where (in which Courts) such injunctive relief may be sought.

[49] As relevant for the purposes of that dispute, Alcatel NZ's position is that clause 30.1 is not a submission to the *exclusive* jurisdiction of the State and Federal Courts of California or New Jersey. Moreover applications for injunctive relief,

made pursuant to the first sentence of clause 28.5, are not subject to clause 30.1 at all, so that New York law did not apply.

[50] Put simply, and leaving the proper interpretation of clause 30.1 to one side for the moment, Mr Squire argued that it was only legal proceedings which commenced after dispute resolution processes had been completed that were subject to clause 30.1, both as to choice of law and jurisdiction. He said this followed, because, on the basis of their position in clause 28.5, the words “subject to Section 30.1 (the Choice of Law clause)” could only apply to the second sentence in clause 28.5. They did not apply to the first sentence. He argued further that this was an appropriate interpretation of clause 28.5. As that clause was designed to enable parties to “protect rights” pending the outcome of resolution or mediation under the preceding provisions of clause 28, and given the many jurisdictions in which “parties” to the GRA existed, it would be inappropriate for parties to have to seek that injunctive relief under New York law. It would be even more inappropriate to restrict the parties to obtaining that relief in the Courts of California or New Jersey.

[51] I am not attracted to that interpretation. In international, multi-party contracts, choice of law clauses, including contractual submissions to jurisdiction, are important provisions for the governance of contractual relationships. In such contracts, both “sides” have a natural interest in restrictive choices both of law and venue in the interests of commercial efficacy. In my view, the choice of law and jurisdiction set out by clause 30.1 naturally applies to proceedings allowed by both sentences in clause 28.5. I accept that clause 28.5 is not well drafted. It would have been more clearly drafted if the reference to clause 30.1 had been inserted at the outset. I sense that, as originally drafted, the clause might have only contained that second sentence, and the first sentence has been added after further consideration. More substantively, I do not consider it likely that either of the parties – that is either of Alcatel USA or Juniper USA – would have intended that injunctive relief sought to protect rights pending resolution or mediation under clause 28.5 might be commenced in any jurisdiction and under any law. In my judgment, therefore, clause 28.5 is, in its entirety, subject to clause 30.1.

[52] Turning to the interpretation of clause 30.1, the choice of law provision, namely the law of the State of New York, is clear and in my judgment cannot be disputed. That law, therefore, applies to any claim Alcatel NZ may have to rectify or reform its contract with Juniper HK.

[53] As to jurisdiction, Mr Smith (for the defendants) freely accepted that there was not an express stipulation that the jurisdiction of the State and Federal Courts of California and New Jersey was to be “exclusive”. He said, however, that the express reference to the States of California and New Jersey in that second sentence was, itself, a clear indication that the parties were submitting to the jurisdiction of those Courts and no others. He relied, in particular, on the third sentence of clause 30.1. He said that the use of the words “[n]otwithstanding the foregoing”, prior to a provision enabling parties to take injunctive relief with respect to breaches of proprietary rights in “any Court of appropriate jurisdiction, except Louisiana, Texas, Florida, Georgia, North and South Carolina, Oklahoma and Kansas”, was a very clear and compelling indication that the previous sentence was properly interpreted as a submission to the exclusive jurisdiction of Federal and State Courts in California and New Jersey. In my view, there is considerable strength to that argument.

[54] Mr Squire submitted that, as there was no (expressly) exclusive submission to California and New Jersey Courts, the words “[n]otwithstanding the foregoing” were properly to be interpreted as “for the avoidance of doubt”. That is not an interpretation I am attracted to.

[55] In my view, the implication of the words “[n]otwithstanding the foregoing” is clear: were it not for the third sentence, parties would not be able to seek injunctive relief in Courts of appropriate jurisdiction, as the only Courts that have jurisdiction are those of California and New Jersey. Further, and although this was not a matter pointed to by either of the parties, I note that both Alcatel USA and Juniper USA are Delaware Corporations that have their principal places of business in New Jersey and California respectively. In my judgment, therefore, they have submitted to the jurisdiction of their “local” courts on an exclusive basis subject only to an ability to seek injunctive relief in support of proprietary rights in any Court of appropriate jurisdiction, other than those listed in the third sentence of clause 30.1.

[56] The third sentence of clause 30.1 also gives rise to a further argument as regards the construction of the first sentence of clause 28.5. If that sentence had been intended to broaden the venues in which injunctive relief might be sought pending resolution or mediation then, as in the third sentence of clause 30.1, that would have been explicitly stated in that sentence.

[57] This interpretation of clause 30.1 is supported by the reasoning of Henry J in the High Court in *Universal Specialities Ltd v Advanced Cardiovascular Systems* HC AK CP162/95 2 May 1996, construing a jurisdiction clause that did not incorporate an express reference to an “exclusive” jurisdictional choice. There, Henry J interpreted a clause drafted in similar terms to clause 30.1 as conferring exclusive jurisdiction on the nominated Court.

[58] I am therefore satisfied that clause 30.1 is an exclusive submission to the jurisdiction of the State and Federal Courts of New Jersey and California except in terms of the narrow exception stated in that clause.

[59] As noted by Mr Smith, in *Society of Lloyd’s & Oxford Members’ Agency Ltd v Hyslop*, Richardson J commented on the effect of an exclusive jurisdiction clause (at 142) as follows:

The existence of an exclusive jurisdiction clause places a heavy burden on the party seeking to oppose the clause. While the Court has a discretion, a stay should be granted unless strong cause for not doing so is shown by the plaintiff.

[60] Strong cause to override an exclusive jurisdictional clause may arise where New Zealand is clearly the most appropriate forum, where the defendant does not generally wish to litigate in the foreign forum or where the relief sought is not available in the foreign forum. (See *Air Nauru v Niue Airlines Ltd* [1993] 2 NZLR 632; *Pacific Fundraising Ltd v Universal Australia Pty Ltd* (1990) 3 PRNZ 372; *Apple Computer Inc v Apple Corps SA* [1990] 2 NZLR 598; *The Atlantic Song* [1983] 2 Lloyd’s Rep 394.)

[61] I am satisfied that Alcatel NZ has not shown strong cause.

[62] The GRA itself is a contract negotiated directly between large US entities in the United States establishing a basis for those entities, and members of their respective groups of companies, to deal with each other around the world. I accept that, in terms of clause 2.1.1 of the GRA there are direct contractual relationships between Alcatel NZ and Juniper HK, but those contractual relationships would appear to arise on a case by case basis when Alcatel NZ orders, and Juniper HK accepts orders, for Juniper telecommunications products and services. In my view, it is the GRA itself, and the collateral contract represented by the MOU and the Exceptions Letter, which established the arrangements which subsisted notwithstanding the cancellation of the GRA itself and which are at issue in the current dispute.

[63] As I think is reflected by Alcatel NZ having discontinued its application for rectification of those arrangements in New Zealand, it simply cannot be established that New Zealand is “clearly the most appropriate forum”. Nor can it be established that Juniper HK, and the Juniper entities more generally, do not wish to litigate in the relevant forum. Dispute resolution procedures are now underway. Finally, the relief sought is, as acknowledged by clause 28.5 itself, available in the Courts of the United States, and more particularly in the Courts of New Jersey and California applying New York law.

[64] In my judgment therefore, and having regard to the relevant High Court Rules, New Zealand is not the appropriate forum for the trial of Alcatel NZ’s substantive claim, based on anticipatory breach, for a permanent, albeit temporary, injunction against either of the defendants. On that basis I must dismiss the proceeding under r 6.29, by reference to r 6.28(5)(b) and consider that a dismissal is the appropriate response in terms of r 15.1.

[65] As a result, it is not strictly necessary to consider the “serious question to be tried” question which arises both in terms of r 6.28(5)(b) (and *forum non conveniens* generally: *Oilseed Products (NZ) Ltd v HE Burton Ltd* (1987) 1 PRNZ 313) and in terms of the first leg of the consideration of whether interim relief should be granted. Having said that, and particularly because of the way in which Mr Squire argued the case for Alcatel NZ as summarised above, it is appropriate that I do so.

Serious question to be tried

[66] Mr Smith argued that the “serious question to be tried” analysis involved an assessment, by reference to the relevant law being that of New York, of the plaintiff’s likelihood of succeeding in a claim of reformation under New York law. In that regard Mr Smith noted, on the basis of affidavit evidence as to New York law, the apparently higher standard of proof that was required under New York law than would have been required by the New Zealand law on contract rectification. Furthermore, he noted that Mr Squire (for Alcatel NZ) had simply not addressed that question (of a serious question of reformation to be tried) at all.

[67] I accept Mr Smith’s submissions on both points. It is apparent that New York law imposes a high standard for reformation in comparison to that imposed by New Zealand law for rectification. Mr Banks, an attorney admitted to the practice of law in the State of New York, gave expert evidence on New York law for the defendants. No evidence as to New York law was given by Alcatel NZ and Mr Banks’ evidence was not challenged. Mr Banks stated:

The doctrine of contract reformation is a very narrow exception to the fundamental principle that the parties’ plainly expressed writing sets forth their agreement. Reformation is an equitable remedy to be applied when clear and convincing evidence shows that the parties’ written contract does not embody their mutually intended true agreement. *Ross v. Food Specialities, Inc.*, 6 N.Y.2d 336, 341, 189 N.Y.S.2d 857, 860 (1959). ... Reformation will not be granted where the evidence is equivocal or open to doubt. *Southard v. Curley*, 134 N.Y. 148, 151, 31 N.E. 330 (1892).

Under New York law, there is a presumption that the parties’ written agreement is accurate and a high order of proof is necessary to modify it. *George Backer Management Corp. V. Acme Quilting Co., Inc.*, 46 N.Y.2d 211, 219-20, 413 N.Y.S.2d 135, 139 (1978). As the Court of Appeals has stated, before a party

can be granted reformation, he *must establish his right to such relief by clear, positive and convincing evidence*. Reformation may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error. ... Nor may [a party] secure reformation merely upon a showing that he or his attorney made a mistake.

Amend v. Hurley, 293 N.Y. 587, 595, 59 N.E.2d 416, 419 (1944).

[68] Mr Banks explained that reformation is appropriate in two circumstances – first, where the parties have an agreement upon particular terms but their writing does not reflect that agreement (“scrivener’s error”); and secondly where there is a fraudulently induced unilateral mistake. The former requires “evidence of a very high order that shows in no uncertain terms” that an error was made and exactly what the parties really agreed upon.

[69] In *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 at 628 Hammond J stated:

As to rectification, in *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 Tipping J adopted a statement by Brightman LJ in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, 1090 in which his Lordship said that the requisite standard [of proof for rectification] is the normal civil standard, "but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention [is very high]". That can usefully be compared with the position in the United States (where such actions are known as "reformation" actions). There some Courts have rejected the normal civil standard. For instance, in *Skelton v Federal Surety Co* 15 F 2d 756 (1926) at p 757 it was suggested that "The rule is that a mutual mistake as the foundation for reformation . . . must be established by proof that is clear, convincing, and satisfactory. Mere preponderance of evidence will not suffice".

[70] Moreover, Mr Squire explicitly argued that it was not necessary for him to address that point. In this, he relied on clause 28.5 of the GRA. His submission was that clause 28.5 of the GRA provided, in these circumstances, that Alcatel NZ was in effect entitled to either interim, or permanent but temporary, injunctive relief to protect its contract rectification (or reformation) claim pending the non-binding dispute resolution and mediation procedures. Until those procedures were completed, the plaintiff was not in a position to commence a substantive legal proceeding for rectification or reformation (i.e. it was not permitted to do so under clause 28). Therefore, in effect, Alcatel NZ argues that clause 28.5 provides for the preservation of what Alcatel NZ argues is the status quo under the contract

(continuing the contractual arrangements beyond 31 December 2009) to be preserved in the interim. Furthermore, the status quo was to be preserved without considering the merits of Alcatel NZ's claim for rectification/reformation.

[71] I do not consider that is the appropriate interpretation of clause 28.5. Clause 28.5 would, if so interpreted, operate as a "standstill clause" where any matter is subject to dispute procedures under clauses 28.1 to 28.4. Moreover, here it requires the parties to agree, notwithstanding the express termination date of the contractual arrangements, which is in dispute, that Alcatel NZ's disputed position should become the status quo, without consideration of the merits of that position, and be preserved by an (in effect) mandatory injunction.

[72] In my judgment, if the GRA had intended such an outcome, and in my view a commercially unusual outcome, it would have so stated. Rather, I think that in preserving the possibility of obtaining injunctive relief, the clause anticipates that the substantive merits of the position by reference to which that relief is claimed are to be investigated. Affidavit evidence of New York law filed on behalf of the defendants makes it clear that such an investigation is part of New York law's consideration of interim or permanent injunctive relief, much as is the position in New Zealand.

[73] It is not sufficient to make a bare allegation of anticipatory breach of clause 28. Juniper USA is apparently complying with the dispute resolution procedure set down by that clause. It is certainly not sufficient for Alcatel NZ to simply state that Juniper intends to breach clause 28 (because it intends to rely on the contract as it now is) on the grounds that that contract should be reformed to terminate the arrangements on 31 December 2011, without any attempt to establish a case for that reformation.

[74] On that basis, therefore, Alcatel NZ's case failed to address whether or not it had a serious question to be tried, and its application for interim relief would have to be dismissed accordingly.

Balance of convenience

[75] Again, having found against Alcatel NZ on the various expressions of the serious question to be tried test that are relevant here, it is not necessary to further consider the balance of convenience in terms of the test for interim relief. Having said that, and in light of my introductory remarks, I will do so briefly.

[76] Suffice to say I was simply not persuaded that damages were not an adequate remedy in all respects for Alcatel NZ. By its own application for rectification it has a contract which at best has two years to run. That contract, as regards Juniper products and services, produces revenue by Alcatel NZ's own assessment of approximately \$2 million a year. To the extent that a damages claim would entitle it to be recompensed for that loss of revenue, that in my view is a matter which would be assessable by a Court in appropriate breach of contract proceedings. Further, and to the extent that Alcatel NZ may be exposed to damages claims by Telecom, those similarly would be assessable by a Court in the normal way, and would provide perfectly adequate compensation to Alcatel NZ. Insofar as those measures of damages are excluded under the GRA, the fact that the parties have contracted out of that liability is not a ground on which an injunction ought to be granted because of the limited nature of the damages available.

[77] Alcatel NZ, particularly in its affidavits, pointed to broader concerns it had as to the effect of its inability to supply Juniper products and services to Telecom, particularly in terms of its reputation and ability to, for example, grow and expand its business operations in New Zealand. Again, I note that Alcatel NZ's contract with Juniper HK has, at best, two years to run. It seems unlikely that Juniper HK would, given the view the group overall has taken of Alcatel's acquisition of Lucent, contemplate any further extension of that contract even were the rectification/reform proceedings to succeed. I note further the relevance of the process Telecom itself has had underway for some time to find a substitute provider of Juniper products and services, and Juniper USA's own interest in ensuring that Telecom does not suffer materially from its decision to terminate its relationship with Alcatel USA, and the Alcatel group, including Alcatel NZ.

[78] In that context I am of the view that damages are an adequate remedy for Alcatel NZ if it is subsequently shown that its contract with Juniper HK does have

until 31 December 2011 to run. For that reason I would also have declined its application for interim relief.

[79] I have carefully considered, both at this point and at other points in this analysis, whether the significance for Telecom of Alcatel NZ being unable to continue to on-sell Juniper products and services, and the relatively short time that now remains before 31 December 2009, are “exceptional circumstances” by reference to which the contractual submission to the exclusive jurisdiction of the Courts of California and New Jersey, and the choice of New York law, should be overridden, and interim relief should be granted. I have concluded that they are not.

[80] As for the effect on Telecom, and the important services it provides, I have relied on a number of factors in reaching my conclusion. These are, first, and in terms of Alcatel NZ’s “7 day a week 24 hour a day end to end network management and support service”, the on-sale of Juniper products and services is only part of that service. Whilst Alcatel NZ may not be able to on-sell and service Juniper products, the evidence did not go so far as saying that Alcatel NZ will be unable to provide any support services to Telecom. Telecom will not, therefore, need to replace Alcatel NZ completely, but rather will need to get another supplier to work alongside Alcatel NZ. Indeed, the difficulties of coordination that might arise were amongst the difficulties referred to by Mr Havercroft for Telecom.

[81] In addition, in terms of Telecom’s ability to procure a replacement Juniper service provider, it is clear to me that Juniper itself has what I would regard as virtually compelling commercial incentives to itself supply, or to procure the supply to Telecom of, the products and services that were previously on-sold by Alcatel NZ. Given the admitted significance of Juniper products and services for Telecom, the reputational harm to Juniper if it did not so act would, in my view, be considerable. There was clear affidavit material provided by Juniper of its commitment, and ability, to provide that support to Telecom.

[82] Finally, and more importantly, I note that whilst Alcatel NZ emphasised the serious implications for Telecom if its application was not be granted, Telecom spoke of those consequences in more measured terms. Mr Havercroft, who provided

the affidavit for Telecom referred to above, spoke of a transition from Alcatel NZ to an alternative provider of support services for Telecom's Juniper equipment as a transition "posing significant risks for Telecom". He noted that any replacement would not have Alcatel NZ's seven years of knowledge or experience and that introducing another provider for Juniper products and services would "cloud KPI's and increase risks to Telecom's network". Whilst I accept that assessment, it could be said that those risks would always be present for Telecom at the expiry of its contractual relationship with Alcatel NZ.

[83] There is a further group of material considerations here, which relate to the question of the time now left to run on the Alcatel NZ contract with Juniper HK. Although that contract now has only one month to run, Telecom has been aware of the stated expiry date of 31 December 2009 since, at latest, 10 June of this year. Moreover, as noted above, from 18 November 2008 Telecom has been considering alternatives to Alcatel NZ for the supply and support of Juniper equipment. In my judgment, the fact that a process has been underway to provide for the replacement of Alcatel NZ from that time (although I accept from the affidavit material that that process has waxed and waned) counts against the consequences for Telecom as being exceptional circumstances which should override the clear and exclusive choice of law and jurisdiction.

Result

[84] I order that Alcatel NZ's substantive proceeding is dismissed under r 6.29 and r 15.1 of the High Court Rules. If necessary, Alcatel NZ's application for interim relief is dismissed.

[85] Questions of costs are reserved. I note, that on my dismissal of the first cause of action, Mr Smith suggested that memoranda as to costs be filed within seven working days unless the question of costs on Alcatel NZ's discontinuance of that cause of action could be agreed.

[86] In light of this judgment, I suggest that that matter be addressed, if necessary, in submissions on costs as to the matters argued at the hearing on 26 November. I

direct that, absent agreement, those submissions be filed by the defendants within two weeks, and the plaintiff within three weeks, of the date of this judgment.

“Clifford J”

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