IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002552
[2014] NZHC 2692

BETWEEN	SCC (NZ) LIMITED Plaintiff
AND	SAMSUNG ELECTRONICS NEW ZEALAND LIMITED Defendant

Hearing: 14 October 2014

Appearances: Paul Hunter for the Plaintiff
Matthew Kersey and Joseph Edwards for the Defendant

Judgment: 31 October 2014

RESERVED JUDGMENT OF MOORE J

This judgment was delivered by on 31 October 2014 at 4:00pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Contents

Introduction

[1] The plaintiff, SCC (NZ) Limited ("SCC"), operates a call centre in Auckland. Its sole client is the defendant, Samsung Electronics New Zealand Limited ("Samsung"). SCC's call centre deals with telephone enquiries from customers in New Zealand who have queries about the operation of and problems with goods manufactured by Samsung in New Zealand.

[2] SCC has provided call centre services exclusively to Samsung in New Zealand since 2007 although the agreement which is at the centre of the present dispute was not entered into until 2012. [1]

[3] On 1 July 2012 SCC entered into a new three year agreement ("the agreement") with Samsung which also provided for an automatic renewal for a further term of one year at the end of the initial three year term provided that SCC met all of the KPIs which were included in the agreement and were not breach of the agreement at the time of the renewal. The expiry date of the agreement was 28 February 2015 which, subject to meeting the conditions permitting an extension, would continue for a further year until 28 February 2016.

[4] On 24 July 2014 Samsung gave SCC notice it was terminating the agreement. In that notice it recited that the terms of the agreement imposed on SCC an obligation to act in good faith in its dealings with Samsung. Samsung claimed that SCC had falsely created entries in its invoicing system for services it did not provide and that this amounted to a "disregard of SCC's obligation of good faith and has destroyed the trust that Samsung had with SCC."

[5] The breaches alleged and relied on by Samsung may be summarised into the three following categories:

(a) falsifying invoices (info.nz emails);

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[1] The agreement was with Samsung Electronics Australia Pty Limited ("Samsung Australia"). Samsung New Zealand was then a branch of Samsung Australia. Samsung New Zealand was incorporated on 30 September 2013 and all existing agreements between SCC and Samsung Australia were transferred to the New Zealand company.

(b) falsifying invoices (the "milk run");

(c) the "hold/mute" issue.

[6] These are separately discussed in more detail below.

These proceedings

[7] On 26 September 2014 SCC commenced proceedings against Samsung. The statement of claim contains 13 causes of action, 12 of which relate to claimed losses prior to termination. The thirteenth cause of action alleges that Samsung wrongly terminated the agreement. It is this cause of action which is at the centre of the current application. SCC seeks a declaration that Samsung's purported termination of the agreement was invalid and that the call centre agreement remains in full force and effect.

[8] SCC also seeks an interim injunction restraining Samsung from terminating the call centre agreement and seeks further orders requiring Samsung to continue:

(a) routing the telephone calls, emails, website enquiries and "live chat" communications to the applicant as it did immediately prior to purporting to terminate the agreement; and

(b) requiring Samsung to purchase the contract of services set out in the agreement and other services which Samsung has purchased under the agreement as it did immediately prior to purporting to terminate the agreement by notice.

The call centre agreement

[9] SCC's principal obligations under the agreement are set out in clause 4. The relevant parts are set out below:

> **4. Contractor services**
>
> The Contractor will at all times during the Term:

4.1 provide the Services from the Agreed Location at all times during the agreed Hours in accordance with Samsung's Warranty Process for Warranty Claims in a timely, efficient, proper and workmanlike manner using reasonable care, skill and diligence;

…

4.4 deal with Samsung in good faith and do such things and sign such documents as is reasonably required for the provision of the Services;

4.5 provide the Services in a manner that promotes the goodwill and reputation of Samsung and will bring to the attention of Samsun on a timely basis, any incident or circumstance which will or may affect the goodwill or reputation of Samsung with a view to ensuring:

(a) the needs of Callers and Customers, dealers and any other individuals are dealt in a timely and professional manner with via an inbound/outbound call centre;

(b) the needs of Customers, dealers and any other individuals are dealt with in a timely manner via the Samsung Web Self-Service and Web Chat service, Samsung Social Media Portals and emails;

(c) pre-sales information is provided in respect to the Products;

(d) post-sales service is provided in respect of the Products;

(e) all Callers' and Customers' questions and complaints are followed up and responded to appropriately; and

(f) the presence and service performance of Samsung within New Zealand is improved;

4.6 provide professional, helpful and informative assistance to Customers, including providing general and technical advice and handling customer complaints from Customers calling via the inbound call centre or making online enquiries via the Samsung Web Chat service, Social Media Portals, Web Self-Service, ERMS, other emails and any other agreed online format, in accordance with the best practice polices in the KMS system and Samsung's policies and procedures;

[10] Clause 8 deals with the mechanisms for payment by SCC to Samsung. Relevant to these proceedings is clause 8.5 which provides:

8. Price and Payment

…

8.5 On each invoice provided by the Contractor to Samsung pursuant to this agreement will:

(a) contain sufficient information to enable Samsung to establish the accuracy of the invoice, including a breakdown of the Services provided and the Service Fee payable;

(b) be in the form of a valid tax invoice for GST purposes;

(c) constitute a certificate by the Contractor that all of the Services that are the subject of that invoice have been performed in accordance with this agreement; and

[11] Clause 15 deals with termination. It provides:

15.1 In addition to any other right of termination or remedy conferred on the parties under this agreement or by law, either party (**First Party**) may terminate this agreement at any time and with immediate effect by written notice to the other party (**Second Party**) if the Second Party:

…

(b) has committed a material breach of this agreement, where that breach is not reasonably capable of being remedied by the Second Party within 5 Working Days;

[12] In justification of its termination of the agreement Samsung claims that SCC deliberately issued falsified and/or inflated invoices for services it did not undertake thereby breaching clauses 4.4 and 8.5.

[13] It claims the breaches are irremediable because, by deliberately issuing falsified invoices, SCC failed to act in good faith and thus committed a material breach of the agreement. Samsung claims that as a consequence a total and irremediable breakdown in the relationship between the parties has occurred.

[14] More particularly, Samsung asserts that SCC's conduct amounted to a material breach of the agreement which is not reasonably capable of being remedied by SCC within five working days in terms of clause 15.1(b). As such, it claims it was entitled to terminate the agreement.

Legal principles

[15] Both counsel accepted that the principles to be applied in considering applications for interim injunctions are those set out by the Court of Appeal in *Klissers Farmhouse Bakeries v Harvest Bakeries Limited*.[2] These are:

(a) whether there is a serious question to be tried;

(b) whether the balance of convenience favours the granting of injunction; and

(c) whether the overall justice of the case favours the granting of injunction.

[16] Thus, the Court must first consider whether there is a serious question to be tried and, if there is, whether damages would provide an adequate remedy and against that, where the balance of inconvenience properly lies. Finally, the Court is required to step back and consider where the overall justice lies.

[17] I note that after identifying those issues Cooke J (as he then was) in *Klissers Farmhouse Bakers* emphasised that:[3]

> An interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.

[18] Furthermore, as Davison CJ stated in that case:[4]

> The threshold question in each case must be whether the plaintiff has established there is a serious question to be tried. In order to determine that question the Court must consider:
>
> (a) first, what each of the parties claims the facts to be;
>
> (b) second, what are the issues between the parties on these facts;
>
> (c) third, what is the law applicable to those issue; and
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> (d) fourth, is there a tenable resolution that the issues of fact and law on which the plaintiff may be able to succeed at the trial.

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[2] *Klissers Farmhouse Bakeries v Harvest Bakeries Limited* [1985] 2 NZLR 129 at 142.
[3] At 142.
[4] At 133.

Is there a serious question to be tried?

[19] Mr Hunter, for SCC, submits that there is clearly a serious question to be tried; that Samsung was not entitled to terminate the call centre agreement as it purported to do.

[20] I note that amongst the grounds relied upon by SCC in the present application is the allegation that Samsung was not entitled to terminate the agreement as it was, itself, in breach of its obligations to SCC under the agreement by actively and intentionally diverting warranty booking work which was supposed to be carried out by SCC away from SCC. This claim was not actively pursued in the course of argument although it was alluded to in the written submissions. I shall deal with this issue as part of the primary question of whether Samsung was entitled to terminate the agreement. [5]

What amounts to a material breach?

[21] Clause 15.1(b) permits either party to terminate the agreement at any time and with immediate effect by written notice if either party has committed a material breach of the agreement where that breach is not reasonably capable of being remedied by the breaching party within five working days.

[22] The agreement does not define "material breach". The term was discussed by Keane J in *TNF Bandit Limited v Air National Limited & Gray*.[6] There his Honour noted that "material breach" is not a concept that has found a place in our law except when imported as a term of contract and, on each occasion when that has happened, as a breach entitling cancellation.[7] His Honour observed that material breach does

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[5] It would appear that SCC originally intended to argue that Samsung was not legally entitled to terminate the agreement because Samsung was itself in breach based on the proposition in *Noble Investments v Keenan* (2005) 6 NZCPR 433. However, the argument before me was that SCC was justified in its breach by reason of Samsung's own breach. There was no mention of a legal barrier to termination. As a result I proceeded solely on the basis that the argument is one of justification rather a legal barrier.

[6] *TNF Bandit Limited v Air National Limited & Gray* HC Auckland, CIV-2005-404-1866, 6 December 2006 at [24]-[29].

[7] *Fletcher Whelan v Cotter* HC Auckland, M10/64-92, 8 April 1993, pp 13, 14, Thorp J; *Greymouth Petroleum Acquisition Company Limited & Southern Petroleum (Ohanga) Limited v Ngatoro Energy Limited* HC Wellington, CP162/02, 30 May 2003, Wild J; *Dewdrop Properties Limited & Zane Grey Restaurant and Bar Limited v Zane Grey Resort Limited* HC Auckland, CIV-2006-404-003196, 4 August 2006, Cooper J.

have a settled place in the law of contract in Scotland and referred to the observations of the Scottish Law Commission which confirmed its main importance as being as a basis for recession.[8]

[23] Keane J concluded that merely to characterise a breach as "material" cannot be conclusive. What must be assessed is how significant the term was and how significant, if at all, was the breach.

[24] It was held that the term has the same meaning as a breach giving rise to a right to cancel as defined in s 7 of the Contractual Remedies Act 1979. Thus the breach must be:

(a) a breach of an essential term; or

(b) in relation to the cancelling party, a breach that will substantially reduce the benefit of the contract, or substantially increase the burden under the contract, or make the benefit or burden of the contract substantially different from that contracted for.

[25] Counsel also referred me to *Vero Insurance New Zealand Limited v Fleet Insurance & Risk Management Limited* in which Asher J also accepted that a material breach is the equivalent of a breach giving rise to cancel under the Contractual Remedies Act.[9]

[26] Thus the present enquiry must focus on the significance of the term in the agreement and how significant the breach is.

[27] Mr Hunter, without conceding that "material breach" can be equated with a breach of an essential term, submits that even if the terms can be equated, Samsung has overstated the importance of the term and, in any event, it is not possible for this Court, in the present procedural context, to determine whether a particular term is essential because this must be judged against all the background to the relationship, a

[8] *TNF Bandit Limited v Air National Limited & Gray,* above n 6, at [25].
[9] *Vero Insurance New Zealand Limited v Fleet Insurance & Risk Management Limited* HC Auckland, CIV-2007-404-001438, 21 May 2007.

task which may only be undertaken at trial. He submits that it is still possible for the parties to work together given that they have continued to do so since the notice of termination and the filing of these proceedings and that trust may be rebuilt over time.

[28] Mr Kersey submits that the breach of clause 4.4, which requires SCC to deal with Samsung in good faith, was a "material breach" and that Samsung would not have entered into the contract with SCC had SCC refused to commit to acting in good faith. He submits that any conduct which results in the foreseeable breakdown of a contractual relationship must be a material breach.

[29] In my view the obligation SCC to deal with Samsung in good faith is a significant term of the agreement as it would be in any agreement. Good faith is the essential bedrock on which every viable and co-operative contractual relationship is founded. Deliberately issuing false or misleading invoices is a highly significant breach which is properly described as a "material breach". The consequence of such a breach is a breakdown of the trust between the parties. In the present case Samsung describes it as "irremediable".

[30] The question of whether there is a serious question to be tried is most conveniently considered in relation to each of the three allegations which Samsung claims it justified it in terminating the agreement.

Falsifying invoices: ERMS and info.nz emails

[31] Samsung claim that SCC deliberately falsified invoices and thus obtained a financial benefit to which it was not entitled. In the notice of termination Samsung expressly referred to s 228 of the Crimes Act 1961 which provides for the offence of dishonestly using a document, stating that by falsely claiming in the invoices amounts for services not provided, SCC committed a criminal offence.

[32] In response SCC claims that its conduct arose from its different interpretation of the agreement.

[33] Before discussing these competing claims it is first necessary to understand how the system worked in practice.

[34] The conduct in question occurred within a short time of the agreement coming into force. It involved two of Samsung electronic systems. These systems, quite separately, involved two different mechanisms under which Samsung would pay SCC for its call centre services.

(a) The first is the ERMS system[10] which is an ongoing customer communication portal linked to Samsung's New Zealand website. Customers with queries submit these via the website. SCC is contractually responsible to deal with the website and is paid $5.20 plus GST by Samsung per ERMS transaction.

(b) The "info.nz" email address is an Outlook email address used primarily by retailers and carriers to log repair job requests for defective products and to forward technical queries. The agreement provided that SCC's back office staff would be responsible for dealing with emails sent to the "info.net" address. Samsung pays for the equivalent of two full-time SCC back office employees to provide this service.

[35] In around May 2014 Samsung began to have concerns about the amount of SCC's invoices. This concern arose after Samsung entered into an agreement with a Philippine call centre company, Transcom, in January 2014. Samsung engaged Transcom to provide "after hours" call centre services. Samsung naturally assumed that the number of SCC's invoices would decrease as a proportion of its customers used the afterhours service. However, this did not happen despite Transcom dealing with approximately 2,000 afterhours calls per month.[11] As a result, Samsung

[10] "ERMS" is defined in the agreement as the acronym for the email reply management system of customer emails sent from the Samsung website.

[11] Mr Hunter submits that there was no reason why Samsung should expect SCC's invoices to decrease after Transcom started to provide its afterhours call service because it was a general trend of increasing numbers of calls as some Samsung sales in New Zealand grew. He also pointed out that Transcom was unable to deal with approximately one quarter of the calls it received initially and referred them back to SCC.

initiated an internal investigation which led to the identification of the invoicing and the duplication of jobs performed by Samsung's authorised service centres.

[36] The investigation revealed that between March 2012 and May 2014 job requests in relation to defective products which were sent in to the "info.nz" address were also being put through the ERMS system. This, Samsung alleges, permitted SCC to charge twice for a single job. This was achieved by SCC employees taking the customer details associated with the "info.nz" email job (i.e. the customer's title, physical address and personal address) before re-submitting to ERMS and changing some of the customer information and then using the "info.nz" address itself in place of the customer's personal email addresses. The removal or change to the customer's title, email address and physical address meant that the customer would not be matched and the two jobs would be allocated different reference numbers and treated as separate jobs.

[37] Samsung claims that there can be no legitimate reason why the "info.nz" address would be used in the place of a customer's personal email address. Using the "info.nz" address ensured customers did not receive a notification email which would normally be delivered automatically because the automatic notification email would be sent to info.nz (and ultimately SCC) rather than to the customer's email address. The consequence was that SCC's conduct did not come to the attention of Samsung.

[38] The practical effect of this system was that the query was dealt with by SCC's back office staff and the job resubmitted to ERMS appeared as a separate job created for a different customer when, in reality, the "info.nz" email job for one customer was also being duplicated for the same customer as an ERMS job. The result was that SCC was able to, and in fact did, claim payment from Samsung for the same work twice.

[39] SCC responds that this was an entirely innocent and justifiable practice. It occurred when back office staff were unable, by reason of work volumes, to handle the number of jobs being referred to them. As a result they submitted the "info.nz" work through the ERMS system. SCC took the view that it was entitled to charge

for warranty booking emails which exceeded the quantity the back office employees could normally handle given that Samsung was only meeting the costs equivalent to two back office staff. Furthermore, the only way that SCC could charge for these emails was by entering the additional jobs into the ERMS computer system because this automatically generated the payment claims. Mr Hunter submits that SCC was not actually charging Samsung twice for the same work. Instead, it was charging Samsung for work which could not be completed by the back office staff who were funded by Samsung. The work had to be undertaken by other staff at SCC's call centre.

[40] SCC submits that there was no breach of good faith because the charges were based on its honest belief it was entitled to claim for these attendances under the contract and the use of the ERMS system was the only way that SCC could charge for these additional jobs.

[41] The amount of overcharging was $89,325 which SCC agreed to repay and which Samsung deducted from SCC's July 2014 invoice.

[42] Mr Hunter further submits that even if SCC had misinterpreted the agreement and its extra charging practices amounted to a breach of contract, other than a breach of the good faith obligation, any breach would be capable of being remedied by a change in SCC's billing practice and a refund of the amount incorrectly charged. He submits there was certainly no breach involved which was not capable of being remedied.

[43] In response, Mr Kersey submits that if SCC sincerely believed it was acting in accordance with its rights under the agreement there was no need for SCC to change customers' details or use the "info.nz" address when re-submitting the "info.nz" emails via Samsung's ERMS system. He submits that SCC would have been aware that:

(a) each customer is allocated one business partner number for use across multiple platforms including ERMS and the "info.nz" email address;

(b) ERMS will only generate a new business partner number for a transaction involving a new customer. It is possible for SCC to upload jobs to ERMS using an existing business partner number so long as the customers' details are kept identical;

(c) if SCC had uploaded the "info.nz" emails to ERMS using identical customer details the business partner number would also have been identical between the two jobs and Samsung would have been in a position to discover the duplication at a much earlier stage. This is because a customer would not contact SCC through the ERMS for advice after their service job had already been booked. A pattern of multiple contacts for a single customer between the "info.nz" email address and the ERMS system would have alerted Samsung to what SCC was doing.

[44] While each of Mr Kersey's submissions carries force, in my view the most telling evidence that SCC was operating a regime by stealth in order conceal the true position from Samsung is that if SCC's back office staff could not cope with the volume of "info.nz" emails its most obvious course of action would have been to notify Samsung of the difficulties it was encountering and attempt to renegotiate the agreement. Absent accommodation on the part of Samsung, SCC remained bound by the provisions of the agreement. SCC had previously undertaken successful negotiations with Samsung in relation to the so-called "happy calls". It is telling, in my view, that SCC elected to embark on this relatively elaborate regime which operated to its own financial advantage without informing Samsung it was doing so.

[45] In my view the logical inference for SCC amending the customer details of the "info.nz" email job and using the "info.nz" email address for each customer before resubmitting it to ERMS is that SCC intended to create a new business partner number and create a new ERMS job each time for the purpose of obtaining additional payment without Samsung either knowing or having the ability to find out through its generally available sources.

[46] In my view, such deceptive conduct breaches SCC's obligation to deal with Samsung in good faith and amounts to a material breach of the agreement which is not reasonably capable of being remedied within five working days.

[47] On that basis alone I am satisfied that Samsung was justified in terminating the agreement on the grounds set out in its notice of termination dated 24 July 2014.

[48] It thus follows that I do not accept that there is a serious question to be tried in relation to the thirteenth cause of action.

Falsifying invoices: the "milk run"

[49] However, in the event I am wrong in relation to the first allegation of false invoicing, I turn to consider the second.

[50] In January 2013 Samsung implemented what has become known as the "milk run", apparently to reduce the turnaround time for the repair of faulty goods. This innovation allowed customers to drop off defective goods to retailers for repair. The repair agents would pick up the defective goods from the retailers' premises and book the repair jobs using a G-SPN system.[12] The new "milk run" bypassed SCC's involvement because before the new system was implemented SCC had sometimes managed the bookings of the repair jobs and received payment from Samsung for undertaking this service. Under the previous regime retailers had the option of either booking through SCC or booking directly with the repair agent.

[51] Samsung claims that the "milk run" was implemented to improve customer satisfaction and to protect Samsung's brand and reputation in the marketplace. Samsung says the new pick up service was necessary following advice that high levels of customer dissatisfaction were being registered under the existing system because goods destined for repair would sometimes sit with retailers for long periods until a sufficient number of faulty appliances had accumulated to make delivery by courier to one of the repair agents viable.

[12] A system used by repair agents in their daily operations.

[52] SCC felt aggrieved that through the implementation of the "milk run" Samsung was effectively cutting it out of a revenue stream which it had enjoyed since the agreement commenced. Apparently SCC raised its concerns with Samsung but without success.

[53] It seems that in the face of Samsung's intransigence, SCC, claiming to act out of a sense of frustration and for the purpose of attempting to force Samsung to confront the issue, unilaterally added a number of extra jobs to its claims for May and June 2014.

[54] SCC employees were instructed to add a number of entries into Samsung's ERMS system based on the number of warranty service booking jobs which Samsung had diverted away from SCC through the "milk run". This was in May and June 2014 and was justified by SCC on the basis it was a procedure designed to compensate for the loss of business. According to SCC's sole director, Mr Yoon, he did this for the purpose of forcing Samsung to confront the issue.

[55] Samsung insists that not only was the "milk run" implemented to improve customer satisfaction but also the agreement expressly permitted such a course. SCC asserts that in the absence of agreement from SCC Samsung was not entitled to change its processes to exclude it from a revenue source it enjoyed at the commencement of the contract. Mr Hunter submits that without SCC's agreement Samsung cannot change its processes so as to "cut out" SCC of fee earning work it was involved in at the commencement of the agreement and from which it earned revenue. He submits this obligation on Samsung is an implied term of the contract.

[56] Mr Hunter also submits:

(a) it is an express term of the agreement that SCC would process all warranty service work;[13]

[13] The express term relied on is Schedule 9 to the agreement. Schedule 9 covers such warranty service work requests. However, it deals with the obligations SCC owes Samsung when undertaking this work. It does not warrant that SCC would process all such requests.

(b) it was not necessary to introduce the "milk run" to protect Samsung's brand;

(c) changing the process to remove SCC from it thereby reducing SCC's revenue in circumstances where it was unnecessary constitutes a breach of Samsung's "good faith" obligation in clause 4.4.

[57] He submits that all SCC did was to claim some extra jobs[14] which was the equivalent of what SCC believed it had been wrongly deprived of. Mr Hunter submits that this does not amount to a breach of the duty of good faith because there was no intent by SCC to deceive Samsung because:

(a) SCC entered the details of the extra jobs into Samsung's own ERMS system to which Samsung had access and provided full details of the extra jobs with its monthly payment claims; and

(b) SCC did not attempt to deceive Samsung by creating different business partner numbers for the extra jobs. It was simply not technically possible to use the same business partner numbers from the G-SPN system used by the authorised repair agents in the ERMS system as it automatically generated its own reference numbers which could not be changed.

[58] Furthermore, Mr Hunter submits that even if SCC's actions amounted to a breach of the duty of good faith it was not a material breach because the amount of the extra charges was modest,[15] it was an isolated incident restricted to May and June 2014 and even if the breach was material it would be reasonably capable of being remedied through the repayment of the extra charges (which has already occurred) and a change in SCC's billing practice.

[59] Mr Kersey rejects this approach. First he submits that there is nothing in the agreement which prevented Samsung from implementing the new regime known as the "milk run". Indeed, the agreement specifically accommodated Samsung taking

[14] This represented 373 jobs which SCC believed it had been wrongly deprived of.
[15] $1,939.60 (GST exclusive).

steps to protect and improve its reputation. In particular, he refers to clause 2.2 which provides:

> [SCC] acknowledges that:
>
> (a) Samsung does not guarantee any minimum quantity or frequency of the Services and makes no representation as to the quantity of the Services required to be provided under this agreement; and
>
> (b) Samsung may take whatever action is reasonably required in order to protect the Samsung brand name, level of service or service perception during the Term.

[60] SCC's sole director, Mr Yoon, in his second affidavit accepted that the agreement was not exclusive. Mr Hunter, on SCC's behalf, also accepted this proposition.

[61] It is apparent from the evidence that Samsung introduced the "milk run" to benefit its customers by reducing the turnaround time for repairs. There is no evidence to support the suggestion that the "milk run" was introduced to deliberately erode SCC's revenue. It was an innovation designed to improve Samsung's customer satisfaction. Indeed, the importance to Samsung of promoting customer satisfaction is apparent not only from the evidence filed on behalf of Samsung but also from clause 2.2 of the agreement which is set out above at [59].

[62] In my view it is significant that SCC does not deny this conduct. Indeed, Mr Yoon attempted to justify the direction he gave his staff:

> Eventually, I decided to instruct SCC staff to add a number of entries into Samsung's ERMS customer relationship management software based on a number of warranty service booking jobs that Samsung had diverted away from SCC, in May and June 2014, in order to claim some compensation from Samsung for this. I thought that doing this would force Samsung to deal with the issue.

[63] This explanation is simply disingenuous for the following reasons:

(a) First, if SCC had wanted to force Samsung to deal with the issue there were other legitimate commercial process it might have engaged without resorting to falsifying invoices. The agreement provides for a dispute resolution in clause 18.

(b) Secondly, the false invoices were never brought to Samsung's attention by SCC. How was it that Mr Yoon was intending to "force" the issue with Samsung? Instead, it was Samsung which discovered the discrepancy in the course of its investigation. But for that discovery it is conceivable, if not likely, that SCC would have continued the practice to its own financial advantage and, in the face of Samsung's ignorance, its disadvantage. While SCC is suggesting it would have been obvious to anyone examining the records that SCC had added these entries to the ERMS, that explanation fails to take into account that Samsung was entitled to trust its business partner implicitly and should not have been obliged to monitor and audit the records in order to determine whether or not the invoices being submitted to it by SCC were consistent with its expectations as to the nature of the work SCC was performing on its behalf. Indeed, the agreement makes specific reference in clause 8.5 to what information each SCC invoice should contain. Mr Kersey described this as the "honesty box" provision because it depends upon the honesty, and candour of SCC in supplying the correct information to Samsung for payment. Samsung was entitled to rely upon the accuracy and honesty of the information provided to it by SCC particularly given that every invoice submitted to Samsung constituted a certificate by SCC that all of the services which were the subject of the invoice had been performed in accordance with the agreement.[16]

[64] As with the "info.nz" email invoicing issue discussed above, I am satisfied that SCC's conduct in this regard amounted to a material breach of its duty under the agreement to deal with Samsung in good faith. It is a material breach by SCC of the agreement and is a breach which is not reasonably capable of being remedied within five working days because it strikes at the heart of the commercial relationship between the parties for the reasons already given in relation to the first allegation of falsification. Again I conclude that Samsung was entitled to terminate the agreement with SCC and that its notice of termination dated 24 July 2014 was valid.

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[16] Clause 8.5(c).

The "mute/hold" issue

[65] In May 2014 it was discovered that SCC call centre staff were placing customers who had rung into the help service on mute for long periods of time.

[66] When a call centre operator needs to suspend dialogue with a Samsung customer they have two options. They can either place the customer on "hold" or they can activate the "mute" facility. When a customer is put on hold he or she hears music and thus knows the call is still connected to the operator. This is in contrast to the mute function where the customer hears no sound of any kind although the operator can hear the caller. According to Samsung the mute function is designed to be activated when the operator needs to suspend dialogue for a short period such as to cough or to take a breath while dealing with a difficult customer.

[67] The hold function, by contrast, is designed to suspend the call while the customer is transferred or where the operator undertakes enquiries for the customer while the customer remains on line waiting to be reconnected to the operator.

[68] Apart from the differences in function and purpose there is a fiscal significance attached to these options. Samsung pays SCC a flat rate per minute for all inbound calls. When operators place customers on hold the clock stops for the purposes of calculating the length of the call for payment. However, when customers are placed on mute the clock continues ticking for the purposes of calculating the length of the call for payment.

[69] When this issue was first raised with SCC by Samsung in mid-May 2014 SCC explained that they had instructed their operators to put customers on mute rather than hold because SCC did not get paid to put customers on hold. Samsung discovered that SCC had been instructing staff to place customers on mute. On 20 May 2014 Samsung issued SCC with a written warning not to continue the practice.

[70] Mr Hunter submits that on the evidence, SCC's use of the mute function amounts to acceptable call centre practice. He submits that given the dispute in the evidence the matter cannot be resolved in the context of this application. In any

event, he submits that Samsung issued a warning letter claiming that the practice constituted unprofessional call centre practice and requesting that SCC cease the practice. Samsung alleged that the practice constituted a breach of contract and in particular clauses 4.4 and 4.5 of the agreement. In any event, SCC changed its practice immediately after the matter was drawn to its attention by Samsung.

[71] Mr Hunter further submits that even if the use of a mute function rather than a hold function was a breach of the agreement it was not a material breach and was reasonably capable of being remedied through a change in practice which, in fact, occurred.

[72] While SCC's direction to its staff to adopt this practice may well evince sharp commercial practice I am not satisfied it equates to a material breach of the agreement such that clause 15 could be invoked to terminate the agreement. In any event, I note that the notice of termination does not claim this is a material breach although it does make mention of the issue.

Summary

[73] It thus follows that I am not satisfied that the threshold question of whether SCC has established that there is a serious question to be tried has been satisfied. For the reasons set out above, and adopting the approach of Davison CJ in *Klissers Farmhouse Bakeries Limited* I am not satisfied there is a tenable resolution of the issues of fact and law on which the plaintiff may be able to succeed at trial.

[74] However, in the event that I am wrong, I shall also consider the other factors which are required to be considered on an application for an interim injunction.

Where does the balance of convenience lie?

[75] There are a number of factors which I am required to consider when weighing where the balance of convenience lies.

Adequacy of damages for SCC if this application is not allowed but SCC succeeds in its claim

[76] As Wild J observed in *Wellington International Airport Limited v Air New Zealand Limited*, a key consideration in the assessment of the balance of convenience is whether either party will suffer unquantifiable loss in the event that they are successful at trial but not on the interim application.[17]

[77] Mr Hunter submits that damages would not be an adequate remedy for SCC if their interim injunction was declined but SCC subsequently succeeded at trial. He accepts that it would be possible to quantify the costs that SCC would incur and the profits SCC would lose if the call centre agreement was to be terminated early rather than running through to its final expiry date, whether that is in February 2015 or 12 months after that. However, the essence of his submission under this head is that there are other unquantifiable losses which SCC would suffer as a result of the wrongful termination of the agreement.

[78] First, he submits there would be hardship imposed on third parties. SCC employs 18 staff including its executive director, Mr Yoon. It provides call centre services to Samsung only. It has no other customers. SCC was established specifically to operate a call centre for Samsung in 2007 and has operated the call centre exclusively since that time. If the agreement was terminated SCC would need to close its call centre and make its staff redundant. Mr Hunter submits, however, that if the agreement was to continue until its final expiry date of 28 February 2016 SCC would have time to try to find a new customer or customers and thus preserve its staff's employment.

[79] In contrast, Mr Kersey first submits that if this matter went to trial SCC would be required to prove that Samsung's wrongful termination of the agreement caused it to lose "a real and substantial and not merely speculative" chance of obtaining a contract with a third party.[18] If causation is not established SCC will not be entitled to damages for loss of opportunity.

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[17] *Wellington International Airport Limited v Air New Zealand Limited* HC Wellington CIV-2007-485-1756, 30 July 2008 at [4]-[14].

[18] *Power Beat Canada Limited v Power Beat International Limited* [2002] 1 NZLR 820 (HC) at [196].

[80] Secondly, Mr Hunter submits that damages would not be an adequate remedy for the loss of opportunity which SCC would suffer in finding a new customer or customers. Mr Kersey submits that there is no evidential basis to support a loss of opportunity claim. He submits that SCC has failed to provide evidence demonstrating it would have "a real and substantial" chance of obtaining a contract with a third party if the agreement was to remain on foot. He further submits that Samsung should not be responsible for the perpetual value of SCC's business supply merely because SCC made the commercial decision to set itself up to be exclusively reliant on its arrangements with Samsung.

[81] I accept that submission. Even if SCC could demonstrate that there was a real and substantial likelihood that cancellation of the agreement would cause a loss of opportunity this does not justify the granting of an injunction. The value of the opportunity is quantified by reference to the likelihood the opportunity would have resulted in SCC securing a third party contract and the value of this hypothetical contract.[19]

[82] Furthermore, it cannot be overlooked that SCC has elected to operate its business relying on a single client with all the commercial risks which are necessarily inherent in such a course. The agreement is due to expiry on 28 February 2015 with a one year further renewal contingent on SCC's performance. SCC could have no reason to assume the agreement would be renewed indefinitely. There is no contractual obligation on Samsung to continue the agreement pending SCC finding another customer or customers. It should have made provision for the possibility that the agreement would end and tailored its business succession planning in accordance with that.

[83] Additionally SCC has provided no evidence of steps they have taken since termination in July to obtain new business and mitigate this loss.

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[19] *Martelli McKegg Wells & Cormack v Combank International* (1996) 10 PRNZ 153.

Are damages an adequate remedy for Samsung in the event interim orders are made but SCC is unsuccessful at trial?

[84] Mr Hunter submits that Samsung will not suffer any losses of significance in the event injunctive relief is granted but Samsung was to succeed at trial. Samsung has indicated it intends to transfer its New Zealand call centre operations to Transcom in the Philippines. There is no evidence that there are any additional costs associated with the implementation of that decision.

[85] That may be so but more significantly in Mr Kersey's submission is that should the injunction be granted there is a real risk of "irredeemable, intangible and unquantifiable damage to the Samsung brand". In support of that submission he relies upon the evidence filed by Samsung from which the following concerns emerge should an injunction be granted:

(a) there will be little incentive for SCC to provide Samsung's customers with a high level of customer service knowing that the agreement will not be renewed;

(b) Samsung will not be in a position to train and develop relationships with Transcom particularly with the imminent approach of Christmas which is Samsung's busiest period;

(c) negative feedback has already been received from customers in relation to SCC's staff;

(d) in a small, highly competitive environment such as that which Samsung operates in New Zealand customer loyalty is fickle and any negative customer experience will translate into loss of customer support;

(e) any drop in customer satisfaction is difficult to measure and quantify but is irredeemable and can cause a great deal of long term brand damage in a short time (even to next February).

[86] Mr Hunter submits that these concerns are over-stated and lack sufficient evidential basis. He submits there is nothing wrong with the quality of SCC's customer service and there is no reason why this should change if the injunction was granted. He further submits that with the exception of the "mute/hold" issue Samsung expressed no significant concerns about the quality of SCC's services before purporting to terminate the agreement. Indeed a recent customer satisfaction survey returned a 97% satisfaction poll. None of those who expressed dissatisfaction were, in fact, dissatisfied by the service provided by SCC's call centre operators.

[87] Against this Mr Kersey submits it is implausible that SCC staff will not become aware of the dispute with Samsung. Samsung has already agreed to enter a contract with Transcom to take over SCC's functions. Despite the present level of service provided by SCC's call centre operators, Samsung's concerns about the future, should an injunction be granted, are not misplaced. The fragility of brand reputation in the intensely competitive environment Samsung operates in is such that any risk to its brand could have catastrophic consequences to Samsung's business in New Zealand.

[88] It is inevitable that staff facing redundancy who perceive Samsung to be responsible for their employment vulnerability will not feel they owe Samsung the same levels of loyalty they may previously have before learning of their uncertain future. This is not to suggest that any would embark on a deliberate course to damage Samsung's reputation. But call centre operators are part of the "shop front" of Samsung's public profile and the risk of any deterioration in the standards of customer service is a substantial, albeit unquantifiable, risk.

SCC's ability to meet a damages award

[89] Furthermore, as Mr Kersey submits, SCC on the evidence may well be unable to meet any damages award if the interim injunction is granted and SCC is unsuccessful in its substantive claim. This is because the only business SCC transacts is with Samsung. There is no available source of income other than SCC's agreement with Samsung. Furthermore, SCC has few physical assets which could be liquidated to meet a damages award.

Status quo

[90] Mr Kersey submits that the irredeemable breakdown of the parties' relationship, which was essential to the agreement, means that the status quo prior to termination cannot be revived.

[91] He submits that if Samsung is required to continue doing business with SCC, Samsung will be forced into the commercially unrealistic and unacceptable position of having to do business with a partner it no longer trusts or has any goodwill towards. An artefact of that loss of confidence is that Samsung is now required to engage in additional monitoring and auditing services to ensure that SCC is undertaking its obligations to Samsung honestly and reliably.

[92] Mr Hunter does not accept these concerns are valid. He submits Samsung is overstating the extent of the damage it would suffer if it was obliged to continue in business with SCC and that there is no reason why the parties could not continue to work together given there have been a number of recent occasions when Samsung has through its actions demonstrated its confidence in SCC's operation. By way of example Mr Hunter pointed to a recent occasion when Transcom's afterhours services failed and Samsung turned to SCC to assist in performing those functions.

[93] I am satisfied that this is a case where it would undesirable to maintain the status quo.

[94] It is readily apparent the relationship between the parties has all but broken down. The reason for the break down is because Samsung simply does not trust SCC at a number of levels.

[95] First and fundamentally, Samsung believes that SCC has acted fraudulently and deceptively. It believes that SCC has obtained monies through deceptive and illicit practices.

[96] I am satisfied that this is a case where the level of mutual mistrust is such that the Court should not require the parties to continue their business relationship.

Third parties – Transcom staff

[97] Mr Kersey submits that if the injunction was granted 40 of Transcom's staff would be likely to be made redundant. The evidence in support of this submission is hearsay drawing, as it does, from a statement attributed to the managing director of Transcom who is not a witness and has not made an affidavit. I also agree with Mr Hunter that the claim is inherently improbable given that Transcom's call centre operations in the Philippines employs more than 6,800 staff in the Philippines. Given the size of that staffing complement 40 staff might be expected to be absorbed by the company relatively easy. Furthermore, the claim that Transcom will need to employ 40 staff to provide services which are currently provided by 18 full-time staff in New Zealand is unexplained.

Samsung's alleged breaches

[98] SCC claims that Samsung has been breaching the agreement for some time by deliberately taking steps to deprive it of work which it is supposed to perform under the terms of the call centre agreement.

[99] Mr Hunter submits that Samsung's disregard of SCC's rights under the agreement is a factor which favours the granting of interim relief as it led SCC to engage in the conduct which Samsung now claims justified it terminating the agreement.[20]

[100] I do not accept this submission. There is evidence that the parties were able to successfully negotiate when there were changes in circumstance. Furthermore, the agreement provides for a dispute resolution process. SCC did not take any steps to engage in a legitimate process to confront its concerns when they arose with a view to resolving them with Samsung. Instead, even if SCC's explanations for its conduct over the invoices is to be accepted, SCC adopted a unilateral process to redress the economics of what it regarded as inequitable conduct on Samsung's behalf.

[20] *Linde AG v CFW Hamilton & Co Ltd* (1988) 3 TCLR 216.

[101] I do not accept that Samsung's conduct, as alleged by SCC, justifies SCC's conduct such that the relief sought should be granted.

Relative strength of parties' cases

[102] This has already been discussed in the context of my examination of whether there is a serious question to be tried.

[103] For the reasons already expressed I am of the view that SCC's chances of success on the thirteenth cause of action are not high.

Overall justice

[104] Standing back, I am satisfied that the overall justice of this case lies in the Court refusing to grant SCC injunctive relief.

[105] In my view Samsung's case is considerably stronger than SCC's. SCC's explanations for the invoices may be superficially plausible but its conduct in not drawing to Samsung's attention its concerns and/or the basis on which it was invoicing Samsung operates as a substantial obstacle in SCC's ability to successfully prosecute this claim.

[106] Finally, it is apparent that the trust necessary in any commercial relationship has all but dissipated in the present case. Requiring the parties to continue to work together, even if that period is measured in but a few months, is unreasonable.

[107] Furthermore, the potential for reputational and branding damage to Samsung if SCC's application succeeded is a real one. It is not speculative given that Samsung, in any event, will not renew the agreement with SCC in February next year or, at the latest, beyond February 2016.

Result

[108] SCC's application for an interlocutory application for an interim injunction is refused.

Costs

[109] Costs are awarded to Samsung on a 2B basis with disbursements as fixed by the Registrar.

Moore J

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