IN THE DISTRICT COURT
AT AUCKLAND

CIV-2014-004-000618
[2016] NZDC 7623

BETWEEN	SATHEESH CHALLAGULLA Plaintiff
AND	V.I.P. CARS LIMITED Defendant

Hearing: 15-17 December 2015

Written Submissions: 7 & 24 January 2016

Appearances: S Connolly and S Khan for the Plaintiff
A Hope and M Mariu for the Defendant

Judgment: 4 May 2016

JUDGMENT OF JUDGE B A GIBSON

Introduction

[1] In September 2014, the plaintiff brought a claim against the defendant for the refund of monies paid as a performance bond in the sum of $18,150, together with a claim for lost revenue of $6,428.57. This latter claim has been abandoned. A statement of defence and counterclaim was filed, the counterclaim being for losses allegedly occasioned to the defendant when the plaintiff failed to give three months' notice of the termination of a taxi operator agreement between the parties, and for failing to return property.

[2] The defendant accepted it had not returned the plaintiff's bond, but maintained it was not obliged to do so until the contract it had with Auckland International Airport Limited ("AIAL") in the form of a licence to operate came to an end on 10 March 2016. Although not pleaded as such, it maintains the monies

due to it under its counterclaim are able to be set off against the monies owed the plaintiff for refund of the bond when the same falls due.

[3] The defendant company operates a taxi business and on 1 April 2011 entered into a licence to operate small passenger service vehicles at Auckland Airport with AIAL for a three year period from 17 October 2010 until 16 October 2012 or such later date as the parties agreed. The defendant had been operating its business there prior to the date of the agreement, the agreement simply being the date the licence was formally executed. A new licence was granted, in similar terms to the preceding licence, on 22 May 2013. The defendant maintained it covered the period from 11 March 2013 to 10 March 2016, but the commencement date was expressed in the interpretation provision to be "11 March 2013 or the date of this licence Agreement, whichever is the later". The agreement provided for the defendant to pay the plaintiff a performance bond equivalent to one quarter of the annual fee levied by the licensor and GST.

[4] The plaintiff was a taxi driver who operated his taxi under the defendant's brand name. He also had 10 other taxis working under the brand, the drivers of which paid him $600 each week.

[5] The contractual relationship between the plaintiff and the defendant was at various times governed by two documents; an operator contract, and a permit to operate at Auckland Airport.

[6] An operator contract was entered into between the plaintiff and the defendant on 1 August 2011 and had no specific termination date save that by Clause 10.3(2) there was an acknowledgement that the taxi operator relied on the defendant to hold an airport licence, and that in the event the licence between the defendant and AIAL came to an end termination of the operator contract was automatic. The taxi operator, of which the plaintiff was one, had to give three months' written notice given before the end of the defendant's licence with AIAL if they "did not intend to remain with the Company at the end of the current licence period"; clause 10.3.(iii) of the operator contract of 1 August 2011. The ability of the operator to withdraw or terminate the contract prior to three months before the

end of the current licence period was at the discretion of the defendant. No period of notice for this was prescribed.

[7] The contract further provided that:

> The operator will remain bound and liable for payment of all airport fees to the end of the airport licence period in accordance with the permit to operate at Auckland Airport.

[8] There was also a separate agreement to operate at Auckland Airport between the plaintiff and defendant. That agreement noted that the licence between the defendant and AIAL had been extended from 16 October 2012 to 28 February 2013, and listed the taxis the plaintiff operated under the defendant's brand. The agreement to operate at Auckland Airport was expressed to be for the duration of the term of the defendant's licence agreement with AIAL, in other words, until 28 February 2013 or such later date to be advised by Auckland Airport. It had no termination by notice provision similar to the operator contract.

The Dispute

[9] By February 2013 the defendant was in negotiation with AIAL and at some point that month was told it would receive a new licence agreement for a further period of three years. That licence agreement was eventually signed on 22 May 2013, essentially in the same terms as the earlier agreement. At some point in February 2013 the existing taxi operators driving under the defendant's brand, and under operator licences with it, were informed of the successful negotiations, but were also told that there would be a change to the fee arrangements, including a requirement that the plaintiff and other drivers pay a proportion of the performance bond the defendant was required to pay to AIAL. The defendant also sought an advance payment of the monthly levies it had to pay to AIAL.

[10] While the plaintiff was prepared to pay the performance bond required he said he did not wish to enter into a new operator's agreement for a period of three years. He paid the required performance bond to the defendant in March 2013, the payment totalling $18,150. Although the plaintiff had paid the bond, and was expecting to enter into an operator agreement, he was not satisfied with the terms

proposed, not only as to length, but also over arrangements for the proposed levies and an administration fee of 2.5% which the defendant proposed to charge him for processing credit card payments. The defendant also required the plaintiff to pay $150 as an administration fee when he wished to replace one of his drivers. Prior to this the defendant had not charged the plaintiff credit card fees, allowing him some latitude over other operators, and had not required payment of an administration or credit card fee for the use of credit cards in meeting payments to the company.

[11] On 25 April 2013, the plaintiff still not having signed a new operator agreement and negotiations over credit card fees and payment of future airport fees still not resolved, a Director of the defendant company, Mr A A Qazi, who was also the Operations Manager for the company, wrote to the plaintiff with a series of proposals and requiring immediate payment of $4,130.00 for the balance of the plaintiff's April levy. Mr Qazi proposed that if a payment was not received in cleared funds at 10.00 am on the following morning, 26 April 2013, the defendant would cancel access cards to Auckland Airport for the plaintiff's drivers. This correspondence was by email timed at 8.18 pm on Thursday 25 April 2013, and led to the plaintiff writing by email to the defendant company on 29 April 2013 stating that he would "like to leave V.I.P. Cabs Limited by 13/04/2013 [sic]. As I understand, I paid the levy up to 10-04-2013". The plaintiff asked for a refund of the bond monies and said "I am not aware of such a condition which is required three months notice to leave the company".

[12] Mr Challagulla accepted there was an error in the departure date stated in the letter, the cessation date was meant to be 13 May 2013.

[13] Mr Qazi replied on behalf of the defendant on 30 April 2013 reminding him that the performance bond secured decals for the licence period which had to be attached to taxis driven under the defendant's brand to enable access to the airport taxi queue. He said that Mr Challagulla had attended a special meeting held at the company office on 23 February 2003 and the minutes recorded that a three month notice period for determining the contract would apply. No minutes for the

meeting were produced in evidence and Mr Challagulla did not accept, in his evidence, that any such agreement had been reached.

[14] As to the defendant's contention that the performance bond did not need to be repaid until the conclusion of the tender period, namely 10 March 2016, I am satisfied that there was no agreement, written or otherwise, between the parties to affirm that. Mr Qazi admitted in his evidence that there was no documentation to that effect, the defendant's contention essentially resting on what was allegedly agreed at the meeting on 23 February 2013.

[15] While I do not accept Mr Challagulla's evidence that he was unaware on 28 February 2013 that a further licence to operate agreement would be entered into between the defendant and AIAL, there being no reason for him to pay the performance bond monies before the end of March 2013 unless he believed the defendant had secured access for taxis operating under its brand to Auckland Airport, I am not satisfied that it was agreed that the bond monies paid by the taxi operators would not be refunded to them in the event of termination until the end of the licence period. Mr Challagulla's evidence was that it was his belief that once the contract was terminated the bond would be refunded. The operator contract dated 1 August 2011 made no reference to a performance bond but did provide that the operator would remain bound and liable for payment of all airport fees, even after termination by notice, until the end of the airport licence period. The monthly fee referred to in that agreement is not the same as the performance bond the defendant was requiring the operator to pay. The monthly fee is based on the number of taxis the operator is licensed to operate from the airport, regardless of whether it actually has that number of taxis.

[16] The defendant contends that the parties operated under, effectively, an oral operator agreement as the earlier written licence agreement between it and Auckland Airport had come to an end and with it the operator contract of 1 August 2011. It was intended the parties would enter into another written operator contract but the plaintiff never signed such a document. There was insufficient evidence that one had ever been tendered to him, the parties still negotiating over terms. The plaintiff withdrew by terminating the arrangement in April 2013. I am satisfied that

the parties, with the agreement of AIAL, operated their respective businesses on the basis of the existing arrangements which, once the new licence was signed with AIAL, would lead to new written operator agreements. However payment of a performance bond was not an existing arrangement, but was a new requirement the defendant proposed so as to enable it to obtain from its taxi operators a proportion of the performance bond the defendant had to pay to AIAL. There was no previous agreement in respect of that, and accordingly there was no basis for asserting the performance bond could not be repaid to the taxi drivers until the end of the licence between the defendant and AIAL once the drivers had ceased to operate taxis under the defendant's brand. This was a term to be negotiated as part of any new operator contract. It was a new condition and the defendant needs to satisfy me that it was a term of the agreement between the parties after the end of the operator contract of 1 August 2011 that the bond would not be repayable until the end of the licence period.

[17] I am not satisfied that agreement was reached in this respect, or that such a provision should be implied in the contract. The bond is distinctly different from the monthly levy referred to in the earlier operator's agreement. The plaintiff, I am satisfied, had still not settled with the defendant the period for which he would be bound as an operator in any event. In the absence of an express agreed term in the agreement between the parties enabling the defendant to hold the bond monies until the end of the term of its licence with AIAL the defendant's contention must fail. As at 13 May 2013, the date the plaintiff ended its arrangements with the defendant, the licence agreement with AIAL had not been entered into.

[18] Accordingly the plaintiff is entitled to recover the bond of $18,150 from the defendant. Even on the defendant's own argument, the plaintiff is entitled to the same as the licence period under the licence agreement of 22 May 2013 between it and AIAL has come to an end. I accept the plaintiff's argument that it was an implied term of the agreement between it and the defendant that when the agreement terminated the bond monies would be repaid to the defendant as it would no longer operate its taxis under the defendant's brand at Auckland Airport, and there was accordingly no reason for the defendant to hold a performance bond from the plaintiff.

The defendant's counterclaim

[19] The defendant brought a counterclaim against the plaintiff. The substantial part of the counterclaim was for $27,225 being airport levy fees from May to July 2013 which the defendant maintained the plaintiff was obliged to pay because of the terms of the agreement of 1 August 2011 which provided that operators who did not intend to remain with the company at the end of the current airport licence period, which under that agreement was 16 October 2012, had to provide three months' written notice in the form of a letter. The defendant maintained the plaintiff's notice was inadequate and so the plaintiff was liable to pay the defendant the levy fees for the period May to July 2013, and a termination fee of $1,925.

[20] The defendant also pleaded by way of counterclaim a further cause of action, namely a failure to pay $3,365 consisting of unpaid items, not specified in the counterclaim, of $1,475 and a further airport levy fee of $1,890. There was a further claim for failure to return property which was not quantified in the statement of defence and counterclaim dated 17 October 2014.

[21] No documents were produced by the defendant to substantiate the airport levy fees from May to July 2013. The licence to operate only came into effect on 22 May 2013 but I accept AIAL and the defendant continued their existing arrangements until such time as a new written licence could be entered into.

[22] It is clear from the terms of the licence agreement dated 1 April 2011 that an annual fee payable in monthly instalments had to be paid by the defendant as licensee, the fee being specified in Schedule 3 of the agreement, but in the copy produced by the defendant no actual amount was shown. No invoices addressed to the plaintiff were produced. There is a reference to three months' levies in an email letter from the defendant to the plaintiff dated 5 June 2014 in the sum of $27,225 but other than that there is no documentary evidence supporting the amount. The termination fee for 11 taxis was said, in that letter, to be $1,925 and was said in evidence to derive from the company's operating rules. Those rules were not discovered. In fact the defendant failed to discover any of the documents needed to support its allegations and when challenged in cross-examination its witness,

Mr Qazi, accepted this was the position but asserted that the documents could be provided. The documents were plainly discoverable.

[23] I do not accept Mr Hope's submission that this is not fatal. While I accept that in some cases, depending on their circumstances, that may not necessarily be so; *Cuff v Broadlands Finance Limited* [1987] 2 NZLR 343, the situation is markedly different here. In that case Somers J said at 346:

> Mr Grove did submit, as he had done in the High Court, that the evidence of value was inadequate to support the finding of the trial Judge. Its quality was certainly not high but in the circumstances it is difficult to see what more could have been tendered. Receipts were produced in respect of some of the larger items which had been recently purchased.

[24] Here there was no documentary information at all. This material which, had it existed, and Mr Qasi asserted that it did, could easily have been produced. The claim for the termination fee was said to be contractual, namely a term in the operator's rules, yet the rules were never produced or referred to in pleading. Evidence of the various items the defendant asserted the plaintiff had but did not pay for, including EFTPOS stickers, camera systems, GPS modems, signage, receipt books, lights and accessories could have been provided through documentary evidence. The plaintiff asserts that he paid for the taxi items provided and for the EFTPOS stickers by way of providing services to the defendant's drivers. The defendant purported to claim $890 from the plaintiff as credit card fees, yet there had not been any agreement between the parties that he would meet those payments, it being the attempt to impose an agreement that was one of the catalysts for the plaintiff terminating the arrangement.

[25] The defendant carries the burden of proving its claim on the balance of probabilities. I am not satisfied that the three month termination provision applied to the circumstances as they existed between the parties.

[26] Clause 10.3 of the agreement of 1 August 2011 between the defendant and the plaintiff provided the agreement terminated automatically "at the end of the airport licence period, i.e. 16 October 2012 unless terminated earlier in accordance with Clause 10.4 below or Clause 10 of the permit to operate at Auckland Airport."

The three month notice provision related to a notice the operator had to give prior to 16 October 2012 if he did not intend to remain with the company at the end of the current licence period. In effect the defendant's claim is for a period under the new agreement with AIAL which, by its terms, had not come into effect by the time the plaintiff had ceased to operate its taxis under the defendant's brand.

[27] Overall therefore I am not satisfied that the defendant has made out its counterclaim and judgment will be entered on the counterclaim for the plaintiff, together with judgment on the plaintiff's own claim for repayment of the bond monies in the sum of $18,150 together with interest thereon under the maximum rate prescribed by the District Courts Act 1947.

[28] The plaintiff is entitled to costs. Memoranda as to costs can be filed and served within 21 days of the date of this judgment unless the parties are able to agree. On its face scale 2B of the costs scale under the District Courts Rules would appear to apply.

B A Gibson
District Court Judge