SUPREME COURT OF QUEENSLAND

CITATION:	*Z487 Limited v Skelton & others* [2014] QSC 309
PARTIES:	**Z487 LIMITED** **(plaintiff)** **AND** **DONALD ALFRED SKELTON** **(first defendant)** **AND** **ANNARUNGA PTY LTD** **(second defendant)**
FILE NO/S:	BS 409 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29-30 September, 1 October 2014
JUDGE:	Atkinson J
ORDER:	**1. The Application is dismissed.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW – RESTRAINT OF PROCEEDINGS – OF LOCAL PROCEEDINGS – GENERALLY – where the plaintiff sought a declaration that a license agreement for the marketing of New Zealand kiwifruit cultivars was not validly terminated – where the first defendant filed an application pursuant to section 17 of the *Trans-Tasman Proceedings Act* 2010 (Cth) and rule 16 of the *Uniform Civil Procedure Rules* 1999 (Qld) seeking a declaration that the claim and statement of claim had not been properly started for want of jurisdiction; an order setting aside the claim and statement of claim; and a stay of the proceeding on the ground that a New Zealand court is the more appropriate forum to determine the matters in issue – where the license agreement contained an exclusive choice of court agreement designating an Australian court as the court to determine the matters in issue – whether the exclusive choice of court agreement is null and void under Australian

	law (including the rules of private international law) *Trans-Tasman Proceedings Act* 2010 (Cth), s 3, s 17, s 19, s 20, s 21 *Eroc Pty Ltd v Amalg Resources NL* [2003] QSC 074, cited *Puttick v Tenon Ltd* (2008) 238 CLR 265; [2008] HCA 54, cited *Taylor v Johnson* (1983) 151 CLR 422; [1983] HCA 5, cited *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, cited
COUNSEL:	J B Sweeney with C M Tam for the plaintiff C Elliott QC for the first defendant
SOLICITORS:	Doyle Wilson Solicitors for the plaintiff Quinn & Scattini Lawyers as town agents for Norris Ward McKinnon for the first defendant

[1] On 28 February 2014, Donald Skelton filed an application pursuant to section 17 of the *Trans-Tasman Proceedings Act* 2010 (Cth) (TTPA) and rule 16 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) seeking a declaration that the claim and statement of claim in this proceeding had not been properly started for want of jurisdiction; an order setting aside the claim and statement of claim; and a stay of the proceeding on the ground that a New Zealand court is the more appropriate forum to determine the matters in issue.

[2] In order to determine whether or not this application should succeed it is necessary to traverse some of the history of the proceeding, the questions in dispute, and the directions made by the judge before whom the application was first heard.

History

[3] This proceeding concerns a dispute over the plaintiff's licence to produce and sell specific cultivars of kiwifruit.

[4] The applicant/first defendant, Mr Skelton, is a horticulturalist. He breeds various varieties of kiwifruit in New Zealand. Rather than marketing the cultivars himself, Mr Skelton enters into licence agreements with third parties which authorise the licensee to market certain varieties of kiwifruit.

[5] Between 2005 and 2010, Mr Skelton entered into a number of licence agreements with two companies, Global Plant IP P/L ABN 42 073 750 017 ("Global Plant"), and Z487 Limited ("Z487"), the plaintiff. The director of those companies, who negotiated the licence agreements, was Colin Lye who lives and works in Australia. Two contracts were concluded between Z487 and Mr Skelton. They will be referred to as the 2008/2009 agreement and the 2010 agreement.

[6] On 6 November 2013, Mr Skelton purported to terminate the 2008/2009 agreement. On 11 December 2013, Mr Skelton purported to terminate the 2010 agreement. Z487 disputes the validity of these terminations. This proceeding concerns the validity of the termination of the 2008/2009 agreement.

[7] On 10 January 2014, Z487 filed a claim and statement of claim in this court ("the Queensland proceeding") seeking a declaration that the 2008/2009 agreement was not validly terminated. On 27 February 2014, Z487 filed an application to join one of Z487's sub-licensees as the second defendant in the Queensland proceeding, and to file an amended claim and statement of claim. Orders to this effect were made by Chief Justice de Jersey on 19 March 2014.

[8] Meanwhile on 28 February 2014, Mr Skelton commenced proceedings in the High Court of New Zealand seeking a declaration that he had validly terminated both the 2008/2009 agreement and the 2010 agreement ("the New Zealand proceeding"). On that date he also filed the application in this court to stay the Queensland proceeding and a conditional notice of intention to defend in which he disputed the jurisdiction of this court to entertain Z487's claim against him without his consent for the following reasons –

> "1. The New Zealand Court is the more appropriate court to determine the matters in issue in view of the following:
>
> a. [Mr Skelton] resides in New Zealand;
> b. [Z487] is registered in New Zealand;
> c. The contract on which the cause of action is based was signed and negotiated in New Zealand;
> d. The kiwi fruit varieties referred to in the contract were cultivated and created in New Zealand;
> e. Royalties had to be paid to [Mr Skelton's] New Zealand account;
> f. There are related proceedings between the parties filed in the Auckland High Court in New Zealand on 28 February 2014 that will be pursued on an urgent basis;
> g. The New Zealand law would be most appropriate to apply in the proceeding;
> h. [Mr Skelton] is not in good health and will find it difficult, if not impossible to travel to Australia for these proceedings
> i. As a matter of convenience."

[9] On 26 March 2014 the High Court of New Zealand heard an application by Z487 to stay the New Zealand proceeding. The decision in that application is adjourned pending the outcome of this application. However, Lang J expressed a preliminary view that New Zealand would be the more appropriate forum to hear the overall dispute.

[10] On 2 April 2014, Z487 filed an amended claim and statement of claim in the Queensland proceeding. The claim was in the following terms:

> "[Z487] claims as against [Mr Skelton]:
>
> 1. A declaration that the Contract between [Z487] and [Mr Skelton] referred to in the Statement of Claim has not been terminated and remains in full force and effect and binding between the parties;
> 2. An injunction restraining [Mr Skelton], by itself, its servants or agents or otherwise howsoever, from:

(a) Representing to sub-licensees or to any other persons whatsoever, that the Contract has been terminated or is at an end;
(b) Otherwise purporting to deal with sub-licensees or other persons whatsoever on the purported basis that the Contract is no longer if full force and effect;

3. Such further or other orders, including interlocutory relief, as may be just;
4. Costs."

[11] Z487 claimed as against the Second Defendant:

"1. An injunction, restraining the Second Defendant, by itself, its servants or agents, or otherwise howsoever, from:
(a) acting as if the Sub-licence is terminated; and
(b) purporting to deal with unlicensed marketers or other persons whatsoever on the basis, or purported basis, that the Sub-licence is no longer in full force and effect.
2. Such further or other orders, including interlocutory relief, as may be just.
3. Costs."

[12] In its amended statement of claim, Z487 alleged that on or about 20 December 2008, it entered into an agreement with Mr Skelton whereby Mr Skelton agreed to give Z487 the exclusive right to sublicense the testing, evaluation, propagation, commercialisation, production and marketing of certain kiwifruit cultivars to other persons in the territory nominated in the agreement. Z487 alleged that the agreement was in writing and contained in a document entitled 'Proprietary Cultivar Commercialisation, Agency, Propagation, Production & Marketing Rights Head Agreement'. Z487 alleged that this agreement was varied on or about 24 May 2010 by the substitution of Annex A with a document entitled "Replacement 24/5/2010 Annex 'A'" initialled by Z487 and first defendant. It was varied again on or about 20 November 2011 by the inclusion of a new document entitled "Annex D" signed by Mr Skelton on 24 October 2010 and on behalf of Z487 on 20 November 2011. Z487 referred in its pleadings to this varied agreement as "the Contract".

[13] In relation to jurisdiction, Z487 alleged that "by Clause (k) e. of the General Terms and Conditions it was agreed to the effect that the Contract was to be governed by the law of Queensland" and that "by clause (k) f. of the General Terms and Conditions it was agreed to the effect that the parties submitted to the jurisdiction of this Honourable Court."

[14] The application by Mr Skelton filed in the Queensland proceeding was first heard by Douglas J in the applications jurisdiction on 11 April 2014. His Honour gave directions for the future conduct of the application. Mr Skelton was directed to file and serve points of claim setting out his allegations of fact and law as to why clause (k)f. of the General Terms and Conditions of the contract between Z487 and Mr Skelton dated 20 December 2014 was null and void. Z487 was directed to file and serve points of defence. The requirement for points of claim and defence was to ensure that each party complied with the rules as to pleading. The points of claim were expected to contain a brief statement of all the material facts relied upon and any relief claimed. Given the applicant's allegation of fraud, this was required to be

specifically pleaded. Douglas J also directed that evidence in chief be by affidavit with both parties being required to file any further affidavit material on which they intended to rely. The application was then referred to the civil list for hearing.

[15] Pursuant to those directions, Mr Skelton filed points of claim in support of his contention that clause (k)f. of the General Terms and Conditions of the contract between Z487 and Mr Skelton dated 20 December 2008 was null and void. The points of claim were also said to address the reasons for Mr Skelton's contention that he did not enter into an agreement designating an Australian court as the only court to determine disputes between him and Z487. No claim for rectification of the contract was made.

[16] On 14 May 2014, Z487 filed its points of defence denying that clauses (k)f. and (k)e. of the General Terms and Conditions of the contract between Z487 and Mr Skelton dated 20 December 2008 were "null and void" as expressed in s 20(2A) of the TTPA for the reasons set out in the points of defence and that in the premises clauses (k)f. and (k)e. were valid and enforceable and s 20(1)(b) of the TTPA applied.

[17] The first paragraph of the points of claim dealt with Mr Skelton's personal situation. It was admitted by Z487 that Mr Skelton lives in New Zealand and uses reading glasses and suffers from serious medical conditions including heart disease and carcinoma of the bowel. The allegations that Mr Skelton has reading difficulties and uses a magnifying glass to read documents were denied. The allegation that Mr Skelton's medical conditions mean that he has not left New Zealand since 1988 was not admitted and it was alleged by Z487 that those medical conditions did not preclude Mr Skelton from travelling outside New Zealand or from travelling over extended distances within New Zealand. Particulars were given by Z487 of Mr Skelton's travels within New Zealand and a statement made by Mr Skelton to Mr Lye in about November 2013 that he was "cleared to fly" internationally and had a new passport ready for the purpose. In paragraph 2 of the points of claim, Mr Skelton alleged that Mr Lye was aware of the matters pleaded in paragraph 1 of the points of claim.

[18] Mr Skelton's points of claim then alleged that on a date between 30 December 2005 and 11 May 2006 Mr Skelton and Mr Lye, as a director of Global Plant, entered into an agreement ("2005 agreement") which designated New Zealand as the governing law and forum for any issue relating to the 2005 agreement. In its points of defence, Z487 admitted that there was such an agreement but said there were two such agreements entered into during 2005 and 2006 being an agreement which dealt with licence rights in Australia and New Zealand only in which the governing law was said to be the law of Australia and an agreement regarding international licence rights in which the governing law was said to be the law of New Zealand. Neither agreement contained a choice of court clause.

[19] It was admitted that in early December 2008, Mr Skelton and Mr Lye, on behalf of Z487, agreed to make changes to their relationship under the 2005 agreement changing *inter alia* the identity of the contracting party from Global Plant to Z487. The wording or effect of the governing law and jurisdiction clauses was not discussed. Mr Skelton claimed that Mr Lye, in his capacity as director of Z487, amended the 2005 agreement and at 9:25am on 7 December 2008 he sent a copy of the amended agreement to Mr Skelton. The amended agreement contained Exhibit

B – General Terms and Conditions which Mr Skelton claims was similar or identical to the 2005 agreement, save that clause (k)e. read:

> "Governing Law. The agreement shall be governed by, and construed in accordance with, the laws of Australia and where applicable the laws of Queensland (without regard to any principles of conflicts of law)."
>
> And clause (k)f. read:
>
> "Jurisdiction and Venue. The Parties to this Agreement acknowledge and agree that the courts listed at the end of this section shall be the sole venue and exclusive forums in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement and the Parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts: Federal Court of Australia or District Court of Queensland or Supreme Court of Queensland."

[20] Mr Skelton further alleged that on or about 9:45am on 8 December 2008 (New Zealand time)[1] he sent Mr Lye a revised Exhibit B – General Terms and Conditions that amended the governing law, jurisdiction and venue to New Zealand. Z487 denied this allegation saying that Mr Lye had never received and had no knowledge of that email. It was claimed by Mr Skelton that in or about April 2009 Mr Lye sent Mr Skelton a further amended agreement providing New Zealand as the governing law, jurisdiction and venue. This too was denied.

[21] Z487 pleaded in the points of defence that at 6.34am on 8 December 2008 Mr Skelton emailed Mr Lye a version of exhibit A - definitions for the 2008 agreement. At 6.37am on the same day Mr Skelton emailed Mr Lye a version of a Deed of Assignment between Z487 and Global Plant. Beyond those two emails Mr Skelton did not send Mr Lye or, alternatively, Mr Lye did not receive, other emails on 8 December 2008 concerning the 7 December version of the 2008 agreement from Mr Skelton. Z487 alleged that on 7 December 2008 at 9.25am Mr Lye provided to Mr Skelton by email various documents and spreadsheets which had been provided from Z487's solicitors earlier that day. This is referred to in the points of defence as the 7 December version of the 2008 agreement. Z487 alleged that Exhibit B to the 7 December version of the 2008 agreement was the only version of the General Terms and Conditions (which contained the exclusive choice of court agreement) contained in the 2008 agreement which Mr Lye provided to Mr Skelton at any material time. Exhibit B contained the exclusive choice of court agreement referred to as clause (k)f. above.

[22] As to the allegation of fraud, Mr Skelton pleaded in paragraph 10 of his points of claim that in or about June 2009, Mr Lye, in his capacity as director of Z487, attended Mr Skelton's residence, stated that a document entitled 'Proprietary Cultivar Commercialisation, Agency, Propagation, Production and Marketing Head Licence' was the "agreement with the changes that we discussed" and failed to tell

---

[1] Unless otherwise specified the time referred to in this judgment is Eastern Standard Time in Queensland.

Mr Skelton that the wording of clause (k)e. and clause (k)f. in the General Terms and Conditions had been changed from New Zealand to Australia.

[23] It was claimed that through these actions Z487 fraudulently misled Mr Skelton as to the content and effect of clauses (k)e. and (k)f.. In reliance on this misrepresentation, Mr Skelton signed the document, Exhibit B to the 2008/2009 agreement.

[24] In the particulars, Mr Skelton stated there was a special relationship between Mr Skelton and Z487 such that Z487 owed Mr Skelton an obligation of trust, confidence and loyalty. It was also alleged that Mr Lye knew Mr Skelton would not have agreed, or had no reasonable basis to believe that Mr Skelton would agree, to change the governing law clauses from New Zealand to Australia. Mr Skelton pleaded that Mr Lye knew that if there was ever a dispute between Z487 and Mr Skelton concerning the agreement that Z487 stood to gain a considerable advantage if it could require that the proceeding be conducted in Australia rather than New Zealand.

[25] In its defence to the claim of fraud, Z487 pleaded that in late December 2008, Mr Lye sent an amended version of the 7 December version of the 2008 agreement containing some amendments, but not to the exclusive choice of court agreement, and posted that document to Mr Skelton. The defendant alleged that Mr Skelton signed the document he received from Mr Lye on about 20 December 2008 and posted the signed original documents to Mr Lye, who then countersigned the documents he received and posted the countersigned document back to Mr Skelton in New Zealand.

[26] The defendant alleged that thereafter there were further amendments to the 2008/2009 agreement by agreement between the parties throughout 2009 and 2010. The defendant alleged that at no material time after Mr Skelton and Mr Lye signed and exchanged the 2008/2009 agreement was Exhibit B to that agreement, which contained the exclusive choice of court agreement, amended.

[27] Mr Lye denied that he attended at the residence of Mr Skelton in June 2009 setting out his overseas trips which were not to New Zealand in June, July and August 2009. Z487 denied that Mr Skelton was misled as to the content and effect of the exclusive choice of court agreement found in the 2008/2009 agreement. Z487 denied that it acted fraudulently or that Mr Skelton was misled, saying that at no material time were they in a special relationship of trust and confidence or were fiduciaries or were in a relationship which had fiduciary aspects or were in a relationship generating fiduciary duties. There was no duty, express or implied, to mutually act in good faith and that Mr Skelton was under no relevant incapacity.

[28] With regard to the 2010 agreement it was claimed by Mr Skelton that on or about 24 May 2010, Z487 and he entered into a new ‘Proprietary Cultivar Commercialisation, Agency, Propagation, Production and Marketing Head Licence’ which, pursuant to clause (k)e. and clause (k)f. of the General Terms and Conditions, identified New Zealand as the jurisdiction and venue. It was claimed that the 2010 agreement superseded all prior agreements pursuant to clause (k)(h)(a)(ii) of Exhibit B which provided that any failure of the licensee to perform any of the licensee’s obligations ‘under any other agreement between the owner and the licensee’ amounted to an event of default.

[29] Z487 admitted that a further agreement was executed between the parties on 24 May 2010 but said that it covered different subject matter from that dealt with in the 2008/2009 agreement.

[30] Finally, Mr Skelton claimed, and Z487 denied, that clause (k)e. and clause (k)f. of the 2008/2009 agreement were void both at common law and by virtue of Z487's misrepresentation and deceit. Mr Skelton alleged that he and Z487 had entered into an exclusive choice of court agreement designating a New Zealand court pursuant to s 20(1)(a) of the TTPA to 'determine the matters in issue' namely, 'any controversy arising either, directly or indirectly, under or in connection with' the 2010 Agreement "and thereby the [2008/2009] Agreement." He also alleged that the New Zealand High Court had jurisdiction to determine the matters in issue between the parties and was the more appropriate forum.

[31] The matter was set down for hearing before me in the civil list to determine the application made by Mr Skelton. The hearing occupied three days. Mr Skelton was able to be present throughout by video link. Essentially the question to be determined was whether or not a dispute about the 2008/2009 agreement could or must be heard in a court in Australia or in New Zealand. The resolution of this question requires the application of the relevant sections of the TTPA to the facts, some of which were in dispute and therefore had to be determined in this application.

***Trans-Tasman Proceedings Act* 2010**

[32] Section 3 of the TTPA provides that the purpose of the Act is to streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; to minimise existing impediments to enforcing certain New Zealand judgments and regulatory sanctions; and to implement the Trans-Tasman Agreement in Australian law.

[33] The Explanatory Memorandum to the Trans-Tasman Proceedings Amendment and Other Measures Bill 2011 provides that the purpose of the legislation is to "enhance cooperation between Australia and New Zealand in civil court proceedings, enable trans-Tasman disputes to be resolved more effectively and at a lower cost to businesses and individuals, and create conditions for increased trade and commerce across the Tasman."

[34] Pursuant to s 17 of the TTPA, a defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue.

[35] Subsection 19(1) provides that, on application under section 17, the Australian court may, by order, stay the proceeding if it is satisfied that a New Zealand court:

(a) has jurisdiction to determine the matters in issue between the parties to the proceeding; and

(b) is the more appropriate court to determine those matters.

[36] Subsection 19(2) then lists a series of matters that the Australian court must take into account in determining whether a New Zealand court is the more appropriate court.

[37] This situation is altered where there is an exclusive choice of court agreement between the parties. Section 20 provides:

> "(1) On application under section 17 (and despite section 19), the Australian court:
> (a) must, by order, stay the proceeding, if it is satisfied that an exclusive choice of court agreement designates a New Zealand court as the court to determine the matters in issue; and
> (b) must not, by order, stay the proceeding, if it is satisfied that an exclusive choice of court agreement designates an Australian court as the court to determine those matters."

[38] Section 20(3) of the TTPA defines an exclusive choice of court agreement, in relation to matters in issue between parties to a proceeding, as a written agreement between those parties that:

(a) designates the courts, or a specified court or courts, of a specified country, to the exclusion of any other courts, as the court or courts to determine disputes between those parties that are or include those matters; and
(b) is not an agreement the parties to which are or include an individual acting primarily for personal, family, or household purposes; and
(c) is not a contract of employment.

[39] Section 20(2) of the TTPA provides that an Australian court is not obliged to stay the proceeding where there is an exclusive choice of court agreement designating a New Zealand court pursuant to s 20(1)(a), if it is satisfied that the exclusive choice of court agreement is null and void under New Zealand law (including the rules of private international law), or a party to it lacked the capacity to conclude it under Australian law, or giving effect to it would lead to a manifest injustice or would be manifestly contrary to Australian public policy, or for exceptional reasons beyond the control of the parties to it, it cannot reasonably be performed, or the court designated by the agreement as the court to determine the matters in issue between the parties to the proceeding has decided not to determine those matters.

[40] However pursuant to subsection 20(2A) of the TTPA, the only circumstance in which paragraph (1)(b) does not apply to an exclusive choice of court agreement is if the Australian court is satisfied that the agreement is null and void under Australian law (including the rules of private international law). Section 21(1) of the TTPA provides that an Australian court cannot stay a civil proceeding on forum grounds connected with New Zealand other than in accordance with the Part of the TTPA (Part 3) in which these sections are found. In other words where an exclusive choice of court agreement designates an Australian court as the court to determine

the matters in issue then an Australian court must not stay the proceeding unless it is satisfied that the exclusive choice of court agreement is null and void.

[41] The explanatory memorandum to the Bill provides that subsection 20(1) is designed to give primacy to the parties' choice of court. However, subsection 20(2A) creates an exception to this general rule while ensuring 'that if the Australian court is the chosen forum under a choice of court agreement, it will only be able to stay the proceeding if the agreement is null and void under Australian law'.

[42] It follows that if there is a valid contractual provision by which an exclusive choice of court agreement designates an Australian court as the court to determine the matters in issue then the contractual provision must be given effect and an Australian court may not stay the proceeding. This statutory provision means that the common law rules as to the grant of a stay on forum grounds as set out in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 and more recently in *Puttick v Tenon Ltd* (2008) 238 CLR 265 are not applicable.

[43] Accordingly I am required to determine whether there was an exclusive choice of court provision in the 2008/2009 agreement made between the parties and, if so, whether it was null and void. The onus of showing that an exclusive choice of court agreement exists is on the party seeking to rely upon it and the onus of showing that any such agreement is null and void must be on the party seeking to oust the jurisdiction of the court which has otherwise been regularly invoked. This is an interlocutory hearing so those questions can not be determined definitively but must be looked at in sufficient detail to determine whether the court has jurisdiction but is a jurisdiction which it may decline to exercise.

[44] Mr Skelton's counsel, Mr Elliott QC, relied upon a number of affidavits as the evidence in chief on behalf of Mr Skelton. A number of those affidavits exhibited copies of affidavits sworn by Mr Skelton. No objection was taken to this form of evidence and Z487 required only Mr Skelton for cross-examination. He was in particular cross-examined on five affidavits which were referred to by Mr Sweeney, counsel on behalf of Z487, as the first affidavit[2] (sworn on 28 February 2014); the second affidavit[3] (sworn on 18 March 2014); the third affidavit[4] (sworn on 25 March 2014); the fourth affidavit (sworn on 19 May 2014); and the fifth affidavit (sworn on 30 May 2014).

[45] Z487's evidence was found in the following affidavits of Mr Colin Lye: the first affidavit[5] (sworn on 13 March 2014); the second affidavit[6] (sworn on 20 March 2014); the third affidavit (sworn on 23 May 2014, filed on 3 June 2014); and the fourth affidavit (sworn on 18 September 2014, filed on 22 September 2014).

[46] I shall first deal with the question of the relationship between the two men to determine whether there is any special relationship of trust or confidence or any reliance which might affect the validity of any contractual provision entered into by the parties.

---

2 Affidavit of Johannes Hermanus Jordaan filed 10 April 2014 Exhibit JHJ-1 at pages 29 – 243.
3 Affidavit of Johannes Hermanus Jordaan filed 10 April 2014 Exhibit JHJ-1 at pages 443 – 596.
4 Affidavit of Johannes Hermanus Jordaan filed 10 April 2014 Exhibit JHJ-1 at pages 646 – 661.
5 Affidavit of Lachlan Talbot Graham Wilson filed 3 October 2014 Exhibit LTGW1.
6 Affidavit of Lachlan Talbot Graham Wilson filed 3 October 2014 Exhibit LTGW2.

[47] Mr Skelton deposed in his first affidavit that he 'trusted' Mr Lye.[7] He said in his fourth affidavit that he relied on Mr Lye to deal with him honestly and 'not pull a swifty'.[8]

[48] It appears that Mr Skelton has problems with his eyesight but that it does not prevent him reading documents. In his fifth affidavit, Mr Skelton provided evidence of his problems with his eyesight. Exhibit A to that affidavit is an email from Mr Skelton to Mr Lye referencing the fact that he has trouble reading documents and needs a magnifying glass to do so. Exhibit B is an email in which Mr Lye requests that Mr Skelton ask his wife to read a document to him. In his fourth affidavit, Mr Skelton stated that he would use a magnifying glass when reading documents in front of Mr Lye.[9] In his third affidavit, Mr Lye deposed that Mr Skelton had never used a magnifying glass during their meetings, and Mr Skelton had never asked him or Mrs Skelton for assistance with reading documents.[10] When giving evidence Mr Skelton was able to read documents put before him. The evidence given by Mr Skelton on this topic is insufficient to give rise to any relationship of disadvantage or any duties upon Mr Lye.

[49] More important is the question of whether or not theirs was a commercial relationship. Clause (k)(j) of the General Terms and Conditions attached to the 2008/2009 agreement[11] provides that the nature of the parties' relationship is "limited to a contractual relationship between two third-parties in a commercial transaction between sophisticated commercial entities dealing with each other on an arm's-length basis." During cross-examination, Mr Skelton confirmed that this was intended to be an expression of the relationship between himself as the licensor and Mr Lye's company as the licensee. He said: 'It was supposed to be, yes, an arm's length thing – a commercial thing." Later in cross-examination he stated that their relationship probably wasn't arm's length in the strict sense as Mr Lye relied on him and rang him for different things.

[50] During cross examination, Mr Lye accepted that he and Mr Skelton had a close personal relationship. He accepted that they trusted each other and Mr Skelton was reliant on him to have the documentation prepared.

[51] I accept that Mr Skelton suffered from various physical illnesses and that he had eyesight and indeed hearing problems. But it was obvious from his demeanour when giving evidence that he was a shrewd businessman, well able, and careful, to look after his own interests. Although Mr Skelton and Mr Lye developed a close personal relationship during their business dealings, their contractual relationships were commercial and entered into by two parties, well able and astute to look after their own interests. Mr Skelton has failed to show that there is an arguable case let alone a good arguable case that there was a special relationship between Mr Skelton and Z487 such that Z487 owed Mr Skelton an obligation of trust, confidence and loyalty.

[52] The next question to be resolved is what was agreed between the parties in the 2008/2009 agreement with regard in particular to choice of law and choice of court.

---

7 Mr Skelton's first affidavit [50], [51] and [56].
8 Mr Skelton's fourth affidavit [50].
9 Mr Skelton's fourth affidavit [7].
10 Mr Lye's third affidavit [98] – [99].
11 Exhibit K to Mr Skelton's fourth affidavit page 160.

I shall then consider whether or not any such agreement was null and void because of an operative misrepresentation.

[53] In his second affidavit, Mr Skelton deposed that after he was diagnosed with 3 months to live in mid 2008, he and Mr Lye discussed the prospect of selling some of the business to a well-known New Zealand fruit grower, Mr Bostock.[12] These discussions took place in the second half of 2008 and Mr Skelton and Mr Lye went to Hastings and Auckland to meet with Mr Bostock several times during this period.[13]

[54] Mr Skelton deposed that in September 2008, Mr Lye sent Mr Skelton a draft contract.[14] This document is exhibit 'C' to Mr Skelton's second affidavit. It is dated as 'revised' 29/09/2008 and shows numerous handwritten notes. Clause 6 refers to General Terms and Conditions contained in Exhibit B, however, Exhibit B is attached to the contract annexed to Mr Skelton's affidavit. In his fourth affidavit and during cross examination, Mr Skelton acknowledged that he did not know what this agreement included in terms of governing law and forum and he could not remember if the General Terms and Conditions were attached to that draft.[15] He stated that 'obviously it would've said New Zealand because Mr Bostock is in New Zealand.'[16]

[55] In his third affidavit, Mr Lye deposed that from about May 2008, he and Mr Skelton discussed the potential sale of the entire kiwifruit business to Mr Bostock.[17]

[56] In his second affidavit, Mr Skelton deposed that on 7 December 2008 Mr Lye sent him a draft 2008 Head Licence for consideration.[18] This document is Exhibit E to that affidavit. The copy of the document at Exhibit E to his affidavit does not include the General Terms and Conditions, however, during cross examination, Mr Skelton said that this document showed Australia as the governing law and forum.[19] He said he was mistaken when he deposed in an earlier affidavit[20] that he had never received any draft copy of the 2008 head licence that showed Australia as the governing law and forum.[21]

[57] Mr Lye gave evidence that at 8:39am on 7 December 2008 he received an email from his lawyers, Doyle Wilson Solicitors, attaching the 2008 Head License Agreement, including Exhibit B – General Terms and Conditions. The email and attachments is found at pages 64 – 98 of Exhibit CSL-1 to Mr Lye's third affidavit. At page 82, clauses (k)e. and (k)f. of the General Terms and Conditions show Australia as the governing law and forum. Mr Lye's evidence is that he made no amendments to the email and forwarded the email together with attachments to Mr Skelton at 9:25am on 7 December 2008.[22]

---

12 Mr Skelton second affidavit, [26].
13 Mr Skelton's first affidavit [35].
14 Mr Skelton's second affidavit [22].
15 Transcript 1 – 56 – 30.
16 Transcript 1 – 56 – 33.
17 Mr Lye's third affidavit [33].
18 Mr Skelton's second affidavit [33].
19 Transcript – 1-58-7.
20 Mr Skelton's third affidavit [10].
21 Transcript – 1-58-11.
22 Mr Lye's third affidavit [47- 48].

[58] In his fourth affidavit, Mr Skelton deposed that on 8 December 2014 he had a long phone conversation where he told Mr Lye of his concerns with the document sent on 7 December 2008, including the governing law and jurisdiction.[23] Mr Lye told him that he would send another version. In his third affidavit, Mr Lye said that he did not recall receiving a call from Mr Skelton on 8 December 2008.[24] During cross examination, Mr Lye accepted that he did have a conversation with Mr Skelton on 8 December 2008, however he doesn't recall what was said.[25]

[59] Mr Skelton said he emailed Mr Lye a copy of Exhibit B – General Terms and Conditions of the agreement.[26] This document is marked as exhibit B to Mr Skelton's third affidavit. It shows that the email was sent at 9:45am on 8 December 2008. The governing law and forum at clauses (k)e. and (k)f. list New Zealand. In his fourth affidavit Mr Skelton stated that he is unsure of how this document was created as it is the text of a document with an email header above it. He said that he does not have 'the understanding of computers or the technical sophistication to alter a document to look like this', however it was found among his pile of documents and he has no reason to doubt its authenticity or that he sent it to Mr Lye.[27] Mr Lye's evidence is that he cannot locate this email on his computer and he does not remember receiving it, although he notes that his email records may be incomplete as he changed email accounts in 2010 or 2011.[28]

[60] Mr Skelton's version finds some support in the affidavit evidence of Kevin Foxall and Samuel Hood. The affidavit of Kevin Foxall sworn 6 June 2014 and filed 11 June 2014 provides that on 11 December 2008 Mr Lye sent an email to John Bostock (cc Tony Fraser). This email is exhibit 'D' to that affidavit. It was sent at 12:00:55am on Thursday 11 December 2008. The subject line reads 'RE: deal'. The body of the email states 'Please see attached copies of the agreements between Don and Z487'. Attached to that email is a document entitled '20081206 International – Skelton Cultivar General Terms Master Final.doc'. This document is found at exhibit 'D2' to that Affidavit. It is the same document that Mr Skelton said he sent to Mr Lye at 9:45am on 8 December 2014. The governing law and forum at clauses (k)e. and (k)f. is listed as New Zealand. During cross examination, it was put to Mr Lye: 'So you're basically saying to Mr Bostock, "Things are sorted now and here are the agreements."?' Mr Lye responded that that was not the case.

[61] Exhibit A to the affidavit of Samuel Wallace Hood sworn 18 September 2014 and filed 23 September 2014 is an email sent by Mr Lye at 11:05 on 10 December 2008. The body of the email reads: 'Hi All, Finally received and sorted between Don and myself the finer issues and this is now in place between Z487 Limited the operating company and its connections and Don Skelton. This is for your record. If you need a signed version please yell.' The remainder of the body of the email is redacted. The email contains numerous attachments including: '20081206 International – Skelton Cultivar General Terms Master Final.doc'. That document is found at exhibit A1 to that affidavit. It is the same document sent by Mr Skelton to Mr Lye at 9:45am on 8 December 2014. The governing law and forum at clauses (k)e. and (k)f. is listed as New Zealand. During cross examination, Mr Lye was questioned

---

23 Mr Skelton's fourth affidavit [41].
24 Mr Lye's third affidavit [56]
25 Transcript 2-15-15
26 Mr Skelton's fourth affidavit [42].
27 Mr Skelton's fourth affidavit [42].
28 Mr Lye's third affidavit [54].

about what he meant by 'final'. He said: 'Basically what it says. Final. It's got no signature. It means nothing.'[29]

[62] While it is not pleaded in the points of claim, Mr Skelton deposed in his fourth affidavit that later on 8 December 2008, Mr Lye sent him another draft agreement.[30] This document is found at exhibit 'G' to that affidavit. It shows New Zealand as the governing law and forum pursuant to clauses (k)e. and (k)f. of the General Terms and Conditions, is unsigned and bears the printed date 8 December 2008. Mr Skelton said that he signed two copies of this version of the agreement and posted them to Mr Lye on 24 December 2008, although he did not receive a copy of the signed version back from Mr Lye. A copy of the agreement signed by Mr Skelton is found at Exhibit 'H' to his fourth affidavit. However this document is not the same document as that found at exhibit 'G'. It is differently formatted and bears the printed date 24 December 2008. Mr Skelton said that he had not initially remembered these events and had not previously referred to them. He said that going through the various documents in his possession and noting small post-it notes he had attached to them he was now able to recall it.

[63] Mr Lye's evidence is that he did not send another amended version of the agreement 'later' on 8 December 2008.[31] He said that he was staying at apartments at Kangaroo Point and did not incur any fees for internet usage, as evidenced by his Business Choice credit card statement.[32] He deposed that he does not recall receiving the document dated 24 December 2008, however, he has a copy in his possession which is exhibited at pages 113 to 120 of CSL-1. This document appears to be identical to part of that found at Exhibit 'H' to Mr Skelton's fourth affidavit. It has been signed by Mr Lye and initialled on each page. The documents refers at clause 8 to 'General Terms and Conditions' set forth in Exhibit B, however, there is no Exhibit B attached to this version of the agreement. During cross examination, Mr Lye agreed that if an agreement says that General Terms and Conditions are attached hereto, they are a necessary part of the agreement.[33] However, he stated that he could not recall whether or not he signed the terms and conditions.[34] When questioned about the agreement executed by Mr Skelton on 24 December 2008, said to include attached General Terms and Conditions, he stated that he could not recall whether or not he had seen the document after December 2008.[35]

[64] In his second affidavit, Mr Skelton said that in April 2009, Mr Lye sent him a further proposed Head Licence for consideration.[36] This document is marked exhibit 'G' to that Affidavit. That document is date stamped 29 April 2009. It is not signed. It provides New Zealand as the governing law and forum at clauses (k)e. and (k)f. of the General Terms and Conditions.

[65] In his fourth affidavit, Mr Skelton stated that sometime after 18 May 2009, Mr Lye sent him another amended agreement increasing the maximum planting allotment

---

29 Transcript 2-21-24.
30 Mr Skelton's fourth affidavit [43].
31 Mr Lye's third affidavit [57].
32 Mr Lye's third affidavit [57] credit card statement found at exhibit CSL-1 pages 60-63.
33 Transcript – 2-25-26
34 Transcript – 2-25-35
35 Transcript – 2-24-6
36 Mr Skelton's second affidavit [44].

from 20 to 2000 hectares. This document is exhibit 'I' to that affidavit. It is signed by both parties, but the General Terms and Conditions document is not attached. Mr Skelton states that sometime after this date, Mr Lye sent him another variation and told him the changes were marked in red. This included an increase from 2000 to 4000 hectares and a change in the date of the planting obligation. This document is exhibit 'J' to that affidavit. There is no General Terms and Conditions document attached.

[66] In his third affidavit, Mr Lye agreed that he sent Mr Skelton a version of the main body of the contract marked up in red amending clauses 2.1(i) (from 2000 hectares to 4000 hectares) and 2.2(i) (from '10th anniversary' to the '30th anniversary'). However, he said that this document was not sent until June 2010.

[67] Mr Skelton deposed that the final signed 2008/2009 agreement is found at Exhibit K to his fourth affidavit. This document does not contain an execution page, but each page is initialled by both parties. Exhibit B – General Terms and Conditions clauses (k)e. and (k)f. provide Australia as the governing law and forum and clause (k)h. provides 'The Agreement supersedes all prior understandings and agreements (whether written, oral or otherwise), and constitutes the entire agreement between the Parties hereto relating to the subject-matter hereof and the transactions provided herein'. This page is initialled by both parties. The 2008/2009 agreement contains an exclusive choice of court agreement within the meaning of s 20(3) TTPA.

[68] In his third affidavit, Mr Lye stated that a copy of the agreement signed in or around June 2009 is found at pages 121-149 of exhibit CSL-1 that affidavit. The main body of this agreement is the same as that found at exhibit 'I' to Mr Skelton's fourth affidavit. Exhibits A and B are the same as those found at exhibit 'K' to Mr Skelton's fourth affidavit. Consequently, the parties disagree as to which version of the main agreement was signed in or around June 2009, however, for the purposes of this application, it is sufficient that both the plaintiff and first defendant agree that Exhibit B – General Terms and Conditions clauses (k)e. and (k)f. providing Australia as the governing law and forum were signed by both parties and were part of the 2008/2009 agreement between the parties.

[69] There is some confusion and disagreement surrounding the circumstances in which this document was signed.

[70] In his points of claim Mr Skelton alleged and in his second affidavit Mr Skelton swore that in or about June 2009 Mr Lye visited Mr Skelton's home, handed him the 2008/2009 agreement to sign and failed to inform him that the exclusive jurisdiction clause had been changed from New Zealand to Australia.[37]

[71] In his fourth affidavit, Mr Skelton deposed that he does not have a clear memory of the exact events surrounding the signing of the 2008/2009 agreement.[38] He admitted that he did not read the General Terms and Conditions or ask about the jurisdiction clause when signing the agreement.[39]

[72] During cross examination, Mr Skelton's evidence was that he did not know when Mr Lye handed him an agreement and said 'here's the agreement with the changes

---

37 Mr Skelton's second affidavit [51] – [54].

38 Mr Skelton's fourth affidavit [49].

39 Mr Skelton's fourth affidavit [50].

that we discussed' or even whether this exchange occurred at all.[40] Mr Skelton's evidence was that he did not believe that Mr Lye had attended his residence in New Zealand at all during 2009. He said that he thought the exchange must have happened in a face to face meeting in April 2010. He then said he received the document by email rather in person. In other words there is no satisfactory evidence from Mr Skelton that there was any misrepresentation by Mr Lye. This confusing and contradictory evidence is not sufficient to satisfy me that there is an arguable case that the allegation of fraud set out in paragraph 10 of Mr Skelton's points of claim that in or about June 2009, Mr Lye, in his capacity as director of Z487, attended Mr Skelton's residence, stated that a document entitled 'Proprietary Cultivar Commercialisation, Agency, Propagation, Production and Marketing Head Licence' was the "agreement with the changes that we discussed" and failed to tell Mr Skelton that the wording of clause (k)e. and clause (k)f. in the General Terms and Conditions had been changed from New Zealand to Australia, can be made out. The evidence does not show that there was any operative misrepresentation. The exclusive choice of court agreement is not null and void by reason of fraud or misrepresentation.

[73] Mr Skelton raised an argument in submissions at the hearing that the 2008/2009 exclusive court clause was entered into by mistake and should be rectified or rescinded. This was not pleaded in the points of claim and no relief has been sought in respect of it.

[74] Only an Australian court has jurisdiction to hear and determine a question arising under the 2008/2009 agreement, such as whether it should be rectified. Unless and until it were to be rectified to remove the exclusive court agreement, the clause stands. I would not be prepared to rectify it, even if such a remedy were available without being pleaded, on the evidence before me. In his final oral submissions, Mr Skelton's counsel quite properly withdrew any reliance on any mutual mistake that might found a claim for rectification.

[75] So far as unilateral mistake on the part of Mr Skelton is concerned, there is no satisfactory evidence of the pleaded deliberate misrepresentation or any deliberate behaviour by Mr Lye to ensure that Mr Skelton did not become aware of his mistake, so there is no basis for rescission[41] of the term of the contract which provides for choice of court. No other factual basis for setting aside the relevant clauses of the 2008/2009 agreement for unilateral mistake[42] is pleaded. The case must be decided on the pleadings before me. The applicant, Mr Skelton, has not shown that the choice of court clause in the contract is "null and void" for mistake.

[76] Accordingly if the matters in issue in this court relate to the agreement in which that exclusive choice of court clause is found then pursuant s 20(1)(b) of the TTPA, this court may not stay this proceeding.

[77] Mr Skelton's next argument was that the matters in issue in this court were not governed by the 2008/2009 agreement but by the 2010 agreement.

---

40 Transcript 1 – 64 – 38.

41 See *Taylor v Johnson* (1983) 151 CLR 422 at 432.

42 Such as those referred to by Muir J (as his Honour then was) in *Eroc Pty Ltd v Amalg Resources NL* [2003] QSC 074.

[78] Both parties accept that on 24 May 2010, Mr Skelton, Mr Lye and Mr Blackler signed the 2010 agreement, which lists New Zealand as the governing law and forum. On this same date, the 2008/2009 agreement was varied by the substitution of Annex A with a document entitled "Replacement 24/5/2010 Annex 'A'" initialled by the plaintiff and the first defendant.

[79] In his second affidavit, Mr Skelton said that it is impossible to separate the 2008/2009 and 2010 Head Licences as Z487 has merged the cultivars covered by each head licence and treated the two agreements as if they were one.[43] Further, clauses (h) and (ii) of the General Terms and Conditions of the 2010 agreement states that a breach of any other agreement is a breach of the 2010 agreement. Mr Skelton argued that as the whole or certainly a substantial part of the matters in dispute in the Queensland proceeding are covered by and subject to the terms of the 2010 agreement,[44] determining whether the plaintiff breached the 2010 agreement will inevitably require a determination of whether it breached the 2008/2009 agreement.

[80] In his second affidavit, Mr Lye deposed that the 2008/2009 and 2010 agreements are clearly distinguishable as they refer to specific cultivars.[45] Further, it is submitted that the fact that both the 2010 agreement and the variation to the 2008/2009 agreement were signed on the same date indicates that they were intended to be separate agreements.[46]

[81] The 2008/2009 agreement and the 2010 agreement are separate agreements and the former has not merged with the latter. The matter sought to be litigated in this court is whether or not the 2008/2009 agreement was validly terminated. The matter in issue between the parties to the Queensland proceeding arises out of,[47] and is governed by the terms of, the 2008/2009 agreement which contains an exclusive choice of court agreement designating an Australian court as the court to determine those matters.

Conclusion

[82] There is an exclusive choice of court agreement between the parties which designates an Australian court as the court to determine the matters in issue between the parties to it. The exclusive choice of court agreement has not been shown in this application to be null and void. Accordingly, pursuant to s 20(1)(b) of the TTPA, this court must not stay the proceeding before it. The applicant is not entitled to any of the relief he seeks. The application must be dismissed. I shall hear argument as to costs.

---

43 Mr Skelton's second affidavit [82].
44 Mr Skelton's second affidavit [82].
45 Mr Lye's second affidavit [35].
46 Transcript 2-74-18.
47 *Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544 [27].