

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

CIV 2007-404-005589

BETWEEN	EDWIN MOLDAUER Appellant
AND	CONSTELLATION BRANDS, INC FORMERLY CANANDAIGUA BRANDS INC First Respondent
AND	CANANDAIGUA WINE COMPANY Second Respondent

Hearing: 13-15 October 2008

Counsel: GJ Thwaite for Appellant
MS Cole and WJR Kiewik for Respondent

Judgment: 16 December 2008

JUDGMENT OF RODNEY HANSEN J

*This judgment was delivered by me on 16 December 2008 at 1.00 p.m.
pursuant to Rule 540(4) of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Gregory J Thwaite, P O Box 2062, Shortland Street, Auckland for Appellant
Simpson Grierson, Private Bag 92518, Auckland for Respondents

Introduction

[1] Mr Moldauer is Romanian born and has New Zealand and Israeli citizenship. In August 2000 he was employed by Constellation Brands Inc as a cost analyst. Constellation Brands is a United States company with extensive interests in the wine industry. Mr Moldauer worked at a winery in California operated by another company in the group, Constellation Wine Company Inc.

[2] In October 2002 Mr Moldauer's employment was terminated on the grounds of insubordination. He took legal advice and, several weeks later, a settlement was reached. Regrettably, that did not bring hostilities to an end. Mr Moldauer has made a number of complaints to US authorities over the conduct of his employer and sought to compel Constellation Brands to submit to arbitration. The complaints have come to nothing and the arbitration proceedings were stayed by order of a New York Court.

[3] Undeterred, Mr Moldauer issued proceedings in the Auckland District Court and, without seeking leave, served the respondents in the United States. They responded by protesting the jurisdiction of the Court and applying to the Court to dismiss the proceeding under r 139 of the District Court Rules 1992. Judge R Joyce QC upheld the protest and dismissed the proceedings. Mr Moldauer appeals his decision.

Issues

[4] In challenging the jurisdiction of the Court, the respondents contended, first, that the proceeding did not come within r 242 of the District Court Rules which permits a proceeding to be served out of New Zealand without leave in certain cases. Secondly, even if the proceeding came within r 242, the defence argued that jurisdiction should be declined as the plaintiff does not have a good arguable case and New Zealand is not the most convenient forum to try the case. On all issues Judge Joyce found against Mr Moldauer.

Service abroad

[5] The questions of whether service comes within the letter and spirit of r 242 and whether there is good arguable case on the merits often fold into one, as they did in *Kuwait Asia Bank EC v National Mutual Life Nominees Limited* [1990] 3 NZLR 50 (CA) at 54. But in this case it is convenient to address them separately. It is not necessary to consider the merits of the case in order to decide whether service could be effected without leave under r 242. If service is not authorised under the rule, the New Zealand Court will not have jurisdiction. For the purpose of considering this issue, the plaintiff must show that the claim falls within the spirit, as well as the letter, of r 242: *Kuwait Asia Bank* (CA) at 54.

[6] Rule 242 provides:

When allowed without leave

Where in any proceeding which a District Court has jurisdiction to hear and determine a statement of claim or counterclaim and the relevant notice of proceeding or third party notice cannot be served in New Zealand under these rules, they may be served out of New Zealand without leave in the following cases:

- (a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand:
- (b) Where the contract sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any proceeding, or for the breach whereof damages or other relief is demanded in the proceeding—
 - (i) Was made or entered into in New Zealand; or
 - (ii) Was made by or through an agent trading or residing within New Zealand; or
 - (iii) Was to be wholly or in part performed in New Zealand; or
 - (iv) Was by its terms or by implication to be governed by New Zealand law:
- (c) Where there has been a breach in New Zealand of any contract, wherever made:
- (d) Where it is sought to compel or restrain the performance of any act in New Zealand which a District Court has jurisdiction to compel or restrain:

- (e) Where the subject-matter of the proceeding is land, stock, or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land, stock, or property:
- (f) Where any relief is sought against any person domiciled or ordinarily resident in New Zealand:
- (g) Where any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand:
- (h) Where the proceeding is a proceeding for relief under the Property Relationships Act 1976:
- (i) Where the proceeding is brought under the Marine Pollution Act 1974:
- (j) Where the person to be served has submitted to the jurisdiction of the Court.

[7] In the District Court, the grounds relied were subparas (b) and (j). Before me Mr Thwaite also relied on subpara (f).

Performance of the contract

[8] Mr Thwaite argued that the employment agreement was to be partly performed in New Zealand because Mr Moldauer was required to obtain a visa in New Zealand in order to work in the United States. In fact, he was not required to obtain a visa in New Zealand; he could apply at any overseas US consulate. Initial arrangements were made for him to apply in Vancouver, the location most convenient to him, but the process eventually took place in Auckland as Mr Moldauer made a personal decision to travel to New Zealand to visit family.

[9] But even if Mr Moldauer had been required to obtain his visa in New Zealand, that would not have constituted performance of part of the contract in New Zealand. His employment contract was subject to his obtaining and maintaining an appropriate work visa, but it was no part of his job description that he do so. It was a condition he was required to satisfy in order to obtain and retain his employment. It was not a duty he was being paid to perform. This was a fanciful argument which must be rejected.

Domicile or residence in New Zealand

[10] Constellation Brands is a corporation organised under the laws of the State of Delaware with its headquarters in New York State. Constellation Wine Company is a trade name used by Constellation Brands. The division of Constellation Brands engaged in the production, distribution and sale of wines, operates under that name. It was formerly named Canandaigua Wine Company, which is named as the second defendant in the proceeding but which is not, of course, a separate legal entity. Constellation Wine Company is not to be confused with Constellation Wine Company Inc, which is a subsidiary of Constellation Brands.

[11] Apart from the registration of a trademark, in New Zealand (which has not been used in New Zealand) Constellation Brands' links with New Zealand derive from its acquisition (through a subsidiary) in 2003 of the shares in an Australian company, BRL Hardy Limited. As a result, again through a subsidiary, Constellation Brands became the owner of shares in Nobilo Wine Group Limited which makes, sells and distributes wines. It operates independently of Constellation Brands which has never traded in New Zealand.

[12] However, Mr Thwaite submitted that Constellation Brands has engaged in "a pattern of economic activity" in New Zealand which established that it is carrying on business in New Zealand and brings it within r 242(f). In summary, these activities are:

- Advising the Companies Office that the address of a firm of solicitors was its registered office.
- Using Computershare, as Australian share registration office, for the purpose of share transfers or issues to New Zealand residents.
- Making offers of shares and share options to employees in New Zealand.
- Using the property of its New Zealand subsidiary as security for financing arrangements.

- Engaging solicitors in New Zealand to act as its agents.
- Registering trademarks in New Zealand.
- Importing New Zealand wines into the United States.
- Appointing directors to sit on the board of its New Zealand subsidiary.

[13] The registration of the trademark took place before 2003 but most of the other activity relied on was associated with or consequent on the merger with BRL Hardy. For example, following the merger, Constellation decided to offer participation in its employee share option plan to New Zealand employees of the Nobile group. That required formalities to be observed under securities legislation, including depositing specified records with the Companies Office.

[14] It is unnecessary to exhaustively examine the factual basis for the various activities relied on by Mr Thwaite. It is sufficient for present purposes to record what is not in contention, namely, that Constellation Brands:

- Does not and never has had a registered office in New Zealand. (The advice of its solicitors that their address was the registered office was given in error.)
- Does not own any assets in New Zealand, apart from its shareholding in the Nobile group.
- Does not pay rates, insurance or tax in New Zealand.
- Does not have any employees in New Zealand and has not appointed agents.
- Does not carry out any trading activities in New Zealand.

[15] I was not referred to any cases in which the concepts of “residence” and “domicile” of a company had been considered in the context of r 242 or its High Court equivalent, r 219. In the context of territorial jurisdiction, residence has been equated with the carrying on of business – see the discussion of Henry J in

Edgbaston Investments Limited v Bank of New Zealand [1994] 1 NZLR 634 at 637-638 and Atkin LJ's dictum in *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101 at 120:

... the true view is that the corporation resides for the purposes of suit in as many places as it carries on business ...

[16] In *Adams v Cape Industries Plc* [1990] 1 Ch 433 (CA), there is an extensive discussion of the concepts of "residence" or "presence" for the purpose of considering whether a foreign company is amenable to jurisdiction. The Court confirmed that the question of whether a corporation is present or resident in a country is to be judged by reference to whether it is carrying on business. The most helpful guidance in determining "residence" or "presence" was suggested to be the judgment of Buckley LJ in the *Okura & Co Limited v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715, who said at 718-719:

The point to be considered is, do the facts show that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business?'

[17] The Court, in *Adams v Cape Industries* went on at 530 to derive three propositions from the authorities cited to it relating to the "presence" of an overseas corporation. The first two of those three propositions are as follows:

- (1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), or (ii) a representative of the overseas corporation has more than a minimal

period of time been carrying on *the overseas corporation's* business in the other country at or from some fixed place of business.

- (2) In either of these two cases presence can only be established if it can fairly be said that the *overseas corporation's* business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.

It is unnecessary to set out the third proposition which considers the questions that are likely to be relevant to an investigation into whether a representative has been carrying on an overseas corporation's business.

[18] Mr Thwaite argued that Constellation Brands should be considered as a non-trading corporation and the focus, accordingly, is on its corporate activities – see *Adams v Cape Industries* at 524. He referred to such activities as the registration of trademarks, engagement of solicitors, share transactions through the employee share scheme and the securities extending to the property of subsidiaries in New Zealand.

[19] However, the evidence is clear. Constellation Brands is a trading corporation and the question of whether it carries on business in New Zealand must be judged on that basis. The activities relied on by Mr Thwaite are nowhere near enough to establish residence in this country. Constellation Brands has not established a fixed place of business, on its own or through a representative, for carrying on its business. It has not carried out any trading activities in New Zealand. It has taken steps to protect its intellectual property and engaged in activities necessarily incidental to its ownership of a New Zealand subsidiary. But it does not carry on a business in New Zealand and never has.

[20] Mr Thwaite advanced, as an alternative basis for establishing domicile or residence, that Constellation Brands carried on business in New Zealand under s 332 of the Companies Act 1993 and was consequently obliged under s 324 of the Act, to register as an overseas company. He submitted that r 242 should be construed so as

to promote “the letter and spirit” of s 324 so that an overseas company which is required to register should come within r 242(f).

[21] Section 332 provides some guidance as to when an overseas company is carrying on business in New Zealand. It provides:

332 Meaning of “carrying on business”

For the purposes of this Part of this Act,—

- (a) A reference to an overseas company carrying on business in New Zealand includes a reference to the overseas company—
 - (i) Establishing or using a share transfer office or a share registration office in New Zealand; or
 - (ii) Administering, managing, or dealing with property in New Zealand as an agent, or personal representative, or trustee, and whether through its employees or an agent or in any other manner:
- (b) An overseas company does not carry on business in New Zealand merely because in New Zealand it—
 - (i) Is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute; or
 - (ii) Holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
 - (iii) Maintains a bank account; or
 - (iv) Effects a sale of property through an independent contractor; or
 - (v) Solicits or procures an order that becomes a binding contract only if the order is accepted outside New Zealand; or
 - (vi) Creates evidence of a debt or creates a charge on property; or
 - (vii) Secures or collects any of its debts or enforces its rights in relation to securities relating to those debts; or
 - (viii) Conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
 - (ix) Invests its funds or holds property.

[22] Mr Thwaite argued that the use of Computershare brought Constellation Brands within subpara (a)(i) of s 332. However, the evidence is clear that

Constellation Brands has not established or used a share transfer office or share registration office in New Zealand. Computershare acts as its transfer agent and registrar in Australia but it has not been engaged to provide services in New Zealand. Constellation Brands does not carry on business in New Zealand for the purpose of the Companies Act.

[23] I would add that, even if Constellation Brands were an overseas company for the limited and specific purposes of the Companies Act, it would not follow that it was ordinarily resident or domiciled in New Zealand for the purpose of r 242 which, as *Adams v Cape Industries* makes clear, is concerned with presence for the very different purpose of establishing jurisdiction.

Submission to jurisdiction

[24] Mr Thwaite accepted that the respondents had taken no steps in the proceeding itself which could be construed as a submission to jurisdiction. He relied on a broader idea of submission by which a foreign corporation doing business in a country may be said to render itself amenable to the jurisdiction of the Court. He submitted that in this sense, Constellation Brands had submitted to jurisdiction, particularly as the registration of a trademark and the issuing of shares rendered the company liable to action in the Courts of New Zealand.

[25] Mr Thwaite was unable to refer me to any authority in which the wider of concept of submission to jurisdiction has been adopted. That is not surprising. The sort of factual considerations Mr Thwaite relied on have relevance to the issue of whether or not Constellation Brand carried on business in New Zealand for the purpose of establishing domicile or residence under r 242(f). The question of whether the firm submitted to jurisdiction must be related to the proceeding itself. As the Court of Appeal said in *Von Wyl v Engeler* [1998] 3 NZLR 416 at 421, quoting Dicey and Morris *The Conflict of Laws* (12th ed 1993) at 311:

In order to establish that the defendant has, by his conduct in the proceedings, submitted or waived his objection to the jurisdiction, it must be shown that he has taken some step which is only necessary or only useful if the objection has been waived or never been entertained at all.

[26] No such steps have been taken by Constellation Brands. Subparagraph (j) cannot apply.

Conclusion

[27] There are no grounds on which Mr Moldauer could serve the respondents under r 242. The claim does not fall within the spirit or the letter of the rule. On this ground alone the Judge was right to uphold the objection to jurisdiction.

Other issues

[28] If, contrary to my findings in relation to r 242, Mr Moldauer had been able to bring his proceeding within the rule, it would still have been open to the Court to set aside service if Mr Moldauer had not been able to show that he had a good arguable case and/or by reference to issues of *forum conveniens*. Judge Joyce considered these issues in the District Court and, in deference to the arguments repeated before me, I will address the submissions advanced under this head.

Good arguable case

Whether the test is relevant

[29] Mr Thwaite argued, as a preliminary issue, that the requirement for a good arguable case does not apply where a defendant is either domiciled or resident in New Zealand or has submitted to the jurisdiction and that, in any event, the issue could not be considered in the context of a protest to jurisdiction in the District Court (as opposed to the High Court).

[30] The requirement for a good arguable case was confirmed by the Privy Council in *Kuwait Asia Bank* where there was a strong New Zealand association and a claim arose out of a business investment in New Zealand. I was not referred to any authority that has suggested the requirement should be qualified in the way proposed

by Mr Thwaite. I am not tempted to revisit the basis for the rule, particularly on facts which have only the most tenuous connection with New Zealand.

[31] The submission that the District Court cannot enquire into whether there is a good arguable case rests on the use of the term “inherent jurisdiction” in Harrison J’s statement of principles in *Bomac Laboratories Limited v F Hoffman-La Roche Limited* (2002) 7 NZBLC 103,634. He said at [28][d]:

The test is applied at two distinct stages of the Court’s inquiry (which in practice often merge) into, first, whether the plaintiff has complied with the letter and spirit of r 219, and, second, the merits of the plaintiff’s claim. The second stage of this inquiry is undertaken within the Court’s *inherent jurisdiction to decline jurisdiction* (*Kuwait Asia Bank* (PC) (supra) at NZCLC pp 66,519-66,523; NZLR pp 535-529. (emphasis added)

Mr Thwaite submitted that as the District Court does not have inherent jurisdiction, it cannot enquire (at least not independently of its enquiry into whether the plaintiff comes within the rule) into the merits of the claim.

[32] However, it is clear that Harrison J was using the term “inherent jurisdiction” in the sense of the exercise of the Court’s inherent power. That is made clear by his comment in [34] where he says:

The relevance of the Privy Council’s judgment seems to lie in its endorsement of the Court’s residual discretion, whether under r 131 or inherently, to set aside service on the same principles applying to the former r 48 New Zealand Code of Civil Procedure ...

[33] Both the Privy Council in *Kuwait Asia Bank* at 524-525, and Harrison J were referring to the inherent powers of all courts to regulate their own procedure as distinct from the inherent jurisdiction of superior courts – see the discussion by Rosara Joseph *Inherent Jurisdiction and Inherent Powers in New Zealand* (2005) 11 Canterbury Law Review 220. See also *Department of Social Welfare v Stewart* [1991] NZLR 697 at 701 and *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 at [16].

[34] There is no doubt that in the exercise of its discretion under r 139 to determine a protest to jurisdiction, the District Court has the power to enquire into the merits of a plaintiff's claim and Judge Joyce was right to do so.

History of proceedings

[35] A brief statement of the factual matrix of Mr Moldauer's claim and the history of the litigation to date is necessary before an assessment can be made of the merits of his claim.

[36] Mr Moldauer and Constellation Brands Inc (then called Canandaigua Brands Inc) entered into a written employment agreement on 23 August 2000 for his employment by Canandaigua Wine Company (now Constellation Wine Company). The letter of agreement concluded with the following:

Lastly, by executing this letter of agreement, you acknowledge and agree that your employment with CWC is at will, meaning that it can be terminated by you or CWC at any time, with or without cause. You further understand and agree that this letter constitutes the entire agreement of the parties, and is governed by New York State law. You hereby consent to binding arbitration under the rules of the American Arbitration Association as they relate to commercial disputes in Rochester, NY as the sole and exclusive means for resolution of any disputes which may arise hereunder or in connection with your employment. No arbitration award shall include any punitive, incidental, consequential or special damages of any kind. Any such arbitration award may be entered in any court having appropriate jurisdiction. There are no other written or oral agreements of the parties, and this letter of agreement cannot be modified or amended, except in writing executed by the President of CB.

[37] The differences between the parties that led up to the termination of Mr Moldauer's employment are the subject of voluminous and conflicting affidavits. It is sufficient to say that Constellation Brands' position is that it terminated Mr Moldauer's employment because of longstanding performance problems, which included continuing insubordination. Mr Moldauer maintains that his employment was terminated because he had detected certain accounting irregularities and had continued to complain after reports to company management had been ignored.

[38] Following termination of his employment, Mr Moldauer retained the services of an experienced employment lawyer. Negotiations led to a settlement. On

1 November 2002 a settlement agreement described as “Severance Agreement, General Release and Waiver” (Severance Agreement) was entered into by Mr Moldauer and Constellation Wine Company. In consideration of Mr Moldauer signing the agreement, he was paid almost \$US16,000 and received other specified benefits. Clause 8 of the agreement provided:

In exchange for the payment and benefits set forth in the Severance Appendix, the Employee, his heirs, personal representatives, successors and assigns hereby release and discharge CWC and CWC’s affiliates, assigns, successors, officers, directors and employees (herein collectively the “Company”) from all claims, liabilities, demands or causes of action, known or unknown, arising out of or in any way connected with or related to the Employee’s employment or the termination (including the manner and circumstances of termination) thereof. This includes, but is not limited to, claims of wrongful discharge, breach of any implied or express contract, whether oral or written, intentional or negligent infliction of emotional harm, defamation, or any other tort. This also includes any claims based on any local, state, or federal constitution or statute relating to age, sex, race, or any other form of discrimination such as, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and other similar state and local anti-discrimination laws.

[39] Soon after settlement was concluded, Mr Moldauer made the first of a series of complaints against his former employer. On 19 November 2002, he complained to the California Department of Fair Employment and Housing (DEFH) that he had been subjected to discrimination and harassment in the workplace. Also in November 2002 he met with an FBI agent to report alleged accounting irregularities by Constellation Brands and complained to the US Securities and Exchange Commission (SEC).

[40] None of these complaints came to anything. The FBI reported on 23 January 2003 that there had been no violation of federal law. The SEC took no action. In September 2003 Mr Moldauer filed eight separate complaints against Constellation Brands and individual managers with the California DFEH and obtained “right to sue” letters but has not pursued the complaints.

[41] On 24 April 2003, Mr Moldauer filed a complaint with the US Department of Labor under the whistleblower protection provisions of the Corporate and Criminal Fraud Accountability Act 2002, popularly known as the Sarbanes-Oxley Act. The Act protects employees against retaliation or discrimination for actions taken against

their employer for violations of securities law. Mr Moldauer filed the complaint after the Sarbanes-Oxley Act came to his notice while he was visiting the website of the US Securities and Exchange Commission.

[42] On 2 July 2003 Mr Moldauer's complaint was dismissed on the ground that it had been received outside the 90-day time limit and did not qualify for an extension. Mr Moldauer lodged an objection to the findings, arguing that he was unable to file his complaint earlier because he was depressed and did not become aware of the whistleblower protection provisions of the Sarbanes-Oxley Act until after the expiry of the limitation period.

[43] In response, Constellation Brands filed a Motion for Summary Decision arguing that any possible cause of action was released as part of the severance agreement and that the complaint was out of time. In response, Mr Moldauer argued:

- a) The severance agreement was a ploy to prevent him from suing Constellation Brands under the Sarbanes-Oxley Act.
- b) He had raised the claim previously but in incorrect forums (the SEC and the California DFEH).
- c) He was prevented from asserting his rights within the statutory period because, despite due diligence, he did not learn of his rights until after the limitation period had expired.

[44] On 14 November 2003, an administrative law judge made an order granting Constellation Brands' Motion for Summary Decision. In a written judgment he rejected Mr Moldauer's argument that Constellation Brands' actions were responsible for the delay in complaining. He also rejected an argument that, despite due diligence, Mr Moldauer had been unable to discover information vital to his claim. The Judge held that, as Mr Moldauer had been represented by an attorney with acknowledged employment expertise in connection with the severance agreement, he was presumed to have constructive notice of the appropriate legal

remedies. He also rejected the argument that the complaints to the SEC and the DFEH excused the delay. He noted that the complaint to the DFEH made no mention of the alleged accounting irregularities and that Mr Mouldauer had failed to produce a copy of the complaint to the SEC.

[45] On 11 December 2003, Mr Moldauer filed a notice of appeal against the Judge's decision. His appeal was dismissed by the Administrative Review Board, a tribunal comprising three judges, on 30 December 2005. In a fully reasoned decision the Court upheld the Judge's decision. All three Judges agreed that the complaint was untimely and the delays could not be excused for the reasons put forward by Mr Moldauer. In a concurring separate judgment, one of the Judges also held that the severance agreement was effective to release Mr Moldauer against any claim for discrimination he might have had under the Sarbanes-Oxley Act. He said:

Accordingly, for valuable consideration, Moldauer knowingly and voluntarily executed a general release of all claims, arising out of his employment with Canandaigua, including employment discrimination.

[46] In the meantime, while the decision of the Board was pending, Mr Moldauer had attempted to commence an arbitration in New York with the American Arbitration Association. On 16 December 2004, Constellation Brands Inc and Constellation Wine Company Inc applied in the Supreme Court of the State of New York for a stay of the arbitration. After considering the application and a memorandum by Mr Moldauer in opposition, the Court granted a stay on the grounds that:

- Mr Moldauer has waived any right to arbitrate;
- The claim Mr Moldauer sought to arbitrate was the subject of another pending proceeding;
- The agreement upon which Mr Moldauer relied to commence arbitration had been extinguished by a subsequent agreement that mandated resolution of disputes in a court of law;
- Mr Moldauer had already released the claim he sought to arbitrate; and

- The claim Mr Moldauer sought to arbitrate was barred by the applicable Statute of Limitations.

[47] The proceedings taken by Mr Moldauer before the Department of Labor and in New York were all taken *in absentia*. In December 2002, after confidential price and customer lists of Constellation Wines had been sent to a competitor, a complaint was made to the Madera County Sheriff's Department in California. Constellation Wine Company Inc filed proceedings in the US Federal jurisdiction against Mr Moldauer alleging theft, dissemination of trade secrets and defamation. The police investigation concluded that Mr Moldauer had stolen and disseminated Constellation's trade secrets. A warrant was issued for Mr Moldauer's arrest on 31 December 2002. It has not been executed. Mr Moldauer left the USA on 12 December 2002 and has not returned.

A good arguable case?

[48] Mr Moldauer's first cause of action rests on the proposition that his employment contract was never terminated. The argument is that he entered into two employment contracts, one with Constellation Brands, the other with the associated company, Constellation Wine Company Inc, only one of which was terminated. That is a demonstrably preposterous argument on any view of the facts and regardless of the applicable law. Mr Moldauer was employed by Constellation Brands and dismissed by Constellation Brands. The contract came to an end in October 2002.

[49] The other possible bases for a claim cannot be so readily dismissed, if only because they rely on alleged breaches of American law which, notwithstanding voluminous submissions and references to scores of authorities, I am in no position, in the context of this appeal, to determine. A brief summary will suffice. Mr Moldauer argues:

- a) A breach of the Californian tort of unlawful termination of employment where an employee has been discharged contrary to

public policy. The relevant public policy, as I understand it, is the interest in upholding the Federal Sarbanes-Oxley Act.

- b) A breach of the California Business and Professions Code prohibiting “any unlawful, unfair or fraudulent business practice”. The breach is claimed to be in terminating Mr Moldauer’s employment for reporting financial irregularities in breach of the Sarbanes-Oxley Act and inducing him to enter into a severance agreement purporting to settle those claims.
- c) A breach of the Californian Civil Code relating to fraudulent misrepresentations, also based on the allegation that Constellation Brands induced Mr Moldauer to enter into a settlement which purported to dispose of the Sarbanes-Oxley claim.

[50] These claims give rise to a raft of disputed factual and legal issues. They include the Constellation group’s position that, as a matter of fact, Mr Moldauer’s employment was terminated for insubordination and not because he reported accounting irregularities. There is, of course, a defence based on the Severance Agreement which has drawn arguments that the Severance Agreement is unenforceable as “a contract of adhesion” (one that has been imposed by a party of superior bargaining strength), that the severance agreement does not apply to Californian tort claims, and that it is not enforceable as it was procured by fraud, undue influence and mistake. There are disputed claims that the causes of action are time barred. And there are the predictable defences of *res judicata* and/or issue estoppel arising out of the determinations of the US Department of Labor and the New York Supreme Court. Questions also arise as to whether California or New York law should apply in relation to the various claims and defences.

[51] Mr Thwaite faced daunting obstacles in his quest to show a good arguable case. On evidence which was challenged on every material issue, he failed to show a credible narrative that Constellation companies had acted unfairly, unethically and unlawfully in dismissing Mr Moldauer and, notwithstanding Mr Moldauer having expert legal advice, were able to fraudulently deny him a remedy. His detailed

arguments in relation to each legal issue, were countered by Mr Cole at every step. The numerical weight of authorities cited from the Courts of California, New York and the US federal jurisdiction was impressive but not enough to show that the decisions of the United States Courts, which have already pronounced on some of the key issues raised in the litigation, were erroneous or not determinative or should not operate as a barrier to further action.

[52] Mr Moldauer has not shown that he has a good arguable case on the merits. I am in general agreement with Judge Joyce's conclusion on the issue. He said:

[180] The short point at the end of what was an unusually extensive argument is that the very recital of American principles and remedies and the fate (and reasons for that) of Mr Moldauer's American endeavours are such as to speak for themselves.

[181] They reveal that Mr Moldauer's endeavours to show a good arguable case can be expected inevitably to founder on the rocks, first, of the release he gave and, secondly, the well-founded reasons why courts or tribunals in the country truly concerned have identified that release as fatal to his case.

Forum conveniens

[53] A finding that Mr Moldauer does not have a good arguable case does not, of course, mean that he has no remedy. What it means is that it is to the American Courts that he must take his case. Considerations of *forum conveniens* decisively favour his claim being heard in the United States. Its only link with New Zealand is Mr Moldauer's residence in New Zealand. All other factors favour the United States as the most convenient forum.

[54] The Courts of the USA plainly have jurisdiction to determine the claims. American law applies. Among the questions of law that would need to be determined are the choice of law itself (California or New York) and the relevance and status of previous determinations of US Courts. It would be patently absurd for a New Zealand Court to undertake the task of addressing difficult and contentious issues of American law. These are matters which an American Court is much better placed to deal with.

[55] Considerations of cost and convenience favour the litigation taking place in the USA. The only witness who would not be in the jurisdiction is Mr Moldauer. Most of the relevant documents will be in the USA. Any judgment against Constellation Brands would be enforced in the USA.

[56] Mr Thwaite points out that the Constellation companies have not brought on for hearing the civil action they instigated in California. He also refers to the difficulties Mr Moldauer would face if he returned to the United States. There is doubt he would obtain a visa. Alternatively, there is a prospect he could be arrested and may be liable for bail of US\$200,000.

[57] In my view, these considerations do not assist Mr Moldauer. He chose to leave the United States, presumably rather than face prosecution and other court action in that jurisdiction. If, as he claims, he has a good case against the Constellation companies on the merits, there is no reason to think that the American Courts will not provide him with the means to a just outcome on all issues arising out of his employment. It would be quite wrong to require Constellation Brands to appear before the New Zealand Courts, in their civil jurisdiction, because Mr Moldauer fears the lawful consequences of returning to the United States.

Application under rule 243

[58] Judge Joyce had before him an application under r 243 of the District Court Rules for leave to serve Constellation Brands out of the jurisdiction. It is not clear from his judgment that Judge Joyce addressed the application, although it is plain that it had no hope of succeeding and his decision to dismiss the proceeding is consistent with that view.

Result

[59] The appeal is dismissed. Constellation Brands is entitled to costs. If the parties are unable to agree, I will consider memoranda.