

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

CIV 2011-463-000291

UNDER the Arbitration Act 1996

IN THE MATTER OF Applications by the Plaintiff to seek leave to Appeal a Question of Law arising from, and the Setting Aside of, the Award of Mr D I Stewart dated 14 February 2011

BETWEEN JUSTMINK LIMITED
Plaintiff

AND TUHOE-WAIKAREMOANA MAORI
TRUST BOARD AS RESPONSIBLE
TRUSTEE FOR TE MANAWA O TUHOE
TRUST
Defendant

Hearing: 9 June 2011

Counsel: P T Harman for Plaintiff
C Bidois for Defendant

Judgment: 9 June 2011

**ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

Solicitors:

BlackmanSpargo (I Blackman): Rachel@blackmanspargo.co.nz

East Brewster Limited (C Bidois) - bidois@eastbrewster.co.nz

Counsel:

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[1] The plaintiff (JL) applies by originating application to set aside part of a final arbitral award dated 14 February 2011, by which the arbitrator rejected a claim by JL for damages for “loss of opportunity”.

[2] The arbitrator held that JL failed to produce any evidence that could be relied upon to show JL’s inability to obtain a satisfactory position the following season was caused by the defendant’s (the Trust Board) actions.

[3] Mr Perkins’ affidavit in support of the application asserts plenty of such evidence of loss was provided to the arbitrator.

[4] The application pleads that the award is in conflict with the common law of New Zealand in that:

1. It fundamentally incorrectly, interpreted and applied, the applicable law as to causation, remoteness, liability for damages thereby substantially affecting the plaintiff.
2. The apparent failure at law to exercise inquisitorial jurisdiction has resulted on the face of the award in, amongst other matters, an illogical finding of fact which supported the above incorrect application of New Zealand common law, thereby substantially affecting the plaintiff.

[5] In response, the defendant (the Trust Board) has filed a notice of opposition and, separately, an appearance under protest to jurisdiction. The protest notes, inter alia:

- (a) JL and the Trust Board signed an agreement dated 13 December 2010 wherein the parties agreed that the arbitral award would be final and that any action to challenge the award would be commenced within 58 days of publication of the award.

(b) The award was published on 14 February 2011. JL's application to the Court was filed on 13 May 2011, some 88 days after the date on which the award was published.

(c) Therefore this application by JL is out of time.

[6] In its notice of opposition the Trust Board pleads:

(a) The application does not disclose any strongly arguable case that the arbitrator has erred in law.

(b) The application does not articulate any clear question of law.

(c) The arbitrator did not ignore the common law principles as to causation, remoteness, and liability for damages.

(d) The arbitrator was not obliged to adopt inquisitorial processes.

(e) The award was based primarily upon the arbitrator's finding that there was not sufficient evidentiary support for JL's claim.

[7] In an affidavit in opposition, Mr A T Temara, the Trust Board's chairperson, reports that he attended the arbitration on behalf of the Trust Board. Mr Temara also provides a signed copy of the agreement for reference to arbitration, dated 13 December 2010.

[8] Mr Temara notes of that agreement a requirement by clause 16 upon any party wishing to take action to have the award set aside, to serve notice accordingly upon the other party within 28 days of the publication of the award "time being of the essence."

[9] Mr Temara also refers to clause 17 of the agreement that a party taking any action against the award pursuant to clause 16, is to commence proceedings in the High Court within 30 days of having given notice of the proposed action "TIME BEING OF THE ESSENCE".

[10] Mr Temara deposed that JL gave notice of its intention to take action against the award in a letter faxed to its solicitor on 15 March 2011. Accordingly, by clause 17, the High Court proceedings were to have been filed by 15 April 2011. They were not filed until 13 May 2011.

[11] Mr Temara advises that by recent order of the Maori Land Court, new trustees to the Trust Board have been appointed with effect from 1 July 2011. He states the new trustees accepted their appointments on the basis that JL's claim had already been settled through arbitration, and that they (the new trustees) would not be required to become involved in that claim. He opines that if JL is granted leave to appeal, the new trustees may wish to reconsider their appointment.

[12] In the ordinary course, this application would be timetabled for a hearing before a High Court Judge. However, the Court needs to deal with two other memoranda filed by counsel for JL. The first of those bore the heading:

MEMORANDUM OF PLAINTIFF COUNSEL SEEKING CLARIFICATIONS AS TO SERVICE, DIRECTIONS AS TO JOINDER, AND RAISING ISSUE OF MISLEADING ARBITRAL PROCEEDINGS; all in support of plaintiff's Application for Setting Aside, an application seeking leave to appeal on a question of Law.

[I will refer to the document as a memorandum seeking clarifications]

[13] The memorandum seeking clarification begins:

This memorandum is filed raising several matters which in Counsel's opinion requires this Court's attention, directions as to service, potential joinder of incoming Interim Responsible Trustee, and finally the bringing to judicial notice that during the arbitral proceeding challenged in these applications apparently false representations made by Defendant Counsel as to this Counsel's legal representation in prior related Maori Land Court may have contributed to a breach of natural justice for my client.

[14] Therein counsel submitted that the terms of the parties' written agreement did not override "the clear statutory appeal period as expressed by Article 34(3) First Schedule of the Arbitration Act which states that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application have received the award ...".

[15] Counsel advises that he had only just become aware of the orders made in the Maori Land Court at Rotorua on 11 April 2011 concerning new appointed trustees.

[16] Finally, counsel raises a concern about some representation having been given to the arbitrator by the Trust Board's counsel which may have led to the arbitrator giving little credence to letters drafted by JL's counsel. Counsel postulates about the possibility of a "breach of natural justice". He submits that this Court should direct the law firm who appeared before the Maori Land Court on behalf of the Trust Board being given a copy of these proceedings "so that they can take the necessary steps to protect themselves, and those that they represent, inclusive of either application for joinder, or an application for adjournment of current apparent Maori Land Court order".

[17] In another memorandum, called a memorandum seeking directions, counsel requests this Court direct that the Rotorua law firm, Aurere Law, receive on behalf of incoming trustees to the Trust Board, a copy of these proceedings. Counsel submits there may be reason to challenge the actions of Mr Temara by his delivery of a letter dated 12 February 2010 requiring JL to leave the dairy farm. Therefore, counsel opines that the incoming trustees ought to be made aware of the possibility that Mr Temara may be held personally responsible for the termination of the share-milking agreement at that time when the said termination may have been unlawful. Appropriate notice to incoming trustees can be served upon Aurere Law, and counsel submits that I should direct that to occur.

Counsel's service concerns

[18] I do not accept this Court has any responsibility at this stage to broaden the scope of the present proceedings beyond its immediate purpose of:

1. Processing the application to set aside an arbitral award.
2. Considering the issue raised by the protest to jurisdiction.

[19] In the context of those matters, the Court has no responsibility to make directions regarding service of documents upon others whose actions may or may not give reason for later concern.

[20] The issues raised by JL's application are concise. They concern whether or not JL is able to proceed with its application at all, notwithstanding Article 34(3).

[21] If the High Court assumes jurisdiction to hear the setting aside application, then the Court's concern will focus upon Article 34(2). In that respect it appears from JL's application that reliance will in the main be made upon Article 34(2)(b)(ii). The Court will only focus upon pleadings and claims of public policy breaches.

[22] If JL is successful in setting aside the arbitral award, then it will be due to the Court being satisfied that the arbitrator's determination of a lack of evidence to support a claim for future losses was wrong, or may have been wrong, or because the Court formed the view that the arbitrator ought to have made further inquiries to satisfy himself about the actual factual position.

[23] For that kind of outcome to occur, JL needs to show that there is an arguable basis for setting aside the arbitral award, pursuant to clause 34. As I earlier indicated, it would appear the only part of clause 34 by which the setting aside application could be brought is pursuant to a claim that the award is in conflict with the public policy of New Zealand. The task before the applicant in that event is to identify public policy considerations in the process by which the arbitrator determined JL's claim for future loss was not sufficiently proved.

[24] Otherwise, JL needs to rely upon clause 5 of the Second Schedule which preserves the right to an appeal to the High Court on any question of law arising out of an award –

- (a) if the parties have so agreed before the making of that award; or
- (b) with the consent of every other party given after the making of that award; or

(c) with the leave of the High Court.

[25] Clause 5(2) prevents the grant of leave by the High Court unless it considers that, having regard to all the circumstances, the determination of the questions concerned could substantially affect the rights of one or more of the parties. In the outcome if leave was granted the High Court may order the confirmation, variation or the setting aside of the award, or remission of the award to the arbitral tribunal for reconsideration.

[26] Inevitably, it appears that if JL gets leave to appeal, and if the arbitral award is set aside, then the matter will be referred back to the arbitrator.

[27] It is sensible to hear the leave application and the setting aside application together. That, of course, must be done before a High Court Judge. I venture to suggest that the following issues may be of importance at the time the leave application is considered:

- (a) Whether good cause exists to avoid the parties' agreement pursuant to clauses 16 and 17.
- (b) Whether there is a strongly arguable case that the arbitrator has erred in law.
- (c) Whether an award based entirely on the arbitrator's assessment of facts, as presented to him in evidence, raises "questions of law".
- (d) Whether the question of law for determination by the Court is clearly identified.
- (e) Whether an arbitrator's understanding of common law principles as to causation, remoteness, and liability for damages, whether correct or otherwise, was material to the making of the award.

- (f) Whether the arbitrator was obliged to adopt any inquisitorial processes in circumstances where there appears to be no statutory obligation on an arbitrator in respect of same.
- (g) Whether the arbitrator was an expert, and in what circumstances a Court could, or should, substitute its view for that of the arbitrator.

[28] This matter assumes some urgency because the Trust Board's incoming trustees are to assume authority for the trust in about two weeks' time. In the circumstances, I am directing the Registrar to consult with the list Judge to organise a 2-hour fixture in Rotorua or in Tauranga, or in Hamilton before a High Court Judge. Two hours should be sufficient time to deal with the matter.

[29] The following pre-hearing directions will apply:

- (a) The applicant's submissions, a bundle of authorities, and a paginated bundle of pleadings is to be filed and served no later than 10 working days prior to the fixture.
- (b) The defendant's reply submissions, and its bundle of authorities are to be filed and served no later than five working days prior to the fixture.

Associate Judge Christiansen