IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2012-463-137
[2012] NZHC 1848

	BETWEEN	JOSEPH RUA, RAYMOND NAMA, BURT MATCHITT, RAWIRI TE MOANA, MIHAERE PAROA, HIRA REWIRI KEEPA AND EDWARD MATCHITT AS TRUSTEES OF THE TE ARAWHATA TRUST Intended Appellants
	AND	MAMAKU HIGHLANDS LTD Intended Respondent

Hearing: 20 July 2012

Counsel: G Brittain for Intended Appellants
P J Morgan QC for Intended Respondent

Judgment: 27 July 2012

JUDGMENT OF HEATH J

This judgment was delivered by me on 27 July 2012 at 10.10am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Potts & Hodgson, PO Box 444, Opotiki
Nielsen Law, PO Box 1108, Hamilton
Counsel:
P J Morgan QC, PO Box 19021, Hamilton

The application

[1] The trustees of the Te Arawhata Trust (the Trustees) seek leave to appeal against a partial arbitral award dated 2 December 2011. The application is brought in reliance on cl 5(1)(c) of the Second Schedule to the Arbitration Act 1996 (the Act).[1]

Background facts

[2] The Trustees own a dairy farm, comprising 432.7745 hectares, situated on State Highway 5, near Mamaku. The farm supplies milk to Fonterra Co-Operative Group Ltd (Fonterra). Shares in Fonterra form part of the assets of the farm owners. The number of shares owned at any one time can fluctuate.

[3] In May 2007, the Trustees agreed to lease the property, with a dairy herd, to Mamaku Highlands Ltd. Although, at that time, the shares in Mamaku Highlands were owned by Mr Bradley, the trustees treated with Mr and Mrs McLachlan. They were to acquire the shares from Mr Bradley, at the start of the next season, 1 June 2007.

[4] The lease was for a term of five years and was evidenced by a Deed of Lease dated 16 May 2007 between the Trustees and Mamaku Highlands. On the same day, the parties entered into a Deed of Trust in respect of the Fonterra shares. Mrs McLachlan signed both documents on behalf of Mamaku Highlands.

[5] The lease was terminated by the Trustees before the end of the agreed five years. All disputes arising out of the termination have been referred to arbitration. Multiple questions have arisen, all of which require resolution before a final accounting of their respective interests can be achieved.

[6] A "Reference to Arbitration" was executed on 18 November 2010. Mr D J Clemens of Rotorua, solicitor, was appointed as the Arbitral Tribunal (the arbitrator)

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1 Clause 5(1)(c) is set out t para [19] below.

to determine the "questions in issue", as defined by the pleadings. The parties agreed that the First and Second Schedules to the Act would apply.

[7] A lengthy hearing took place, dealing only with questions of liability. The arbitrator resolved those questions in a partial award. He found that the Trustees had wrongfully terminated the lease before expiry of the agreed term.

[8] Leave to appeal is sought on one aspect of the award on liability. It concerns the Fonterra shares and the obligation of Mamaku Highlands under the Deed of Trust to account to the trustees, if they were to receive moneys as a result of an involuntary redemption. Clause 4 of the Deed of Trust states:

> **4. Redemption of Capital**
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> 4.1 The Lessee shall not voluntarily redeem any Shares or Benefits.
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> 4.2 *Any involuntary redemption or any payment of capital by Fonterra to the [Mamaku Highlands] shall be paid to the [the Trustees] immediately upon receipt of any such redemption or capital payment without setoff or deduction*.
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> 4.3 For the avoidance of doubt, the word "capital" shall mean Shares, Excess Shares, any other Benefits of any kind, but shall not include the Additional Shares referred to in clause 2.
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> (my emphasis)

[9] Under the deeds entered into on 16 May 2007, the Trustees agreed to provide 77,291 Fonterra shares to Mamaku Highlands. At some time after the agreement was struck, Fonterra redeemed 11,254 of those shares. Fonterra paid $73,826.24 to Mamaku Highlands, for those shares, on 13 July 2007.

[10] On redemption, Mamaku Highlands held 66,077 shares on trust for the Trustees, as opposed to the 77,291 originally contemplated. As indicated, the Deed of Trust provided that any payment for redemption of the shares should be paid by the lessee (Mamaku Highlands) to the lessor (the Trustees) immediately on receipt.[2]

[11] Fonterra paid $73,826.24 into the bank account of Mamaku Highlands. At the time of the payment, the relevant account remained under the control of Mr

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[2] See cl 4, set out at para [8] above.

Bradley, even though the new season had begun. Mr Bradley gave evidence that he had a discrete arrangement with the Trustees that moneys deposited into the Mamaku Highlands account could be used to pay farm bills and to reimburse "original start-up costs funded" by another business. That agreement pre-dated the Trustees' May 2007 arrangements with the McLachlan interests. The issue for the arbitrator was whether, on termination of the lease, the Trustees were entitled to recover $73,826.24 from Mamaku Highlands.

[12] Relevantly, after referring to extensive background correspondence and documentation, the arbitrator held:

> 80 It seems that [the Trustees] Solicitor at Potts & Hodgson made Mamaku Highlands Limited the Lessee, and then decided it did not need to register any transfer. The Lease which had been drafted and finalised by Blackman Spargo along with the Deed of Trust for the shares, was signed by Mrs McLachlan as Director of Mamaku Highlands Limited on 16 May 2007. Really at that date, Mr Bradley had control of the company and Mrs McLachlan was not a director. It was two weeks later than the transfer of shares from Bradley to Mrs McLachlan and her appointment as Director occurred.
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> 81 In the chronological order that follows, when [the Trustees] Solicitor discovered the payment of the resumed shares of $73,826.24 he attempted to recover this in July [2007]. It was then agreed that [Mamaku Highlands] would have the option of continuing on the farm at Mamaku pursuant to the Lease and at the end of the Lease, the 77,291 shares would be transferred back. As Counsel for [Mamaku Highlands] has stated in his submission
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> > *"a problem that has arisen is that [the Trustees] has not permitted [Mamaku Highlands] the five year term of the lease. It only made available to [Mamaku Highlands] 66,037 shares and that is what it has had returned to it. It could have purchased the extra shares after unlawful termination of the Lease but declined".*
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> 82 In submissions made by [the Trustees] it is stated that [Mamaku Highlands] was *"having it both ways".* This does not appear to be the case. On the totality of the evidence presented, [Mamaku Highlands] got 66,037 shares. Not 77,291 specified in the Deed of Trust of 16 May. The payment back of $73,826.24 was when the [Mamaku Highlands] company was under the control of Bradley. [Mamaku Highlands] needed to buy extra shares to operate and it did so. The evidence of Mr McLachlan was to the effect that at expiry of the five year term of the original Lease, proper accounting would have taken place and everything would have been sorted out. The early termination of the Lease denied the [Mamaku Highlands] that option.

[13] On this aspect of the arbitration, the formal award was expressed as follows:

> G. In respect of Fonterra shares, under the Deed of Trust 77,291 shares were to be transferred to [Mamaku Highlands]. The fact that 66,037 were. A penalty was applied by Fonterra and the amount of such penalty is payable by [the Trustees] to [Mamaku Highlands]. Any payment of funds by Fonterra received by Bradley is not the responsibility of [Mamaku Highlands] and any claim for the same should be directed against Bradley and not [Mamaku Highlands] and/or Mr McLachlan.

Summary of competing submissions

[14] Mr Brittain, for the Trustees (without objection from Mr Morgan QC, for Mamaku Highlands) re-formulated the questions on which leave to appeal is sought:

> 18. The questions of law for appeal arise from the interpretation of the Deed of Trust:
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> (a) In determining whether the applicants complied with their obligation to transfer shares to the respondent pursuant to the Deed of Trust dated 16 May 2007, did the proper construction of the Deed require that any subsequent redemption of shares by Fonterra Co-operative Group Limited be taken into account?
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> (b) On the proper construction of the Deed of Trust dated 16 May 2007, did the respondent receive the sum of $73,826.24, being a payment made by Fonterra Co-operative Group Limited on or about 13 July 2007 into a bank account in the name of the respondent on the redemption of Fonterra shares, as trustee for the applicants?

[15] Mr Brittain submits that a pure question of law arises, out of the interpretation of the Deed of Trust. He contends that, whomever may have owned shares in Mamaku Highlands at particular times, under the Deed of Trust it was necessary for Mamaku Highlands (as a distinct legal entity) to account to the Trustees for moneys it received for shares in Fonterra for which the latter paid. The rationale for that view was the need for vendors and purchasers of shares to make arrangements as between themselves for the control of bank accounts and other assets, rather than leaving questions of indoor management for a third party to second guess. On its face, that is a compelling argument, advanced on conventional company law principles.

[16] For the purpose of cl 5(2) of the Second Schedule to the Act, Mr Brittain submitted that, in context, I could regard the question as "substantially affecting" the rights of the Trustees in relation to matters in dispute. He highlighted the amount at stake and emphasised the narrow nature of the point of law. Having done that, he acknowledged there was no precedent value in any decision that might be given, the point was isolated in nature and the amount at stake in relation to the particular point was something in the order of $70,000. Because the error was "glaring", Mr Brittain contended that leave should be granted.

[17] Mr Morgan argued that the question posed by Mr Brittain was not a pure question of law. He referred me to aspects of the arbitrator's reasoning that tends to suggest that questions of fact intruded upon the conclusions to which the Tribunal came; in particular arrangements that were entered into around July 2007 when the existence of the payment to Mamaku first came to the notice of the Trustees.

[18] Even if I were to find that a question of law arose, Mr Morgan submitted that it did not "substantially affect" the rights of the Trustees. He submitted that the issues outlined in the Tribunal's decision and the particular awards made suggested that amounts in excess of $1 million were at stake and a sum of about $70,000, in that context, was of modest significance. Further, for similar reasons to those accepted by Mr Brittain as militating against a grant of leave, Mr Morgan submitted that, as a matter of discretion, leave should be refused.

Jurisdiction

[19] The Court's jurisdiction to grant leave to appeal springs from cl 5(1)(c) and (2) of the Second Schedule to the Arbitration Act 1996:

> **5 Appeals on questions of law**
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> (1) Notwithstanding anything in articles 5 or 34 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award—
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> ...
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> (c) With the leave of the High Court.

> (2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.
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> ....

[20] The limited circumstances in which this Court ought to grant leave to appeal from an arbitral award were discussed in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*.[3] Significant restrictions are placed on the ability to appeal against an award because of the nature of arbitration, as a consensual dispute resolution process.

[21] I discussed the general scheme of the Act in *Pathak v Tourism Transport Ltd*.[4] Two important principles, for present purposes, are those of party autonomy and reduced curial involvement in the arbitration process. In *Pathak*, I explained the rationale for those principles, by reference to particular provisions of the Act.[5]

[22] In *Williams and Kawharu on Arbitration*,[6] the learned authors discuss the circumstances in which leave may be given for a party to appeal on a question of law. They refer to cl 5(10) of the Second Schedule to the Act in which the term "question of law" is defined, for the purposes of cl 5:

> **5 Appeals on questions of law**
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> ...
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> (10) For the purposes of this clause, question of law—
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> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
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> (b) does not include any question as to whether—
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> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and

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3 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2003] 3 NZLR 318 (CA).
4 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC) at paras [22]–[25].
5 Ibid, at para [23].
6 David A R Williams QC and Amokura Kawharu, *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at para 18.4.

(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[23] Clause 5(10)(b) makes it clear that questions whether an award (or any part of it) was supported by evidence is not something on which an appeal can be granted. Nor can leave be granted to challenge whether correct inferences have been drawn from relevant primary facts. That is consistent with the general principle that: "Questions of fact are immune from appeal under cl 5".[7]

[24] Clause 5(10) draws on observations made by Lord Mustill, delivering the advice of the Privy Council in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd*:[8]

> [1] Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complaint.
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> [2] Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.
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> ...
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> [4] More controversial is the extent to which the losing party may protest that even if the arbitrator was right (or at least invulnerable) in his findings of fact, he has drawn from them the wrong conclusion of law. Many systems of law refuse to admit any interference on the ground of a mistake of law. Others, including English law and certain systems founded upon it, do allow some degree of challenge. Over the centuries, three quite distinct methods of recourse for errors of law have been developed. It is convenient to describe them in reverse chronological order. The most recent, and the simplest and

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7 Ibid, at para 18.4.2 and *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2003] 3 NZLR 318 (CA) at para [55].

8 *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* (16 February 1995), reported as an Appendix to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2003] 3 NZLR 318 (CA) at 338–340.

> most direct, operates by way of an appeal. Although the procedure resembles other appeals in its general shape, the criteria for leave to appeal and the grounds on which the Court will interfere are so tightly drawn that successful appeals are rare. . . .

[25] There is some doubt about whether mixed questions of fact and law qualify for leave to appeal under cl 5 of the Second Schedule.[9] I prefer the view that, to the extent that a question of fact is bound up inextricably with a question of law, the Court's discretion to refuse leave might be exercised more readily. In *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, Blanchard J, giving the judgment of the Court of Appeal, observed:[10]

> [52] But our Parliament, like those in the United Kingdom and Australia, has chosen to favour finality, certainty and party autonomy over these considerations. It intended to encourage arbitration as a dispute resolution mechanism. By enacting a statute with the express purpose of redefining and clarifying the limits of judicial review of arbitral awards, Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Courts where this choice has been made. This makes inappropriate a broad approach to the discretion, such as that proposed by counsel for the appellant in this case. (Of course, where both parties repent of their decision to choose arbitration over litigation and wish to submit their dispute over a question of law to the Courts, the 1996 Act makes provision for them to do so without leave: see cl 5(1)(b).)

Analysis

[26] In this case, I have reached the view that leave to appeal should be refused. These are my reasons for doing so.

[27] First, while in the way in which Mr Brittain advanced the Trustees' application, a pure (and compelling) question of law might be thought to arise,[11] on closer analysis the very unusual circumstances in which the issue fell to be determined raised factual questions that were inextricably bound up with determination of the point.

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9 David A R Williams QC and Amokura Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at para 18.4.3.

10 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2003] 3 NZLR 318 (CA) at para [52].

11 See para [15] above.

[28] For example, although Mamaku Highlands was, effectively, controlled by Mr Bradley at the time of the May 2007 Deed of Lease and Deed of Trust, the Trustees (knowing that) were prepared to deal directly with the McLachlan interests, on behalf of the company. Further, there appears to have been some agreement reached once it became clear, in July 2007, that Fonterra had paid $73,826.24 into a bank account of Mamaku Highlands that remained under the control of Mr Bradley. Those funds had been used for purposes for which Mr Bradley was authorised. Those facts cast a shadow over what would otherwise be a straightforward legal point, namely whether the legal entity that had promised to pay the money to the Trustees should be required to pay, notwithstanding the issue of ownership of the shares.

[29] Second, as the partial award deals only with liability, it is difficult to know what significance grant or refusal of leave to appeal will have, for the purposes of cl 5(2) of the Second Schedule. The Court is enjoined from granting leave unless it considers that determination of the Court of law "could substantially affect the rights of one or more of the parties". The evidence is equivocal. I am not satisfied that any substantial effect would flow from determination of the question posed in favour of the Trustees.

[30] Third, there is no question of legal principle involved. Nor will any judgment of this Court have any value as a general precedent. The Court's determination would be confined to the interests of these two parties.

[31] Fourth, the chosen arbitrator was a very experienced commercial solicitor, with particular expertise in dealing with farm conveyancing and commercial transactions of the type in issue. Applying the party autonomy principle, the Trustees and Mamaku Highlands entrusted their dispute to his determination. The fact that he is legally qualified and has experience in this area makes it more difficult to obtain leave to appeal on a question of law.[12]

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[12] *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2003] 3 NZLR 318 (CA) at para [54](3). See also *Ipswich Borough Council v Fisons plc* [1990] CH 709 (CA) at 724, per Lord Donaldson of Lymington MR.

[32] Fifth, the time it will take to hear and determine any appeal will delay, possibly until next year, resolution of outstanding issues in the arbitration. At this stage, only questions of liability have been determined.

Result

[33] The application for leave to appeal is dismissed.

[34] Costs are awarded in favour of Mamaku Highlands, on a 2B basis, together with reasonable disbursements, both to be fixed by the Registrar.

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P R Heath J

Delivered at 10.00am on 27 July 2012