IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-000780
CIV-2013-404-004203
CIV-2013-404-004204
[2014] NZHC 889

UNDER	the Arbitration Act 1996
IN THE MATTER	of an arbitration before the Rt Hon Sir T M Gault, Hon R L Fisher QC and T C Weston QC
BETWEEN	SHELL (PETROLEUM MINING) COMPANY LIMITED First Plaintiff
	TODD PETROLEUM MINING COMPANY LIMITED Second Plaintiff
AND	VECTOR GAS CONTRACTS LIMITED First Defendant
	VECTOR GAS LIMITED Second Defendant

Hearing: 16 April 2014

Appearances: M G Colson and M F Mabbett for Plaintiffs/Applicants
B A Scott and A Kraack for Defendants

Judgment: 2 May 2014

JUDGMENT OF VENNING J
ON APPLICATION FOR LEAVE TO APPEAL

This judgment was delivered by me on 2 May 2014 at 11.00 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

Solicitors: Bell Gully, Wellington
Chapman Tripp, Wellington

[1] The plaintiffs (KMCs) apply for leave to appeal to the Court of Appeal from one paragraph of the judgment delivered by this Court on 31 January 2014.

Procedural background

[2] In the judgment this Court dismissed the KMCs' appeal from decisions of an Arbitral Tribunal (the Tribunal) on the following three issues:

(a) the allocation issue;

(b) the quantum issue; and

(c) the pricing issue.

The background to the arbitrations and the appeal is set out fully at paras [1]–[31] of the judgment. I do not propose to repeat it in this judgment.

[3] The application for leave to appeal relates to one paragraph in the course of the decision on the pricing issue. In the course of considering the appeal on that issue the Court stated:

> [171] Nor am I able to accept the KMC argument that cls 3.2 to 3.10 of the settlement agreement have no application to it once Vector takes its share under the contract. The settlement agreement deals with concepts of adjusted annual contract quantities and maximum daily quantities. Where, for example, either party was taking gas at a lesser rate than the maximum daily quantity the other was entitled to use such surplus deliverability: cl 3.10. That clause must still apply notwithstanding that Vector has completed taking its share of shared gas. If, for example, the KMCs do not take their half of the shared gas, per cl 3.8.3, the quantity of gas not taken is to be shared equally between KMCs and Vector. If either party does not use their share of the annual contract quantity they lose half the amount they have not taken and it is available to the other party. That applies notwithstanding that Vector may have already completed taking its share of the shared gas.

[4] However the Court's ultimate conclusion was that it agreed with the Tribunal's reasoning on the issue of pricing. The appeal on the issue of pricing was therefore dismissed.

[5] The KMCs seek leave to appeal against the reasoning and conclusion in [171] of the judgment.

[6] Mr Colson explained the KMCs' application for leave to appeal was out of an abundance of caution and to avoid the suggestion the KMCs are fixed with an issue estoppel arising from [171] in the arbitration proceedings the parties are currently engaged in. The KMCs' position is that no issue estoppel can arise but if it could then leave ought to be granted.

[7] On the other hand the Vector interests submit the findings in [171] were part of the essential and fundamental steps in the logic of the judgment and could support an issue estoppel but that leave to appeal ought not to be granted as the decision whether it actually supported an issue estoppel should be left to be determined when the precise issues the estoppel was said to relate to were defined. Further, as to the merits of the application for leave Vector submits:

(a) it is too late to raise the issue now;

(b) the alleged error of law is not capable of serious argument;

(c) the issue is not of sufficient importance; and

(d) a second appeal is not justified.

The practical background

[8] The reason the matter may be of some moment is set out in the affidavits of Mr Palmer for the KMCs and Mr Seymour on behalf of Vector filed for the purposes of this application.

[9] The parties formerly agreed that the reserve of current tranche gas (which was the focus and subject of the earlier arbitrations) was 1010 PJ. The Vector interests have taken their 50 per cent share of the current tranche gas. However the KMCs are yet to complete taking their share.

[10] In November 2011 the parties agreed that the gas reserves were more than 1010 PJ and recorded that they:

> [expect] that ORGR would be sufficient to accommodate supply to Vector of a further 36 PJs over a five year term. …

[11] Although the Vector interests have exhausted their share of the current tranche gas they continue to take gas from the field's reserves. The terms upon which that gas is to be taken are the subject of the present arbitration instigated by the parties.

[12] Mr Palmer's evidence is that now, in light of recent analysis, the KMCs are concerned that there is considerably more reserves risk than previously thought. There is a possibility the KMCs may never be able to access their full entitlement to their 50 per cent share of the current tranche gas. For that reason they are concerned at the possible implications of [171].

The issues on this application

[13] The first issue on this application is whether [171] of the judgment does potentially create an issue estoppel. If it does not, then there is no basis to grant leave.

[14] If [171] could potentially create an issue estoppel then the next issue is whether leave ought to be granted as the KMCs submit, or declined for the reasons submitted by Vector.

The decisions of the Tribunal and Court

[15] To determine whether the passage of the judgment at [171] creates an issue estoppel it is necessary to put it in context. The paragraph appears in that part of the Court's decision on the appeal against the Tribunal's finding in Partial Award (No 2) as to the price Vector should pay for shrinkage. In short the Tribunal concluded:

> [111] … The key point, to us, is that there remains the existing price for Shared Gas. Until that is exhausted, we think that Vector should pay for shrinkage at the existing price.

[16] Following the delivery of the second Partial Award the parties exchanged further submissions on the terms of the formal declarations arising from the Tribunal's findings in its first two partial awards.

[17] On the pricing issue Vector sought a declaration in general terms that the KMCs take their share of gas under the terms of the Kapuni Gas Purchase Contract (as amended). A declaration in those terms were opposed by the KMCs. In its final award the Tribunal recorded:

> 12. The key passage relied upon by Vector to support its more general declaration is found in para 109 of the second partial Award. We there stated that "clauses 3.6, 3.7, 3.8, 3.8.1, 3.8.3 and 3.10 all cast the KMCs in the role of a taker of gas under the Contract rather than a mere keeper of gas to which the KMCs would have been entitled in any event."
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> 13. Vector rightly refers to that sentence as one of the steps in the Tribunal's reasoning. We were rejecting an argument to the contrary advanced by the KMCs. However, we do not think that our sentence could be elevated to an independent finding which would be capable of supporting a declaration of the kind sought by Vector. The sentence is confined to its context. The context was the price to be paid for shrinkage. It was in that context, and that context alone, that we characterised the KMCs as having the role of the taker of gas under the Contract rather than a mere keeper of gas.

[18] Ultimately the Tribunal's declaration in relation to pricing was:

> C. *Price payable for energy shrinkage:*
>
> Declarations that –
>
> (1) The Buyer is required to pay the [KMCs] for the energy shrinkage by way of a monetary payment per gigajoule of energy lost.
>
> (2) The price payable by the Buyer to the [KMCs] for the energy shrinkage on the [KMCs] Shared Gas is:
>
> (i) the price payable by the Buyer for Kapuni Gas as set by the Gas Price Arbitration award dated 14 April 1999; and
>
> (ii) that price applies for the duration of the period that the [KMCs] have an entitlement to use their remaining Shared Gas.

[19] The appeal to this Court on the pricing issue was framed as, [is] the price paid by Vector for shrinkage, before the KMCs have taken their share of Shared Gas, to be calculated at:

> (i) the marginal price paid by Vector for gas; or
>
> (ii) the price set for Vector to buy its share of current tranche gas?

[20] The KMCs argued the price was the marginal price paid by Vector for gas.

[21] In rejecting the KMCs' argument and confirming the decision of the Tribunal this Court found that the issue could not be looked at in isolation by reference to Order 27 alone as the KMCs submitted. The settlement agreement and its terms were also relevant. Clause 3.2 of the settlement agreement provided for the parties to endeavour to agree a price for the sale and purchase of the current tranche gas.[1] The price for current tranche gas was not exclusively determined by Order 27.[2] The Court then rejected the KMCs' further argument that cls 3.2 to 3.10 of the settlement agreement had no application to it once Vector had taken its share under the contract.[3] The Court's ultimate conclusion was that until the current tranche gas had been exhausted the price Vector was to pay for shrinkage was the shared gas price.[4]

Issue estoppel

[22] Against that background I turn to whether [171] could give rise to an issue estoppel so as to support an appeal. Counsel agree the leading authority on issue estoppel is *Talyancich v Index Developments Ltd*.[5] In that case the Court of Appeal stated the law as follows:[6]

> Issue estoppel arises where an earlier decision is relied upon, not as determining the existence or non-existence of the cause of action, but, as determining, as an essential and fundamental step in the logic of the judgment, without which it could not stand, some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceedings: (Spencer Bower & Turner, The Doctrine of Res Judicata (2nd ed, 1969), pp 149-150, para 191). ....
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> As is pointed out by Spencer Bower & Turner at p 179, para 210, an issue estoppel can only be founded on determinations which are fundamental to the decision and without which it cannot stand. Other determinations cannot support an issue estoppel however definite the language in which they are expressed. ...
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> The learned authors of Spencer Bower & Turner refer at p 182 para 211 to the useful test of asking whether it was possible to appeal against the finding which is being put forward as founding an estoppel. If there can be no

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1 At [167]–[168].
2 At [169].
3 At [171].
4 At [173].
5 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28.
6 At 37–38.

effective appeal against the particular determination, it is impossible to regard it as fundamental to the judgment. They continue at p 186 para 215:

> "To recall the statement of principle from the judicial pen of COLERIDGE J, set out in an earlier paragraph, the question as to findings or decisions not expressly set out in the formal record (ie the sealed judgment or order) is as to what matters were necessary to decide, and actually decided, as the groundwork of the decision itself. Not every finding of fact in a judge's judgment, not every issue of fact determined by a judge or jury, is res judicata between the parties in later proceedings. Thus, a decision of fact or law against the party in whose favour the substantial dispute was ultimately decided will not found an estoppel in a later proceeding; and this because it cannot have been necessary to the substantive decision . . . And a similar argument may apply to cases where, of several available factual grounds alternatively advanced as the basis of a cause of action, the court (or a jury in issues put to it) has determined more than one in favour of the party who ultimately succeeds on the main issue. No estoppel can be founded on any one of the findings, for it is obvious that the party failing on such issues cannot appeal on any of them separately. In order to succeed on an appeal he must succeed on all the issues, and if the finding on even one of them be good this will be fatal to an appeal on any of the others."

[23] Mr Colson noted that the KMCs' concern is that in the current arbitration concerning the terms and price at which gas other than the current tranche gas is to be taken Vector will submit the KMCs are estopped by the finding at [171] as to the effect and application of cls 3.10 and 3.8.3 of the settlement agreement in particular.

[24] Mr Scott submitted that the finding at [171] could potentially support an issue estoppel but argued it was not for this Court to determine the matter in the abstract. As noted, he submitted that whether the findings at [171] would support an issue estoppel in the current arbitration was best left for another day when the precise issues and what the issue estoppel was said to directly relate to were identified.

[25] Despite Mr Scott's submission, I consider it is open for the Court on this application to rule on whether the findings at [171] could create an issue estoppel. In the current arbitration the KMCs will be seeking declarations or arrangements in relation to the next tranche gas that provide them with priority to take the shared gas before Vector may access the next tranche gas or, alternatively, that the KMCs have preferential priority to take shared gas with Vector's rights to access next tranche gas being restricted to allow the KMCs to catch up on the existing imbalance. To that extent, the issue against which it is said the issue estoppel would operate has at least been generally identified.

[26] Further, the Court was presented with a similar situation in *Talyancich*. The only purpose of the application for leave to appeal in that case was to remove the threat of an issue estoppel in the future. Although it was conceded by the respondent no issue estoppel arose the Court was prepared to go on and consider the issue before confirming no issue estoppel arose.

[27] The starting point must be to identify the issue that was before this Court on the appeal. As relevant, the issue before the Tribunal (and this Court on appeal) was the price at which shrinkage was to be charged given that Vector had exhausted its share of the current tranche gas (as defined in the settlement agreement) but the KMCs were yet to exhaust their share. Neither this Court (nor the Tribunal for that matter) were asked to, and so could not determine, what the parties' position was to be in the event that the field reserves became insufficient for the KMCs to take their share of current tranche gas.

[28] The ultimate finding of the Court on the price Vector was required to pay for shrinkage was that until the current tranche gas was exhausted the price was to be the shared gas price. In coming to that conclusion the Court rejected the KMCs' arguments to the contrary. The KMCs' argument was essentially that they did not pay for their gas, only the Buyer (Vector) took gas under the contract. In challenging the Tribunal's finding on this issue the KMCs' primary argument was that the issue of the price at which shrinkage was to be charged was determined by the words of Order 27. To support that argument then counsel for the KMCs, Mr McIntosh, submitted that once Vector had taken its share of the current tranche gas then cls 3.2 to 3.10 of the settlement agreement had no continuing effect. A similar argument had been advanced before the Tribunal and rejected by it.[7]

[29] The fundamental finding of the Court on this issue was the rejection of the KMCs' argument that the KMCs did not take under the contract and the KMCs paid nothing for their gas. That is found at [167]–[170]. The reasoning at [171] was a rejection of Mr McIntosh's supporting argument that cls 3.2–3.10 of the settlement agreement no longer had any application once Vector took its share under the contract. While it was a response to counsels' argument, it was not in my judgment a

[7] As noted above at [17].

fundamental step in the logic of the decision on pricing, without which the ultimate finding which upheld the Tribunal's conclusion could not stand.

[30] The Court's reasoning at [171] was similar to the Tribunal's reasoning on the point, namely, it was part of the reasoning relied on to reject part of the KMCs' argument, but it was strictly unnecessary for the Court to consider the operation and effect of clauses 3.8.3 and 3.10 to determine the pricing issue. The clauses were referred to as examples of how the clauses in the settlement agreement could continue to operate, even after Vector exhausted its share of current tranche gas.

[31] The findings at [171] were legal findings in response to Mr McIntosh's legal submissions to support his primary argument for the KMCs on this point. However, I do not consider they could support an independent appeal. The Court's rejection of the KMCs' argument that the price was to be the marginal price for gas would stand even without the reasoning at [171]. Further, even if leave were granted on the point the ultimate finding would stand as it is not the subject of an appeal.

[32] One fundamental step in the reasoning which the parties are bound by is that the price for the current tranche gas is determined under cl 3.2 of the settlement agreement. The parties are bound by the Court's finding that the clause applied, as it is integral to the determination of the pricing issue. The clause confirms the process by which the price for the current tranche gas was to be set. Clause 3.2 of the settlement agreement is referred to in [171]. But the Court had previously identified that the clause applied at [168]. That paragraph is not sought to be the subject of appeal.

[33] For those reasons I do not consider that the reasoning at [171] creates an issue estoppel which would prevent the KMCs arguing that, in the circumstances of their being unable to take their share of current tranche gas because of the depleted state of the reserves the effect of cls 3.8.3 or 3.10 of the settlement agreement should be reconsidered.

[34] I am fortified in coming to this view by the lack of evidence before this Court and the Tribunal relating to the point which Mr Scott says would be the subject of an

issue estoppel. If an issue estoppel arose on the interpretation of cl 3.8.3 and 3.10 and leave were granted to appeal, the Court of Appeal would be asked to determine the issue in the absence of any evidence (other than that adduced for this application). To determine the proper interpretation and effect of cls 3.8.3 and 3.10 in the circumstances that the KMCs are concerned about the Court of Appeal would be required to take in fresh evidence on this issue which would clearly be contrary to the intent of the arbitration process.

[35] The short point is that while the reasoning at [171] is legal reasoning it is binding only in relation to the issue of pricing and the application of cl 3.2 of the settlement agreement in relation to that pricing.

Result

[36] I do not consider any issue estoppel arises on the point of concern to the KMCs. There is no basis for an appeal. The application for leave to appeal is declined.

Costs

[37] Given the outcome and in light of the parties' approaches to the matter, costs are to lie where they fall on the application (with the exception of the wasted travel and accommodation costs of the earlier hearing which the applicants are to pay).

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Venning J