

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE**

**CIV 2018-485-125
[2018] NZHC 1611**

BETWEEN SEAVIEW HP LIMITED
Appellant

AND NZ TUBE MILLS LIMITED
Respondent

Hearing: 7 June 2018

Counsel: R C Laurenson for Appellant
N L Smith and E M S Cox for Respondent

Judgment: 2 July 2018

JUDGMENT OF SIMON FRANCE J

[1] This is an appeal from an arbitral award. Such appeals are limited to questions of law arising out of an award.¹ The appellant says the arbitrator has misinterpreted the deed of lease between the parties. That would be a question of law. The respondent says the arbitrator has not so erred, but also that there are factual conclusions that are determinative of the matter and concerning which Seaview HP Ltd (Seaview) cannot appeal. I consider the respondent is correct.

[2] The respondent, NZ Tube Mills Ltd (NZTM) leases a building on a site owned by Seaview. Power to the whole site is provided by Meridian. Since 2010, Seaview has paid Meridian, and has then apportioned the costs as an outgoing under the lease. It transpires that in August 2014, unknown to NZTM, Seaview added an uplift to the sum billed by Meridian before apportioning the total amongst the tenants. In correspondence Seaview has explained it is doing this to recover the administrative

¹ Arbitration Act 1996, art 5, sch 2.

cost of calculating and issuing invoices, participating in the bulk purchase scheme and the overall handling supervision and administration of the electricity supply.

[3] Under the standard lease agreement between the parties, electricity is a named outgoing. Further, and importantly, management expenses are expressly deleted as a recoverable outgoing. It is therefore common ground between the parties that, under the lease, Seaview cannot add on a margin to Meridian's charge.

[4] Seaview's answer to this is that it is not invoicing NZTM under the lease as lessor. Rather, it is invoicing NZTM as an independent electricity retailer and so the amount it charges is not constricted by the outgoings provision of the lease (other than the need to be reasonable and fair). This proposition was rejected by the arbitrator. In this case that is a determination on a question of fact – was there an agreement between the parties whereby Seaview would supply electricity to NZTM as NZTM's electricity retailer? If not, Seaview can only be invoicing NZTM in its capacity as landlord. The terms on which it does so are governed by the lease.

[5] The arbitrator held that Seaview was not NZTM's electricity retailer. Given the parties agree that there is no power to add administration costs under the lease, that is the end of the matter. It is a determination of fact not capable of appeal. I note for completeness that art 5(10) of the Second Schedule to the Arbitration Act expressly excludes sufficiency of evidence and the drawing of inferences as questions of law for the purposes of the appeal.

[6] I observe that on the evidence the proposition that the parties had agreed to Seaview supplying NZTM its electricity as a retailer seems optimistic. It was an agreement unknown to NZTM which is not a promising start, and would be an unwritten agreement. For three years the invoices were assessed on the basis of passing on Meridian's charges. The alteration to this arrangement was not advised to NZTM who are meant to be the other party to the electricity supply contract.

Conclusion

[7] The appeal is dismissed. The questions of law on which the appeal is advanced do not arise for determination. The key finding is that Seaview was not supplying electricity to NZTM in its capacity of retailer. That finding is determinative of the issue between the parties. It would not be an appropriate use of the limited appeal power to determine questions of interpretation that do not arise.

[8] Subject to any matter being drawn to my attention, the respondent is entitled to scale costs for a standard appeal, and reasonable disbursements to be fixed by the Registrar if necessary.

Simon France J