IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-001203

IN THE MATTER OF	the Arbitration Act 1996
AND	
IN THE MATTER OF	an Arbitration
BETWEEN	BODY CORPORATE 212002, BODY CORPORATE 211997, BODY CORPORATE 212022, BODY CORPORATE 212135, BODY CORPORATE 322439, BODY CORPORATE 331469, BODY CORPORATE 370404, BODY CORPORATE 358048 AND BODY CORPORATE 334478 Plaintiffs
AND	BEAUMONT PARTNERS LIMITED Defendant

Hearing: 7 May 2009

Appearances: R B Stewart QC and N J Carter for the Plaintiffs
J A McKay and H Glennie for the Defendant

Judgment: 13 May 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 13 May 2009 at 11.00 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This is an application made under cl 5 of the second schedule to the Arbitration Act 1996 for leave to appeal on three questions of law from a decision of an arbitral tribunal dated 10 December 2008.

[2] The arbitral decision resolves a dispute over the amount of rental to be paid for each of nine ground leases, all dated 23 August 2002, for a seven year period commencing on 28 March 2008. The dispute follows the first rent review under each of the leases, which all have identical terms as to rent review. The ground rent for each lot was to be assessed as at 28 March 2008. The leases are all for a 21 year period with perpetual rights of renewal. Rent reviews are to be undertaken at seven yearly intervals.

[3] The applicants are nine bodies corporate, which are the lessees under the subject leases. The respondent, Beaumont Apartments Limited, is the lessor. The leases apply to what is known as the Beaumont Quarter Development. There are 258 apartments of varying sizes spread over the nine lots. On a tenth lot is a gymnasium and swimming pool for the use of the residents of the Beaumont Quarter. On an eleventh lot (Lot 1), there is a building used for commercial offices. It has been designated a heritage building under the Auckland City District Plan.

[4] The Arbitration Act 1996 provides a limited right of appeal against an arbitral award. Clause 5 of the second schedule to the Act provides:

> **5 Appeals on questions of law**
>
> (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—
>
> (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.
>
> (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.
>
> …

[5] Clause 5 restricts a Court from granting leave under subclause 1(c) unless it considers that, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties.

[6] The first step, therefore, is for the Court to be satisfied that the applicant has identified questions of law that could substantially affect the rights of one or more of the parties. But even if so satisfied, the Court has a residual discretion as to whether or not to grant leave: *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at [54]. The legal principles governing the exercise of this discretion are to be found in that judgment. The relevant considerations to take into account when deciding whether or not to exercise the residual discretion are:

i) The nature of the alleged error. If the question of law involves a one-off point that is of little precedent value, it is only if there are very strong indications of an error that leave to appeal will be granted. Where the question of law has precedent value, or the relationship between the parties is ongoing and will be affected over time by the question, a lower standard is applied. However, even then, the test is that of a "strongly arguable case that an error existed".

ii) If the question of law under consideration was the very reason for the arbitration, this weighs against the grant of leave to appeal, whereas if the question of law has emerged incidentally during the arbitral process, leave will be granted more readily.

iii) Where the arbitral tribunal is legally qualified, leave to appeal is more difficult to obtain.

iv) Where the dispute is of great significance to the parties, this will weigh in favour of granting leave to appeal.

v) Where a substantial amount of money is involved, it might be somewhat easier for the parties to obtain leave.

vi) Where the likely amount of delay consequent in granting leave is disproportionate to the significance of the dispute, or if the issue is urgent, leave to appeal will be less likely.

vii) If the parties have agreed that the arbitral award is to be final, this, while not determinative, will weigh against leave to appeal being granted.

[7] The eighth consideration formulated in *Gold & Resource Developments (NZ) Ltd* relates to international arbitrations and is not relevant here.

[8] The questions of law the applicants rely on are:

i) Whether the arbitrator was wrong in concluding that the word "other" should be excluded from the definition of variable "A" in the formula for assessing a lot's Adjusted Market Value in cl 2.3.3 of each lease on the basis that to include the word "other" in the definition did not make commercial sense.

ii) Whether the arbitrator was wrong, as a matter of interpretation, when reading the lease as a whole, to ignore, for the assessment of land value, the terms of each lease and, in particular, the prohibition against subdivision of the land.

iii) Whether the arbitrator was incorrect in his interpretation of cl 10.2 of each lease, allowing the defendant to charge a penalty interest rate of 19.5 per cent per annum and whether the rate of interest was to apply on any overdue rent down to the date of payment.

I will deal with each question of law in turn.

Question 1

[9] I am satisfied that, in terms of cl 5 of the second schedule, the first question of law is one which could substantially affect the rights of one or more of the parties. I now turn to the considerations formulated in *Gold & Resource Developments (NZ) Ltd*.

[10] The paramount consideration is the nature and strength of the case for establishing an alleged error. Here the respondent has responsibly conceded that the alleged error does not relate to a one-off event; hence the appropriate test to apply is the less stringent test of whether the applicant has established a strongly arguable case for there being an error of law.

[11] The applicants contend that the arbitrator has misinterpreted the rent review clause and this in turn has caused him to reach a wrong conclusion on the outcome of the rent view. The respondents contend that the approach the arbitrator adopted was legally correct. It is necessary to consider the relevant clauses in the leases.

[12] Paragraph 14 of the arbitral decision sets out the relevant terms as to rent review to be found in each lease:

> **2.3 Rent Review**
>
> 2.3.1 At any time not earlier than four (4) months (in which regard time shall not be of the essence) prior to each Review date the Lessor may give notice in writing to the Lessee ("the Lessor's notice") setting out the amount which the Lessor considers to be the adjusted market value of the Lot and the new Rent as at that particular Review Date for the period until the next following Review Date accompanied by a certificate signed by a registered valuer supporting the Rent set out in the Lessor's notice and unless within one (1) month (time to be strictly of the essence) after the date of service of the Lessor's notice the Lessee's Representative shall by notice in writing to the Lessor ("the Lessee's notice") dispute the Rent so fixed then the Rent so fixed by the Lessor shall be the Rent payable as from that particular Review Date. The new Rent shall be 7% per annum of the *adjusted market value of the Lot*, as determined either by agreement *or in accordance with clauses 2.3.3 and 2.3.4* (emphasis added).

2.3.2 Notwithstanding that the lessee's Representative may dispute the Lessor's notice of the adjusted market value, pending determine of the adjusted market value either by negotiation or arbitration provided for herein the Lessee shall pay Rent for the Lot at the Rent set out in the Lessor's notice from the particular Review Date subject always to adjustment between the parties once the new Rent is determined by negotiation or arbitration.

[13] Clause 2.3.3 provided that:

> For the purposes of clause 2.3, it is agreed that the "*adjusted market value*" *of the Lot* shall be derived by applying the following formula:
>
> $$\text{Adjusted Market Value} = A \times \frac{B}{C}$$
>
> Where:
>
> A = the sum of the *current (not adjusted) market values* individually assessed *in respect of all other non-commercial lots in the Development*. For the purposes of this clause a "non-commercial lot" is a lot which is used predominantly (but not exclusively) for residential accommodation. (emphasis added)

Clause 2.3.3 then goes on to define what variable "B" represents and what variable "C" represents. The clause then continues with the following statement:

> In assessing the *current market values for the purposes of variable A in the formula* above, the valuers and any arbitrator shall:
>
> (a) make the following assumptions in respect of *the Lot (and all other non-commercial lots in the Development):*
>
> (i) It is deemed to be vacant freehold residential land situated on firm, level, natural land;
>
> (ii) That all essential services such as electricity, gas, telephone, sewerage and water supply are available to the Lot;
>
> (iii) The Lot is unencumbered by any restrictions as to title or use;
>
> (iv) That the Lot is being sold on the open market by a hypothetical willing vendor to a hypothetical willing purchaser without compulsion and on an arm's length basis.
>
> (v) The Lot is able to be developed to its fullest potential.
>
> (vi) The underlying zoning at the Review Date applies to the Lot provided that such development potential shall not be less than the potential existing under the prevailing zoning at the Commencement Date.

(vii) Primary sales comparisons will be land of a similar zoning and in comparable locations.

(b) disregard *in respect of the Lot (and all other non-commercial lots in the Development);*

(i) Any possibility that the Lot may be used for a purpose or be developed in any way otherwise than for residential apartments or terraced houses;

(ii) Any deleterious condition of the Lot;

(iii) Any nuisance or adverse effect arising from the use of any surrounding land;

(iv) the value or existence of the Lease and the value of any buildings structures, fixtures or any other improvements erected or made on the Lot.

[14] The considerations set out in (a) and (b) have become known as the "compulsory Regards and Disregards". I will also use these terms.

[15] The arbitrator found at para 71:

> … It does not make commercial sense for the value of the subject lot to be excluded from the formula for its own valuation. The situation is similar to that in the *Rattrays Wholesale* case where subsequent references indicate that there had been an omission made in the first reference.

In reaching this conclusion, the arbitrator was referring to the fact that the definition of variable "A" referred to "all other non-commercial lots" and made no reference to the lot that was the subject of the rent review. But then in the latter part of the same clause, the compulsory Regards and Disregards for assessing the current market values of those lots that made up the sum of the lots used in variable "A" contained references to the lot that was being rent reviewed as well as to "other non-commercial lots". Thus there was an apparent inconsistency on the face of cl 2.3.3.

[16] At para 72 of his decision the arbitrator said:

> Had there not been the references to the subject lot in the compulsory Regards and Disregards, the Tribunal would have concluded that the exclusion of the subject lot in Item A of the formula whilst odd, did not provide an occasion where the clear meaning would have to be ignored. However, the inconsistency between the two provisions tilts the balance of this difficult decision in favour of the Lessor's submissions. The *Rattray* case provides a precedent.

[17] The applicants contend that the arbitrator has disregarded the literal meaning of variable "A" in favour of a meaning that makes commercial sense. I was referred to a number of authorities where the Courts have held that the literal meaning of the terms of a contract must be adhered to. However, these were all cases where there was no apparent inconsistency between the contractual terms under consideration. Here there is such an inconsistency. It could only be resolved by reading the definition in variable "A" in the way in which the arbitrator read it, or by reading the compulsory Regards and Disregards as if they made no reference to the lot being rent reviewed. Given the number of times the Regards and Disregards refer to the lot being rent reviewed, I consider that the approach taken by the arbitrator causes less violence to the language of the clause. There is nothing which the applicants have drawn to my attention that would persuade me there is a strongly arguable case for saying the arbitrator has wrongly interpreted cl 2.3.3.

[18] When I turn to the other considerations formulated in *Gold & Resource Developments (NZ) Ltd*, I find that the applicants have shown that the dispute is of great significance to the parties and that it involves a substantial amount of money. They have also shown that the likely amount of delay that would be consequent on the grant of leave to appeal is not disproportionate to the significance of the dispute. This is a case where the parties have not agreed that the arbitral award would be final. That factor, therefore, is neutral.

[19] Against the considerations in the applicants' favour, there is the fact I have not found the error identified in this question of law to be strongly arguable. Furthermore, this question of law was one of the very reasons for the arbitration and, this, therefore, weighs against exercising the discretion. I also consider that the arbitrator concerned, Sir Ian Barker QC, is a well respected legal practitioner with extensive experience in commercial arbitration. He was the former Senior Puisne Judge of this Court. The legal qualification of the arbitrator is another factor that tells against the grant of leave to appeal. Although there are some considerations which do favour the applicants, the majority of the considerations do not. Furthermore, the most important consideration, whether the applicants can point to a strongly arguable case, has not been made out. It follows that the weight of the considerations is against the grant of leave for question one.

Question 2

[20] This requires me to consider if the applicants have made out a strongly arguable case as to whether the arbitrator was wrong to ignore, for the assessment of land value, the terms of each lease and, in particular, the prohibition against subdivision of the land. One of the terms of the leases under review is prohibition against subdivision. For the purposes of valuation for a rent review, the compulsory Regards require the arbitrator to view the land as vacant, freehold, residential land situated on firm, level, natural land. The compulsory Disregards require the arbitrator to exclude the existence of the leases from the valuation assessment. The arbitrator found that since the prohibition on subdivision was imposed by a term of the lease, this should be ignored. There is nothing to which the applicants have drawn my attention that would cause me to conclude that they have shown there is a strongly arguable case the arbitrator was wrong to have reached this view. As for the other considerations from *Gold & Resource Developments (NZ) Ltd*, they apply in the same way as for question one. It follows that the applicants have failed to show proper cause for leave to be granted to appeal on question two.

Question 3

[21] This question raises the issue of whether or not the arbitrator was wrong in his interpretation of cl 10.2 of each lease, allowing the defendant to charge a penalty interest rate of 19.5 per cent per annum and whether the rate of interest was to apply on any overdue rent down to the date of payment. The amount of money in dispute, which is 2.0 per cent of the total awarded interest amount of $54,982.95, comes to $1,127.15. This issue fails to meet the legal requirements for leave to appeal set out in cl 5(2). Given the amounts in issue, the applicants cannot show the question raised in question three is one that could substantially affect the rights of one or more of the parties.

Result

[22] Leave to appeal is refused

[23] The respondent is entitled to costs. The parties have 10 working days to file memoranda on costs.

Duffy J

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