IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-000139
[2014] NZHC 1341

BETWEEN	ROY SYDNEY BRUCE NICHOLS Appellant
AND	THE ATTORNEY-GENERAL (on behalf of the Ministry of Agriculture and Forestry – now Ministry of Primary Industries) Respondent

Hearing: 12 June 2014

Appearances: A D Banbrook for the Appellant
K G Stephen for the Respondent

Judgment: 16 June 2014

[RESERVED] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 16 June 2014 at 1.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] The applicant, Mr Nichols, has applied for leave to appeal a first (partial) award (with reasons) made by an arbitrator, Mr Tómas Kennedy-Grant QC, pursuant to s 162A(5) of the Biosecurity Act 1993 (as it stood in 2011).

[2] The application for leave relates to a claim made by Mr Nichols in April 2011 for compensation for losses he alleged he sustained as a result of the exercise by the Ministry of powers open to it under the Act. In 2006, the Ministry, under ss 111 and 118 of the Biosecurity Act, uplifted nine reptiles from Mr Nichols' property. It subsequently euthanased eight of those reptiles, and it repatriated the ninth to its country of origin. Mr Nichols claimed $882,000 by way of compensation. His claim for compensation was declined by the Ministry on the grounds that, in terms of s 162A(4) of the Biosecurity Act, any loss sustained was in relation to unauthorised goods or uncleared goods, and was therefore not eligible for compensation.

[3] Mr Nichols disputed this decision. Section 162A(5) of the Biosecurity Act provided that any dispute concerning eligibility for compensation had to be submitted to arbitration, and that the provisions of the Arbitration Act 1996 applied. At the request of Mr Nichols, Mr Kennedy-Grant was appointed as arbitrator, and his first (partial) award (with reasons) was provided to the parties on 24 October 2013.

Application for leave to appeal – was it served in a timely fashion?

[4] As noted, pursuant to the Biosecurity Act as it stood in 2011, the Arbitration Act applied to arbitrations held pursuant to s 162A(5).

[5] Section 6 of the Arbitration Act 1996 provided at the time, and continues to provide, that if the place of arbitration is New Zealand, the provisions of Schedule 1, and those provisions of Schedule 2 (if any), which apply to the arbitration under subs (2), apply in respect of the arbitration. Section 6(2) provided, inter alia, that a provision in Schedule 2 applies to domestic arbitrations, unless the parties have agreed to exclude it.

[6] The arbitration by Mr Kennedy-Grant was a domestic arbitration and it follows that appeals against his arbitral award are governed by cl 5 in Schedule 2 to

the Arbitration Act. Moreover, although it was expressed to be a first partial award, it purported to finally decide an issue – namely who bore the burden of proving that the reptiles seized by the Ministry were "unauthorised goods" or "uncleared goods". As such, the award was amenable to appeal.[1]

[7] Clause 5(1) in Schedule 2 provides as follows:

> **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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> (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.
>
> …

[8] In the present case, cl 5(1)(a) and (b) do not apply. Rather, the application for leave is brought pursuant to cl 5(1)(c).

[9] Clause 5(8) provides as follows:

> **8** Article 34(3) and (4) of Schedule 1 apply to an appeal under this clause as they do to an application for the setting aside of an award under that article.

[10] Relevantly, cl 34(3) in the First Schedule provides as follows:

> **34 Application for setting aside as exclusive recourse against arbitral award**
>
> …
>
> (3) An application… may not be made after 3 months have elapsed from the date on which the party making that application had received the award…
>
> …

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[1] *Opotiki Packing & Cool Storage Ltd v Opotiki Fruit Growers Co-Operative Ltd (in rec)* [2003] 1 NZLR 205 (CA) at 219.

[11] The challenged award was issued to the parties on 24 October 2013. The three-month period specified by cl 34(3) expired on 24 January 2014. An originating application seeking leave to appeal under cl 5(1)(c) of the Second Schedule was filed on that date.

[12] Part 26 of the High Court Rules applies to all appeals from arbitral awards, including applications for leave to appeal against arbitral awards.[2]

[13] Rule 26.15 provides that a plaintiff must commence proceedings to which cl 5(1)(c) of Schedule 2 to the Arbitration Act applies by filing an originating application in the proper registry determined under r 5.1. It details the form of the originating application, and then goes on to that rules 26.4 to 26.7 apply, with all necessary modifications.

[14] Here, r 26.4 was breached, because no affidavit was filed in support. Rather, counsel for Mr Nichols filed a memorandum making various assertions and annexing a copy of the arbitral award.

[15] Further, r 26.5 was breached. It provides as follows:

> **26.5 Service**
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> The plaintiff must serve copies of the originating application and the affidavit on the defendant either before or immediately after filing.

[16] The originating application and the memorandum were not promptly served on the respondent Ministry. They were only forwarded to the respondent Ministry by email on 18 February 2014 – some 25 days after they were filed in court.

[17] I note that Part 19 of the High Court Rules provides that a proceeding that may be commenced by originating application is commenced when the originating application is filed.[3] It is, however, clear that Part 19 does not apply to originating applications brought pursuant to cl 5 of Schedule 2 of the Arbitration Act 1996.[4]

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2 High Court Rules, r 26.2(b).
3 Rule 19.7(1).
4 Rule 19.2(a)

[18] It is clear from the rules that an applicant for leave must serve a copy of the originating application and the supporting affidavit on the respondent either before, or immediately after, filing. Service is an integral part of the process. The appeal is not brought simply by filing the application for leave in the court.[5]

[19] I note that in relation to a similar provision contained in s 72(3) of the District Courts Act 1947 (as it stood prior to November 2003), it was observed that the service requirement – namely that service be attended to before or immediately after the notice of appeal was lodged – was a jurisdictional issue, and that very little leeway should be permitted.[6] In this context, it was observed that the words "immediately after":[7]

> … import a degree of urgency in the requirement of notice to the other party of the bringing of an appeal without avoidable loss of time… They connote expedition and promptitude so that the filing and service following upon it become aspects of a continuing process which will be as contemporaneous as the circumstances permit.

[20] In my view, the 25-day delay in service in the present case does not fall within the phrase "immediately after". In the context of the three-month time limit mandated by cl 34(3) of the First Schedule to the Arbitration Act, a 25-day delay is very considerable indeed. It follows that the application for leave to appeal has not been properly brought by Mr Nichols. It must be dismissed and I so order.

Oral application for leave to file late affidavit

[21] I record that Mr Banbrook asserted from the bar that the notice of application for leave was sent to the respondent on 24 January 2014. He made an oral application for leave to file a late affidavit in this regard from his secretary.

[22] I am not prepared to grant leave.

[23] The point was plainly put in issue from the outset:

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5 And see, *Downer Construction (New Zealand) Ltd v Silver Field Developments Ltd (formerly Redwood Group No 8 Ltd)* HC Auckland CIV-2005-404-6800, 13 February 2006 at [22] & [24].

6 *McNicholl v McNicholl* [1996] 1 NZLR 611 at 613; see also, *Gilgen v Hatcher* HC Auckland M302/90, 6 September 1990, where the authorities are discussed.

7 *State Insurance General Manager v Scott* [1982] 1 NZLR 717 (CA) at 719.

(a) The respondent, in its notice of opposition to Mr Nichols' application for leave, recorded that the application was served on it on 18 February 2014. Further, it asserted that the notice of originating application was out of time, pursuant to cl 5(8) of Schedule 2 to the Arbitration Act 1996. The notice of opposition expressly referred to Part 26 of the High Court Rules, and to an affidavit filed by Ms Geraldine Gardner.

(b) Ms Gardner, in her affidavit, asserted that she was unaware of the application for leave until 17 February 2014, when Mr Nichols' counsel rang her regarding a mentions hearing in this Court on the following day. She said that she told Mr Banbrook that she had not received an application for leave, and that she knew nothing about the High Court mentions hearing. She stated that Mr Banbrook told her that he would email her a copy of the documents. She said that at 2.22 pm on Tuesday, 18 February 2014, she emailed Mr Banbrook and asked, as a matter of urgency, for a copy of the documents filed in court. The email stated as follows:

> Tony
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> As you advised me by telephone yesterday an appeal on the above matter had been filed in the High Court but not served. You also advised that the matter was called for mention by the High Court.
>
> As a matter of urgency would you please email me a copy of the appeal as filed.

Mr Banbrook, via his secretary, replied at 10.16 pm, attaching a copy of the notice of originating application for leave to appeal and his memorandum in support. It is noteworthy that he did not take issue with anything stated in Ms Gardner's email.

(c) In a minute issued by Ellis J on 18 February 2014, she recorded as follows:

> When the matter was called in the list this morning Mr Banbrook advised that it appeared that service of the

> application had not yet been affected on the respondent. He sought an adjournment of two weeks to attend to this.

(d) Mr Banbrook failed to comply with the time limit for filing submissions on behalf of Mr Nichols. The respondent Ministry applied for an adjournment of the hearing. In a memorandum in support of that application, it was expressly recorded that the notice of originating application had been filed out of time.

[24] Mr Banbrook cannot have been unaware that the point was being taken by the respondent Ministry. It is manifestly unsatisfactory to belatedly seek leave to file an affidavit on the issue. Mr Banbrook suggested that any prejudice could be dealt with by way of a costs award against Mr Nichols. I disagree. Were an application for leave to be granted at this stage, the respondent Ministry would want to reply. Given the matters I have set out above – in particular, in [23](b) and (c) – there would likely be a challenge to any affidavit filed by Mr Banbrook's secretary; Ms Gardner, who is no longer employed by Crown Law, would have to give evidence; Mr Banbrook and whoever filed the affidavit would also have to give evidence. This matter would be unnecessarily delayed. That would be unfair to the respondent Ministry.

[25] It also has to be appreciated that court time is a precious resource. I note and adopt comments made in the High Court of Australia, when discussing an appeal against the grant of an adjournment. French CJ noted as follows:[8]

> The time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system.

These comments apply as much in New Zealand as they do in Australia.[9]

[26] Accordingly, I decline the oral application for leave to file a further affidavit.

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8 *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, (2009) 239 CLR 175 at [5] per French CJ; See also [101] per Gummow, Hayne, Crennan, Kiefel & Bell JJ;

9 *Aon* was cited with approval in *Hayes v Parlane* [2014] NZHC 1306 at [48]–[49].

Costs

[27] The respondent Ministry is entitled to its costs and disbursements. In this regard, I direct as follows:

(a) Any application for costs is to be filed and served within 10 working days of the date of release of this judgment;

(b) Any response from Mr Nichols is to be filed and served within a further 10 working days;

(c) Memoranda in relation to costs are not to exceed 10 pages in length.

I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

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Wylie J