IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-004284
[2013] NZHC 3295

IN THE MATTER	of an Application in an Intended Appeal against an Arbitral Award under the Arbitration Act 1996
BETWEEN	BODY CORPORATE 172108 a Body Corporate constituted under the Unit Titles Act 1972 Appellant/Applicant
AND	MANCHESTER SECURITIES LIMITED Respondent

Hearing: 21 November 2013

Appearances: T J G Allan for Appellant/Applicant
M C Harris and B A Tompkins for Respondent

Judgment: 10 December 2013 at 4pm

(RESERVED) JUDGMENT OF ANDREWS J
[Application for leave to appeal against arbitral award]

This judgment is delivered by me on 10 December 2013 at 4pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
Grove Darlow & Partners, Auckland
Gilbert Walker, Auckland

Introduction

[1] The appellant/applicant is the body corporate for Hobson Towers, a 12-storey apartment building in Auckland. The respondent (Manchester) owns the penthouse which occupies level 12 of the building.

[2] The appellant/applicant has issued this proceeding seeking leave to appeal against the award of Mr AMR Dean, arbitrator, given on 30 August 2013. Manchester opposes the application for leave.

Background

[3] Hobson Towers is a leaky building. In 2010, Heath J settled the terms of a remediation scheme under s 48 of the Unit Titles Act 1972, for repairs to the common property and owners' units ("the remediation scheme").[1] The remediation scheme provided, amongst other matters, that the body corporate could levy owners for the cost of repairs (clause 6), and that where an owner objected to a levy, the matter was to be referred to arbitration, and the arbitrator's decision is to be final (clause 13).

[4] The remediation scheme contained, at clause 21, a special arrangement with Manchester, with respect of level 12. This provided, in essence, that:

(a) Manchester could (within certain limits) determine the scope of the work undertaken for level 12, and pay for it. (Work for levels 1 to 11 was to be undertaken by the body corporate.)

(b) Manchester would not, however, be liable to pay more than 11.88 per cent (being Manchester's unit entitlement) of the total cost of repairs under the remediation scheme ("the 11.88 per cent cap"). Manchester's 11.88 per cent cap is subject to a proviso that any costs incurred by Manchester in respect of project management consultants or other construction-related advisors that do not provide any benefit

[1] See *Body Corporate 172108 v Meader* (2011) 12 NZCPR 101 (HC), *Body Corporate 172108 v Meader* (No 2) HC Auckland CIV-2009-404-6868, 19 August 2010, and *Body Corporate 172108 v Meader* (No 3) HC Auckland CIV-2009-404-6868, 31 August 2010.

to all other individual owners or the body corporate are the sole responsibility of Manchester.

[5] In a judgment dated 23 October 2013 (in relation to an appeal by Manchester in respect of a statutory demand issued by the body corporate), the Court of Appeal noted that at the time the remediation scheme was settled, Manchester's payment of 11.88 per cent was expected to cover all of the level 12 remedial costs, and provide a contribution by Manchester to the body corporate costs.[2]

[6] In July 2012, the body corporate raised an interim levy against all owners, including Manchester, in respect of 75 per cent of the combined value of its building contractor's tender for all units, including Manchester's on level 12. Manchester's levy was $181,745.17. The body corporate deducted $132,605.62 from this, on account of an award of costs in Manchester's favour (ordered by Heath J against the body corporate) leaving a balance of $49,139.55 claimed from Manchester.[3]

[7] Manchester challenged the interim levy as being based on unreasonable calculations. On 8 March 2013, Mr Dean was appointed sole arbitrator in relation to the dispute between Manchester and the body corporate as to the interim levy. The arbitration was heard on 25 July and 1 August 2013. During the arbitration hearing, the body corporate applied to stay the arbitration, on the grounds that it had applied to this Court to vary the remediation scheme, and that the outcome of that application would render the arbitration redundant. The application for stay was refused.

[8] At the arbitration, Manchester argued that the body corporate did not take proper account of a number of issues when assessing the interim levy, so that the levy imposed on Manchester was unreasonable. It was submitted that the body corporate:

---

2 *Manchester Securities Ltd v Body Corporate 172108* [2013] NZCA 515 at [2].

3 This levy was paid by Manchester following its unsuccessful challenge to a statutory demand issued by the body corporate: see *Manchester Securities Ltd v Body Corporate 172108* [2013] NZHC 177, and the judgment of the Court of Appeal, above n 2.

(a) Did not take proper account of the cost of Manchester's planned work for level 12;

(b) Did not take proper account of the increased costs of the body corporate's work on levels 1 to 11 as a result of "betterment" included in that work; and

(c) Did not take due regard of the fact that Manchester would have to fund the cost of repairs to level 12, and that an excessive levy would impact adversely on Manchester's ability to complete that work.

[9] The body corporate argued that its calculations were not unreasonable, and that Manchester was required to pay the levy. The body corporate argued that if, when Manchester had completed its work on level 12, it was found that Manchester had paid more than 11.88 per cent of the total repair cost, it could then claim a credit. However, it was submitted, Manchester's having completed work on level 12, and paid for it, was a pre-condition to it making any claim in respect of the 11.88 per cent cap. It was submitted that Manchester could not make a claim on the basis of anticipated costs.

[10] The arbitrator accepted Manchester's argument that completion of its work on level 12 was not a pre-condition for applying the 11.88 per cent cap. He also decided that the body corporate's calculation of the interim levy was, in one respect, unreasonable, in that its calculation of the cost of level 12 work had incorrectly excluded contractor's margins, contingencies, and provisional sums, which had been included in its calculation of the cost of work on levels 1 to 11. That is, the body corporate's calculation of costs for each of Manchester and the body corporate were not on the same basis. The arbitrator decided that the appropriate levy for Manchester was $82,915, not $181,745.

[11] In the light of the deduction of the costs award in favour of Manchester, the effect of the arbitrator's award is that the interim levy is more than offset by the costs award. As noted earlier, the body corporate seeks leave to appeal against the interim award.

Appeals against arbitral awards

[12] It was common ground that arbitration, as distinct from other dispute resolution procedures such as mediation, incorporates, by consent of the parties, the power of the arbitrator to make a binding decision. As the Court of Appeal said in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd*:[4]

> … arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the difference between them to the decision of an arbitrator or panel of arbitrators, the exclusion of the courts, and they bind themselves to accept that decision, once made, whether or not they think it right.

[13] Accordingly, the ability of the courts to interfere with an arbitral award is generally limited.[5] However, clause 5 of Schedule 2 of the Arbitration Act provides a limited ability to appeal against an arbitral award. Pursuant to clause 5, a party may appeal to the High Court on any question of law arising out of an award, with the leave of the High Court. Clause 5(2) further provides that the High Court is not to grant leave 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.

[14] The importance of finality, and limited judicial intervention, is the lens through which the present application must be filtered. Simply satisfying the court that the threshold for judicial intervention is satisfied, in that there is a question of law the determination of which could substantially affect the rights of the parties, does not mean that the court must grant leave. The decision to grant leave is discretionary.

[15] In its judgment in *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd*, the Court of Appeal noted that once the statutory threshold has been passed, the Court should in each case exercise its discretion in a disciplined way.[6] The Court went on to set out eight factors which are to be considered, noting "as a matter of

---

4 *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2003] NZLR 338 (PC) at 338.

5 See clause 5 of schedule 1 of the Arbitration Act 1996, which provides that "In matters governed by this schedule, no court shall intervene except where so provided in this schedule." There are only limited grounds for intervention: see clause 34.

6 *Gold & Resource Developments (NZ) Limited v Doug Hood Ltd*, [2000] 3 NZLR 318 (CA) at [52].

caution" that there may be other considerations which should be taken into account in the circumstances of a particular case. The factors are the strength of the challenge and nature of the point of law, how the question arose before the arbitrator, the qualifications of the arbitrator, the importance of the dispute to the parties, the amount of money involved, the amount of delay involved in going through the Courts, whether the contract provides for the arbitral award to be final and binding, and whether the dispute before the arbitrator is international or domestic.[7]

Pleadings

[16] On behalf of Manchester, Mr Harris first submitted that the body corporate's application for leave to appeal breached every requirement for such applications, in that it failed to specify any question of law arising from the award, failed to specify the answers contended for, and failed to specify the relief sought. Mr Harris accepted that the question of law had emerged in the body corporate's submissions, but maintained his submission that the relief sought was not coherently addressed anywhere. He submitted that in the appellant/applicant's submissions, the only relief sought was "to overturn the arbitrator's finding that clause 21.3 [of the remediation scheme] has no application until, inter alia, the end – whatever that concept may entail." Mr Harris submitted that an applicant who cannot clearly answer its own question of law, or coherently articulate the relief it seeks, cannot expect to obtain leave to appeal an arbitral award.

[17] While I accept that the application fails to specify the relief sought, I do not accept that this is, without more, fatal to the application for leave. If the alleged error of law otherwise justifies leave to appeal being given, the failure to specify the relief sought on appeal may be inconsequential. It is appropriate, therefore, to defer consideration of this point.

The threshold for granting leave

[18] It was common ground that the arbitrator's interpretation of clause 21.3 of the remediation scheme raises a question of law. It was also accepted by both parties that the determination of the question of law substantially affects the rights of both

---

7 At [52].

Manchester and the body corporate and its members.[8] Accordingly, it is not necessary to consider whether the threshold for exercising the discretion to give leave to appeal has been met. The question is whether the Court should exercise its discretion to grant leave.

Alleged error of law as to interpretation of clause 21.3 of the remediation scheme

[19] It will be apparent from the previous references to clause 21.3 of the remediation scheme that the central issue is whether the body corporate should be given leave to appeal against the arbitrator's interpretation of clause 21.3: that Manchester's completion of, and payment for, its level 12 work is not a pre-condition for it claiming a credit against levies raised by the body corporate. Counsel for both parties agreed that in deciding whether to exercise the discretion in favour of giving leave to appeal, this Court should consider the factors set out in *Gold & Resource Development (NZ) Ltd v Doug Hood Ltd,* and that the strength of the body corporate's argument was the most important of the factors listed by the Court of Appeal.[9]

[20] Mr Allan submitted for the body corporate that it had a strongly arguable case that the arbitrator was wrong in his interpretation of clause 21.3. Mr Harris for Manchester contended that the body corporate did not have an arguable case, let alone the required strongly arguable case, that the arbitrator's interpretation was wrong.

[21] It is helpful to set out clause 21.3 in the context of clauses 21.2 and 21.4:

> 21.2 Manchester shall not be liable to pay more than 11.88 per cent of the total Cost of Repairs carried out pursuant to this Scheme provided however that any Costs incurred by Manchester in respect of project management consultants or other construction-related advisors that do not provide benefit to all other individual proprietors or the body corporate shall be borne solely by Manchester. The costs in respect of project management consultants or other construction-related advisors that Manchester contends provide a benefit to all individual proprietors (other than Manchester) or the body corporate shall be made available in writing, together with supporting

---

8 It is pertinent to record that counsel advised at the hearing that three further levies have been raised since the first one in July 2012.

9 See *Gold & Resource Development Limited (NZ) Ltd v Doug Hood Ltd*, above n 6, at [54].

> documentation to the secretary of the body corporate. Any dispute about whether benefit is provided to all individual proprietors (other than Manchester) or the body corporate shall be determined under the dispute resolution provisions of the Scheme.
>
> 21.3 The Cost of Repairs to the Units and Common Property situated at level 12 of the Building shall be separately assessed and paid by Manchester, provided that Manchester shall give to and consult with the Body Corporate all documents and or information in connection with any design element, pricing, quantity surveyor's or other review of prices, contracts and or sub-contracts with the intent that any works undertaken and to be paid by Manchester shall be transparent from the outset.
>
> 21.4 Subject to clauses 21.1 [which notes that clause 21 provides for the carrying of repairs to level 12 and Manchester's share of the total cost of repairs of the entire building] and 21.2, the amount payable by Manchester on account of Repairs to the building other than the works to level 12 listed in clause 21.7 [which outlines the work to be completed] shall be 11.88 per cent of the total Cost of Repairs less the Cost of Repairs assessed and paid for in accordance with clause 21.3.

[22] In clause 2.2 of the remediation scheme "Repairs" is "to be given the widest possible meaning", to include "the redesign, alteration, demolition, reconstruction, restoration, reinstatement or modification to any part of the Common Property or a Unit …" The term "Costs" is stated in clause 3.1 of the remediation scheme as having "the widest possible meaning" to include "all costs involved in assessing and carrying out the Repairs and in obtaining code compliance certificates for the Building once the Repairs are complete".

[23] In respect of clause 21.3 the arbitrator said at paragraphs 13 to 15 of the award:

> **Was the Body Corporate obliged to give credit?**
>
> 13. In the closing submissions filed by Mr Allan, on behalf of the Body Corporate he says that Manchester was not entitled to any credit for the cost of repairs on level 12 until Manchester had paid for those repairs. Mr Allan says that clause 21.3 of the Scheme specified a pre-condition that before any Manchester assessment of the repair costs can be brought into the equation, it has to have paid for it.
>
> 14. The wording of clause 21.3 is *"The Cost of Repairs to the Units and Common Property situated at level 12 of the Building shall be separately assessed* ***and paid by Manchester****, …"*. I have emphasised the words upon which Mr Allan relies.
>
> 15. I would accept that in the final reckoning of the actual costs it would be essentially for Manchester to have paid for the repair work. However, I

> do not think that clause 21.3 is a pre-condition that should be imposed when making the assessment of an interim levy. In other words, I am not satisfied that the Body Corporate could have ignored recognising a credit until the entire repair work had been completed, and paid for. To have ignored the potential credit would have been unreasonable.
>
> (Emphasis as in original)

[24] Mr Allan submitted that clause 21.3 creates a requirement that Manchester must have paid for repairs before the cost of its work could be brought into consideration. He submitted that the arbitrator had failed to give any reasons for his conclusion as to the interpretation of clause 21.3, or set out the basis for it, and had either failed to take clause 21.3 into account, or had misinterpreted it. He further submitted that the importance of the requirement that repair costs be paid by Manchester before they can be taken into account is re-emphasised by the words in clause 21.4: "and paid for in accordance with cause 21.3".

[25] The reason for the importance of the requirement that Manchester must have paid for repairs was, Mr Allan submitted, that it prevents Manchester from "forever saying that it has an assessment or estimate for repair costs and therefore the Body Corporate may not look to it for a contribution to the costs of common property, where there is no guarantee that Manchester actually carries out the work for which the estimate is touted". I support of this submission, Mr Allan submitted that Manchester had claimed it would carry out repairs immediately, and the remediation scheme was settled on that basis, but Manchester had yet to carry out any repairs.

[26] Mr Harris submitted that clause 21.3 simply confirms Manchester's responsibility to pay for the level 12 work; that the cost of repairs to level 12 are to be separately assessed and paid by Manchester. It does not say that Manchester cannot get credit against its liability under the remediation scheme until the work on level 12 has been completed, and Manchester has paid for it.

[27] Mr Harris submitted that the body corporate had, in fact, applied clause 21.3 in the manner in which it was interpreted by the arbitrator when it issued the levy in July 2012: it allowed for an assessment of Manchester's costs (albeit, as the arbitrator held, incorrectly). Clause 21.4, Mr Harris submitted, provides only that Manchester is not liable to pay more than 11.88 per cent of the total costs. Mr Harris

further submitted that nothing in the remediation scheme provides support for the body corporate's argument that Manchester can be compelled to pay 11.88 per cent of the costs of fixing the entire building up front, and have to rely on the body corporate refunding actually level 12 costs after the work is done.

[28] Mr Harris also submitted that the body corporate's attempt to derive support for its argument by submitting that Manchester had said it would undertake its repair work "immediately" was misconceived, and overwrought. He submitted that Manchester had sought and obtained the right to carry out repairs independently of the body corporate, which was pursuing a leaky building claim against the parties involved in the original development. As Mr Harris put it, Manchester said it did not want to be "hitched to the body corporate's wagon". He submitted that there is nothing in the remediation scheme which obliges or requires Manchester to act "immediately".

[29] I am not persuaded that the body corporate has an arguable (let along strongly arguable) case that the arbitrator wrongly interpreted clause 21.3. To the contrary, the interpretation the body corporate contends for is strained.

[30] In context, the remediation scheme provides that Manchester must carry out and pay for the repairs to level 12, and must pay for its share of the total cost of repairs of the entire building. At the same time, Manchester's costs are capped at 11.88 per cent of the total costs. As for all other unit owners, the share is based on Manchester's unit entitlement.

[31] On a plain reading of the remediation scheme, the intention is that Manchester carries out the repairs on level 12 itself, as it owns the exterior of and interior of level 12. In doing so, it must consult with the body corporate, as it is not intended that Manchester can simply do what it sees fit, or spend whatever amount it wants. After consulting, and providing estimates, Manchester might be required to pay a further amount to the body corporate so that Manchester bears 11.88 per cent of the total repair bill (that is, the cost of repair work on levels 1 to 11 as well as level 12). Similarly, after paying for the repairs to level 12, Manchester may have

spent more than 11.88 per cent of the total remedial work, and thus not be required to make a further payment to the body corporate.

[32] At the same time, on a plain reading of the remediation scheme, it does not provide that Manchester is required to pay the body corporate up front, and then be reimbursed later. To reach this interpretation it is necessary to imply into clause 21.3 words expressly requiring payment by Manchester before any consideration of the 11.88 per cent cap can be entered into. It would also require implying further wording into clause 21.4, again to provide that payment "in accordance with clause 21.3" must have been made before there is any consideration of the 11.88 per cent cap. I am not satisfied that there is any proper basis for doing so.

[33] I am supported in my conclusion by the fact that the body corporate in fact assessed Manchester's levy on the basis of estimated costs, allowing for those costs in calculating the amount payable by Manchester.

[34] Accordingly, as set out above, I conclude that the body corporate has not established that it has a strongly arguable case that the arbitrator made an error of law in his interpretation of clause 21.3. Given that conclusion, leave to appeal should be refused.

Other relevant factors

[35] Two further matters point strongly to leave not being given for the body corporate to appeal. The first is that the remediation scheme provides, at clause 13.2, that the "arbitrator's decision shall be final". Patently, an appeal to this Court is not envisaged. While it can be accepted that where there has been a strongly arguable error of law, this express statement of finality might be overcome. However, in the present circumstances, the agreed finality favours declining leave to appeal, and to leave the award as being final.

[36] The second matter counting against leave is that the body corporate has an application for variation of the Scheme presently before the High Court. As noted earlier, the body corporate had applied for the arbitration to be stayed on the grounds

that its application to vary the Scheme terms would render the arbitration redundant. Mr Harris submitted that the arbitrator's decision on the first levy had long since been overtaken by subsequent events. The amount spent by both parties since the interim levy was raised has increased subsequently beyond what was originally estimated to be the cost of repairs. Further amounts will be spent over the forthcoming months. I accept Mr Harris' submission that appealing the arbitrator's award will serve little practical purpose.

Result

[37] The application for leave to appeal against the arbitral award is dismissed.

[38] Counsel did not address me on the issue of costs. If costs (on a 2B basis) cannot be agreed, memoranda should be filed, and the matter may be determined on the papers, unless counsel expressly seek an oral hearing.

_____

Andrews J