IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-002164

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an Arbitration Award dated 10 March 2009
BETWEEN	MARK AND MARTINE GOODACRE Applicants
AND	PACIFIC ABODE HOMES (2004) LIMITED Respondent

Hearing: 1 July 2009

Appearances: D Grove for Applicant
A Maclean for Respondent

Judgment: 2 July 2009

JUDGMENT OF VENNING J
on application for leave to appeal

This judgment was delivered by me on 2 July 2009 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Dpth.....

Solicitors: Grove Darlow & Partners, Auckland
Kidd Tattersfield Maclean, Auckland

Introduction

[1] The applicants seek leave to appeal the partial award dated 10 March 2009 and final award dated 6 May 2009 made by an arbitrator pursuant to which the applicants were directed to pay $122,613.74 (including interest and costs) to the respondent.

Other proceedings

[2] The applicants also seek to set aside the award under cl 34 of the First Schedule to the Arbitration Act 1996 on the grounds that a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the order with the result the award is in conflict with the public policy of New Zealand.

[3] In separate proceedings CIV-2009-404-3656 the respondents seek to enter the award as a judgment in this Court. In response the applicants have made an application for an order refusing recognition and enforcement of the award.

[4] Despite the other applications before the Court counsel agreed that the hearing before me was to be limited to the application for leave to appeal.

Background to the arbitration

[5] The dispute arose out of building work carried out by the respondent at a property owned by the applicants. The work was carried out pursuant to a labour only contract evidenced by a letter of 1 November 2006. During the course of the contract the parties had a falling-out over the respondent's claims for payment and the scope of the contract. The contract was terminated by agreement. Other contractors were engaged by the applicants to complete the building work and the dispute referred to arbitration.

[6] The arbitrator identified the following principal issues for determination:

- the terms of the agreement;
- the value of the incomplete work at the time of cancellation;
- the proper amount to be claimed by the respondent for additional work;
- the proper amount to be paid by the applicant in respect of Placemaker invoices and other reimbursement invoices;
- the extent and value of defective work for which the respondent was responsible;
- claims for consequential damages; and
- the pool cover deposit.

[7] On principal issues, particularly the interpretation of the contract including the terms of the contract and scope of the respondent's obligations under it, the arbitrator found in favour of the respondent.

[8] The applicants seek leave to appeal against those findings.

Legal principles

[9] The appeal is restricted to questions of law. Leave is required to appeal as the parties did not agree that an appeal lay before the making of the award and the respondent does not consent to the appeal: cl 5(1) Second Schedule Arbitration Act 1996. The Court may not 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: cl 5(2). That requirement is a precondition for the grant of leave but its existence does not itself justify the grant. The principles to apply on an application for leave have been

settled by a Full Court of the Court of Appeal in *Gold and Resource Developments Limited (NZ) Limited v Doug Hood Limited* [2000] 3 NZLR 318.

[10] Of particular relevance in this case is that as the question involves a one-off point of little precedent value a strongly arguable case is required for leave to be granted: *Gold and Resource Developments Ltd* at para [54].

[11] The scheme and intent of the application for leave to appeal procedure is that the application will be heard and disposed of promptly: r 26.15 High Court Rules *et seq*. Counsel's submissions at the hearing are limited and the Court need not give reasons for granting leave.

The grounds for leave

[12] The application for leave sets out the following as the grounds upon which the application is pursued:

a) The interpretation of the contract did not correctly consider alternative outcomes given the factual issues leading to and after the contract was signed;

b) The contract was ambiguous and open to different interpretations;

c) The arbitrator wrongly concluded that the contract document was not susceptible to more than one meaning or contained any ambiguity or contingency.

d) There were procedural irregularities that have caused breach of natural justice.

e) The award was based on facts not before the Court.

f) The arbitrator failed to determine or give reasons for determinations that were before the arbitration.

g) The award was based on facts that were contradicted by the defendant's expert evidence.

h) The plaintiff was prejudiced in that it did not call any evidence in relation to the remuneration payable for the role of project manager.

i) The arbitrator used his own opinions and ideas in determining issues that were not traversed during the hearing or put to the plaintiff's witnesses and experts.

[13] The application for leave is unfortunately confused by the combination of the application for leave to appeal and also the application to set aside in the one application. Although both are to be brought by way of originating application they involve different and distinct issues and should have been brought separately, particularly where, as here, the applicants intended that the application for leave to appeal would be dealt with first and in advance of the substantive application for leave to set aside.

[14] Although there is no direct evidence on the issue, for present purposes I accept it could be said the determination of the questions of law could substantially affect the applicants' rights (or for that matter, the respondent's). The pre-condition is met.

[15] Of the matters identified as grounds to support the application, the first three are most relevant to a question of law on appeal. Grounds (d) to (i) appear more directly related to the application to set aside the award on the basis of a failure of process leading to a breach of natural justice. But Mr Grove submitted that the allegation of breach of natural justice and the following grounds (e) to (i) could be considered in the context of an application for leave to appeal as it was in the case of *A's Company Limited v Dagger* HC AK M1482-SD00 5 June 2003 Baragwanath J. In that case the considerations of breach of natural justice and process were discussed during the Judge's consideration of the application for leave. No issue seems to have been taken with that approach. But I note the distinction between the application for leave to appeal and the application to set aside was observed by both

Elias J and Fisher J in their respective decisions in the case of *Trustees of Rotoaira Forest Trust v Attorney-General*, both in granting leave to appeal (Elias J): [1998] 3 NZLR 89 and by Fisher J in his consideration of the application to set aside and substantive appeal: [1999] 2 NZLR 452. In my judgment, that is the preferred approach.

The gravamen of the applicants' complaint

[16] Mr Grove explained the basis of the applicants' concern at the award. In short it is that the arbitrator has misinterpreted the contract and particularly the respondent's obligations under it. Mr Grove noted that the initial negotiations between the parties contemplated a full "turn key" project which would have involved the respondent project managing the complete works. The price for that entire project was to be $651,288 including a P & G sum of $59,050. The P & G sum included a labour component of $30,850 which in turn allowed $15,750 for supervision and attendance.

[17] The parties did not, however, go ahead on the basis of a "turn key" contract. The applicants sought to reduce costs by paying for materials and subcontractors directly. Pursuant to the contract concluded between the parties as evidenced by the letter of 1 November 2006, the respondent agreed to provide a labour only contract for certain work listed in the schedule attached to the letter. The material part of the letter recorded:

> Scope of work is the provision of all labour services to manage and complete all onsite construction of the trades and items listed in the attached.
>
> All work to be as per the contract drawings and specifications and undertaken to the highest quality, best trade practice as expected for a premium quality dwelling. I (Graeme Hannah) will be physically onsite full-time and shall supervise any direct staff. All work that needs to be sublet shall be approved by yourself before hand.
>
> The lump sum price for labour only for this contract has been agreed at $244275.00 + GST. Any additional scope of work items or reduction to be agreed as a separate price prior to commencement if possible, or otherwise undertaken at the following hourly rates;
>
> * Labour rate @45 hr +GST
> * 5t Excavator @ $45hr + GST (wet hire)
>
> ...

[18] The P & G figure for the labour only contract was $33,935. Mr Grove explained that the change in the P & G figure reflected a 10% variance from the $30,850.

[19] When the respondent's evidence was exchanged in preparation for the arbitration the applicants noted that Mr Nash, a quantity surveyor who assisted in the preparation of costings for the job gave evidence that:

> Typically a project management role would be costed out at 2%-4% of the materials and work by the tradesmen that were being supervised and added at the end of the costings.

[20] On the basis of that statement the applicants took the view that the figure of $15,750 that had earlier been set out for supervision and attendance, and included within the P & G figure, was within that 2% – 4% range and related to the project management fee the respondent was to charge for the contract. The applicants then took the view that the contract of 1 November 2006 (which included the labour only P & G figure of $33,935) included payment to the respondent for project management services which the respondent was obliged to provide.

[21] On the other hand, the respondent's case was that in providing the labour only contract, the only supervision it was responsible for was in relation to "direct" staff, in other words those staff involved with its own labour only work. It was not to be responsible for project managing the balance of the work to be carried out on the site by the other trades people engaged by the applicants.

[22] Because of the view the applicants took of the documentation and Mr Nash's evidence they did not call expert evidence of their own on the issue. They did, however, provide evidence to the arbitrator from a number of witnesses who referred to the issue of project management (identified by the arbitrator at para [20] of the decision).

The arbitrator's decision

[23] In his decision the arbitrator concluded that the agreement between the parties was a simple labour only contract. He found that the respondent was not the project manager for the entire redevelopment works and was not responsible in any capacity for the work of other contractors employed by the owners on the project. In coming to that view the arbitrator referred to the construction of the terms of the letter of 1 November and in addition made the following points:

- The applicants' arguments were inconsistent with the labour only contract structure they agreed to.

- He accepted Mr Hannah's evidence that the focus of the initial discussions was on a full contract/shared contract arrangement where he would provide a turn key service.

- He also accepted Mr Hannah's evidence that the applicants told him they did not want to pay an architect or a project manager to administer the project and the discussion turned to a labour only option.

- He was satisfied that Mr Hannah's evidence was corroborated by Mr Nash's evidence in relation to the preparation of costings.

- In the circumstances it was not surprising that Mr Hannah may have talked to the owners and Mr Jolly about project managing works prior to the signing of the final agreement but any such discussions did not of itself translate into contractual rights and obligations. He rejected Mr Mann's evidence about the matter because of his relationship with Mr Hannah.

- He was not persuaded there was any evidence of consideration for the responsibility contended. He rejected the applicant's submission that the amount of $15,570 for supervision and attendance was for project management of the entire works.

- The applicants contracted with and paid each subcontractor directly. The respondent did not pay any of the tradesmen who worked on the site.

[24] The applicants do not accept the arbitrator's construction of the contract and say that his erroneous construction is based on the errors of law identified in the grounds of the application.

Decision

[25] Insofar as the applicants seek to rely on the pre-contractual negotiations between the parties, (that were about a different contract which it is accepted was not proceeded with), those pre-contractual negotiations would generally not be admissible: *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74, 82. But it appears both parties sought to rely on the earlier quotation for the entire work in their closing submissions to the arbitrator. In Court proceedings, the evidence would become admissible by consent: s 9 Evidence Act 2006. I accept the arbitrator was entitled to have regard to these earlier costings at least.

[26] But even accepting for present purposes the sum of $15,750 was included for supervision and attendance in the original costings and was included in the operative contract that does not directly advance the applicants' case. There was direct evidence on whether the $15,750 covered a project management fee. The applicants' reliance on Mr Nash's evidence that a project management fee of between two and four percent of the total price supported their interpretation that the $15,750 for supervision and attendance was for project management overlooks the further evidence given by Mr Nash that:

> This allowance [$15,750] was not intended to cover project management or the supervision and control of other contractors employed by the owners. The costings were prepared on the basis, as advised by Graeme, that the company would be undertaking the work as a labour only contract. As such it would not be managing the project by definition. If the costings had been prepared on the basis that the company would be also acting in a project management role then the cost of doing so would have been much greater and appropriate allowance would have been made for this.

[27] The arbitrator was entitled to accept that evidence from Mr Nash and conclude that the $15,570 was not a fee for the project management of the entire works. It was open to the arbitrator to draw the conclusion that he did, on the basis of Mr Nash's evidence, that the labour only P & G figure did not include a fee for project management.

[28] Next, quite apart from the evidence of Mr Nash there is also the further point that any additional work to be carried out over and above the labour only contract was to be carried out on a charge up basis. The other contractors that the applicants say the respondent ought to have managed were not involved in that part of the project covered by the fixed price contract. The supervision and attendance allowance could not have related to their work. It is inherently more likely that an additional charge out fee would have been charged for those services.

[29] The submission that the arbitrator did not consider post contractual conduct is a challenge to the weight the arbitrator placed on the evidence before him. It is clear that the evidence of the post contractual contract relied on by the applicants was before him. The arbitrator expressly referred to the witnesses who had given evidence for both parties. He rejected some evidence. It was not necessary for the arbitrator to refer to and deal with each of the witness statements he had in front of him, particularly when he was dealing with the issue of construction of the contract.

[30] As to whether the contract was ambiguous, the arbitrator was correct to take the start point as the terms of the letter. He was entitled to find on its terms that the letter recorded a labour only contract and that the supervision was limited to the respondent's "direct" staff being workmen employed by the respondent.

[31] The arbitrator was entitled to find, for the reasons he gave, that the contract was not ambiguous and could be interpreted in the way he interpreted it. Rather than being strongly arguable that the arbitrator has erred in law in his interpretation of the contract my consideration of the documentation supports the arbitrator's interpretation of the contract.

[32] The remaining grounds are essentially that the arbitration process was unfair because the applicants were caught by surprise by the arbitrator's decision that the $15,750 was not a fee for project management for the entire work, that there was no basis for the arbitrator to come to that view and that the applicants were prejudiced in that they did not call evidence to address that issue. In case I am wrong in my view that those points are more relevant to the application to set aside, I deal with them briefly.

[33] The submissions that the award was based on facts that were either not before the Court or were contradicted by the respondent's expert evidence cannot stand in light of Mr Nash's evidence. Further, I note that since that clause 5(10) was inserted in 2007 a question of law does not include any question as to whether:

> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
>
> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

That does not support the applicant's case that a question of law arises on these points.

[34] Nor can it be said that the applicants were prejudiced and caught by surprise as was the concern of the Court in *A's Company Ltd* case. Both parties to this arbitration knew that at issue was the construction of the contract including the responsibility of the respondent under that contract particularly in relation to project management. The applicants decided, having received Mr Nash's evidence that it was unnecessary for them to call their own expert evidence. That was a decision the applicants made. They cannot now complain that the arbitrator took a different view of Mr Nash's evidence than they did.

[35] Nor is this a case where it can be said the arbitrator simply imposed his own opinion. The arbitrator came to a conclusion about the construction of the basic contractual document after hearing the evidence and considering the full written submissions of counsel.

[36] The applicant's case was considered by the arbitrator. Counsels' submissions addressed the very issue the arbitrator ruled on.

[37] I turn to briefly consider the other factors discussed by the Court of Appeal in *Gold and Resource Developments Limited.*

How the question arose before the arbitrator and the qualifications of the arbitrator.

[38] The principal complaint is the arbitrator got the interpretation of the contract wrong. The arbitrator is a person of experience in interpretation and resolution of contractual disputes as a Fellow of the Arbitrators and Mediators Institute of New Zealand and the United Kingdom and a member of the Building Disputes Tribunal. No doubt he was appointed because of that expertise. The parties knew that the dispute involved the construction of a contract, the parties' obligations under it and agreed to the appointment of the arbitrator with that knowledge. They did not include provision for appeal as of right.

The importance of the dispute between the parties and the amount of money involved

[39] The dispute concerns a monetary claim. While the award is not an inconsequential sum, nor can it be said to be for a substantial sum of money in terms of the value of the works.

The delay of going through the Courts

[40] This issue is neutral in the present case. There is still an extant application for leave to set aside.

[41] The other considerations identified by the Court in *Gold and Resource Developments Ltd* are not applicable in this case.

Result

[42] I conclude that the errors of law alleged by the applicants fall well short of the standard required for grant of leave. The applicants fail to satisfy the onus on them to establish that they have a strongly arguable case that the arbitrator made an error of law in this case. Indeed on my interpretation of the facts the arbitrator's interpretation of the contract is correct.

[43] The application for leave to appeal is dismissed.

Costs

[44] The respondent is entitled to costs on a 2B basis for this application and hearing.

Directions for the other matters

[45] The Goodacres' application to set aside the award and Pacific Abode Homes (2004) Limited's application to register the award are to be heard at **10.00 a.m. on 22 July 2009 (half day allocated).** The Goodacres are to file and serve submissions by 10 July 2009. Pacific Abode Homes to file and serve submissions by 17 July 2009.

Venning J