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

**CIV-2013-470-000521**
**[2013] NZHC 2622**

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| BETWEEN | ELAINE EVELYN COXHEAD<br>Plaintiff/Applicant |
| AND | RODGER WALLBANK<br>Defendant/Respondent |

Hearing: 8 October 2013

Appearances: M B Beech for Plaintiff/Applicant
C Muston for Defendant/Respondent

Judgment: 9 October 2013

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**JUDGMENT OF VENNING J**
**on preliminary question**

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**This judgment was delivered by me on 9 October 2013 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Holland Beckett, Tauranga
Copy to: C Muston, Whangarei

## Introduction

[1] The plaintiff seeks to challenge an interim arbitral award of Mr David Ian Stewart dated 14 May 2013 (the award).[1] The plaintiff seeks to set aside the award under art 34 of sch 1 of the Arbitration Act 1996 (the Act) and also to have the award set aside on the ground that the arbitrator erred in his finding on a question of law.

[2] A preliminary point arises as to whether leave is required on the application to set aside on a question of law.

## Background

[3] The plaintiff is a farm owner. The defendant is a sharemilker. They were parties to a private sharemilking agreement dated 3 August 2010.

[4] Following a dispute the agreement was terminated. Mr Stewart was appointed arbitrator. In the award he:

(a) ordered the defendant provide $15,000 as security for costs; and

(b) held that the defendant's notice of claim had been made and received by the plaintiff within the time constraints of clause 138 of the Sharemilking Agreements Order 2001 (the limitation point).

[5] The plaintiff seeks to set aside the award in relation to the limitation point.

[6] The issue for the Court at this time is whether the parties had agreed to an appeal on a question of law or whether the plaintiff requires leave to bring an appeal on a question of law.

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[1] Arbitration Act 1996, s 2. Award includes an interim award.

**The statutory framework**

[7] Section 6 of the Arbitration Act 1996 provides:

> **6 Rules applying to arbitrations in New Zealand**
>
> (1) If the place of arbitration is, or would be, in New Zealand,—
>
> (a) The provisions of Schedule 1; and
>
> (b) Those provisions of Schedule 2 (if any), which apply to that arbitration under subsection (2),—
>
> apply in respect of the arbitration.
>
> (2) A provision of Schedule 2 applies—
>
> (a) To an arbitration referred to in subsection (1) which—
>
> (i) Is an international arbitration as defined in article 1(3) of Schedule 1; or
>
> (ii) Is covered by the provisions of the Protocol on Arbitration Clauses (1923); or the Convention on the Execution of Foreign Arbitral Awards (1927), or both,—
>
> only if the parties so agree; and
>
> (b) To every other arbitration referred to in subsection (1), unless the parties agree otherwise.

[8] In the present case the provisions of sch 1 to the Act apply to the arbitration, in particular art 34, "exclusive recourse against the arbitral award". The provisions of sch 2 also apply unless the parties agreed otherwise.

[9] There is no suggestion that the parties agreed to exclude the provisions of Sch 2. Even where a clause in the Arbitration Agreement stated the award would be "final and binding" that was insufficient to exclude a right of appeal on question of law by leave: *Gold and Resources Developments (NZ) Ltd v Doug Hood Ltd.*[2] There was no such clause in the Arbitration Agreement in this case.

[10] The relevant provisions of the Arbitration Agreement are cls 16 and 17 as follows:

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2 *Gold and Resources Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).

> **16.** **IN** the event of either of the parties wishing to take any action to have the award set aside, then the party initiating such action shall lodge in the solicitor's trust account a sum equal to the amount that has been awarded against it and no such action against the award shall proceed unless the notice of the intended action is served upon the other party within 28 days of the publication of the Award and, at the same time, the moneys as set out above are deposited in the solicitor's trust account, time being of the essence. The lodgement of such funds by a party into their solicitor's trust account shall constitute an irrevocable authority by that party to their solicitor to pay that sum of money to the other party in the event that the action taken against the award is unsuccessful.
>
> **17.** **THE** party taking such action against the Award pursuant to Clause 16, of this Agreement, is to commence proceedings in the High Court within 30 days of having given notice of the proposed action, TIME BEING OF THE ESSENCE.

[11] Schedule 2 provides for appeals on questions of law 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—
>
> (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.
>
> ...

[12] Applying art 5 of sch 2 to the present case, and given the defendant does not consent, the plaintiff may appeal to this Court on any question of law arising out of the award:

> (a) if the parties had so agreed before the making of the award; or
>
> (b) with leave of the Court.

[13] As noted, the issue for this Court is whether the parties agreed that either of them may appeal to this Court on a question of law.

**The competing contentions**

[14] Mr Beech submitted the reference in cl 16 of the Arbitration Agreement to taking "any action to have the award set aside" was broad enough to encompass an appeal on a question of law. He submitted that, by using those words, the parties had effectively agreed to an appeal on a question of law as of right. He submitted the clause was consistent with the relevant clauses of the Sharemilking Agreements Order 2001, namely cls 147 and 157.

[15] Mr Muston submitted that there was no agreement any party could appeal on a question of law. He submitted that any such agreement had to be express, referring to the decisions of *A's Company Ltd v Dagger* and *Royal & SunAlliance Insurance Plc v BAE Systems (Operations) Ltd*.[3] Mr Muston submitted the ordinary words of cl 16 did not give either party a right to appeal on a question of law arising out of the award so that leave was required.

**Decision**

[16] On balance I favour the argument advanced by Mr Beech on behalf of the plaintiff. The important words of cl 16 are "any action to have the award set aside". "Any action" is broad enough to include both an application to set aside the award in accordance with sch 1, art 34 and also an appeal on a question of law under sch 2, art 5. Both are actions taken with the desired objective of ultimately setting aside the award. Importantly art 5.4 provides that:

> (4) On the determination of an appeal under this clause, the High Court may, by order,—
>
> (a) Confirm, vary, or *set aside the award*; or
>
> (emphasis added).

[17] It follows that the outcome of an appeal on a question of law may be the setting aside of the award. An appeal on a question of law is thus "any action" to set aside the award. Clause 16 is consistent with the focus of the inquiry being on the potential outcome of the Court process, namely the setting aside of the award,

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[3] *A's Company Ltd v Dagger* HC Auckland M1482-SD00, 5 June 2003; and *Royal & SunAlliance Insurance Plc v BAE Systems (Operations) Ltd* [2008] EWHC 743 (Comm).

whether it be by way of an application under art 34, sch 1, or by way of appeal on a question of law under art 5, sch 2 rather than as a descriptor of the type of application (or appeal).

[18] Next, there are only two routes provided to challenge an award. The first, under art 34 sch 1 and the second, under art 5, sch 2. There would have been no need for the parties to refer to "any action" if the clause was only ever intended to apply to an application under art 34. Further, the phrase "any action" is broader than "any application" for instance, which might more readily apply to an application under art 34. "Any action" encompasses an appeal on a question of law.

[19] Mr Muston submitted *Royal & SunAlliance Insurance Plc* showed the type of wording required to satisfy the requirement of an agreement to preserve the right of appeal. In that case the crucial sentence was:[4]

> Any party to the dispute may appeal to the court on a question of law arising out of an award made in the arbitral proceedings.

[20] Mr Muston is correct in that the sentence cited is a clear and express provision which deals with the right of appeal. However, it is not necessary for such express wording to be used, provided the effect of the wording used, properly interpreted, is to record an agreement that preserves the right of appeal on a question of law. In *Royal & SunAlliance* Mr Justice Walker rejected a submission that an agreement providing for an appeal must be expressed "in the clearest terms". In principle that must, with respect, be correct. Clause 16 contemplates both a challenge under art 34 sch 1 and art 5, sch 2.

[21] Mr Muston also relied on the decision of Baragwanath J in *A's Company Ltd v Dagger*. However I consider that case can be confined to its facts. In *A's Company Ltd* the agreement to arbitration was made orally and only confirmed subsequently by the arbitrator.

[22] In addressing whether the parties had agreed in terms of subcl (1)(a) of art 5 that any party might appeal on a question of law arising out of the award,

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4 *Royal & SunAlliance Insurance Plc v BAE Systems (Operations) Ltd*, above n 3 at [16].

Baragwanath J recorded that the high point of the evidence was that both parties had agreed to there being a right to appeal. Baragwanath J observed:[5]

> What was not said is what sort of appeal - as of right or only by leave.

[23] The arbitrator had recorded in a minute following the telephone conference that:

> The parties confirmed their oral agreement ... that any dispute or claim ... shall be referred to and finally resolved by arbitration in accordance with the Arbitration Act 1996.

[24] The Arbitration Agreement ultimately concluded by the parties was silent on the issue. Baragwanath J concluded:[6]

> The result of failing to stipulate for appeal as of right is that there is no reason to infer agreement to exclude the need for leave. Accordingly leave to appeal is required under Article 5(1)(c).

[25] If the above passage is to be interpreted as requiring an express recitation of words to the effect the parties agree an appeal may lie on a question of law without leave, then I respectfully consider that it is wrong. Such express wording is not required. What is required for an appeal on a question of law without leave is wording that confirms the parties' agreement an appeal may be lodged on a question of law. That is what art 5(1)(a) provides. The issue is not whether the parties had agreed to exclude the need for leave, but rather whether they had agreed to an appeal on a question of law. Article 5 does not require any particular form of words to be used to express that agreement.

[26] Effectively the parties in *A's Company* did no more than expressly confirm the rights in art 5 were to apply. They did not go on to address how they were to apply. To that extent the case is similar to the decision of Asher J in *Airwork Holdings Ltd v Auckland Regional Rescue Helicopter Trust*.[7] In that case the Arbitration Agreement contained a clause:[8]

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5 *A's Company Ltd v Dagger*, above n 3, at [11].
6 At [14].
7 *Airwork Holdings Ltd v Auckland Regional Rescue Helicopter Trust* HC Auckland CIV-2005-404-6808, 16 May 2006.
8 At [12].

> 8.1 The award of the Arbitral Tribunal shall be final subject to the parties' agreed rights of appeal as set out in clause 5 of the Second Schedule to the Act.

Asher J rejected a submission that the effect of the clause was to provide for a right of appeal without leave. The Judge held:[9]

> Arbitration Agreements can state that clause 5 does not apply, and that there may be no right of appeal on any point including a point of law. On the other hand, an Arbitration Agreement may indeed record that there is a right of appeal to the High Court without leave. Clause 8.1 of this Agreement does neither of these things. It does no more than record the legal position set out in s 5.

[27] By contrast the present clause provides a process which either of the parties wishing to take "any action" (including an appeal on a question of law) to set aside the award are to follow. Significantly, art 5(8) provides that the provisions of art 34(3) and (4) apply to an appeal on a question of law. Clause 16 of the Arbitration Agreement provides a mechanism which overrules art 34(3) (in particular), which is equally applicable to both an application under art 34 and an appeal on a question of law under art 5.

[28] For the reasons given above I consider that the reference to "any action" in this case includes an application to set aside (on the grounds of art 34, under the First Schedule) and also an appeal on a question of law under sch 2, art 5. There is no need to read the words of cl 16 in the restrictive way argued for by Mr Muston.

[29] I also observe that, interpreted in that way, the provision is consistent with the Sharemilking Agreements Order. As Mr Muston submitted, the intention of the Sharemilking Agreements Act 1937 is that, (in certain defined circumstances), if any term in the private sharemilking agreement is less favourable to the sharemilker than the statutory agreement in the order it is null and void and the latter term is substituted for it. However, and to the extent that a term of the agreement is of the same or greater advantage to the sharemilker then that term stands as part of the private sharemilking agreement: *Handley v Wishnowski*.[10]

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9 At [17].

10 *Handley v Wishnowski* [1941] NZLR 390.

[30] Clause 16 of the Arbitration Agreement in the present case is consistent with cl 157 of the Sharemilking Agreements Order which refers to either party wishing to take any action whatsoever against the award. "Any action whatsoever" is a broad concept. "Any action" in cl 16 of the Arbitration Agreement in the present case is similarly broad. It is consistent with the Order.

[31] For the above reasons I conclude that in this case, by cl 16 of the Arbitration Agreement, the parties have agreed to a process to apply in the event either wishes to challenge the award either by an application under art 34 and/or an appeal on a question of law under art 5.

**Result**

[32] On the preliminary point I find for the plaintiff. The plaintiff may pursue the appeal on a question of law. Leave is not required to do so.

**Costs**

[33] Costs to the plaintiff on a 2B basis on this issue, quarter day allowed.

**Timetable directions**

[34] At the conclusion of the hearing I invited counsel to settle a timetable for the substantive disposal of the case. By consent the following directions are to apply:

(a) The application to set aside (under art 34) and the appeal on a question of law will be heard in this Court at Auckland on **5 December 2013 at 10.00 am** (one day allocated).

(b) Plaintiff's submissions to be filed and served by 7 November 2013.

(c) Defendant's submissions to be filed and served by 14 November 2013.

(d) Any reply submissions to be filed and served by 28 November 2013.

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Venning J