IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008 404 4436

BETWEEN	GENERAL DISTRIBUTORS LIMITED Applicant
AND	MELANESIAN MISSION TRUST BOARD Respondent

Hearing: 21 November 2008

Appearances: M Eastwick-Field for Applicant
B W Morley and K Meikle for Respondent

Judgment: 21 November 2008

ORAL JUDGMENT OF CHISHOLM J

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[1] On 29 August 2008 Lang J dismissed an application by General Distributors Limited (General Distributors) for leave to bring an appeal pursuant to rule 5(1)(c) of the second schedule to the Arbitration Act 1996. The application was dismissed on the basis that this Court had no jurisdiction to entertain the appeal. General Distributors now seeks leave to appeal to the Court of Appeal. This application is strongly opposed by Melanesian Mission Trust Board (the Trust Board).

Background

[2] General Distributors, which operates the Foodtown chain of supermarkets, leases supermarket premises at Mr Eden from the Trust Board. The last three year rent review under the lease was due on 29 May 2006. When the parties were unable to agree as to the rent that was to be paid from that time the matter was referred to arbitration. The formal reference was about 12 months ago.

[3] A former High Court Judge, the Hon Barry Paterson QC, and two experienced valuers were appointed as the Arbitral Tribunal. They were required to determined the *"fair market rent"* in terms of the lease. During the process leading up to the arbitration the Trust Board sought discovery of information relating to 18 other supermarkets operated by General Distributors. While General Distributors was prepared to provide information in relation to 10 supermarkets, it declined to do so in relation to the remaining eight and in February 2008 the Trust Board formally sought discovery.

[4] Following a hearing the Arbitral Tribunal issued its ruling on 2 July 2008. It is apparent from the ruling that there was no dispute as to the Tribunal's power to make orders as to discovery in terms of s 6 of the Arbitration Act, rule 19 of the first schedule, and rule 3 of the second schedule.

[5] In its ruling the Tribunal recorded that it had:

> *"… formed views as to the possible relevance of the documents and materials sought. As the information is in the control of one party, it is not possible to assess absolute relevance at this stage."*

The Tribunal accepted that information relating to supermarkets within the Auckland area *"may well be relevant to assessing the fair market rent"* and ordered General Distributors to discover information relating to those leases, including a ranking of the supermarkets in relation to turnover, subject to various orders to preserve the confidentiality of the information.

[6] Although the Tribunal was of the view that turnover would not normally assist in arriving at a fair market rent, it accepted that in the case of supermarkets turnover could be an indicator of the locality value. On that basis it required a limited form of discovery in relation to the turnover of the supermarkets in the Auckland area. The supermarket with the highest turnover in any one year was to be ranked first. Then there was to be a band indicating in order the supermarkets whose turnover was within 10% of the top supermarket. And subsequent bands were to be in 10% bands.

[7] Because General Distributors was extremely concerned about this ruling, both in terms of relevance and in terms of the requirement to disclose confidential information, it sought leave to appeal to this Court on five questions. It is not disputed that the first question, which concerned the discovery test that should be applied, raised a question of law. (General Distributors alleges that the Arbitral Tribunal erred by confining its consideration to relevance and that it should have also considered necessity, broadly in line with the High Court Rules). The remaining questions concern the application of that test to the facts. I doubt that they raise questions of law.

[8] It was argued before Lang J that a dangerous precedent would be set if the discovery ordered by the Arbitral Tribunal was allowed to stand. Lang J concluded that the High Court had no jurisdiction because in terms of rule 5(1) of the second schedule General Distributors was not appealing any question of law arising out of *"an award"*. It was also his view that sub-rule (2) of rule 5 could not be satisfied because the question of law concerned could not "*substantially affect the rights of one or more of the parties*". In reaching those conclusions he derived particular support from *McConnell Dowell Constructors Ltd v Pipeflow Technology Ltd* HC AK M2029/98 25 March 1999. Lang J also concluded that the granting of leave for a procedural ruling would be contrary to the purpose and objective of the Arbitration Act.

Test For Leave To Appeal To The Court Of Appeal

[9] The relevant test to be applied was recently described by the Court of Appeal in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355 at [33]:

> *"…the primary focus is on whether the question of law is worthy of consideration. We cannot do better than Randerson J's summary of the position in Cooper at para [12]:*
>
> > *"(a) The appeal must raise some question of law … capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.*

> *(b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.*
>
> *(c) Not every alleged error of law is of such importance either generally or to the parties as to justify further pursuit of litigation that has been twice considered and ruled upon by a Court.""*

The critical question in this case is, of course, whether the High Court had jurisdiction to entertain the appeal. If not, any attempt to appeal to the Court of Appeal is futile.

Whether There Was Jurisdiction

[10] I have no doubt at all that Lang J was right when he concluded that this Court has no jurisdiction in this case. My reasons can be briefly stated. In broad terms they are in line with the views expressed by Lang J.

[11] Jurisdiction to appeal is conferred by rule 5 (1) and (2) of the second schedule:

> *"(1) Jurisdiction to appeal is conferred by clause 5(1) of the second schedule: 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".*

There are two prerequisites to jurisdiction: the question of law must arise out of an award; and, if so, the requirements of subclause (2) must be met.

[12] The word *"award"* is defined in s 2 of the Act:

> ***"award** means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award",*

For present purposes the critical component is the requirement for there to be a decision on the *substance* of the dispute. In other words, the decision must relate to the essence or most important part of the dispute.

[13] Generally rulings concerning procedural matters, such as discovery, will not constitute an "*award*". It is only if the interlocutory or procedural ruling goes to the essence of the dispute that it could qualify as an award. For example, an interlocutory ruling striking out a party to an arbitration.

[14] This interpretation is supported not only by the plain wording of the definition, but also by *McDowell Dowell Constructors Ltd v Pipe Technology Ltd*, which was decided by the Hon Barry Paterson QC when he was on the Bench. It is also supported by the obiter remarks of Williams J in *McKenzie v Toogood* HC AK 27 March 2002 CL 1/02 at [17]. Although some United Kingdom authorities were referred to in written submissions, they are of little assistance because the United Kingdom legislation does not carry a definition of "*award*".

[15] Like Lang J, I am also of the view that this conclusion reflects the underlying philosophy of the Act. As a full Bench of the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood* [2000] 3 NZLR 318 noted, the purposes expressed in s 5 indicate Parliament's intention of encouraging the use of arbitration to resolve disputes and to limit the High Court's involvement in reviewing and setting aside arbitral decisions. Later in its judgment the Court of Appeal commented:

> *"[52] … Parliament … has chosen to favour finality, certainty and party autonomy… It intended to encourage arbitration as a dispute resolution mechanism. By enacting a statute with the express purpose of redefining and clarify the limits of judicial review of arbitral awards, Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Courts where this choice has been made …."*.

It also reminded this Court that it should exercise its discretion in a disciplined way and for that purpose listed guidelines that might be considered.

[16] Granting leave to appeal to the High Court (or the Court of Appeal) where purely procedural matters are involved would be entirely contrary to the statutory regime. And apart from being incompatible with the clear signals in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, it would, as Mr Morley observed, also represent the thin edge of the wedge. In my view it is the very thing that the legislation and the Court of Appeal has been at pains to discourage.

Other Matters

[17] Even though I am perfectly satisfied that the jurisdictional issue is sufficient to resolve this application, it is appropriate to mention some other matters.

[18] First, even if there had been jurisdiction, I doubt that the issues that General Distributors seeks to place before the High Court (and now the Court of Appeal) are capable of bona fide or serious argument. Rule 19 of the first schedule provides:

> ***"Determination of rules of procedures***
>
> *(1) Subject to the provisions of this Schedule, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Schedule, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence. (Underlining added)*
>
> …".

Thus an Arbitral Tribunal has been deliberately given a very wide discretion when it comes to procedural matters. Added to that rule 5, which concerns Court intervention, specifically provides that in matters governed by the first schedule *"no Court shall intervene except where so provided in this schedule"*. The message could not be much clearer.

[19] Second, to the extent that General Distributors wants this Court to provide universal guidelines for discovery, it seems to me that it is being overly optimistic. Given the wide power conferred by rule 19 of the first schedule and the specific power to order discovery conferred by rule 3 of the second schedule, I am inclined to

agree with Mr Morley that there is no gap to be filled by guidelines. Discovery will need to be approved on an arbitration by arbitration basis.

[20] Third, it is important to keep in mind that the Arbitral Tribunal comprises a retired High Court Judge and two very experienced arbitrators. In this respect the comments of the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood* at 334 are particularly relevant.

[21] Fourth, there is also force in Mr Morley's argument based on *Re Dickinson* [1992] 2 NZLR 43 (CA) which arose out of a rent review arbitration and where confidentiality issues arose. In that case both Gault and McKay JJ emphasised (at 49 and 50 respectively) that in the context of commercial rent reviews it is important to utilise accurate market information about comparable rents, where available, so that proper rent levels can be ascertained and fixed. Given that approach it is difficult to see how it could be argued that the Arbitral Tribunal exceeded its powers, or erred in principle, by requiring discovery in this case, subject to measures designed to protect General Distributors' confidentiality.

[22] This brings me to the fifth point. Despite Ms Eastwick-Field's valiant attempts to persuade me to the contrary, I cannot see any reason why this procedural matter needs to be appealed at this time. If it transpires that the tribunal applies irrelevant information when reaching its decision then, as Mr Morley acknowledged, leave could be sought to appeal any questions of law that legitimately arose out of the final determination. I cannot see how General Distributors is in any way prejudiced by having to wait until the arbitral process is completed before bringing any appeal, if such exists.

[23] Finally, an appeal to the Court of Appeal would involve further delay and cost. There is no justification for the Trust Board being subjected to either of those burdens.

Outcome

[24] The application for leave to appeal to the Court of Appeal is dismissed.

Costs

[25] There will be costs to the Trust Board on the 2B scale.

Solicitors: Russell McVeagh, Auckland for Plaintiff
Hesketh Kenry, Auckland for Defendant