IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2009-441-000103

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an application for leave to appeal to the High Court under cl 5(1)(c) of the Second Schedule of the Act, and an application to set aside an award under cl 34 of the First Schedule of the Act
BETWEEN	GEOFFREY MAURICE HENNAH AND CHERYL ELLEN HENNAH Plaintiffs
AND	FENTON THOMAS KELLY AND FELICITY MONICA MARY KELLY Defendants

Hearing: 2 June 2009

Appearances: L J Blomfield for the Plaintiffs
J O Upton QC for the Defendants

Judgment: 17 June 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 17 June 2009 at 9.30 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J O Upton QC P O Box 10048 Wellington 6143 for the Defendants

Solicitors: Sainsbury Logan and Williams P O Box 41 Napier 4140 for the Plaintiffs

Copy To: Kelly McNeil (G D J Wellwood) P O Box 1148 Hastings 4156 for the Defendants

[1] This is an application under cl 5(1)(c) of the second schedule to the Arbitration Act 1996 for leave to appeal on two questions of law from a decision of an arbitral tribunal made on or about 1 December 2008.

[2] The arbitral decision determined the value of notional livestock for the purposes of a written bailment agreement that had been in place since 1987. The original livestock that were subject to the bailment agreement were itemised in a schedule attached to the agreement. The agreement provided that on the disposal or death of the original livestock, the bailees would replace the same with "stock of the number kind and classes" of the original stock (see clause 2). During the currency of the bailment agreement, all replacement livestock were deemed to be the property of the bailors (see clause 4). On the expiration of the bailment agreement, the bailees were required to deliver up to the bailors stock of like numbers, kinds and classes of the stock itemised in the schedule, or pay to the bailors the amount of the value of all stock not so delivered up (see clause 2).

[3] The bailment agreement is about to come to an end (the bailee's lease of the land on which the stock was to be kept expired on 31 May 2009). As matters have turned out, the bailees have no replacement stock to deliver up. Consequently, there has been an attempt at setting a notional current day value of stock based on the original stock itemised in the schedule.

[4] Nothing was said in either the bailment agreement or the attached schedule about the live weight of the subject livestock. However, there is evidence that the plaintiffs, who are the bailees, weighed the original livestock. Nonetheless, there is also evidence from the plaintiffs' witness, Terry Coffey, that 20 odd years ago, weighing systems were not commonplace and so it was unusual to see any reference to live weight in livestock bailment agreements.

[5] The plaintiffs contend that the arbitral award on the valuation of the notional stock should have taken into account an assessment of their live weight. The defendants, who are the bailors, do not agree with this approach. Neither did the arbitral tribunal.

[6] The plaintiffs contend that the arbitral award raises two questions of law, which the arbitral tribunal has answered in error. These questions are:

a) Whether or not the live weight of livestock was a relevant consideration in determining the value of livestock under the bailment agreement (the plaintiffs say that live weight is a relevant consideration); and

b) Whether or not the arbitral tribunal made an error of law in the interpretation of the bailment agreement when it excluded the live weight of livestock as a relevant consideration when determining their value under the bailment agreement (the plaintiffs say that such an error has occurred).

[7] The defendants contend that the arbitral award discloses no errors of law. First, they say that the arbitral award raises no issue of interpretation of the bailment agreement. This is because the bailment agreement makes no provision for what has eventuated. Secondly, they say that the void, which this omission has created, was filled by the parties' election to refer the valuation dispute to arbitration, with the result that their agreement to go to arbitration constitutes a separate contract that is distinct and stands alone from the bailment agreement: see *Halsbury* vol 2(3) at para 6. Thirdly, they say that any interpretation issues can only arise in the context of this second agreement. In this regard, the defendants argue that as part of the reference to arbitration, the parties could have agreed on a formula for how the notional stock valuation was to be assessed. That they did not do so means they elected to leave it to the arbitral tribunal to determine the procedure for how the notional valuation was to be achieved: see *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 (HL) at 301. In this circumstance, the defendants contend that as regards the adoption of a method of valuation, no interpretation issue can arise. The plaintiffs accept that there was no formal agreement on the process to be applied in the arbitration.

[8] Under the Arbitration Act 1996, the right of appeal against an arbitral award is limited. Clause 5 of the second schedule to the Act provides:

5 Appeals on questions of law

(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.

(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.

…

[9] Clause 5 restricts a Court from granting leave under subclause 1(c) unless it considers that, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties.

[10] The first step, therefore, is for the Court to be satisfied that the plaintiffs have identified questions of law that could substantially affect the rights of one or more of the parties. But, even if so satisfied, the Court has a residual discretion as to whether or not to grant leave: *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at [54]. The legal principles governing the exercise of this discretion are to be found in that judgment. The relevant considerations to take into account when deciding whether or not to exercise the residual discretion are:

i) The nature of the alleged error. If the question of law involves a one-off point that is of little precedent value, it is only if there are very strong indications of an error that leave to appeal will be granted. Where the question of law has precedent value, or the relationship between the parties is ongoing and will be affected over time by the question, a lower standard is applied. However, even then, the test is that of a "strongly arguable case that an error existed".

ii) If the question of law under consideration was the very reason for the arbitration, this weighs against the grant of leave to appeal, whereas if the question of law has emerged incidentally during the arbitral process, leave will be granted more readily.

iii) Where the arbitral tribunal is legally qualified, leave to appeal is more difficult to obtain.

iv) Where the dispute is of great significance to the parties, this will weigh in favour of granting leave to appeal.

v) Where a substantial amount of money is involved, it might be somewhat easier for the parties to obtain leave.

vi) Where the likely amount of delay consequent in granting leave is disproportionate to the significance of the dispute, or if the issue is urgent, leave to appeal will be less likely.

vii) If the parties have agreed that the arbitral award is to be final, this, while not determinative, will weigh against leave to appeal being granted.

[11] The eighth consideration formulated in *Gold & Resource Developments (NZ) Ltd* relates to international arbitrations and is not relevant here.

[12] In this case, the difference in the value of the notional livestock, depending on whether or not live weight is considered, is approximately $260,000. The difference is enough to satisfy me that recognition of the impact of live weight on the valuation will have a substantial affect on the rights of the parties. However, I am not satisfied that the arbitral tribunal's omission to consider live weight as part of the valuation exercise raises a question of law.

[13] The bailment agreement does not provide for arbitration. Over the years, while the bailment agreement was operative, the parties had been able to arrive at

valuations of the replacement livestock. As regards the current need for a valuation, the defendants engaged a valuer, Lawrence Redshaw, to provide a valuation of notional livestock. His valuation came to $675,036. This figure was not acceptable to the plaintiffs, and so they engaged another valuer, Ross Dyer. His estimate came to $414,700. This valuation included an assessment of the notional stock's live weight, which, in turn, was based on the live weight of the original stock as recorded by the plaintiffs. The defendants were not a party to this record and so they do not accept the plaintiffs' record.

[14] Faced with a dispute over valuation with a difference of approximately $260,000.00, the parties then agreed between themselves that their valuers would appoint a third valuer, Iain McKewan. This resulted in a valuation signed by all three valuers that assessed the value of the notional livestock at $578,633 as at 1 February 2008, with a bailment rental of 12 per cent per annum. The signed off valuation took no account of an attributed live weight of the notional livestock.

[15] I accept the defendants' submission that an agreement to go to arbitration can create a separate agreement. The authority the defendants rely upon in this regard clearly supports this proposition. Since the bailment agreement does not provide for arbitration, the decision to have the valuation dispute determined by arbitration, and the terms on which the arbitration was to be conducted, must constitute a separate agreement between the parties.

[16] I also accept the defendants' submission that the parties could have agreed on a more detailed process for the arbitration. As it was, they agreed that their valuers would appoint a third valuer as umpire/arbitrator. The omission to specify a particular method for valuing the notional livestock means that the parties have elected to leave it to the valuers to reach agreement on the appropriate valuation method. In this circumstance, provided a recognised orthodox method of valuation was reasonably applied, there can be no complaint about what was done. I cannot see how a particular method of valuation (being here one that took account of live weight) can be read into the void which has resulted from the parties' omission to specify a particular procedure for the arbitration. The evidence I have read satisfies me that currently an orthodox and reasonable method of valuing livestock is to arrive

at a valuation based on numbers, kinds and classes of livestock, without regard to live weight. This is how the original livestock were valued. Their live weight did not form part of their value under the bailment agreement. In the circumstances of this case, therefore, the arbitral tribunal's decision to use a method of valuation that is current and which is in accord with the original methodology (which did not take live weight into account), involves no question of interpretation. The issue of how to value the notional livestock was purely a procedural issue for the arbitral tribunal to determine. There is no question of law that has been answered in error.

[17] However, if I am wrong on this point, as an alternative approach, I now turn to consider the plaintiffs' questions of law on the assumption that they qualify as such. The argument the plaintiffs make turns on the alleged questions of law being seen to arise from the bailment agreement, rather than from a separate agreement to go to arbitration. They argue that the bailment agreement, by implication, mandates a valuation that takes live weight into account.

[18] The interpretation of a contract is a legal question, and an error of interpretation is an error of law. However, even if the source of the valuation decision is seen to be the bailment agreement, it is difficult to see how it can give rise to a question of law that meets the requirements formulated in *Gold & Resource Developments (NZ) Ltd*. This case makes it clear that the paramount consideration is the nature and strength of the alleged error of law.

[19] The plaintiffs' own evidence is that at the time the bailment agreement was made, the weighing of livestock was not commonplace. Furthermore, the bailment agreement did not provide for the live weight of the subject livestock to form part of any valuation. It follows that the plaintiffs are essentially asking the Court to imply into the bailment agreement a term for valuing the subject livestock that includes a method which was not then in common use.

[20] To imply into the contract a term that contemplates taking into account live weight at a time when that was not commonly done, and the means for doing so were not commonly available, would be to defy the legal principles on when a Court can imply terms into a contract. The plaintiffs were unable to identify any authority to

support the proposition that some 20 years later, a Court can imply into the contract a term requiring something to be done that, whilst currently commonplace, was not usually done at the time the contract was made. This is not a case where the parties have subsequently updated their bargain to take into account new developments. The terms of the bailment agreement they reached have remained the same since 1987. I do not think that it can be seriously argued that the arbitral tribunal has erred in law when it did not interpret the bailment agreement as having a requirement for live weight to form part of its valuation. Under the principles in *Gold Resource Developments*, the test for determining an alleged error of law will differ depending on whether or not the question of law has precedent value and the ongoing nature of the parties' relationship. If the error of law will have precedent value and there is an ongoing relationship between the parties, a lesser threshold applies than is otherwise the case. But, even then, the test is whether or not there is a "strongly arguable case that an error existed". When I apply this test to the present circumstances (which may well fall into the category of cases requiring a more stringent test), I am not satisfied the plaintiffs can meet the test. There is nothing to suggest to me that there is a strongly arguable case for saying there should be an implied term of the bailment agreement requiring the live weight of any livestock to be taken into account as part of a valuation under that agreement. It follows that if the plaintiffs cannot meet the less stringent test in *Gold Resource Developments*, they could not meet the alternative stricter test.

[21] I have found that the plaintiffs have failed to establish that there is a question of law to be determined on appeal. In the alternative, I have found that if there is a question of law, there is no strongly arguable case that an error of law exists. Since this consideration is said to be the paramount consideration in the exercise of the residual discretion, I see no purpose in going on to consider the other aspects of the test formulated in *Gold Resource Developments*. It follows that the plaintiffs have failed to establish that their application for leave to appeal qualifies under cl 5(1)(c).

Result

[22] The application for leave to appeal is refused.

[23] Leave is reserved to the parties to file memoranda on costs.

Duffy J