IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-002598
[2018] NZHC 316

UNDER	the Arbitration Act 1996
IN THE MATTER	of an application for leave to appeal pursuant to clause 5(1)(c) of Schedule 2 of the Arbitration Act 1996
BETWEEN	NH3 REFRIGERATION LIMITED Plaintiff
AND	REFRIGERATION ENGINEERING CO LIMITED Defendant

Hearing: 9 February 2018

Appearances: G Williams for the Plaintiff
S Aymeric and G A Hazel for the Defendant

Judgment: 5 March 2018

JUDGMENT OF JAGOSE J

This judgment is delivered by me on 5 March 2018 at 11.30 am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
G Williams, Barrister, Auckland
James & Wells, Auckland

Introduction

[1] The plaintiff, NH3 Refrigeration Ltd ("**NH3**") (a company based in the United Kingdom), seeks leave to appeal a partial award in an arbitration with the defendant, Refrigeration Engineering Co Ltd ("**RECL**") (a company based in New Zealand).

[2] RECL makes chilling and freezing carton tunnels. Under a distribution agreement dated 16 August 2002, RECL gave NH3 an exclusive right within Europe to purchase and distribute RECL's tunnels. RECL claimed NH3's conduct was in breach of the distribution agreement. NH3 denied, among other things, the distribution agreement was in force at any material time. The distribution agreement requires such disputes to be arbitrated, in accordance with New Zealand law.

[3] The Arbitration Act 1996, sch 1, art 34, limits parties' recourse to a court against an arbitral award only by application for setting aside on specific grounds. But appeals on questions of law are permitted if the parties adopt the additional optional r 5 in sch 2. On the parties' appointment of the arbitrator, Royden Hindle (an Auckland barrister), and at his suggestion, the parties agreed to adopt the sch 2 rules.

[4] Mr Hindle's partial award of 4 July 2017 (the "**Award**") determined the distribution agreement remained in force between the parties until 23 May 2013. He considered those parties effectively included RECL's wholly owned subsidiary, Milmeq Ltd ("**Milmeq**"), to which RECL's relevant operations were transferred in 2009. He also determined various of NH3's actions, while the distribution agreement was in force, were in breach of the distribution agreement. RECL has indicated a claim for damages in the realm of $1.5m. That quantum remains for Mr Hindle's determination.

[5] NH3 wishes to appeal Mr Hindle's determinations relating to the distribution agreement remaining in force, and treating RECL and Milmeq interchangeably, as giving rise to identified questions of law. The parties having neither agreed nor consented to any party appealing to this Court on any question of law arising out of the Award, NH3 requires this Court's leave in terms of sch 2, r 5(1)(c).

[6] Applications for leave have (as NH3's had) "the most truncated of oral hearings" – an indicator "leave will only be granted in the clearest cases".[1]

Appeals on questions of law

[7] Rule 5 relevantly provides:

> **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—
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> (a) if the parties have so agreed before the making of that award; or
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> (b) with the consent of every other party given after the making of that award; or
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> (c) with the leave of the High Court.
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> (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 1 or more of the parties.
>
> (3) The High Court may grant leave under subclause (1)(c) on such conditions as it sees fit.
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> …
>
> (10) For the purposes of this clause, question of law—
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> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
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> (b) does not include any question as to whether—
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> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
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> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[8] Where, as here, leave is required, the threshold issues are thus whether the award is contended to give rise to questions of law, and then whether determination of those questions could substantially affect a party's rights.

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[1] Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thompson Reuters, 2016) at [HR26.16.02].

[9] As to the former of those considerations, several New Zealand judgments adopt the Supreme Court of Canada's explanation in *Canada (Director of Investigation and Research) v Southam Inc*:[2]

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognise, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

At least in New Zealand, the application of law to the facts – the legal consequences of facts – is "a conventional question of law".[3]

[10] Once the threshold is crossed, the Court's discretion to grant leave is exercised in accordance with guidelines set out by the Court of Appeal in *Gold & Resource Developments (New Zealand) Ltd v Doug Hood Ltd*.[4] Those guidelines anticipate consideration of the following:[5]

(a) the strength of the challenge and the nature of the point of law;

(b) whether the question for appellate consideration arose incidentally or was "the very point" of the arbitration;

(c) whether the arbitrator was legally qualified;

(d) the importance of the dispute to the parties;

(e) the amount of money involved;

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2 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 (SCC) at [35] cited in *Nixon v Walker* HC Auckland CIV-2007-404-1372, 13 July 2007 at [25], *Shell (Petroleum Mining) Co Ltd v Vector Gas Contracts Ltd* [2014] NZHC 31 at [43], and *Commerce Commission v Harmoney Limited* [2017] NZHC 1167, (2017) 14 TCLR 572 at [30].

3 *R v Vaihu* [2010] NZCA 145 at [23] cited in *Commerce Commission v Harmoney*, above n 2, at [31].

4 *Gold & Resource Developments (New Zealand) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).

5 At [54].

(f) the amount of delay involved in going through the Court;

(g) whether the award was intended by the parties to be final and binding; and

(h) whether the arbitration is domestic or international.

The Court's intervention is restrained, to acknowledge parties' choice in adopting the alternative dispute resolution mechanism of arbitration.[6]

The proposed appeal

[11] NH3 identifies the following questions arising from the Award:

> **Question 1**: Was the Arbitrator's finding that the 2002 Agreement remained on foot according to its terms (including the grant to the plaintiff of exclusive rights to distribute in Europe, including Great Britain, Ireland, mainland Europe and Scandinavia) between the defendant and the plaintiff until 23 May 2013 correct or had the 2002 Agreement been discharged?
>
> **Question 2**: Was it appropriate for the Arbitrator to treat the defendant and Milmeq Ltd interchangeably in dealing with the issues in the Arbitration when the defendant and Milmeq Ltd are separate legal entities and Milmeq Ltd was not a party to the Arbitration?
>
> **Question 3**: Was there an onus on the defendant to show that the 2002 Agreement was still on foot and did it establish that it was given the evidence and admissions that it made, particularly regarding the restructuring of the defendant's business and operations that took place in 2009?
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> **Question 4**: If the 2002 Agreement had been discharged, were the Arbitrator's findings of breach of contract, namely the findings listed at paragraph [11][c] to [11][h] (inclusive) of the Award, correct?
>
> **Question 5**: If the 2002 Agreement had been discharged did the defendant have any right to commence the Arbitration and/or did it have any contractual basis to make the claims of breach of contract which it did against the plaintiff?
>
> **Question 6**: If the Arbitrator erred as a matter of law by treating the defendant and Milmeq Ltd interchangeably in dealing with the issues in the Arbitration, did the defendant have any right to commence the Arbitration and/or did it have any contractual basis to make the claims of breach of contract which it did against the plaintiff?
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> **Question 7**: Was the true contractual position that there had been a novation of the 2002 Agreement as between the plaintiff and Milmeq Ltd and that

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6 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 at [22]-[25].

consequently the defendant had no right to claim any breach of contract against the plaintiff?

Question 8: Did the Arbitrator err as a matter of law by finding an estoppel (if that is what he did), so as to prevent the plaintiff from being able to take advantage of the legal distinction between the defendant and Milmeq Ltd when no such estoppel was ever pleaded by the defendant?

Analysis

[12] It appears accepted determination of NH3's identified questions could substantially affect one or other party's rights. If the distribution agreement was not in force at any material time, or if RECL and Milmeq were not to be treated interchangeably, RECL would have no, or a materially reduced, claim for damages, and NH3's liability under the partial Award would correspondingly be affected. Such would adjust each party's rights vis-á-vis the other from that for which liability had been found under the Award, and in a substantial way. Thus NH3 has crossed one of the thresholds in r 5(2) for this Court's intervention.

[13] The other threshold issue is whether the identified questions are 'questions of law'. Rule 5(10)(b) expressly excludes from the phrase's reach questions on the award's evidential support, or on inferences open to being drawn from primary facts. It is less clear all NH3's questions are capable of meeting that threshold, which anticipates each can be prefaced "Did the arbitrator err in law in…?".

[14] Questions 4, 5, and 6, in particular, posit hypotheticals contingent on NH3's successful appeal on questions 1 and 2, and are more about the relief NH3 seeks than identifying any question of law. They do not cross the threshold for leave to be granted.

[15] Question 7 seeks to elevate a footnote in the Award into a qualifying question of law.[7] The footnote comments on NH3's late purported amendment of its pleading

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[7] Footnote 133 is appended to the final sentence of paragraph [181] of the Award, which states:

> If there is an estoppel in this case, I think it operates in such a way as to prevent NH3 from now trying to take advantage out of the bare legal distinction between RECL and Milmeq.

The footnote reads:

> In fact, strictly speaking the legal position is probably that there was a novation of the 2002 agreement as between NH3 and Milmeq, arising out of and evidenced by the parties' conduct since Milmeq became involved. However approached, and for the reasons given, I am not willing to allow NH3 to raise the issue at the last minute as it has sought to do.

of an estoppel "to inject an argument about the fact that there is a legal distinction between RECL and Milmeq as a defence to the claim".[8] The arbitrator declined "to allow NH3 to raise that issue at the eleventh hour".[9] The footnote is plainly commentary, not determinative. There is no error of law, and accordingly no qualifying question of law for appeal.

[16] The same could be said of Question 8, which seeks to address the arbitrator's "finding of an estoppel (if that is what he did)". As should be plain from the text of footnote 7 above, he did not. The arbitrator earlier had held NH3's claim to estoppel failed.[10] His later reference to estoppel, sought to be impugned by Question 8, was purely rhetorical. It founds no qualifying question of law.

[17] NH3 may appear to be on stronger grounds with Questions 1, 2 and 3, which are at least conceivable as substantive questions of law, even if not articulated expressly as such.

[18] Counsel for NH3, Garry Williams, characterises Question 1 as relating to "whether or not the 2002 Distribution Agreement had been discharged". He submits, as the legal consequence of found facts, it is 'a conventional question of law'. Mr Williams also relies on the House of Lords' treatment of a mixed question of fact and law in *Edwards (Inspector of Taxes) v Bairstow*.[11] He contends, while acknowledging conflicting decisions of this Court,[12] "the weight of authority supports the proposition that reaching an incorrect legal conclusion from factual findings is an error of law".

[19] Mr Williams identifies certain of the arbitrator's "factual findings", ending with the 'finding' referred to at the Award's footnote 133 (referred to at [15] above), to submit "these findings ***very strongly*** indicate that the Arbitrator has erred in holding

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8 Award at [177].
9 At [180].
10 At [151].
11 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).
12 See, for example, *Trustees of Rotoaira Forest Trust v Attorney-General* [1998] 3 NZLR 89 (HC); *Todd Petroleum Mining Co Ltd v Vector Gas Trading Ltd* [2017] NZHC 1166 at [49]-[54]; *Nixon v Walker* HC Auckland CIV-2007-404-1372, 12 December 2008 at [13]-[18]; *Stanaway Real Estate Ltd v Cooper & Co Real Estate Ltd* HC Auckland CIV-2010-404-8007, 18 May 2011 at [7]. See also David Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at 531-532.

that the 2002 Distribution Agreement was not discharged" (original emphasis). Mr Williams submits "the Arbitrator's ruling on this issue is so obviously wrong that error of application of legal principles should be inferred".

[20] However, the identified 'findings' are only some of those addressed by the arbitrator. The arbitrator expressly acknowledged some of the documents are "at odds" or "inconsistent" with the 2002 agreement's continuation after RECL's corporate restructuring, but concluded, "[i]n contrast, there seem to me to be more (and, from an evidential point of view, more weighty) pointers towards the opposite conclusion…".[13] He continued:[14]

> I am unable to infer from the evidence in this case that these parties had implicitly agreed to abandon the 2002 agreement at any time before 23 May 2013.
>
> That conclusion is all the more obvious when considering the position as it stood as at September 2008. Assessed at that point, the evidence favours a finding that the agreement was still on foot. Evidence of events and communications after 2008 falls a long way short of persuading me to any different conclusion.
>
> I therefore find that the parties did not terminate the agreement under clause 7.3, and it was not abandoned.

[21] More particularly, the 'findings' identified by Mr Williams are not findings at all, but largely identification instead of individual emails, on which Mr Williams relies for NH3's preferred conclusion. For example, Mr Williams emphasises a 2 September 2008 email from RECL to NH3, stating, "[our agreement] is well expired and we have been remiss in not reinstating it". But, of that email, the arbitrator's actual finding was:[15]

> I do not agree that the 2 September 2008 email amounted to a representation that was understood by Mr Ball at the time he received it as meaning that the 2002 agreement was no longer in force.
>
> In any event, and given the way in which HH3 subsequently conducted itself (including but not limited to its many late assertions that the 2002 agreement was still binding) I am not satisfied that NH3 ever relied on such representations as there were in Mr Adams' email of 2 September 2008.

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13 Award at [139]-[140].
14 At [142]-[144].
15 At [149]-[150].

[22] Similarly, Mr Williams identifies a RECL internal email of 11 February 2013, stating, "[w]e originally had an agency agreement with [NH3] however this is well lapsed … [and NH3] does not currently have exclusivity". But the arbitrator took the email into account in concluding, "in the overall scheme of the evidence":[16]

> … neither party really thought that the 2002 agreement had been terminated in 2008: RECL saw it as necessary to do something about terminating it [by letter of 23 May 2013]; and [NH3] responded to that by asserting it and claiming rights under it.

[23] Question 1 is thus excluded by sch 2, r 5(10)(b): properly comprehended,[17] it is a question about whether the award was supported by the evidence, and whether the arbitrator drew the correct factual inferences from the relevant primary facts. Question 1 is not a qualifying question of law.

[24] The same criticism may be made of Question 3. Mr Williams' submissions expressly assert "the Arbitrator's failure to reach the correct conclusion from [RECL's] admissions [inconsistent with the 2002 agreement remaining on foot at material times]". That is exactly a question about whether the award was supported by the evidence. It is not a qualifying question of law.

[25] Mr Williams submits Question 2 identifies a clear error of law "because as a matter of law, RECL and Milmeq Ltd are separate legal entities and cannot be treated as if they are not". He says "the Arbitrator's ruling on this issue is so obviously wrong".

[26] Again, however, that is to mischaracterise the arbitrator's finding. The arbitrator comprehended the pleadings included NH3's counterclaim:[18]

> … against RECL on the basis of things that had been done or omitted by Milmeq. The pleaded basis for the counterclaim was that Milmeq was the wholly owned subsidiary and agent of RECL.

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16 Award at [111].
17 *Nixon v Walker* HC Auckland CIV-2007-404-1372, 13 July 2007 at [30]-[31].
18 Award at [162].

The arbitrator took the view NH3's pleading "gives rise to an inference that NH3 would not be making an issue of the bare legal distinction between RECL and Milmeq".[19]

[27] Any error in law on the arbitrator's part therefore is not in his analysis of the relationship between RECL and Milmeq, but to be identified in his construction of the pleadings. That is not what NH3 contends. Again, NH3 has not identified any qualifying question of law.

[28] On that basis, NH3's application for leave to appeal does not cross even the initial threshold for consideration.

[29] I accept Question 1 has potential to establish a mixed question of fact and law. NH3's case on Question 1, even if a question of law, cannot be addressed except by (re)considering questions of fact. That alone tends against a grant of leave.[20] As said in *Casata v General Distributors*, the need thoroughly to review the evidence to assess whether the arbitrator erred in law indicates the arbitrator's conclusion is not perverse in the sense meant by *Edwards v Bairstow*.[21]

[30] If I am wrong in my view Question 1 is excluded from consideration by sch 2, r 5(10)(b), I turn to consider whether leave should be granted, in accordance with *Gold & Resource Developments*' guidelines:[22]

(a) NH3's argument for an error of law is not strong, because it is contending essentially for a different weighting of the evidence to come to the (legal) conclusion the contract was discharged earlier;

(b) that issue – whether the 2002 agreement continued in force after 2008 – was 'the very point' of the arbitration, and likely explained the parties' choice of a legally trained arbitrator;

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19 Award at [163].
20 *Rua v Mamaku Highlands Ltd* [2012] NZHC 1848 at [25].
21 *Casata v General Distributors* [2005] 3 NZLR 156 at [84] citing *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).
22 *Gold & Resource Developments (New Zealand) Ltd v Doug Hood Ltd,* above n 4, at [54].

(c) the result is only important to the parties, who are no longer bound by the 2002 agreement, in terms of the (contended substantial) quantum of NH3's liability to RECL;

(d) an appeal would delay completion of the arbitration, which has yet to determine that quantum; and

(e) the 2002 agreement provided "The arbitrator's decision shall be binding on both parties executed as an Agreement". The clause is poorly phrased. Without further analysis, RECL submits it means the Award is final and binding; NH3 made no submission in response. I consider the more natural reading of the clause, more consistent with the parties' actions, is the arbitrator's decision is binding 'as if' executed as an agreement. The parties' adoption of sch 2 does not undermine that intended certainty.

[31] I see no basis on which to exercise my discretion to grant NH3 leave to appeal.

Result

[32] NH3's application for leave to appeal under r 5(1)(c) of sch 2 to the Arbitration Act 1996 is dismissed.

Costs

[33] I heard no submissions on costs. My preliminary view is NH3 should be liable to RECL for 2B costs for all steps taken in the proceeding. If that is not accepted by the parties, costs are reserved for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served by:

(a) RECL within ten working days of the date of this judgment;

(b) NH3 within five working days of service of RECL's memorandum; and

(c) RECL strictly in reply within five working days of service of NH3's memorandum.

—Jagose J