IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-008007

UNDER	the Arbitration Act 1996
BETWEEN	STANAWAY REAL ESTATE LIMITED Plaintiff
AND	COOPER & CO REAL ESTATE LIMITED Defendant

Hearing: 12 May 2011

Counsel: D R Bigio for Plaintiff
A R B Barker for Defendant

Judgment: 18 May 2011

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 18 May 2011 at 3pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Langton Hudson Butcher, P.O. Box 3690, Shortland Street, Auckland for Plaintiff
The North Shore Law Practice, P.O. Box 31361, Milford, North Shore City, Auckland for Defendant

[1] On 23 September 2010 Mr H L A Morley, an arbitrator appointed under the rules of the Real Estate Institute of New Zealand Incorporated, awarded to Cooper, a Harcourts Agency, $34,035 plus GST, 30% of the commission charged by the sole agent, Stanaway, a Bayleys agency, on the sale of a property in Cheltenham, Devonport, for $4.5M.

[2] The purchaser, an American national, first learned of the property through Cooper, whom she had engaged to find one in the area for her. They had advertised for prospective vendors and the vendors had responded. In the event, the vendors made Stanaway their sole agent. The purchaser inspected the property at an open home Stanaway conducted and it saw to the completion of the agreement for sale and purchase.

[3] Cooper looked to Stanaway for 40% of the commission, relying on an earlier assurance from the vendors that Cooper was entitled, despite Stanaway's sole agency, to take the purchaser through the property and that Stanaway was 'more than happy' to share the commission; an assurance Cooper believed they later confirmed with Stanaway itself. Stanaway, however, as sole agent, declined to share its commission.

[4] The issue for the arbitrator was whether Cooper was, as it claimed, entitled to 40% of Stanaway's commission, relying on a conjunctional agreement with Stanaway. Stanaway denied that Cooper was entitled to share. Stanaway was, it said, the vendor's sole agent and it was as well the instrumental agent.

[5] Stanaway and Cooper, the arbitrator concluded, may not have entered into a conjunctional agreement formally. But Cooper had introduced the purchaser, and the vendors had assured Cooper that it could take her through the property and that Stanaway had agreed to share the commission. He reduced Cooper's 40% share of the commission to 30% because Cooper had not formally agreed this with Stanaway.

[6] Stanaway contends that the arbitrator did not answer the question he was asked and erred in law in the answer he did give. Cooper contends that the answer he gave was well within his remit and at most involved an error of fact beyond appeal.

Appeal by leave

[7] An arbitrator's award may only be appealed on a question of law.[1] This may include 'an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision)'. It does not extend to whether an inference on which an award depends is supported by evidence or is correct.[2] An error of law susceptible of appeal appears, therefore, confined to a conventional legal question on unchallenged facts.[3]

[8] Even where the issue is one of law, cl 5(2) prohibits leave being granted unless the issue is truly significant:

> The High Court shall 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.

[9] In *Gold and Resource Developments (NZ) Ltd v Doug Hood Limited*,[4] moreover, the Court of Appeal held that the intent of the Act is 'to encourage the use of arbitration to resolve disputes between parties, and to limit the High Court's involvement in reviewing and setting aside arbitral decisions'.

[10] This Court, the Court of Appeal said, retains on an application an 'important discretion' as to whether to grant leave,[5] that must be exercised 'in a disciplined way'.[6] Eight guidelines are to be taken into account, the first of which is the most important - the strength of the challenge and the nature of the point of law. As to that it said:[7]

> If it is a one-off point, in the sense that it is unlikely to occur again and cannot be seen as having any precedent value, either generally or to the parties on another occasion, then unless there are very strong indications of error leave should rarely be given. In other cases, the Court will be looking for a somewhat less stringent assessment. In those cases a strongly arguable case would normally be required for leave to be granted.

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1 Arbitration Act 1996, Schedule 2, cl 5(1)(c).
2 Clause 5(10).
3 *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76, 85 - 91.
4 *Gold and Resource Developments (NZ) Ltd v Doug Hood Limited* [2000] 3 NZLR 318 at [14].
5 At [11].
6 At [54].
7 At [54](1).

[11] The nature and significance of the issue of law, the Court of Appeal said, is very relevant to the question of leave. Is the question novel, or of general interest, or is it neither? If it is neither is a lot of money involved? Or is the issue central to the result, and did the arbitrator clearly get it wrong? No less relevant is how the issue came to the arbitrator. Is it the very issue entrusted to the arbitrator because of his or her usual competence? Or did it arise incidentally and lie beyond his or her usual competence? Did the parties agree that the arbitrator's decision should be final?[8]

[12] That assessment, the Court of Appeal said, is to be made with economy. Where leave is granted the reasons why are not to be stated. Where leave is refused short reasons, for the benefit of the parties, is all that is called for.[9]

Conclusion

[13] The issue the arbitrator had to decide at its most basic was whether Cooper was entitled to 40% of Stanaway's commission. He did so accepting that, though Cooper may have been the purchaser's agent and introduced her to the vendors, it never became the vendor's agent. Cooper, he recognised, could only share in Stanaway's commission, as sole agent, if Stanaway agreed.

[14] The arbitrator decided that, though they did not enter into a formal conjunctional agreement, Stanaway did agree that Cooper should have a 40% share. He did so for seven reasons, the first of which was that the vendors had been instrumental in securing for Cooper a share in Stanaway's commission by reserving to Cooper the right to take the purchaser through the property, despite Stanaway's sole agency; a right reserved that Stanaway had agreed, the vendors said, entitled Cooper to a share.

[15] In setting out his seven reasons and his conclusion, the arbitrator was, unfortunately, more elliptical than he had been to that point in his award, which is otherwise plainly expressed. His conclusion is nevertheless intelligible. It rests on

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8 At [54].
9 At [58], [59]; see also HCR rr 26.16 - 26.18.

facts he was entitled to find and on inferences he was entitled to make that are, in any event, unable to be challenged on this application or on any appeal. He made no obvious error of law.

[16] A conjunctional sale agreement is simply an agreement under which a sole agent permits another to introduce a potential buyer on the basis that, if the sale eventuates, they will share the commission. It is normally, and should be, formal. That did not happen here, but is not fatal. The arbitrator was entitled, as he did, to find that the two agencies did agree to share the commission in the event of a sale; an agreement the vendors brokered. At most he made an error of fact beyond appeal.

[17] That conclusion is fatal to this application for leave to appeal and the discretionary factors also stand against leave. Stanaway and Cooper agreed Mr Morley as their arbitrator because he was a highly experienced and prominent real estate agent. They did not turn to a lawyer and Stanaway cannot complain now that the award was less than clear in law. Their choice was sensible. This dispute turned on an issue of fact of no general significance. Though the sale price was large, the amount in issue, 30% of the commission, was small. Resort to appeal in this kind of case is disproportionate.

[18] The application is dismissed. Cooper is entitled to costs, as I should have thought at scale 2B. If costs cannot be agreed Cooper is to file a memorandum within 10 working days and Stanaway within the succeeding 10 working days.

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P.J. Keane J