IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2172
[2020] NZHC 663

UNDER	the Arbitration Act 1996
IN THE MATTER	of an Application for Leave to Appeal against Arbitration Tribunal's Award
BETWEEN	DIAMOND HOSTEL LIMITED Applicant
AND	SUNGJA KIM Respondent

Hearing: 19 March 2020

Appearances: S Kang for the Applicant
A Ho for the Respondent

Judgment: 31 March 2020

JUDGMENT OF GORDON J

This judgment was delivered by me
On 31 March 2020 at 2 pm, pursuant to
R 11.5 of the High Court Rules

Solicitors: Fairbrother Family Law, Napier
Norling Law Limited, Auckland

Application

[1] Diamond Hostel Ltd (Diamond) applies under cl 5(1)(c) of sch 2 of the Arbitration Act 1996 for leave to appeal part of a decision of an arbitrator given on 9 July 2019. The exercise of the discretion to grant leave is subject to cl 5(2).

[2] The dispute relates to Diamond's liability for outgoings under a lease of a property, presently owned by Ms Kim, at Spring Creek, north of Blenheim. The arbitrator found Diamond was liable for outgoings under the terms of the lease. Diamond seeks leave to appeal on a question of law arising out of the arbitrator's determination on liability. Ms Kim opposes leaves.

Background

[3] Diamond leases the property from Ms Kim and operates a low-cost accommodation service there called "Swampys Backpackers". Mr Kim is the sole shareholder and director of Diamond. Prior to 2017, Diamond occupied the property under an informal arrangement with the then landowner. Novagen Developments Ltd acquired the property during 2017 and required a formal lease. This was signed on 24 May 2017. It is in the standard ADLS form for commercial leases (sixth edition, 2012). Ms Kim acquired the property on 15 May 2018.

[4] The terms of the lease are largely unremarkable for the purposes of this application. Clause 18 in the first schedule to the lease is a list of outgoings for which the tenant is liable. There are 13 items in the list. One has been deleted, presumably because it is not relevant (body corporate charges for insurance premiums for cover held by the body corporate).

[5] Under the terms of the lease as executed, Diamond is liable for outgoings under cl 3.1. The arbitrator, Royden Hindle, estimated the annual amount to be between $15,000 and $20,000, though he considered the latter figure to be at the upper end of the range. Over a 20-year period, the total liability could be between $300,000 and $400,000.[1]

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[1] The parties agree that the relevant sum for the purposes of this application is between $30,000 and $40,000 being the arrears for outgoings ($30,000) plus interest.

Submissions for the applicant

[6] In the application seeking leave to appeal filed on behalf of Diamond, a number of errors of law were alleged. However, in his oral submissions Mr Kang, for Diamond, abandoned all but one alleged error of law. That is, that the arbitrator failed to consider s 231 of the Property Law Act 2007 (PLA) and the resulting possibility that an alleged obligation not to charge outgoings was transferred to the new owner of the reversion.

[7] Mr Kang refers to his written submissions in the arbitration which he says squarely raised the application of s 231. Mr Kang submits the arbitrator failed to assess the elements of the section, to test whether there was any "covenant" not to charge outgoings which then ran with the reversion. Instead, the arbitrator "jumbled the issues and jumped to a conclusion that there was no variation that binds the respondent".

[8] Mr Kang says leave should be granted under cl 5(1)(c) because the precondition in cl 5(2) (that the question of law could substantially affect the rights of one or more of the parties)[2] has been met, as it goes to the liability of Diamond for the outgoings and interest on those outgoings. That precondition having been met, the factors that the Court of Appeal identified in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, relevant to the exercise of the discretion to grant leave to appeal, favour the exercise of the discretion.[3] Mr Kang considers each factor in the following terms:

(a) Strength of the challenge and nature of point of law: a determination will have value as a precedent for similar leases as use of the standard form is widespread and Mr Kang says there is no authority on s 231 of the PLA;

(b) How the question arose before the arbitrator: Mr Kang says when, as in this case, the issue was put to the arbitrator directly, this would usually

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2 I have set out in parenthesis the precondition in cl 5(2). Mr Kang's submissions correctly cite the test but he goes on to submit that the question of law "*would* substantially affect the rights ...".

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

operate against an applicant seeking leave to appeal. But he says in this case it does not. That is because although the issue was before the arbitrator he failed to consider it;

(c) Qualifications of the arbitrator: Mr Kang acknowledges Mr Hindle is an experienced barrister and accepts that would usually make it more difficult to obtain leave. However, Mr Kang submits that in this case the arbitrator failed to use his expertise to consider s 231;

(d) Importance of the dispute to the parties: Mr Kang addresses this factor jointly with the amount of money involved, which is considered next. He submits the dispute is important because Diamond is held by one shareholder and is a small business;

(e) Amount of money involved: Mr Kang addresses this factor jointly with the previous one and acknowledges the sum of $30,000 plus interest is not particularly large but describes it as "a crucial amount for the applicant". He therefore submits that while the amount is not large on an objective analysis, it is large when considered from the subjective viewpoint of Diamond. He submits the liability would exceed the cost of appealing the decision of the arbitrator as the appeal hearing would only involve written submissions on one issue;

(f) Extent of delay in going through the court: Mr Kang says there has been no delay. He estimates two and a half years since the dispute arose until any appeal hearing;

(g) Provision in the contract for arbitration to be final and binding: Mr Kang submits no such agreement was entered into;

(h) Whether the dispute is international or domestic: the dispute is a domestic one. This consideration therefore does not apply.

Submissions for the respondent

[9] Mr Ho, for Ms Kim, opposes the application. He submits the statutory precondition is not satisfied. Mr Ho says the amount in dispute of $30,000.00 plus interest is modest when compared to other cases. He also notes that in separate proceedings Diamond has told the Court it is solvent and able to meet that liability. On the basis of these points, Mr Ho says the question of law is not one that could substantially affect Diamond's rights.

[10] If the precondition is satisfied, Mr Ho submits the Court should not exercise its discretion to grant leave. He notes that the Court of Appeal held in *Gold and Resource Developments* that the discretion should be exercised by the courts in a context where Parliament has preferred finality, certainty and autonomy over broader judicial review of the determinations of arbitrators. Mr Ho cites several compelling authorities on this point.[4] He also submits this approach is consistent with the purposes of the Arbitration Act.

[11] Mr Ho proceeds to address each of the eight factors identified by the Court of Appeal in *Gold and Resource Developments* in exercising the discretion to grant leave to appeal:

(a) Strength of the challenge and nature of point of law: Mr Ho says s 231 does not assist Diamond. That section is concerned with lessor covenants. On the facts as found by the arbitrator there was no lessor's covenant to vary the lease so as not to charge outgoings. Section 231 therefore did not apply. He submits s 233 which is concerned with lessee covenants (such as those contained in the lease to pay outgoings) would be the relevant provision. Section 233 has been the subject of authoritative interpretation in the courts, such that an appeal would not add to the existing jurisprudence on the point.

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4 *Pioneer Shipping Co v BTP Tioxide (The Nema)* [1982] AC 724 (HL); *Ipswich Borough Council v Fisons PLC* [1990] Ch 709 (CA); *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* PC63/1994, 16 November 1995; *Manukau City Council v Fencible Court Howick Ltd* [1991] 3 NZLR 410 (CA); *Opotiki Packing & Coolstorage Ltd v Opotiki Fruitgrowers Co-operative Ltd* (in rec) [2003] 1 NZLR 205 (CA).

(b) How the question arose before the arbitrator: Mr Ho submits the question of law at issue was the very point of the arbitration and the parties should be held to their choice;

(c) Qualifications of the arbitrator: Mr Ho notes Mr Hindle's legal qualifications and extensive experience as an arbitrator;

(d) Importance of the dispute to the parties: Mr Ho emphasises that the merits of Diamond's appeal are limited, the quantum in issue is modest and Diamond has indicated in separate (liquidation) proceedings that it can discharge the liability so the dispute cannot have much importance for the company;

(e) Amount of money involved: Mr Ho submits the amount of money in dispute is modest and that it would be unjust to require Ms Kim to incur further cost in opposing the appeal;

(f) Extent of delay in going through the court: the delay caused by pursuing the appeal is disproportionate to the modest sum in dispute;

(g) Provision in contract for arbitration to be final and binding: there was no arbitration agreement between the parties but Mr Ho submits there is a presumption of finality in arbitral awards;

(h) Whether the dispute is international or domestic: the dispute is a domestic one and Mr Ho says this factor is not relevant.

Discussion

[12] Clauses 5(1)(c) and 5(2) of Schedule 2 of the Arbitration Act provide:

> **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—
>
> (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.

[13] It is common ground that the relevant principles for applying cl 5(2) are to be found in the decision of the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*.

Precondition

[14] The first step is to determine whether the question of law could substantially affect the rights of the parties in terms of cl 5(2) of sch 2 of the Arbitration Act. It is agreed that the disputed sum is approximately $30,000 (being the arrears) plus interest on that sum.

[15] Mr Kang submits that determination of the question of law would substantially affect the rights of the parties. "Substantially affect" is not a low threshold. It is not simply that Diamond's rights could be affected but that they could be *substantially* affected. Moreover, the Court of Appeal is clear in *Gold and Resource Developments* that the policy of the Arbitration Act is to provide certainty and finality in dispute resolution. Judicial intervention in an arbitration is to be limited where the parties have chosen to submit their dispute to this type of process.

[16] As Mr Ho correctly points out this is a modest sum. On the other hand, Diamond is a small company. The information before me indicates Mr Kim is the sole director and shareholder. Diamond operates a budget accommodation service in a rural town. So even if $30,000 (plus interest) is a modest sum, for a company like Diamond, liability could have consequences that would be more than minor. But, as noted, Mr Ho also points out that Diamond has said elsewhere that it is solvent and able to discharge this liability.

[17] On the information before me, I cannot be satisfied that the precondition has been discharged. There is in dispute liability for outgoings in the sum of $30,000 plus interest. That is a modest sum. Diamond is a small business but has apparently indicated it has the resources to pay this amount and that it is solvent. The threshold

in cl 5(2) is not a low one. It has not been established that a determination which bears on liability for this amount could substantially affect Diamond's rights.

Discretion

[18] Even if I am wrong on this point, I would nevertheless exercise my discretion by refusing leave after taking account of the factors identified in *Gold and Resource Developments*. The Court of Appeal emphasises that the eight factors identified are, with the exception of the first dealing with the strength of the challenge and the nature of the point of law, not exhaustive and best characterised as guidelines. Other than the first, they are not arranged in order of importance. There are two factors I do not need to consider. There is agreement that the parties did not contract for the award to be final and binding. In addition, whether the dispute is international or domestic is not a relevant consideration in this case (because it is a domestic dispute).

[19] The first factor to be considered, which the Court of Appeal describes as the "most important", is the strength of the argument that there has been an error of law and the nature of that point. The Court of Appeal provides clear direction on this factor, which I mention first, before applying the principles to the present proceedings. In particular, a one-off point with little precedent value in the absence of a clear error favours declining leave. A very strongly arguable case is required. Where there is possible precedent value in settling a disputed point of law, then "a strongly arguable case would normally be required for leave to be granted".[5] It is clear from the remarks in *Gold and Resource Developments* that the threshold created by cl 5(2) is not just a high one but a very high one, even where the point of law has precedential value. A strongly arguable case is still required.

[20] Section 231 of the PLA provides:

> **231 Burden of lessor's covenants to run with reversion**
>
> (1) If the reversion expectant on a lease ceases to be held by the lessor (whether by transfer, assignment, grant, operation of law, or otherwise), the obligations imposed by every covenant of the lessor—
>
> (a) run with the reversion; and

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5 At [54](1).

(b) may be enforced by the person who is from time to time entitled to the leasehold estate or interest against the person who is from time to time entitled to the reversion.

(2) Subsection (1) applies unless a contrary intention appears from the lease or from another circumstance.

(3) In subsection (1), the reference to every covenant of the lessor is,—

(a) for a lease that comes into operation before 1 January 2008, a reference to every covenant of the lessor that refers to the subject matter of the lease; and

(b) for a lease that comes into operation on or after that date, a reference to every covenant of the lessor, whether it refers to the subject matter of the lease or not.

[21] Prima facie, this provision does apply to the lease. The reversion has been transferred so the obligations imposed by covenants run with the reversion and pass to Ms Kim. They can be enforced. Mr Kang submits that the covenant in this case was an agreement by Novagen not to charge outgoings. He says this covenant is established by the pattern of invoicing and correspondence with Novagen after the lease was entered into.

[22] It is correct that the arbitrator did not address s 231. However, Mr Ho submits the need to do so did not arise.

[23] Before the arbitrator Mr Kang submitted there had been a variation of the lease dispensing with the obligation in the lease to pay outgoings. The arbitrator approached this question by examining the chronology of events leading to the execution of the lease and afterwards. Agreement was reached on the rent and outgoings following discussions between a representative of Novagen and Mr Kim. These exchanges occurred before the lease was signed. Mr Kim says the arrangement was to apply after the lease was entered into. The arbitrator found no evidence to support this assertion. Nor was it consistent with Mr Kim's subsequent actions. The lease was executed in its present form. The arbitrator found Mr Kim knew the content of the lease and was given the opportunity to amend it. He could have deleted cl 3.1 but did not do so.

[24] When questioned on these points, Mr Kim said he was mistaken, there was some urgency in signing the lease, that he did not read it properly and that he did not

take independent advice. The arbitrator rejected all of these explanations. The variation was said to been made on 11 March 2017 for a lease executed on 24 May 2017. Messages from Novagen's representative invited Mr Kim to alter the lease in any way he liked. There was no evidence to suggest urgency. Indeed, the arbitrator found Mr Kim had plenty of time to consider the terms of the lease and seek legal advice if he required it. The arbitrator was also clear that the case was put to him on the basis the lease was varied before it was signed.

[25] There was no variation because there was no lease in existence at the time. It is impossible to vary an agreement which does not exist. Whatever happened afterwards is irrelevant, as the arbitrator correctly found, because there simply was no variation. Mr Kang submits the oral agreement in March was an irrelevant consideration and that the arbitrator failed to consider correspondence and a pattern of invoicing after the lease was entered into. I do not accept that submission. Although the arbitrator remarked on mistake and rectification, this was only to emphasise the manner in which the case was argued.

[26] This is made clear in footnote 25. The arbitrator states:

> In fairness to Mr Kang, in his reply submissions dated 11 June 2019 there is an assertion that the variation was made after the written lease was signed – see para 5 "The role of the March agreement is to provide factual background and explanation as to why DHL and Novagen agreed to vary the lease not long after entering into it." That proposition was really only articulated clearly for the first time in this way at this point; i.e., after the hearing and even after the primary submissions had been filed. It does not sit comfortably alongside the way the case was put in the DHL position statement, and Mr Kim's evidence, both of which make it very clear that the agreement about outgoings had been made in March 2017. In any event, if one searches for a point in the correspondence after 24 May 2017 at which it could be said that the discussion between Novagen and DHL had crystalised (sic) into an agreement that DHL would never have to pay outgoings under the lease, it cannot be found.

[27] I will further address the arbitrator's remark that the possibility of variation occurring later was only raised in reply submissions below. What is significant is the finding that there was never any agreement not to enforce the covenant in the lease dealing with outgoings. The arbitrator considered the evidence put to him by Mr Kang and found there was no variation.

[28] Further, it is unlikely, even if there was a variation, that it amounted to a covenant for the purposes of s 231. The PLA sets out the definition of a covenant in s 4:

> **covenant** means a promise expressed or implied in—
>
> (a) an instrument; or
>
> (b) a short-term lease not made in writing

[29] The lease in question is not a short term one as defined in s 207 so in these circumstances a covenant must mean a promise expressed or implied in an instrument. The question is whether the various documents identified by Mr Kang constitute an instrument. An instrument is defined in the PLA as:

> (a) means any use of words, figures, or symbols (for example, an agreement, contract, deed, grant, or memorandum, or some other document that is certified, executed, or otherwise approved by or on behalf of a party or parties, or a judgment, order, or process of a court) that—
>
> (i) creates, evidences, modifies, or extinguishes legal or equitable rights, interests, or liabilities (without being lodged, filed, or registered under an enactment, or after being so lodged, filed, or registered, or both); and
>
> (ii) is in a visible and tangible form and medium (for example, in handwriting, print, or both), or is in an electronic form in accordance with Part 4 of the Contract and Commercial Law Act 2017 or the Land Transfer Act 2017; and
>
> (b) *[Repealed]*
>
> (c) includes any covenant expressed or implied (under this or any other enactment) in, and any variation of, any instrument as defined in paragraph (a) or (b); but
>
> (d) does not include an enactment (though it may be in a form prescribed by one, or have covenants or terms implied in it under one, or both).

[30] Leaving aside the question of whether the materials Mr Kang identifies modify or extinguish legal or equitable rights or liabilities, which I will return to below, and assuming there is no dispute that the materials are in an electronic form, the issue for consideration is whether they satisfy the first part of the definition. The emails and invoices come within the scope of "any use of words, figures, or symbols", because they are all of those things. This is a very broad definition of what might be an

instrument. However, there are two further issues to resolve. First, do the words in parenthesis which follow the broad definition narrow the meaning of the first part of the definition. Secondly, can this apply to a collection of documents, such as the emails and invoices.

[31] There are two points which can be taken from these words. First, they are examples. They illustrate but do not modify the general terms. However, they give guidance in interpretation. Second, they give guidance in interpretation in two ways. The examples all refer to a single document: an agreement, a contract, a deed, a grant or a memorandum. An instrument is not a collection of materials but a single document. This is consistent with s 24 of the PLA, which has a long history in our legal tradition and requires dispositions of land to be in writing. Legal rights in land cannot usually be altered without some degree of formality and an instrument can be an important feature in discharging the formal requirements.

[32] This leads to the second feature of the examples. The document must be certified, executed or otherwise approved by or on behalf of a party. This feature of the definition is also consistent with s 24. It requires the party or parties to the document to give their assent to the arrangement. It cannot be assumed that the emails and invoices were "otherwise approved" simply by sending them. The approval which must be given in the context of the definition of instrument in the PLA is to one which creates or modifies legal or equitable rights. Sending an invoice for payment and responding to inquiries about the amount owed cannot constitute approval to create or alter rights for the purposes of this definition.

[33] The examples qualify the general words of the definition of an instrument to the extent that some formality is required and certain technical requirements must be met. On this construction of the definition, therefore, there was no instrument. In the absence of an instrument there could be no covenant, in the form of a variation to the lease, binding the owner of the reversion not to charge outgoings. The express terms of the lease applied, as the arbitrator found. Section 231 does not apply and there was no error of law.

[34] However, even if the materials were an instrument for the purposes of the PLA the arbitrator found as a matter of fact there was no variation of the lease. In addition to the footnote set out in [26] above, the arbitrator stated:

> So, while I understand and accept that Novagen elected not to charge DHL for outgoings as it was entitled to do under the lease, I can find no evidence of any variation or waiver or representation made at any stage after the lease was signed by Mr Revill, or by anyone else representing Novagen, to the effect that the lease might not in future be applied according to its terms. As Mr Hall submits, Novagen's forbearance to demand outgoings does not establish that DHL is not obliged to pay outgoings in addition to the rent in just the way that the lease provides.

[35] This is a factual determination and the Court has no jurisdiction to consider an appeal on this finding.

[36] The arbitrator carefully considered Diamond's position on the events after the execution of the lease. The arbitrator found that none of the invoices to or correspondence with Novagen altered the express terms of the lease. For the reasons set out above, there was no covenant altering the terms of the lease, just as there was no variation, so it was not necessary for the arbitrator to consider s 231. It did not arise on the facts as he found them. In my view this issue is not one that has precedential value. It is simply a question of the application of the facts to settled principles. The arbitrator made no error of law. Diamond does not have a strongly arguable case let alone a very strongly arguable case (being the test where there is no precedential value).

Other factors

[37] As the Court of Appeal explains, how the question of law arose before the arbitrator is connected with the decision of the parties to submit a dispute to arbitration. The parties choose to seek arbitration and "should generally be held to their choice".[6] The question of law might be central to the arbitral process, in which case leave would be harder to obtain. Alternatively, unanticipated legal issues may arise, in which case leave would be more readily granted.[7]

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6 At [54](2).
7 At [54](2).

[38] This case does not appear to be one where unexpected legal issues emerged. The legal issue of whether there had been a variation to the terms of the lease so that Diamond was not required to pay outgoings was at the heart of the dispute from the start. What Mr Kang raises is not the manner in which the issue arose in the arbitration but how the arbitrator dealt with it. Although part of the case was put to the arbitrator late in the proceedings, he also addressed it satisfactorily in his award. This is a case where, as the Court of Appeal suggests, it will be harder to obtain leave to appeal. This factor favours exercising the discretion to decline leave.

[39] As to the qualifications of the arbitrator, Mr Hindle is highly qualified, with legal training and significant experience in the practice of law. The parties can be assumed to have had good reason to select him as the arbitrator in this dispute given his skills and knowledge. The Court of Appeal notes it is more difficult to obtain leave to appeal the award on a question of law in such circumstances. This factor favours exercising the discretion to decline leave.

[40] The dispute is primarily about liability under the lease. This liability has been quantified. The dispute is primarily about money. There is nothing to suggest that the dispute is about anything other than money. The dispute is important to the parties to that extent only. This factor favours exercising the discretion to decline leave.

[41] As I have already indicated, I consider the amount of money in dispute to be modest. This takes into account the context of the dispute, involving a small company operating a low-cost tourism and accommodation business. Mr Kang accepts the amount "might not be [an] objectively substantial amount in the commercial sense". However, he describes it as a "crucial amount" for Diamond. This appears connected to the small size of the company. What is not explained by Mr Kang is why it is a "crucial amount". He does say that the net surplus in the 2019 financial statements was $22,000. Nevertheless, there is Diamond's assertion in the liquidation proceedings that it is able to discharge the liability. Moreover, and contrary to Mr Kang's assertion, the cost of correcting the alleged error of law would be disproportionate to the $30,000 plus interest in dispute. This factor favours exercising the discretion to decline leave.

[42] Finally, the Court of Appeal says in *Gold and Resource Developments* that the amount of money involved is to be balanced against the delay in going through courts. I agree with Mr Ho's submission that, given the modest amount of money involved, the delay in resolving the dispute in the Court system is disproportionate to the sum in dispute. It is already nearly two years since the dispute arose and, optimistically, it will be somewhere between six and 12 months before any resolution is reached if leave to appeal is granted. Certainty and finality are desirable in this case. This factor favours exercising the discretion to decline leave.

Conclusion

[43] The most important consideration in the exercise of the discretion is the strength of the case and the nature of the point of law. I have found that while the arbitrator did not discuss s 231, its application did not arise on the facts as he found them. There is no precedent value and Diamond does not have a very strongly arguable case, which is the test which must be satisfied.

[44] All of the other factors favour exercising the discretion to decline leave.

Result

[45] For these reasons, I decline leave to appeal the partial award of the arbitrator.

Costs

[46] Costs are reserved. If the parties are able to agree costs, counsel should file a joint memorandum within 20 working days of the date of this judgment. If agreement cannot be reached the respondent is to file and serve her memorandum within five working days of the date for the joint memorandum. The applicant is to file and serve its memorandum within a further five working days. Memoranda are not to exceed five pages (excluding any attachments). I will determine costs on the papers.

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Gordon J