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Forestry Corporation of New Zealand Ltd (In Receivership) v Attorney-General - [2003] 3 NZLR 328

High Court Auckland
M 1505/02

7, 10 February 2003
Harrison J

Access Linxplus and NZ Unreported Judgments

Arbitration -- Submission -- Whether dispute clause constituted submission to arbitration -- Effect of providing that valuers and umpire acted as experts and not arbitrators.

A dispute clause in a licence agreement provided for the resolution of a dispute as to land value by the appointment by each side of a valuer and, if the valuers were unable to agree, by the determination of an umpire whose determination was final and binding. The clause stated expressly that the valuers and the umpire were deemed to be acting as experts and not as arbitrators. Nevertheless, the Crown, as one of the parties, contended that the dispute clause constituted an arbitration agreement, on the basis that the umpire would need to conduct a formal hearing at which witnesses would give evidence and be cross-examined.

Held:

The dispute clause was not a submission to arbitration. Although not conclusive, the provision that the umpire was not acting as an arbitrator was a powerful indicator that the clause did not constitute an arbitration agreement. Although no particular form of words was required, the Court had to satisfy itself that there had been a genuine meeting of minds agreeing to arbitrate. A purposive approach to construing the agreement was only required where the words of the contract were unclear or ambiguous. To be valid and enforceable an arbitration agreement had to be clear and certain and consistent with provision for arbitration, although today, with increasing informality in arbitration, the distinction between arbitration and expert determination was becoming blurred. Nonetheless, in this case there was no reference to the Arbitration Act 1908 or its successor and there was no difficulty in inferring that the parties had not intended that the umpire should exercise a judicial function or that the umpire was bound to hear evidence from the parties (see para [13]).

Briscoe and Co Ltd v Victorian Railways Commissioners [1907] VLR 523; [1907] 13 ALR 308 adopted.

Palacath Ltd v Flanagan [1985] 2 All ER 161 adopted.

Taylor v Yeilding (1912) 56 SJ 253 adopted.

Lobb Partnership Ltd v Aintree Racecourse Co Ltd [2000] BLR 65 adopted.

AIG Europe SA v QBE International Insurance Ltd [2001] 2 Lloyd's Rep 268 adopted.

Langham House Developments Ltd v Brompton Securities Ltd (1980) 256 EG 719 adopted.

Re Carus-Wilson and Greene (1886) 18 QB 7 (CA) discussed.

Declaration granted.

Other case mentioned in judgment

Dickinson Re; Board of Trustees of the National Provident Fund v Dickinson (1991) 1 NZ ConvC 191,037 (CA)

Declaration

This was an application by the Forestry Corporation of New Zealand Ltd (In Receivership) and by CITIC New Zealand BVI (In Receivership) as partners in the Central North Island Partnership (referred to collectively as FCNZ), for a declaration that the determination of a licence fee was not, under the terms of the licence from the Crown, subject to the Arbitration Act 1908.

M Casey and *P Mulligan* for FCNZ.

M Parker for the Attorney-General.

Cur adv vult

HARRISON J.

[1] The issue for determination in this proceeding is whether or not the parties' appointment of an umpire to assess land value pursuant to a dispute resolution clause in a licence agreement, specifying that in undertaking this assessment the umpire shall be deemed to be acting as an expert and not as an arbitrator, nevertheless constitutes a submission or agreement to arbitrate under the Arbitration Act 1908 or its 1996 successor.

[2] The plaintiffs are the Forestry Corporation of New Zealand Ltd (FCNZ) and CITIC New Zealand BUI. Both are in receivership. They are parties in what is known as the Central North Island Partnership. They are licensed by the Crown to use large areas of forestry land in the central North Island, principally to harvest trees. Their relationships with the Crown are governed by 21 similarly worded licence agreements.

[3] FCNZ is bound to pay the Crown a licence fee which is subject to periodic revision. The licence agreements include detailed provisions for fixing a licence fee on revision wherever the parties are unable to agree. Their construction is at the heart of this proceeding. In reliance on art 16(3) of the First Schedule to the Arbitration Act 1996 FCNZ has applied for a declaration that determination of the periodic review of the licence fee under the licences is not subject to the Arbitration Act and, accordingly, the umpires appointed pursuant to the licences are not arbitrators.

Background

[4] The relevant background facts are not in dispute, and are briefly as follows:

(a) The Crown Forest Assets Act was enacted in 1989 as part of the government's programme to corporatise and privatise its commercial assets. It also established the Crown forestry licence (CFL) regime allowing the government's commercial forest privatisation programme to proceed while preserving ownership of the underlying land to satisfy possible claims under the Treaty of Waitangi. The scheme of the statute is to grant CFLs to those who purchase the trees on the land within each licence;

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(b) In 1990 the Crown as licensor and Timberlands (Bay of Plenty) Ltd as licensee entered into 21 CFLs. Timberlands was then a state-owned enterprise. Shortly afterwards it changed its name to FCNZ. In 1996 the partnership acquired ownership of the licensee; and

(c) Section 29 of the Act provides for payment and periodic review of an annual fee for using the licensed land. The fee must be based on market rates. However, the Act does not stipulate the mechanism or procedure for fixing this fee.

[5] The subject licence agreement was entered into on 30 May 1990 and covered an area of 10,706 ha. Its terms were settled by agreement between the Crown and Maori before being put out to tender as part of the assets sale programme. Prospective licensees were presented with the licence agreement as drafted by the Crown. Consequently, they had no opportunity to negotiate about any of its provisions, including those for fixing a licence fee and governing its review.

[6] The CFLs are for a term of five years commencing on 30 April 1990. Thereafter they run from year to year by way of automatic extension. The initial licence fee was fixed at $531,440 pa (cl 4.1). The fee is to be reviewed periodically on 30 April 1993 and every third successive anniversary thereafter (cl 4.3). The fee is to be 7 per cent of land value as at the review date. The procedure for fixing the fee opens by the Crown giving notice of its assessment of land value (cl 4.3.1). In the event that the licensee disagrees then it must give a notice requiring the value to be determined in accordance with cl 4.4 and also setting out the amount which it considers to be the land value.

[7] Clause 4.4 is central to this proceeding. It is appropriate to recite its terms in full:

"4.4 - Dispute Provisions:

Where the Licensee gives notice disputing the Crown's assessment of the Licence Fee, the parties shall endeavour to resolve the dispute. Should agreement not be reached within fourteen (14) days (or such longer period as the parties shall agree upon) after the date on which the Licensee gives the Licensee's Notice then:

4.4.1:

The parties shall, within twentyeight (28) days after the date on which the Licensee gives the Licensee's Notice ('the twenty-eight (28) day period') each appoint a valuer (being a member of the New Zealand Institute of Valuers or its successor) to determine jointly the Licence Fee;

4.4.2:

If either the Crown or the Licensee fails to appoint a valuer within the 28 day period then the determination of the Licence Fee shall be made by the sole valuer as nominated by either the Crown or the Licensee, as the case may be, and such determination shall be final and binding on both parties as if the appointment had been by consent;

4.4.3:

If both the Crown and the Licensee have appointed valuers then, before proceeding with their determination, the said valuers shall

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agree upon and appoint an umpire also qualified in the manner referred to in clause 4.4.1 and obtain the umpire's acceptance in writing of appointment;

4.4.4:

> Subject to clause 4.4.2 and 4.4.3, the valuers so nominated shall within fiftysix (56) days of the expiration of the 28 day period jointly determine the Licence Fee as at the Review Date;
>
> 4.4.5:
>
> Each valuer will provide to the other within twentyone (21) days of the expiration of the 28 day period a written assessment of the Licence Fee and will provide full details of the market evidence on which the assessment is particularly reliant;
>
> 4.4.6:
>
> If the said valuers are unable to agree upon a determination within fiftysix (56) days of the expiration of the 28 day period then the Licence Fee shall be assessed by the umpire whose determination shall be final and binding on the parties hereto. The umpire shall give such determination and the reasons therefor in writing;
>
> 4.4.7:
>
> In assessing the Licence Fee, the valuer(s) and/or umpire shall be deemed to be acting as expert(s) and not as arbitrator(s)."

[8] Clause 4.7 provides that the basis for fixing the licence fee may be reviewed prior to the review scheduled for 30 April 1999 undertaken in accordance with cl 4.3 and prior to every ninth successive anniversary thereafter. Its provisions are materially identical to cl 4.3 and 4.4, except of course in one case the umpire is fixing the land value and in the other he or she is fixing the licence fee.

[9] The relevant periodic review in terms of cl 4.3 fell due on 30 April 2002. The Crown gave notice of a new land value. FCNZ responded with a counter-notice. This procedure invoked cl 4.4. However, the parties were unable to reach agreement. So each appointed a valuer who together appointed Mr John Larmer of New Plymouth, a registered valuer, as umpire. The valuers were unable to resolve the dispute within the 56-day period. The valuation now falls for determination by Mr Larmer.

[10] I interpolate to note that two affidavits have been filed in this proceeding. One is from Mr Michael Stiassny, one of the partnership's receivers. The other is from Mr Paul Jackson for the Crown. He is employed by Land Information New Zealand in Wellington and is responsible for administering the licences. He exercises the Crown's powers by virtue of statutory delegation. Mr Jackson has deposed that both parties accept the umpire will need to conduct a formal hearing at which witnesses will be called to give evidence and subject themselves to cross-examination. I cannot follow the basis for this agreement if, as FCNZ contends, cl 4.4 does not constitute an arbitration agreement.

Decision

[11] The question of whether or not cl 4.4 constitutes an arbitration agreement or alternatively provides for resolution of disputes by an expert determination is one of contractual construction. I gratefully adopt this succinct summary of the relevant principles formulated by Mr Patrick Mulligan, FCNZ's junior counsel, as follows:

> "48 The 1996 Act does not prescribe that an 'arbitration agreement' needs to be in any form. All that is required are the indicia of consensus which the law demands of any other simple contract. The Court must satisfy itself that there is a genuine meeting of minds agreeing to arbitrate [*Briscoe and Co Ltd v Victorian Railways Commissioners* [1907] VLR 523] .
>
> 50 Like arbitration, expert determination provides for the final resolution of disputes by a private tribunal to whom issues are referred for a binding decision [*Russell on Arbitration* - 22 Ed (2003) para 2-030]. Traditionally the distinction between the two has been drawn on the basis that at arbitration the tribunal must act judicially whereas an expert decides according to his own expertise [*Re Carus-Wilson and Greene* (1886) 18 QB 7 per Lord Esher MR at p 9]. With the increasingly informal nature of arbitration and the use of experts in the

arbitration context this distinction is being increasingly blurred.

51 . . . The express words used may give a strong indication of [the parties'] intentions and the phrase 'as an expert and not as an arbitrator' is frequently used to signify that the process is intended to be one of expert determination. This wording has been found to be persuasive [*Palacath Ltd v Flanagan* [1985] 2 All ER 161], but not necessarily conclusive *Taylor v Yeilding* (1912) 56 SJ 253].

52 To be valid and enforceable, the terms of an arbitration agreement must be clear and certain [*Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] BLR 65]. In particular there must be a clear reference to arbitration, and the procedure envisaged by the clause, to the extent that it is prescribed, must be consistent with a provision for arbitration [*AIG Europe SA v QBE International Insurance Ltd* [2001] 2 Lloyd's Rep 268].

53 " . . . A purposive approach, where the circumstances surrounding the making of the agreement are considered, is only required if the words of the contract are unclear or ambiguous [*Langham House Developments Ltd v Brompton Securities Ltd* (1980) 256 EG 719]."

[12] Construed according to its plain terms and in context, cl 4.4 is not an agreement to arbitrate. Clause 4.3 provides a mechanism for periodically reviewing the licence fee. But, if they are unable to agree, the parties must resort to cl 4.4, headed "Dispute Provisions". Each party appoints a valuer. Contemporaneous with their appointments the valuers appoint a suitably qualified umpire. Each valuer then provides the other with a written assessment of the land value supported by full details of market evidence on which the assessment relies particularly. However, if they are unable to agree, then the umpire shall assess the land value. His or her determination shall be final and binding and supported by written reasons. When carrying out that assessment the valuer shall be deemed to be acting as an expert and not as an arbitrator.

[13] On their face these provisions evince unequivocally a common or shared intention that the umpire shall act as an expert when assessing the land value. While they are not conclusive, the terms of cl 4.4.7, deeming that the umpire is not acting as an arbitrator in conducting this exercise, are a powerful indicator that this was not an arbitration agreement. Significantly, in a document drafted by the Crown, there is no reference whatsoever to the Arbitration Act 1908 (then in force) or its successor. I can only assume by recording that, first, the umpire's determination was to be final and binding and, second, the umpire was

not acting as an arbitrator, the Crown was anxious to ensure that any determinations made by the umpire were truly final and to exclude all means of challenge which might otherwise be available under the Arbitration Act 1908. I have no difficulty in inferring that the parties did not intend that the umpire should exercise a judicial function or that he or she was bound to hear evidence or submissions from either of them.

[14] As Mars-Jones J observed in *Palacath Ltd v Flanagan* at p 165:

> "The parties expressly stipulated in cl 8 of the second schedule that the surveyor appointed 'will act as an expert and not as an arbitrator'. Counsel for the plaintiff submitted that those words demonstrated (1) that the parties were aware of the difference between an arbitrator and an expert, (2) that they did not want to appoint an arbitrator and (3) that they did want him to act as an expert. I must confess that I, too, consider it would be fanciful to imagine the parties intended the surveyor to act as an arbitrator or quasi-arbitrator despite such a clear and unambiguous stipulation to the contrary."

[15] Mr Malcolm Parker, counsel for the Crown, did not disagree with Mr Mulligan's summary of the relevant principles. Nor was he able to identify any provision within the licence which would displace the clear intention for expert determination in a document drafted by his client. Instead he placed his faith in an unreported judgment of the Court of Appeal (*Re Dickinson; Board of Trustees of the National Provident Fund v Dickinson* (1991) 1 NZ ConvC 191,037).

[16] In that case the parties were lessor and lessee. They were engaged in a rent review of commercial premises in Wellington. In accordance with the contract the parties had appointed valuers who had disagreed. The umpire was actually conducting a hearing at the time of the litigation. The lessee issued three subpoenas under s 9 of the Arbitration

Act 1908. They were directed to representatives of other lessees in allegedly comparable rent review situations. The lessors applied to set the summonses aside. One of the issues on appeal was whether or not the valuer was acting as an arbitrator in order for s 9 of the Arbitration Act to apply.

[17] All members of the Court in *Re Dickinson* found that the valuer was acting as an arbitrator even though the review provision provided that the umpire should be deemed to be acting as an expert and not as an arbitrator when determining the current market rent. None of the members of the Court subjected the provision to detailed analysis. However, they were apparently influenced by an express requirement that "the umpire shall have due regard to any evidence submitted by the valuers as to their assessment".

[18] Cooke P was satisfied that the relevant clause amounted to a "submission" within the definition found in s 2 of the Arbitration Act 1908. He was influenced also by the fact that the umpire was conducting a hearing with the assistance of counsel and that the parties wished to call evidence. There was ". . . a very large sum at stake . . .." The two other members of the Court, Gault and McKay JJ, simply emphasised the same factor that the umpire with the assistance of counsel was hearing evidence and making a determination which was to be imposed upon the parties. McKay J acknowledged that the effect of a provision deeming an umpire to be acting as an expert and not as an arbitrator was to permit the umpire to make a decision as an expert without the necessity for a formal hearing.

[19] In my respectful judgment *Re Dickinson* does not assist the Crown. All cases in this area depend primarily on their contractual terms. In *Re Dickinson*, no doubt because of the pressures imposed by an urgent interlocutory appeal, the Court did not subject the analogous provision to a careful contractual construction. The three Judges were swayed by the fact that the umpire was then in the process of conducting what appeared to be a quasi-judicial hearing in the nature of an arbitration. The clause was also materially different in that it required the umpire to have due regard to evidence submitted by the valuers. It did not apparently stipulate that the umpire's determination was to be final and binding.

[20] For the reasons set out above I am satisfied that when performing his functions under cl 4.4 the umpire is acting as an expert and not as an arbitrator. Accordingly, he is not bound to act in accordance with the provisions of the Arbitration Act 1908 or 1996. FCNZ is successful. By agreement between the parties I award costs for two counsel according to category 2B.Declaration granted.

Solicitors for FCNZ: *KPMG Legal* (Auckland).

Solicitors for the Attorney-General: *Crown Law Office* (Wellington).

Reported by: Andrew Borrowdale, *Barrister*