IN THE COURT OF APPEAL OF NEW ZEALAND

CA195/2014
[2014] NZCA 245

BETWEEN	DAVID ANDREW HOLDEN AND MARIE ALICE HOLDEN Applicant
AND	FOODSTUFFS (WELLINGTON) CO-OPERATIVE SOCIETY LIMITED Respondent

Hearing:	29 May 2014
Court:	Ellen France, Harrison and White JJ
Counsel:	N R Campbell QC for Applicant R C Laurenson for Respondent
Judgment:	16 June 2014 at 11.30 am

JUDGMENT OF THE COURT

A The application for special leave to appeal is dismissed.

B The applicant must pay the respondent costs as on a standard application for leave on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] In their capacities as trustees of the D and M Holden Trust, David and Marie Holden apply for special leave to appeal to this Court against a judgment given in the

High Court at Auckland.[1] In the High Court Woolford J reversed an arbitral award of damages in the Trust's favour against the respondent, Foodstuffs (Wellington) Co-operative Society Ltd and later declined the Trust's application for leave to appeal.[2]

Background

[2] The Trust owns a property in Marton which it has leased to Foodstuffs since 1990. The term of the original lease was for 12 years. Foodstuffs exercised its right of renewal for the same term. The lease will expire in September 2014.

[3] Foodstuffs in turn subleased the property to a sub-tenant who operated a New World supermarket there. On 23 November 2010 the supermarket closed for business on the site and was relocated across the road. The property has since remained vacant but Foodstuffs has continued to pay the agreed annual rental of $154,451.16.

[4] The lease also obliged Foodstuffs to pay a turnover rental of one per cent of all gross sales made by Foodstuffs in excess of $5.2 million. Foodstuffs has not paid this turnover rental since vacating the premises.

[5] Clause 2.19 of the lease provides as follows:

> 2.19 THE Lessee shall during the term hereof ensure that the demised premises are open for business and occupied during normal trading hours and that at all other times all exterior windows are fastened and outside doors locked AND during the term hereof will not use or permit to be used the demised premises or any part thereof for any purpose other than as premises for carrying on in an efficient and proper manner the businesses of a Supermarket or for any other use as may be a predominant use under the Operative District Scheme for the zone within which the demised premises are situated and will not permit or suffer the use of the same or any part thereof for any other purpose …

[6] In reliance on cl 2.19 the Trust claimed that Foodstuffs was liable from 23 November 2010 to continue paying turnover rent based on the turnover that would have been achieved if the supermarket had continued to operate from the

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1 *Foodstuffs (Wellington) Co-operative Society Ltd v Holden* [2013] NZHC 3379.
2 *Foodstuffs (Wellington) Co-operative Society Ltd v Holden* [2014] NZHC 490.

property. Foodstuffs denied liability on the ground that there had been no sales from the property over that period.

[7] The parties agreed to submit their dispute for determination by an arbitrator, the Honourable Barry Paterson QC. In summary he construed cl 2.19 as obliging Foodstuffs to operate and keep open on the property a supermarket generating turnover rental in excess of $5.2 million annually. Accordingly, Foodstuffs was in breach and the Trust was entitled to damages assessed by reference to the turnover rent from gross sales which Foodstuffs would have achieved if the premises had remained open for that purpose.

High Court

[8] The parties' arbitral reference allowed a right of appeal on a question of law arising out of the award. Foodstuffs filed what appeared to be a general appeal against the award. Numerous grounds were raised. However, prior to the hearing in the High Court, Foodstuffs filed a more focussed document identifying five alleged errors by the arbitrator. We are satisfied that they were sufficiently particular to give the High Court jurisdiction.[3]

[9] Woolford J allowed Foodstuffs' appeal on the ground that cl 2.19 could not be read down to require Foodstuffs to operate a supermarket or another business there with a turnover of at least $5.2 million. He considered that the plain words of cl 2.19 did not impose such a turnover requirement and to hold otherwise would be to substantially rewrite the provision. On the Judge's construction, Foodstuffs was liable only to pay the fixed annual rent but not the gross turnover rent if it was not operating a supermarket from the property.

[10] The Trust applied to the High Court for leave to appeal. Woolford J dismissed the application without hearing submissions from counsel. The only documents then filed were a notice of application for leave to appeal and a notice of opposition. Apparently the parties were not advised that this procedure was to be followed.

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[3] Arbitration Act 1996, sch 2, cl 5(1).

Appeal

[11] The Trust applies for special leave to appeal.[4] Both counsel accept that its application should be determined according to the principles set out by this Court in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*:[5]

> [33] It does not matter particularly whether the cl 5(5) test is equated to the s 67 test or the s 144 test. Under either test the primary focus is on whether the question of law is worthy of consideration. We cannot do better than Randerson J's summary of the position in *Cooper* at [12]:
>
> (a) The appeal must raise some question of law… capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.
>
> (b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.
>
> (c) Not every alleged error of law is of such importance either generally or to the parties as to justify further pursuit of litigation that has been twice considered and ruled upon by a Court.
>
> …
>
> [35] Where the High Court has refused leave, this court has power under cl 5(6) to grant special leave to appeal. Obviously that should not be a second bite at the same cherry. This court will be very mindful of why the High Court declined leave, and will grant special leave only if the High Court judge's decision was plainly wrong or if the test set out above was not applied or was misapplied. We would hesitate to say that the test under subcl (6) is different from the test under subcl (5). It is simpler to say the test is the same, but this court will exercise its powers sparingly and mindful of why the High Court declined leave. ...

[12] Mr Campbell QC, who did not appear for the Trust before the arbitrator or in the High Court, properly noted that Woolford J's decision refusing leave was made without the benefit of argument from counsel. That factor is relevant, and we agree that the Judge should have allowed for submissions. However, we must determine for ourselves whether the Trust's application satisfies the statutory threshold, bearing in mind the Judge's conclusion that the principal question formulated for appeal was

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4 Arbitration Act, sch 2, cl 5(6).

5 *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591. The reference to *Cooper* in this quoted passage from *Downer Construction* is to *Cooper v Symes* (2001) 15 PRNZ 166 (HC).

not capable of bona fide and serious argument and did not involve a public or private interest of sufficient importance to outweigh the cost and delay of a second appeal.

[13] Mr Campbell has identified three questions of law for consideration by this Court. The first and primary question is of a general nature, asking whether Woolford J or the arbitrator was correct in construing cl 2.19. In argument he expanded his formulation of the question to: what is the meaning of the "keep open" obligation in cl 2.19, in particular does it require Foodstuffs to keep the premises open and occupied during normal trading hours and trading as a supermarket?

[14] Mr Campbell submitted that the Judge wrongly focussed on the use restriction part of cl 2.19. As a result he failed to consider properly the earlier obligation on Foodstuffs to ensure that the premises were kept open. In Mr Campbell's submission, it is seriously arguable that when considered in context the obligation required Foodstuffs to keep the premises open as a supermarket, as the arbitrator found.

[15] Mr Campbell accepted that the question as formulated does not involve a wider public interest. But he submitted that the Trust's private interest, arising from the financial importance to it of receipt of the gross turnover rent, was sufficient to outweigh the cost and delay of a further appeal. The Holdens retired in 1990 and the lease provides a substantial source of their retirement income.

[16] We are not satisfied that special leave to appeal should be granted to argue this question. We accept that its determination is a matter of financial importance to the Trust. However, the strictness of the leave requirement when considered in conjunction with sch 2 of the Arbitration Act 1996 is decisive to the contrary.

[17] Parties agree to submit their disputes to arbitration because it provides a relatively prompt, efficient and effective means of resolution. In contrast to court proceedings, the law does not allow parties to the arbitral process a general right of appeal on findings of fact. Appeal rights are tightly circumscribed. Parties can only appeal on a question or questions of law, and then only by agreement to the High Court or with the leave of the High Court or, with special leave, to this Court. In this

context the phrase "special leave" must be given its true and literal meaning. The appeal must have some special feature justifying a further appeal to this Court.[6]

[18] Clause 2.19 is unique to this agreement to lease. It has no apparent wider currency. The argument before the arbitrator and in the High Court focussed purely on the correct construction of the words used. The terminology and context may arguably give rise to differing interpretations. However, we cannot say that the construction favoured by Woolford J was not reasonably open to him.

[19] The arbitrator's construction required that words be read into clause 2.19, effectively implying a term in the lease. As Mr Laurenson pointed out, the arbitrator's finding was not just that Foodstuffs was bound to keep open a supermarket but was also bound to generate turnover from the premises in excess of $5.2 million. In agreement with Woolford J, we doubt whether that construction is seriously arguable; it appears to strain the plain words of cl 2.19. The question is not one which justifies the cost and delay of a second appeal.

[20] The second question raised by Mr Campbell is whether, even if Woolford J was correct in his construction of cl 2.19, damages for Foodstuffs' breach are to be assessed on the assumption that Foodstuffs would have performed its obligations in the manner which the leased imposed upon it. Assuming again that cl 2.19 was to be interpreted as found by Woolford J, the third and related question is whether Foodstuffs is on the arbitrator's factual findings liable for damages in the amount awarded.

[21] We accept Mr Laurenson's submission that the second question is in reality little different from the first question and that the third question was not raised as a point of law in the High Court. The whole purpose of the Arbitration Act is to ensure that issues are narrowed rather than expanded through the appellate process.[7] Moreover, we are not satisfied that either of these questions qualify for leave.

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6 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

7 *Downer Construction*, above n 5, at [40]–[43].

Result

[22] The Trust's application for special leave to appeal is dismissed.

[23] The Trust must pay Foodstuffs' costs as on a standard application for leave on a band A basis together with usual disbursements.

Solicitors:
AnnanLaw Limited, Tauranga for Applicant
Gillespie Young Watson, Lower Hutt for Respondent