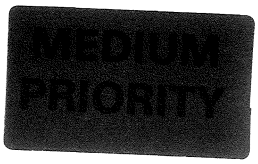
IN THE COURT OF APPEAL OF NEW ZEALAND CA 207/97



BETWEEN T H BARNES & COMPANY LIMITED
Appellant

AND THE MINISTER OF INLAND REVENUE
Respondent

Coram: Keith J
Gallen J
Doogue J

Hearing: 20 April 1998

Counsel: G M Brodie and A Borrowdale for the Appellant
J A L Oliver and D B Woodworth for the Respondent

Judgment: 28 April 1998

JUDGMENT OF THE COURT DELIVERED BY KEITH J

The plaintiff, the respondent in this Court, applied for an order setting aside an arbitral award relating to a lease under which the plaintiff was the tenant and the defendant the landlord. The application succeeded and the defendant appeals.

The case presents issues about the extent of Court review of arbitral awards, a matter which has heightened significance following the enactment of the Arbitration Act 1996. The Act came into force after the making of the award and after the bringing of the High Court challenge but before the hearing in the Court and its judgment. That Court was not however referred to the new Act.

The lease and steps taken under it

The respondent leased premises in Blenheim from the appellant. The lease was for 15 years from 11 September 1988 with two rights of renewal for three year periods. The opening yearly rent was $324,217. Only the landlord could initiate a rent review, every three years. To do that it was to give a written notice at the appropriate time to the tenant "specifying the annual rent considered by the landlord to be the current market rent as at that review date". If the tenant disputed the proposed rent it could require the rent to be determined by arbitration. There was no bar to the review reducing the rent.

On 30 August 1991 the landlord wrote to the tenant. A central issue in the arbitration was whether that letter initiated a review in terms of the lease. The letter read as follows:

> We advise that the rent on your Blenheim offices is due for review for three years commencing 11 September 1991.
>
> We have obtained a registered valuer's assessment of a fair market rental for the review period of $324,217 pa (excluding GST) which includes rent for air conditioning and extra lighting.
>
> This valuation represents a nil increase over the rent currently being paid.
>
> We look forward to hearing your acceptance of this nil rent review.

The tenant did not respond immediately, but on 22 January 1992 sought its own rental valuation and informed the landlord of that. On the basis of the advice that the fair market value was the much lower figure of $211,046 pa the tenant wrote to the landlord on 12 June 1992 acknowledging the letter of 30 August 1991 and indicating that following the report of the valuer the tenant considered the current market value was $200,000. The letter concluded:

> Please write and advise of acceptance or otherwise of this current market value. I look forward to your response.

The landlord in its response said that it did not accept the counter offer and that following discussions with its valuer it would contact the tenant. Further correspondence in July and meetings between valuers for the two parties followed.

The arbitration

At the beginning of 1993, solicitors for the landlord wrote to the tenant saying that they did not consider that the letter of 30 August 1991 amounted to a decision or an advice on behalf of the landlord to review the rental but was a notice to continue the existing rental. The tenant's reply was that a rent review had been instigated, it had disputed the review and accordingly it was entitled to have the matter determined by arbitration under the lease. The landlord's disagreement with that view led to the following three questions being referred to an arbitrator:

> **2. Questions in dispute**
>
> The questions in dispute to be decided by the Arbitrator are:-
>
> (a) Does the letter written by the landlord to the tenant on the 30th August 1991 operate as an effective trigger whereby the landlord commenced a review of rental within the meaning of clause 4, page 16, of the Deed of Lease dated 4th October 1989?
>
> (b) Is the tenant entitled to require that a new annual rental from the first review date be determined by arbitration?
>
> (c) If not, is the landlord entitled to require payment of the rental at the existing rate for the current term of the lease?

The arbitrator answered the three questions no, no and yes.

The High Court judgment

McGechan J held that the arbitrator's answer to the first question was beyond court review since it was a specific question of law which had been referred to the

arbitrator for his decision. He referred to a number of decisions to that effect, including *Kelantan Government v Duff Development Ltd* [1923] AC 395, 409, and in this Court *Attorney-General v Off-Shore Mining Ltd* [1983] NZLR 418 and *GUS Properties Ltd v Tower Corporation* [1992] 2 NZLR 678. By contrast the Judge considered that the second question was general, raising more than the specific reference of a question of law, that the answer to it was reviewable within the normal limits for error of law on the face of the award (relating to estoppel) and that there was an error of law in relation to the second question which should have been answered "yes". The third question accordingly did not arise. It followed that he ordered that the award be set aside.

The tenant abandoned its cross appeal against the finding on the first matter, accepting that court review is not available in respect of a specific question of law referred to the arbitrator for decision.

Arbitration Act 1996

This Act came into force on 1 July 1997. In giving effect in general to the model law on international commercial arbitration prepared by the United Nations Commission on International Trade Law, it took further the recent tendency in cases and legislation in various jurisdictions to narrow the scope of court review and give greater autonomy to the arbitration; see in particular articles 5, 34 and 36 of Schedule 1 and clause 5 of Schedule 2 (which generally applies to national arbitrations). Counsel for the respondent did not attempt to argue that he could have successfully obtained review and an order quashing the award under the new Act. Accordingly the question arises whether that Act applies to this award even although it was given in October 1995 and the High Court proceedings were begun in October 1996. The Act was assented to on 2 September 1996 and came into force on 1 July 1997.

While the usual presumption or principle is that legislation has only prospective

effect, that is not an invariable rule. The presumption or principle has its own limits; and Parliament can and does apply its legislation in a retrospective way - as in this case.

The transitional provisions included in s19 of the Act make it clear that the new provisions are to be applicable not simply to arbitration agreements, proceedings and awards of the future. It has express retrospective effect. So far as awards are concerned, subs (5) provides:

> This Act applies to every arbitral award, whether made before or after the commencement of this Act.

Subsection (1)(a) deals with arbitration agreements and arbitrations under them. It provides:

> This Act applies to every arbitration agreement, whether made before or after the commencement of this Act, and to every arbitration under such an agreement.

That provision, read alone, is in its effect identical to subs (5). It is however subject to exceptions. In particular, under subs (3):

> Where the arbitral proceedings were commenced before the commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied had this Act not been passed.

Subsection (5) is expressly comprehensive applying to arbitral awards made earlier, as in the present case. By contrast to subs(1) it is not subject to any exception. Section 19 distinguishes between arbitration agreements, arbitral processes, and arbitrations under arbitration agreements, on the one side, and arbitral awards, on the other. It is the latter which is in issue here. There is for instance no challenge in this

case relating to the validity of the agreement or the process followed in the course of the arbitration. Any such challenge would, in terms of subs (2), be in accordance with the law which would have been applicable had the new Act not been passed. But that exception is not relevant here. What is in question is simply the award itself, and so far as awards are concerned, subs (5) is in categorical terms. The new law applies to any challenge to that award and, as noted earlier, no basis was suggested for a challenge under that new law. It follows that the appeal has to be allowed.

Counsel for the respondent referred to the unfairness of his being deprived of the wider basis for review. It is true that a major justification for the principle against the retrospective application of the new law is fairness: parties should not be deprived of rights or expectations established under the earlier law; see the discussion of the Law Commission *A New Interpretation Act* (NZLC R7 1990) ch v. We do not question that proposition in any way. Rather we make three points relevant to its application in this context. The first is that the courts in recent decades have increasingly

> stress[ed] that the parties to arbitration should in general be kept to their agreements. The Courts should be reluctant to intervene, eg *Manukau City Council* [*v Fencible Court Howick Ltd* [1991] 3 NZLR 410, 412-413] and Law Commission, *Arbitration* (NZLC R 20 1991) referring to international as well as national developments. *Thomas v Bradford Construction Co* (1996) 9 PRNZ 481, 485-486.

The second point is that the Law Commission in proposing the legislation, in its report on *Arbitration*, having considered the competing considerations relating to retrospectivity concluded that it was proper to provide for the early application of the Act and the avoidance of a lengthy transitional period:

> In particular, we are mindful that the draft Act does not impact on accrued rights but is particularly concerned with procedures.
>
> 275. Accordingly, we have taken the further step of clarifying, in [s19(5)], the application of the draft Act to every arbitral award, whether made before or after the commencement of the Act. This

> provision makes it clear that the new Act will apply to the recognition and enforcement of an award, even when the arbitral proceedings which led to the award had been commenced before the entry into force of the draft Act and so were governed by the pre-existing law under [s19(2)].

While Parliament did amend the transitional provision by adding another qualification to subs (1) (by introducing subs (3)) it left the basic thrust of s19 unchanged and in particular made no change to the clear provisions of subs (5) applying the new law to all awards.

The third point about an argument of possible unfairness concerns a particular feature of this case - the holding that review was available for error of law in respect of the second answer given by the arbitrator concerning estoppel by reference to the letter of 30 August 1991 and related actions. While we do not have to decide this issue, we do, with respect, find it difficult to reconcile this holding with the holding that there could be no review of the very closely related answer to the first question about the effect of the letter alone.

Result

The appeal is allowed. The arbitral award is restored.

The appellant is entitled to costs in respect of both Courts of $5,000 and to disbursements including travel and accommodation expenses for one counsel to be fixed, if necessary, for the High Court, by the Registrar of that Court and, for this Court, by its Registrar.

Solicitors:
Anthony Harper, Christchurch for the Appellant
Crown Law Office, Wellington for the Respondent