IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-630

UNDER	The Arbitration Act 1996
IN THE MATTER OF	An award dated 26 August 2003
BETWEEN	RAYMOND CHEUNG Applicant
AND	PLASTERTECH LIMITED Respondent

Hearing: On the papers

Counsel: PSJ Withnall for Applicant
W A Endean for Respondent

Judgment: 3 July 2009 at 4pm

I direct the Registrar to endorse this judgment with a delivery time of 4pm on the 3rd day of July 2009.

RESERVED JUDGMENT OF MACKENZIE J

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[1] This proceeding is an application for an order for refusal of recognition and enforcement of an arbitral award. It has been filed in response to an application by the present respondent to enforce the arbitral award, commenced as CIV-2009-485-494, pursuant to Part 26 of the High Court Rules. The rather cumbersome procedure, under which a party who wishes to oppose an application to enforce an arbitrator's award as a judgment of the Court must make a separate application, is prescribed by r 26.27.

[2] The opposition to the entry of the award as a judgment is based on several grounds. When the matter was first called before me in the Judge's Chambers list on

27 April 2009, Mr Withnall, counsel for the applicant, raised a jurisdictional question whether the substantive application should be heard in this Court or the District Court. With the agreement of counsel, I directed that the question be dealt with on the papers as a preliminary question, and fixed a timetable for written submissions. I then adjourned the proceeding to the Judge's Chambers list on 15 June 2009, in anticipation that I would have been able to give a judgment on the preliminary question before then. Unfortunately, although counsels' submissions were filed in accordance with the timetable, an administrative oversight meant that those were not submitted to me until 2 July 2009. That oversight is regretted.

[3] The enforcement of the arbitral award in this case is governed by art 35 of the First Schedule to the Arbitration Act 1996. That article, as amended in 2007, provides as follows:

> (1) An arbitral award, irrespective of the country in which it was made,—
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> (a) must be recognised as binding; and
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> (b) on application in writing to a Court, must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36.
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> (2) The party relying on an award or applying for its enforcement must supply—
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> (a) the duly authenticated original award or a duly certified copy of the award; and
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> (b) if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement; and
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> (c) if the award or agreement is not made in the English language, a duly certified translation into the English language of either or both documents.
>
> (3) For the purposes of this article, Court means—
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> (a) the High Court; or
>
> (b) a District Court in any case where the amount of any money made payable by the award does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases.

[4] The arbitral award in this case was for a sum of $28,000 plus penalty interest. That is well within the monetary jurisdiction of the District Court in civil cases.

[5] The essence of the jurisdiction question which I must address is whether, by reason of the definition of the term "Court" in art 35(3), jurisdiction of the District Court in respect of awards within its jurisdiction is exclusive, or whether, in such a case, both the High Court and the District Court have jurisdiction.

[6] Mr Withnall submits that the natural and ordinary meaning of these words is that the jurisdiction of the District Court in such a case is an exclusive jurisdiction. He submits that that conclusion is supported by the legislative history.

[7] Mr Endean, for Plastertech, submits that both the High Court and the District Court have jurisdiction to deal with such an application.

[8] Mr Withnall's submission requires that art 35(3) be read entirely disjunctively, so that only one paragraph can apply in any case. The point arises because the word 'or' can have a number of different meanings. It is a conjunction used to link alternatives. But the alternatives can be of different types. For example, they may be mutually exclusive (X or Y, but not both) or they may both be possibilities (X and/or Y). If the English language had been designed by a master planner, with input from a logician, then doubtless we would have different words to express these quite different possibilities. But it was not, and we do not. The ambiguities inherent in the word must be resolved from the context.

[9] Art 35(1)(b) provides that an award must be enforced "on application in writing to **a** Court". The use of the indefinite article suggests that there may be more than one Court available. The High Court is included within that term as defined in art 35(3). There is no exclusion of the High Court in any case. To render the alternatives in s 35(3) mutually exclusive, it would be necessary to read words of limitation in respect of the High Court, into art 35(3)(a). So, on the plain words of art 35, the High Court is within the meaning of the term "a Court" in art 35(1)(b), in all cases. In a case where the award is within the monetary jurisdiction of the

District Court, paragraph (b) of art 35(3) will also apply, so that the District Court will also be within the term "a Court" for the purpose of art 31(1)(b).

[10] Because there are two Courts which, under art 35(3), fall within the term "a Court" under art 35(1)(b), the applicant has a choice as to the Court in which the application for entry of judgment is made. That choice may have costs consequences, but that is another matter.

[11] I consider that that interpretation accords with the purpose of the Act. Prior to the 2007 amendment, the High Court had exclusive jurisdiction in all cases. On Mr Withnall's interpretation, the effect of the 2007 amendment was to exclude the jurisdiction of the High Court in some cases. In the absence of words which clearly show that effect was intended, I do not consider that such a purpose is to be attributed to Parliament.

[12] It is relevant that the interpretation for which Mr Withnall contends would be inconsistent with the civil jurisdiction of the District Court. That jurisdiction is not an exclusive jurisdiction. Proceedings which fall within the jurisdiction of the District Court are also within the jurisdiction of the High Court. I would not readily attribute to Parliament an intention to create a different position for the enforcement of arbitral awards.

[13] For these reasons, the challenge to jurisdiction is rejected. I rule that this Court does have jurisdiction to entertain both the substantive application for entry of the award as a judgment, and this proceeding seeking refusal of that course.

[14] This proceeding has been adjourned to the Judge's Chambers list for 13 July 2009. Under r 26.27(4)(d) this proceeding must be determined at the same time as Plastertech's application to enforce the award. I therefore direct that CIV-2009-485-494 also be listed in the Judge's Chambers list on 13 July 2009.

[15] Because this application was dealt with on the papers without an oral hearing, and because this judgment deals with only one aspect of the application, I consider that the appropriate course is for costs on the present matter to be reserved.

"A D MacKenzie J"

Solicitors: Paul Cheng & Co, and PSJ Withnall, Terrace Chambers, Wellington, for Applicant
Dawsons, Auckland, for Respondent