IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CL No.17/98

IN THE MATTER	of the Arbitration Act 1996
BETWEEN	**JUKEN NISSHO LIMITED** a duly incorporated company having its registered office at Auckland and carrying on the business of forestry management Appellant
A N D	**THE ATTORNEY-GENERAL** Respondent
Hearing:	14 August 1998
Counsel:	D A R Williams QC for Appellant M T Parker and Ms M L T Townsley for Respondent
Judgment:	25th. August 1998

JUDGMENT OF SMELLIE J

Solicitors for the Appellant:	Hesketh Henry, DX CP 24017, Auckland
Solicitor for the Defendant:	Crown Solicitor, DX SP 20208, Wellington

Introduction

The appellant, Juken Nissho Limited ("JNL") has two applications before the Court both of which are opposed by the Attorney-General ("AG"). The first is an application under R.705(1)(c) for an extension of time for the bringing of an appeal. The second is the application for leave to appeal on a question of law pursuant to Article 5 (1) of the Second Schedule of the Arbitration Act 1996 which came into force on 1 July 1997. The awards concerned are those of Mr J P Larmer fixing certain tri-annual license fees for logging rights to Crown forests.

JNL was a month late in filing its application for leave to appeal and, of course, even if it gets an extension of time it still has to satisfy the requirements of Article 5. In particular, the prohibition in the second section of that Article which requires that the Court shall not grant leave unless it considers the question of law concerned could substantially affect the rights of one or other party.

Background

JNL is engaged in forestry management and is the licensee in respect of five Crown forestry licences ("CFLs") issued by the Crown pursuant to s.14 of the Crown Forest Assets Act 1989. Four of those licences, all of which are in common form, relate to the Aupouri, Otangaroa, Wharerata and Patunamu Forests.

Part III of the Crown Forest Assets Act deals with the return of Crown forest land to Maori ownership and compensation and, in particular, in Sections 35 and 36, sale of Crown forest land is made subject to Waitangi Tribunal recommendations and to potential final recommendations of the Tribunal which would require the return of the land to Maori ownership.

The consequence is that CFLs are issued subject to potential termination in the event that the Crown is obliged to return the land to Maori ownership. The licences, nonetheless, assure a tenure of 35 years with reviews of licence fees every three years. There are in all, ninety-eight licences issued under the Crown Forest Assets Act, five of them are held by JNL and another eighteen to twenty by Carter Holt Harvey. As we shall see shortly, Carter Holt Harvey has obtained leave under Article 5 (1) of the Second Schedule of the Arbitration Act to litigate the very point which JNL wishes to pursue. Effectively, therefore, some 25 percent of all CFLs involve licencees who wish to challenge arbitral awards on much the same grounds.

So far as JFL's four licences are concerned, however, the review of land values leading to increased licence fees for the three-year period ending 10 December 1993 was the subject of arbitration and an award by Mr Larmer as an umpire on 12th February 1998. I interpolate to say that the challenges being taken by Carter Holt Harvey actually relate to the 1996 review but the issue in each case is the same. Broadly the issue is whether or not Part III of the Crown Forest Assets Act impacts on the value of the land to effect a diminution. That, of course,

is significant because the Act fixes the licence fee at 7 percent of the land value in each case.

The Extension of Time Application

This application is brought pursuant to R.705(1) of the High Court Rules which prescribes that the Court may extend the time prescribed for appeal in various circumstances including:

"... if the enactment conferring the right of appeal -
(a)...
(b) ...
(c) *prescribes a longer period of time than that prescribed by Rule 704."*

Rule 704 prescribes a period of one month.

The provisions of Article 5 (8) refer back to Article 34 (3) and (4) of the First Schedule of the Arbitration Act 1996 which fixed a three-month period. As a consequence the jurisdiction exists for the Court to grant the extension should it see fit to exercise its discretion.

There is no decided authority which sets out specifically the factors which go to the exercise of the Court's discretion under R.705(1)(c) but both counsel submitted that although unfettered, the discretion requires the consideration of overall justice and cases such as ***Brown v Chow Mein Fashions Limited*** (1993) 7 PRNZ 43, indicate that the general factors to be considered are as follows:

- When and under what circumstances was the decision to appeal taken?
- The extent of the delay.
- Whether the delay is capable of a satisfactory explanation.
- Whether prejudice will be suffered by other parties if time is extended.
- The strength of the appeal and any other relevant circumstances."

In **McGechan** the commentary to the Rule in relation to paragraph (1)(c) observes that "*it is not easy to see why by reason simply of such longer period, the power to extend time still further should be available*". The observation is understandable but the Rule is clear and I have no doubt the jurisdiction to extend available.

The delay was only for one month so the duration was not extensive. The solicitor for JNL has deposed in his affidavit and Mr Parker properly accepted, that he was misled by certain seminar material provided by the New Zealand Law Society to the effect that no time limit is set in the Arbitration Act or its Schedules in relation to applications for leave to appeal.

The thrust of Mr Parker's argument in opposition to the granting of an extension of time related to alleged prejudice to the Crown. Again, with proper objectivity, Mr Parker acknowledged, however, that the prejudice was not so great as to be insurmountable. Clearly if an extension is granted and leave to appeal is then obtained it will be some time before the parties know whether or not the award of Mr Larmer dealing with the 1993 review is to stand. The result is that the 1996

review which is now overdue cannot proceed. The Crown's revenue flow from these licences which, via a trust, are used to fund applications before the Waitangi Tribunal, is therefore affected by uncertainty and the necessity to plan for potential adjustments. One can appreciate the inconvenience and indeed frustation caused, but the parties are locked into a running account relationship for approximately another thirty years. Accordingly any adjustments that have to be made as a result of a successful challenge to Mr Larmer's award should be capable of administrative correction without undue disruption.

I am unable to see, therefore, that the prejudice to the Crown would be sufficient to justify a refusal of an extension if it is otherwise warranted.

On the other hand, as we shall see in more detail when I move on to consider whether or not leave should be granted, the prejudice to JNL if an extension is not granted, could be considerable.

So far as the strength of the appeal is concerned that, in the circumstances of these applications, is not an appropriate topic for me to comment upon in detail. But it is also an issue on the question of whether or not leave should be granted and the observations I make later in the judgment on that topic also apply here.

In all the circumstances the appellants have shown adequate grounds for an extension and the same is granted. It is perhaps as well to observe, however, that the error in the New Zealand Law Society information which tripped up JNL's

solicitor has now been corrected. In future those advising on applications for leave on points of law, pursuant to Article 5 of the Second Schedule of the Arbitration Act 1996, should not assume the accommodation extended to the appellants on this occasion.

Leave to Appeal

The leave available under Article 5 of the Second Schedule of the 1996 Arbitration Act is restricted to questions of law. There are three circumstances under which such appeals can be advanced. We are concerned only with the third, which requires the leave of the High Court. As earlier indicated, that leave is not to be granted unless the question of law involved could substantially affect the rights of one of the parties. Here, as I have indicated when considering the question of an extension of time the rights, particularly of JNL, will be substantially affected if Mr Larmer's award stands unchallenged. At its highest the prejudice could be of the order of $1.25m for the three-year period involved. Mr Parker pointed out that that calculation was based upon an acceptance of all the propositions advanced by JNL's valuer during the arbitration and that in reality, even if an appeal is successful, a rather less dramatic result can be anticipated. That may well be so, but I cannot assess the prejudice at this stage any more precisely than to recognise it as substantial.

The matter does not rest there, however. Both counsel recognised that the 1996 Act incorporating as it does the Model Law on International Commercial

Arbitration as adopted by the United Nations, seeks to emphasise the permanency of arbitral awards and diminish significantly the circumstances pursuant to which they can be challenged. Indeed the Second Schedule of the Act which opens the door to an appeal here relates only to domestic arbitrations and is a relaxation of the otherwise more restrictive provisions of the international code.

General guidance on the granting of leave was provided by the House of Lords in ***Pioneer Shipping Limited v BTP Tioxide (Nema)*** [1982] AC 724, and ***Antaios Cia Naviera SA v Salen Rederierna AB*** [1984] 3 All ER 229. The principles to be discerned from those cases have been summarised by the learned authors of **Mustill and Boyd : The Law and Practice of Commercial Arbitration in England**, 2nd Ed 1989, pgs 605-608.

In essence the authors suggest that the presumption in favour of the arbitral award depends on several factors. Among the most important, the utility of the decision. If it relates to a "*one-off*" contract then leave is unlikely to be granted. At the other extreme, appeals on questions of interpretation in contracts in general use will be more readily given leave provided there is a real possibility of error.

What have come to be known as the ***Nema*** guidelines are not necessarily appropriate without some qualification, however, to rent or licence fee reviews. The refinement required for cases such as this were spelt out by Browne-Wilkinson V.C. (as he then was) in ***Lucas Industries PLC v Welsh Development Agency***

[1986] 1 Ch. 500. On pg 503, having referred to the ***Nema*** and ***Antaios*** cases, the Judge said between lines D and E:

> *"Difficulty has been experienced in determining the extent to which those guidelines are applicable to appeals from arbitrators under rent review clauses. It is for that reason that in this case I have, with some trepidation, decided to give my reasons, a practice which Lord Diplock in* ***The Antaios*** *characterised at pp.205-206 as not "normally" desirable for a "commercial" judge to adopt."*

The judgment then goes on to recognise the reforms that are inherent in the enactment into domestic law of the international model and the specific rules that have grown up around them. Dealing with the application of those rules to rent reviews, however, at pg 504 between lines A and C, the judgment reads:

> *"Thirdly (and to my mind the most important) save in the case of the last review, the proper legal effect of a rent review clause will be material on future reviews between the same parties under the same lease. Thus in the present case exactly the same point will arise between these parties (or their successors in title) on the reviews which will have to take place in the tenth, fifteenth and twentieth years of the term. There are strong dicta which suggest that the decision by the arbitrator on this point of law will constitute an issue estoppel which will prevent a different arbitrator taking a different view of the point of law on future reviews: see per Diplock L.J. in* ***Fidelitas Shipping Co. Ltd. v VIO Exportchleg*** *[1966] 1 Q.B.630,643."*

The Vice Chancellor then goes on to express the view that the House of Lords guidelines are not capable of direct application to arbitrations on rent review clauses and proceeds at line E to say:

> *"What then should be the correct approach? All that the House of Lords has said about the need to avoid delay and expense in commercial arbitrations is applicable to rent review arbitrations, although possibly to a lesser extent. Accordingly the need to avoid appeals on over ingenious points of law which have no real prospect of success is equally applicable to arbitrations on rent review clauses. But, in my judgment, in cases where the same point of law will regulate future rent reviews a lower standard than strong prima facie case is appropriate. If, after hearing*

> *submissions, I am left in real doubt whether the arbitrator was right in law, it seems to me appropriate to grant leave so that the law regulating the future relationship of the parties can be authoritatively determined by the court."* (emphasis added)

For the sake of completeness I also mention that towards the end of the judgment the Vice Chancellor adopts the indication given by the House of Lords that when leave is to be granted, the Judge granting it should not give reasons or discuss the merits of the appeal that is to be taken. At line H on pg 504 the judgment reads:

> *"Following the House of Lords guidelines I do not think it appropriate to give my reasons: to do so would merely embarrass the judge who will have to determine the question after full argument."*

Clearly I am not faced here with a "*one-off*" situation. The point is relevant to four of JNL's five licences and to 25 percent of all licences if one includes the Carter Holt Harvey appeal.

Furthermore, looking at JNL's position in isolation it seems probable that if leave to appeal is not granted, because of issue estoppel, Mr Larmer's conclusion which, as I understand it, substantially excludes Part III of the Crown Forest Assets Act 1987 from consideration in relation to the land value upon which the licence fees are based, will apply throughout the rest of the thirty-odd years of the term and beyond if there is any extension.

A further relevant consideration which is unique to this case is the fact that in a judgment delivered on 11th June last, (CL9/98 ***Carter Holt Harvey Forests Limited v Attorney-General***), Williams J granted leave to Carter Holt Harvey to appeal Mr Larmer's decision in respect of the 1996 licence fees as they relate to twenty or so licences. It appears that in respect of those license fees, Mr Larmer reached his decision in exactly the same way and on the same legal advice which led to the decisions in respect of the four licences which JNL is concerned with in this case. Properly, it seems, in view of the guidelines laid down by the House of Lords and followed by Browne-Wilkinson V.C. in ***Lucas***, Williams J did not give reasons when ruling that the application succeeded.

I was advised from the Bar that Williams J's judgment is subject to appeal although it appears that there may be some procedural difficulties so far as the Crown is concerned in taking such an appeal. Be that as it may, the judgment stands at present, and there can be no assumption that it will be over-turned. The consequence is that if leave is not granted to JNL, there is the potential for Carter Holt Harvey to succeed and thereafter to have its licence fees assessed on a much more favourable basis than applies to JNL, despite the fact that all Crown forestry licences issued under s.14 of the Crown Forest Assets Act are in identical terms. Such a result would bring the arbitral process, and indeed the common law into disrepute and is clearly a contingency to be avoided if the law will properly allow.

Mr Parker, while recognising that it is inappropriate for a judge hearing an application for leave to appeal to record his or her reasons if leave is granted, nonetheless urged upon me that the Crown was entitled to have the Court look carefully and seriously at the merits of the case before making its decision.

The four points of law set out in the Schedule to JNL's application for leave to appeal are recorded as follows:

> *"1. That Mr J P Larmer [the Umpire] was in error in adopting a distinction between the definition of "Land Value" in cl 1.1.6 of the Crown Forest Licenses [CFLs] under consideration and the definition of that term which appears in s2 of the Valuation of Land Act 1951 providing as a reason for that distinction that the CFLs refer to the value being "in relation to the Land" as defined whereas the Act requires the "owner's estate or interest" in the Land to be assessed.*
>
> *2. That the Umpire was in error in failing to take into account the restraint on sale of the Land in the CFLs that is imposed by the provisions contained in s35 of the Crown Forest Assets Act 1989.*
>
> *3. That the Umpire was in error in relying on the decision of the Privy Council in Gollan v Randwick Municipal Council 1961 [AC 82] in that Gollan was distinguished in Mangatu Corporation v Valuer-General [1996] 2 NZLR 683 in the decision of Barker J. and that decision was upheld by the Court of Appeal, see Valuer-General v Mangatu Inc [1997] 3 NZLR 641.*
>
> *4. That as a consequence of point 3 above, the Umpire was in error in construing the terms of cl 1.1.16 in the CFLs in that he did not adjust the freehold equivalent values of the Land in the CFLs taking into account the terms and conditions of the CFLs from the licensor's perspective which was a requirement of cl 1.1.6 of the CFLs"*

Those four points were, as I understood it, accepted by the Crown as encapsulating the issues of law involved. In discharge of my obligation to consider the merits of the appeal I have considered them carefully. In the end, however,

adopting the phraseology of the Vice-Chancellor in ***Lucas*** *"I am left in real doubt whether the arbitrator was right in law"* in the decision he made. Therefore, it is appropriate to grant leave.

Conditions upon which Leave is Granted

Article 5 (3) of the Second Schedule of the Arbitration Act 1996 provides that leave may be granted under subclause 1(c) on such conditions as the Court sees fit.

Clearly the Crown should not be obliged to bear the cost associated with that part of this matter which relates to the application for an extension of time. I award the Crown $1,000 in that regard which is to be paid promptly.

During his submissions, Mr Williams submitted that an appropriate course if leave was granted would be to direct that JNL's appeals should be heard with those already in train by Carter Holt Harvey. The advantages resulting from that approach in terms of uniformity, use of judicial resources, and costs to the parties are obvious and I so direct.

As a third condition I require JNL to apply for priority for the hearing of these appeals. I make that a condition of leave so that the prejudice to the Crown can be minimised.

Otherwise, however, I reserve costs on this matter to be fixed according to the outcome of the appeal. For the benefit of the Judge who hears the appeal, however, I indicate that the application for leave would warrant an award of costs of $2,500 plus Court filing fees and reasonable disbursements as fixed by the Registrar to the successful party.

Robert Smellie J.