Forest Holdings Ltd v Mangatu Blocks Incorporation

-by Sarah Redding

The High Court recently considered an appeal against an arbitral award including the ability to adduce further evidence on appeal. In his decision to dismiss the application for leave to appeal, Heath J confirmed the Court's reluctance to interfere in the arbitration process where parties have contractually agreed to arbitrate.

Background

Mangatu Blocks Incorporation (**Mangatu**) owns indigenous forestry land in the Gisborne area. In 2003, Mangatu and Forest Holdings Limited (**Forest Holdings**) entered into a contract under which Mangatu granted Forest Holdings a registered Forestry Right to manage, protect, harvest and carry away and otherwise utilise trees, timber and logs growing or to be grown on the forest land[1]. The **Forestry Right** was granted for a maximum duration of 50 years, provided Forest Holdings continued to comply with the agreed terms of contract.

Forest Holdings began operating in accordance with the Forestry Right and continued operations for approximately 10 years. In July 2013, Mangatu sent a letter to Forest Holdings purporting to cancel the Forestry Right "with immediate effect" alleging breaches of contract. Forest Holdings initially opposed the termination questioning its validity, however in August 2013 Forest Holdings accepted the repudiation and elected to cancel the Forestry Right.[2].

Forest Holdings sought relief for cancellation of the Forestry Right, claiming damages in the sum of what they purported the market value of the Forestry Right was at the date of repudiation – some $10.75 million dollars. Mangatu denied its termination was unlawful or in the alternative, that Forest Holdings was only entitled to nominal damages. The parties entered arbitration to resolve the dispute.

The arbitrator concluded that Mangatu had wrongfully terminated the Forestry Right. The arbitrator considered Mangatu's cancellation was premature and that Forest Holdings should instead have been granted 120 days to remedy the alleged breaches before termination could become effective. However, the arbitrator confirmed that Mangatu's lack of notice did not affect Forest Holding's ability to claim minimal damages only. In reaching this conclusion, the arbitrator determined Forest Holdings would not have been able to remedy the breaches within 120 days. The arbitrator's approach to assessing Forest Holding's damages claim for capital loss centered on two issues: first, that it would be necessary to determine what was a real possibility to happen at the date of repudiation, and second, quantum.

Forest Holdings appealed against the arbitrator's damages decision, and was successful in the High Court. The High Court allowed the appeal against the arbitrator's damages award, holding that the arbitrator was wrong to say that Forest Holdings was unlikely to recover other than nominal damages on its claim for capital loss[3]. Heath J remitted all questions of damages back to the arbitrator.

Mangatu then sought leave to appeal to the Court of Appeal against that judgment, on grounds including that the judgment failed to identify any error of law in the damages award, and wrongfully concluded that the arbitrator had pre-determined damages. Mangatu also sought permission to adduce further evidence relating to the arbitrator's actions following the previous damages appeal decision, in support of its application for leave to appeal.

Decision

In reaching his decision to dismiss the application for appeal, Heath J considered the legal principles in relation to granting leave to appeal. Given arbitration is a consensual process designed to enable parties to obtain a binding decision on a dispute[4], Heath J observeded that generally speaking, no challenge may be made to an arbitrator's factual findings, and that there are limited circumstances in which arbitral awards may be challenged in the High Court.

His Honour went on to reiterate that Forest Holdings' first appeal was heard following the grant of leave to appeal on a question of law under clause 5(1)(c) of the Second Schedule to the Arbitration Act 1996 (**Act**). Further, that Clause 5(5) of the Second Schedule of the Act confers jurisdiction on the High Court to determine whether leave should be granted to appeal to the Court of Appeal.

Heath J considered the Court of Appeal's approach to the application of clause 5(5) in Cooper v Symes (No 2).[5] citing Randerson J's summary at para [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."*

In determining whether there was any need for him to consider the additional evidence proposed by Mangatu to determine whether there was a qualifying question of law fit for submission to the Court of Appeal for decision[6], His Honour referred to Wylie J's discussion of jurisdiction to admit further evidence in Fresh Direct Ltd v JM Batten & Associates in which Wylie J admitted some evidence relevant to the importance of the question arising on the application for leave to appeal, but ruled other evidence inadmissible:

> *[11] Supporting affidavits should, however, be confined to the application which is before the Court. They may be necessary to explain why leave should be given. They should not, however, seek to introduce fresh evidence which could and should have been before the Associate Judge at the first hearing and this Court on the review.*

Heath J ultimately dismissed Mangatu's application to adduce further evidence. His Honour concluded that there was no additional evidence proposed by Mangatu relevant to his decision which fell within the scope of the circumstances envisaged by Wylie J in *Fresh Direct Ltd.*

Heath J dismissed the appeal as he was not satisfied it met the required threshold. His Honour acknowledged the preliminary determination by the arbitrator as to methodology used in determining damages, but found there was a *factual vacuum* which meant important facts remain to be determined, and that the appropriate forum for determination was by the arbitrator. Remaining facts for determination included whether Mangatu would have issued a notice to terminate at the same time, if it had proceeded on the footing that immediate termination was impossible, and what steps might have been taken in the period between any notice being given and its expiry, to determine whether, and if so, to what extent, Forest Holdings has suffered loss.

Comment

The outcome of the consequent arbitral decision remains to be seen, and may only become public if either party appeals the arbitrator's award. However, Heath J's referral of the damages quantum back to the arbitrator is to be welcomed as it demonstrates the Court's support for arbitration and its reluctance to interfere in the arbitration process where parties have contractually agreed to pursue arbitration in the event of a dispute arising.

References

[1] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 448 at [5].

[2] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 448 at [10].

[3] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 448, at para [51].

[4] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 1174 at [5].

[5] *Cooper v Symes* (No 2) (2001) 15 PRNZ 166 (HC).

[6] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 1174 at [11].

[7] *Fresh Direct Ltd v JM Batten & Associates* HC Auckland CIV-2008-404-4757, 3 December 2009, at [11].