IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-001809
[2023] NZHC 518

BETWEEN	QST LIMITED Plaintiff
AND	MOBIL OIL NZ LIMITED Defendant

Hearing: 15 March 2023

Counsel: L McEntegart and AJ Steel for Plaintiff
JF Anderson KC and SJ Shanks for Defendant

Judgment: 21 March 2023

JUDGMENT OF DOWNS J

This judgment was delivered by me on Tuesday, 21 March 2023 at 11.30 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Thompson Blackie Biddles, Auckland.
Russell McVeagh, Auckland.
JF Anderson KC, Auckland.

The proposed appeal

[1] QST Ltd[1] and Mobil Oil NZ Ltd[2] dispute the rent payable by Mobil to QST in the wake of a review from 3 April 2021. QST contends clause 3.3 of the sublease is applicable, whereas Mobil contends clause 3.2 is applicable. As required by the sublease, the parties submitted their dispute to arbitration. They agreed the Hon Rodney Hansen KC be appointed by the Arbitral Tribunal[3] to consider which clause prevailed. He concluded clause 3.2 did, and the Tribunal accepted his opinion. QST seeks permission to appeal the issue to this Court.[4]

[2] In *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, a Full Court of the Court of Appeal emphasised the desirability of a "short judgment" in this context.[5] This judgment respects that observation and adopts the considerations identified in that case. But first, a little more about the sublease, which concerns land at Unit A, 8 Quay Street, Auckland, and the parties' competing contentions.

The sublease and competing contentions

[3] The critical clause is clause 3, which reads:

> **3 Rent Reviews**
>
> 3.1 Subject to clauses 3.2, 3.3 and 3.4, the rental payable during the term of this Sublease may be subject to review by the Sublessor on the Review Dates set out in the Schedule.
>
> 3.2 Subject to clauses 3.3 and 3.4, the rental payable may be reviewed by the Sublessor to the higher of:
>
> (a) the current market rental; or
>
> (b) the rental incorporating an increase in the rent applicable at the date of commencement or the last preceding review date (whichever is appropriate) equal to an increase based on the change expressed as a percentage of the All Group Section of the Consumer Price Index as notified in the Monthly Abstract of Statistics (or other like index in the event of such index not being made available) published by the Department of Statistics commencing on the last quarterly period

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1 QST.
2 Mobil.
3 The Tribunal.
4 By clause 5(1)(c) of Schedule 2 to the Arbitration Act 1996.
5 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at [59].

> immediately preceding the last preceding review date and ending on the last quarterly period immediately preceding the current rent review date.
>
> 3.3 Subject to clause 3.4, on the 15th anniversary of the Headlease commencement date and each rent review date thereafter, the rental payable may be reviewed by the Sublessor to the higher of:
>
> (a) the rental as determined pursuant to clause 3.2; and
>
> (b) 9% per annum of the current freehold market undeveloped block value of the Land. For rent review purposes, the area of the Land shall be deemed to be 2,696m^2.
>
> 3.4 In no circumstances shall the rental payable from any Review Date be less than the rental payable during the 12 months immediately preceding the appropriate Review Date.

[4] Clause 1.1.4 of the sublease and an associated schedule define "Review Date" as "Each succeeding *third* anniversary of the Commencement Date".[6] The Commencement Date is 3 April 1997.

[5] The headlease is also relevant. Its Commencement Date is 2 August 1996. Clause 3.3 of it provides:[7]

> The Lessor may review the Rental for the time being payable under the Lease, such reviewed rent to be 6% per annum of the current freehold market undeveloped, block value of the Land and such reviews to be carried out on the 15th anniversary of the Commencement Date and, every *seven* years thereafter in the following manner …

[6] As observed, QST contends clause 3.3 of the sublease is applicable, whereas Mobil contends clause 3.2 is applicable. Their respective contentions are helpfully summarised by the Tribunal:[8]

> Mobil contends the rent review as at 3 April 2021, being a review on a defined "Review Date" under the Sublease, is to be undertaken in accordance with the rent review mechanism in clause 3.2 of the Sublease. Accordingly, the annual rent to apply from 3 April 2021 is the higher of the "current market rental" of the land or a rental determined by multiplying the passing rent by the CPI formula in clause 3.2(b). Mobil says the clause 3.3 rent review mechanism applies to any rent review undertaken by QST on each of the seven-yearly rent review dates under the Headlease, the next of which is 2 August 2025, but has no part to play in reviewing the rent as at 3 April 2021.

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6 Emphasis added.
7 Emphasis added.
8 Interim award as to preliminary question, 12 July 2022, at paras 9 and 10.

> QST's position is that clause 3.3 of the Sublease applies to the 3 April 2021 review. It says that from 2 August 2011 (the 15th anniversary of the Commencement Date) rent under the Sublease became amenable to review under clause 3.3 which enlarged the methodological options for three yearly reviews to provide for the adoption of whichever of the two methods set out in clause 3.2 (via clause 3.3(a)) and clause 3.3(b) produced the higher rental.

Analysis

A question of law?

[7] An appeal against an arbitral award is permissible only if a question of law arises, determination of which could substantially affect the rights of one or more of the parties.[9] It is common ground the jurisdictional threshold is met for reasons that are self-evident.

The strength of the challenge/nature of the point of law

[8] This consideration is the "most important", albeit the assessment is "preliminary" in nature.[10]

[9] QST's contention is expanded in its submissions:

> The plain and ordinary meaning of the words "*each rent review date thereafter*" refer, in the scheme of clause 3, not to Headlease review dates, but to review dates in the Sublease. The clause enabling rent reviews under the Sublease, on each of the Review Dates, is clause 3.1. Clauses 3.2 and 3.3 then go on to provide two interdependent bases upon which such reviews may be carried out. Clause 3.2 provides for the rent to be reviewed every 3 years to current market rental or CPI (while not expressed in the clause 3.2 to be every 3 years it could not be otherwise given the terms of clause 3.1 and the Schedule). Clause 3.3 plays no part in the rent review scheme until QST becomes liable for a rent above peppercorn level (the 15th anniversary of the Headlease), on which date and on every 3 yearly Sublease review date thereafter the rent is reviewed to the higher of that resulting from the clause 3.2 method (via clause 3.3(a)) and clause 3.3(b). Both such bases of review are then subject to the ratchet contained in clause 3.4. Clauses 3.2 and 3.3 differ only in their temporal application – the former is available on every 3 yearly review date over the course of the Sublease but is the exclusive point of reference until 2 August 2011, at which time clause 3.3(b), previously unavailable, becomes an available method for review, but only employed if it produces a rent higher on each succeeding third anniversary than that produced under the continuing clause 3.2 method (via clause 3.3(a)). The text of clause 3.3 admits, accordingly, of no real ambiguity when construed in the context of the language and scheme of clause 3 as a whole.

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9 Arbitration Act 1996, cl 5(1)(c) of sch 2.

10 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 5, at [54].

[10] The contention attracts difficulty. First, when referring to three-yearly rent reviews based on the commencement date of the sublease, clause 3 uses the capitalised term "Review Date(s)" in clauses 3.1 and 3.4, in turn linking to clause 1.1.4 of the sublease and an associated schedule of terms. Second, when referring to seven-yearly rent reviews based on the commencement date of the headlease, or, in omnibus fashion, to both types of review, the sublease uses non-capitalised terms "rent review date" or "review date" in clauses 3.2(b) and 3.3. Third, clause 3 therefore appears to contemplate two distinct *types* of rent review: three-yearly reviews from the sublease's commencement date employing the methodology in clause 3.2; and seven-yearly reviews from the headlease's commencement date employing the methodology in clause 3.3. Unsurprisingly, that was the conclusion of the Tribunal.

[11] QST argues the sublease capitalises terms in "random fashion", so this reasoning is inapt. But, even if this were true of the sublease beyond clause 3, about which I express no view, it does not follow clause 3 should be read as QST contends. The distinctions apparently drawn by clause 3 present as logical and intentional. Therein lies the point.

[12] QST also argues the opening phrase of clause 3.3—"Subject to clause 3.4"—tells against provision of seven-yearly rent reviews. The Tribunal addressed this argument:[11]

> … But we see those words as intended to ensure that clause 3.4 applies for the purpose of determining rental under clause 3.3(a). Arguably that outcome could have been achieved without making clause 3.3 subject to clause 3.4 but the incorporation of the clause 3.2 mechanism into clause 3.3 made it sensible to do so and to put the position beyond doubt. On the other hand, the interpretation urged on us on behalf of QST would have the opening words of clause 3.3 overriding the ordinary and natural meaning of the words which follow.

[13] The Tribunal considered QST's analysis "wholly uncommercial and inconsistent with business common sense", as (a) a rental rate of nine percent per annum (see clause 3.3(b)) is "very high by any standards and certainly by reference to the rental rate applicable to the Headlease"; and (b) QST would "undoubtedly

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[11] Interim award as to preliminary question, 12 July 2022, at para 22.

receive a windfall benefit if it were able to secure a rent review based on 9% every three years while subject itself to reviews based on 6% every seven years".[12]

[14] QST contends these observations are unsupported by evidence, and unwarranted, particularly in light of the rent actually paid by Mobil to QST. The point, however, is that the Tribunal was entitled to consider commercial imperatives when construing the sublease, including any apparent benefit to QST given differences between headlease and sublease.

[15] QST also contends the sublease could not have intended to impose administrative burdens and potentially "anomalous outcomes" associated with two different types of rent review. On behalf of QST, Mr McEntegart offers these examples:

> - In the space of 3 years from 3 April 2018 there could be 3 clause 3.2 reviews (or two clause 3.2 reviews and one clause 3.3(b) review) – one under the first concurrent review (4.10(a)) on 3 April 2018, a second four months later on 2 August 2018 under the second concurrent review (4.10(b)), and a third on 3 April 2021 under the first concurrent review.
>
> - Similarly, over the 3 years from 3 April 2024 there would be three reviews (at least two pursuant to clause 3.2 but potentially all three under that formula) – one under the first concurrent review on 3 April 2024, a second on 2 August 2025 under the second concurrent review, and a third on 3 April 2027 under the first concurrent review.
>
> - The same pattern would occur between 3 April 2030 and 3 April 2033 (again two pursuant to clause 3.2 but potentially all three), with a first concurrent review on 3 April 2030, a second concurrent review on 2 August 2032, and a first concurrent review on 3 April 2033.
>
> - From 3 April 2018 to the last review (being a three yearly review first concurrent review) on 3 April 2036, there would be 10 reviews – one on average every 21 months.

[16] The likely answer is that offered by Ms Anderson KC on behalf of Mobil: this is "not … reason to override the natural and ordinary meaning of the words of clause 3.3", particularly as QST has "the discretion whether it wishes to invoke a review on any particular rent review date".

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[12] Interim award as to preliminary question, 12 July 2022, at para 23.

Nature of the point of law

[17] The point could, of course, arise again between the parties with each rent review. That arguably supports permission. As against this, the point is confined to the parties; no issue of general precedential value arises.

Summary in relation to this consideration

[18] I summarise by making explicit what is hitherto implicit: QST's case does not reach the standard of "strongly arguable", still less "very strongly arguable", standards endorsed by the Court of Appeal in *Gold and Resource Developments*.[13] Approached another way, the Tribunal's decision appears correct for the reasons it gave. Again, no issue of general precedential value arises.

How the question arose before the Arbitrator

[19] The question addressed by the Tribunal, and which QST wishes the Court to hear, "was the very point of the arbitration".[14]

[20] QST and Mobil agreed to submit their competing contentions to the Tribunal, and to the Tribunal appointing an expert to address them. Each party identified Mr Hansen KC as a suitable expert.[15] Each party offered full argument, including written submissions, to him. The Tribunal accepted his opinion.

The qualifications of the Arbitrator

[21] The Tribunal comprised three senior valuers. Mr Hansen is a retired High Court Judge with considerable commercial experience.

The importance of the dispute to the parties and amount of money involved

[22] The dispute is significant to both parties. Much money is involved.

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13 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 5, at [54](1).
14 At [54](2).
15 On a list submitted by each.

Delay in going through the courts

[23] The rent review concerns a period beginning 3 April 2021. QST contends it suffers most from delay, and it is prepared for more in what it perceives to be the interests of justice.

[24] I do not agree QST's position occupies the field. The dispute is almost two years old. There is a public interest in the prompt resolution of disputes, particularly in a court-system afflicted by a pandemic-related backlog.

Whether the contract provides for the arbitral award to be final and binding

[25] The sublease does not provide for the arbitral award to be final and binding. QST contends "lack of agreement to that effect" favours permission being granted.

[26] I am not sure this is so, as against merely neutral. *Gold and Resource Developments* says when "there is such a clause", this is "an important consideration".[16] This is not the same as saying the absence of a clause favours permission.

Conclusion

[27] Jurisdiction exists for an appeal, and two considerations favour one: the importance of the dispute to the parties and amount of money involved. However, with the exception of a neutral consideration,[17] all remaining considerations tell against an appeal, including the most important: strength of the challenge. QST's case is not strongly arguable. Consequently, its proposed appeal has little prospect of success. No issue of general precedential value arises. The question QST wishes to litigate was "the very point of the arbitration" and determined by a former High Court Judge.[18] Furthermore, the case is already just shy of two years old. The mix weighs heavily against permission, which I decline.

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16 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 5, at [54](7).
17 See [26].
18 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 5, at [54](2).

Result

[28] The application is dismissed.

Costs

[29] There is no obvious reason why Mobil should not have costs. If agreement is not reached, the parties may file and serve memoranda of not more than five pages:

(a) QST on or before **18 April 2023**.

(b) Mobil on or before **2 May 2023**.

……..

Downs J