IN THE SUPREME COURT OF NEW ZEALAND

SC 77/2015
[2015] NZSC 150

BETWEEN	KYBURN INVESTMENTS LIMITED Applicant
AND	BECA CORPORATE HOLDINGS LIMITED Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: D J Goddard QC for Applicant
D J Neutze for Respondent

Judgment: 21 October 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent costs of $2,500.

REASONS

[1] The proposed appeal concerns a rental arbitration in respect of a building in Wellington owned by Kyburn Investments Ltd (Kyburn) and leased by Beca Corporate Holdings Ltd (Beca). The arbitrator was a valuer. It had been agreed that he would inspect the building prior to the hearing and that, to do so, he would contact a representative of Beca to be nominated by Beca's lawyers. In fact no such nomination was made. So the arbitrator made contact with Mr Michael Kerr who was Beca's regional manager and who was to give evidence at the arbitral hearing. The arbitrator made a brief visit (of around 20 minutes) to the building and he inspected the building while accompanied by Mr Kerr. On the evidence, such discussion as they had about the building was limited and not of particular materiality to what was in issue in the arbitration.

[2] Two preliminary points should be noted. First, it was implicit in the inspection arrangements agreed to by the parties that the arbitrator would be accompanied by a Beca person during the inspection. This is because it would have been unrealistic to expect the arbitrator to walk through the building unaccompanied. The second point is that it was not necessary for Mr Kerr to be the person who accompanied the arbitrator.

[3] Before the award was released, Kyburn raised its view that the inspection had been conducted by the arbitrator in breach of natural justice. The arbitrator dismissed a challenge to the continuation of the arbitration and duly produced an award which Kyburn then challenged unsuccessfully in the High Court[1] and Court of Appeal.[2] The Court of Appeal held that the arbitrator had been in breach of arts 18, 24(2) and 24(3) of the first schedule to the Arbitration Act 1996 and that the award was susceptible to challenge under art 34(2)(b)(ii).[3] As counsel for the applicant has noted, art 34(2)(a)(iv) could also have been relied on. The Court, however, declined, in the exercise of its discretion to set-aside the award.[4]

[4] It was not in dispute that breach of natural justice, even where serious (as the High Court and Court of Appeal thought was the case here) does not of itself require an award to be set-aside. The Court has to determine whether or not the award should be upheld. The basis of the proposed appeal is the applicant's contention that where there is a breach of natural justice, the default position should be that the award should be set-aside with the discretion not to do so being merely residual in nature and reserved for what are said to be "the clearest of cases" where substantive justice is done despite the breach.

[5] While there may be cases where the approach taken by a reviewing court to relief may entail a matter of principle (such as whether setting-aside an award is the default position, leaving only a residual discretion to maintain the award), no such formula was adopted here. The Court of Appeal specifically did not adopt the view

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1 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2014] NZHC 249 (Simon France J) [*Kyburn* (HC)].

2 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] NZCA 290 (White, Fogarty and Dobson JJ).

3 At [29]–[40].

4 At [51].

that an award should be set-aside only if there has been demonstrable prejudice in terms of outcome to the party seeking relief.[5] Its conclusion that the "risk" associated in the breach of natural justice "did not … have any material effect on the outcome of the … arbitration"[6] was an affirmative finding on the facts that there was no adverse impact on the award. Simon France J in the High Court seems to have been broadly of the same view.[7]

[6] That conclusion was reached on a close examination of the award and the basis given for it.[8] The context of valuation for rental purposes was important in that assessment. The scope of the arbitration inquiry was relatively narrow and the considerations which bore on it were largely obvious and standard. On this close analysis of the facts, the Court of Appeal was affirmatively satisfied that no material impact followed from the irregularity. We see no point of public or general importance in the proposed appeal and no appearance of a miscarriage of justice.

[7] For these reasons, the application for leave to appeal is declined. The applicant is to pay the respondent costs of $2,500.

Solicitors:
Luke Cunningham Clere, Wellington for Applicant
Brookfields, Auckland for Respondent

5 At [47].
6 At [48].
7 *Kyburn* (HC), above n 1, at [46]–[47].
8 *Kyburn* (CA), above n 2, at [48].