IN THE SUPREME COURT OF NEW ZEALAND

SC 80/2008
[2009] NZSC 10

	BETWEEN	DIAGNOSTIC MEDLAB LTD Applicant
	AND	AUCKLAND DISTRICT HEALTH BOARD & ORS Respondents

Court: Blanchard, Tipping and Wilson JJ

Counsel: J E Hodder SC and A S Ross for Applicant
G M Illingworth QC and C P Browne for First Respondents
G P Curry and S S Cook for Second Respondent

Judgment: 12 February 2009

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the first respondents (jointly) and $2,500 to the second respondent.

REASONS

[1] The proposed appeal concerns the award of a monopoly contract by the several Auckland District Health Boards (the Boards) for communal laboratory services in the Auckland area. It challenges the Boards' decision to accept a tender from a newcomer, the second respondent Lab Tests Auckland Ltd, which had as one of its shareholders/directors a member of one of the Boards, Dr Bierre.

[2] There were essentially three heads of challenge to the decision:

(a) Procedural unfairness/lack of probity in the decision-making process, i.e an allegation of a conflict of interest on the part of Dr Bierre influencing the Boards' decision and an allegation of the use by Lab Tests of confidential information said to have been imparted by him.

(b) Failure to carry out legally required consultation with primary health organisations (PHOs).

(c) Unreasonableness/irrationality of the decision.

[3] The High Court[1] accepted the arguments of the previous (incumbent) contractor, the applicant Diagnostic Medlab Ltd, under the first two of these heads but rejected the unreasonableness/irrationality argument despite accepting that it should apply a "hard look" test. The Court of Appeal reversed the High Court's decision in favour of the applicant, rejecting all of its heads of argument. The applicant seeks to raise all of them again before this Court.

[4] The Court of Appeal[2] discussed the High Court Judge's approach to the questions of whether the decision of the Boards to enter into the contract was reviewable and as to the scope of any such review. In the reasons of the Appeal Court Judges different possible approaches are identified. If the choice of the correct approach had been determinative, this may well have been a case for leave. The facts as found by the Court of Appeal were, however, such that the outcome would be the same whatever approach to review is adopted.

[5] In relation to the asserted procedural unfairness or lack of probity in the decision-making process the Court of Appeal accepted that judicial review is available where an insider with significant information and a conflict of interest has used that information to disadvantage its rivals in connection with a tender process. But it considered that the High Court Judge had not given proper weight to the particular commercial context. It was of the view that the Boards could not be said to be in breach of public law obligations where they had followed statutory procedures concerning conflicts of interest or the use of inside information.

---

1 *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.
2 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385.

[6] The Court of Appeal then, nevertheless, carried out a careful and detailed review of the facts, concluding that whatever approach was taken to the legal issues the claim must fail. It accepted that in relation to an earlier time period criticism could fairly have been made of Dr Bierre's failure to disclose his conflict of interest in some of his dealings with the Auckland Board. But it found that at that time he did not have in mind anything similar to the tender in which he later became a participant. He became interested in that project only when he decided to put together a consortium in late November or early December 2005 to bid for the contract. The Court of Appeal found that Dr Bierre had no *relevant* conflict of interest before that time; and that soon afterwards, before any significant event occurred, he took leave of absence from the Board and suspended his Board participation until after the tender process was completed.

[7] Again differing from the High Court in its factual assessment, the Court of Appeal held that Dr Bierre had not misused confidential information. It doubted that the four items of information in question were in fact confidential so far as the Auckland Board was concerned but, assuming to the contrary, found there had been no misuse. The first two items were the Board's desire for open book accounting and its perception that Diagnostic Medlab was achieving super profits and was opposed to change. The Court of Appeal found that Diagnostic Medlab knew about both these matters. The third item was the desired level of savings on the part of the Boards. The Court of Appeal found that the Boards did not in fact have a settled view on the level of savings to be achieved and that Diagnostic Medlab knew that they were looking for savings. The final item was knowledge of the Boards' willingness to contemplate radical change in the level of services from the contractor in order to achieve those savings. The Court of Appeal held that Diagnostic Medlab's belief to the contrary was not a reasonable belief and that it had in fact been told of the Boards' desire for innovative solutions. The Court concluded that there had been no improper use of inside information and no informational disadvantage for Diagnostic Medlab.

[8] On the claim that the Boards failed to carry out consultation required by statute, the Court of Appeal said that the statutory obligation was to consult resident populations rather than PHOs, and that consultation was not required where the Boards' plan was to maintain existing service standards for the public. The Court's analysis of the facts led it to the view that it was not the intention of the Boards that these standards would be lowered. Again that conclusion was very much driven off the facts of the particular case. It may be arguable that the Boards could not assume, without first consulting the PHOs, that standards of service could be maintained if substantial cost savings were to be achieved. But, even so, it would first be necessary for Diagnostic Medlab to overcome the Court of Appeal's prior conclusion that the statute required consultation with the community generally, not with the PHOs in particular, and the argument for the applicant relating to that matter appears to us to be weak.

[9] In the case of unreasonableness/irrationality ground, even a close scrutiny failed to convince the High Court. The Court of Appeal, which also looked carefully at the facts, was in agreement.

[10] We have not been persuaded that any arguable question of public or general importance is raised which is likely to be determinative of the proposed appeal. Each aspect of the case ultimately turns on its own facts. The Court of Appeal has made no obvious error in its factual assessment. The criteria for leave have therefore not been met.

Solicitors:
Chapman Tripp, Auckland for Applicant
Wilson Harle, Auckland for First Respondents
Russell McVeagh, Auckland for Second Respondent