IN THE SUPREME COURT OF NEW ZEALAND

SC 55/2012
[2012] NZSC 88

BETWEEN	NEW ZEALAND DAIRY PROCESSING LTD Applicant
AND	SCHENKER (NZ) LTD Respondent

Court: McGrath, William Young and Chambers JJ

Counsel: P D Sills for Applicant
M D Arthur and J A McMillan for Respondent

Judgment: 25 October 2012

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $5,000 to the respondent, plus all reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

[1] Schenker (NZ) Ltd, the respondent, served a statutory demand on New Zealand Dairy Processing Ltd, the applicant. New Zealand Dairy applied to set aside the statutory demand under s 290 of the Companies Act 1993. The High Court dismissed that application,[1] a decision affirmed on appeal.[2] New Zealand Dairy has since paid the amount of the statutory demand.

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1 *New Zealand Dairy Processing Ltd v Schenker (NZ) Ltd* HC Auckland CIV-2011-404-5179, 15 December 2011.

2 *New Zealand Dairy Processing Ltd v Schenker (NZ) Ltd* [2012] NZCA 343, [2012] NZCCLR 28.

[2] New Zealand Dairy seeks to appeal. Its principal concern is not Schenker's win on its claim but rather a finding the Court of Appeal made as to the terms of a management agreement under which Mr Ogden's services were provided. New Zealand Dairy intends to sue Schenker for losses said to arise from Schenker's breaches of the management agreement. New Zealand Dairy is concerned that the Court of Appeal's findings as to the terms of that agreement will bind the High Court when it hears New Zealand Dairy's claim and will prevent New Zealand Dairy disputing Schenker's reliance on certain exclusion and limitation clauses. That is because, it is said, a res judicata estoppel might arise.

[3] It is by no means certain that an estoppel will arise.[3] If it does not, then the terms of the management agreement will have to be determined afresh by the High Court. If either party is dissatisfied with the High Court's determination on that point, that party will have appeal rights. If the High Court holds an estoppel does arise, then such a finding in itself could be the subject of appeal, not only to the Court of Appeal but also potentially to this Court.

[4] We would also observe that it is rare for this Court to grant leave on the interpretation of a one-off agreement which will plainly not be used as a template for future agreements.[4] We are even less inclined to grant leave when the primary purpose of the proposed appeal is limited to potentially affecting (but not necessarily determining) future litigation which may not even be commenced.[5]

[5] New Zealand Dairy's submission concerning the evidential threshold a s 290 applicant must reach is not worthy of a second appeal. The law on that question is settled. The Court of Appeal's application of the standard test to the evidence presented in this case does not amount to a matter of general commercial significance.

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3 See, for example, the discussion in *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA), especially at 42–44.

4 *Simpson v Commissioner of Inland Revenue* [2012] NZSC 62 at [4].

5 We note that Associate Judge Gendall heard the application to set aside the statutory demand in November last year. At the date of the parties' submissions, New Zealand Dairy had still not brought its anticipated claim.

[6] We are not satisfied that a substantial miscarriage of justice may occur unless the appeal is heard.

[7] New Zealand Dairy having not satisfied us that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal, we dismiss the application for leave to appeal. Schenker having succeeded in its opposition to the application, New Zealand Dairy must pay its costs in accordance with normal principles.

Solicitors:
Hornabrook Macdonald Lawyers, Auckland, for Applicant
Chapman Tripp, Auckland, for Respondent