

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-000219
[2016] NZHC 1180**

BETWEEN CUSTOMS STREET HOTEL LIMITED
Applicant

AND PLUS CONSTRUCTION NZ LIMITED
First Respondent

PLUS CONSTRUCTION CO LIMITED
Second Respondent

Hearing: 23 May 2016

Appearances: R B Stewart QC and I Rosic for Applicant
A Barker for Respondents

Judgment: 2 June 2016

JUDGMENT OF PALMER J

*This judgment is delivered by me on 2 June 2016 at 4.30 pm
pursuant to r 11.5 of the High Court Rules.*

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Registrar / Deputy Registrar

Counsel / Solicitors:
R B Stewart QC, Auckland
A Barker, Barrister, Auckland
Gilbert Walker, Auckland (I Rosic)
Alexander Dorrington, Auckland (D Marsden)

Summary

[1] Custom Street Hotel Ltd applies for leave to appeal an arbitral award on five questions of law. I am satisfied there are serious arguments regarding the questions which could substantially affect the rights of the parties and that leave to appeal should be granted.

Questions for Appeal

[2] The applicants, Custom Street Hotel Ltd (CSH), contracted with the respondents (to whom I refer collectively as Plus) to develop a hotel on Customs Street in Auckland. There were problems with the development. In early 2015 CSH required the engineer to suspend the contract works and both parties purportedly terminated the contract. The parties agreed to arbitration over whether CSH could make demand on a performance bond for some \$3.6 million. In November 2015 the arbitrator, the Hon Rodney Hansen QC, held Plus had validly cancelled the contract and no sums were properly due by it under the contract. So the engineer was wrong to issue his certificate and CSH could not make demand under the bond.

[3] CSH seeks leave to appeal on the following questions:

- (a) In relation to Plus' purported termination of the construction contract:
 - (i) Did the arbitrator err in holding that the defendants' breach must be repudiatory in nature before the defendants would be disentitled from terminating?
 - (ii) Did the arbitrator correctly construe clause 14.3.3 of the contract and err in holding that the defendants terminated in accordance with clause 14.3.3?
- (b) In relation to the proper construction of clause 2(c) of the performance bond issued by Plus in favour of CSH:

- (i) Did the arbitrator correctly construe clause 14.2.4 of the contract and err in holding that the difference, between a certified cost to complete the contract works and the cost to CSH had the contract works been completed by Plus, could not be “properly due under the contract” until the contract works have been completed?
- (ii) Did the arbitrator err in holding that the damages claimed by CSH for breach of contract cannot be “properly due under the contract” until CSH’s claim is admitted or determined as to liability and quantum?
- (iii) Did the arbitrator err in holding that CSH cannot rely upon the amounts claimed under the indemnity clause in the contract as amounts “properly due under the contract”.

Leave to Appeal

[4] Clause 5 of Schedule 2 of the Arbitration Act 1996 provides that the High Court must not grant leave to appeal on a question of law arising out of an arbitral award unless it considers “having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more of the parties”.¹

[5] I am satisfied that the test for the grant of leave to appeal is met here. I grant the leave as sought.

[6] Both parties’ positions were that, if leave were to be granted, the substantive appeal should be heard separately from the application for leave. In accordance with Rule 7.14 the Registrar must make arrangements for a case management conference on the first available date 15 working days after the date of this judgment.

Palmer J

¹ See *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).