

Pupuke Service Station Limited

Appellant

v.

Caltex Oil (N.Z.) Limited

Respondent

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 16th November 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Jauncey of Tullichettle
Lord Mustill
Lord Nicholls of Birkenhead
Lord Hoffmann

[Delivered by Lord Mustill]

Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the court the losing party may afterwards be tempted to think better of it, and ask the court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complaint.

Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.

At the other extreme are complaints that the decision has been reached by methods which are unfair, contrary to natural justice, in breach of due process, or whatever other term is preferred. With very few exceptions all systems of law permit the injured party some means of recourse. They need not be explored, since there are no such allegations here.

More controversial is the extent to which the losing party may protest that even if the arbitrator was right (or at least invulnerable) in his findings of fact, he has drawn from them the wrong conclusion of law. Many systems of law refuse to admit any interference on the ground of a mistake of law. Others, including English law and certain systems founded upon it, do allow some degree of challenge. Over the centuries, three quite distinct methods of recourse for errors of law have been developed. It is convenient to describe them in reverse chronological order. The most recent, and the simplest and most direct, operates by way of an appeal. Although the procedure resembles other appeals in its general shape, the criteria for leave to appeal and the grounds on which the court will interfere are so tightly drawn that successful appeals are rare. At least for the moment this procedure does not exist in New Zealand.

Secondly, there is the procedure by way of case stated. Often in conjunction with the parties the arbitrator identifies the questions of law which are critical to the resolution of the dispute and sets out in his award the findings of fact necessary for a decision upon them. Widespread criticism led to the abolition of this procedure in England, not so much because it was defective in itself, but because of the opportunities which it gave to a cynical defendant to raise spurious points of law simply for the purposes of delay. It is still available in New Zealand under section 11 of the Arbitration Amendment Act 1938.

Finally, there is the power to set aside an award which on its face discloses an error of law. This procedure has long and respectable historical origins, but in practice it has proved the least satisfactory of the three. Where the arbitrator is asked to state a special case all concerned know that the matter is likely to be taken to court, know what legal issues will be debated and can (if the process is working properly) ensure that all the facts needed for a decision on the law are fully and precisely set out. The

special case will not, save in exceptional circumstances, give an account of the evidence adduced before the arbitrator, since this was merely the foundation for his findings of fact, which are not open to review and are the starting point for the examination of the law. The jurisdiction to set aside for error on the face is altogether less methodical, since the proceedings are not set up in advance by a document specially tailored to the argument of a point of law, but are conducted after the event through scrutiny of an award devised for a quite different purpose, namely to explain to the parties why they have won and lost. Such an award quite commonly mingles facts and evidence, dwells on factual issues of no relevance to the questions of law, and deals in a cursory manner with facts which in legal terms are crucial. Furthermore, the need for the error to be "on the face" of the award means that the availability to the court of documents deployed in the arbitration is often a matter of chance. These weaknesses led in England to the abolition of the power, but it continues to be available in New Zealand and founds the present appeal.

The source of the dispute is a lease made on 1st July 1987 between Pupuke Service Station Limited ("Pupuke") as lessor and North Harbour Travel and Rental Car Co. Limited as lessee. The subject matter of the lease was a plot of land, owned by Pupuke at Takapuna, North Auckland, on which the proprietors of Pupuke (the Smale family) had for some years been operating a modest service station. The duration of the lease was twelve years. The contract provided for biennial rent reviews according to a stipulated formula, and for a reference to arbitration in the event of dispute. The lessees did not prosper, and on 20th December 1988 assigned the benefit of the lease to Caltex Oil (NZ) Limited ("Caltex"). The first rent review took place during the summer of 1989 and resulted in an increase in rent from the original \$90,000 p.a. to \$110,769 p.a. It had from the outset been recognised that the existing service station did not fully exploit the development potential of the site, and Caltex therefore secured the consent of Pupuke to embark on a major redevelopment of the service station, the terms being embodied in Heads of Agreement dated 23rd November 1990 ("the development agreement"). By the time of the next rent review, which covered the period from 1st July 1991 to 30th June 1993, the project had been completed. No agreement could be reached on the values to be assigned to the variables contained in the review formula, and the resulting dispute was referred to the arbitrament of Sir Duncan McMullin, a distinguished former judge. At the hearing of the arbitration expert evidence was given by four valuers, who spoke for a wide variety of figures which, when permuted with alternative readings of the review clause, yielded new rentals ranging from \$122,547 to \$329,000.

In the event the award of the arbitrator was almost at the bottom of the range, establishing a rental of \$122,552.62 per annum for the two years in question.

Propelled by its governing spirit, Mr. A.W. Smale, Pupuke took Caltex to the High Court on an application to set the award aside for error on the face. Before Robertson J. the response of Caltex was two-fold. First, that the circumstances of the reference to arbitration were such that, in the light of certain reported cases, the court had no power to intervene even if the arbitrator committed an error of law. Second, that in any event no such error could be apparent from the award. Caltex succeeded on both counts and the application was dismissed. Pupuke thereupon appealed, with this limited degree of success, that the Court of Appeal differed from Robertson J. in concluding that the award was not in principle immune to attack. But the Court unanimously held that no error of law was disclosed. Now, Pupuke advances before the Board its third attempt to hold that the award should be set aside, and that the rental for 1991-1993 should be re-fixed in another arbitration.

The material facts, so far as they appear from the award, may be summarised as follows. The dispute revolves round clause 1 of the lease:-

"1.2 The Lessor shall be entitled to review the Annual Rent with effect from the Rent Review Dates in accordance with the following procedures:

- (a) At any time...the Lessor may give notice in writing to the Lessee specifying the Annual Rent payable with effect from the Rent Review Date stated in the notice. The rent specified shall in each case be that sum which the Lessor considers was, is or will be the Annual Rent as determined by the formula set out below as at the Rent Review Date.

$$p \times q = A$$

Where p is the minimum capitalisation rate applicable being the capitalisation rate applicable at the commencement of this lease. q is the current market value of land and of buildings comprising the Premises without taking into account Lessee's improvements (otherwise than by way of repairs and maintenance to the Premises at the Lessee's expense). A is the Annual Rent.

...

- (e) In no circumstances shall the amount of any Reviewed Annual Rent be less than the greater of:

- (i) The Annual Rent payable by the Lessee during the period of 12 months immediately prior to the Rent Review Date ("the Period"), or
 - (ii) Where there has been an increase in the Consumer Price Index (all groups), then the Annual Rent payable by the Lessee during the Period increased by a percentage equal to the increase of the Consumer Price Index (all groups)...
- (f) In determining the current market value of the land and buildings, regard shall be given to any use to which the land may lawfully be put. The Lessor and the Lessee acknowledge that a premium rental is being paid if the land was to be considered solely as a Service Station. The Lessor and the Lessee further agree that because of the size, exposure and other permissible uses a premium will continue to be payable on any rent review."

As previously stated, the rental agreed for the first two years of the term was \$90,000 p.a. How this was arrived at does not appear from the award, but the arbitrator has found that it was greater than the then existing use of the site would have justified. As emphasised in clause 1.2(f) this was a premium rental, which must have reflected an appreciation that the site had an unused potential for development.

It will be noted that although the variable "q" was to reflect the current (i.e. current at the time of each rent review) market value of the premises, variable "p" was to be the rate "applicable at the beginning of the lease". The fact that no such capitalisation rate had been agreed when the lease came into effect is the source of one issue now before the Board. It seems from the award that the primary case of Pupuke in the arbitration was that a retrospective agreement on the capitalisation rate subsequently came into existence in the following manner. During July 1988 Mr. Smale instructed Mr. R. Forsyth to prepare a valuation "as if it were made prior to any knowledge of the lease rental paid by North Harbour". In his report Mr. Forsyth stated that:-

"...the prime determinant of value for an investment holding such as the subject is the income or investment approach whereby the established or projected income stream is capitalised at an appropriate rate of return to reflect the quality and quantity of the rental, nature and location of the property, standing of the tenant etc. There is need also to consider the replacement cost approach to ensure the investment approach is supported by bricks and mortar."

Mr. Forsyth evidently used comparables to arrive at a rental of \$62,000 p.a. and capitalised this at a 10 per cent rate of return, yielding an investment value of approximately \$620,000. On a replacement cost approach he arrived at a figure of \$726,000. Putting all the factors together he reached a fair market value "in the vicinity of \$650,000".

On the basis of this valuation Mr. Smale maintained in his evidence before the arbitrator that he had expressly agreed with the original lessees, and later with Caltex when they came on the scene, that the capitalisation rate for use in the formula would be 13.85 per cent, viz. the rate required to derive a capital value of \$650,000 from a rent of \$90,000. The arbitrator found that no such agreement had been made.

In July 1989 the first rent review fell due. For this purpose Pupuke obtained a valuation from Mr. A.J. Davies which, at least as reproduced in the award of the arbitrator, contained a statement of principle identical to that of Mr. Forsyth, quoted above. He began with an assessment of rental of \$78,390 p.a., which he capitalised at 11 per cent, the latter rate being explained by reference to specialised investment properties yielding 10 per cent to 12 per cent, with well leased, well situated properties in the neighbourhood giving rates from as low as 10 per cent up to approximately 10.5 per cent and 11 per cent. The outcome of this calculation was \$713,000 as the market value of the property. As Mr. Forsyth had done, Mr. Davies cross-checked by reference to the estimated cost of replacement, which he fixed at \$875,000. In the result he arrived at a figure for the fair market value of \$800,000. This was 23.079 per cent higher than Mr. Forsyth's figure of \$650,000 for the value of the property at the date of the lease, and Mr. Davies simply applied a similar uplift to the initial rental of \$90,000, obtaining a new rental of \$110,769 p.a.

It seems that Caltex, who by now had become assignees of the lease, did not agree with this figure, but omitted to give the necessary notice to launch an arbitration, so that for the two years ending June 1991 the rental due and paid was that proposed by Mr. Davies.

It is convenient at this stage to quote from clause 1 of the development agreement, made on 23rd November 1990:-

"1. Pupuke hereby authorises the alteration work proposed by Caltex, the 'Caltex development' as shown on the plans submitted by Pupuke for its approval [herein enclosed]. It is further agreed:

(a)

- (b) For the purposes of clause 1.2(a) of the lease the Caltex Development shall be excluded from the term 'lessee's improvements' to the intent that the Caltex Development shall be taken into account in assessing the capital value of the premises. Provided however if at any rent review date after the commencement of the Caltex Development the capital value of the buildings on the land shall be less than the capital value that the buildings on the land prior to the Caltex Development ('the previous buildings') would have had if they had remained on the land at that rent review date then the market value of the premises (to the extent that it relates to the buildings) shall be determined as if the previous buildings remained on the land at that rent review date."

Turning now to the award, the arbitrator first addressed the capitalisation rate "p". Having rejected the evidence of Mr. Smale that this had been expressly agreed at the figure of 13.85 per cent, he went on to dismiss the proposition that a premium rent continued to be payable even after the redevelopment had been carried out, and adopted the rate of 10 per cent contained in the report of Mr. Forsyth. Next, he considered whether certain tanks and piping installed as part of the work done on the site by Caltex formed part of the "Caltex Development" for the purposes of clause 1(b) of the development agreement, and hence should be taken into account in valuing the property, notwithstanding the exclusion of "lessee's improvements" by clause 1.2(a) of the lease. He held that they did not. Next, he dealt with the quantification of the development costs, an issue not material to this appeal. Finally the arbitrator examined in some detail the evidence on the current market value of the premises and adopted the figure of \$1,180,000 proposed by Mr. P.J. Mahoney, a witness for Caltex. Applying to this the rate of 10 per cent per annum, and adjusting for an increase in the Consumer Price Index, the arbitrator arrived at a rental for the period in question of \$122,552.62 p.a.

This award did not satisfy Pupuke, who had been arguing for a much higher figure. They accordingly set out to challenge it in the courts, and since they had not asked the arbitrator to state a special case they were constrained to argue that an inspection of the award disclosed that the arbitrator had proceeded on a mistaken understanding of the law. It seems from certain submissions tentatively advanced by counsel on the instructions of Pupuke in the course of the argument before the Board that Pupuke have still not fully grasped that it is of no use simply to complain that the arbitrator has got the answer wrong. Only if the award, read in complete isolation, clearly discloses an error of law does the court have power to intervene, and the court

must be alert not to blunt the point of an agreement to arbitrate by allowing what is really an appeal on the facts to be dressed up as a dispute on the law. The risk that the court will be drawn into re-hearing the arbitration must always be avoided, as the passage of this matter through successive courts has amply shown.

The first alleged mistake of law relates to the capitalisation rate, factor "p". The arbitrator, on the evidence before him, found that the appropriate rate was 10 per cent for the two years in question. As already stated, the case for Pupuke at the arbitration was that after the lease had been in force for some time the parties expressly agreed a rate of 13.85 per cent, arrived at by matching the initial rent of \$90,000 against an ascertained initial capital value of \$650,000. This contention need not be explored, since the finding of fact that no such agreement was made is not open to review. Pupuke maintain, however, that the same result follows directly from clause 1.2(a) itself, since this requires the "capitalisation rate applicable at the commencement of this lease" to be derived by simple arithmetic by applying the rental payable at the commencement of the lease to the subsequently established value of the property as at the commencement of the lease.

In theory, the correctness of this argument, depending as it does on the interpretation of a written instrument, raises a question of law. In practice, however, the court should not be too ready to differ from the tribunal to which the parties have agreed to entrust their differences on the meaning of an ill-drawn provision in a "one-off" document, no question of principle being involved. In any event, two successive courts have agreed with the arbitrator in rejecting Pupuke's reading of clause 1.2(a), and their Lordships are of the same opinion. The arbitrator has found that the initial rent of \$90,000 was greater than the existing use could have justified, as indeed is made clear by clause 1(f), with its reference to a premium rental "as if the land was to be considered solely as a Service Station". Given the unexploited development potential of the site it is not surprising that the rent should have been fixed at a higher rate than could be justified by the current revenue stream. By contrast, it would make no commercial sense to project the artificial capitalisation rate implicit in the initial rental into all subsequent calculations, even when the development potential had been unlocked and (as the arbitrator expressed it) the service station represented the highest and best use to which the land could be put. As all the tribunals hearing this dispute have recognised, this would be to activate the initial premium twice. The clearest of words would be required to produce this result, and there are none to be found in the lease.

The rejection of the appellant's version of "p" on the facts and on the law still leaves open the question of the meaning, if any

can be found, which should be given to the definition in clause 1.2(a), and in particular to the word "minimum". The latter does not feature in the award and in the judgment of Robertson J., but the point is squarely faced in the judgment of the Court of Appeal. In a few words, the problem is to reconcile a "minimum" rate, which seems to suggest that the rate in question is a "floor" below which a current rate ascertained on the occasion of each review cannot fall, with the word "being" in the expression "being the capitalisation rate applicable at the commencement of this lease", which conveys the idea of a single rate already determined. To express the problem in this way overloads the syntax of a very poorly expressed contract, but the court must do the best it can with the words which the parties chose. In the end, the Board sees no reason to differ from the opinion of the Court of Appeal, expressed in the judgment of Gault J. as follows:-

"The reference to the minimum rate applicable recognises that there may be a range of rates which different experts would propose and directs that the bottom of the applicable range is to be taken. That rate is thereafter to be used in the formula to determine the new rent at each review."

The next challenge to the award of the arbitrator is on that part of his award which set the current market value of "q" for the purposes of the formula at a figure of \$1,180,000. A more unpromising subject for the judicial review of an award it would be hard to imagine, for a valuation is not a mechanical exercise, to be performed according to rote, but a broad weighing of necessarily imprecise data directed to the individual transaction in hand. Having entrusted this task to an arbitrator the parties should abide by the result, unless the arbitrator has employed a method clearly outwith the contemplation of the contract. The court should in their Lordships' opinion be particularly hesitant to intervene where the disappointed party alleges an error of law on the face, for on a matter of valuation the award is likely to consist largely of a rehearsal of the evidence of rival valuers and the reasons why the arbitrator preferred one rather than another. This material is entirely superfluous to any power of review by the court and simply hinders the identification and decision of any question of law which may exceptionally arise. The present appeal is an example. The relevant part of the award summarises and comments upon the evidence of the four expert witnesses called at the hearing. This is entirely what one would expect, but it is an unsatisfactory basis for a review limited to a question of law. Understandably assuming that the parties already knew what had passed during the arbitration the arbitrator had no need to spell out the evidence at length, which he stated in a compressed form, not in every respect easily grasped by a court

with no prior knowledge of what was said. Moreover, since the arbitrator had no reason to draw a sharp distinction between evidence, findings and principles, the court is faced with the task of sifting out those parts of the award which are not subject to review to see whether there is anything which can properly be regarded as a debatable issue of law.

Having performed this sifting in the present case, their Lordships find that there is nothing left. The reasoning of the arbitrator can be found in a few lines at the end of his award. Unfortunately, in order to understand it reference must be made to the evidence which it calls up: although not, as just emphasised, for the purpose of considering whether the conclusions which the arbitrator drew from it are factually correct. Each of the four valuers appears to have offered alternative methods of valuation; a direct assessment of the capital value and an investment approach based on assumptions about potential sales and profitability. In particular, Mr. Mahoney who gave evidence for Caltex started with an assumption of the throughput of petroleum spirit per annum, and derived from it a market based rent, which he capitalised at 10 per cent. He acknowledged that the market value so assessed was considerably less than the cumulative value of the land and depreciated replacement cost of the buildings, but remarked that cost did not necessarily equal value. As an alternative Mr. Mahoney went on to take other service stations as comparables, from which he drew a direct assessment of capital value at \$1,180,000, observing that a rental income at 10 per cent would require forecourt sales equivalent to an increase of 3.5 times on actual sales as at June 1990 and of 125 per cent on his projected maximum sales. The arbitrator dealt with the matter as follows:-

"Mr. Mahoney's valuation of \$809,520 is based on the true throughput. On a comparative value basis he thought that the property might be worth \$1,180m. and then have a rental of \$118,000 p.a. But, as he pointed out, a rental of that size would require forecourt sales of 5.4m. litres p.a. And, Mr. Mahoney said that the \$1,180m. reflected a substantial premium which 'may be paid by a potential owner/occupier as compared with the estimated market value on a traditional investment basis'. But I am required to fix the current market value of the premises as the basis for the application of the formula in the lease. I determine this to be \$1,180m. although I think that this is generous to Pupuke."

Two patent errors of law are alleged by Pupuke. First, that the arbitrator used the wrong method by "failing to consider the depreciated replacement cost factor at all" and "failing to consider any recent free sales of comparable properties unencumbered by a lease". The short answer to this contention, and only a short

answer is called for, is that there is nothing whatever in the award to suggest that the arbitrator did not consider these factors, or that he would have erred in law if he had failed to do so. As to the law, various reported cases, some of high authority, were relied upon to show that certain methods of valuation were appropriate to the kinds of valuation there under consideration. But they stop far short of establishing that one particular method must always be employed in all valuations, whatever the factual circumstances and legal contexts in which they are made. All that can be derived from the award is that the arbitrator knew that a replacement cost approach was a possibility, since he recites Mr. Davies' use of that method, but preferred to use a value based on comparables, with an income stream method used, not as the source of the ultimate award, but as a means of verifying the direct assessment. How the arbitrator can be said to have erred in law by performing his task in this way the Board is quite unable to understand. Indeed, it may not be unfair to record that Pupuke's complaint sits singularly ill with the opinion of Mr. Davies, the valuer whom they had themselves employed to perform a valuation in 1989, who had then described the prime determinant of value as the capitalisation of the established or projected income stream.

The second complaint is that the arbitrator went astray in using a throughput of sales in the year subsequent to the valuation date as the basis for his calculations. It is undeniable that in the passage quoted the arbitrator referred to "the true throughput", and it seems that this is a reference to data relating to a subsequent year. It appears however that Mr. Mahoney, upon whose evidence the arbitrator relied, was employing this figure by way of contrast to the much more optimistic and, as it transpired, unrealistic forecasts which formed the basis of some of the higher valuations. If the award had clearly disclosed that in reliance on known after events the arbitrator had written down from its true figure a valuation as at the review date there might have been a question of principle to consider, although in the context of a valuation referred to an arbitrator the court might well have been reluctant to intervene. But the passage quoted suggests that this is not what happened. The arbitrator did not base his award on after events. He adopted the direct valuation made by Mr. Mahoney, but observed that this yielded a rent which was a multiple of what would have been appropriate if the real trading results of the service station had been applied. There is no sign here of an error of principle.

The third ground of challenge most clearly demonstrates the unsatisfactory and erratic nature of the jurisdiction to set aside for error on the face, for it presents the court with a problem which is virtually insoluble on the facts found in the award. The

subject matter of the dispute is a group of underground tanks, pumps and pipes which were installed in place of the former equipment by Caltex at very considerable expense. The question before the arbitrator was whether, although the value of this work would *prima facie* be excluded from the variable "q" by virtue of the provision in clause 1.2(a) of the lease that the current market value should not take into account lessee's improvements, it should nevertheless be written back into "q" through the further exclusion (by clause 1(b) of the development agreement) of the Caltex Development from the term "lessee's improvements".

The difficulty for Pupuke here is that nothing in the award and documents incorporated identifies the equipment as part of the development. It is true that there was annexed to the development agreement, and hence incorporated in the award, a small scale plan labelled "Proposed Redevelopment Lakeside Fuel Centre" which showed the outlines of the pumps and underground tanks. But none of the notes and legends on the plan refer to them, and indeed the plan seems to have been intended to do no more than indicate the outlines of the proposed layout. It is moreover to be noted that some of the features identified on the plan were to remain unchanged even when the development had been completed. The agreement does not define "the alteration work" referred to in clause 1(a), beyond reciting that Caltex desired to "make alterations to the existing premises by way of demolishing part of the existing buildings on the site and carrying out certain construction work in order to make better utilisation of the site and achieve better petrol sale volumes". Furthermore, as the Court of Appeal has pointed out, the elaborate breakdown of expenditures contained in clause 11 of the development agreement (which is too long for quotation here) makes no reference to the tanks etc. There is a general reference to "any other expenses" but it is scarcely conceivable that if it had been intended to include the very expensive underground works they would not have been described as explicitly as those carried out above ground. Nor does it advance Pupuke's case to contend that the pipes and tanks became fixtures, for even if they did this would not affect the manner in which they should be treated for the very special purposes of clauses 1.2(a) and 1(b) of the respective agreements.

All this being so, their Lordships must agree with the following observation of the Court of Appeal:-

"It might be that there could have been developed before the arbitrator with the support of appropriate evidence (including perhaps other plans submitted to Pupuke for approval), a case for construction of the very general definition and drawing referred to in clause 1 of the development agreement as necessarily including everything

reasonably required to operate the service station depicted on the site plan on a commercial basis. However the award gives no indication of this and, in this jurisdiction limited to the review of errors on the face of the award, it is not something we can investigate."

For these reasons their Lordships agree with the Courts of New Zealand in their rejection of all the contentions advanced by Pupuke. As became evident from the attempts made at the instance of Pupuke to introduce new evidence, and contentions on matters not canvassed in the award, those controlling that company have failed to appreciate the very narrow scope of the exception, created by the jurisdiction to set aside for error on the face, from the essential principle that the parties to an arbitration agreement promise to abide by the outcome of their agreed procedure. This jurisdiction does not operate by way of appeal, and still less does it provide an opportunity to refight the dispute in the hope of a more favourable outcome. Out of deference to the resourceful arguments of Mr. Finnigan, and in recognition that the appellants have pursued their appeals as far as the Board in London their Lordships have thought it right to examine the matter at a little length. In reality, however, the application to Robertson J., being entirely at odds with both the spirit and the rules of arbitration law, had no realistic prospect of success. It was properly dismissed in a quite summary manner. The Court of Appeal considered it with care and found no ground for complaint. Neither do their Lordships, and they will humbly advise Her Majesty that this further appeal should be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.