IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA284/2024
[2025] NZCA 18

BETWEEN	ANTIPODES NEW ZEALAND LIMITED Applicant
AND	ACCEL (HK) COMPANY LIMITED Respondent

Court:	Mallon and Ellis JJ
Counsel:	M D O'Brien KC and S J Corlett for Applicant A E Kirk and C J Pendleton for Respondent
Judgment: (On the papers)	20 February 2025 at 11.00 am

JUDGMENT OF THE COURT

A The application for special leave is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Ellis J)

[1] Antipodes New Zealand Ltd (Antipodes) seeks to appeal an arbitral award to the High Court on a question of law. To do that, it is required to obtain leave to appeal from the High Court under cl 5(1)(c) of the second schedule to the Arbitration Act 1996. It applied for such leave, but the application was declined by Churchman J.[1]

[1] *Antipodes New Zealand Ltd v Accel (HK) Company Ltd* [2024] NZHC 245 [first High Court judgment].

Antipodes then sought leave to appeal Churchman J's refusal of leave. But the Judge again declined the application.[2] This prompted Antipodes to seek special leave from this Court under cl 5(6) of the second schedule. It is that application which is the subject of this judgment.

Background

[2] Antipodes is a New Zealand-registered company engaged in the skincare and cosmetic products industry. Accel (HK) Company Ltd (Accel) is an e-commerce company registered in Hong Kong.

[3] Antipodes and Accel entered into a Management Services Agreement (MSA) on 11 April 2019 for the promotion and sale of Antipodes' products in China.[3] Clause 20.3 of the MSA provided that any dispute arising in connection with the agreement was to be "referred to and finally resolved by arbitration by the New Zealand Dispute Resolution Centre … in accordance with its arbitration rules in force at the time".

[4] Following a dispute, Antipodes terminated the MSA in August 2020. On 8 December 2020, Antipodes filed proceedings in the High Court alleging a breach of the MSA by Accel.

[5] On 22 June 2021, Accel issued a notice of arbitration seeking a declaration that Antipodes had breached the MSA, and applied for an award of unpaid fees, damages and costs.[4] The proceedings in the High Court were stayed.

[6] Ms Brenda Horrigan, a highly experienced and legally qualified international arbitrator, was appointed as sole arbitrator in March 2022. The arbitration took place between 12 and 16 December 2022, and an award was rendered in Accel's favour on 9 June 2023 (Award). The Award was accompanied by extensive reasons, some 924 paragraphs in length. Antipodes was ordered to pay Accel USD 2,028,097.29 and

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2 *Antipodes New Zealand Ltd v Accel (HK) Company Ltd* [2024] NZHC 764 [second High Court judgment].

3 There is no dispute that the MSA was governed by New Zealand law and any such arbitration would be governed by the Arbitration Act 1996.

4 First High Court judgment, above n 1, at [4]–[5].

RMB 226,978.87 plus interest. On 29 August 2023, the arbitrator issued a costs award in which she ordered Antipodes to pay Accel a further NZD 670,986.56 plus interest.

Application for leave to appeal the Award to the High Court (first decision)

[7] Clause 5 of the second schedule to the Arbitration Act permits an appeal to the High Court on any question of law arising out of an award if the parties have so agreed (either before or after the making of the award) or with the leave of the High Court. Sub-clause (10) says a question of law:

> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
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> (b) does not include any question as to whether—
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> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
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> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[8] As Churchman J recognised, the principles a High Court judge should apply in determining whether to grant an application for leave under cl 5(1)(c) are well established, having been articulated by this Court in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*.[5] In that case, this Court held that once the judge has satisfied themselves that the proposed question is a question of law, he or she must then consider the following factors:[6]

> (a) the strength of the challenge/nature of point of law;
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> (b) how the question arose before the arbitrators;
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> (c) the qualifications of the arbitrators;
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> (d) the importance of the dispute to the parties;

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5 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).
6 At [54].

(e) the amount of money involved;

(f) the amount of delay involved in going through the courts;

(g) whether the contract provides for the arbitral award to be final and binding; and

(h) whether the dispute is international or domestic.

[9] In this case, Antipodes identified what were said to be nine questions of law on which leave to appeal was sought. But because Antipodes has subsequently reduced the number of questions, it is necessary now to focus on only three.[7] Those three questions are whether the arbitrator erred in law by:

(a) failing to apply s 50 of the Contract and Commercial Law Act 2017 (CCLA) when finding the entire agreement clause of the MSA (cl 22.3) was not conclusive between the parties and did not prohibit a finding of misrepresentation;[8] and/or

(b) awarding Accel lost profits on 80 per cent of the original annual Flagship Store sales targets that had been set out in the MSA, despite finding the parties had agreed to reduce the financial target in year two from RMB 35 million to RMB 9 million; and/or

(c) using the so-called "TP Mode" to calculate the service fees payable to Accel for the period from May to August 2020 and lost profits, despite finding that the parties did not legally adopt the TP Mode, it was not

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7 Only three grounds were pursued in Antipodes' subsequent application for leave to appeal Churchman J's first decision to this Court. These were the first, fourth and sixth of Antipodes' original grounds.

8 Clause 22.3 provides:

> This Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

provided for by the MSA and there was no written variation entered into.[9]

[10] Churchman J found:

(a) there was no appealable error in relation to the first question, because:[10]

(i) the arbitrator had accurately set out the terms of s 50 of the CCLA;

(ii) both parties had agreed she had a discretion to look behind the entire agreement clause (cl 22.3); and

(iii) the arbitrator had set out the parties' respective submissions and explained the conclusions she reached;

(b) the second question was essentially a challenge to factual findings (based on the evidence given by Accel's independent quantum expert involving a counterfactual in which Antipodes had not repudiated the MSA by terminating early and had controlled pricing in the market) and the arbitrator had approached the calculation of contractual damages correctly;[11] and

(c) the third was also a challenge to factual findings (a counterfactual based on the proposition that, had the breach of the MSA not occurred, the parties would have signed the Second Supplementary Agreement and so used the TP Mode to calculate service fees).[12]

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9 As this summary suggests, the TP Mode was a method by which service fees could be calculated by Accel. The TP Mode methodology was the subject of negotiations between the parties whereby it was agreed to include it in a supplementary agreement, but that agreement was never signed.

10 First High Court judgment, above n 1, at [20].

11 At [29].

12 At [46]–[50].

[11] Overall, the Judge said:[13]

> [70] Quite apart from the fact that no seriously arguable errors of law have been identified, the factors identified by the Court of Appeal in *Gold and Resource Development (NZ) Ltd v Doug Hood Ltd*, do not, on balance justify the exercise of the Court's discretion to grant leave.

[12] The most important factor identified by the Judge was that this was an international arbitration between two experienced and substantial commercial parties, and the arbitrator was both legally qualified and highly experienced. The Judge said there is nothing in the Award to suggest the arbitrator misunderstood New Zealand law or had any difficulty applying it. The Award was "comprehensive and well-reasoned".[14]

[13] The Judge also noted that almost all of the points raised by Antipodes related to incidental issues in the arbitration; the cost and delay in litigating them on appeal outweighed the significance of the issues, and so even if there were errors of law in the Award, the discretion to grant leave should not be exercised.[15]

The application under cl 5(5) for leave to appeal the first decision to this Court

[14] As we have noted, Antipodes' next application for leave, under cl 5(5) of the second schedule to the Arbitration Act, focused only on three of its original proposed grounds of appeal.[16]

[15] On 11 April 2024, before any notice of opposition had been filed and without calling for further submissions, Churchman J declined this application on the papers.[17]

[16] In declining leave, the Judge expressly referred to the key criteria relevant to the determination of an application for leave under cl 5(5), namely that: the proposed appeal must raise some question of law capable of bona fide and serious argument in

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13 Footnote omitted.
14 At [70].
15 At [71].
16 Antipodes also applied for a stay of enforcement of the Award and for a further extension of the interim suppression order.
17 Second High Court judgment, above n 2.

a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.[18]

[17] In substantive terms, the Judge essentially re-affirmed the reasons he had given in his first decision in relation to those three matters. More specifically, he said:[19]

> [20] The issues raised by the applicant appear largely to be a re-litigation of the matters covered in the decision on appeal, namely whether the arbitrator correctly applied s 50 of the CCLA in allowing a misrepresentation claim despite the entire agreement clause of the MSA, and whether the correct methodology was used to calculate the amount to be awarded by using the TP Mode and calculating the loss of profits based on the original sales targets.
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> [21] The issues raised are not questions of law capable of serious argument in a case involving some interest of sufficient importance to outweigh the cost and delay of the further appeal. The High Court's finding that the use of the TP Mode and the manner in which the loss of profits were calculated were questions of fact does not raise any seriously arguable questions of law, particularly given that the Privy Council has previously found in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* that valuation methodology is a question of fact.
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> [22] The finding that the arbitrator correctly applied s 50 of the CCLA to the entire agreement clause of the MSA, whilst clearly a question of law, also does not provide a seriously arguable ground of appeal. The High Court identified that the arbitrator set out the correct test for s 50, and that she also provided reasons for her decision to allow the misrepresentation claim despite the entire agreement clause, and that because of this *Forrest Holdings Ltd* was distinguishable.
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> [23] Even if there was some error in law, there are no matters of sufficient importance to outweigh the cost and delay of further appeal. The application of s 50 of the CCLA is settled law that is in no need of clarification. The issues raised relate to the highly specific facts of this case, and so are unlikely to have wider currency in terms of precedent.
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> [24] Although the entire agreement clause was pleaded as a complete defence to the misrepresentation claim, and so was of relative private importance to the applicant, the claimed grounds are not sufficiently arguable to justify granting leave to appeal to the Court of Appeal. Accordingly, the application for leave to appeal is declined.

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[18] At [13], citing *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591.

[19] Second High Court judgment, above n 2 (footnotes omitted).

The application for special leave under cl 5(6)

Relevant principles

[18] The decision in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* remains the leading authority not only on the grant of leave under cl 5(5) but also on the grant of special leave under cl 5(6). In general terms, this Court held that leave under sub-cl (5) should only be granted where the relevant court is satisfied the proposed appeal raises some question of law capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.[20] And in terms of the test under sub-cl (6) (the provision with which we are now dealing), the Court said:[21]

> [35] Where the High Court has refused leave, this Court has power under cl 5(6) to grant special leave to appeal. Obviously that should not be a second bite at the same cherry. This Court will be very mindful of why the High Court declined leave, and will grant special leave only if the High Court Judge's decision was plainly wrong or if the test set out above was not applied or was misapplied. We would hesitate to say that the test under subcl (6) is different from the test under subcl (5). It is simpler to say the test is the same, but this Court will exercise its powers sparingly and mindful of why the High Court declined leave.

[19] Later, in *Saltburn Holdings Ltd v Penrose Leasehold Ltd*, this Court said:[22]

> [4] … under cl 5(6) it is *not* our task to determine whether to grant leave to bring an appeal in this Court regarding the correctness of the arbitral award. We are dealing only with the issue of whether Saltburn should be permitted to appeal against Downs J's refusal to grant leave to appeal *to the High Court*. To put it another way, if we were to grant this application, the hearing that would then subsequently take place in this Court would be limited to inquiring into the correctness of Downs J's refusal to grant leave under cl 5(1)(c). A successful outcome in this Court for Saltburn from that hearing would be an order directing the High Court to consider and determine an approved question of law. Contrary to the notice of application, it would *not* be an order setting aside the arbitral award.

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20 *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*, above n 18, at [33], citing *Cooper v Symes* (2001) 15 PRNZ 166 (HC) at [12].

21 *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*, above n 18.

22 *Saltburn Holdings Ltd v Penrose Leasehold Ltd* [2019] NZCA 127 at [4] (emphasis in original).

[20] Similarly, in *Alusi Ltd v G J Lawrence Dental Ltd*, this Court referred to the dicta from *Downer* and then observed:[23]

> [15] Those remarks were made in the context of an application for special leave where the High Court had declined leave to appeal its substantive decision on a point of law appeal made to it with leave. Where the application to this Court is for special leave to appeal where the High Court has declined leave, in effect on two occasions, the need to focus on the possibility of error in the second leave decision, rather than in the award itself, is emphasised.

The application in this case

[21] Antipodes' application under cl 5(6) is very lengthy. It also arguably conflates the grounds for seeking second leave to appeal the second High Court judgment (which is the matter before us) and its proposed appeal of the first (which is not before us). As discussed later, however, we accept that — in a case such as this — there will be (at least) a degree of overlap and so, although bearing in mind the dicta to which we have just referred, we deal with the grounds on their merit as best we can.

[22] Summarised slightly, Antipodes says the High Court erred:

(a) in finding there was no appealable error of law and/or seriously arguable ground of appeal in respect of the s 50 CCLA issue "notwithstanding the arbitrator's failure to consider … and/or to give adequate reasons as to … whether it was fair and reasonable in all the circumstances of the case" that cl 22.3 of the MSA should be conclusive so as to exclude pre-contractual representations of post-contractual price control;

(b) in treating the arbitrator's assessment of loss of profits as a factual finding, when it was based on sales targets which "presupposed the inclusion … of a price control provision and excluded the agreed reduction in the Year 2 sales targets from RMB 35 million to RMB 9 million" — and that finding required the arbitrator to exclude operation of clause 22.3 of the MSA;

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[23] *Alusi Ltd v G J Lawrence Dental Ltd* [2021] NZCA 87.

(c) by failing to take proper account of or give sufficient weight to "the arbitrator's error in awarding Accel its service fees for the period May to August 2020, and lost profits based on a margin calculated on the TP Mode", when the arbitrator also made a finding that "the parties did not legally adopt the TP Mode", "such a mode was not provided for under the MSA", and "there had been no written variation to the MSA to enable a transition to TP Mode as was required by clause 22.4 of the MSA";

(d) in finding that almost all the points sought to be appealed by Antipodes "were incidental to the arbitration", that the cost and delay involved in litigating these issues would be disproportionate to the amount in dispute, and that there were no matters of sufficient importance to outweigh the cost and delay of a further appeal;

(e) in failing to accept that the issues were questions of law, that determination of those issues could substantially affect Antipodes' rights, and that the statutory thresholds in cl 5(1) and (2) of sch 2 of the Arbitration Act were therefore met;

(f) in exercising the discretion as to whether to grant leave, not considering the significance of, or giving proper weight to, the fact that the parties intended the possibility of recourse to the Court on the question of an error of law by expressly opting into cl 5 applying to the MSA; and

(g) in delivering the second High Court judgment without giving Antipodes an opportunity to be heard and to present submissions. Antipodes notes that "the [j]udgment was delivered when the parties were discussing a timetable and without any hearing or submissions".

[23] Antipodes also records in its application that it has made payment to Accel of "all sums that it does not now dispute, being a total [NZD] 1,355,016, and has provided a bank bond as security against the sums that remain in issue". Antipodes relies on this as an additional ground.

Analysis

Failure to have a hearing

[24] We deal with the last of the summarised grounds — which is concerned with process rather than substance — first.

[25] As we have noted at [15], the Judge delivered the second High Court judgment without calling for submissions or having an oral hearing. Although acknowledging that there is authority to the effect that a hearing is not in all cases required, Antipodes says this was not such a case and Churchman J's second decision should be "discounted" accordingly.

[26] We begin by noting that no application for recall in the High Court was made by Antipodes. That was the course suggested by Miller J as potentially appropriate in the very similar scenario that arose in *The Party Bus Company Ltd v Attorney-General*.[24]

[27] Be that as it may, in *Party Bus*, Miller J was required to consider whether an application for leave to appeal could lawfully be determined without a prior oral hearing. He determined that it could. After acknowledging that he had been mistaken about whether the parties in that case desired a hearing, Miller J said:[25]

> [7] … However, a hearing is not always required for interlocutory applications. On occasions the objective of the Rules can be met by a decision on the papers. A hearing is frequently unnecessary on a leave to appeal application because the judge is already familiar with the file and such applications are usually of narrow compass. They turn on the usually straightforward question whether there is an issue of sufficient importance to warrant the attention of the Court of Appeal.

[28] And as far as natural justice was concerned, Miller J went on:

> [9] But the original application was expressed in substantial terms, providing me with an adequate basis to determine it given my history with the proceeding. The general question — whether there was an error of law which justified an appeal — is the same, and with one exception, the application

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[24] *The Party Bus Company Ltd v Attorney-General* [2012] NZHC 445. This was an application to recall after Miller J declined leave to appeal the High Court's earlier decision declining leave to appeal an arbitral award.

[25] Footnotes omitted.

> raised the same specific questions of law that were raised in the applications to set aside the arbitral award and for leave to appeal to this Court, for which there was a hearing and substantial written submissions. The reserved judgment required a careful review of the record. I understood the case for both the applicant and respondent. I was not satisfied that these questions were seriously arguable for leave to appeal to this Court, and was similarly not satisfied that they were both seriously arguable and of sufficient importance to warrant a second appeal.

[29] As in *Party Bus*, Antipodes' application for leave in the High Court was "expressed in substantial terms" and it provided the Judge "with an adequate basis to determine it" given his history with the proceeding. As well, the general question — whether there was an error of law justifying leave to appeal — is effectively the same as the question in the application for leave to appeal; the second application raised the same specific questions of law (albeit fewer in number) raised in the first.

[30] That said, however, we would be reluctant to conclude that the mere presence of those factors completely mitigates the failure to have a hearing on the second application. We therefore agree with Antipodes that we should, to some extent, "discount" the second leave decision and focus more squarely on the merits of the original application for leave to appeal. In any event, that also reflects the reality of the way the application was advanced (and opposed) before us.

Analysis

[31] We begin by making two preliminary observations.

[32] First, the sheer number of grounds sought to be advanced by Antipodes in support of its application counts against its contention that there is a seriously arguable error of law in the second decision (or, indeed, in the first). It might be thought that any such error would be readily identifiable and could more briefly be articulated and addressed.

[33] Secondly, and in terms of the three questions of law sought to be advanced in any eventual appeal from the award, Accel points out that only the first (s 50) question is addressed substantively in Antipodes' written submissions. The TP mode issue is not addressed at all.

[34] That, too, is potentially telling, and supports our view that, in reality, the other two questions are (as the High Court Judge held) essentially questions of fact. Both are concerned with counter-factual scenarios adopted by the arbitrator in assessing compensation or damages. It seems to us those methodologies were grounded in the evidence and were entirely open to the arbitrator. We do not propose to consider them further.

[35] In terms of the first question, we accept that a question about the interpretation and application of s 50 of the CCLA potentially constitutes a question of law. But whether such a question has been identified here, and whether it might justify the grant of leave, is a different matter.

[36] Section 50 is engaged where a contract contains a provision purporting to prevent a court from inquiring into or determining the question of:

> (a) whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
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> (b) whether, if it was so made or given, it constituted a representation or a term of the contract; or
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> (c) whether, if it was a representation, it was relied on.

[37] There is, as we understand it, no dispute that the entire agreement clause (cl 22.3) in the MSA is such a provision.

[38] Section 50 goes on to provide:

> (2) The court is not, in any proceeding in relation to the contract, prevented by the provision from inquiring into and determining any question referred to in subsection (1) unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to the matters specified in subsection (3).
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> (3) The matters are all the circumstances of the case, including—
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> > (a) the subject matter and value of the transaction; and
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> > (b) the respective bargaining strengths of the parties; and
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> > (c) whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

[39] In the present case, the arbitrator's conclusion on the application of s 50 was expressed at [362] of the Award as follows:

> Both Parties agree that the Tribunal has discretion to look behind the entire agreement clause. In the circumstances, the Tribunal agrees with Claimant that the persistent and consistent manner in which Respondent represented that it would undertake pricing control, along with the fact that such control was common in the Chinese e-commerce market, make it inappropriate to exclude liability for misrepresentation based on the entire agreement clause.

[40] Antipodes now says this finding constitutes a legal error because the arbitrator failed to give adequate reasons for it, did not properly examine the relevant authorities and did not address why it was not "fair and reasonable" to apply the entire agreement clause here. Antipodes also says that the substitution of an "appropriateness" standard in the face of the "fair and reasonable" statutory one raises a matter of some general importance.

[41] As to this last point, it seems to us that the use of the word "appropriate" in the concluding paragraph is neither here nor there. The arbitrator had earlier referred to the relevant statutory wording and (as discussed shortly) took numerous factors into account in her consideration of what was "fair and reasonable" here. Moreover, what is "fair and reasonable" in any given case will inevitably be intensely case specific; we do not accept Antipodes' contention that resolution of the issue in a particular context is likely to have any significant precedent value.

[42] And assuming that a failure to give reasons could constitute a relevant error of law, on a straightforward reading of the Award, there was no such failure in this case. While the specific paragraph in the Award where the arbitrator records her view that it is "appropriate" not to apply the entire agreement clause itself contains limited reasoning, it needs to be read in context. More specifically, the conclusion was preceded by a very lengthy analysis in which the arbitrator considered (among other things):

(a) the nature, significance and effect of the misrepresentations made by Antipodes (misrepresentations she found were established on the evidence);

(b) the degree of reliance on those misrepresentations by Accel;

(c) the fact that Antipodes itself had sought to bring a misrepresentation claim, despite the entire agreement clause;

(d) the fact that both parties were arms-length commercial entities, each with the benefit of appropriate legal advice; and

(e) the cultural and legal context in which the MSA was operating.

[43] All these seem to us to be potentially relevant "circumstances" under s 50. As well, the arbitrator referred to the respective positions as advanced at the arbitration and the case law to which they had referred.

[44] We also note Accel's submissions that the s 50 issue was a minor one, briefly argued in the context of the arbitration overall. That is unsurprising, given that Antipodes was also alleging pre-contractual misrepresentation. Accel also points out that cases now referred to by Antipodes were not referred to the arbitrator at all.

[45] It follows that we are unable to discern any seriously arguable error of law in either the first (or the second) High Court decision on this issue. Although we acknowledge that there is a not insignificant private interest involved for the parties, it is not one that outweighs the cost and delay of an appeal to the High Court, particularly in circumstances where the arbitration has been conducted by a legally qualified, highly regarded arbitrator and where we are satisfied there is no seriously arguable error of law.

[46] Nor does the security now provided by Antipodes in respect of the disputed sums change this view. Accel advises the security paid (after an initial refusal to do so, despite orders made by the arbitrator) does not cover the entire outstanding amount.

Result

[47] The application for special leave is declined.

[48] The applicant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.

Solicitors:
Brookfields Lawyers, Auckland for Applicant
Turner Hopkins Solicitors, Auckland for Respondent