APPEAL OF ARBITRATORS AWARD ON COSTS REFUSED

Supreme Court of Western Australia, Unreported
Anderson J.
23 February 1993

Keywest Construction Group Pty Ltd and
Footscray Holdings Pty Ltd (t/as Premier Commercial Ceilings)

This action arose out of a fairly typical construction dispute.

THE FACTS

The appellant builder had entered into a sub-contract with the respondent sub-contractor to supply and install ceilings, suspended ceilings, wall linings and metal stud work in a large development at Freemantle for the lump sum of $900,000. After the project was completed, the sub-contractor claimed the total sum of approximately $679,000 from the builder for variations, errors in the measurement of quantities, damages for delay and other breaches of contract. The builder counterclaimed for an overpayment of approximately $237,000. Thus the parties were apart by approximately $916,000.

THE INTERIM AWARD

After taking into account claims and counterclaims, the arbitrator awarded the sub-contractor the sum of $81,171. This interim award did not deal with the question of costs.

THE FINAL AWARD

The arbitrator called for written submissions on the question of costs following the handing down of the interim award and then made his final award on costs. He ordered that the builder pay the sub-contractor's costs and the arbitrator's fees.

THE LEAVE TO APPEAL APPLICATION

The builder sought leave to appeal on the question of costs pursuant to Section 38 (4) (b) of the Commercial Arbitration Act 1985 of Western Australia. The application came before Master Bredmeyer. The Master had no difficulty in finding that the decision on costs was a question of law and since the costs involved exceeded $100,000, the question would substantially affect the rights of one or more of the parties to the arbitration agreement as required by s38 (5) (a) of the Act. The application came under the amended uniform Act and in keeping with the approach of the New South Wales and Victorian Full Courts the Master held that his discretion was general and not limited by The Nema guidelines. In all the circumstances, the Master granted leaved to appeal.

SOME COMPLICATING FACTORS

In the course of the hearing, the sum of $13,600 was added to the sub-contractor's claim and the builder conceded this claim.

Prior to the commencement of the hearing, the builder had made an Offer of Compromise in accordance with the Supreme Court Rules for the sum of $80,000. The sub-contractor's solicitors immediately advised the builder's solicitors that the Court Rule under which the Offer of Compromise was made applied to Court proceedings only and not to litigation and referred the builder's solicitors to the appropriate Court Rules which applied to arbitration. These in fact provided for a payment into Court procedure. The builder's solicitors took no steps to comply with these latter rules.

THE DECISION

The Court dismissed the appeal. The fact that the sub-contractor had claimed the sum of $679,000 and was only awarded $81,000, in His Honour's view "did raise for serious consideration the question of how the costs should go". In one sense, both parties had to some degree been successful in that they succeeded on some claims and were successful in defeating other claims against them. The Court noted however that the arbitrator had followed the normal rule of costs following the event since the sub-contractor, in the end, had a nett payment made to it. The builder could have protected itself by making an appropriate payment into Court. The invalid Offer of Compromise could not be regarded as an open offer which should have been taken into account by the arbitrator – although the amount of the award was in excess of the ineffectual Offer of Compromise, the amount awarded to the sub-contractor would have been less than the Offer of Compromise had there not been an amendement at the hearing to increase the sub-contractor's claim by $13,600.

It was submitted for the builder that it should have been awarded costs on the issues upon which it was successful. His Honour indicated that the arbitrator in exercising his discretion could have made an order along these lines.

COMMENT

Although His Honour stated that the arbitrator in the exercise of his discretion could have departed from the normal rule of costs following the event, the approach taken by the arbitrator in making a costs order in favour of the sub-contractor, to whom monies were payable, is the preferable approach. It is essential those advising parties to arbitration proceedings are able to predict with some certainty what costs orders are likely to be made. It is difficult to do so if arbitrators, in the exercise of their discretion, depart from the normal rule that costs follow the event. As His Honour stressed, a party can adequately protect itself from a costs order by an appropriate payment into Court (or where the Court Rules provide, an Offer of Compromise).