2689

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.53/76

BETWEEN ZOLTAN SHARDY

Appellant

A N D GUARDIAN ROYAL EXCHANGE ASSURANCE OF NEW ZEALAND LIMITED

Respondent

Coram - Woodhouse J.
Richardson J.
Somers J.

Hearing - 1 June 1978

Counsel - Appellant in Person
B.R. Boon for Respondent

Judgment - 1 June 1978

ORAL JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J.

Between 4 July 1974 and 28 July 1974 a house property at 11 Crosby Terrace, Wellington owned by Dr Zolton Shardy, the appellant, was damaged by unauthorised occupants of the premises. The appellant held a Houseowners policy of insurance with the Guardian Royal Exchange Assurance of New Zealand Limited, the respondent, and made a claim under that policy. After some negotiations for settlement had taken place without success, the appellant wrote on 1 October 1974 invoking the arbitration provisions of the policy. But it was not until May 1975 that Mr L.E. Brooker was appointed as the arbitrator. Both parties were represented by counsel at the arbitration hearing on 4 June 1975 and the award was published in late July - the actual date is not in evidence.

The award records that it was agreed that there were three issues for the arbitrator to adjudicate -

(a) whether wall-to-wall floor coverings were included in the insurer's policy;

(b) the cost of reinstating damage caused by the trespassers; and

(c) the amount payable for loss of rent.

As to (a) the arbitrator directed his attention to the wall-to-wall carpets. He held that they were not fixtures and were not covered by the policy. Turning to (b) he assessed the cost of reinstatement at $1,750 and under (c) he assessed the loss of rent for which the respondent should be responsible, at $660.

The appellant applied to the Supreme Court to have the award set aside on the grounds of misconduct on the part of the arbitrator and of error of law on the face of the award. Ongley J. dismissed the application in a reserved judgment given on 30 March 1976. The appellant now appeals on the ground that that judgment is erroneous in law.

He raised before us a number of matters in support of his two general submissions - that the arbitrator had misconducted himself in the arbitration and that there were errors of law on the face of the award. As to the first, we have carefully considered all the submissions that the appellant has raised in that respect but are satisfied, for the reasons given by Ongley J., that it has not been established that the arbitrator misconducted himself in the arbitration. As to the second, we do not find it necessary to discuss all the submissions in detail. This is because we are satisfied

that in a material respect there is an error of law which is manifest on the face of the award. It relates to the basis in law on which the arbitrator assessed the loss of rent for which the respondent should be responsible at $660. In order to consider this aspect of the case it is necessary to set out some particulars of the insurance policy and also to refer in a little detail to facts relevant to this matter as recorded in the award. The loss of rents provision in the policy provided:

> "LOSS OF RENT RECEIVABLE (not exceeding 15% of the sum insured and not otherwise insured) for the period reasonably necessary for reinstatement following loss or damage under Section 1 during which the insured premises are rendered uninhabitable."

As usual in such policies, the policy in this case contained a reinstatement clause conferring on the insurer the option of making good the loss by reinstatement. It provided:

> "THE COMPANY AGREES to indemnify the Insured ... by payment or at the option of the Company by reinstatement or repair."

A further provision that needs to be noted is Condition B which provided:

> "The Insured shall not without the written consent of the Company -
>
> (i) incur any expense in making good any damage or any expense of litigation."

Finally, there is the arbitration provision which provided:

> "If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an Arbitrator to be appointed by the parties in accordance with the Statutory Provisions for the time being in force.

> Where any difference is by this Condition to be referred to Arbitration the making of an Award shall be a condition precedent to any right of action against the Company."

The reinstatement clause does not specify when the option to reinstate is to be exercised. In such circumstances it is well established that it must be exercised within a reasonable time and, further, that before that time has expired the insurer may waive its right to reinstate in which case liability under the policy must be discharged by payment of money. Election may be express or by conduct and it is always a question of fact whether the particular conduct constitutes an election to pay and waive the right to reinstate (MacGillivray & Parkington on Insurance Law (6th ed.) para. 1921-1922).

There is no direct evidence in the award of the date when the respondent decided not to elect to reinstate and advised the appellant of that decision or made it clear from its conduct that it was unequivocally electing not to reinstate. But it is clear from the factual narrative in the award that, following receipt of a preliminary advice claim from the appellant, an insurance adjuster engaged by the respondent reported to the respondent on 26 July 1974 and sought authority to ask a Mr Colley, a building contractor, to do the repairs as soon as possible; that the appellant wanted the property reinstated and obtained his own report and estimate of the cost of remedial work from a Mr James Green, quantity surveyor, on 30 August 1974; that following further discussions the appellant wrote formally invoking

the arbitration provision of the policy on 1 October 1974 and the respondent replied on 7 October 1974 nominating an arbitrator and withdrawing all previous offers; that on 15 October 1974 the appellant wrote to the respondent in relation to a number of matters and suggested obtaining a quote from another builder or builders to do the repair work; that on 22 November 1974 the respondent's solicitors wrote to the appellant's then solicitors and as the award states "they discussed arbitration and suggested that Mr Colley be instructed to carry out the remedial work"; that the appellant's solicitors replied on 22 November 1974 rejecting that proposal; and, finally, that on 4 December 1974 the respondent's solicitors wrote to the appellant's solicitors agreeing to an arbitrator being nominated by the President of the New Zealand Institute of Architects.

Against this background we turn to consider the limits of the loss of rent provision. What the provision is concerned with is the period reasonably necessary to reinstate the rent producing capacity of the damaged property. That is reinforced by the concluding words referring to the period "during which the insured premises are rendered uninhabitable." The qualifying adverb "reasonable" makes it clear that the parties are not stipulating for the bare minimum period and "necessary" is used in the sense of "require". So what is to be determined is the period reasonably required for reinstatement. What is reasonable or reasonably required cannot be decided in the abstract. It must always depend on the circumstances. In turn, what circumstances are relevant depends

on the nature of the transaction. It follows that in this case they must relate to the reinstatement of the property as provided and allowed for under the insurance policy. In the events that have happened the provision is concerned with reinstatement by the insured, not by the insurer. It is a relevant consideration that an insured who wishes to retain his protection under the policy is not at liberty to reinstate unless and until the insurer has waived its option to reinstate or the period during which he may elect to reinstate has expired. In terms of commercial reality, too, it would not ordinarily be reasonable to expect an insured to undertake any substantial expense and/or effort in relation to reinstatement by him before then. This is reinforced by the consideration that the condition referred to earlier prohibits the insured from incurring any expense to the account of the insurer in making good any damage without the written consent of the insurer. That condition, designed to protect the insurer, ceases to have effect once the insurer has elected to pay but operates as a restraint on the insured up to that time. It all depends on the circumstances of the particular case, what, if any, steps it is reasonable to expect the insured to take before then in anticipation that he may have to reinstate himself, referring here to steps in relation to the obtaining of local authority approval to the repair work and the arranging of an appropriate building contract and, of course, as we have said, obviously regard must be had to the impact of the policy provisions to which we have referred.

In the present case we are satisfied that the arbitrator erred in law in the way he approached this question. An unqualified acceptance of arbitration is, of course, inconsistent with the retention of an option to reinstate, for the arbitration is "as to the amount to be paid under this policy". And Mr Boon for the respondent submitted that there was an unequivocal election by the respondent early in October to go to arbitration; that the letter of 22 November 1974 was written at a time when the arbitration was clearly launched on its course; and that on that basis the $660 allowed for could be sustained. Against that submission it may be said that, inasmuch as the respondent was suggesting as late as 22 November 1974 that the premises should be reinstated by its nominee, it was still pursuing reinstatement as the method of discharging liability to the insured and had not unequivocally renounced any interest on its part in having the premises reinstated. But it is not necessary to resolve that difficult question of construction of the award. It is sufficient to say that it is clear from the award itself that the arbitrator did not direct his attention to the provisions of the policy as to reinstatement and to the effect of the insurer's option in that respect in calculating the loss of rent payable under the policy. He began this part of his award as follows:

> "If the negotiations had proceeded normally a settlement should have been reached and the reinstatement completed in September or October 1974."

and ended by concluding:

> "I consider a period of sixteen weeks should have been ample to enable Dr Shardy to iron out his differences with the insurer."

The arbitrator does not advert to the important point - and we should emphasise that so far as can be judged this matter was not drawn to his attention - that it was not until the respondent elected not to reinstate that the appellant was in a position to do so. It may be that if the arbitrator had approached the matter on the proper basis he might have arrived at a similar award under this head. Or he might have awarded a substantially increased amount. We cannot say, because the answer depends on facts which have not been considered in the award and so as to which there are no findings.

Mr Boon then made two further and associated submissions. The first was that in the exercise of its discretion under sections 11 and 12 of the Arbitration Act 1908 a court may refuse to interfere with an award even where one of the grounds on which awards may be remitted or set aside exists and that this was such a case. The second was that in these circumstances it cannot be said that Ongley J. wrongly exercised his discretion to refuse to disturb the award. Both matters can be dealt with very briefly. As to the second, it is sufficient to note that Ongley J. was not asked to consider the significance of the insurer's election to reinstate so he did not have to consider the exercise of his discretion in that regard. As to the first, Mr Boon accepted that, where an error of law exists on the face of an award, a court should not refuse to interfere with the award unless there is no real possibility of manifest injustice if the award is allowed to stand. This is not a case where the court can say that the

arbitrator must have come to the same result had he adopted the correct approach in law (Parsons and Others v Farmers Mutual Insurance Association [1972] NZLR 966). In these circumstances the award cannot stand and, the arbitrator having died, it must be set aside. It is to be hoped, in view of the nature of the issues and the amount involved, and the lapse of time since it first arose, that the parties may yet be able to resolve their differences. Otherwise a further arbitration will have to take place.

It is not necessary in the circumstances to consider the other issues that were canvassed before us. The appeal will be allowed. There will be an order setting aside the award. The appellant is entitled to the expenses of printing the case and any other reasonable disbursements to be fixed by the Registrar.

Solicitors

Appellant in Person

Chapman, Tripp & Co., Wellington for Respondent