IN THE SUPREME COURT OF NEW ZEALAND

A. 282/75

CHRISTCHURCH REGISTRY

BETWEEN ENVIROTECH AUSTRALIA PTY LIMITED

PLAINTIFF

A N D CHARLES MARTIN

FIRST DEFENDANT

A N D NEW ZEALAND ALUMINIUM SMELTERS LIMITED

SECOND DEFENDANT

Hearing: 15th September 1975

Judgment: 1ST OCTOBER 1975

Counsel: Mr A.J. Forbes for Plaintiff
Mr J.G. Matthews for First Defendant
Mr J.T. Eichelbaum for Second Defendant

JUDGMENT OF CASEY J.

The Plaintiff contracted with the Second Defendant to instal equipment in the Aluminium Smelter at Tiwai. Claims for disbursements against the Plaintiff (totalling $1,453.64 disbursements - total $4,[illegible]) were made by the latter which involved an alleged arbitration clause in the contract, and it purported to appoint the First Defendant sole Arbitrator in default of any co-operation from the Plaintiff, which thereupon issued a writ seeking an injunction against both Defendants from proceeding with the arbitration upon the grounds that there was no agreement or authority to dispose of the dispute in that way. A motion for interim injunction was filed by Plaintiff on 1st July 1975 and, in the supporting affidavits Mr Gibson (a Director of the Plaintiff) maintained that his Company had received only one page of the standard conditions of contract (running into ten printed pages) which the Second Defendant claimed has been sent to the Plaintiff and incorporated by reference into their contract. These conditions (but not the page acknowledged by Mr Gibson) contained an arbitration clause clearly applicable to the present dispute. I am informed that the potential damages to date as a result of the alleged breach amount to $2.5 million and accrue at the rate of $800.00 per day; clearly very substantial sums are involved and the Second Defendant was anxious to have the matter resolved without delay.

The matter for interim injunction came before me on 31st July and after hearing Counsel I adjourned it for the hearing of the main action on 15th September 1975 by agreed terms having strict time limits for discovery. The Plaintiff's affidavit of documents was due to be filed [illegible]th August, the Second Defendant prepared a motion to have the [illegible] for want of prosecution; before it was [illegible] solicitors advised that their client would not [illegible] with the action.

Counsel appeared before me on the trial date on 15th September. I was informed by Counsel that Plaintiff had found the full [illegible] in its possession and now conceded that the dispute was properly subject to arbitration. I gave judgment dismissing the action and full indemnity for solicitor and client costs was [illegible]

Counsel for the First Defendant (the Arbitrator) took no active part in the proceedings and was granted leave to withdraw after intimating that he would abide by the Court's decision.

Mr Eichelbaum for the Second Defendant submitted that the Plaintiff's claim that it had never received the full conditions of contract (except for one page) was a fabrication and, faced with the prospect of having to swear an affidavit of documents to this effect, it decided its bluff was called and abandoned the case. He seeks support for this view from these facts:-

(a) The total lack of any co-operation in the arbitration, the subsequent arbitration clause, and the obvious fact that the full document had been sent to the Plaintiff during the course of negotiating the contract, and the improbability

The motion for interim injunction came before me on 31st July and after hearing Counsel I adjourned it for the hearing of the main action on 15th September 1975, on agreed terms fixing strict time limits for discovery. The Plaintiff's affidavit of documents was due to be filed on 29th August and on default, the Second Defendant prepared a motion to have the action dismissed for want of prosecution; before this was filed, Plaintiff's solicitors advised that their client would not be proceeding with the action.

Counsel appeared before me on the trial date of 15th September. I was informed by Counsel that Plaintiff had found the full document containing the arbitration clause in its possession and now conceded that the dispute was properly subject to arbitration. The Second Defendant sought judgment dismissing the action and full indemnity for solicitor and client costs and disbursements against the Plaintiff (amounting to $3,150.00 costs, $1,453.64 disbursements - total $4,953.64), on the basis that the Plaintiff's action for injunction was an attempt without any merit to delay the arbitration and was an abuse of the Court's procedure. Counsel for the First Defendant (the Arbitrator) took no active part in the proceedings and was granted leave to withdraw after intimating that he would abide by the Court's decision.

Mr Eichelbaum for the Second Defendant submitted that the Plaintiff's claim that it had never received the full conditions of contract (except for one page) was a fabrication and, faced with the prospect of having to swear an affidavit of documents to this effect, it decided its bluff was called and abandoned the case. He seeks support for this view from these facts:-

(a) The total lack of any co-operation in the arbitration, all steps having to be taken by the Second Defendant;

(b) The Plaintiff acknowledged having received only one page of the conditions of contract because in previous correspondence relating to extras they had referred to matters on that page. They knew they had to acknowledge at least that page.

(c) The reference in one clause at the top of that page to the subsequent arbitration clause, and the obvious fact that it was part of a much fuller document;

(d) The Second Defendant's assertion on affidavit that the full document had been sent to the Plaintiff during the course of negotiating the contract and the improbability

of it departing from its standard practice of sending the full document, and simply extracting a page to send to the Plaintiff on this particular contract;

(e) Discrepancies in various letters from the Plaintiff about the number of clauses on the page it acknowledged receiving - supposedly indicating they didn't really know or care what they had;

(f) Plaintiff through its Counsel admitted that the full 10 page document was finally discovered after an "exhaustive search" following a trip across the Tasman by its solicitor - presumably in the course of the solicitor's preparation of an affidavit of documents.

Taking all these matters together, Mr Eichelbaum asks me to infer that the Plaintiff deliberately commenced the action for injunction, alleging there was no provision for arbitration, when all along it had the full conditions of contract and must have known there was such a clause; alternatively, it was guilty of carelessness amounting to a wilful disregard of the documents in its possession.

For the Plaintiff, Mr Forbes was somewhat handicapped by having to acknowledge the discovery of this vital document at the eleventh hour, as a result of the solicitors investigations on the order ~~for discovery. I emphasise there is~~ no suggestion that the Plaintiff's solicitors were at fault or in any way involved in the allegedly improper conduct of the Plaintiff. But Mr Forbes submits that the Plaintiff's Director (Mr Gibson) was genuinely mistaken in his belief that only one page of the contract conditions had been sent to his Company and incorporated in the contract. There was an extended correspondence covering the formation of the contract and apparently at one stage a set of conditions proposed by one of the parties was rejected. So far as I can gather from the numerous exhibits filed with the affidavits, the final contract was made by order forms with printed conditions and incorporating by reference standard conditions, so this is not a case of a formal signed document embracing all the relevant conditions of the type a lawyer likes to see - for reasons this dispute makes obvious.

In the end, I have to acknowledge (in spite of Mr Eichelbaum's persuasion) that on balance of probabilities I am not satisfied the Plaintiff deliberately set out to delay the arbitration by this action, knowing that it had no possible case.

Mr Gibson clearly deposed as to his earlier belief about the existence of the disputed arbitration clause and I am reluctant to make a finding on the evidence before me which would be tantamount to suggesting perjury on his part. But the Plaintiff's conduct was certainly suspicious and earns the epithet of "gross negligence" applied by Mr Eichelbaum.

Rule 555 of the Code deals generally with the Court's jurisdiction on costs and declares that they shall be in the discretion of the Court or Judge "subject, however, to any special provision as to costs in any statute or in these rules.", There follow a number of specific instances and rule 568 then provides that costs are to be regulated and paid according to the scale in Table C of the Third Schedule "but the Court or Judge may, in giving judgment or making any order, fix a sum or sums as costs of the action or of the application, as the case may be, in full of all costs, notwithstanding that such sum is greater or smaller than the sum named in the said table." This rule was considered by Cooper J., in Wilson v. Dominion Portland Cement Co. (1916) N.Z.L.R. 792, as giving the Court discretionary power which should be exercised "on reasonable grounds",

Under the scale the Second Defendant in this action could be entitled, on the highest scale and making all allowances in its favour, to $470.00 made up as follows:-

Statement of Defence	42.00
Preparation (Maximum certified)	315.00
Affidavit of Documents	63.00
Inspection of Documents	42.00
Judgment dismissing action	8.00
	$470.00

Mr Eichelbaum submits that the Court of Chancery in England has jurisdiction to award full solicitor and client costs to a successful defendant at its discretion in appropriate cases and cited Andrews v. Barnes (1888) 39 Ch.D. 133, and contended that the same principle could be applied in New Zealand to cases where equitable relief is sought, in the exercise of the Court's

our tradition of making litigation as cheap as possible. The

discretion under Rule 568. I think that over the years New Zealand has adopted an independent approach to costs in civil litigation in which English practice is largely irrelevant. The scale makes it clear that there is no intention generally to give a successful party a complete indemnity and this was confirmed as long ago as 1887 when Williams J. refused to allow Second and Third Counsels' fees as a necessary disbursment in <u>Sargood v. Corporation of Dunedin</u> (1887) 5 N.Z.L.R. 461, saying in respect of the then rules "The intention was to cheapen litigation." Coming to more modern times, Perry and McMullin JJ. in re <u>M's Applications</u> (1973) N.Z.L.R. 169 (dealing with the proper assessment of legal aid costs) refused to import into our system the English three-tiered system of costing of a party-and-a-party basis, a common fund basis, and a solicitor-and-own-client basis. It is by now clearly established that Rule 568 gives the Court a complete discretion on costs, including the right to depart from the scale in appropriate cases and I see no reason why that discretion should be limited by importing English practice to our local situation, which has the fundamental difference of a fused profession as well as a tradition of attempting to keep the costs of litigation as low as possible. This discretion is illustrated by such a case as <u>Bevan Investments Ltd. v. Blackhall & Struthers</u> (1973) 2 N.Z.L.R. 45 where at p. 84 Beattie J. had no hesitation, in view of the time occupied and the complexity of the issue, in departing totally from the scale and awarding a very substantial lump sum against the unsuccessful parties. In the present case I consider the scale too low in view of the amounts at issue and the urgency and responsibility involved. I have not taken into account the Plaintiff's conduct in commencing this action on an assumption which proved quite mistaken; this is an aspect which the Court must approach with caution. Costs are not meant to punish a careless party - even one as carless as this Plaintiff. Many people indulge in litigation in an honest but sometimes grossly mistaken belief in their own rights, and to hold that this justifies an increase beyond the scale under Rule 568 would constitute a radical departure from our tradition of making litigation as cheap as possible. The

position may be different where a party has virtually abused the Court's procedure by commencing an action knowing that his case has no merits, but I am not satisfied this is the situation here.

In all the circumstances I think an appropriate award of costs to the Second Defendant on the dismissal of this action would be $1,200.00. I have no doubt that the bill of costs of $3,150.00 is fully justified having regard to the seniority and experience of Counsel engaged and the responsibility and urgency involved, but in fixing costs as between the parties the Court is not obliged to take into account the Defendant's natural desire to have the best representation possible, and must look at the position between them on what might be regarded as a normal solicitor-client basis, bearing in mind that the approach is not that of a full indemnity, but a reasonable contribution to the other party's costs.

The disbursements of $1,453.64 have also been queried but I am satisfied these have been reasonably and properly incurred. They include the cost of flying an officer of the Company to New Zealand to deal with the voluminous documents and to assist in preparing the Second Defendant's affidavit (at a time when there was a postal strike in Melbourne) as well as numerous telex messages, toll calls etc. In view of the urgency of the occasion these were fully justified.

I therefore give judgment dismissing the action with costs to the Second Defendant of $1,200.00 together with $1,453.64 disbursements as listed in the bill of costs submitted, plus any other necessary disbursements to be fixed by the Registrar. The first Defendant was involved to the extent of appearing at the interim motion and at the final hearing and obtaining leave to withdraw in each case and I fix his costs at $75.00 plus disbursements.

MB Casey J

Duncan Cotterill & Co, Christchurch
Lane Neave & CO, Christchurch
Chapman Tripp & Co, Wellington