

IN THE HIGH COURT OF NEW ZEALAND

M. 1342/83

AUCKLAND REGISTRY

701

IN THE MATTER of the Arbitration Act 1908

BETWEEN LIONEL TREVOR PATTISON
and DOROTHY SHIRLEY PATTISON

APPLICANTS

A N D ALLAN BROOKE MITCHELL

DEFENDANT

Judgment: 18 May 1984
Hearing: 18 May 1984
Counsel: R.S. Chambers for Applicants
B.M. Grierson for Defendant

ORAL JUDGMENT OF CASEY J.

A dispute between the Applicants and the Defendant over a lease was the subject of an agreement between them made on 9th June 1982 and it provided that failing settlement of certain aspects they should be referred to a sole arbitrator. Under Clause 16, \$15,000 was to be lodged by Mr and Mrs Pattison with an independent solicitor. Subject to certain payments, the balance was to be charged with the costs and expenses payable to the arbitrator and "shall then be payable or refundable to Mitchell or Pattisons in accordance with any awards or agreements made between the parties." The arbitrator duly published his award and I understand it provided for some \$6,000 to be paid to the Applicants. Mr Mitchell was unhappy with this and applied to have the award set aside and in a judgment of 23rd March 1984 Thorp J. dismissed this and gave leave to the Applicants to enforce the award, directing that costs and disbursements amounting to some \$2,600 be paid to them.

The Defendant has since appealed to the Court of Appeal and has paid the security of \$750 fixed by this Court and now moves for a stay of execution which is opposed by the Applicants. Mr Grierson, in support, conceded that the

general rule was that a successful party is entitled to the fruits of his judgment pending an appeal unless the effect would be to render it nugatory, or there are other special circumstances. From the affidavits filed by the Applicants it is quite clear that there is far more than sufficient to meet the amounts in issue or any costs that may be awarded on the appeal; by comparison with the total assets, I think my description of the amounts involved being "chicken feed" was apt. But Mr Grierson has argued that in this case a special fund was set up to cover the award that might be made by the arbitrator, and this constituted a special circumstance which the Courts have always acknowledged may justify a stay of execution, even in those cases where there is no question about the amount of the ultimate judgment being paid or met. I refer to his citation of Polini v. Gray (1879) 12 Ch.D. 438 where the Master of the Rolls said in relation to the fund the subject of the appeal in that case, that there should be an order for its preservation having regard to the peculiar circumstances until the decision of the House of Lords had been obtained. He concluded by saying that:-

"It must not be supposed from what I have said that I consider such an order to be by any means of course, or one that ought to be made except under very special or peculiar circumstances."

The existence of such circumstances here is asserted by Mr Grierson and in effect his submission is that the parties have agreed to set up a fund not only to provide security for the outcome of any arbitration, (not now relevant, having regard to the extent of the Applicants' assets disclosed), but also to avoid the need to take any enforcement proceedings. The solicitors holding the money need do no more than pay out automatically once the final result is known. As a mark of his good faith he says Mr Mitchell is prepared to add to the fund the amount of the costs ordered to be paid in the existing Court judgment, which would in effect bring up the total due to some \$9,000-odd. I understand that there is actually more in the fund than this, although the final figures are not available to me.

Mr Chambers submits that the present application is not apt and the Court is only dealing on a stay of execution with the amount of the costs of \$2,700 awarded under the judgment of Thorp J. The appropriate action should have been an injunction to restrain the solicitors from paying out under the agreement, which is not otherwise under the Court's jurisdiction. Be that as it may, and assuming that the whole fund can be the subject of the stay applied for, these people have been out of their money now for over two years. The agreement itself demonstrates an attitude by the parties corresponding to what would prevail if this had been an ordinary litigation - namely, that the one having the benefit of the award should be entitled to the fruits of it, and not have to await the outcome of an appeal. I can see no reason, therefore, to apply a different rule to this fund than that which has prevailed in the Courts for so long between ordinary litigants. Certainly the agreement makes no reference to appeal or further proceedings under the award as a condition of payment by the solicitors. Whether or not this should be implied is a question, perhaps, for other litigation, but I do not see it as very relevant in this application. This is a matter for my discretion and Mr Grierson's main point, that the fund was there to avoid the need of enforcement or execution proceedings, is not enough to constitute special circumstances affecting the Court's discretion towards a stay of execution, notwithstanding that there is ample available to comply with any judgment that may finally be obtained after appeal. Indeed, there is an air of unreality about the application suggesting to me that Mr Mitchell may have other unstated motives in bringing it. The motion will accordingly be dismissed.

On the question of costs Mr Chambers has mentioned that his firm was prepared to give a solicitor's undertaking for costs in order to have the funds released, but this was rejected and his clients have been put to the inconvenience and expense of having to oppose this application, which he considered was without merit and I am inclined to agree with him. However, a party is not to be penalised in costs just because he has exercised rights open to him, and again they

are at my discretion. I do not propose awarding as much as the \$500 Mr Chambers suggested because they must be related to the amount and the issues involved. His clients were put to a deal of trouble and I think that in all the circumstances an award of \$300 costs plus disbursements is adequate to compensate them. There will be an order accordingly.

M. G. Casey J.

Solicitors:

Short & Co., Auckland, for Applicants

B.M. Grierson, Birkenhead, Auckland, for Defendant