16/8 NZLR.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1220/83

950

IN THE MATTER of the Arbitration Amendment Act 1938, Section 11

A N D

IN THE MATTER of an Arbitration

BETWEEN: ALEXANDER FREIGHTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a Refuse Contractor

Claimant

A N D: THE EAST COAST BAYS CITY COUNCIL a body corporate under the Local Government Act 1974

Respondent

Hearing: 27 June 1984

Counsel: T W H Kennedy-Grant for Claimant
A D Banbrook for Respondent

Judgment: 31 JUL 1984 1984

JUDGMENT OF HENRY J.

Case Stated pursuant to s.11 Arbitration Amendment Act 1938 and pursuant to certain terms of reference to arbitration dated 23 September 1981 following an award made on 19 November 1981 by William Henry Mansell, as sole arbitrator.

The arbitration arose out of an agreement dated 10 September 1974 between Alexander Freights Limited ("Alexander") and the East Coast Bays Borough Council as it then was ("the Council") relating to the removal of refuse by Alexander for the Council. The parties had entered into an earlier refuse removal agreement dated 2 August 1967, clause 21 of which provided:

> "21. IF the contractor shall have duly and punctually complied with all its obligations hereunder to the satisfaction of the Council it shall be entitled on the expiration of the term of this Agreement on giving to the Council not less than three months' previous notice in writing to a renewed Agreement for a term of seven years at a rate of remuneration to be then agreed upon by and between the parties hereto and failing agreement to be settled by arbitration in accordance with the provisions of the Arbitration Act 1908 but otherwise upon the same terms and conditions mutatis mutandis as are herein contained."

Alexander exercised its right given by that provision, and the agreement of 10 September 1974 was accordingly entered into. The case records that this later agreement was for the collection of refuse in the area of the East Coast Bays Borough and for the operation of the Rosedale Road disposal site. The contract was for a period of seven years, commencing on 7 August 1974. Clause 13 of this agreement provided :

> "13. NOTWITHSTANDING the term mentioned in Clause 1 hereof the Council shall be entitled at any time absolutely to determine this agreement on giving to the Contractor one calendar

month's notice in writing under its Common Seal of its intention so to do and the agreement shall be deemed to be determined and to come to an end accordingly at the expiration of one calender month from the day on which such notice is delivered at the registered office or place of business of the Contractor or posted to the Contractor in a pre-paid registered envelope addressed to such registered office or place of business and thereupon the Borough Senior Inspector shall ascertain and determine the value of the services actually executed and performed by the Contractor under the terms hereof and an apportionment of the rate of payment set out in paragraph 16 hereof up to and inclusive of the day of determination as aforesaid after deducting therefrom any amounts previous paid to the Contractor in respect of such services by the Council and any amounts for which the Contractor may be liable to the Council under any of the provisions of this Agreement. The Borough Senior Inspector shall also assess and fix compensation for the loss (if any) which in the opinion of the said Inspector the Contractor may sustain by reason of such termination of this Agreement and the amount of such compensation shall be in the absolute discretion of the Borough Senior Inspector and shall be accepted by the parties.

The net amounts so fixed for services actually performed and for compensation (if any) shall be paid by the Council to the Contractor in full satisfaction and discharge of all claims and demands which the Contractor may have against the Council under and by virtue of or in any way relating to this Agreement. A certificate in writing under the hand of the said Inspector as to the amount or amounts payable by the Council to the Contractor under the provisions of this clause shall be binding upon the parties hereto."

The power to terminate was exercised by the Council by letter dated 27 January 1977, so as to terminate the contract on 28 February 1977. Following termination, Alexander lodged a claim for compensation for

loss sustained by reason of the termination, and for damages for breach of contract. The arbitration was concerned only with the first of these matters, namely, the assessment of compensation for loss arising from the termination. Four of the issues considered by the arbitrator were :

"First: Should the claimant's loss of profit on the tip management operation and the landfill be calculated on the basis of refuse from the area of the Respondent only or on the basis of refuse from the other areas referred to in the Claimant's submission as well ?

Second: Is the Claimant entitled to recover loss of profit on the recycling operation or not ?

Third: If the answer to the last question is "Yes" should the Claimant's loss of profit on the recycling operation be calculated on the basis of refuse from the area of the Respondent only or on the basis of refuse from the other areas referred to in the Claimant's submission as well ?

Fourth: Was the purchase by the Claimant of the Rex Trashmaster 350 Compactor complete with Rops Cab and Blade made in performance of the

Claimant's obligations under the contract between the Claimant and the Respondent or not ?"

The arbitrator recorded in the case his findings of fact in relation to those issues; the case also contains a record of some of the relevant evidence. The arbitrator has posed the following questions for the opinion of the Court :

"A. .As to the First Issue:

(1) Was I entitled to hold that in fixing any loss or damages the relevant time as to what the parties had (or should have had) in their contemplation was September 1974, and not the earlier contract date of August 1967 ?

(2) Was I entitled to hold that any loss or damages in regard the Claimant's refuse collection services should be assessed -

(a) Principally on the basis of the refuse received from the Respondent's area but taking into account the minimal quantities from private sources received in 1974 and subsequently from areas outside the Respondent's area ?

and/or

(b) not taking account of the additional refuse received after and by reason of the Auckland Regional Authority taking control of the site ?

B. As to the second issue:

Whether I was right in holding that the Claimant was entitled to compensation in

respect of profit on the recycling operation ?

C. As to the third issue:

(1) Whether I was entitled to hold that in fixing any loss or damages the relevant time as to what the parties had (or should have had) in their contemplation was September 1974, and not the earlier contract date of August 1967 ?

(2) Was I entitled to hold that any loss or damages in regard the Claimant's recycling operations should be assessed -

(a) Principally on the basis of the refuse received from the Respondent's area but taking into account the minimal quantities from private sources received in 1974 and subsequently from areas outside the Respondent's area ?

and/or

(b) not taking account of the additional refuse received after and by reason of the Auckland Regional Authority taking control of the site ?

D. As to the fourth issue:

Whether I was entitled to hold on the evidence and submissions before me that the purchase of the Rex Trashmaster 350 complete with Rops Cab and Blade was not necessary in performance of the Claimant's obligations under the contract in question ?

FIRST ISSUE - QUESTION 1:

It was common ground that in assessing compensation the arbitrator was required to apply the

general law as to breach or termination of a contract as laid down in the well-known passage in the judgment of the Court delivered by Alderson B. in Hadley v Baxendale [1854] 9 Exch. 341 at 354-355 :

> "....Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

It was therefore necessary for the arbitrator to determine what was within the actual or imputed knowledge of the parties at the time they made the contract. The question is how to apply that principle to the present facts.

For Alexander, it was submitted that as it was the 1974 agreement which was terminated and which was the basis for the claim for compensation, 1974 was the proper enquiry date.

For the Council, it was submitted that the 1974 agreement was only a "renewed agreement" and an extension in identical terms (subject to a re-negotiated remuneration) of the existing contractual relations between the parties; that the Council was always bound, as from 1967, at the option of Alexander, in the terms contained in the 1967 agreement; therefore, it was submitted, 1967 was the proper enquiry date.

The issue as I see it is one of construction. I note, first, that the 1974 agreement is completely self-contained; clause 23 provides that it "revokes all previous agreements between the contractor (Alexander) and the Council"; its operative starting date is expressed as 7 August 1974, and its termination by effluxion of time as 6 August 1981; the entitlement to compensation arises under clause 13. Second, the 1967 agreement is expressed as being for a period of seven years, commencing on 7 August 1967 and ending on 6 August 1974; its clause 21 gives Alexander the right on the expiration of the term, on giving not less than three months' previous notice, to a renewed agreement.

Looking at the respective documents, it is my view that the 1967 agreement ceased to have any operative effect on 6 August 1974, and thereafter did not and could not govern the rights and obligations of the parties.

Those rights and obligations were as from the 10 September 1974 governed only by the 1974 agreement. In particular, the consequences of breach or termination, and the resolution of any other questions arising between the parties in respect of their contractual relationships could be determined only by reference to the 1974 agreement. The relevance of the 1967 agreement is that by it the Council undertook to enter into a further agreement - which it duly did in compliance with that obligation. An agreement to enter into an agreement can itself be binding, but once the further agreement has in turn been entered into the former agreement in general ceases to have any future effect. It would therefore seem to follow that 1974 is the proper enquiry date.

In the course of argument reference was made to the decision of the Court of Appeal in Inder Lynch Devoy & Co v Subritzky (1979) 1 NZLR 87, where, in giving the judgment of the Court, Somers J. said (at p.93) in relation to the question of remoteness of damage :

> "The principles indicating the damage for which the party in breach of contract is liable have already been mentioned. It is such damage as may fairly and reasonably be regarded as arising naturally, that is to say, according to the usual course of things, from the breach or, materially in the present case, because of special knowledge which the person in breach had at the time of the making of the contract. The reason why knowledge at that time is postulated by the rule is that such prospective damage not being within normal contemplation, a party apprised of special circumstances may wish to avoid the loss,

> or simply not enter into the contract at all. Justice requires that a party should not be liable for damage of a type not within reasonable contemplation at the time the contract was entered into."

The present issue did not arise in that case, and the passage which I have quoted is a re-statement of principle, with reference to the reasoning behind that principle. The application of that principle, bearing in mind the reasoning, required the arbitrator to regard 1974 as the date of enquiry. Under the 1967 agreement Alexander was in effect granted an option to enter into a further agreement on specified terms. One of those terms was that if the Council terminated the agreement before its due date of expiry, Alexander would be entitled to compensation, to be assessed according to the normal rules. One of those rules is that remoteness is to be judged at the time the contract is entered into - not at the time of granting the option. The Council agreed in 1967 that any renewed agreement would so operate - that is precisely what it undertook. This results from an application of the Inder Lynch rationale, because in 1967 the parties knew and agreed that, inter alia, if there was a renewed agreement which was terminated by the Council, then, for better or for worse, the consequences would have to be assessed according to the circumstances as they would exist at the time of the new agreement. The 1967 agreement could have contained a provision for example requiring damage for breach or termination of the renewed agreement to be assessed according to knowledge as at

1967, or even as at the date of breach or termination. It did not, and the normal rule must apply. It is also to be noted that early termination was at the choice of the Council, with full knowledge of the right to compensation and of the likely heads of claim.

The inquiry is as to when the agreement was entered into. Here, as I have said, this agreement was entered into on 10 September 1974, and no other date. To hold otherwise would, in my view, be doing violence to the principles of construction. Accordingly, it was September 1974 to which the arbitrator had to have regard in determining knowledge for the purposes of assessing compensation. The answer to the question must therefore be in the affirmative.

FIRST ISSUE - QUESTION 2:

The arbitrator found the following relevant facts :

(a) Prior to the execution of the contract, some refuse from outside the area of the Respondent came to the Rosedale Road site but it was a very small proportion of the total refuse received there.

(b) This tipping of refuse from outside the area of the Respondent was known by the parties to be occurring prior

to the execution of the 1974 contract.

(c) The quantities of refuse tipped from outside the area of the Respondent were fairly minimal.

(d) The contract contained no restriction on the area from which refuse could be tipped at the site but I considered that the basic role of the Claimant was to perform services for what was then the East Coast Bays Borough Council and that the Council was concerned to provide services for its residents and ratepayers. The collections were only such as were authorised by the Council and the Claimant undertook to receive instructions from the Respondent relative to the operation of the agreement. I thought that the primary obligation on the part of the Claimant was to ensure that an efficient refuse service should be maintained in the Borough.

(e) In 1974 the parties did not envisage the Auckland Regional Authority being given the power to take over the refuse disposal functions of all the local authorities in the Greater Auckland area.

(f) In 1974 the parties did not foresee, nor should they have been expected to foresee, the Auckland Regional Authority taking over the site.

(g) In 1974 the parties similarly did not foresee the Rosedale Road site becoming a regional tip and I did not consider that they should have anticipated this happening.

(h) In 1974 the Council was under no obligation to provide a refuse disposal facility for other local bodies on the North Shore.

(i) In 1974 the Rosedale Road site was not even suitable, without considerable works being undertaken, to become a regional facility.

(j) On 1 March 1977 the Auckland Regional Authority took over control of the Rosedale Road site from the Respondent.

(k) From the date on which the Auckland Regional Authority took over control of the site, additional refuse from outside the area of the Respondent, collected on behalf of other local authorities on the North Shore, was tipped at the site.

Again, the parties were in agreement as to the legal principle to be applied - namely, that recovery for loss was limited to that actually resulting and which was, at the time of the contract, reasonably foreseeable as liable to result from the breach (Victoria Laundry (Windsor) Limited v Newman Industries Limited [1949] 2 KB 528; [1949] 1 All ER 997). The dispute between them was whether the loss areas excluded by the arbitrator should have been classified as being of the type or kind reasonably foreseeable or contemplated, and therefore recoverable.

It was submitted for Alexander that the degree or amount of loss did not need to be foreseeable,

but only the type or kind. That, I accept, is a correct statement of legal principle and one which is applied both in contract and in tort (Wroth v Tyler [1973] 1 All ER 897; Overseas Tankship (U.K.) v Morts Dock & Engineering Co., The Wagon Mound (No.1) [1961] AC 388).

However, what must first be done is to identity the type or kind of loss which, on the facts found by the arbitrator, was here contemplated. When asked to so identify the loss, Mr Kennedy-Grant, for Alexander, described it as that flowing from the loss of fees on refuse recovered from within the borough area but excluding any area south of the Auckland Harbour Bridge or, alternatively, the whole of the area being serviced by the Rosedale Road tip as at 1974. These answers I think highlighted the difficulties inherent in the submissions. The first could clearly embrace areas from outside the parties' contemplation. The second would cover a situation in which, for example, refuse from the whole of the Auckland Metropolitan area, or perhaps even beyond, was serviced by the Rosedale Road tip - again something clearly beyond contemplation.

The type or kind of loss found by the arbitrator was that arising from the loss of fees on refuse recovered from the borough, but taking into account also the fact that the tip serviced, to a minimal extent, refuse from outside it.

In my view, that finding was, on the facts as found, not only open to the arbitrator but the only conclusion which could be drawn from the facts recorded by him. The type or kind of loss related to the use of the Rosedale Road tip associated with its character in 1974 - namely the character of servicing in the manner indicated. A substantial alteration to that character, be it by a dramatic and unforeseeable development of the tip, or to the nature of its functions in the sense, for example, of converting it into a regional from a local service, must therefore mean the loss then arising is of a different type or kind, just as the tip itself becomes of a different type or kind. Just as in Victoria Laundry, it was the ordinary profit and not all profit including extraordinary profit which was recoverable, here it was only the ordinary or contemplated use of the tip which could be the subject of compensation. It therefore follows that the answer to this question is in the affirmative.

SECOND ISSUE:

This concerns an award of compensation in respect of loss associated with a recycling operation carried out by Alexander. Additional relevant facts as found by the arbitrator were :

"(a) Prior to entering into the 1974 contract, the Claimant had been engaged in certain refuse recycling operations associated with its activities at the Rosedale Road site.

(b) The facts relating to the source of that refuse were as stated in sub-paragraph (a) to (c) under First Issue Question 1 above.

(c) The contract contained no reference to any recycling operation but some recycling continued throughout the period between the execution of the 1974 contract and its termination."

The same rules as to remoteness which I have already discussed under the First Issue must apply here. Mr Banbrook, for the Council, placed reliance on the fact that the agremeent itself made no reference to the right to conduct a recycling operation and drew attention both to the measure of control able to be exercised by the Council over the tip operation and to the provisions for remuneration. He also referred to Lavarack v Woods of Colchester Limited [1967] 1 QB 278, a wrongful dismissal case which established that only emoluments to which an employee was contractually entitled could be taken into account in assessing damages. I do not think that principle has any application to the present situation. A contract-breaker is called upon to pay damages representing what a plaintiff would have gained in money or money's worth if the contract-breaker had fulfilled his legal obligations and no more. In Lavarack a claim was made, but disallowed, in respect of a bonus in addition to

loss of salary, but which the defendant was not contractually bound to pay. To have allowed the claim would have converted the entitlement to the bonus into a contractual term, which it was not.

Here, the re-cycling operation was quite irrelevant to the Council's legal obligations. The Council could not lawfully prevent Alexander from conducting the operation, whereas in Lavarack the employer could lawfully refuse to pay the bonus. Although it is not dealt with expressly in the findings set out in the case stated, I think it implicit in them that the Council had knowledge, as at September 1974, of the fact that a recycling operation was being conducted by Alexander. Therefore, applying Hadley v Baxendale and Victoria Laundry, a loss attributable to the inability to continue a recycling operation was a proper head of damage.

THIRD ISSUE: QUESTIONS 2 and 3:

The same principles of law and the same relevant facts apply to these questions as apply to Questions 2 and 3 of the First Issue. Accordingly, the answers to both these questions are again in the affirmative.

FOURTH ISSUE:

Alexander claimed as part of its compensation entitlement a loss relating to a particular item of plant it had purchased in 1976, known as a Rex Trashmaster 350 Compactor. The arbitrator, having considered conflicting expert evidence, found these facts :

> "(a) The Claimant purchased the Trashmaster because it anticipated a very great increase in the amount of refuse going to the Rosedale Road site as a result of the closure of other tips on the North Shore.
>
> (b) The Trashmaster was a bigger machine than was required, even allowing for greatly increased amounts of refuse after the Auckland Regional Authority upgraded the facility. It would have been too expensive both to purchase and to operate.
>
> (c) It was therefore not necessary or economical for the Claimant to purchase it."

Relevant also to this issue is clause 3 of the agreement, which provides :

> "3. The Contractor shall supply all tools, vehicles, plant, machinery and labour whatsoever which may be necessary or advisable for the proper and efficient carrying out of all the services referred to in this Agreement including the loading and discharging operations maintenance and running costs of all vehicles plant and machinery used in connection with the same."

Alexander could, of course, purchase any plant it desired, without restriction as to its capability, expense, or utility. To found a head of damage under clause 3, however, any item of plant must be "necessary or advisable for the proper and efficient carrying out of all the services". That is a question of fact which was for determination by the arbitrator. There is a positive finding to this effect, although I note that there is reference to the purchase being not economical rather than not advisable. That, I do not think, alters the sense of the finding, and clearly the arbitrator had direct regard to clause 3 and found that the machine was simply too big for the work. The mere fact that it could do the required work does not thereby make it "necessary or advisable" within the meaning of clause 3. Obviously if an item of machinery had a capacity of ten times the anticipated work and would still be capable of doing the actual work, then that machine could not be said to be necessary or advisable if one of a smaller capacity in line with the actual workload was available. The test to be applied to this issue is not whether this machine could do the work, but whether <u>it</u> (i.e. this particular machine) was necessary or advisable for the work. The arbitrator therefore applied the correct test in deciding this head of claim.

ANSWERS:

The answers to the questions posed in the case stated are therefore :

A. Question 1 -

Was the Arbitrator entitled to hold that in fixing any loss or damages the relevant time as to what the parties had (or should have had) in their contemplation was September 1974, and not the earlier contract date of August 1967 ?

Answer: YES.

Question 2 -

Was the Arbitrator entitled to hold that any loss or damages in regard the Claimant's refuse collection services should be assessed

(a) Principally on the basis of the refuse received from the Respondent's area but taking into account the minimal quantities from private sources received in 1974 and subsequently from areas outside the Respondent's area ?

and/or

(b) not taking account of the additional refuse received after and by reason of the Auckland Regional Authority taking control of the site ?

ANSWER: YES

B. Question -

Whether the Arbitrator was right in holding that the Claimant was

entitled to compensation in respect of loss of profit on the recycling operation ?

ANSWER: YES

C. Question -

(1) Whether the Arbitrator was entitled to hold that in fixing any loss or damages the relevant time as to what the parties had (or should have had) in their contemplation was September 1974, and not the earlier contract date of August 1967 ?

ANSWER: YES

(2) Whether the Arbitraror was entitled to hold that any loss or damages in regard the Claimant's recycling operations should be assessed -

(a) Principally on the basis of the refuse received from the Respondent's area but taking into account the minimal quantities from private sources received in 1974 and subsequently from areas outside the Respondent's area ?

and/or

(b) not taking account of the additional refuse received after and by reason of the Auckland Regional Authority taking control of the site ?

ANSWER: YES.

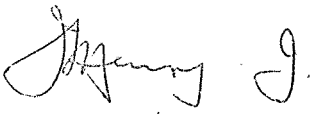
D. Question -

Whether the Arbitrator was entitled to hold on the evidence and submissions before him that the purchase of the Rex Trashmaster 350 complete with Rops Cab and Blade was not necessary in performance of the

Claimant's obligations under the contract in question ?

ANSWER: YES.

Having regard to the above answers, it may well be appropriate not to make any order as to costs. However, I have not heard counsel on this topic, and it is accordingly reserved with liberty to either party to apply.



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