30/10. NZLRpts. (43) RM X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A No 112/82

1332 (2)

BETWEEN CITY REALTIES (DEVELOPMENTS) LTD
Plaintiff

AND INDUSTRIAL HOLDINGS LTD
Defendant

Hearing: 10 October 1984

Counsel: D L Mathieson for plaintiff
J G Fogarty for defendant

Judgment: 19 OCT 1984

JUDGMENT OF EICHELBAUM J (NO 3)

This judgment will deal primarily with the Inquiry as to the loss caused to the defendant by the plaintiff's delay in regard to obtaining the Bank's consent. There are also some further matters incidental to the entry of final judgment. The background to the order for the Inquiry is summarised at the commencement of my judgment (No 2) and need not be repeated. In ordering the Inquiry I reserved leave to apply in relation to the procedural aspects and to define the issues for the Inquiry more specifically. These matters were attended to by directions subsequently given. Both parties desired that the Inquiry should be conducted by the Court. Although the rules are not specific on the point there is precedent for that course, see Aitchison v Kaitangata Railway & Coal Co Ltd (No 2) (1900) 21 NZLR 149. Where the Inquiry is held before the Registrar or other delegate of the Court a certificate is provided which when adopted by the Judge is filed in the registry and becomes binding unless application for discharge or variation is made within one month, see Rule 443.

Then Rule 298 appears to contemplate a motion for judgment in accordance with the certificate, although the directions may be so framed as to render such an application unnecessary; Williams v Baker (1896) 14 NZLR 428. The rules do not afford any guidance as to how this process is to be adapted or modified in the instance where the Inquiry is before the Judge himself. The parties were content however to waive any need to follow the foregoing procedure and desired that when I had completed the Inquiry I should issue my conclusion in the form of a judgment which when taken with the matters finally decided in my judgment (No 1) would enable a completive formal judgment to be entered in the litigation.

To this end the parties appeared before me on 10 October 1984 to make submissions not only on matters directly relevant to the Inquiry but also in relation to interest and costs. In doing so, by common consent they departed slightly from the order of matters laid down in the directions. I record too that the parties agreed that I may decide the Inquiry not only on the basis of the evidence specifically filed for that purpose but also taking into account the evidence already given, following again the precedent of Aitchison v Kaitangata Railway & Coal Co (above, see p 151). The remaining preliminary matter I should note is that the parties were agreed that although I had entered into matters set out in step (vii) of the Order for Directions it was still competent for the Court if it so desired to summons the quantity surveyors for consultation as envisaged by step (vi). However in the event I have found it unnecessary to do so. I can now proceed to deal separately with the various outstanding matters.

Relevant dates

In regard to the delay caused by CRL's inability to obtain the Bank's consent my judgment (No 1) contained findings as to three relevant dates. The date by which IHL

would have been able to obtain a building permit if not delayed by CRL's breach of contract was fixed at 4 December 1981. The building permit in fact became available on 8 February 1982; by some slip, in the Order for Directions this was stated to be the 9th. As from 22 January 1982 IHL knew that the Bank's consent was imminent. There has been a difference of opinion between the quantity surveyors who furnished reports for purposes of the Inquiry as to how these facts are to be used.

For the defendant Russell Drysdale & Thomas Ltd (Russell Drysdale) were of the view that preceding 4 December 1981 there would have been first a period of three weeks while sub-contractors prepared tenders, secondly a period of two weeks while sub-contracts were let and thirdly a period of three weeks during which the contractor was able to carry out such preliminary work as could be done pending availability of a building permit. In total these periods brought the effective date back to 9 October 1981 which Russell Drysdale then took as the starting point for the period of delay.

On the other hand the plaintiff's quantity surveyors Holmes Cook Hogg & Cardiff (Holmes Cook) simply proceeded on the basis of the gap between the assumed date when the permit could have been obtained and when it in fact became available, that is to say they took the period between 4 December and 8 February.

As will appear a little later in this judgment the object of the exercise is to obtain a starting and a finishing date for the application of an inflation based index. In that respect the approach of both parties was the same. It will be appreciated that this is not an absolutely precise method of calculating the increase in the cost of the contract. To do that one would have to examine each sub-contract separately, since they would have been let at different times. Likewise, to be meticulous one would

have to look at the direct costs incurred by IHL item by item, since they too would have been incurred over a period of time. Very sensibly the parties have decided that it is unnecessary or unprofitable to descend to that type of detail. However, the method that is being adopted instead is necessarily somewhat crude. In dealing with the present issue the parties would not expect me to adopt a degree of refinement which they themselves have eschewed.

I have no doubt that the approach favoured by Russell Drysdale is an orderly one that would be followed under favourable conditions but the actual evidence does not lead me to believe that given a permit date of 4 December, IHL would have been able to follow through the progression set out in Russell Drysdale's calculations to the full. The evidence indicated that even before the difficulties regarding the Bank's consent became apparent IHL was not hurrying through with a programme of obtaining tenders and preparation for the start.

There is also room for argument in relation to the closing date. The proximity of 22 January to 8 February leaves insufficient time for the orderly programme referred to earlier to be carried out. However in fixing as they have on 19 February as the appropriate date Russell Drysdale have worked backwards from the tender date of McMillan & Lockwood Ltd (McMillan Lockwood) which seems to me to be quite irrelevant.

As I have indicated, whatever date is taken will be an artificial one, which endeavours to capture a single point of time taking into account the period over which sub-contracts were let and the defendant's expenses were incurred. This period would commence before and conclude after the permit date. Viewed in this light it is inappropriate to take a date many weeks in advance of the permit date; the latter appears more apt and accordingly I propose to take 4 December 1981 as the starting date. But for one additional consideration it would

be appropriate again to take the date of issue of the permit as the finishing date. However, here I think my finding that it was not until 22 January that the defendant was aware that the issue of a permit was imminent has significance. The factual situation was that for many weeks there had been uncertainty whether the plaintiff would be able to obtain the Bank's consent. Accordingly, the defendant would not immediately have been able to take full advantage of the availability of the building permit on 8 February. It would reasonably have required some additional time before it was in a position fully equivalent to that pertaining on 4 December. If one allows four weeks from 22 January we arrive at 19 February which as it happens is the date submitted by Russell Drysdale. I therefore propose to adopt that date although for reasons different from those which they advanced.

I therefore rule that the relevant commencing and finishing dates are 4 December 1981 and 19 February 1982.

Base figure

The proper theoretical basis for the exercise, as I see it, was to establish the extent to which the cost to the defendant of carrying out its contract increased as between the relevant dates. Again there has been a degree of pragmatism in the evidence submitted by the respective quantity surveyors which will be reflected in the Court's own approach. Russell Drysdale simply accepted the McMillan Lockwood tender figure dated 26 March 1982. There is no reason to assume that this represents the cost to IHL of carrying out the contract in December 1981. Not only is there the difference in dates but clearly the McMillan Lockwood figure would include a profit element.

Holmes Cook worked on the IHL contract figure of $679,500. On the available information I think that this is in fact the best evidence of what it would have cost IHL to complete the contract. As indicated in my judgment (No 1) I did not consider that it would have left IHL with any margin of profit but nor on the other hand did I think it was based on any mistake.

Calculation of loss

In the end there was no difference between the quantity surveyors as to the method of calculation to be followed. I have worked from the BIAC index and regarded it as applicable to the mid-point of each quarter, the relevant dates for present purposes being 15 November 1981 (when the index stood at 7761) and 14 February 1982 (8111). The increase for the period 15 November to 14 February was 350 while that for the succeeding period was 199. My calculations of the base figures applicable on 4 December 1981 and 19 February 1982 respectively, and of the defendant's loss, are set out below. I need not explain the mode of calculation since it is the same as was used by both quantity surveyors :

4 December 1981

$$7761 + \left(\frac{19 \text{ days}}{91} \times 350\right) = 7834$$

19 February 1982

$$8111 + \left(\frac{5}{91} \times 199\right) = 8122$$

Loss :

$$\left(\frac{8122}{7834} \times \$679{,}500\right) - \$679{,}500 = \$24{,}980$$

Accordingly I fix the defendant's loss at $24,980.

Form of judgment

It is unnecessary to add anything to my discussion on this subject in my judgment (No 2). The plaintiff's damages are fixed at $176,137 - $24,980, that is $151,157. The plaintiff will have judgment accordingly. On the second counterclaim there will be judgment for the defendant for nominal damages of $10.

Interest

It was not disputed that interest should be awarded. There is no universal rule as to the date from which interest should run. Here I think the appropriate principle is to have regard to the time for which the plaintiff was kept out of its money. The sum in issue is what became payable by CRL over and above the amount that would have been payable to the defendant, subject to the adjustment discussed earlier. According to the evidence McMillan Lockwood completed the building in mid-February 1983. There being nothing to indicate the contrary I propose to assume that in accordance with usual practice a significant proportion of the contract price was still outstanding. The figure required to be retained in accordance with s 32 of the Wages Protection and Contractors Liens Act 1939 was in excess of $50,000. The amount of the judgment under discussion however represents some 17% of the contract price and I am not prepared to assume that the balance outstanding was as much as that. Making the best assessment I can I award interest as from 1 January 1983, at 11%.

Costs

The defendant has been successful on the second counterclaim but only to the extent of nominal

who has succeeded in obtaining merely nominal damages I am mindful of the remarks in McGregor on Damages 14th Ed para 308 to which Mr Mathieson referred me, particularly the passage there quoted from the judgment of Devlin J in Anglo-Cyprian Agencies v Paphos Industries 1951 1 All ER 837. In any event the evidence relating to the second counterclaim was subsumed in the totality of the evidence that had to be put before the Court regardless, being relevant to other issues as well. I do not think it is an appropriate situation for a separate award of costs to the defendant in respect of the counterclaim.

The defendant was also successful in resisting the plaintiff's application for reconsideration of the argument concerning reduction of the plaintiff's damages. Finally, the outcome of the Inquiry has been a reduction of the plaintiff's damages. Nevertheless, viewed against the totality of the issues, the points on which the defendant has succeeded must be regarded as relatively minor.

The hearing occupied 13 days altogether one of which was very brief while another was somewhat less than a full day. I propose to treat the hearing as having taken 12 days. I will take account of the aspects where the defendant was successful by reducing the allowance for extra days by two. My orders regarding costs are as follows :

1. The plaintiff will have costs according to scale. Ordinarily the computation of such costs is a matter for the Registrar to check when the formal judgment is submitted for sealing but as the topic was raised in argument I will refer to the question of the amount on which the scale costs are to be based. Under Item 36 of Table C the calculation is on the amount "recovered" for the plaintiff

which in my opinion means not only the damages but also the interest awarded. In that respect I follow the view taken by Mahon J in Blackley v National Mutual Life Association of Australasia Ltd (No 2) 1973 1 NZLR 668, 673. To the extent that the matter is discretionary I see no ground for departing from what I regard as the ordinary rule.

2. I certify for 9 extra days.

3. There will be a certificate for second counsel for 7 days. The allowances under (2) and (3) are to be at the maximum permitted by the scale. By way of explanation I add that while, having regard to the scope of the case, I think it proper to allow for second counsel for the period during which evidence was being called, the legal submissions for the plaintiff were presented by Mr Mathieson alone and I do not think it appropriate to grant any additional allowance in respect of those days.

4. In addition the plaintiff is entitled to disbursements and witnesses expenses as fixed by the Registrar.

5. Pursuant to Item 37 of Table C I certify for the total costs.

6. In case counsel are unable to agree regarding any other matters relating to costs (including any certificates required in addition to those mentioned) I reserve leave to apply in those respects. Counsel may submit memoranda on any such matters.

Final judgment

I have not thought it necessary to repeat in this judgment reference to those matters dealt with finally in my judgment (No 1) e g items 5 and 6 on p 57. In

regard to the latter however I order that the stay of execution in relation to the third counterclaim be removed as at the date when formal judgment is sealed in respect of the judgment now pronounced.

Solicitors :
Hogg Gillespie Carter & Oakley (Wellington) for plaintiff
Weston Ward & Lascelles (Christchurch) for defendant