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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 417/86

3

LR 534

IN THE MATTER of Section 11 Arbitration Amendment Act 1938

BETWEEN J. RATTRAY & SON LIMITED a duly incorporated Company having its registered office at Christchurch

Plaintiff

A N D IAN ROBERT TELFER of Christchurch, Registered Public Valuer

First Defendant

A N D DIMITRI RICHARD COCOREMPAS of Christchurch, Company Director

Second Defendant

Hearing: 7th August 1987

Counsel: E.D. Wylie for Plaintiff
R.J. De Goldi for First Defendant
T.C. Weston for Second Defendant

Judgment: 23 OCT 1987

JUDGMENT OF WILLIAMSON J.

The Plaintiff seeks an order setting aside an arbitration umpire's award. Initially the proceedings sought an order pursuant to s.11 of the Arbitration Amendment Act 1938 requiring the arbitrator to state a special case on matters of law but, at the commencement of the hearing, leave was sought and given to amend the pleadings to ones for orders pursuant to s.11 or s.12 of the Arbitration Act 1908. The grounds advanced for such orders were that the arbitrator had misconducted himself by failing to decide the matter in accordance with the terms of the agreement between the parties or that there was an error of law on the face of the award.

FACTS

The Plaintiff leases shop premises on the Nayland Street frontage of Sumner Village from the Second Defendant. They are used as a dairy. The lease is for a term of nine years commencing on the 24th May 1982 and terminating on the 23rd May 1991. The initial nett annual rent was $4,792.50. After three years the lessor had the right to review the rent payable for each three yearly period of the lease upon the basis of a rental agreed upon by the parties, or in default of agreement to be fixed by arbitration. Clause 6(f) of the lease deals with arbitration in the following terms:-

> "(f) AND IT IS HEREBY FURTHER AGREED AND DECLARED that if any difference or dispute shall at any time or from time to time arise between the said parties hereto touching the interpretation construction or application of any provision in these presents or any clause or thing herein contained or relating thereto or the rights or liabilities of either of the parties under these presents or what under the particular circumstances for the time being should be done by either of the parties to these presents in order to carry out the true intent and meaning hereof such question or difference shall forthwith be referred to the arbitration of two indifferent persons one to be chosen by each of the parties hereto and such person shall appoint a third person or umpire and if either of the parties hereto shall neglect to appoint an arbitrator for the space of seven days after a notice in writing so to do shall have been given to it by the other party or shall appoint an arbitrator who shall refuse to act then the arbitrator appointed by the other party shall have the final decision alone and further that such arbitration shall be conducted under the provisions of Arbitration Act 1908 PROVIDED ALWAYS that this provision shall not be a bar to any action at law or any other proceedings to recover any rent in arrear or any other liquidated sum owing by the Lessee to the Lessor."

The first three yearly review was due in April 1985. Agreement was reached for the twelve month period until April 1986 upon the basis of further increases taking place for the remaining two years of the three year period. Apparently the

parties later agreed to refer the matter of increased rental to arbitration. Mr Lucas of Davis Haliburton Lucas was appointed as an arbitrator by the Plaintiff, while Mr Smith of Schultz Knight & Associates was appointed as an arbitrator by the Second Defendant. Mr Lucas and Mr Smith endeavoured to resolve the dispute but could not agree. In accordance with clause 6, they then appointed the First Defendant to act as umpire. Written and oral submissions were made. Mr Lucas proposed a rental of $5,418 per annum, representing $9 per square foot for the premises which consist of 602 square feet, whereas Mr Smith contended for a rental of $6,772.70 per annum, or $11.25 per square foot.

On the 2nd September 1986 the umpire delivered his award setting the annual rent for the new term at the sum of $6,622 per annum, that is $11 per square foot. Prior to delivering his award the umpire had not only received written submissions from each of the arbitrators nominated by the parties, but had also conducted a hearing on the 7th August 1986 at which evidence was received from the arbitrators as well as from Mr D. Lloyd and Mr B. Simmons on behalf of the Plaintiff. The award was in a normal short form. There was also a two page explanatory sheet. The First Defendant there summarised the dispute between the parties by saying that the submissions for the Second Defendant rested on comparable rental evidence of other shops in the block and a fair return on the capital invested, while the Plaintiff's evidence and submissions rested on the contention that there were too many shops in Sumner and that a dairy operation could not afford to pay the rental suggested by the Second Defendant. The umpire referred specifically to the evidence of the restriction in the lease for use of these premises as a dairy and to the lack of success that the Plaintiff's sublessees had experienced up to that point. He then stated:-

> "For many years the Courts have found that a substantiated comparable evidence in valuation matters must be the most compelling evidence and I believe that the landlords valuer has tended to demonstrate this. While one may have some sympathy for the tenant's lack of ability to pay

> the rent suggested as a dairy operator, there was no evidence submitted to satisfy that shopping centres generally have been let on the basis of an individual tenant's ability to pay in terms of the particular type of business he undertakes. There just does not seem to be any precedent to adopt this view so that it is really necessary to adhere to the principle of accepting rental evidence, particularly in a case where there is a lot of rental evidence available."

PLAINTIFF'S SUBMISSIONS

The basic point made by Counsel for the Plaintiff was that the umpire had failed to have regard to the contractual arrangements between the Plaintiff and the Second Defendant, particularly in so far as they restricted the use of the premises to a dairy or to another use permitted by the lessor in writing. He contended this resulted from the umpire relying almost entirely upon the evidence of other comparable rentals of shops in Sumner. He submitted firstly that this approach by the umpire constituted misconduct because he was failing to decide the dispute in the context of the agreement between the parties and secondly that the following errors of law were manifest on the face of the record: namely that the First Defendant:-

> "1. Misdirected himself in basing his award only upon evidence of comparable rentals of other shops in the block.
>
> 2. Failed to take into account relevant considerations, namely the evidence of rentals paid for other properties in the Sumner area other than in the block owned by the landlord Mr Cocorempas, and in particular failed to take into account evidence relating to vacant premises, and evidence relating to fair market levels.
>
> 3. Failed to take into account relevant considerations, and in particular failed to take into account evidence that J. Rattray & Son Limited as lessee had been unsuccessful in its proposals to sublease the premises.
>
> 4. Erred in law in holding that there had been no evidence submitted to satisfy himself that shopping centres generally had been let on a basis of an individual tenant's ability to pay in terms of the particular type of

business he undertakes.

5. Reached a conclusion which on the facts were supported by no evidence, or was a conclusion which no reasonable arbitrator properly directing himself in law could have reached."

SUBMISSIONS FOR THE FIRST DEFENDANT

In view of the correspondence which had passed between the Plaintiff and First Defendant, and because the proceedings originally sought an order obliging the First Defendant to state a case, Counsel for the First Defendant made a number of submissions with the object of assisting the Court. General submissions were made that:

1. The process of arbitration is essentially a contractual one and consequently it was not normally reviewable. Counsel contrasted this to the situation in review proceedings under the Judicature Amendment Act 1972. He claimed that the approach taken by Counsel for the Plaintiff was more applicable to that type of proceedings.

2. The supervisory jurisdiction of the High Court over arbitrators is restricted to ensure that the process continues to be a speedy and inexpensive one.

3. The facts in dispute are entirely for judgment by the arbitrator.

4. Error of law is only reviewable in so far as it appears on the face of the record.

5. The face of the record, so far as an arbitrator's award is concerned, is only that part of it which the arbitrator intends to be part of the award.

In more specific submissions Counsel contended:-

1. That the explanatory document did not form part of the award.

2. It had not been demonstrated that there was any error of law on the face of the record. The umpire was using the special knowledge he had as a valuer to weigh the effect of valuations made by the arbitrators appointed by each party.

3. Even if the Court considers all of the material put forward by the Plaintiff, it would be inappropriate to conclude that any error was one of law rather than fact.

SUBMISSIONS FOR SECOND DEFENDANT

Counsel for the Second Defendant commenced by adopting the submissions made on behalf of the First Defendant. He also contended that:-

1. The award involved only the document labelled as an award, and did not include the explanatory two page document or any part of the evidence.

2. The jurisdiction to set aside an arbitrator's award for error of law was one which should be rarely exercised.

3. There could be no question in this case that there was no evidence before the umpire upon which he could have made the award.

4. While misconduct may include many various types of conduct on the part of an umpire, it did not include matters relating to sufficiency of evidence.

MISCONDUCT

Section 12(2) of the Arbitration Act 1908 provides:-

> "Where an arbitrator or umpire has misconducted himself or the proceedings or any arbitration or award has been improperly procured, the Court may set the award aside."

What constitutes misconduct is described in para. 622 of Halsbury's Laws of England, 4th Edn, Volume 2 page 330. Clearly the list of instances of misconduct set out in that

paragraph is not an exhaustive one. Steel v Evans (No. 2) [1949] NZLR CA 557. It is not misconduct to come to an erroneous decision on the facts, and even gross inadequacies in the quantum of an award against related evidence will not support a charge of misconduct such as to enable the award to be set aside. Mayor of Wellington v Aitken, Wilson & Co. [1914] 33 NZLR 897 and Wilson v Glover [1969] NZLR 365.

In this case the misconduct relied upon by Counsel for the Plaintiff was an alleged failure by the First Defendant to decide the dispute in accordance with the agreement of the parties, namely the agreement to lease which contained a restriction as to the use of the premises.

One of the examples of misconduct mentioned in Halsbury para. 622 is when an arbitrator fails to comply with the terms, express or implied, of the arbitration agreement. The examples given of London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 All ER 494, 1958 1 WLR 271 confirmed on appeal at [1958] 2 All ER 411, 1958 1 WLR 661 and Margulies Bros Ltd v Dafnis Thomaides & Co. Ltd [1958] 1 All ER 777, 1958 1 WLR 398 are illustrations of irregularity in procedure. Indeed in the first case Diplock J. said that the term "irregularity in procedure" is a more appropriate term than misconduct.

The terms which might be implied in an arbitration agreement are set out in para. 534 of Halsbury 4th Edn Volume 2 page 273. Normally an arbitrator is required to decide the dispute in accordance with the ordinary law. See Chandris v Isbrandtsen-Moller Co. Inc. [1951] 1 KB 240, [1952] All ER 618. Counsel for the Plaintiff argues that a failure to have regard to the restrictive business provisions in the lease is a failure to decide the dispute in accordance with the ordinary law and therefore would amount in effect to a breach of the arbitration agreement. To accept this submission would, in my view, strain the meaning of misconduct, since the alleged failure is not a procedural one. Even if it were accepted that the umpire in this case had failed to have regard to the terms

of the actual lease between the parties that would be an action related particularly to the agreement to lease rather than the agreement to arbitrate. In any event I am not satisfied on the evidence that the umpire did fail in the manner alleged.

No other satisfactory basis for a finding of misconduct was made out and accordingly I have no hesitation in rejecting the Plaintiff's argument in this respect.

ERROR OF LAW ON THE FACE OF AWARD

Counsel for the Plaintiff relied principally on his submissions under this heading. There is no doubt that the Court has jurisdiction to set aside an arbitrator's award for error of law on its face. See University of New South Wales v Max Cooper & Sons Pty Ltd [1979] 35 ALR 219, Kenneth Williams & Co. Ltd v Martelli [1980] 2 NZLR 596 at 602 and Attorney-General v Offshore Mining Co. Ltd [1983] NZLR 418 at 421. It is a discretionary power of a general and unfettered nature. Parsons v Farmers M.I.A. [1972] NZLR 966 at 973.

The general approach to applications of this nature is thoroughly discussed in the judgment of Thorp J. in the case of Kenneth Williams & Co. Ltd v Martelli. He said (page 605):-

> " It may be that there is no simple solution to the dilemma discussed by Donaldson J and in Russell, and that in the nature of things there must always be a conflict between principle and expediency, between the desire to obtain perfect justice and the need for a reasonably prompt determination of disputes, particularly the commercial disputes which form the subject of most arbitral work.
>
> Though it is not necessary for the determination of the present application that I try to resolve that dilemma or make any general redefinition of the Court's powers to set aside or remit awards, it is necessary to decide whether the Max Cooper decision should be regarded as affecting the general approach which should be taken by the Court to the exercise of its discretion to set aside or remit awards, in particular whether it has altered the assessment of what constitutes 'error of law on the face of the award'.

On the first and more general question, my conclusion is that it is not possible to read the Max Cooper decision merely as a minor gloss on the cases which preceded it."

...

And further, on page 606:-

" I read the judgment as an affirmation of the special value of arbitration to the commercial community, and a recognition of the need, if that value is to be freely available, for a more restricted control of arbitration by the Courts.

On the more limited question of the effect of the Max Cooper decision on the meaning of 'error of law on the face of the award', the three portions of the judgment which will again demonstrate a change in direction are:

(1) (At p.262): '... to make [the award] vulnerable what the error is must appear upon its face as a matter of actual exposition, not one of inference only':

(2) (Again on p.262): '... if there be ambiguity in the terms of an award the Court should lean in favour of a construction which does not involve treating it as intended in itself to expose to everyone who reads it the actual process of legal reasoning by which the arbitrator arrived at his decision': and

(3) (On p.264): 'Reference in the award to the existence of other documents is of itself neutral; it raises no presumption of incorporation as part of the award. Unless the intention to incorporate is clear, the presumption, as their Lordships have already said, should be against incorporation.'

Those passages seem to me in such contrast to the language used in the decisions upon which the applicant initially relied, such as the decisions in Northumberland Compensation Appeal Tribunal, Baldwin & Francis, and R v Board of Industrial Relations (Alberta), as to compel the conclusion that the Privy Council thereby declared that the term 'error of law on the face of the record', should not have the same meaning in arbitration law as it is customarily given in the wider field of administrative law.

> For my part I see no cause to lament that conclusion. There are obvious reasons for distinguishing the situation of those who have chosen arbitration as a means of determination of their rights from that of the general body of citizens enmeshed without option in the multitudinous administrative jurisdictions which make up the modern welfare State and which provide the subject-matter of most decisions in the developing field of administrative law."

I have quoted these passages at some length because they provide the framework for consideration of the submissions made by the Plaintiff's Counsel and are directly related to a number of the submissions which were made concerning the applicability of administrative law decisions. Within this framework I now consider what constitutes the basis of the award and whether error has been shown on the face of it.

THE AWARD

The Plaintiff claims the award consists of the short document labelled "Umpire's Award" which is dated the 2nd September 1986, together with a two page explanatory note. The First and Second Defendants, on the other hand, claim that the award includes only the short form dated the 2nd September 1986. Consideration of what constitutes an award was the subject of decision in the case of Manukau City Council v Fletcher Mainline Ltd [1982] NZLR 142. It was there held, by a majority, that the 107 pages attached to the formal award and correspondence labelled "Reasons for Award" were part of the face of the award. Somers J. said (at page 161):-

> "The contemporaneous delivery of the award and reasons, physical connection of the same by the arbitrators and the internal references of the one to the other, together make it clear in my view that the arbitrators intended the whole 119 pages to be read together as an award. It constitutes a physical, verbal and intended unity."

After reviewing the authorities, which also have been cited to me in this case, namely Gold Coast City Council v Canterbury Pipelines (Aust.) Pty Ltd [1968] 118 CLR 58,

Champsey Bhara & Co. v Jivraj Balloo Spinning and Weaving Co. [1923] A.C. 480, Max Cooper & Sons Pty Ltd v The University of New South Wales [1979] 2 NSWLR 257; 54 ALJR 21, and The General Valdes [1982] 1 Lloyds Rep. 17, the Court of Appeal Judges agreed that the composition of the award depended upon the arbitrator's intention and that intention was normally a matter for inference from the documents prepared by the arbitrator. In the case of Manukau City v Fletcher Mainline the Judges differed as to the inferences which could be drawn. They had regard to matters such as the physical attachment of the documents, the reference in one document to the other, the time of their delivery and the way in which they related one to the other.

So far as this case is concerned the only evidence before the Court is that contained in the two affidavits of Derek Lloyd. The first affidavit refers to the arbitrator's award but does not attach a copy or indicate the date when it was received by the Plaintiff or whether or not it was accompanied by any other documents. The second affidavit of Mr Lloyd annexes a copy of the one page award together with a copy of the lease. The two page explanatory document was handed to the Court by Counsel for the Plaintiff. Counsel for the Defendants did not consent to this material becoming evidence before the Court, but agreed to it being received de bene esse. It follows that there is no evidence as to the time of delivery of the two page explanatory document in relation to the time of delivery of the formal award. There is no evidence that they were physically annexed in any way. Also neither document refers to the other. Certainly a reading of the explanatory document suggests that it may have been prepared by the umpire prior to or at the time of his award. It is not headed in any specific way or labelled so as to identify its purpose. The explanatory document is on the business letterhead of the umpire, whereas the award is clearly prepared as a formal document headed "Umpire's Award" and entituled as a formal legal document.

After considering carefully both documents and the evidence available to me, I am unable to conclude that the umpire's intention was that the explanatory document should form part of the award. Accordingly, in my view, the face of the award consists only of the one page formal document dated the 2nd September 1986 and headed "Umpire's Award".

ERROR OF LAW

No proposition of law is disclosed on the face of the award consisting of the above document. Accordingly I conclude that the Plaintiff has not shown any error of law justifying the remission or the setting aside of the award.

Even if the explanatory two page document did form part of the award, then I do not consider that any error of law has been shown. On the authority of Thomas Bates & Son v Wyndham's Ltd [1981] 1 All ER 1077 at p. 1087 Counsel for the Plaintiff argued that the rental clauses in this lease (i.e. Clause 5(g) and (h)) should be interpreted as providing for a rental "as it would have been reasonable for this landlord and this tenant to have agreed under the lease". I accept that as an appropriate construction of the clauses contained in this lease. It, however, does not require an umpire to disregard market rentals or to discount market rentals but rather to consider the rental having regard not only to market criteria which one party may urge on him but also to have regard to the particular features of the property or lease which either party may stress as relevant to any agreement or arbitration of rental for the premises.

The umpire, who was a valuer chosen by the arbitrators nominated by each of the parties to the arbitration, has used his skills and expertise as a valuer to conclude the appropriate rental for the continued lease of these premises. In doing so he has specifically referred to the evidence concerning the use of these premises as a dairy and the difficulties experienced by the Plaintiff in arranging for the premises to be sublet as a dairy. Also specific reference was made to the problems experienced by the three

sublessees. In these circumstances it would be inappropriate to conclude that he did not have regard to this evidence in arriving at a conclusion concerning rental. A valuation judgment, based upon the umpire's knowledge and experience, on these issues was what the parties sought. After hearing the evidence the umpire preferred to rely substantially on the evidence of comparable rentals. North P. in the case of Wellington City v The National Bank of New Zealand [1970] NZLR 660 expressed the position generally concerning rental valuations in this way (page 669):-

> "Of course if a lease for example contains a formula for fixing a rent the arbitrators or the umpire must comply with the directions given to them in the instrument, but short of anything like that the method of valuation which finds favour with the arbitrators or the umpire is essentially a matter for them."

Despite the skill of the Plaintiff's Counsel in endeavouring to analyse the umpire's explanatory note, I am not brought to the view that there was in fact any error of law as contended in paragraphs 1 to 4 of Clause 5 of the Statement of Claim.

The fifth error of law contended for by the Plaintiff was that the First Defendant reached a conclusion which, on the facts, was not supported by evidence or was a conclusion no reasonable arbitrator properly directing himself in law could have reached. Such a question sometimes suggests that it has been posed in an effort to convert what are truly questions of fact into a question of law. It is a formulation of a question of law which received the approval of the House of Lords in the case of Edwards (Inspector of Taxes) v Bairstow & Another [1955] 3 All ER 48. The good sense of an appellate Court proceeding on this basis is explained in the judgment of Viscount Simonds at page 53 in this way:-

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying

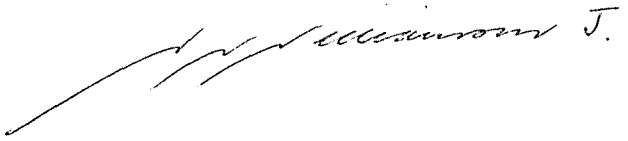
> that the court should take that course if it appears that the commissioners have acted without any evidence, or on a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is, therefore, a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way."

Even if the case is approached upon the premise that the face of the award includes the two page explanatory document, it would not be reasonable to include as part of the award the various copies of written documents which were handed to me by Counsel for the Plaintiff. I do not accept his contention that I am entitled to have regard to these documents because the First Defendant referred to "evidence" in the explanatory note. There is no cross reference between the explanatory note and the other documents. Also it is clear that the First Defendant heard other evidence of which no transcript or record has been submitted to me. A review of all the material which was produced to me does indicate that, even in that material, there is evidence on which a reasonable arbitrator could arrive at the result which the First Defendant did. In all valuation matters there are areas where opinions may differ, but the fact that the First Defendant, after being made aware of the Plaintiff's problems with these premises and the terms of the lease, chose to rely upon comparable rental value evidence is not a sufficient basis upon which to rationally conclude that no reasonable arbitrator could have

reached the decision.

CONCLUSION

For the reasons I have set out this application is dismissed. The Defendants are entitled to their costs and disbursements. I fix the costs in respect of each Defendant at $600. Any disbursements are to be fixed by the Registrar.



Solicitors:
Lane Neave Ronaldson, Christchurch, for Plaintiff
Simes Jacobsen & Steel, Christchurch, for First Defendant
Brookman Stock, Christchurch, for Second Defendant