MCW SET 3

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 793/88

BETWEEN THE ELECTRIC COMPANY OF NEW ZEALAND LIMITED
Plaintiff

AND McMILLAN & LOCKWOOD LIMITED
Defendant

Hearing: 13 February 1989

Counsel: K.B. Johnston for the Plaintiff
Joanna Holden for the Defendant

Date of Judgment: 13 February 1989 S/N 14.2.89

ORAL JUDGMENT OF HERON J.

In this application the defendant seeks a stay of proceedings pursuant to s.5 of the Arbitration Act 1908. In order to grant a stay the defendant is required to satisfy me that there is a submission to arbitration pursuant to any contract between the plaintiff and the defendant.

The plaintiff and the defendant were sub contractors and head contractors respectively in respect of a contract for the construction of a multi-storey building on the corner of Hunter Street and Customhouse Quay. In December 1984 the plaintiff was invited to tender for the contract for the installation of lifts in the building. The plaintiff's claim is that there is a balance owing to it pursuant to that sub contract. I am advised, although the defendant of course has not yet filed any statement of defence because of the present application, that the dispute involves delays in the carrying out of the plaintiff's work, and that there is a matter in issue between them which needs to be resolved either by the Court or by an arbitrator. Critical to the defendant's application for stay is an examination of the contract entered into between the

parties. It is clear that negotiations commenced at some date in 1985 and the plaintiff tendered on its standard form to supply and install the lift equipment for this building. The tender document is not exhibited in whole, but contained in it is the clause which reads:

> "In the event of this proposal being accepted it shall be deemed to form part of any subsequent contract between the parties and where these special conditions conflict with other conditions of contract these special conditions will take precedence."

The evidence is that following that tender, which makes no reference to arbitration, there were discussions between Mr Ruscoe of the defendant company and Mr Mardell of the plaintiff company, which concluded on 6 March 1986 by the plaintiff specifying its fluctuating price of $417,757 for the work and specifying certain other matters that it would attend to. It is the plaintiff's contention that that clarification, combined with the original tender, was accepted orally, it would seem, by the defendant at some time shortly thereafter. The plaintiff refers to a number of actions that it took from this point on until some date in September 1986, which it says, and I find, are consistent with their being a contract between the parties entitling the plaintiff to consider that it had a contractual commitment with the defendant which the defendant resiled from at its peril. I am fortified in that view of the arrangements which are presented to me by what Mr Ruscoe says for the defendant. He says:

> "It is true that shortly after 6 March 1986, I advised Mr Mardell that the plaintiff had the contract to supply the lifts for this job. However there remained after that date many details that required to be finalised between the parties."

And again:

> "The reality of the position, in March 1986, was that I advised the plaintiff that it would be given the contract for the supply of lifts on this job. The plaintiff was able to order its materials accordingly. I cannot

emphasise enough that a final and concluded contract between the parties did not exist at that stage."

Having regard to the evidence, which is largely uncontested, as to the existence of the initial tender, and then the subsequent letter in which that tender was modified, and the evidence of Mr Mardell and Mr Ruscoe that there was an agreement between the parties that the contract was to go to the plaintiff, I have difficulties in accepting the assertion by the defendant that there was no concluded contract between them at this stage. Mr Ruscoe may have imagined the position to be otherwise, but it seems to me that the parties were committed to one another and that had they attempted to avoid their mutual obligations at that time there would have been a right of action by the aggrieved party. The narrative that I have described, which includes the rendering of a progress payment from the plaintiff to the defendant, preceded the letter of 22 October 1986, in which the defendant wrote to the plaintiff purporting to accept its tender at a price which is exactly the same price as contained in the letter of 6 March 1986. I quote the letter in its entirety.

"22 October 1986

The Electric Construction Co. of NZ Ltd
P O Box 27028
Upper Willis St
WELLINGTON

Attention: Mr J.C. MARDELL

Dear Sir

RE: NORWICH II - LIFT INSTALLATION

We have pleasure in accpeting your tender as per your letter dated 6th March 1986 in the sum of $417,757.00 (Four Hundred and Seventeen Thousand Seven Hundred and Fifty Seven Dollars) for the lift installation specified and shown on the head contract drawings. This acceptance is made in terms of the head contract and the sub contract agreement.

Two copies of the sub contract agreement are enclosed. Please sign and return one copy to us by return mail.

The contract contacts are as follows:

(1)	Project Manager - Lutz Neumayr	728-735
(2)	General Foreman - Fred Fox	731-154
(3)	Quantity Survey - Eric Fraser	692-013

Thank you for your tender and we trust that our association on this contract will be mutually beneficial.

Yours faithfully,
McMILLAN & LOCKWOOD LTD

E.M. FRASER
QUANTITY SURVEYOR

EMF:LSR
ENCL."

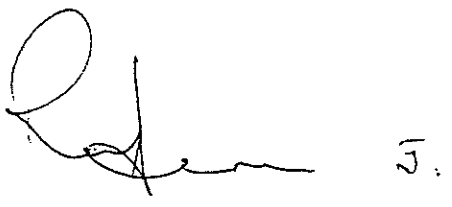
I have emphasised the words "This acceptance is made in terms of the head contract and the sub contract agreement."As the letter records, two copies of the sub contract agreement were enclosed, they were never signed. I think Mr Johnston is right when he submits for the plaintiff that the plaintiff's actions can be correctly regarded as simply ignoring the sub contract agreement in light of what had gone before. I do not think that any subsequent conduct on the part of the plaintiff constitutes some implicit acceptance of the need for it to comply with the terms of the sub contract agreement which was enclosed in that letter. I think the plaintiff was entitled to say that the arrangements had been concluded between the parties, and that as the original tender made no reference to the requirement to submit contractual disputes to arbitration there was therefore no submission as such as required by s.5.

It is undoubtedly so that if the sub contract agreement had been signed, which is in the standard master builder's form, or if there had been some acknowledgment by the plaintiff that the terms of the head contract were binding on it, then in respect of both undoubtedly a submission to arbitration would have existed between the parties. All that would have been left for my consideration was the exercise of my residual discretion as to whether the matter should go to arbitration. It is difficult, of course, in dealing with what is the ultimate

contract position between these two parties on affidavits, and it may well be that when and if the Court has to consider what the exact contractual relationships were between the parties and what documents comprised the contract, more than just the information that is presently before me will be available.

But in this case the onus is on the defendant to show that there is in existence between the parties by agreement between them a submission to arbitration. I find on the evidence that there was a contract between them which makes no reference to arbitration, and on the information to date I am satisfied that there is no entitlement on the defendant to have the matter referred to an arbitrator. I acknowledge what Miss Holden says, that in certain circumstances the letter of 22 October, if preceded by nothing more, coupled with an entry into the work or on to the site might constitute conduct of a kind sufficient to amount to an acceptance of an offer which the letter of 22 October could be said to convey. But this case is different because prior to any such letter there was a course of conduct between the parties, coupled with what I find to be a commitment by the defendant to this plaintiff that it was the successful sub contractor. This precludes the defendant from now saying that the later sub contract agreement contains provisions which are binding on the parties.

It is clear from what I have said that the application for stay cannot succeed, and it is accordingly declined. The plaintiff is entitled to its costs, which I fix at $500.



J.

Solicitors
Rudd Watts & Stone for the Plaintiff
Kensington Swan for the Defendant