NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

6/6

M.193/89

NOT RECOMMENDED

UNDER the Arbitration Act 1908

BETWEEN HORIZON ALUMINIUM PRODUCTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a Manufacturer

Plaintiff

901

AND GREENLANE PROPERTY INVESTMENTS LIMITED a duly incorporated company having its registered office at 205 Great South Road, Greenlane, Auckland, and carrying on business as a Real Estate Developer

Defendant

Hearing: 17 May 1990

Counsel: Mr S. C. Dench for Plaintiff
Mr D. A. Towle for Defendant

Judgment: 17 May 1990

ORAL JUDGMENT OF WYLIE, J.

This is an application by the plaintiff for leave to enforce an arbitrator's award pursuant to s.13 of the Arbitration Act 1908 and an application by the defendant to set aside or remit the award.

The primary issue is the defendant's application. Counsel for the defendant accepted that if his application were not successful there were no grounds on which he could oppose the plaintiff's application for leave to enforce.

The plaintiff as contractor and the defendant as developer were parties to a building contract. It contained a fixed completion date of 3 October 1988 with provision for liquidated damages of $1,500 per day if that date was not met. It was not met, but there were disputes as to the reasons therefor. The plaintiff continued on the job after the passing of the completion date, but in December abandoned the job because of alleged breaches by the defendant in relation to its payment obligations under the contract. All the disputes between the parties were eventually referred to arbitration by Court order. The arbitrator appointed was Mr G. R. Joyce, Q.C. There was a site inspection and a six day hearing, five of those days being taken up with evidence, between 12 and 27 October 1989. There was an interim award on 7 December 1989 which contained all the basic reasoning and findings of the arbitrator, but a final award was deferred to enable the parties to endeavour to settle incidental matters such as interest, goods and services tax and costs. The final award was published by the arbitrator on 6 March 1990.

In essence the arbitrator awarded the plaintiff $141,000 odd for its unpaid contractual work and awarded the defendant almost $72,000 damages for breach related to delay. He found

against the defendant on its claim for liquidated damages, which on the time elapsed would have amounted to $222,000. The defendant's challenge to the award is based solely on that issue of the dismissal of the liquidated damages claim. Counsel claims that in relation to that matter there is error on the face of the award.

Counsel relied on the inherent common law jurisdiction of the Court which was recognised in Attorney-General v OffShore Mining Company Limited [1983] NZLR 418 and not on s.12 of the Arbitration Act relating to misconduct on the part of the arbitrator. Counsel accepted that I must confine myself to the award itself in order to detect whether there was any error on its face. The error of law alleged is in relation to a finding that the defendant had waived its right to insist upon the fixed completion date and thus its right to liquidated damages. That finding and conclusion is contained principally in a passage in the interim award as follows:

> "I infer that two parties, the one struggling with a novel concept (Horizon) the other all too coy (for fear of variation/extension consequences over such as prototypes), so conducted themselves as to require me to recognise that there was over the crucial period when delays became obvious, a give and take of legal consequence. Give and take which, if legal labels are needed, ultimately and at least involved a limited waiver by Greenlane.
>
> One which put the time for practical completion at large, even as regards interference with other trades, but not in terms that Horizon could expect any latitude beyond the end of October 1988."

The arbitrator then, treating time as being at large, concluded that liquidated damages could not be awarded since there was not a day certain from which such damages could be calculated. Counsel for the defendant accepted that if the finding as to waiver was upheld then the waiver would have that consequence that liquidated damages could not be claimed.

The nub of the argument for the defendant is that there is no evidence on which to base a finding that there was a representation, express or implied, by the defendant, to the effect that it had waived the contractual term requiring practical completion by 3 October or the defendant's right to claim liquidated damages under the contract. He submitted that for the defendant merely to have allowed the plaintiff to complete the contract works after the completion date did not amount to a waiver.

If one were to confine oneself to the passage from the arbitrator's award which I have read out then there might be some substance in the submission that the evidential finding there recorded was not such as to justify a finding of waiver, and if that were the case, that might amount to an error of law. In relation to waiver counsel relied for its essential elements on a passage from the judgment of Lord Denning, M.R. in W. J. Alan & Co. Limited v El Nasr Export Company [1972] 2 QB 189 which passage was cited with apparent approval in Connor v Pukerau Store Limited [1981] 1 NZLR 384. In the

latter case the Court of Appeal made reference to the leading New Zealand case on waiver of Neylon v Dickens [1978] 2 NZLR 35 where the Privy Council referred to the need for clear and unequivocal evidence and unambiguous representation. It might well be, as I have said, that a mere finding that the parties conducted themselves in such a way as to require the arbitrator to recognise a "give and take of legal consequence" might not of itself have taken the matter far enough. But in effect that passage from the arbitrator's award is a finding that the conduct constituting a "give and take" was in fact a limited waiver. It would be wrong, I think, to regard the arbitrator's finding as to waiver as based solely on that finding of a "giving and taking". I think it must also be remembered that the arbitrator was an experienced senior counsel who would be well aware of the requirements necessary to establish legal waiver. It must, I think, be assumed in his favour that when he used that term he was using it in the legal and not merely in a layman's sense. I think it is essential to look at the award as a whole in order to appreciate the significance to be attached to that brief extract from the arbitrator's finding which is so crucial to this issue. The hearing was spread over some five days of evidence. It would have been impracticable for the arbitrator to have dealt with all of that evidence in extenso. It is clear from a number of passages in the award that the arbitrator was not attempting to set out all the relevant aspects of the evidence that led him to the conclusions that he drew, but that he was relying on the overall impressions to

be gained from the extensive evidence that he had heard. As he said in one passage:

> "I have had no sensible choice but to deal with this aspect of the case as one of general impression. Citation of examples is merely to exclude others equally pertinent."

So it is, I think, essential that one looks further through the award to establish just what evidence the arbitrator was relying on. He said, for example, at page 17 of the award dealing with the dispute over the failure to pay progress payments:

> "It seems to me that Horizon was conscious of defaults on its part whilst Greenlane was reluctant to come out and say that defaults there were and that was why it was not paying. This for fear (as ultimately was the event) of contractor's departure."

Again at page 27:

> "On the whole of the evidence, and particularly involving that of Mr Sutherland when it came to the matter of the SFD's, I find that neither party, more recent protestations and latter correspondence put to one side, took the view that SFD's were ultimately <u>entirely</u> Horizon's responsibility as to resolution."
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> (SFD was an abbreviation for sliding folding doors, difficulty with which contributed to the delayed completion.)

At page 28 he made reference to the parties working on a common problem. Very significantly at page 29 he said:

> "It is convenient at this point to enlarge upon the reasons why I conclude that time was put at large by an unspoken abandonment of the Horizon generated programme to be found in the contract agreement."

He then went through correspondence passing between the respective solicitors and at page 31 said:

> "The correspondence for Greenlane, astutely calculated to give Greenlane greatest potential for benefit, certainly gave no hint of waiver. But because of its understandable calculation I looked again at the general body of evidence."

At that point the arbitrator was clearly directing his mind to the necessity for finding some unequivocal, clear expression of waiver. He could not find it in the correspondence and appears to express the view that that may have been, as he termed it, "astutely calculated". But because of that he then went to the general body of the evidence with that necessity in mind. He reviewed the evidence in a number of sections of the award, but the extracts I have already cited indicate the kind of background against which he was looking at the evidence. He reviewed the history of the matter a little further after the passage I have just cited and expressed the opinion again on page 31:

> "In my view by and up until then at least, it was in reality prepared to accept a delay from July to a more workable conclusion date for the main work. Only when it saw that that date was becoming later and later (indeed not in sight) did it seek to go back to that which it had by then really put aside."

Again at page 32 he said:

> "By 18 August at least Greenlane had accepted in practical terms that completion was to be later rather than sooner. The subsequent pattern, until patience ran out in October, involved for weeks - albeit with expressions of frustration and impatience - it going along with the idea that no immediate end was in sight."

Now it may be that the arbitrator could have expressed more directly in the passage which I first cited where he made the crucial finding as to waiver, the particular findings justifying his conclusion as to that point, but his findings of fact are spread throughout the award under a variety of headings and it would be wrong as I have said, to look at that passage on its own. I adopt as a basic approach, the principle that the parties having elected to resort to arbitration the Court should seek to uphold the award unless there are clear grounds existing for setting it aside or otherwise interfering with the decision reached. I refer to Max Cooper and Sons Pty Limited v University of New South Wales [1979] 2 NSWLR 257; also to Kenneth Williams & Co. Ltd v Martelli [1980] 2 NZLR 596. There is a heavy onus on a party to an award seeking to set it aside. It is not for the plaintiff in this case to justify the finding, it is for the defendant to show in the particular circumstances of this case that there was no evidence to support the finding of the arbitrator. It is useful I think to extract the following from the Max Cooper case where it was said:

> "....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. In their Lordships' view, 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."

I again remind myself of the legal qualifications of the arbitrator, and his search for evidence of the waiver outside the correspondence, which to me indicates a full awareness on his part of the necessity to find a clear representation by the defendant of its election not to rely on its strict rights. I am satisfied that it has not been shown that the arbitrator made any error of law in considering the evidence on which he based his finding and applying those findings in such a way as to conclude there was a waiver of the defendant's strict legal rights. So overall the defendant has failed to discharge the heavy onus on him and to persuade me to the view that there is an error of law on the face of the award. Accordingly the defendant's application to set aside or to remit the award is dismissed.

The plaintiff's application for leave to enforce the award was not opposed and I give leave accordingly in terms of s.13. Counsel for the plaintiff sought that I enter a judgment in monetary terms with calculations of the net amounts owing and interest and so on, but I do not think that such an exercise is for this Court to undertake. Section 12 of the Arbitration Amendment Act 1938 enables judgment to be

entered in terms of the award once leave has been granted. That can be done simply as an administrative act without the intervention of the Court. Indeed, it seems to me that this Court has no role to play in moulding a judgment to any form different to that which the award itself takes. However, should I be wrong in that view I reserve leave for the form of judgment to be submitted to me if that should be necessary. The plaintiff being successful on both applications is entitled to costs which I fix at $500 plus disbursements.

Solicitors: Bell Gully Buddle Weir, Auckland for Plaintiff
Holmden Horrocks, Auckland for Defendant