IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

29/5.

782

M. 490/92

BETWEEN FAI METROPOLITAN LIFE ASSURANCE COMPANY OF NEW ZEALAND LIMITED

Applicant

AND MACDOW PROPERTIES (1988) LIMITED

Respondent

LOW PRIORITY

Hearing: 11, 14 May 1992

Counsel: V.A. Deobhakta for applicant
Mrs W.N. Brandon for respondent

Judgment: 14 May 1992

(ORAL) JUDGMENT OF BARKER J

This is an application under S.6 of the Arbitration Act 1908 inviting the Court to appoint an arbitrator in a dispute between the parties.

The applicant, an insurer, owns a property in Broadway, Newmarket called "On Broadway". An agreement dated 30 April 1987 was entered into by the applicant with a company called Macdow Properties Limited for the construction of a building on the site, for a contract sum of $10,517,716. There were the usual specifications, drawings and certain standard forms as

prescribed in the New Zealand Institute of Architects' general conditions of contract.

One of the standard clauses in the agreement between the parties was -

> "In case any dispute or difference shall arise between the employer and the contractor as to the construction of this memorandum of agreement or as to any matter or thing arising thereunder then such dispute or difference shall be referred to arbitration under the Arbitration Act 1908 and its amendments"

The building proceeded to completion but not before Macdow Properties Limited, in February 1989, had gone into voluntary liquidation; it transferred its remaining assets and presumably its liabilities to a new property development company, the present respondent, Macdow Properties (1988) Limited. This change was advised to the plaintiff on 27 February 1989 who did not object.

The building proceeded to completion. A certificate of final completion dated 22 December 1989 records that Macdow Properties (1988) Limited had been paid in full and final settlement the sum of $10,784,140.

In May 1991 the applicant alleged that there were defects in the building. Later, on 24 June 1991, it confirmed that it was to obtain an engineer's report in respect of these defects. On 28 June 1991, the respondent's solicitors confirmed that the respondent would await proof of these defects. There was correspondence

between solicitors. No liability was admitted. A final report was sent to the respondent's solicitors on 29 January 1992 under cover of a letter from the applicant's solicitors. The letter was fairly detailed and quantified the claim at around $212,000.

The applicant subsequently sought the agreement of the respondent to the appointment of an arbitrator. Names were suggested. It now appears that if an arbitrator is to be appointed, there is no objection by the respondent to the appointment of Mr Jeff Jefferson a quantity surveyor, as sole arbitrator.

The respondent claims that it has not had an opportunity of considering the claim; that the officers of the company in charge of the building project are overseas. One in particular, who will be processing the claim, will be returning later this month. The affidavit filed on behalf of the respondent stated that the respondent did not do any construction itself; it is in form a head contractor, which one would normally have expected to have undertaken the major construction work. In fact it sub-contracted everything, including the work normally done by head contractors.

There is no evidence before the Court of the terms of the contracts between the respondent and the various sub-contractors, including the main construction contractor. This is a matter of some relevance because, normally, in

a large building job, there is some requirement that the sub-contractors be bound by relevant terms of the head contract, notably an arbitration clause. So if there is an arbitration arising out of the construction job, then all claims by the contractor against the sub-contractors or vice versa, can be disposed of in the one arbitration hearing.

The respondent objects to the application to appoint an arbitrator on a number of grounds. The first, which was not mentioned in the notice of opposition and which was not canvassed in the respondent's affidavits, is that the named respondent Macdow Properties (1988) Limited was not the contracting party and is not bound by an arbitration agreement.

This contention, made for the first time at the hearing on 11 May 1992, quite understandably, took counsel for the applicant by surprise. I therefore adjourned the hearing until today to enable affidavit evidence to be filed. An affidavit has been filed from a Mr Mitchell which attached the letter from Macdow Properties Limited to which I have earlier referred and certain other documentation which cumulatively give rise to a clear inference that the named respondent has assumed the burden of the liability of Macdow Properties Limited under the original agreement and that the applicant had knowledge of this and did not object at the relevant time, namely February 1989.

Mrs Brandon no longer placed reliance on this ground of objection which is therefore rejected.

Next, it was submitted that there is 'no dispute or difference' between the parties to be referred to arbitration, in that the existence of a formulated claim is not sufficient to create a dispute. Reference was made to **Mustill & Boyd, The Law and Practice of Commercial Arbitration in England** (2nd ed) at 127, 128 where the authors say -

> "Equally, silence in the face of a claim does not raise a dispute, for it may simply indicate that the recipient is considering whether or not to deny the claim. What is required is a rebuttal or denial of the claim."

That is a comment in the text under the word "disputes". The authors note that the word "differences" has a wider scope than "disputes".

Looking at all the documents, I consider that there is a 'dispute or difference' between these parties. The fact that the claim has not been formally denied by the respondent is not in the circumstances of this case sufficient. One would have thought that some clear statement, such as "we admit liability but would like an opportunity to consider the quantum" might have been more helpful to the respondent than saying: "we just don't know the particulars of your claim". The respondent has had particulars of the claim for 3 months and has not

made any statement admitting liability. If it had done so, then there might be some merit to this submission but in my view it would be contrary to commercial commonsense to say that there is no difference or dispute between these parties. That objection must also fail.

The last must likewise fail, namely that there are a number of other parties concerned, i.e. the sub-contractors; the respondent or its predecessor was merely a developer which contracted for the whole of the building project, not just specified sub-contracts. That provides no reason why the applicant is not entitled to the benefit of the arbitration clause. If the respondent was experienced in property development, then it should have ensured by some mechanism that any disputes with sub-contractors were to be resolved by arbitration, preferably in the same arbitration process as between the applicant and respondent. There is no reason why the applicant should suffer because this elementary precaution was not taken. Therefore that objection fails also.

The power of the Court to appoint an arbitrator has been discussed in many cases; notably in recent times in **Wilsons Cement v Gatx-Fuller** [1985] 2 NZLR 11, **Roose Industries Limited v Ready Mixed Concrete** [1974] 2 NZLR 246 and by myself in **Bulk Storage Terminals Limited v Robt Stone & Co Limited** (C.L.10/91, 26 April 1991).

That case discussed the well-known principles which do not need to be referred to here.

There is here a valid arbitration agreement covering the question in dispute on which the applicant is entitled to rely. The applicant is willing and ready to arbitrate. I am satisfied that there is no sufficient reason why the matter should not be referred to arbitration. This is the very sort of dispute which is appropriately determined by an arbitrator. If the matter were to be litigated in the Court, then it would be quite likely that the Court would want to refer the matter to a referee under S.15 of the Act. In fact, Mr Jefferson who has been appointed as the arbitrator, has been appointed by the Court in that role on a number of occasions to my knowledge.

Accordingly, the application must succeed. Mr Jefferson is appointed as sole arbitrator. I suggest that the parties now confer to prepare a submission outlining the powers that they wish Mr Jefferson to have; there is probably technically no need for a submission, since there is one incorporated in the documents and Mr Jefferson has now been appointed by the Court.

The applicant is entitled to costs of this proceeding which I fix at $1,000 plus disbursements.

R. D. Barker J

Solicitors: Simpson Grierson Butler White, Auckland, for applicant
Ellis Gould, Auckland, for respondent