IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

C.P. No.455/91

487

BETWEEN JOHN D. HOOPER

Plaintiff

A N D BARRY GEORGE HADLEE, SPENCER WILLIAM BULLEN, HUGH ROSS GIBBONS, MARTIN J. HADLEE, JOHN H. MIDGLEY, PAUL J. SARGISON, G.R. WOOD & PETER WILLIAM YOUNG

Defendants

Hearing: 19 April 1994

Counsel: D.H. Hicks for Plaintiff to oppose
N.R.W. Davidson for Defendants in support

Judgment: 21 APR 1994

JUDGMENT OF TIPPING, J.

Introduction

This is an application by the Defendants for an order reviewing and setting aside the award as to costs delivered by Master Hansen sitting as an arbitrator. The learned Master's costs award followed his substantive award which determined a number of matters at issue between the parties. The substantive award was delivered on 15 November 1993 and the award in relation to costs on 20 December 1993. The parties are all chartered accountants. During the events with which the case is concerned they were in partnership in the Christchurch office of the national firm known as KPMG Peat Marwick.

Liability Issues

The Plaintiff, Mr Hooper, commenced proceedings in this Court on 22 November 1991 alleging that he had been wrongly expelled from the partnership as at 31 December 1990. He sought special damages under six heads totalling $363,927.00 and general damages of $100,000.00. The largest element in the claim for special damages was a claim in relation to goodwill of $267,000.00. An order was made by consent that the whole case be tried before the Master sitting as an arbitrator in his capacity as an officer of the Court. That order was made on 17 February 1992 pursuant to s.15 of the Arbitration Act 1908 in combination with s.26M(2) of the Judicature Act 1908.

The proceeding went to hearing over eight full days in July and September 1993. In his award the Master identified eight issues raised by the pleadings. The predominant issue was whether Mr Hooper's undoubted departure from the partnership resulted from expulsion or retirement. It was Mr Hooper's case that he had been expelled. The remaining partners took the stance that he had retired. The evidence in question need not now be traversed in any detail. Because of difficulties in the partnership a report was commissioned. That report made certain recommendations. Included among them was the departure of Mr Hooper. After hearing considerable evidence the Master held that the remaining partners asked Mr Hooper to leave, which he did. Mr Hooper's contention that it was an expulsion was expressly rejected.

The next issue related to whether or not there was any formula covering the financial ramifications of Mr Hooper's retirement. It was the Defendant's case that by course of dealing and other matters the amounts to which Mr Hooper was entitled following his retirement had been defined. They pleaded in some detail what they contended Mr Hooper's entitlements under various headings were. Mr Hooper's case was that there was no

preordained formula and that matters were at large. His claims under the various heads seem to have been a difficult mix of an expulsion approach in respect of some items and a retirement approach in respect of others. Mr Hooper seemed, in spite of his principal stance that it was an expulsion not a retirement, to be looking to the balance sheet when it suited him and to a different approach when it did not.

In summary, on all issues of liability, the Master accepted the Defendants' case and rejected that of Mr Hooper. Indeed he went on to consider certain points which did not strictly arise following his decision that it was a retirement. He held that if it had been an expulsion the Defendants' approach, on that basis, was to be preferred in a number of material respects to that put forward by Mr Hooper. That applied, in particular, in relation to the question of goodwill in the normal sense and what the parties came to call exit goodwill. I do not consider it necessary to traverse the various liability questions any further but I have noted the points made by Mr Davidson in his submissions analysing the effect of the Master's liability award.

Master's Decision on Costs

The Master's decision on costs was to leave them lying where they fell. Both sides had applied for costs by memoranda, each contending that they had been the successful party. In his costs award the Master summarised the contentions of each side. He noted the Defendant's position that the award which Mr Hooper received was for no more than what he had been offered throughout. He also noted the Defendants' submission that much of Mr Hooper's case was ill founded in law and fact and exposed them to a very substantial claim. That is undoubtedly a correct analysis of the position.

Further the Master noted that the Defendants had handed a letter to Mr Hooper at what the Master described as the commencement of

the hearing. This was a short letter noting that the parties were about to embark on a long hearing. It set out the Defendants' contentions as to what Mr Hooper was entitled to. It suggested that each side should bear its own costs and made an offer of a sum of $3,500.00 upon one head when the strict contention was that Mr Hooper was entitled to nothing on that head. The letter expressly stated that the Defendants would use it on the issue of costs. It was not expressed to be without prejudice in any respect.

The Master then recorded that Mr Hooper had argued that it was he who had been successful at the hearing and that costs should follow the event in his favour. It was suggested that the letter just mentioned had been received after the hearing started but it now seems plain that it was handed to Mr Hooper just before the hearing was due to commence. I do not think much turns on the precise timing of the letter. Further, the Master recorded Mr Hooper's contention that the letter should be ignored because it was not accompanied by any cheque making it analogous to a payment into Court. The Master also noted Mr Hooper's contention that the letter offered less than he would have received if an award had been made in his favour at that point, albeit not by much. There was a reference in Mr Hooper's costs submissions to the subject of interest but I do not think it necessary to discuss that aspect any further.

To this point the Master had simply been recording the contentions of the parties on the subject of costs. The substantive part of his costs award is quite short and it is convenient to set it out verbatim:

> "In relation to the memoranda of costs filed by both parties, I consider that there is justification for the stance taken by both parties. The reliance on the exit goodwill formula, as is clear from my award, I considered to be misguided. However, the same applies, in my view, to the overall financial viability of this firm and the case advanced on the basis of its supposed worth.
>
> Equally, however, it seems to me that in circumstances such as this a 'Calderbank' letter which is of great moment in relation to costs

> should have been made before the hearing commenced, and should have been accompanied by a cheque. It would be the only way to place it in the same category as a payment into Court.
>
> Looking at the matter overall, I consider that the costs of the arbitration should lie where they fall. Accordingly, there will be no order for costs."

Legal Principles - Costs and Review

Although there was no significant difference between counsel on the principles which apply, first in relation to the costs of the arbitration and second in relation to this Court's powers of review in circumstances like the present, I will briefly set out the position. The costs of his award were within the Arbitrator's discretion. Such discretion was not, however, untrammelled. It was to be exercised judicially and in a Court ordered arbitration was capable of review by the Court to the same extent as a Judge's costs order may be reviewed upon appeal: see Russell on Arbitration 20th edition (1982) at page 334. The extent to which this approach applies to an award of costs made by an out of Court arbitrator need not be considered. As with any discretionary decision the reviewing tribunal will not review the exercise of the discretion simply because it would itself have exercised the discretion in a different manner.

The need for an arbitrator in such circumstances as these to exercise his discretion judicially means that if the discretion is to be exercised in a manner adverse to the successful party the arbitrator must give his reasons for doing so. Those reasons must be properly connected with the case and must be proper reasons: see Lewis v. Haverfordwest Rural District Council [1953] 1 W.L.R. 1486, 1487. I regard as correct for present purposes the statement in Russell at page 336 that an arbitrator who proposes to depart from the usual approach that costs follow the event should set out the grounds which have caused him to take that course. Russell may be putting it a little high to say that an order which departs from

that normal approach is an exceptional step to take. Nevertheless Masters acting as arbitrators under s.15 should adopt the approach that ordinarily costs follow the event, by analogy with Rule 47, unless, of course, there is something in the submission which displaces that as the appropriate starting point.

Before turning to the way in which the Master dealt with the question of costs in this case, I mention finally the decision of the Court of Appeal in Davidson v. Wayman [1984] 2 N.Z.L.R. 115. That was a case like the present of a reference to arbitration under s.15 of the Arbitration Act 1908. In his judgment Cooke J. referred to the decision of the majority of the High Court of Australia in Buckley v. Bennell Design & Construction Pty Ltd (1978) 140 C.L.R. 1 which decided that the grounds upon which the Court may set aside or remit an award by an arbitrator appointed under the Australian equivalent of our s.15 are not limited to those upon which an award on a reference out of Court may be set aside. His Honour continued at page 116:

> "The New Zealand and Australian authorities are thus uniform and establish that, while an award [on a s.15 arbitration] will never be interfered with lightly, the Court has wider reviewing scope than as regards ordinary arbitrations."

At page 122 Somers, J. said that an award following a reference under s.15 is not of the same kind as an award following a submission by the parties out of Court. He said that s.15 provides a mode of trial by the High Court itself. The arbitrator is an officer of the Court either ex officio or pro tem. It follows that the supervision which the Court exercises is not the same as that exercised in respect of arbitrations out of Court. He too expressed his agreement with the views of the majority in Buckley.

Circumstances of this Case

In the present case the Master was faced with the rather unusual situation that both sides claimed to have been successful. He did not say what view he took of this conflict. Specifically he did not indicate which party he regarded as having been successful. Thus there is no indication in the award what the Master's starting point was. I am of the view that in substance (see Walsh v. Kerr [1987] 2 N.Z.L.R. 166, 182-183) it was the Defendants who were successful. The award effectively ratified their stance on all issues. Thus, in my view, the correct starting point for costs was that prima facie the Defendants were entitled to an award and should not have been deprived of such award except for good cause. It is not clear whether the Master approached the matter on this basis or not. It is possible that he took the view that Mr Hooper had been successful but, in all the circumstances, he should be deprived of any award. In this state of uncertainty the normal approach of not lightly interfering with the Master's discretion seems to me to have less force.

Assuming for the moment that the Master did take the view that the Defendants had been successful, it is necessary to examine the costs award to see upon what basis he decided that the Defendants were nevertheless not to have costs. The Master's first point was that in his view there was justification for the stance taken by both parties. I presume this means that he thought that there was force in Mr Hooper's view that he had been successful. If that is so I must, with respect, disagree. The Master's next point, that Mr Hooper's reliance on the exit goodwill formula was misguided, can only have favoured the Defendants in relation to costs.

His next proposition is introduced by the word "however" which suggests that it is a proposition to different effect. The Defendants have understood the Master's comment about the overall financial viability of the firm as being a point which the Master has somehow counted against them

in relation to costs. That is understandable in view of the introductory word "however" but, on any view of it, I think the Master must have been intending to count this in the Defendants' scales on the question of costs. Anything else would have been illogical. I take the Master's comment as meaning that Mr Hooper's approach, which seriously overvalued the firm from the point of view of goodwill, was one which the Defendants were obliged to resist and did resist successfully.

The Master then turned to the so-called Calderbank letter. He described it as being a factor of great moment in relation to costs. His first point was that the letter should have been made (sic) before the hearing commenced. It is now clear from the evidence before me that the letter was actually handed to Mr Hooper before the hearing commenced, if only shortly before. The master's next point was that the letter should have been accompanied by a cheque. A Calderbank letter (see Calderbank v. Calderbank [1975] 3 All E.R. 333) is a convenient way in which parties to litigation, when the circumstances are not conducive to a payment into Court, can make an offer, without prejudice for the purposes of the litigation but with an indication that the letter may be referred to on the subject of costs. If a payment into Court is possible and apt then that is what should be done. There may be circumstances in which a Calderbank letter should be accompanied by a cheque to make it as close as possible to a payment in. That well may be so in the case of an arbitration which involves a simple money claim.

The letter which the Defendants handed to Mr Hooper just before the arbitration hearing commenced was not really a Calderbank letter at all. It was simply an open reaffirmation of the stance which they had been taking throughout, as evidenced by their pleadings. It did add a couple of sweeteners from their strict stance, one in relation to sabbatical leave and the other in relation to the proposition that costs should then lie where they

fell. With respect to the Master, I consider that he has placed too much emphasis, apparently against the Defendant, on the circumstances of the so-called Calderbank letter.

The Master's final comment was that looking at the matter overall he considered that costs should lie where they fall. The expression "looking at the matter overall" does not really give any indication as to what it was which brought the Master to the view that the Defendants should not have costs, they having succeeded in real terms on all fronts. I have considered the substantive award to see if I can pick up any matters which might be thought to have justified the Master's decision. At page 46 of the award the Master said:

> "In all the circumstances of this case, one can only have the greatest sympathy for the Plaintiff. He no doubt considered himself to be a member of the 'Peat Marwick family'. The involvement with them went back to his days in Canada, before he came to New Zealand. However, the reality of this partnership was that it was in dire financial straits. The problems had to be addressed, and to this end the partners all agreed to commission the Bayliss report."

I note the Master's expression of sympathy for the Plaintiff. I cannot, however, see it as sufficient forensic sympathy so as to be relevant to costs.

On the same page the Master said he found it inexplicable that Mr Hooper did not at any stage object to the Bayliss report or request what he described as a confrontation in a full partnership meeting. Earlier in his award at page 22 the Master said that if Mr Hooper was not intending to comply with the recommendations of the report " it is strange in the extreme and, in my view, inexplicable that he raised no protest with the partners at an earlier stage". Earlier still at page 16 the Master said: "Overall, I must say, even allowing for the shock and trauma faced by Mr Hooper I find it most bizarre that he made no overt challenge to the recommendations until the 8th November".

In the light of these comments, and in the light of the Master's justified observation that much of Mr Hooper's claim was ill founded in law and fact, it is not altogether easy to see the basis upon which the Master's sympathy was expressed. I must, however, recognise that the Master will undoubtedly have had a much better opportunity to gain the full flavour of the case, he having presided over eight full days of hearing, than I have had simply when reviewing the costs issue.

All that said I come back to the following key points. First the Master did not, either expressly or implicitly, decide who had in substance won the arbitration. In my view the Defendants clearly won. That being so they were prima facie entitled to some award of costs unless there were good reasons for exercising the discretion otherwise. I am not clear from the award of costs, or indeed from the substantive award, why the Master decided to exercise his discretion as he did. As already indicated, for the purposes of a Court ordered arbitration, the arbitrator is obliged to apply the same principle as applies in Court, namely that the successful party should ordinarily receive an award of costs. In addition to the authorities earlier mentioned on that subject the point is also discussed and confirmed in Mustill & Boyd: Commercial Arbitration 2nd edition (1989) at page 395.

I consider, with respect, that no good reason was shown or has been shown why the Defendants should have been deprived of costs. The whole of Mr Hooper's case was premised on the basis that he had been expelled. It was the Defendants' case that he had retired. The Plaintiff did not succeed on his own case at all. The only basis upon which it could be said that he succeeded is that he succeeded on the Defendant's case. They acknowledged that he was entitled to certain payments on certain bases but he went in to bat on a wholly different approach upon which he wholly failed.

I reject also Mr Hooper's contention that there was an analogy with the payment in rules. The case was not really like that at all. The irony was that on Mr Hooper's approach of an expulsion involving a dissolution he would actually, so it appears, have been worse off than on the Defendants' approach of a retirement. On a dissolution approach Mr Hooper would have been left carrying his share of the on-going liabilities, whereas on a retirement approach the Defendants were prepared to try and procure his release from continuing liabilities or at least give him an indemnity.

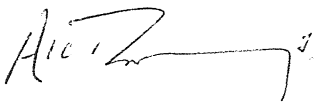
With respect, the Master's sympathy, on whatever basis, for Mr Hooper cannot, in my view, have justified the decision to deprive the Defendants of an award of costs. Indeed there is authority for the proposition that such sympathy is not a proper basis for depriving a successful party of costs: see Mustill & Boyd at page 395. In all the circumstances and for the reasons given I consider that the Defendants should have had an award of costs.

I must in the circumstances exercise the discretion afresh. There are, as Mr Davidson was fairly prepared to acknowledge, some grounds for tempering the quantum wind to the shorn lamb. The Defendants' total costs, including expert witnesses, came to almost $57,000.00. Their solicitor and client costs, including counsel's fees, were a little short of $48,000.00, inclusive of GST. On the amounts at stake costs according to the High Court scale would have been about $21,500.00 plus expert witnesses and disbursements. From the point of view of the scale there is, of course, the bar at $5,750.00 but it would undoubtedly have been a case for exceeding the bar, which has now become wholly unrealistic, although it remains in force.

There is clearly here no call for an award of solicitor and client costs or anything approaching that level. There is, however, in my judgment justification for an award of substance, even allowing for the tempering of

the wind point. In my view GST should not be added to party and party costs but the amount of the award should reflect the fact that the costs of the successful party are subject to GST. There is no suggestion that the costs actually incurred by the Defendants are anything other than reasonable. Indeed I understand Mr Hooper's costs are at a similar level.

Mr Hooper put the Defendants to very considerable expense by adopting a wholly erroneous approach, both on matters of fact and on matters of law. In my view he should make a contribution to the Defendants' costs in the sum of $17,500.00 all in. I therefore review and set aside the Master's costs award. In its place I make an order for the payment by the Plaintiff to the Defendants of the sum of $17,500.00 as aforesaid. I make no separate order for costs on the present application, having borne it in mind in fixing the main order.



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NZLR

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