IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-004879

BETWEEN	IRONSANDS INVESTMENTS LIMITED First Applicant
AND	CHEUNG KONG INFRASTRUCTURE HOLDINGS LIMITED Second Applicant
AND	TOWARD INDUSTRIES LIMITED First Respondent
AND	NEW ZEALAND STEEL LIMITED Second Respondent

Hearing: On the papers

Judgment: 30 August 2011 at 4:00 PM

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 31 August 2011 at 4:00 pm
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date.....

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[1] In this proceeding the applicants (together CKI) have made an originating application to set aside an interim arbitral award and an arbitral ruling. They advanced five grounds of challenge. The respondents (together NZS) applied to strike out the application. I held that all but one of the grounds were untenable and made an order striking out CKI's originating application except to the extent of that one ground. NZS now seek costs on their strike out application.

[2] NZS have submitted that costs should be fixed on a 3B basis with certification for two junior counsel to reflect the complexity of the matter. They also seek an uplift of those costs on the basis of unnecessary steps taken by CKI. CKI does not resist costs being awarded against it but opposes costs being awarded on a 3B basis, certification for more than one junior counsel and any uplift. In addition, CKI seeks a 20% discount to any costs awarded to reflect the fact that NZI was not wholly successful.

[3] I start with the costs categorisation. I do not regard this application as being one of average complexity. Although an interlocutory application, it was argued on both sides by senior counsel and required careful consideration of the grounds on which an arbitral award might be set aside. There was no authority in relation to some of the points being argued and on some of the grounds the arguments went beyond the wording of the Arbitration Act 1996 and into the public policy that lay behind the Act. The only ground of challenge to survive was one of the more straightforward grounds. I consider that a 3B basis would be an appropriate basis for the costs in this case.

[4] I do, however, agree with CKI's submission that certification for only one junior counsel is appropriate. It is true that the arguments were complex. However, the arguments were carried by the same counsel and the number of documents required was manageable. On this interlocutory application, even allowing for its complexity, there is no justification for certifying for two junior counsel.

[5] Turning, then, to the uplift sought. NZS maintains that CKI's last minute (unsuccessful) application for adjournment of the fixture and its late application for leave to include a fraud and corruption ground in its application to set aside were

unnecessary steps which contributed to the cost of determining the strike out application. NZS seeks an uplift from its calculated sum of $23,352 to $30,000.

[6] I accept that CKI's application for adjournment and application to add a further ground to its setting aside application contributed unnecessarily to the time and expense of the proceeding and justify an uplift under r 14.6(3)(b)(ii). The grounds advanced in support of the application for adjournment were unconvincing. NZS had to deal with the written memorandum seeking the adjournment, attend a telephone conference before Asher J and spend time arguing the matter before me at the outset of the fixture. The application for leave to amend the originating application to include allegations of fraud and dishonesty were also premature because there was, at that stage, insufficient information to allow an amended claim to be properly particularised. In those circumstances, time should not have been devoted to the issue. I allow an uplift of 10%.

[7] I acknowledge that CKI did succeed in retaining one ground of challenge to go forward to a substantive hearing. However, that ground was fairly straightforward and required less argument than the others. It seems very likely that, had CKI limited its application to set aside the award to this ground, NZS' application might have been avoided altogether. I therefore do not consider it necessary to discount the costs award to reflect CKI's partial success.

[8] The result is that there will be an order for costs in favour of NZS of $22,409 together with disbursements of $600.

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P Courtney J