

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-3549

UNDER the Arbitration Act 1996

IN THE MATTER OF an arbitration between L I Nicholson and M
M Dunick

BETWEEN MARLENE MARIE DUNICK
Plaintiff

AND LEIGH IRVING NICHOLSON
Defendant

Hearing: 31 August 2011

Appearances: R T Fenton for the Plaintiff
Defendant in Person

Judgment: 31 August 2011

ORAL JUDGMENT OF PETERS J

Counsel: Mr R T Fenton, Barrister, Auckland (email: RTFenton.barr@xtra.co.nz)

Copy to: L I Nicholson, 10A Rogers Avenue, Eastern Beach, Manukau, Auckland

[1] The plaintiff has applied pursuant to High Court Rules, rr 26.21(1)(b) and 26.22, to enter an award as a judgment. The application is made in respect of three interim awards (“awards”) made by Mr D M Carden of Auckland, barrister (“arbitrator”), delivered on 5 October 2010, 15 November 2010 and 14 March 2011.

[2] The arbitrator made the awards pursuant to an arbitration agreement in a cross-lease. The parties agreed on the appointment of the arbitrator. The first award determined the dispute. In the second and third awards, the arbitrator determined issues as to damages and costs.

[3] The defendant opposes the plaintiff’s application. She has filed an application for an order that recognition and enforcement be refused in terms of article 36 of Schedule 1 of the Arbitration Act 1996 (“Schedule 1” and “the Act”). The defendant’s application is made pursuant to High Court Rules, r 26.27. The defendant has also sworn an affidavit dated 19 July 2011 in support of her notice of opposition.

[4] The Court is required to grant the order the plaintiff seeks, subject to:

- (a) the plaintiff’s compliance with article 35 of Schedule 1; and
- (b) the provisions of article 36 of Schedule 1, on which the defendant relies in making her application.

[5] The relevant part of article 35 reads as follows:

35 Recognition and enforcement

- (1) An arbitral award, irrespective of the country in which it was made,—
 - (a) must be recognised as binding; and
 - (b) on application in writing to a Court, must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement must supply—

- (a) the duly authenticated original award or a duly certified copy of the award; and
- (b) if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement; and
- ...

[6] The plaintiff has complied with article 35. Accordingly, she is entitled to the orders sought, subject to the defendant's application.

[7] The relevant part of article 36 reads as follows:

36 Grounds for refusing recognition or enforcement

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only—
 - (a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that—
 - (i) A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of the country where the award was made; or
 - (ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
 - (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
 - (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that—

...

(ii) The recognition or enforcement of the award would be contrary to the public policy of New Zealand.

...

[8] It is apparent from the opening words of article 36(1) that recognition or enforcement of an award may be refused only if a ground listed in article 36(1) is made out. The defendant bears the onus of establishing that one of the grounds applies.

[9] The defendant did not specify in her application the ground or grounds in article 36(1) on which she relied. The defendant simply said in the application that the grounds on which she relied were those set out in her affidavit sworn on 19 July 2011.

[10] It is clear from her affidavit that the defendant disputes many of the findings of the arbitrator and considers he erred in numerous respects. I am not, however, able to discern from the affidavit any ground on which the Court could refuse to recognise or enforce the awards.

[11] In addition to the matters in her affidavit, the defendant submitted that the Court should decline to grant the plaintiff's application because the awards are interim only and many issues remain outstanding between the parties. The defendant submitted that the awards should not be entered as judgments pending resolution of all disputes between the parties.

[12] The definition of "award" in s 2 of the Act includes an interim award. Accordingly, the awards are in this case "awards" for the purposes of the Act. Neither of these matters, that is that the awards are interim only and that other issues

remain outstanding between the parties, provides a ground on which the Court could refuse to recognise or enforce the awards.

[13] In submission, the defendant also referred to article 36(1)(b)(ii) which provides that the Court may refuse to recognise or enforce an award if doing so would be contrary to the public policy of New Zealand.

[14] The defendant submitted that this ground applied in the present case. The defendant alleged that features of the plaintiff's unit raise safety issues and this in turn raises issues of public policy. One example cited was the location of the electricity meter for the plaintiff's unit.

[15] Matters of this nature, however, are not such to render recognition or enforcement of an award contrary to the public policy of New Zealand for the purposes of article 36.

[16] At the conclusion of submissions, I advised the parties that I proposed to dismiss the defendant's application and that I would grant the plaintiff's application. It became apparent, however, that the certified copies of the documents referred to in article 35(2) were not before the Court. I gave the plaintiff the opportunity to obtain those copies, which were then provided. Prior to the adjournment, the defendant enquired whether she was required to appear at 2:15 pm. I advised the defendant that it would be preferable for her to appear but that it was a matter for her. The defendant did not appear again at 2:15 pm.

Result

[17] I dismiss the defendant's application dated 19 July 2011.

[18] I make an order entering as a judgment the awards of Mr D M Carden dated 5 October 2010, 15 November 2010 and 14 March 2011.

[19] In paragraph 3 of her application, the plaintiff seeks judgment for various sums awarded by the arbitrator, together with interest. The appropriate course for

the parties from hereon is to seek to enforce the awards as judgments in the usual way.

[20] Counsel for the plaintiff seeks costs. There is no opposition to the application. The general rule is that costs follow the event. Accordingly, I make an award of costs in favour of the plaintiff on a 2B basis, with disbursements as fixed by the Registrar, on the plaintiff's application referred to in [1] above and on the defendant's application referred to in [3] above.

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PETERS J