IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2010-470-685

BETWEEN	REAL COOL HOLDINGS LIMITED AND REAL COOL LIMITED Applicants
AND	PAGE & MACRAE LIMITED Respondent

Hearing: 27 October 2010

Appearances: MRT Colthart for the Applicants
A Barker for the Respondent

Judgment: 12 November 2010

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on Friday 12 November 2010 at 1.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel:
MRT Colthart, P O Box 535, Shortland Street, Auckland 1140. Fax: 09 379 6018
Email: mark@markcolthart.co.nz
A Barker, P O Box 4338, Shortland Street, Auckland 1140. Fax: 09 366 1599.
Email: ab@shortlandchambers.co.nz

Background

[1] The applicants (Real Cool) had a historic commercial relationship with the respondent (P & M).

[2] Real Cool owned land in Mt Maunganui on which it operated a cold storage facility.

[3] Around 2003 P & M carried out structural steel works and pipe work for the construction of two cool stores for Real Cool. There were no problems, and clearly Real Cool was satisfied with the outcome.

[4] In May 2006 Real Cool approached P & M and indicated it wanted to build two new cool stores on the site. These were to be known as cool stores 5 and 6.

[5] In July 2006 P & M provided a written quotation for the structural steel work which Real Cool accepted.

[6] The same month, the parties entered into a further arrangement whereby P & M would insulate pipe work and provide refrigeration for cool stores 5 and 6. Unlike the contract for the structural steel work, there was no written contract for this arrangement.

[7] This absence of any contract document unsurprisingly led to difficulties. Real Cool considered that an oral contract had been reached during a telephone conversation between one of its employees and a representative of P & M. Its belief was P & M would install piping work, fans, and evaporators in the two cool stores for the same price it had done the pipe work for the two previous cool stores in 2003, plus 20%.

[8] The construction work got under way. In respect of the piping and refrigeration work P & M presented regular invoices to Real Cool. The aggregate amount of the relevant work carried out between July 2006 and January 2007 was

just under $1 million. Real Cool reached the view that it had been overcharged and withheld payments of approximately $280,000.

[9] This led to an adjudication in September 2007 under the Construction Contracts Act 2005, which was resolved in P & M's favour. The alleged overcharge was paid to P & M.

[10] Real Cool took the view it was entitled to recover from P & M what it considered to be an overcharge. The parties decided the best way to resolve this dispute was to submit it to arbitration.

[11] In October 2009 the parties entered into an arbitration agreement. The appointed arbitrator was Mr R J Green who, it is common ground, is experienced in the area of building disputes. Mr Green conducted a two day hearing in Auckland during the course of which he heard from nine witnesses and considered a large bundle of documents and exhibits.

[12] A partial award (on the contract and quantum issues) was released on 8 June 2010. The award essentially resolved the dispute in P & M's favour.

[13] Relevantly the award provided the amount payable by Real Cool was:

Unpaid sum	$279,964.66
Added undercharge	$ 5,570.71
Less overcharge for mark up	($ 14,209.48)
Subtotal	**$271,325.89**
Interest	$230,687.13
Total	**$502,013.02**

[14] In terms of the Arbitration Act 1996 the parties' arbitration agreement permitted an appeal to the High Court solely on a question of law. The relevant clause specifically excluded any appeal on questions of fact. The provisions of Schedule 2, clause 5(1)(a) of the Act were specifically incorporated.

The Award

[15] Mr Green's award is clearly written and well organised. To make sense of counsel's submissions it is necessary to set out certain passages of it. But first, the relevant features of Real Cool's claim and P & M's defence (there was also a counterclaim for an undercharge), must be mentioned. The disputed sum allegedly owing by Real Cool on P & M's invoices had already been paid across as a result of the Construction Contracts Act adjudication. Thus Real Cool was in the position of being the claimant before the arbitrator.

Pleadings before the Arbitrator

[16] Real Cool's claim was that the disputed balance ($279,964) represented an overcharge by P & M "in excess of the amount quoted for the pipe work". In the alternative, were the arbitrator to find, as P & M alleged, that the work was carried out on a "charge up" or "cost plus" basis, then Real Cool claimed that it was an implied term of such a contract that any amounts claimed would be "reasonably and properly incurred" and that P & M would carry out the supply and installation of the pipe work "with reasonable economy".

[17] P & M's pleading before the arbitrator was that the supply and installation of the pipe work and installation work in the two cool stores had been carried out on a "charge up and cost plus basis".

[18] The arbitrator set out in his Award the parties' respective positions. He then turned to examine what the terms of the contract were:

> [44] At the crux of this dispute lies the question of whether or not the contract between RCH and P&M for the pipework, fans and evaporators was a fixed price contract or a charge up contract.

The contract

[19] The arbitrator scrutinised the evidence with the relevant witnesses and the surrounding circumstances relating to a telephone conversation between the parties'

two relevant employees on 20 July 2006, during which Real Cool asserted that the agreed contract price was to be the same as it had paid for the two previous cool stores built in 2003, plus 20%. The arbitrator found against Real Cool on that issue. He reached the conclusion (at [65]) that the evidence he had heard did not persuade him there was an unambiguous offer and acceptance of the type which was intended to create a binding legal obligation. He was driven to "the ineluctable conclusion" that there was no agreement between the parties as to price, or indeed the scope of work for the piping, fans and evaporators in the two cool stores.

[20] The arbitrator went on to say that even if his conclusion was wrong, he was satisfied the evidence established "overwhelmingly" that various variations and changes in the scope and extent of the work which P & M was carrying out during the construction phase, were so extensive that any quotation based on the 2003 projects would have been "meaningless" by the time the two cool stores in question had been completed. The arbitrator concluded this phase of his Award by stating:

> [67] Accordingly, in the absence of any agreement as to price, it follows that P & M was entitled to the reasonable cost of carrying out the works that it was requested to undertake by RCH and that the contract for the piping, fans and evaporators for coolstores 5 & 6 was carried out on a charge up or cost plus basis.

Mr Colthart accepts that there can be no challenge to the arbitrator's conclusion on the terms of the contract, it essentially flowing from his factual findings.

Reasonableness of P & M's claims

[21] The arbitrator then addressed the question of what was the amount for which Real Cool was liable in respect of the work carried out by P & M. In that regard the arbitrator heard evidence from two quantity surveyors (who did not particularly impress him) and considered all the documentary evidence before him. He had also been referred to extracts from *Keating on Construction Contracts*[1] and *Hudson's*

[1] Stephen Furst and Vivian Ramsey *Keating on Construction Contracts* (Sweet & Maxwell, London, 2006) at 4-017/1.

Building and Engineering Contracts.[2] The arbitrator referred to these texts during the course of examining the law relevant to cost reimbursable or charge up contracts.

[22] The arbitrator turned to whether it was appropriate, in respect of the parties' contract, to imply a term that P & M's costs should be reasonable. He concluded:

> [95] There are in my judgment, compelling and persuasive reasons for the implication of the term contended for, namely that the reimbursable "costs" that P&M is entitled to be paid by RCH under the contract should be limited to those costs that are reasonably and properly incurred by P&M in carrying out the contract works under the contract.

[23] The arbitrator next assessed the overall reasonableness of P & M's charges. He referred to the expert evidence he had heard in that regard, and also to the evidence of various P & M witnesses. He considered he was not assisted to any great degree by the experts. He did, however, find, as he was entitled to do, that the evidence of a Mr Hoggart, who had carried out the insulation and accompanying sheet metal work on the cool stores was "convincing and compelling".

[24] The arbitrator then said:

> [103] I have carefully considered the submissions and the evidence as to the reasonableness of P&M's charges and in the result I am not persuaded that there is any reason to go behind P&M's invoices. The burden lies with RCH to show they were unreasonable and in the end no serious challenge has been made to them. I am satisfied that the evidence establishes that the costs claimed by P&M are those costs that were reasonably and properly incurred by P&M in carrying out the contract works under the contract, particularly when compared with the earlier work to coolstores 3 & 4.

[25] The arbitrator went on to consider issues arising out of P & M's mark-ups, which are not in issue here. He then turned to the question of interest which, as is apparent from the Award figures (supra [13]), comprised a substantial component of the sum for which Real Cool is liable.

---

[2] A A Hudson and IND Wallace *Hudson*'s *Building and Engineering Contracts*, (11th ed, Sweet & Maxwell, London, 1995) at 3.045

Interest

[26] P & M's stance at the arbitration was that it was entitled to interest at the monthly rate of 2.5% on late payments, such an interest entitlement being based on its standard terms and conditions. P & M's standard terms and conditions were printed on the back of each invoice, with a clear direction to that effect on the front of each invoice.

[27] The arbitrator commented that P & M's standard terms and conditions were not disputed so far as the structural steel contract between the parties was concerned, which was proceeding in much the same time-frame. He saw the issue as essentially being whether the interest provision had been brought to Real Cool's attention before the oral contract relating to the piping and refrigeration work had been included.

[28] The arbitrator heard evidence from relevant witnesses, particularly Real Cool's head engineer, Mr J. Rhodes. Mr Rhodes' version of the terms of the oral contract had been rejected. There was some suggestion by Mr Rhodes that he had been waiting for a written quote from P & M for the piping and refrigeration work. Mr Rhodes also gave evidence about his knowledge of P & M's standard form.

[29] The arbitrator's conclusion was in P & M's favour and to the effect that it was entitled to interest on the unpaid invoices:

> [127] Given the long course of dealing between the two firms, it is therefore implicit in my judgment that Mr Rhodes ought reasonably to have believed that P&M's quotation would be in its standard form complete with and incorporating its standard terms and conditions that were by then well known to RCH, but moreover, that the parties [sic] rights and liabilities under the piping and refrigeration contract (whatever the price) would be ascertained by reference to P&M's standard terms and conditions which were known to RCH. No other conclusion is tenable in my view.
>
> [128] Accordingly, I am satisfied that all work undertaken by P&M for RCH was undertaken pursuant to its standard terms and conditions which include the provision (clause 4) that P&M is entitled to interest at 2.5% per month on all overdue accounts calculated on a daily basis until the date payment is received.

Relevant law

[30] Appeals to the High Court on questions of law arising out of arbitral awards are governed by cl 5 of the Second Schedule of the Arbitration Act 1996. Clause 5 relevantly provides:

> **5 Appeals on questions of law**
>
> (1) Notwithstanding anything in articles 5 or 34 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award—
>
> (a) If the parties have so agreed before the making of that award; or
>
> (b) With the consent of every other party given after the making of that award; or
>
> (c) With the leave of the High Court.
>
> (2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.

[31] Clause 16.1 of the parties' October 2009 arbitration agreement provided that any award would be final and binding on the parties. Clause 16.2.2 stipulated that any appeal on a question of law required the High Court's leave.

[32] Thus leave will not be granted in terms of cl 5(2) of the Second Schedule unless the Court considers that, having regard to all the circumstances, the determination of the question of law could substantially affect the parties' rights. Both counsel accepted that, given the sum of money involved, the subclause was engaged.

[33] This Court, however, still retains a discretion to grant leave if the cl 5(2) criterion is met. Counsel agreed that the Court of Appeal's judgment in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*[3] set out the relevant considerations to guide this Court in deciding whether or not to exercise the discretion.

---

[3] *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).

[34] The factors which must inform the discretion are set out in [54] of the Court of Appeal's judgment. They are:

a) The strength and nature of the challenged area of law, which should be strongly arguable.

b) How the question of law arose before the arbitrator and in particular whether the question of law was "the very point" in the arbitration.

c) The qualifications of the arbitrator, including the issue of whether he was legally qualified.

d) The importance of the dispute to the parties.

e) Whether a substantial amount of money was involved.

f) The delay which the litigation might involve.

g) Whether the contract provides for the arbitral award to be final and binding.

h) Whether the dispute is domestic or international.

[35] The Court of Appeal at [58] and [59] suggested that if leave were to be granted, reasons should not ordinarily be given so as not to embarrass or influence the Judge who will hear the substantive argument. If leave was refused the judgment should be "short" and did not require a detailed analysis of the alleged error of law.

Discussion

[36] Mr Colthart for Real Cool identified what he submitted to be three errors of law. The first appeared early in the award at [44] (supra [18]). The arbitrator identified the dispute as essentially whether the parties' contract was a fixed price contract or a charge up contract. In Mr Colthart's submission there was a third

option which the arbitrator should have articulated, namely a *quantum meruit* contract.

[37] When considering this third option, submitted Mr Colthart, it was difficult to see how the arbitrator could have reached the conclusion that P & M was entitled to "those costs that are reasonably and properly incurred ... in carrying out the contract works under the contract" as he found in [95] of his Award. A charge-up contract implied there had to be an agreement on margins and rates. Here there was no such agreement. A *quantum meruit* contract was essentially quasi-contractual. In respect of a *quantum meruit* contract the onus rested on P & M to establish its costs were actually reasonable.

[38] This led to the alleged second area of law, which Mr Colthart identified as the statement in [103] of the Award that the burden lay with Real Cool to show that P & M's invoices were unreasonable. This, submitted Mr Colthart, was incorrect. It demonstrated that the arbitrator had been looking at the issues of cost through the wrong end of the telescope. That was a fundamental error of law. As in all contractual claims, it was for the claimant under the contract, P & M, to discharge the onus that the amounts claimed were reasonable.

[39] The third error of law advanced by counsel was that if the arbitrator's determination on a *quantum meruit* basis was correct, was he entitled to award P & M interest under its standard terms and conditions of contract? If there was no specific contract, but Real Cool was entitled to relief by the *quantum meruit* route, then Mr Colthart claimed it was an error of law to incorporate into a *quantum meruit* contract the interest component of P & M's standard contractual conditions.

[40] Mr Barker saw the first question of law being advanced as misconceived. He pointed out that Real Cool's claim before the arbitrator had been expressed in the alternatives of either a fixed price contract or a charge up or cost plus based contract.

[41] Mr Barker also relied on an elegant analysis in *Hudson's Building and Engineering Contract*[4] to the effect that the expression "*quantum meruit*" was

[4] Above note 2 at 1-263 and 1-264.

frequently employed in two different legal contexts. Properly, it should only apply to quasi-contractual situations where a claimant's remedy was restitutionary in nature and equity required some reasonable compensation or remuneration. The sense in which Real Cool was using *quantum meruit* was seen by the authors as:

> *... where a true contractual situation exists, in the sense of a request to do work accompanied by an intention to pay for it, and so supported by consideration, but where the price may not have been fixed at all, or with sufficient precision, by the contract, so that a promise to pay a reasonable price or remuneration requires to be implied to give practical effect to the parties' intention. This is merely an application of the rules as to implied terms... and it is not a case of quasi-contract.*

[42] In essence, Mr Barker submitted that Real Cool's first question of law was no more than an attempt to avoid the primary issue Real Cool's claim had placed before the arbitrator which had been determined on the evidence in P & M's favour.

[43] As to the second question of law, being the alleged application of an incorrect onus of proof, Mr Barker's submission was that the Award was not decided on any burden of proof. The arbitrator (at [97] and [98]) referred to the full scope of P & M's supporting invoices and the detailed audit of the work undertaken. The arbitrator had commented that there was "no serious challenge" to P & M's evidence and that the challenges to reasonableness were vague and amounted "... to nothing more than a general submission that the costs 'seem a bit high'". He had further commented that specific challenges to unit prices had been met with "clear and compelling answers" by P & M's witnesses.

[44] In any event, submitted Mr Barker, when one scrutinised [103] of the Award, the sentence relating to Real Cool carrying the burden to show that the charges were unreasonable was followed by a finding that the arbitrator was satisfied the costs claimed by P & M were costs reasonably and properly incurred in carrying out the contract works.

[45] As to the third question of law, Mr Barker submitted that the entire issue of whether or not Real Cool was aware of the interest entitlement contained in P & M's terms and conditions, and whether those terms and conditions would govern the contract, was a question of fact which the arbitrator had resolved in P & M's favour.

Decision

[46] I do not consider that the first question of law advanced by Real Cool in the context of the dispute, is a question of law. The parties, for whatever reason, had not deployed the normal commercial mechanisms of seeking and accepting a written quotation. Nothing was recorded in writing. The work proceeded and P & M invoiced Real Cool for it.

[47] In that situation, where there were no agreed or stipulated core components for pricing, the arbitrator had no option but to proceed the way he did. Real Cool, which was attempting to recover what it considered to be overpayment, faced with the rejection of its first claim that there was an agreed fixed price, alleged as an "implied term" of the contract that the work would be carried out with "reasonable economy".

[48] The arbitrator (at [90] and [91]) appears to have accepted Real Cool's counsel's submission that a term should be implied into the contract and that the sum for which P & M was entitled to be reimbursed should be limited to the actual costs reasonably and properly incurred in carrying out the contract work. This is precisely the approach which the arbitrator adopted. His conclusion was that the costs claimed by P & M were indeed costs reasonably and properly incurred in carrying out the works under the contract.

[49] As to the third question of law (the incorporation of P & M's terms and conditions relating to interest) I accept Mr Barker's submission that this is not a question of law at all. Rather, it is a question of fact. The arbitrator considered and weighed the evidence he had heard from relevant witnesses. He was satisfied that, given the dealings of the parties, both contemporaneous and historic, Real Cool was aware that tardy payment would result in the imposition of a 2.5% monthly interest charge.

[50] I was initially concerned that, of the total sum awarded, the interest component represented approximately 45.95%. However, that factor cannot properly justify converting a factual issue into a question of law. Real Cool, for

whatever reason, presumably failed to take advantage of various available mechanisms to avoid the risk of interest accruing on a disputed sum.

[51] I turn to the second question of law, being the arbitrator's suggestion at [103] that it was for Real Cool to prove that P & M costs were unreasonable. I consider that, prima facie, this is an error of law. I am not attracted to Mr Barker's submission that, because Real Cool was the claimant at the arbitration, it, rather than P & M, carried some onus.

[52] I am, however, more attracted to Mr Barker's submission that the issues before the arbitrator were not governed by questions of which party bore the civil onus. Obviously, in a situation where sums owing to P & M were being disputed, it was for P & M, being the party claiming monetary entitlements under a contract, to establish that its claims were reasonable, having regard to the work performed. Seen in isolation and out of context, the first half of [103] suggests that all that P & M had to do was to present figures and sit back and wait for Real Cool to satisfy the arbitrator the figures were unreasonable. That cannot be the case in any claim founded in contract.

[53] But although I accept that the arbitrator's articulation of the burden in the first half of [103] is in error of law, in the exercise of my discretion, I decline leave to appeal. I do so because a careful reading of the Award makes it clear that, far from looking at the dispute through the wrong end of the telescope, the arbitrator was correctly approaching his task. The error of law was immediately followed by a finding that the arbitrator was satisfied the evidence established P & M's claimed costs were reasonably and properly incurred in carrying out the contract work. The arbitrator had previously, as I have noted, (supra [23]) referred to the detailed evidence which P & M had produced to support its claims. If, hypothetically, the dispute was remitted back to the arbitrator to re-determine on the basis that P & M had to satisfy him that its claims were reasonable, I have no doubt that exactly the same determination would result.

[54] In deciding to exercise my discretion against granting leave, I have considered the eight criteria mandated by *Gold and Resource Developments*. The

error of law is closely related to what P & M had to prove to claim relief under a contract. However, for the reasons I have stated, I do not see the error as being determinative.

[55] The question of law clearly arises out of the central issues of the arbitration, which were the terms of the parties' contract.

[56] Mr Green is not a lawyer. He is nonetheless an experienced arbitrator in the building area and his infelicitous use of the word "burden" had not, in my judgment, deflected him from a proper determination of the issues dividing the parties.

[57] I accept that the dispute is of considerable significance to the parties and that a substantial sum of money is involved. However, those factors do not justify my granting leave in respect of an error of law which I do not consider influenced the result.

[58] The delays involved and resulting prejudice are of no great moment here. P & M holds the disputed sum and has done so for some time. Only the interest remains to be paid across.

[59] The dispute was not an international one.

[60] I give some weight to the fact that the parties agreed that the arbitral award was to be final. P & M's claim included a claim for contract interest. So clearly, what I see as a factual dispute over a contested term (an interest entitlement) was in what the parties intended to be a final and binding arbitration.

[61] For all these reasons therefore, and in the exercise of my discretion, I decline leave on the one question of law which Real Cool has successfully identified. I add, however, that even were I to be wrong on the first and third questions of law raised by Mr Colthart, I would have declined leave for the same reasons.

Result

[62] The application for leave to appeal the Award made by Mr R J Green on 8 June 2010, such application being made under cl 5(1)(c) of Schedule 2 of the Arbitration Act 1996, is declined.

Costs

[63] Counsel were agreed that the successful party would be entitled to costs on a 2B scale. Accordingly I order that the applicant is to pay the respondent's costs on that scale.

.....…
Priestley J