IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

BETWEEN

SIMON ROSSER AND YULIA ROSSER
Plaintiff

AND

GLOBAL CONSTRUCTION SERVICES LTD
Defendant

Hearing: 6 August 2004

Appearances: G W Halse for Plaintiffs
M J Koppens for Defendant

Judgment: 10 August 2004

RESERVED JUDGMENT OF RANDERSON J

Solicitors:
Foy and Halse, P O Box 26218, Epsom, Auckland for Plaintiffs
Wynyard Wood, P O Box 2217, Auckland for Defendant

ROSSER V GLOBAL CONSTRUCTION SERVICES LTD HC AK CIV-2004-404-2564 [10 August 2004]
Introduction

[1] On 10 April 2002, the plaintiffs entered into a building contract with the defendant for the completion of the plaintiffs' home at Te Atatu. Differences between the parties arose and the dispute was referred to the arbitration of an experienced barrister, Ms B Hunt. After a hearing occupying two days, Ms Hunt issued a partial award on 21 January 2004; a second partial award on 12 February 2004; and a final award on 27 February 2004.

[2] In the final award, the plaintiffs (as owners) were ordered to pay the defendant (as builder) the sum of $45,796.03 made up as follows:

| Amount due | $23,298.00 |
| Interest   | 1,763.28   |
| Costs      | 20,734.75  |
| **Total**  | **$45,796.03** |

[3] There are two applications brought by the owners:

a) An application for leave to appeal on a question of law under clause 5(1)(c) of the Second Schedule of the Arbitration Act 1996;

b) An application for variation of the costs awarded on the grounds that the award in that respect was unreasonable in all the circumstances in terms of clause 5(3) of the Second Schedule of the Arbitration Act.

[4] The sole alleged error of law relied upon by the owners is that the arbitrator erred in awarding variations of $8544 to the builder when clause 7 of the building contract required all variations and the cost thereof to be agreed in writing before work commenced.

[5] The builder's case is that the application for leave to appeal on a question of law is out of time and that, in any event, there was no error of law. The builder also says that the costs award was not unreasonable in the circumstances.
Is the application for leave to appeal out of time?

[6] By virtue of clause 5(8) of the Second Schedule of the Act, the time limit for bringing an application for leave to appeal on a question of law is the same as that prescribed for bringing an application to set aside an award under Article 34(3) of the First Schedule of the Act. Under that provision, any such application may not be made:

"... after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal."

[7] Mr Koppens submitted that the three month time limit expired either on 21 April 2004 or on 12 May 2004 (depending on whether time ran from the first partial award or the second one). Mr Halse, on the other hand, submitted that time did not run until the date of the final award. As the application for leave was filed on 20 May 2004, the application was in time, he submitted.

[8] The answer to the time limit issue depends in part on the effect of the two partial awards and the final award in determining issues in the arbitration and in part on corrections to the awards made upon request under Article 33 of the First Schedule of the Act. Under that provision, within 30 days of receipt of an award (or other agreed period), a party may request the arbitral tribunal to correct in the award any "errors in computation, any clerical or typographical errors, or any errors of similar nature ...". Notice of any such request must be given to the other party and if the arbitral tribunal considers the request to be justified, it is obliged to make the correction within 30 days of receipt of the request. Under Article 34(3), the effect of making any such request for a correction is to extend the time for bringing an application for leave to appeal until the date on which the request has been disposed of by the arbitral tribunal.

[9] In considering the effect of interim and final awards, it is well established that once an arbitrator has delivered an award on an issue referred to arbitration, an issue estoppel arises with respect to that matter and the arbitrator is powerless to re-visit it (save in respect of computational or similar errors in terms of Article 33 of the First
Schedule). Where an award purports finally to decide an issue, it does not matter if
the award is described as an interim or partial award. The authority for these
propositions is the decision of the Court of Appeal in Opotiki Packing &
Coolstore Ltd v Opotiki Fruitgrowers Co-Operative Ltd (In receivership) [2003]
1 NZLR 205 upholding the decision of Fisher J at first instance. As the court noted
at p 219, the expression "award" means "a decision of the arbitral tribunal on the
substance of the dispute and includes any interim interlocutory or partial award":
s 2(1) of the Act.

[10] Mr Koppens submitted that the liability of the owners to the builder for
variations was finally determined in the first partial award and the amount due by the
owners was finally determined in the second partial award at the latest. It followed,
he submitted, that time ran from the date of the second partial award (12 February
2004) and the three month time period expired on 12 May 2004. As the application
for leave to appeal was filed after that time, he submitted it was out of time.

[11] It is necessary to examine the terms of the three awards. Paragraph 2 of the
first partial award dated 21 January 2004 states:

A partial award is one which gives a final decision on some, but not all, of
the issues in the arbitration. In this partial award I have resolved all issues,
with the exception of interest and costs. A final award will be issued after
the parties have had the opportunity to implement my orders relating to
specific performance on the warranty item and after they have made
submissions, if they wish to, on interest and costs.

[12] Thus, on its face, the arbitrator was making an award which resolved all
issues on a final basis except interest and costs. Amongst those issues were the
variations. The arbitrator dealt with these at paragraphs 47 to 56 of her award and
concluded that the builder was entitled to $8544 for variations. After allowing a
credit to the owners of $10,000 for work in the kitchen carried out by another
contractor, it was determined that the builder owed the owners a net sum of $1456.
That sum was allowed as a credit to the owners in the final calculation in the first
partial award in which the arbitrator ordered that the owners were to pay to the
builder the sum of $14,143 (inclusive of GST) “forthwith”. The arbitrator also
ordered in the first partial award that the builder must carry out specified work under
warranty by 20 February 2004 and if there were any difficulties arising in relation to
the completion or adequacy of that work, the owners were to notify the arbitrator by 27 February 2004 so that the arbitrator could "make a financial adjustment in my final award". Submissions were sought on the remaining issues of interest and costs.

[13] It is clear from the first partial award that the arbitrator ordered the owners to pay to the builder a specified sum forthwith. The calculation of the specified sum included the amount ordered for variations. Although it was possible a further adjustment could be made to the amount payable to the builder depending on the outcome of the warranty work ordered, the arbitrator was explicit in requiring that the specified sum be paid immediately. Other than any possible later adjustment for warranty work, the only outstanding issues were interest and costs. But for the computational adjustment made in the second partial award, liability for the variations was finally settled in the first partial award. The quantum of the variations was also settled in the first award although the amount due was subject to correction in the second partial award.

[14] In the second partial award issued on 12 February 2004, the arbitrator recorded that she had been asked by the builder to correct a computational error relating to the deduction of the costs of the kitchen. She recorded that there had also been a request by the builder to make an adjustment in respect of the warranty work because the owner's property had been sold and the warranty work had been completed by another without reference to the builder. At paragraph 5 of the second partial award, the arbitrator stated:

This second partial award is made in response to the request by the claimant pursuant to article 33, and addresses the two issues raised by the claimant. It follows and in certain respects, identified later, it corrects the partial award of 21 January 2004, but except as corrected by this second partial award, in all other respects the partial award of 21 January 2004 is confirmed.

[15] The arbitrator re-calculated the amounts due to arrive at a figure of $23,518 due to the builder. The arbitrator then stated:

7. It follows that the order made in paragraph 59a of my partial award will be amended to read:

"The respondents shall pay to the claimant the sum of $23,518 (inclusive of GST) forthwith."
8. With the exception of the corrections to paragraphs 58 and 59, the partial award of 21 January 2004 remains the same. The final award, which will follow the implementation of the orders made with respect of the warranty items, will include the amended figures.

[16] As to the warranty issue, the arbitrator noted the concerns raised by the builder following the disposal of the property by the owners but decided she was obliged to wait until 27 February 2004 for advice from the owners as to whether the warranty work had been satisfactorily completed.

[17] By the time of the second partial award, which corrected a computational error in terms of Article 33 of the First Schedule of the Act, all issues had been finally determined except any adjustment for warranties, interest, and costs. In particular, the liability for and quantum of the variations had been finally determined. I do not accept the submission made by Mr Halse for the owners that the reference by the arbitrator in the second award to the final award including the amended figures meant that the second partial award was not, on its face, a final award in relation to the issues then determined. Whatever adjustments may have been made for the warranty issue, interest, and costs, all issues relating to the variations had been finally determined and an issue estoppel thereby arose in respect of variations.

[18] In the final award issued on 27 February 2004, the arbitrator noted that the builder had conceded the claim by the owners for warranty items. She adjusted the amount due in terms of the second partial award by deducting $2020 to arrive at a final sum for damages of $23,298 payable by the owners to the builder. As well, the interest and costs awards were made. No adjustment to the final figure was made in respect of variations or any other items.

[19] Having reviewed the awards made, I find that the variations issue was finally determined in all respects in the second partial award issued on 12 February 2004 and that the time for filing any application for appeal began to run from that date. The three month time period expired on 12 May 2004 and the application for leave to appeal filed after that date is out of time accordingly. It follows that the application for leave to appeal must be dismissed.
I add only that the point of law raised appears to have little merit. Although it was accepted that there was no agreement about the cost of the variations before work commenced on those variations, clause 7 of the building contract does not stipulate what is to happen in that event. The arbitrator found that although the contractual procedure was not strictly followed, the parties had agreed that the additional work should be carried out and additional materials were supplied and the work completed. The experts engaged on each side in the arbitration agreed on the value of most of the variations and the outstanding items were fixed by the arbitrator. Prima facie, it is difficult to see why the builder should not have been entitled to be paid for the variations on a quantum meruit basis.

The costs issue

The arbitrator has a discretion to award costs under clause 6(1)(a) of the Second Schedule of the Arbitration Act which provides:

6. Costs and expenses of an arbitration –
   (1) Unless the parties agree otherwise,-
   (a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the First Schedule, or any other additional award under article 33(3) of the First Schedule; or ...

The power of this court to intervene in relation to a costs order is contained in Article 6(3) of the Second Schedule of the Act which provides:

6. Costs and expenses of an arbitration –
   (3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

The builder's claim was for a total sum of $38,076.78 (including $257.53 for interest). The ultimate award of the arbitrator was for $23,298 plus interest of $1762.28.
The builder claimed $48,005 for costs made up as follows:

<table>
<thead>
<tr>
<th>Costs</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solicitor's costs</td>
<td>$19,296</td>
</tr>
<tr>
<td>Experts' expenses</td>
<td>20,000</td>
</tr>
<tr>
<td>Total</td>
<td>8,709</td>
</tr>
<tr>
<td>Total</td>
<td>$48,005</td>
</tr>
</tbody>
</table>

The arbitrator awarded costs to the builder of $28,864 made up as follows:

<table>
<thead>
<tr>
<th>Costs</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two-thirds share of arbitrator's costs</td>
<td>$12,864</td>
</tr>
<tr>
<td>Contribution to solicitor's costs</td>
<td>16,000</td>
</tr>
<tr>
<td>Experts' costs</td>
<td>Nil</td>
</tr>
<tr>
<td>Total</td>
<td>$28,864</td>
</tr>
</tbody>
</table>

After receiving submissions from both parties, the arbitrator's reasons for her costs award were as follows:

15. Costs follow the event, and I have a discretion in the award I make for costs.

16. The claimant has provided a method of calculation of costs by reference to the High Court scale. I accept the respondents' submission that the High Court scale has no application.

17. The claimant has largely succeeded with its claim, although not to the full extent claimed. In that regard the respondents have failed in their defence and the claimant is entitled to costs. The respondents have also succeeded in part with their counterclaim for damages for defects and they are entitled to costs on that, although their claim for general damages failed. I have considered the correspondence prior to the arbitration. That correspondence, and the parties' conduct during the course of the arbitration, have not impacted on costs. I have taken into account, however, as noted in the first partial award, that in certain, significant respects, the cause of the dispute was the respondents' expectation of a higher level of finish than was specified in the contract.

18. It is my award in respect of costs that the respondents should pay two thirds of the costs of the arbitration, being $12,864.00. The respondents have paid $8,129.25 to date, so respondents are to pay to claimants the sum of $4,734.75 in respect of the costs of the arbitration. The respondents are to pay $16,000.00 towards the claimant's legal costs. Because of the respondents' partial success with their counterclaim it is my award that the experts' costs should lie where they fall.

Mr Halse submitted that the District Court scale of costs should have been followed which would have resulted in an award of costs of around $4000 to the builder offset by approximately $1900 for the owners' counterclaim. He submitted
that this would have resulted in the builder being entitled to around $2000. Looking at the circumstances overall, he submitted that costs should lie where they fall. Coupled with that submission, Mr Halse submitted that the arbitrator had not taken into account (adequately or at all) the fact that the owners had succeeded in part. He further submitted that the builders' claim for costs had been based on the High Court scale which was inappropriate for a number of reasons. Finally, he submitted that the arbitrator had published her final award only about an hour or a little longer after receiving the owners' submissions and for that reason the arbitrator had not given full and proper weight to them.

[28] I am not at all persuaded that any of the submissions made on behalf of the owners has any merit. An arbitrator has a broad discretion in fixing costs. I accept that the discretion must be exercised judicially and in accordance with established principle: *Angus Group Ltd v Lincoln Industries Ltd* [1990] 3 NZLR 82. Unreasonableness in all the circumstances in terms of clause 6(3) of the Second Schedule of the Act may be established where there is an error of principle or where there is a lack of balance, proportionality, or equity: *The Marble and Granite Centre Ltd v R and Y Emery and Ors* (High Court, Auckland, M.384/98, 30 September 1998, Robertson J at p 11). However, it is well settled that the object of the Arbitration Act is to encourage the use of arbitration as an agreed method of resolving commercial and other disputes and thereby avoid litigation in the courts: s 5(a). This court will not lightly interfere with costs awards made by an arbitrator unless it is plainly shown that the award was unreasonable in all the circumstances. This court will not intervene merely because it would have arrived at a different conclusion. If the award accords with principle and if it is one which could reasonably be made by an arbitrator in all the circumstances, this court will not interfere.

[29] Here, the arbitrator was entitled to conclude that the costs should follow the event. Ordinarily, a successful party is entitled to a reasonable contribution towards costs unless there are special circumstances making it fair to depart from this principle: *Marx v Attorney-General* [1974] 2 NZLR 372. The arbitrator, correctly in my view having regard to the amounts at issue, determined that the High Court scale of costs was not appropriate. Equally, the arbitrator was entitled to reject the
submission that cost should have been fixed on a District Court scale. It is well known that the scale of costs in the District Court is woefully inadequate to reimburse a successful party in litigation and the same applies to arbitrations. The arbitrator gave weight to the owners' success on the counterclaim by disallowing any claim by the builder for the amounts claimed for the cost of the expert witnesses involved.

[30] The arbitrator was in the best position to form an assessment of the overall circumstances of the arbitration and was entitled to conclude that the owners should pay two-thirds of the arbitrator's costs. I do not detect any lack of proportionality or injustice in the award.

[31] Mr Halse also submitted that the arbitrator should have required the builder to provide copies of the solicitors' bills of costs. While that may be a desirable course in many cases, it is not essential. The arbitrator was entitled to exercise her discretion based on her experience and on the assurance from the builder's solicitors that their legal costs exceeded the $20,000 claimed. The suggestion that the arbitration did not give sufficient consideration to the owners' submissions on costs is rejected. In fact, she plainly accepted part of the owners' submissions by disallowing costs on the High Court scale and by disallowing the builder's claim for the cost of expert witnesses.

Result

[32] The application for leave to appeal and the application of variation for the costs orders are both dismissed. The defendant is entitled to costs against the plaintiffs in this court on a 2B basis. If agreement cannot be reached, the defendant is to file and serve a memorandum as to costs within 14 days of the date of this decision and the plaintiffs within seven days thereafter.

Signed at ______________ this 10th day of August 2004.

AP Randerson J