IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-3149

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an originating application to set aside an arbitral award
BETWEEN	JACK TAGGART AND PATRICIA TAGGART Applicants
AND	JIM VISSER LIMITED Respondent

Hearing: 12 July 2010

Counsel: Iain M Hutcheson for Applicants
M J Koppens for Respondent

Judgment: 30 July 2010 at 4:30pm

RESERVED JUDGMENT OF HUGH WILLIAMS J.

This judgment was delivered by
The Hon. Justice Hugh Williams
on
30 July 2010 at 4:30pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

A. The application by Mr and Mrs Taggart for leave to set aside the arbitral award concerning the dispute between them and Jim Visser Limited is dismissed.

B. Costs are to be dealt with in accordance with para [40][c] of this judgment

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Introduction

[1] The applicants, Mr and Mrs Taylor, employed the respondent, Jim Visser Limited ("JVL"), to construct a house for them at 39 Fidelis Avenue, Snells Beach. A dispute between them in relation to the building work led to them appointing a Mr Bayley, a quantity surveyor of Auckland, as sole arbitrator. In a partial award of the arbitral tribunal, delivered on 19 February 2010, the arbitrator found that Mr and Mrs Taggart owed JVL $43,458.74 plus $1260 being their share of the arbitration costs paid by way of security by JVL.

[2] On 18 May 2010 Mr and Mrs Taggart applied to this Court to set aside that part of the award relating to an invoice from JVL dated February 2008, and all calculations consequently affected, on the grounds the award dealt with a dispute not contemplated by or falling within the terms of the submission to arbitration and thus containing decisions on matters beyond its scope. JVL opposes the partial setting-aside application on the ground the award was within the arbitrator's jurisdiction in terms of the submission and the parties agreed the award would be final and binding.

[3] This judgment deals with Mr and Mrs Taggart's application.

Law

[4] The application was brought under chapter 7 of Schedule 1 of the Arbitration Act 1996 which, as invoked in this case, reads:

> **34 Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if –
>
> (a) The party making the application furnishes proof that –
>
> ...
>
> (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside ...

[5] It is to be noted that Mr and Mrs Taggart did not claim that the award was in conflict with the public policy of New Zealand because the rules of natural justice were breached.[1]

Agreement to arbitrate

[6] Between 26 November 2008 and 22 January 2009, the parties to the dispute severally executed an arbitration agreement referring "all matters in dispute or difference between them or any of them arising out of or in connection with" the erection of Fidelis Avenue to Mr Bayley and provided they would "abide by the award of the arbitrator" and that the "award determination and directions of the

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[1] Clause 34(6)(b).

arbitrator should be final and binding upon the parties".[2] The parties expressly requested the arbitrator to give reasons for his "award but these shall not form part thereof".[3]

Award

[7] The arbitrator first recounted the procedural history of the matter including the pre-hearing timetable and the service of the claim and defence (not included in the case before this Court) and the arbitration hearing itself on 15 June 2009. Mr and Mrs Taggart drew inferences of forgetfulness or omission on the part of the arbitrator from the fact that the award was not delivered until 19 February 2010, a delay partly attributable to bereavement.

[8] The arbitrator then rehearsed the factual background, the building and resource management applications, JVL's performance pursuant to the agreement including changes in the scope of the work and its progress.

[9] Under the heading "Payments" the arbitrator recorded:

> 26 Mr Visser made progress claims from October 2006 to April 2008. By April 2008 the relevant amounts claimed by Mr Visser and payments made by Mr and Mrs Taggart were as follows:

Month	***Amount claimed***	***Paid Amount (incl GST)***
February 2008	$42,530.05	$31,280.05
March 2008	$26,372.80	Nil
April 2008	$29,473.44	Nil
3 month totals:	$98,376.29	$31,280.05
Deduct payments	$31,280.15	
Balance claimed but not paid:	**$68,096.24**	

[10] At the heart of Mr and Mrs Taggart's present application is the submission that the entry for February 2008 was erroneously included by the arbitrator as the invoice for that month was not in dispute. If accepted, that would alter the

[2] Clauses 1-4.
[3] Clause 5.

"3 month totals", remove all reference to the amount paid for February 2008, and amend the balance.

[11] The arbitrator then continued his recitation of the facts including JVL ceasing work in late April 2008 and the preparation of the claim.

[12] He then worked his way through the claims and defences in relation to each aspect of the work, first listing Mr and Mrs Taggart's position then JVL's position, commenced his findings at para 45 and listed his conclusions in relation to each issue[4] and the outcome of each claim. The net result, he held, was that Mr and Mrs Taggart were to pay JVL the balance claimed but not paid of $60,096.24 less a deduction for remedial work ($24,637.50) to leave a balance payable of $43,458.74. Because of what they claim are the arbitrator's errors in relation to the February 2008 payment recounted above, Mr and Mrs Taggart say the balance claimed but unpaid should be reduced to $55,846.24 and the amount payable by them to $31,208.74.

[13] The arbitrator then dealt with interest - unclaimed by either party – and the arbitration costs, to reach the conclusion earlier noted.

[14] Mr Taggart's affidavit in support of the present application said he and his wife identified two errors when they first read the award, one of which has since been acknowledged by JVL and corrected by the arbitrator, and the other being the inclusion of the February 2008 invoice which was not in dispute though it was included with other invoices in an over-claim for painting which JVL subsequently acknowledged.

[15] Because the February 2008 invoice was never in dispute, Mr Taggart said "we did not provide evidence or explanation to the arbitral tribunal in relation to that invoice or the painting quote and the over-charge in the invoices for painting", the latter being the subject of an oral quote from JVL, details of which and the invoices for which he put in evidence.

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[4] At para 52.

[16] He said the February invoice was part-paid on 2 April 2008 in the sum of $31,280.05 calculated by deducting the second progress claim for painting and paying the balance in full. The further claim for painting in the April invoice was left unpaid as Mr and Mrs Taggart were seeking to set this off against remedial work JVL had failed to complete. That, he said, was confirmed by an email from JVL on 22 May 2008 which said:

> ... the outstanding payments for the painting and overlay are $6478.24 plus GST and $15,500 plus GST respectively (these amounts have been added to your April invoice)".

[17] JVL's subsequent invoices had a handwritten notation that they were payment claims under the Construction Contracts Act 2002 plus other annotations, but made no claim for the invoice for February 2008.

[18] Subsequent invoices and correspondence, Mr Taggart said, were directed only at the March and April 2008 invoices and not that for February.

[19] Correspondence with Mr Bayley ensued after delivery of his award, raising both errors which Mr and Mrs Taggart claimed. Correspondence between the parties' legal advisers also occurred without complete agreement.

[20] However, on 25 March 2010, Mr and Mrs Taggart sent JVL a cheque for $31,208.74 "which is tended [sic] in full and final settlement of all matters including the subject matter of the arbitration, the award, costs and the building work carried out on our property" but on two conditions relating to aspects of the building work. The letter said that if the "terms of settlement are not acceptable then the cheque must be returned to us and we do not authorise the banking of the cheque on any basis other than the terms under which it has been tendered, namely, in full and final settlement of all matters." The cheque was presented and honoured.

[21] On 29 March 2010 JVL's counsel wrote to Mr and Mrs Taggart's counsel saying the "monies paid have be [sic.] receipted on account" as the sum was "not accepted in full settlement and my client will be pursuing the balance due", a comment that was confirmed in a letter from JVL to Mr and Mrs Taggart dated 26 March 2010.

[22] On 26 April 2010 Mr Bayley responded to counsel for both parties saying that, with the agreement of the parties, his award had been amended under Art.33 of the First Schedule to the Arbitration Act 1996 by reducing the "balance claimed but not paid" figure in para 26 from $68,096.24 to $67,096.24 with consequential arithmetical adjustments in the award resulting in Mr and Mrs Taggart owing JVL $43,718.74.

[23] However, as far as the February 2008 invoice was concerned, Mr Bayley noted the issue was raised after the time limit set out in Art.16(2) of the First Schedule to the Arbitration Act 1996 and, further, that he remained unconvinced that what occurred amounted to an arithmetical error which Art.33 entitled him to correct. If the parties intended to pursue the matter towards an additional award, Mr Bayley would have been prepared to consider the issue following submissions.

[24] Nothing further occurred in that arena and Mr and Mrs Taggart brought this application, though Mr Visser's affidavit opposing the application (and claiming interest and additional costs) said that JVL had offered to have all issues determined by the arbitrator or, if preferred by Mr and Mrs Taggart, by the Disputes Tribunal. Mr and Mrs Taggart disagreed because they did not wish to have the new issues of interest and costs being brought into the arbitration.

Submissions

[25] For the applicants, Mr Hutcheson submitted the above factual analysis showed JVL orally quoted for the painting for Fidelis Avenue in the sum of $27,000 plus GST and JVL invoiced a painting progress claim for $11,500 plus GST on 31 January 2008, which Mr and Mrs Taggart paid in full. The next painting progress claim was for $10,000 plus GST in a JVL invoice dated February 2008 but there was no claim for painting in its 31 March 2008 invoice. Mr and Mrs Taggart paid all the February invoice, other than the painting component, in early April but JVL claimed all the outstanding painting, namely $15,500 plus GST in its 30 April 2008 invoice. Mr and Mrs Taggart paid none of that invoice because they thought they were entitled to set-off the sum claimed against outstanding remedial work thus the outstanding painting claim was only the $15,500 plus GST.

[26] Adding up all the painting invoices from January to April 2008 at face value, totalled $37,000 plus GST, but the February and April invoices at face value only summed to $27,500. Thus, he submitted, the arbitrator erred in his approach when he included the value of painting including GST in the sum of $30,375 in his award and deducted $12,100 for defective work. He claimed the arbitrator's total of $68,096.24 for "balance claimed but not paid" included the whole of the February, March and April 2008 and deducted the part-payment of the February invoice.

[27] Noting the lengthy delay in delivery of the award and the informal nature of the arbitration, he submitted the arbitrator overlooked that the February 2008 invoice was never put in issue by Mr and Mrs Taggart and should not have have featured in the award, particularly as they made no submissions on it.

[28] Mr Hutcheson noted Mr Visser's affidavit dealt with issues other than the suggested error and said he was "not sure what [Mr Bayley] did and did not take into account".

[29] For JVL, Mr Koppens stressed the lengthy line of authority at the highest level, to the effect that once parties have chosen arbitration, absent manifest error, the Courts will not intervene in an award: *Gold and Resource Developments (NZ) Limited v Doug Hood Limited*.[5] The Court of Appeal said, as Mr Koppens pointed out, that the Arbitration Act 1996 favours "finality, certainty and party autonomy."[6]

[30] He said JVL did not accept there was a factual error in the award, still less a clear one, and this application was an attempt by Mr and Mrs Taggart to re-litigate the dispute.

[31] Errors of fact only rarely warranting leave being granted to set aside awards,[7] he submitted it was plain the parties intended the arbitration to be binding, a factor which was against the grant of leave though not determinative.[8]

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[5] *Gold and Resource Developments (NZ) Limited v Doug Hood Limited* [2000] 3 NZLR 318, citing the Privy Council decision in *Pupuke Service Station Limited v Caltex Oil (NZ) Limited* [1996] BCL 49 (PC) as an Appendix.
[6] At p 332 para [52].
[7] *Pupuke Service Station* at 2; *Gold and Resource Developments* p 339; *Halligan v Stewart Construction Ltd* High Court Dunedin M145/90, 14 December 1990, Master Hansen, pp 8-13.

[32] He then dealt with issues of interest, abuse of process, and the inherent jurisdiction, but these do not need to be detailed.

Discussion

[33] As the Court of Appeal said in *Gold and Resource Developments*,[9] hearings for leave should be brief and if leave is not to be granted only a short judgment is appropriate.

[34] Because this Court has decided that the application should be declined, the Reasons part of this judgment will be brief.

[35] The principal – and determinative – reason for reaching the view just expressed is that it is by no means clear that the factual basis underlying Mr and Mrs Taggart's application is made out. True, they may have considered the JVL February 2008 invoice not to be in contention, but the evidence does not demonstrate they made that view plain to JVL and the arbitrator. It is certainly possible to read the documentary evidence as supporting Mr and Mrs Taggart's view, but it is by no means plainly apparent their view was the basis on which the arbitration was undertaken. In building disputes the only issues usually alive need to be clearly spelt out. Such is not the case in this instance.

[36] In addition, the arbitrator plainly did not accept Mr and Mrs Taggart's viewpoint and, though he corrected one arithmetical error where the parties held a common view, he declined to make the further arithmetical readjustment requested, not just because he felt he was without jurisdiction so to do without consent but, plainly, because he did not accept the matter was necessarily such as Mr and Mrs Taggart contended.

[37] Those circumstances plainly tell against the grant of Mr and Mrs Taggart's application, as does the phrasing of the arbitration agreement.

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[8] At 334 para [54].

[9] At 335-336, paras [56]-[58].

[38] These parties were content to arbitrate all the issues between them with minimal documentation and on a relatively informal basis. Having signed an agreement which said that the arbitration would be in full and final settlement of all matters between them, they should be held to that approach.

[39] In addition, when the parties excluded the arbitrator's reasons from the award, it is even more difficult to conclude the result was outside jurisdiction, still less that he must have been plainly wrong.

Result

[40] That being the Court's conclusion:

a) There is no need to deal with whether JVL's acceptance of Mr and Mrs Taggart's cheque in settlement amounted to an accord and satisfaction. Counsel disavowed any reliance on that possibility.

b) There is no need to deal with JVL's application for interest. The parties did not put that in issue at the arbitration and there is no formal application to include it at this stage.

c) JVL is entitled to the costs of this application on a 2B basis with the usual disbursements. If the parties are unable to agree on the amount, leave is reserved for them to apply by way of memorandum.

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HUGH WILLIAMS J.

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