(tho96005)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
IN DARWIN

No. 59 of 1996
(9607338)

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1985 AS AMENDED

AND:

IN THE MATTER OF A DISPUTE BETWEEN:

ADVANCE CIVIL ENGINEERING PTY LTD
Plaintiff

AND:

NORBUILT PTY LTD
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 3 June 1996)

This is an application by the defendant for orders that there be:

(1) Judgment for the defendant; and

(2) The plaintiff pay the defendant's costs of these proceedings.

This application was heard on 26 April 1996, and during the course of the hearing the Court made the following orders by consent:

1. The plaintiff have leave to amend the originating motion from Form 5C to Form 5B.

2. The defendant have leave to file an appearance.

3. The defendant have leave to file summons dated 23 April 1996

The plaintiff commenced these proceedings in the Supreme Court by originating motion dated 3 April 1996 which by leave was subsequently amended seeking the following orders:

1. That the time limit by Order 91.09 of the Supreme Court Rules for the filing and serving of this originating motion be extended to the date upon which this originating motion is served on the defendant.

2. The interim award made by the Arbitrator, Mr Colin Pascoe, on 30 September 1995, be set aside as being improperly procured pursuant to s42 of the *Commercial Arbitration Act* 1995 (NT).

3. The defendant pay the costs of these proceedings to be agreed or taxed.

On 24 June 1994 the defendant ("Norbuilt") formally entered into a contract with the Department of Transport and Works ("the Principal") for the design and construction of a

bridge and approaches at the Batten Creek crossing on the McArthur River Mine haul road ("the Works").

On 25 July 1994, Norbuilt entered a subcontract with the plaintiff ("Advance") to undertake part of the works on behalf of Norbuilt ("the subcontract"). These works included the construction of the footings.

At a meeting on site on 7 August 1994, that is after the subcontract price had been agreed upon between Norbuilt and Advance, a decision was made to vary the size of the footings. Following the variations in the size of the footings, Advance, Norbuilt and the principal, through its superintendent and the superintendent's representative, sought to agree on a price for the variation.

A dispute arose between Norbuilt Pty Ltd and Advance Civil Engineering Pty Ltd as to the amount of the valuation of the changed design of the footings, among other things.

The Department of Transport and Works were in effect the owner in relation to the project. The head contractor was Norbuilt. The subcontractor was Advance. Pursuant to the head contract a superintendent was appointed to administer the works on behalf of the Department of Transport and Works. Mr Ken Hornsby was the superintendent pursuant to the head contract. The superintendent's representative was in effect

the manager from time to time of an engineering company Gutteridge Hoskins and Davey.

Clause 45 of the head contract effectively provided that where a dispute arose between the contractor and Transport and Works, there was a certain dispute mechanism to be followed.

By letter dated 26 July 1995 the superintendent made a determination as to the value of the additional size of the footings.

The matter proceeded to Arbitration between Advance and Norbuilt. On 30 September 1995, the Arbitrator issued an Interim Award in which he determined that the matter of the valuation of the increased size of the footings must be deleted from the scope of the formal arbitration dispute between Advance and Norbuilt pursuant to subclause 44(a) of the subcontract.

It is not in dispute that prior to the Interim Award made by the Arbitrator the defendant failed to discover two letters. These being letters dated 18 July 1995 from the Department of Transport and Works to Mr Stefan Koser, Managing Director of Norbuilt Pty Ltd, and a letter from Norbuilt Pty Ltd dated 20 July 1995 to the Department of Transport and Works.

I refer to paragraphs 33 and 34 of the affidavit of Stefan Koser sworn 19 April 1995 which states:

> "33. The Superintendent's letter to Norbuilt of 18 July 1995 and Norbuilt's response of 20 July 1995 were not provided to Advance prior to the Preliminary Arbitration hearing nor were they subsequently discovered as I did not consider them relevant.
>
> 34. These letters became available to Advance following subpoena of the Principal's files which was returned with those files on 19 January 1996."

The defendant argues that the plaintiff has no cause of action and the failure to discover these two letters does not mean the interim award was improperly obtained.

The defence argument is that when the matter came before the Arbitrator for adjudication there had been a determination in accordance with clause 45(a) of the contract and a failure or otherwise to discover those two letters is immaterial. The failure to discover the two letter does not, on the defence argument, constitute an improper obtaining of an award.

Secondly, the defendant argues the plaintiff is estopped from bringing this claim because prior to the hearing of the arbitration coming to an end the plaintiff gained access to the Transport and Works documents by way of subpoena. The submission is that this is an "Anshun" estoppel (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, *Bryant v Commonwealth Bank of Australia* 130 ALR 129). The defendant argues that the plaintiff could have taken some

steps to ensure the issue relating to the late discovery of the two letters was canvassed at the arbitration.

This argument has not been addressed by the plaintiff who contends the issues in this claim are matters for the trial judge, the plaintiff having shown that its claim is not so untenable that it should be dismissed summarily and without opportunity for the plaintiff to be properly heard.

The application by the defendant is pursuant to Order 23.01 of the Supreme Court Rules. Order 23.01(1) states as follows:

> "(1) Where a proceeding generally or a claim in a proceeding -
>
> (a) does not disclose a cause of action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court,
>
> the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim."

The essence of the defendant's application is:

(1) that it cannot be said that the interim arbitration award has been made improperly simply because there was not discovery of certain letters. The defendant's argument is that if those letters had been discovered it would not have affected the result. Because the award was not improperly obtained, the plaintiff has no right to continue this

proceeding. The plaintiff is currently time barred from bringing this proceeding and to allow an extension of time would be futile.

(2) The plaintiff is estopped from the right to take proceedings in these circumstances where they have allowed the hearing of the arbitration to conclude.

The Court was informed the award itself was to be handed down by the Arbitration Court within the next few days.

In support of the application for judgment the defendant sought to rely on two affidavits, being affidavits of Stefan Koser sworn 19 April 1996 and affidavit of Ken Hornsby sworn 23 April 1996.

Annexed to the affidavit of Stefan Koser being annexure "L" is a true copy of the superintendent's letter dated 18 July 1995 and annexure "M" which is a copy of a letter from Stefan Koser to the superintendent dated 20 July 1995.

Details of these two letters are as follows:

"Mr Stefan Koser
Managing Director
Norbuilt Pty Ltd
GPO Box 4869
DARWIN NT 0801

Dear Sir
RE: CONTRACT NO. TW88 OF 1993/94 BATTEN CREEK BRIDGE
"Without Prejudice"

Your letter of 9 June 1995, reference 9326 sk95 126 in respect of additional footing works refers.

I have fully considered all the matters before me in relation to this issue and hereby offer you the sum of $66,790.60 in full and final settlement in respect of this issue.

(signed) KEN HORNSBY (dated) 18 July 1995"

"20 July 1995
The Superintendent
Department of Transport and Works
GPO Box 2520
DARWIN NT 0801
ATTENTION: MR KEN HORNSBY

Dear Sir

RE: CONTRACT No. TW88 OF 1993/94
BATTEN CREEK BRIDGE

Thank you for your letter date (sic) 18 July 1995, the contents of which is quite acceptable to Norbuilt.

In order to make my subcontractor see sense I need a slightly differently worded letter. Could I ask you to send me a new letter similar to the attached sample?

Please give me a call should you wish to discuss this matter further.

(signed) Stefan Koser."

The "attached sample" referred to above reads as follows:

Mr Stefan Koser
Managing Director
Norbuilt Pty Ltd
GPO Box 4869
DARWIN NT 0801

Dear Sir

RE: CONTRACT NO. TW88 OF 1993/94 BATTEN CREEK BRIDGE

Your letter of 9 June 1995, reference 9328 sk95 126 in respect of additional footing works refers.

In accordance with clause 45 of our General Conditions of Contract I determined that the value of widening the 13 bridge foundations is $66,790.60.

Yours faithfully
(signed) Ken Hornsby
18 July 1995”

The plaintiff argues that the material in the affidavit of Stefan Koser sworn 19 April 1996 and Ken Hornsby sworn 23 April 1996 is irrelevant to the present application because it is inappropriate for the Court to embark upon a consideration of the facts of the matter at this stage.

Counsel for the plaintiff referred to the relevant principles in respect of the defendant’s application under Order 23.01. The Court will not make an order under this rule unless it is clear on the pleadings or from the extrinsic evidence that the claim is unsustainable in law. The burden on this question lies on the defendant (*Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 57).

The principles to be applied are set out in Williams Civil Procedure Victoria Vol 1 at p3417:

> “.... The traditional view is that the object of the rule is to “get rid of frivolous actions” (*Weedon v Pick* (1889) 11 ALT 94) or, in other words, “to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious or obviously unsustainable” (*Attorney-General for Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). Thus, it has been said that the power to summarily determine a proceeding is reserved for a claim or defence which is “obviously unsustainable” (*Attorney-General for Duchy of Lancaster v London & North Western Railway Co,* supra), or “so obviously untenable that it cannot possibly succeed” (*Burton v Shire of Bairnsdale* (1908) 7 CLR 76 at 92; *Reed International Books Australia Pty Ltd (t/as*

> *Butterworths) v King and Prior Pty Ltd* (1993) 11 ACSR 560 (Fed C of A)), or "so manifestly faulty that it does not admit of argument" (*Wall v Bank of Victoria Ltd* (1890) 16 VLR 2 at 4), or for cases which are "plain and obvious" (*Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86; [1895-9] All ER Rep 244; *William Charlick Ltd v Smith* [1922] SALR 364; *Arbon v Anderson* [1942] 1 All ER 264 at 266), or "clear beyond all doubt" (*Kellaway v Bury* (1892) 66 LT 599 at 602; *Hill v Scott* (1892) 8 WN (NSW) 98; *Woods v Wilson* (1902) 19 WN (NSW) 147; *Agar v J C Williamson Ltd* (1920) 42 ALT 98; *Arbon v Anderson*, supra) The matter was stated succinctly by Higgins J in *Burton v Shire of Bairnsdale* (1908) 7 CLR 76 at 98, thus: "The arguments put before us on behalf of the plaintiff ... may not be sustainable; but they are not unworthy of serious discussion, not unworthy of evidence. It is surely absurd to argue for days as to a plaintiff's case being arguable." The other approach is a later development. It holds that the necessity for argument, even argument of an extended kind, is no bar to the exercise of the summary power to dismiss provided the court is able to reach a clear conclusion that the claim or defence is not maintainable. For a valuable examination of the two approaches: see *Mathaman v Nabalco Pty Ltd* (1969) 14 FLR 10; *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30."

In *Sun Earth Homes Pty Ltd v Australian Broadcasting Corp* (1990) 98 ALR at 112 Burchell J said:

> "It would not be conducive to respect for the law to strike out a claim, which was not plainly untenable, before the claimant had had an opportunity to present it properly and to call evidence in its support."

Mr Reeves, counsel for the plaintiff, submits the plaintiff has a cause of action and it is not plainly untenable. The plaintiff submits they have a right under s42(1) of the *Commercial Arbitration Act* to apply to set aside an award if it has been improperly obtained. Section 42(1) of the *Commercial Arbitration Act* states as follows:

"(1) Where -

(a) there has been misconduct on the part of an arbitrator or umpire or he has misconducted the proceedings; or

(b) the arbitration or award has been improperly procured,

the Court may, on the application of a party to the arbitration agreement, set the award aside, either wholly or in part."

With respect to the defendant's failure to discover certain documents, being the two letters which have been reproduced above, the plaintiff refers to the High Court decision of *Commonwealth Bank of Australia v Quade & Ors* 178 CLR 134 at 142-143:

"The position is, however, different in a case such as the present where the unavailability of the evidence at the trial resulted from a significant failure by the successful party to comply with an order for the discovery of relevant documents in his possession or under his control. The application to that category of case of the general rule that a new trial should only be ordered on the ground of fresh evidence if it is "almost certain" (see *Orr v. Holmes* (1948), 76 C.L.R., at p.640) or "reasonably clear" (see *Greater Wollongong Corporation v. Cowan* (1955), 93 C.L.R., at p.444) that the opposite result would have been produced if the evidence had been available at the first trial would, particularly where the failure was deliberate or remains unexplained, serve neither the demands of justice in the individual case nor the public interest in the administration of justice generally. In so far as the demands of justice in the individual case are concerned, it would cast upon the innocent party an unfairly onerous burden of demonstrating to virtual certainty what would have happened in the hypothetical situation which would have existed but for the other party's misconduct. In so far as the public interest in the administration of justice generally is concerned, it would be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than to penalize, failure to comply with pre-trial orders and procedural requirements.

> It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court's assessment of what will best serve the interests of justice, "either particularly in relation to the parties or generally in relation to the administration of justice" (cf., e.g., *McDonald v. McDonald* (1965), 113 C.L.R., at pp.533, 542). In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party (cf. *Southern Cross Exploration N.L. v. Fire & All Risks Insurance Co. Ltd.* (1985), 2 N.S.W.L.R. 340, at p.357), any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. While it is not necessary that the appellate court be persuaded in such a case that it is "almost certain" or "reasonably clear" that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so."

In this matter there is no dispute the defendant failed to discover two letters. Counsel for the plaintiff has not addressed this Court on whether there was a real possibility that had these letters been discovered there would have been a different result.

Counsel for the plaintiff submits I should not refer to the affidavit material put forward by the defendant, being affidavit of Stefan Koser sworn 19 April 1996 and Ken Hornsby

sworn 23 April 1996, and that it is not relevant for the purpose of this application. I do not agree with this submission. The defence are entitled to file affidavit material in support of their application. Order 23.04(1) states as follows:

> "23.04(1) On an application under rule 23.01 or 23.03 evidence shall be admissible for a party by affidavit or, if the Court thinks fit, orally."

The plaintiff can raise an objection to the admissibility of all or parts of the affidavit or can seek to have the deponents made available for cross examination. Mr Reeves, counsel for the plaintiff, has not done this but reserved his rights to do so if I were to rule against him on his primary submission that on the basis the defendant failed to discover two letters the defendant's application should be dismissed. I do not agree the affidavits relied on by the defence in their application are irrelevant. I have read the affidavit material put forward by the defendants in support of the application. The defence submission is that there is no dispute there was a failure to discover the two letters set out above. The question is, does the failure to discover those two documents mean that the award made on 30 September 1995 was improperly procured. The defence submission is that the failure to discover those documents made no difference to the outcome of the proceedings. The defendant further argues there has not been a miscarriage of any proceeding before the Arbitrator because of the conduct of the defendant. The

defendant submits the plaintiff has no cause of action and accordingly its claim must fail and the provisions of rule 23.01 should apply. It is the defendant's argument that for there to be an improper procurement of the award, there has to be something to indicate that this evidence, which has come to light subsequently to the award, would lead to a real possibility that the award would not have otherwise been made.

I agree with the plaintiff that the power to order summary judgment must be exercised with "exceptional caution" (*Webster v Lampard* 116 ALR 545 at 548):

> "Nowhere is that need for exceptional caution more important than in a case where the ultimate outcome turns upon the resolution of some disputed issue or issues of fact. In such a case, it is essential that "great care ... be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his [or her] opportunity for the trial of his [or her] case by appointed tribunal". [*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR, at 130; see, also, *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, at 31; 43 ALR 587]".

However, I consider the plaintiff has to go further than to rely on the bald fact that two letters were not discovered. I agree with the defendant's submission that the plaintiff should be able to put forward something to indicate that there is a real possibility had these two letters been discovered the Interim Award would have been different.

Both parties agreed to proceed on the basis that if the primary submission by counsel for the plaintiff was not accepted, then the matter should be relisted and the plaintiff given an opportunity to cross examine the deponents of the two affidavits relied on by the defence or otherwise challenge the affidavit material and to put forward any further submissions.

The plaintiff's primary submission is :

(1) that for the purpose of the defendant's application I should ignore the affidavit material. I have rejected this argument for the reasons stated.

(2) I should dismiss the defendant's application because there is a disputed fact about the effect of the failure to discover the document had upon the award. I do not consider a statement from counsel for the plaintiff that there is a disputed fact as to the effect of the failure to discover the two letters is a sufficient basis to dismiss the defendant's application. The plaintiff should be able to state the cause of action (*Krau v Sydney University* 34 IR 466 Gleeson CJ at 475:

> "If one sees that a plaintiff's lawyers are experiencing extreme difficulty in formulating with clarity and particularity their client's cause of action, then that is often a very good indication that there is no cause of action."

There is at the present time nothing before me from the plaintiff to support a finding that there is at least a real possibility that the award would not have been made had the two letters been discovered. The plaintiff has not persuaded me on his primary submission which was essentially to ignore the defendant's affidavit material and dismiss the application on the basis that there was a disputed fact about the effect that the failure to discover the document had upon the award. The plaintiff should be able to indicate the basis on which failure to discover the two letters resulted in an Interim Award being improperly obtained.

Accordingly, the parties are at liberty to liaise with my Associate for the purpose of having the matter relisted to enable the plaintiff to present their further submissions.