12 pages.

ROYAL COURT
(Samedi Division) 205.

4th November, 1996.

Before: F.C. Hamon, Esq., Deputy Bailiff and
JuratP.G. Blampied OBE and Jurat A. Vibert

In the matter of an Arbitration under the Joint Contract Tribunal Arbitration Rules

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Between	(1) Mark Amy Limited (2) The Viscount of the Royal Court of Jersey	Claimants
And	Olcott Investments Limited	Respondents

Advocate A.D. Robinson for the Respondent.
Advocate R.J. Michel for the Claimants.

JUDGMENT

THE DEPUTY BAILIFF: On 2nd August, 1989, Mark Amy Limited entered into a contract in writing with Olcott Investments Limited to construct 24 flats in 3 four storey buildings in St. Helier. The contract was substantially the form of contract published by the Joint Contract Tribunal and known as the Intermediate Form of Contract.

The contract was expressed to be governed by Jersey Law and was subject to arbitration but stated that *"the award of such arbitrator shall be final and binding on the parties."*

Disputes arose and an arbitrator, Mr. Ian William Menzies was appointed by agreement of the parties on 15th July, 1992. He accepted his appointment on 16th July 1992.

The named sub-contractor under the main contract was a firm called Flaherty and Company Limited of Parr's Yard, Grève d'Azette, St. Clement.

The Arbitrator made an interim award on 7th September, 1995. This followed a hearing in London lasting eleven days between 5th June, 1995 and 21st June, 1995. The parties were represented by English Counsel and the first award dealt with issues of liability and quantum leaving over to a second award the issue of interest and costs.

By the first interim award the arbitrator found that the claimants were entitled to be paid by the respondents the sum of £40,224 for measured work performed by Flaherty as a named sub-contractor plus 5% of that sum or £2,011 by way of profits thereon. By consent he reserved his decision on interest and also by consent reserved his decision on liability for the costs of the defence and of the interim award which he taxed and settled in the sum of £17,136. He later corrected this sum to £34,044 plus 5% of that sum or £1,702.20 by way of profit thereon.

The arbitrator's final award on 10th January, 1996 was in these terms:-

"ACCORDINGLY I HEREBY AWARD AND DIRECT THAT

9.1 Within 28 days of the date hereof the Respondent shall pay to the Claimants the sum of £35,746.20 (Thirty Five Thousand, Seven Hundred and Forty-Six Pounds and Twenty Pence) plus the sum of £12,300.00 (Twelve Thousand Three Hundred pounds) by way of interest to the date hereof on the said sum.

9.2 The Respondent shall pay the Claimants' reasonable costs reasonably incurred in this arbitration except as follows:

9.2.1 The Claimants shall bear their own and pay the Respondent's costs of the first day of the hearing on 5 June, 1995, pursuant to the direction I then made.

9.2.2 The Claimants shall bear 80% of their own costs and pay 80% of the Respondent's costs of the application and my Order No. 3 dated 17 February, 1993.

9.2.3 The Claimants shall bear their own and pay the Respondent's costs thrown away as a consequence of my Order No. 4 dated 16 June 1993.

9.3 Costs if not agreed to be taxed by me pursuant to Rule 12.5 of the JCT Rules.

9.4 The costs of my Interim Award of 7 September 1995 in the sum of £17,136.00 (Seventeen Thousand One Hundred and Thirty-Six Pounds) plus the costs of this Award which I tax and settle in the sum of £5,920.00 (Five Thousand Nine Hundred and twenty Pounds) shall be paid as follows:

9.4.1 £1,165.00 shall be paid by the Claimants.

9.4.2 £21,791.00 shall be paid by the Respondent.

9.5 If either party shall have paid more than it is required by this Award to pay then it shall be forthwith reimbursed by the other."

This application is a request that the Court quash the decision by the arbitrator on costs and remit the matter to him with a direction that he reconsider it and reach a decision in accordance with the findings of the Court.

Does the Court have jurisdiction in this matter?

In Le Gros v. Housing Committee (1974) 1 JJ 77 the Court said:

> *"The first issue the Court raised before us was whether the Court has the power to interfere with an arbitration award and, in our opinion, it undoubtedly has such a power if, for example, the arbitrators exceed their authority, are wrong in law, deny the parties justice and reach a conclusion devoid of reason. In all such cases the Court has an inherent jurisdiction to have put right what is wrong. What the Court cannot do is to interfere with an award which has been regularly made. A power of discretion properly exercised by a person or a body having the legal authority to exercise it is generally unassailable."*

That case was cited with approval in Charles Le Quesne v. T.S.B. Channel Islands Ltd. (4th September, 1986) Jersey Unreported. Furthermore, in a recent judgment of this Court L.C. Pallot (Tarmac) Limited v. Gechena Ltd. (11th July, 1996) Jersey Unreported.

> *"If the parties to a dispute lawfully agree to submit the issues in question to arbitration and the arbitrator makes an award determining those issues the Court must, in general, enforce that award. A Court cannot permit a party to challenge an award merely because he does not like it. The maxim "interest reipublicae ut sit finis litium" - it is in the public interest that there should be an end to litigation - appears to us to apply here. As a matter of public policy it is just and convenient that certain disputes, particularly where technical or esoteric issues are in question, should be determined by arbitration. It would have very unfortunate consequences if the Courts were too readily to agree to review an arbitrator's award. There is, of course, a narrow band of circumstances where the Court should assert its jurisdiction to do so. We do not purport here to circumscribe that band. Clearly the circumstances set out in the extract from Pothier cited by counsel for the*

defendant where for example the arbitrator has failed to answer the questions referred to him or there is an error on the face of the record are instances where the Court has power to strike down or interfere with the award."

The representation of the respondent claims that the decision of the arbitrator on costs was unreasonable and/or wrong in law. Clearly, if it were wrong in law, or so unreasonable that no sensible arbitrator could have reached the decision then this Court would have the right to interfere. We heard much argument on the fact that the parties had used the words "final and binding" and had, according to the relevant page of the contract shown to us, struck out paragraph 9.5 which gave a right to either party to appeal to the High Court under Sections 1(3)(a) and 2(1)(b) of the Arbitration Act 1979. We have said that the contract followed a set English precedent. It may well be that the parties struck out clause 9.5 because it was wholly inappropriate to a contract which had Jersey parties, a Jersey *locus* and which was governed by Jersey law. Mr. Michel had originally argued in his Answer to the Representation that on a strict interpretation of the terms agreed between the parties no right of appeal existed in law or in fact because by deleting the specified appeal provisions Olcott had effectively shut itself off from any appeal at all. He did not press the matter before us. We think that was right. While *"la convention fait la loi des parties"*, if the arbitrator erred in law, then the parties could not in our view bind themselves to him not applying the law. In any event, we intend to examine the matter to see what is complained of and only then to decide whether we should interfere.

In the normal run of things every arbitration agreement is deemed to include a provision that the costs of the reference and award are to be in the discretion of the arbitrator. But a discretion is to be exercised judicially. Mr. Menzies is a very experienced arbitrator. Where then is there clear evidence that he has gone so substantially wrong that this Court will interfere? In effect, where are we to find a manifest error?

A further question that we need to ask is whether there is anything that we need to consider particularly in an application such as this which deals only with costs. In President of India v. Jadranska Slobodna Plovidba (1992) 2 Lloyd's Law Reports 274 it was held that the award of costs raised the same considerations and the same principles were applicable whether it was an award by a judge or an arbitrator; the ability to challenge the award was limited since the awarding of costs involved an exercise of a judicial discretion not the recognition of a legal right; and it therefore became a question of showing the the tribunal failed in its duty to exercise its discretion on costs and to do so judicially. At page 278 Hobhouse J said:

"A failure to exercise it is misconduct; a failure to exercise the discretion judicially is the same as a failure to exercise it at all."

In paragraph 8.1 of his award on costs the arbitrator began with these words:

"I start from the premise that it is a generally accepted principle that a successful party is entitled to recover its reasonable costs reasonably incurred in prosecuting its case."

Looking at the matter in purely financial terms Olcott was condemned to pay £34,000 more than they were prepared to pay. Any further claims for loss and expenses failed but, as explained to us by Advocate Michel when we examined letters put in by the contractor, failed principally because of technical points. That exercise was sufficient in itself to satisfy us that there were reasons why the arbitrator could have made the decision that he did. It was perhaps unfortunate that this very experienced arbitrator did not give reasons for his decision.

In The Erich Schroeder (1974) 1 Lloyd's Rep 192 at 193-194 Mocatta J said this:

"In my view, at any rate, in the normal case it is not proper in considering this question whether the arbitrator has rightly exercised his discretion as to costs, for the Court to have regard to those matters. If for no other reason it would be for this reason, that if one starts to look at all at the proceedings in order to see what has influenced the arbitrator's mind, one cannot stop short of a review of the whole of the proceedings in the arbitration, the speeches on behalf of the parties, the evidence and so forth, because it may be that in any of those matters there would be material on which the arbitrator could properly have relied in exercising his discretion as to costs. Once one is precluded from obtaining from the arbitrator himself, in a case where the award as to costs seems somewhat unusual, if he does not choose to give it, his statement of his reasons, in my view, it would normally be wrong, and it would be wrong in this case, to look at affidavits as to what I may call the merits of the proceedings. To do so would be in effect for the Court to review the whole of what took place in the arbitration. Unless one did that, one could not be confident that one had seen all the material on which the arbitrator might properly have exercised his discretion in the way in which he did. It follows that I am unable here to come to the conclusion that there was no material on which the arbitrator could exercise his discretion as he did."

The case appears to hold that failure to give reasons for an award of costs was in itself a ground for remitting the award to the arbitrators if there was any evidence that the arbitrators had not acted judicially. That may be so but we cannot see that either of the parties in this case requested reasons for the award of costs and there is nothing that has been shown to us to lead us to the conclusion of an injudicious action.

There is a contrast in some way with a case upon which Mr. Michel relies heavily and which Mr. Robinson rejects as no longer being good law, Matheson & Co. Ltd. v. A. Tabah & Sons (1963) 2 Lloyds Rep 270.

In that case Megaw J said at p. 275:

> *"First, an arbitrator, like a judge, in dealing with costs must exercise the discretion invested in him judicially ...*
>
> *Secondly, there is no need for an umpire or arbitrator, if he so exercises his discretion to depart from the general rule, to state the reason why he does so in his award. On the other hand, in all probability, in most cases where an umpire or arbitrator does so act, it would save costs if he were to state his reasons in his award. In that event the parties would not be put to the expense of trying to ascertain what his reasons were and possibly moving the court to set aside the award ...*
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> *Thirdly, if the award does depart from the general rule as to costs but bears on its face no statement of the reasons supporting that departure the party objecting to the award may bring before the court such evidence as he obtains as to the ground, or lack of ground, bearing upon the unusual exercise of discretion by the arbitrator or umpire. Sometimes this is done by one party or the other obtaining from the arbitrator or umpire a letter or affidavit setting out his reasons. Sometimes it is done by one party or another stating on affidavit what the arguments were and what the facts were at the hearing before the arbitrator so as to enable the court to be in a position to judge whether or not there was a judicial exercise of discretion ...*
>
> *Fourthly, the above propositions, in my judgment, apply to all categories of awards as to costs. That is to say, they apply to the extreme case in which the successful party has been ordered to pay all the costs of an unsuccessful party as well as the costs of the award, and also to a case like the present in which a successful party has been made to bear his own costs and pay half the costs of the award.*

Fifthly, and finally, there is, of course, a burden of proof upon the party seeking to set aside the award in relation to the decision of an umpire or arbitrator in relation to costs, or seeking to have the award remitted ..."

If the case is not good law then it is surprising that it is twice cited in footnotes to the commentary on The Eric Schroeder in Arbitration Law (1991) by Robert Mekin a work supplied by the respondent in support of its contention.

We cannot hope to examine the very detailed submissions written and oral that were before the arbitrator. We do not, however, having seen some of these written submissions regard the position as anything like as clear cut as submitted by Mr. Robinson.

In any event one is left with the words of McNair J in Demolition & Construction Co. Ltd v. Kent River Board (1962) 2 Lloyds Rep 7 where McNair J said at page 15:

"But I know of no principle of law in relation to costs which compels an arbitrator or a judge in his award or judgment to reflect the measure of success which one party or the other has achieved."

If the arbitrator did not give reasons there is a submission that he committed an error of law by failing correctly to interpret the dicta of Megaw L.J. in The Toni (1974) 1 Lloyd's Rep 489.

The matter came about in this way. On 20th March, 1995 the English Solicitors acting for Olcott made an offer ("without prejudice save as to costs") of £100,000 plus interest and certain costs. The offer was to remain open for 21 days.

On 24th April, 1995 (that first offer having lapsed) the solicitors made a second offer ("without prejudice save as to costs"). Again the lump sum was £100,000 with certain costs and again the offer was to remain open for acceptance for a period of 21 days from the date of the letter. The letter concludes with these words:

"Finally, if this offer is not accepted, we reserve the right to refer to it and to our earlier letter of 20th March and the correspondence which flowed from it after the arbitrator has made his award on liability and quantum but before exercising his discretion on costs."

The arbitrator concentrated his reasons on the question of the offer and relied on the dicta of Megaw L.J. in The Toni (1974) 1 Lloyd's Rep 489. It is there, according to Olcott, that he erred in law.

In that judgment Megaw L.J. said at page 468:

"It is no doubt right that, normally, where such an offer has been made and maintained, but not accepted by the other party, and the party who has made the offer obtains a result in the litigation not less favourable to him than the terms of the offer, the Judge should have a discretion to make a special order as to costs in his favour. The normal exercise of the discretion would be to give the offeror his costs from the date of the offer. But it seems to me that, normally at least, the discretion would not properly be exercised in favour of the offeror unless he had maintained the offer up to the commencement of the trial of the action. I do not see why it should be thought that the offeror should acquire some kind of moral or discretionary right to the whole of the costs thereafter incurred merely because he has, for a period of time ending before the start of the hearing, held out an offer which has not been accepted during that period. If he is to get the benefit of a subsequent order as to costs, it ought normally to be on the basis that his offer has been a continuing offer up to the start of the trial. It may be that there are exceptional cases. But I do not think that the mere fact of no response being made for six weeks is such as to bring this case within the range of such possibly exceptional cases.

It would, in my view, be unfortunate if the law were otherwise, and if there were any general principle that an open offer, made and then withdrawn, gives a right, or a claim which would normally be allowed as a matter of discretion, to a special order as to costs. For that would mean that a party who had once made an open offer, and thereafter wrongly thought it was over-generous, could protect himself against the consequences of his supposed over-generosity by withdrawing the offer, and yet would still be entitled to get the benefit of it, by a special order as to costs, when it had turned out that the original offer has not been over-generous. That would not be justice or good sense."

The judgment in "The Toni" is the judgment of the Court of Appeal. The arbitrator pointed out that he did not accept that he was bound by the case but did accept that it was highly persuasive. He also accepted that "The Toni" was an appeal from a judge at first instance in admiralty litigation and did not address an arbitral situation in the construction industry. He also accepted that "The Toni" related to an open offer made by a plaintiff rather than to a Calderbank offer made by a respondent.

The question of costs was fully argued in detailed written pleadings settled, as we have said, by English Counsel. The arbitrator gave a reasoned judgment. Mr. Robinson, before us,

accepted that the arbitrator was right when he said *"All three Lords Justice in "The Toni" were, therefore, agreed that, where an offer to settle was made and later withdrawn, a judge at first instance was entitled, in exercising his discretion, to disregard that offer when considering liability for costs."* The arbitator went on to say, however, in conclusion:

> *"Having considered the views of the judges in all the cases to which I have been referred, I am satisfied that, on balance, I prefer the view expressed in "The Toni" and conclude that an offer which has lapsed prior to the start of the hearing provides no protection to the offeror with regard to costs."*

Mr. Michel invites us to consider that it was perhaps unusual for both parties to be given the opportunity to address the arbitrator in detail in relation to the costs order that they sought and to make detailed written submissions in consideration of the written submission put in by the other party. The arbitrator allowed, in our view, every opportunity and more to the parties who were making originally oral submissions before him.

Mr. Robinson seemed to say that the arbitrator was bound to have taken into account the offer made whether it had lapsed by effluxion of time or not. But even if the offer were still alive Olcott might, because of it, have had a reasonable expectation of obtaining an order in its favour but could not, in our view, in the absence of clear caprice, have a right to such an order. Mr. Robinson says that an offer, once made, is always there on the record to be considered and weighed in the balance. We have to remind ourselves that in contract a promise to keep an offer open for a fixed period does not prevent its revocation within that period unless there was for example a binding option granted under seal or for value.

In the danger of repeating ourselves let us merely rehearse the matter in different words. In Tramontana v. Atlantic Shipping (1978) 2 All ER 870 at 875 Donaldson J said this:

> ***"In reviewing an arbitrator's decision on costs, it is of the greatest importance to remember that the decision is within his discretion and not that of the courts. It is nothing to the point that I might have reached a different decision and that some other judge or arbitrator might have differed from both of us. I would neither wish nor be entitled to intervene, unless I was satisfied that the arbitrator had misdirected himself."***

Furthermore, the question of open offers, sealed offers and without prejudice offers were all argued in detailed pleadings before the arbitrator. He must have had the clearest indication of how to deal with this question of the purported offer; he found "The Toni" persuasive and was able, in his discretion, to ignore the offer.

In conclusion, we cannot see any way that the arbitrator misdirected himself in law. He certainly had every argument before him. It is said, that he concentrated on the Calderbank letters and may have made an unusual order but he was, in our view, perfectly entitled to ignore an offer made and then withdrawn in considering how to exercise his discretion on costs.

In our view, the representation must be dismissed.

Authorities

Basden Hotels -v- Dormy Hotels (1968) JJ911.

G.K.N. (Jersey) -v- Resources Recovery Board (1982) JJ359.

Le Gros -v- Housing Committee (1974) 1 JJ 77.

Charles Le Quesne -v- T.S.B. Channel Islands Ltd. (4th September, 1986) Jersey Unreported.

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Mustill & Boyd: Commercial Arbitration (2nd Ed'n) p.439; p.27; pp604-608.

Kent -v- Elstob (1802) 3 East 18; 102 ER 502.

re Jones & Carter's Arbitration [1922] 2 Ch. 599.

The Nema [1982] A.C. 724.

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Matheson & Co. -v- Tabah & Sons [1963] 2 Lloyds Rep. 270.

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Tramontana Armadora -v- Atlantic Shipping Co. [1978] 1 Lloyds Rep. 391; [1978] 2 All E.R. 870.

Demolition & Construction Co. Ltd. -v- Kent River Board [1962] 2 Lloyds Rep. 7.

Evmar Shipping Corporation -v- Japan Line Ltd. ("The Evmar") [1984] 2 Lloyds Rep. 581.

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Costs

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D.M. Cato: "Arbitration Practice and Procedure" (1992 Ed'n) Chapter 9.

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The "IOSI" [1987] 1 Lloyd's Rep.321.

Argolis Shipping Co. SA -v- Midwest Steel & Alloy Corporation, The Angeliki [1982] 2 Lloyd's Rep.594.