IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND

CA 2/92

IN THE MATTER of the Arbitration Act 1908

BETWEEN MAINLINE BROWN CONSTRUCTION (PACIFIC) LIMITED

First Appellant

A N D DAVID BROWN CONSTRUCTION LIMITED

Second Appellant

A N D ISLAND HOTELS LIMITED

Respondent

Coram: Roper C.J.
Quilliam J.A.
Speight J.A.

Hearing: 16th July 1992

Counsel: G.J. Christie for Appellants
G.B. Chapman for Respondent

Judgment: 6 August 1992

JUDGMENT OF THE COURT DELIVERED BY ROPER C.J.

This is an appeal against part of the judgment of Chilwell J. delivered on the 26th March last in which he reviewed an arbitrator's award following an application to the High Court to set aside the award or remit it to the arbitrator for reconsideration on the grounds that there were errors on the face of the award and misconduct by the arbitrator in that his findings were inconsistent. Nothing turns on the fact that there are two Appellants

and references in this judgment to "the contractor", "the Builder" or "D.B.C." apply to the Appellants jointly.

The Respondent (I.H.L.) owns the Edgewater Hotel in Arorangi. Between 1985 and 1987 D.B.C. constructed 99 accommodation units as additions to blocks A, B, C and D of the hotel. Subsequent to the completion of the work disputes arose between the parties and the various claims and counterclaims were referred to Mr John Sutherland, an experienced registered architect of Auckland. The arbitration was conducted in Arorangi between the 2nd and 6th April 1991 with the award being delivered on the 18th June 1991.

The only aspect of the case with which we are concerned relates to the bonus/penalty clause in the contract documents. D.B.C.'s letter of tender dated 12th November 1985, which was one of the contract documents, provided for sectional completion, there being a bonus for early completion and a penalty for late completion. This is the relevant text of the letter:

> " Our price to construct units as per plans and brief specifications is $2,600,000.00. This figure includes $100,000.00 for four penthouse units (details provided later).
>
> Completion date Blocks A,B, 24 units by 15th August
> C 30 units by 14th September
> D 45 units by 14th November
> Penthouses to be finished off after above date.
>
> Bonus/Penalty : as agreed $3500.00 per week."

In the Statement of Claim filed by D.B.C. in the arbitration proceedings was a claim for bonuses for early sectional completion as follows:

| | |
|---|---|
| " A block 5.5 weeks at $3,500 per week | $19,250 |
| B block 3.0 weeks at $3,500 per week | $10,500 |
| | $29,750 " |

I.H.L. denied entitlement to bonuses and counterclaimed for penalty payments of $167,300 for non-completion by due date, after allowing for 37 days earlier claimed and agreed to as an extension of time.

In its defence to the counterclaim D.B.C. affirmed its stand that it was entitled to such extensions of time as would justify the payment of bonuses.

The arbitrator allowed D.B.C. 20 days extension in respect of blocks A, B and C and 25 days for block D, in addition to the 37 days extension granted by I.H.C. and earlier referred to. The result was that D.B.C. was liable to pay penalties for 1.5 weeks for blocks A and B, 15 weeks for block C and 17.7 weeks for block D. The arbitrator rejected D.B.C.'s claim for bonus payments and awarded I.H.L. $119,700 by way of penalty payments.

D.B.C. sought to have the arbitrator's finding on that issue set aside on several grounds, only one of which was pursued before this Court.

This passage (with case references omitted) from the judgment of Chilwell J. summarises the position:-

> " Counsel for the contractor submitted that the arbitrator committed an error, or errors, of law in several respects; he should have found -
>
> (a) that the employer's breach of duty to reply to extension of time claims terminated its right to claim liquidated damages:
>
> (b) that the power to grant extensions of time not having been exercised within a period of time, either fixed or reasonable, there was no date from which liquidated damages could run:
>
> (c) that as the contractor was entitled to know what extension of time he had received and the new date for completion as soon as a decision could reasonably and practically be made, the extension of time procedure had failed, the completion date could not be extended and the liquidated damages provision could not be enforced:
>
> (d) that after the contract was concluded, the arbitrator did not have power to exercise the employer's power to extend the time for completion and thereby keep alive the liquidated damages clause: the employer had become functus officio in relation to the power:
>
> (e) if clause 31.2 of the NZIA document did not apply, then a reasonable time for responding to the contractor's claims for extensions of time would be implied. Here the whole process broke down; time for completion became at large and the liquidated damages stipulation was no longer enforceable;
>
> (f) that the employer should not be allowed to take advantage of its own wrong in allowing the extension of time process to break down and therefore should obtain no benefit from the liquidated damages stipulation:"

Chilwell J. upheld those submissions and concluded that long before the arbitrator had become seized of the matter time had become at large and there was no date from which liquidated damages could run. It followed that the arbitrator had erred in law in awarding them.

However, that was not the end of the matter. Chilwell J. went on to refer to the fact that the question of time being at large had never been pleaded or raised before the arbitrator; and indeed D.B.C. had put its case on the basis that it was entitled to extensions of time and had succeeded in persuading the arbitrator that it was so entitled but not to the extent necessary to bring the bonus provision into operation.

Chilwell J. then said:-

> "The contractor has taken the benefit of pleading and arguing its case for bonuses, and of defending the employer's counterclaim for liquidated damages, on the basis that the contractor was entitled under the contract to sufficient extensions of time. Neither party pleaded that time was at large, nor was it put to the arbitrator. I observe that a case in which time is at large could raise questions of a reasonable time for completion and unliquidated damages for late completion. In my judgment, the contractor made an election between inconsistent courses of conduct from which it ought not to be allowed to resile. The principle that a person may not approbate and reprobate applies, for which see 16 *Halsbury's Laws of England* 4th ed, paras 1507 and 1508. By its pleadings and at the arbitration hearing, the contractor approbated the extension of time provision and its then validity, whereas in this Court the contractor has attempted to reprobate it."

And further:

> "I find that the contractor is estopped by his conduct from alleging that time was at large and from denying the

> validity of the extension of time provision. In consequence the Court will not grant the relief sought in this application in relation to the extensions of time and liquidated damages awarded by the arbitrator."

On the appeal Mr Christie submitted that the informal course of the arbitration pleadings and its hearing was such that it could not be said that D.B.C. had decided to abandon the defence that time was at large. We cannot accept that. A claim for bonuses, which necessitated a finding by the arbitrator that D.B.C. was entitled to extended time was inconsistent with a defence that time was at large. He then dealt with approbation and reprobation and the doctrine of election and submitted that election involves intention based on knowledge and that in the instant case there was no evidence that D.B.C. knew of its right to claim time at large as an alternative defence. We do not accept that either. D.B.C. knew enough to plead the defence in its application for review and nothing that occurred in the arbitration added to its fund of knowledge of the relevant facts.

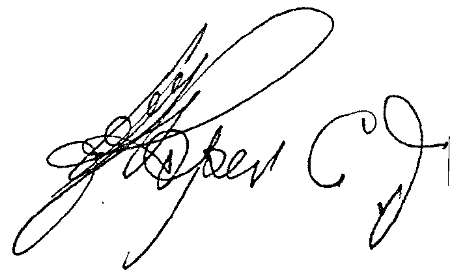
Mr Christie then submitted that it was open to us to amend the arbitration pleadings to include a defence of "time at large". He argued that such an amendment would not require a rehearing by the arbitrator as all that was required was "a different legal interpretation of the same set of facts - facts which were the subject of extensive scrutiny at the arbitration". We do not believe we have a power of amendment at this stage but if we had we would not exercise it and adopt as our reason for the approach the following submission of Mr Chapman:

> " Had any suggestion been made by the appellants to the contrary, at the arbitration hearing (that is, to the effect that time could be, or was, at large) the respondent, quite clearly, would have confronted such contention, with full vigour, and would have adduced evidence and addressed argument accordingly. Evidence which

With respect we must conclude that Chilwell J. did not have the evidence before him to make such a finding. Not only did he not have all the evidence adduced before the arbitrator, but more importantly he did not have the evidence which might have been presented by the Respondent if the question of time being at large had been in issue before the arbitrator.

In the result basic justice was done by the arbitrator's award. The parties had agreed that bonuses or penalties would be paid depending on whether extensions to the completion dates were justified. The arbitrator resolved that issue on the facts before him.

The appeal is therefore dismissed. Costs are reserved and if Counsel cannot agree Memoranda are to be presented to the Chief Justice.



<u>Solicitors:</u>
Anthony Manarangi of Rarotonga for the Appellants
Clarkes of Rarotonga for the Respondent