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JUDGMENT REISSUED PURSUANT TO RECALL JUDGMENT DELIVERED ON 15 FEBRUARY 2011

IN THE COURT OF APPEAL OF NEW ZEALAND

CA239/2009
CA807/2009
[2010] NZCA 450

BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Appellant
AND	NZ WINDFARMS LIMITED Respondent

Hearing: 21 June 2010

Court: William Young P, Heath and Allan JJ

Counsel: D J Goddard QC and W Lawson for Appellant
R G Smedley and L M Taylor for Respondent

Judgment: 4 October 2010

JUDGMENT OF THE COURT

A **The appeal in the relation to the Rotorua proceedings is dismissed as moot but the appellant is nonetheless entitled to costs in this Court for a standard appeal on a band B basis together with usual disbursements.**

B **The appeal in relation to the Christchurch proceedings is dismissed for want of jurisdiction but on the application for review, the decision of Associate Judge Osborne is set aside. The award of costs made in the High Court is reversed and the appellant is awarded costs in this Court for a standard appeal on a band B basis together with the usual disbursements.**

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] These two appeals arise from a single dispute between the respondent, NZ Windfarms Ltd and the appellant, Concrete Structures (NZ) Ltd. They were parties to a contract under which Concrete Structures was to construct, for NZ Windfarms, wind turbines on sites in the Manawatu. This agreement was in the standard form NZS 3910:2003. Engineering services associated with the construction project were provided by Connell Wagner, and Mr Murray Fletcher of that firm was the engineer to the contract.

[2] At the completion of the construction, Mr Fletcher issued a final payment schedule which recorded that Concrete Structures was required to pay to NZ Windfarms $109,522.78. The effect was to require Concrete Structures to repay money to NZ Windfarms which it had already received. Concrete Structures challenged this schedule. On 25 January 2008 it purported to refer the dispute to arbitration. This purported reference was premature under the contractual dispute resolution process. That process resumed but did not result in a settlement. Concrete Structures then, on 15 February 2008, invited Mr Fletcher to issue a formal decision under cl 13.2.4 of the contract. This the engineer did on 6 March 2008. This decision was, in terms of the contract, final unless arbitration proceedings were initiated by Concrete Structures.

[3] Under cl 13.4 of the contract, a party wishing to initiate arbitration is required to give notice to that effect and such notice is required to be:

> ... in writing and should be given by the Principal or the Contractor to the other of them ... .

In this case, the time limit was one month. So Mr Fletcher's decision would become final unless an appropriate notice was given by 6 April 2008.

[4] As to service, cl 15.1.2 provides:

> Any document which is to be served upon the Principal, the Contractor or the Engineer under the contract shall be sufficiently served if it is handed to the person, or to their appointed representative, or delivered to their address as stated in the Contract Documents or as subsequently advised in writing. Except for payment claims, or for a notice given to the Principal under 13.3, 13.4 or 14.3.3, or any notice under the Construction Contracts Act 2002, every notice to the Principal shall be sufficiently given if it is given to the Engineer.

It is common ground that the notice in question in this case is within cl 13.4 and was therefore required to be given to NZ Windfarms.

[5] On 14 March 2008 Concrete Structures wrote to Mr Fletcher in these terms:

> Dear Sir
>
> We refer to your notice of 6 March 2008, issued under 13.2.4 of NZS 3910, and advise that your assessment of the Final Payment Schedule is not accepted. Accordingly this matter is in dispute.
>
> NZS 3910 requires this matter now be referred to Mediation pursuant to clause 13.3.
>
> Given that a quasi mediation took place in early December 2007, we are of the view that clause 13.2 has been satisfied and, as the parties were unable to reach an agreement, the matter should now be referred to Arbitration.
>
> Please advise whether you are in agreement with this or whether you wish to proceed to a formal Mediation.

Concrete Structures had misconstrued the agreement because – and this is common ground – a mediation was not required.

The proceedings in the High Court

[6] NZ Windfarms served a statutory demand under s 289 of the Companies Act 1993 for the money payable under the engineer's decision. When this was not complied with, NZ Windfarms issued proceedings in the High Court at Rotorua seeking to liquidate Concrete Structures. This resulted in an application by Concrete Structures to prevent advertising the liquidation proceedings and to stay those proceedings, an application which was dismissed in a judgment delivered by

Associate Judge Doogue on 7 April 2009.[1] The upshot was that Concrete Structures paid the sum demanded on 16 April and these proceedings have been discontinued.

[7] In the Christchurch proceeding, Concrete Structures sought $409,128.82 from both NZ Windfarms and Mr Fletcher. The claims were in contract, as against NZ Windfarms, and in negligence as against Mr Fletcher. NZ Windfarms applied to have the claim against it dismissed. This resulted in Associate Judge Osborne, in a judgment delivered on 24 November 2009, striking out the claim against NZ Windfarms.[2]

[8] In each case, Concrete Structures lost because of the following findings:

(a) the decision of the engineer was final and binding unless appropriately challenged;

(b) there was no effective arbitration notice because the letter of 14 March was sent to the engineer rather than to NZ Windfarms; and

(c) the notice was, in any event, so equivocal as not to be an effective arbitration notice.

Jurisdiction

[9] An appeal as of right lies against the Rotorua decision.

[10] The judgment of Associate Judge Osborne in the Christchurch proceeding, being interlocutory, is subject not to appeal to this Court but rather to review in the High Court. This having been appreciated rather late in the piece, an application for review was lodged in the High Court on 14 June 2010 and was transferred to this Court for decision by a minute dated 15 June 2010.

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1 *NZ Windfarms Ltd v Concrete Structures (NZ) Ltd* HC Rotorua CIV-2008-463-566, 7 April 2009.

2 *Concrete Structures (NZ) Ltd v New Zealand Windfarms Ltd* HC Christchurch CIV-2008-409-2301, 24 November 2009.

[11] All issues between the parties are therefore appropriately within the jurisdiction of this Court.

A shift in the arguments and an application to adduce further evidence

[12] There was some shift between the arguments advanced for Concrete Structures in the High Court and those presented to us by Mr Goddard QC (who did not appear in either of the proceedings in the High Court). In the High Court Concrete Structures argued that service on the engineer ought fairly to be regarded, in context, as service on the principal, a contention which was rejected by both Associate Judges. In this Court, Mr Goddard did not persevere with the agency argument. Instead, he took the logically upstream point that there is no evidence at all that the 14 March 2008 facsimile was not forwarded by Mr Fletcher to NZ Windfarms.

[13] This argument was put to Associate Judge Osborne but, as will become apparent, he was not much impressed. We will set out shortly what he had to say about it in his judgment.

[14] On 24 July 2009, the solicitors for Concrete Structures wrote to the solicitors for NZ Windfarms and Connell Wagner asking directly whether Mr Fletcher had passed the letter on. At this stage the judgment of Associate Judge Osborne was still outstanding. Despite the question being a straightforward one to which a straightforward response could easily have been given, both solicitors chose to respond evasively, in that they neither confirmed nor denied the forwarding of the letter.

[15] Concrete Structures applied for leave to adduce as new evidence in this Court the exchange of correspondence just referred to. This application was opposed. If it were necessary to do so, we would allow the application but, for reasons which we will give shortly, we are satisfied that the case can be resolved in favour of Concrete Structures on the basis of what was before the High Court.

Was the 14 March 2008 letter a notice requiring arbitration?

[16] The view adverse to NZ Windfarms on this point was expressed most cogently by Associate Judge Osborne in this way:

> [24] Faced with the engineer's formal decision, both the Principal and Contractor had three choices:
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> (a) To accept the decision (which required no formal notice).
>
> (b) To require mediation (which required a notice under cl 13.3.1).
>
> (c) To require arbitration (which requires a notice under cl 13.4.1).
>
> [25] I adopt Mr Smedley's characterisation of the 14 March 2008 letter as "equivocal". The letter does make plain that Concrete Structures is not accepting the formal decision. But what the letter does not do is indicate to the reader what (if anything) Concrete Structures now requires. The facsimile states (incorrectly) that NZS 3910 requires the matter now to be referred to mediation pursuant to cl 13.[3]. In fact, cl 13.3.1 allows either party to require the matter to be referred to mediation. In any event, the subsequent paragraph of the facsimile makes it clear that Concrete Structures does not wish to proceed to mediation having regard to what is referred to as "a quasi Mediation" which had taken place on 4 December 2007. This leads to Concrete Structures' proposition that the matter should now be referred to arbitration and Concrete Structures then asks whether the engineer is in agreement with that, or whether the engineer wishes to proceed to a formal mediation.
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> [26] Accordingly, the 14 March 2008 letter remains equivocal and does not state any particular requirement of Concrete Structures.

[17] The relevant test is as stated by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd,*[3] as adopted by this Court in *Shanks v Media 1 Ltd.*[4] On the basis of those authorities, the 14 March letter is to be interpreted in a way in which a reasonable person would have construed it in light of the relevant commercial and legal context.

[18] In the Christchurch proceeding, the question was whether the claim of Concrete Structures against NZ Windfarms was "so certainly or clearly bad" that it should be stopped in its tracks.[5] With the utmost respect to Associate Judge Osborne and the careful submissions advanced by Mr Smedley, we think that, at the very

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3 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
4 *Shanks v Media 1 Ltd* [2008] NZCA 77.
5 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

least, it is reasonably arguable that a *reasonable* recipient of this letter would have seen it as a notice referring the dispute to arbitration. Indeed that is how we think that a reasonable recipient would have viewed it. We say this given the following considerations:

(a) Concrete Structures had already, but prematurely, purported to refer the dispute to arbitration;

(b) unless the dispute was referred to arbitration by 6 April 2008, Mr Fletcher's decision became final;

(c) there is no indication that Concrete Structures intended to give any further notice prior to the 6 April deadline;

(d) Concrete Structures plainly disputed the engineer's decision, as was evident in the 25 January 2008 letter;

(e) Concrete Structures did not regard mediation as appropriate; and

(f) Concrete Structures considered that the matter should be referred to arbitration.

[19] In short we agree with Mr Goddard that a reasonable recipient of the letter would have understood:

> That the only reason Concrete Structures had identified for not referring the matter to arbitration was the possibility that a formal mediation was first required. And had it known that this was not in fact a requirement of the contract, so was not a barrier to an immediate reference to arbitration, plainly Concrete Structures wanted to refer the dispute to arbitration, if they were able to do so under the contract – and they were in fact able to do so.

Was the 14 March letter received by NZ Windfarms and if so did it constitute notice to it?

[20] These related points were raised only, it seems, in passing in the Christchurch proceedings and were dealt with by Associate Judge Osborne in this way.

> [34] In his submissions, Mr Lawson referred the letters written by the engineer to Concrete Structures which had been copied to Windfarms between 21 December 2007 and 6 March 2008. He asked the Court to conclude from the copying of that correspondence that Windfarms was aware and therefore given notice of Concrete Structures' intention to refer the matter to arbitration, that is through the 14 March 2008 facsimile.
>
> [35] There are a number of difficulties with Mr Lawson's propositions in that regard. First, there is no evidence to suggest that the 14 March 2008 facsimile received by the engineer was copied to Windfarms within the notice period. Secondly, the 14 March 2008 facsimile remains a letter as between Concrete Structures and the engineer rather than a letter or notice to Windfarms. Thirdly, the characterisation of the 12 March 2008 ... letter as a "reference to arbitration" is not sustained for the reasons discussed above ...

[21] The last of the points we can put on one side for reasons already given. The first two points made by the Associate Judge, however, require brief discussion.

[22] Whether Mr Fletcher did or did not send the letter to NZ Windfarms was not within the knowledge of Concrete Structures. The way in which the proceedings were dealt with in the High Court meant that there was no discovery. In this context, the absence of evidence ought to have been to the account of NZ Windfarms rather than Concrete Structures.[6] It was simply not safe to determine the case as if it were incontrovertible that the letter had not been forwarded (which, in effect, is what the Associate Judge did).

[23] We are thus of the view that the Associate Judge should have addressed the case on the basis that it was arguable that the 14 March letter had been forwarded by Mr Fletcher to NZ Windfarms. We have reached that view without regard to the evasive responses to the letter of 24 July 2009, and accordingly it is not necessary for us to deal formally with whether evidence in relation to that exchange of letters ought to be admitted. We feel bound to say, however, that if it is the case that Mr Fletcher sent the 14 March letter on to NZ Windfarms, it is regrettable that this was not disclosed fairly and squarely in the High Court.

[24] As to the second of the points made by Associate Judge Osborne, concerning the 14 March letter being addressed to Mr Fletcher, the significance of this – as to whether, on receipt by NZ Windfarms, it constituted notice to NZ Windfarms – falls

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6 See for instance *Ma v Ming Shan Holdings Ltd* [2010] NZCA 325 at [25].

to be determined in accordance with the principles discussed above.[7] Essentially for the reasons already given,[8] we are satisfied that it did constitute such notice, providing it was so received. Whether or not it was received will have to be determined at trial in the substantive proceedings.

The Rotorua proceedings

[25] It will be recalled that after the judgment in the Rotorua proceedings, Concrete Structures paid the amount demanded and the proceedings were discontinued. Concrete Structures also paid NZ Windfarms costs on an agreed 2B basis. Concrete Structures prosecuted its appeal against the Rotorua judgment primarily as a long stop against the possibility that NZ Windfarms might otherwise be in a position to rely successfully on issue estoppel arguments. It was only late in the hearing before us that Mr Smedley confirmed that he would not rely on issue estoppel. Since Mr Goddard had earlier made it clear that he would not prosecute the appeal solely in relation to the costs, this meant that the appeal became moot and it can be dismissed as such.

[26] We nonetheless propose to award Concrete Structures costs in relation to this appeal on the basis that we have been persuaded that the Rotorua judgment was wrong, the appeal was appropriate given the issue estoppel argument advanced by NZ Windfarms, and that argument was abandoned towards the end of the hearing before us.

Conclusion

[27] Accordingly:

(a) The appeal in the relation to the Rotorua proceedings is dismissed as moot but the appellant is nonetheless entitled to costs in this Court for

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7 At [17].
8 See above at [18]–[19].

a standard appeal on a band B basis together with usual disbursements.

(b) The appeal in relation to the Christchurch proceedings is dismissed for want of jurisdiction but on the application for review, the decision of Associate Judge Osborne is set aside. The award of costs made in the High Court is reversed and the appellant is awarded costs in this Court for a standard appeal on a band B basis together with the usual disbursements.

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