IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-1289
CIV-2011-404-2012
CIV-2011-404-6843
[2012] NZHC 3031

UNDER	the Arbitration Act 1996
BETWEEN	IRONSANDS INVESTMENTS LIMITED First Applicant
AND	CHEUNG KONG INFRASTRUCTURE HOLDINGS LIMITED Second Applicant
AND	TOWARD INDUSTRIES LIMITED First Respondent
AND	NEW ZEALAND STEEL LIMITED Second Respondent

Hearing: On the papers

Counsel: M G Colson and F J Tregonning for the Applicants
J E Hodder SC and D S Alderslade for the Respondents

Judgment: 15 November 2012

COSTS JUDGMENT OF ELLIS J

This judgment was delivered by me on 15 November 2012
at 11am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Bell Gully, PO Box 1291, Wellington 6140
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Counsel: FMR Cooke QC, PO Box 1530, Wellington 6140

[1] In my judgment dated 8 June 2012 I indicated that NZS, having been entirely successful, was entitled to costs in the usual way.[1] I said that if no agreement could be reached memoranda in that respect could be filed.

[2] Since my decision it appears that counsel for NZS put a costs proposal to CKI to which no response was received. That proposal was that NZS would accept payment of its costs on a 3B basis, certification for second counsel and an uplift of $5,000. But NZS reserved its right to seek a more substantial uplift from the Court in the event that CKI did not agree to the proposal.

[3] Following CKI's failure to respond, a memorandum was then filed by counsel for NZS seeking 3B costs (two counsel) of $28,356, disbursements of $4,368.46 and then a substantial uplift of approximately 75 per cent, for reasons that were set out in the memorandum. The exact uplift sought is for $21,644, which would yield a total costs award of $50,000.

[4] CKI did not file a memorandum in response until further directed by the Court to do so. That memorandum makes it clear that it is only the matter of the uplift that is in dispute.

[5] The uplift sought is said by NZS to be appropriate because:

(a) The hearing (and the judgment) effectively related to three separate proceedings;

(b) One of the challenges to the arbitral award originally advanced by CKI:

(i) was always hopeless in light of the ruling of Justice Courtney in the *Ironsands I* decision (which had already decided the issue), but

[1] *Ironsands Investments Ltd v Towards Industries Ltd* [2012] NZHC 1277.

(ii) was not withdrawn until the eve of the hearing (20 April 2012), notwithstanding that NZS had given CKI the opportunity to withdraw it on 13 March 2012.

(c) because CKI did not withdraw the challenge until the last minute, NZS was required to prepare submissions dealing with it (thereby engaging Rule 14.6(3)(b)(v) for the purposes of seeking increased costs);

(d) the issues raised by CKI's "fraud and corruption" challenge were complex and novel and required substantial effort and research to address, beyond the time allocation permitted by a "3B" classification (engaging Rule 14.6(3)(a)); and

(e) the "fraud and corruption" allegation involved a serious challenge to the reputational integrity of NZS and was dismissed in its entirety. Because my judgment at [74] records the view that the materiality of the documents produced by CKI to support that challenge was dubious, rule 14.6(3)(b)(ii) is engaged;

(f) the general rule that if fraud is alleged and not made out, indemnity costs are appropriate is also engaged. Although the allegation of fraud was advanced as a technical or "constructive" fraud, and was only one of the three challenges struck out, that principle at the very least supports a substantially increased award of costs; and

(g) in the overall context of this dispute, the uplift sought is modest in quantum.

[6] Counsel for NZS also noted that there was precedent for an increased costs award in the wider context of this dispute as Courtney J had ordered a 10 per cent uplift to recognise a last minute application to adjourn an earlier fixture by CKI which she considered to be without merit.

[7] The principal basis on which the uplift is opposed by CKI is that:

(a) the challenge which was withdrawn on 20 April 2012 related to a very minor issue and had been brought to preserve rights. If argued, the challenge would have required no more than a few paragraphs of submission and brief oral comments.

(b) while the specific issues of fraud and corruption (i.e. in the context of undiscovered or late discovered documents) in terms of Article 34 had not been considered by the Courts in New Zealand, there was relevant overseas authority on the point. It would be "double counting" to claim both costs on a 3B band, and, further, some form of increase on the basis that the issues were complex and novel.

(c) the fraud and corruption challenge was clearly pleaded on the basis of "equitable" fraud or corruption "of process" based on a failure to disclose certain relevant documents. CKI had relied on *Green and Hunt* and the decision in *Commonwealth Bank of Australia v Quade* to submit that Article 34(6) could be interpreted to extend to a failure to disclose relevant documents particularly where such a failure remained unexplained.

(d) similarly, it was always clear that the fraud/corruption allegation was a "technical" one and as such it did not engage the general rule referred to above.

(e) the uplift ordered by Courtney J related to an entirely different issue.

[8] I have carefully considered the above matters. In the end, I am satisfied that an uplift of $11,644 (or a little over 40 per cent) is appropriate in the circumstances. I say that in particular because:

(a) The challenge that was ultimately not pursued was, in my view, plainly unmeritorious. Its very late withdrawal imposed an additional

and unnecessary (albeit comparatively small) burden on both NZS and (to a lesser extent) the Court;

(b) notwithstanding the arguably "diluted" or technical pleaded form of the fraud and corruption allegation, CKI's written submissions contended that the Court could draw an inference that the documents concerned were deliberately (and therefore dishonestly) withheld by NZS.[2] That in itself is an allegation that is in my view serious enough to engage the general rule to which I have referred. And as recorded in my judgment, my own preliminary view was that the allegation was without factual foundation.

[9] I record that I have placed little weight on the complexity of the "fraud and corruption" issues, essentially for the reasons advanced on behalf of CKI. Similarly, while I accept (and the entituling makes clear) that the judgment related to three proceedings, that is a matter that is also adequately reflected in the 3B categorisation. Nor do I regard the previous costs award made by Courtney J as being of any relevance. It is for those reasons that the amount of the uplift sought by NZS has been reduced.

[10] In summary, CKI is to pay costs to NZS in the sum of $40,000, together with disbursements of $4,368.46.

Rebecca Ellis J

[2] Ibid at [34].