IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-026

UNDER	the Arbitration Act 1996
BETWEEN	SHADY EXPRESS LIMITED Applicant
AND	SOUTH STAR FREIGHTLINER LIMITED Respondent

CIV-2008-485-281

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an application for enforcement of an award as a judgment
BETWEEN	SOUTH STAR FREIGHTLINERS LIMITED Applicant
AND	SHADY EXPRESS LIMITED Respondent

Hearing: 3 March 2008

Counsel: E Cox and C Dunne for Shady Express Ltd
B Hunt for South Star Freightliner Ltd

Judgment: 14 March 2008

JUDGMENT OF DOBSON J

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[1] This dispute relates to some $18,800 in repair costs charged by the respondent in the first proceeding ("South Star") for effecting repairs to a truck operated by the applicant in the first proceeding ("Shady Express").

[2] On 22 December 2003, Ms Nicky Simpson, driver of Shady Express' truck, noticed water apparently leaking from the front of its engine at various points of a journey from Wellington to Christchurch. The truck was taken to South Star in Christchurch which took some time to effect repairs, having been unable to identify the source of any water leak from the engine without partially dismantling it. On the day the truck was uplifted after the engine repairs, a water leak resumed, and on this occasion it was promptly diagnosed as a fault with the air-conditioning unit, entirely unrelated to the engine. Apparently water lost from the air-conditioning unit channelled out through the radiator overflow hose, giving the impression of a leak from the engine.

[3] Shady Express refused to pay for the repairs that had been effected. South Star sued in the Lower Hutt District Court for $18,785.49, plus interest and costs. Shady Express denied liability and counterclaimed for misdiagnosis of the fault and for some $11,700 as loss of profits claimed to have been suffered in the period in which the vehicle was needlessly off the road.

[4] The parties then agreed to refer the dispute to arbitration, and appointed Mr G L Hargreaves, a claims assessor and loss adjuster in Christchurch, for that purpose. I was advised that the parties did not provide any list of issues for the arbitrator. Rather, they provided him with the pleadings from the District Court proceedings, treating those as the source from which the arbitrator should discern what the issues were.

[5] As far as evidence of Shady Express' complaints were concerned, the arbitrator was also given a colourfully worded eight page (single spaced) chronology, prepared by Ms Simpson setting out her concerns over the truck, her dealings with South Star about it, and the revelation, on the day she eventually picked the vehicle up, of the unrelated source of a leak from the air-conditioning unit. I was invited to infer from this narrative that the conduct of the employee of South Star who eventually identified a leak from the air-conditioning unit, did so in terms implicitly acknowledging that South Star ought to have discovered that source of the leak at the very outset.

[6] The arbitrator's award, dated 25 August 2007, began (the following text accurately reproducing how it was expressed):

> **INQUIRES**:
>
> (1) **AIR CONDITIONING**: While the repairs to the engine were being carried out it was found that there was a small problem with one of the sensors, and this sensor was replaced, this fault sensor caused the air conditioning to loose water, and it was thought that this was the cause of the engine loosing water.
>
> I was advised that the air condition had not been working properly for some time.
>
> This air conditioning problem is **TOTLY UNRELATED** to the engine loosing water; therefore I shall NOT refer to it again in this report.

[7] The rest of the award analysed the checks that were undertaken on the engine, and the repairs then effected. It found that the work had been carried out competently, and that the charges were reasonable.

[8] With the benefit of hindsight, it is now easy to predict that the terms of the award could have been quite different if it had been determined by a panel including a legally qualified arbitrator. Also if there had been argument focusing on whether it was negligent of the repairer not to identify the source of the leak as unrelated to the engine, and competing positions were argued on the respective levels of responsibility for that misdiagnosis. A range of outcomes would be possible from the decision reached that the repairer was not responsible for the failure to diagnose an unrelated leak at the outset in any way that compromised its entitlement to be paid, to a finding of shared responsibility for that, or even that it was solely the fault of the repairer. Once any significant liability for misdiagnosis was attributed to South Star on terms disentitling it to payment for repairs which were themselves found to be competently carried out, then issues of betterment to the engine might also arise. The modest amount involved means this dispute is not too far above the Disputes Tribunal's extended consensual jurisdiction. In that forum, one can imagine the prospect of something akin to "equity and good conscience" influencing the outcome.

[9] However, this is very far removed from an appeal by way of rehearing, and what might have occurred in a different arbitral forum can have very little bearing on the confined jurisdiction which the Court has in respect of arbitrations. The parties have pursued a consensual opting-out of the Court system and, except in narrowly defined circumstances, the Court recognises the finality of the parties' decision to do so.

[10] Shady Express did seek leave to set aside the award. This was pursued out of time, a point taken against the application on behalf of South Star. For its part, South Star made application to enter the award as a judgment.

[11] When the matter was called, Mr Cox for Shady Express sought leave to expand the terms of its application to include an application that the award not be recognised. That amendment was not opposed and, in reliance on it, Mr Cox accepted that there was no scope to extend time for the application for leave to set the award aside. Accordingly, the argument focused on Article 36 of the First Schedule to the Arbitration Act 1996 ("the Act"), as affording grounds for refusing recognition or enforcement of the award.

[12] Mr Cox indicated reliance first on Article 36(1)(a)(iv) which relevantly provides:

> 36. Grounds for refusing recognition or enforcement –
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> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only –
>
> (a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that –
>
> …
>
> (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

[13] It was argued that New Zealand law (namely Article 31(2) of the First Schedule to the Act) required the provision of reasons unless the parties had agreed

to waive that requirement. There had been no waiver here, and the award was contrary to law because there were no reasons given for a critical aspect of the award, namely that there was no relevant mistake in South Star's failure to find the cause of the water leak at the outset.

[14] The argument also invoked Article 36(1)(b)(ii) which relevantly provides that recognition or enforcement may be refused:

> (b) If the court finds that –
>
> …
>
> (ii) The recognition or enforcement of the award would be contrary to the public policy of New Zealand.

[15] That provision is to be considered in light of subs (3)(b) which further provides:

> (3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii), it is hereby declared that an award is contrary to the public policy of New Zealand if –
>
> …
>
> (b) A breach of the rules of natural justice occurred –
>
> (i) During the arbitral proceedings; or
>
> (ii) In connection with the making of the award.

[16] As to an alleged absence or inadequacy of reasons, the content of the dispute, the way it was presented to the arbitrator and qualifications of the arbitrator will all affect the reasonable expectation on the extent of reasons to be provided. The complaint here is that the arbitrator "missed the point", and has not made a determination on the complaint that South Star failed to correctly identify the original source of the leak, with the consequence that they proceeded to recommend, and get authority from Shady Express to carry out, repairs that were not necessary.

[17] The response is that the opening finding in the award, quoted in [6] above, does recognise the "unrelatedness" of the leak from the air-conditioning unit. Having put the issue to one side, the award then proceeds to consider the

reasonableness of the sequence in which steps were taken to find a leak in the engine. The arbitrator found:

> Inside the engine there were marks relating to water entering the combustion chamber; so it was decided to send the heads to Transport Repairs & Servicing 2002 Ltd (T R S) as they have the special Cummins tools required to service Cummins cylinder heads. T R S found there were damaged injector tubes and seals, and this were (sic) the water leak was, and this water leak could vary depending on temperature.

[18] The award then acknowledges other indications of slight water damage to the engine.

[19] This reasoning is only consistent with a view that there were grounds for seeking a water leak in the engine, and that there was damage to parts of the engine consistent with it having occurred. Within the confines of this arbitration, where matters were informally referred to a technical expert, without a defined set of issues and without there having been any hearing, or even an exchange of submissions prepared by the respective lawyers, I am not prepared to find that there is an absence of reasons on a material point, such as would render the award other than in accordance with the requirements under New Zealand law. The finding that the air-conditioning leak was "totally unrelated", means it did not have a bearing on the sequence in which investigative steps were undertaken to identify and then repair an engine leak.

[20] The second argument is that the finding that the work charged for was reasonable was either a finding so contrary to the evidence and, or in the alternative, a finding so entirely unsupported by any evidence, that it was made in breach of the rules of natural justice.

[21] "Rules of natural justice" is a concept borrowed in the Schedule to the Act from administrative law where it connotes a fluctuating expectation as to procedural fairness obligations imposed on those exercising powers, in their dealings with persons affected by them. In administrative law, as Lord Steyn has observed, "context is everything" (*R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [28].

[22] So too, when requirements of "natural justice" are imported into the conduct of arbitrations. For instance, one of the authorities cited for Shady Express was *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554. That related to an arbitration over a claim to additional payments of FJD22,000,000 for completion of a roading contract. The arbitral tribunal comprised Sir Ian Barker QC, a former member of this Court and at the time of the arbitration a Judge of the Fijian Court of Appeal, together with a senior New Zealand engineer and an English QC.

[23] Mr Cox was inclined to accept that the expectations of the arbitrator in the present case must be vastly different from what was reasonably expected in that far more complex and structured arbitration before a panel including two expert lawyers and a technical expert.

[24] I fully understand the frustration felt by Shady Express at the arbitrator not dealing more prominently with the complaint that South Star negligently failed to identify the unrelated leak in the air-conditioning unit. On its view that should have led to an appreciation that it was the innocuous cause of Ms Simpson's concerns, so that arguably nothing further was required. That frustration must be caused in significant measure by the reality that the arbitrator did not agree with this point – that work to identify an engine leak was warranted, damage consistent with an engine leak was found, and on the arbitrator's view, such damage was competently repaired.

[25] Other aspects of the criticisms raised against the repairer related to the decisions made on whether to repair or replace certain parts, and competing opinions on those technical aspects were put to the arbitrator. Given the technical nature of the expertise which is inferentially why he was appointed, it is understandable that the award went on to focus on those.

[26] Any challenge on a claimed breach of natural justice needs to surmount a high hurdle. As the Full Court observed in *Downer*:

> [84] Even assuming that Downer could establish a breach of the *Erebus* ground of natural justice, the "public policy" requirement in art 34 imposes a high threshold on Downer. The phrases "compelling reasons" and "a very strong case" are employed in the judgments of the Hong Kong Court of

> Appeal in *Hebei Import and Export Corporation v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at pp 211 and 215. *Hebei* involved an application to set aside a foreign award. To warrant interference there must be the likelihood that the identified procedural irregularity resulted in a "substantial miscarriage of justice": *Honeybun v Harris* [1995] 1 NZLR 64 at p 76. That entails the impugned finding being fundamental to the reasoning or outcome of the award. The Court of Appeal suggested in *Amaltal* (at para [47]) that the arbitrator's findings of fact should not be reopened unless it was "obvious" that what had occurred was contrary to public policy.

[27] Shady Express cannot elevate this criticism of absence of evidence for findings into a breach of natural justice. The outcome is within the range of options reasonably open to the arbitrator, and his findings do not go beyond what might be expected on the material before him.

[28] Whilst Shady Express criticises the arbitrator for "going past" the primary point that South Star negligently failed to consider a leak other than in the engine, there is another view that was open to the arbitrator, and he took it. Accordingly, the grounds for refusing to recognise the award are not made out.

South Star application to have the award entered as a judgment

[29] Mr Cox accepted that if his arguments fail, then there was nothing more that could be argued in opposition to this application.

[30] Ms Hunt sought interest, at Judicature Act 1908 rates, from the date of the award, 25 August 2007. Mr Cox was inclined to accept that if South Star was entitled to enter the award as a judgment, then an entitlement to interest would follow. However, whilst the Court's ability to decline to enter the award as a judgment is specifically confined, steps post entry are within the Court's own jurisdiction, and there is a broad discretion. Shady Express can validly consider that they were let down by the quality of the arbitral output, and an attempt to challenge it in the Court is understandable. In the particular circumstances involved, I consider that interest should only run from the date of entry of the award as a judgment. To afford an opportunity for the liability to be settled without entry of a judgment, that step is to be delayed for a period of 14 days from delivery of this judgment.

[31] I accordingly grant the application for entry of the award as a judgment which is not to be effected for 14 days. I direct that South Star is entitled to interest on the terms described in the preceding paragraph.

Costs

[32] Mr Cox urged that if his arguments were unsuccessful, then the Court ought not to order costs against Shady Express because this was a bitter experience where the system had let his client down, and it was a small, struggling business where the loss it has suffered ought not to be further compounded. To heap more costs on Ms Simpson's company would not reflect justice.

[33] However, both parties have contributed to this modest dispute being seriously overworked. The position of the repairer was vindicated by the technical expert appointed, and little weight can be given to the notion that the Court – or indeed any lawyer – would probably approach the issues differently from the manner in which they were addressed in the award.

[34] Although jurisdiction to challenge, and all aspects of enforcement of arbitral awards are reserved solely to this Court, here the substantive dispute was near the bottom of the District Court's jurisdiction. The exceptionally low value of the interests at stake is one of the matters warranting a reduced award of costs in terms of r 48D(b). Others of the criteria on reduced costs in that rule could also apply here. I consider the appropriate course is to classify the proceedings as category 1A, and allow South Star costs only on its own originating application to enter the award as a judgment. South Star is, however, also entitled to all reasonable disbursements incurred in both sets of proceedings.

Dobson J

Solicitors:
Gibson Sheat, Lower Hutt for Shady Express Ltd
Macky Roberton, Auckland for South Star Freightliner Ltd