Copy for Mr A. Kroft.

No. 43

IN THE SUPREME COURT)
OF THE TERRITORY OF) CORAM : OLLERENSHAW, J.
PAPUA AND NEW GUINEA) Monday

28th August, 1966.

BETWEEN W.N. JOHNS (N.G.) PTY. LTD.

Plaintiff

AND THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

Defendant

JUDGMENT

1967
August 17, 18, 21, 28.
PT MORESBY
Ollerenshaw, J.

In this action the plaintiff sues to recover the sum of $14,877.60 which it claims is the balance payable to it under an Award published by an arbitrator on the 29th December, 1965.

On the 10th February, 1965, the parties had entered into a "Lump Sum Contract", in the pleadings called the "Main Agreement", for the reconstruction by the plaintiff of part of the Rigo Road for reward to be paid by the defendant.

This work included the excavation of cuttings and the construction of embankments along the alignment of the road.

As it transpired the quantities expressed in the Schedule of Quantities to the Main Agreement were underestimated in respect of both of the items : "Excavation in cutting" and "Compacted fill in embankment". So it was that on the 25th May, 1965, the parties entered into what has been called the "Arbitration Agreement".

The Main Agreement, the Arbitration Agreement and the Award are the exhibits marked "A", "B" and "C" respectively and they make up the whole of the plaintiff's case.

Clause 2 of the Arbitration Agreement is in these terms :

"2. The question for determination by the

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Arbitrator are as follows:-

(a) In a properly computed Bill of Quantities prepared from reliable and representative survey figures what should be the percentage order of accuracy of the final calculations for a project of the size and type comprised in the Works. In determining this question the Arbitrator should be entitled to rely on his own experience and may determine the question without hearing evidence from the parties.

(b) The extent by which the actual volume of excavation in cutting (other than rock) necessary for the completion of the Works (apart from the variations) differs from the volume of 170,000 cubic yards stated in the Schedule of Quantities annexed to the Agreement.

(c) The extent to which the actual volume of compacted fill in embankment necessary for the completion of the Works (apart from the variations) differs from the volume of 166,700 cubic yards stated in the Schedule of Quantities annexed to the Agreement."

In his award the arbitrator answered questions (a) and (b) in a way that has not caused any disagreement between the parties. However, they do disagree about the legal effect of that part of the award upon which the plaintiff in this action must and does rely as an answer to questions (c). This part of the award is in these terms :

"Total fill required in embankments as per computer sheets.	232,933 cu. yds. (solid)
Replacement of stripping under embankments	15,034
Total fill	247,967 cu. yds. (solid).
Allowance for compaction	37,194
	285,161 cu. yds. (loose)
Volume in schedule of quantities	166,700
Difference	118,461 cu yds."

Counsel for the plaintiff rests its case upon the words and figures at the conclusion of my quotation from the award, namely : "Difference 118,461 cu. yds." If these words and figures amount to a valid answer to question (c) then the plaintiff is entitled to recover the full amount claimed. This follows from what I may call the rise-and-fall monetary provisions of the Arbitration Agreement, which require no more than this mention here. If these words and figures are not a valid answer to the question then the plaintiff is not entitled to recover anything.

At one stage counsel for the defendant submitted that these words and figures, as relied upon by the plaintiff, were not intended, and did not purport to be an answer to the question. There is little to be said for this contention and I do not find it necessary to examine it.

Looking at the question and the answer it is abundantly clear that this is not a valid award as maintained for the plaintiff. The reason for this is that in determining the difference to be 118,461 cubic yards the arbitrator was not answering the question which the parties had submitted for his determination.

He was asked to determine the extent to which the actual volume of compacted fill in embankment necessary for completion differed from the volume of 166,700 cubic yards stated in the Schedule of Quantities.

It is clear from the whole award that the arbitrator found what was the actual volume of compacted fill in embankment necessary for completion. He called it : "Total Fill" and he underlined these words. He found it to be 247,967 cubic yards and described it as : "(Solid)". By "solid" it appears, as counsel for the plaintiff said in opening the case, that the arbitrator meant : "after compaction". He then did something for which there was no justification in the question : he

added an "Allowance for compaction". He took fifteen per cent of the actual volume of compacted fill to get a figure of 37,194 (cubic yards) and he added this figure to such actual volume to give a volume of 285,161 cubic yards required before compaction which he called : "(loose)". It is clear from the whole award that "loose", in the context in which the arbitrator used it, means before compaction; "not compact" is a good meaning for the word : see Shorter Oxford English Dictionary. It was from this volume and not from the actual volume of compacted fill that he subtracted the volume 166,700 cubic yards stated in the Schedule of Quantities, and so he arrived at a difference of 118,461 cubic yards.

It is manifest that what the arbitrator did determine when he found that the difference was 118,461 cubic yards was the extent to which the volume that was required before compaction to produce after compaction the actual volume of compacted fill in embankment differed from the stated volume of 166,700 cubic yards. This is an essentially different thing from what he was asked to do and in making such a determination the arbitrator went outside his jurisdiction so that the award relied upon by the plaintiff is invalid : see Hutcheson v. Eaton (1); Falkingham v. Victorian Railways Commissioner (2); Oppenheim & Co. v. Mahomed Haneef (3); Buccleuch (Duke) v. Metropolitan Board of Works (4); Bowes v. Fernie (5); Williams Brothers v. Agius (E.T.) Ltd. (6) and the cases collected in Halsbury's Laws of England, 3rd Ed. Volume 2 at page 43, note (m).

(1) (1884), 13 Q.B.D. 861.
(2) (1900), A.C. 452 at p. 463.
(3) (1922), A.C. 482 at p. 487.
(4) (1872), L.R. 5 H.L. 418; (1870), L.R. 5 Exch. 221.
(5) (1838), 4 My. & Cr. 150; 41 E.R. 59.
(6) (1914), A.C. 510.

It is not necessary but instructive to consider how it happened that the arbitrator went wrong. For reasons which he explained in his award he found it necessary to consider questions (b) and (c) "conjointly". For the purpose of answering question (b), which, in fact, he answered after he had answered question (c), he did require to ascertain the volume before compaction and he did then use, as appears from his answer to question (b), and he did then use legitimately, the before-compaction volume of 285,161 cubic yards, to which I have already referred. When setting out his calculations for his answer to question (c) he may have been thinking ahead to the answer he would be making to question (b) and to his need to ascertain for it the volume before compaction and so inadvertently included it in his calculations for his answer to question (c).

On the other hand it may be, as counsel for the plaintiff suggested in opening, that the arbitrator proceeded upon the assumption that, to speak in general terms, the obligation for compaction under the Main Agreement was on the defendant. This suggestion invites two comments. One, that under the Main Agreement the obligation for compaction in the case of embankments was upon the plaintiff, the contractor. The other comment and the more significant for my purpose is that if the arbitrator meant to determine where this obligation lay he had no jurisdiction to make such a determination because he was not asked nor required to do so.

Although counsel for the defendant did submit that there was no valid award or, what is the same thing, no award upon which the plaintiff could recover the balance it sues for and this was the real defence, clearly open on the amended pleadings, he seemed to lose sight of it for some of the time occupied in argument. He cited a number of cases that have arisen in England in the exercise of the arbitration

jurisdiction upon motions to set aside or remit awards and he had much to say about such matters as ambiguity and uncertainty. I am not called upon to exercise that jurisdiction and I do not see this as a case of ambiguity or uncertainty.

No motion was made on behalf of the defendant, either before or in the course of this action, to set aside the award. It is clear to my mind that the real defence is based upon a defect on its face that goes to the root of the award : see Oppenheim & Co. v. Mahomed Haneef (7). It is, therefore, equally clear that no such motion was necessary to protect the defendant's position. This is not a case for the application of the principle requiring such a motion as enunciated in Thorburn v. Barnes (8) and often repeated : see, e.g., Hutcheson v. Eaton (9); Bache v. Billingham (10); Oppenheim & Co. v. Mahomed Haneef (7) and H.E. Daniels Ltd. v. Carmel Exporters and Importers Ltd. (11); and see also Smith v. Whitmore (12).

Counsel for the plaintiff has relied upon the conclusive nature in law of an award of a domestic tribunal, such as an arbitrator, to whom parties have submitted their differences for determination and he has pressed upon me the principle of law appearing from the judgments, particularly that of Williams, J., in Hodgkinson v. Fernie (13), as held to be clearly settled in Goode v. Bechtel (14). However, I do not think that such a principle can avail the plaintiff where there is a defect upon the face of the award revealing a lack of jurisdiction such as there is in this case.

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(7) (1922), A.C. 482 at pp. 486 & 487.
(8) (1867), L.R. 2 C.P. 384.
(9) (1884), 13 Q.B.D. 861 at p. 867.
(10) (1894), 1 Q.B. 107 at p. 112.
(11) (1953), 2 Q.B. 242.
(12) (1864), 2 De G.J. & Sm. 297; 46 E.R. 390.
(13) (1857), 3 C.B.N.S. 189; 140 E.R. 712.
(14) (1904), 2 C.L.R. 121 at pp. 125 & 126.

I should mention that there is authority for saying that such a defect may be shewn by extrinsic evidence ; see, e.g., Falkingham v. Victorian Railways Commissioner (15) and cf. In re Dare Valley Railway Company (16). It has not been necessary to consider this interesting point in its relation to this case because counsel for the defendant did not pursue his questioning of the witness he called.

I may add here that although the award is bad, goodness may be extracted from it by omitting from the arbitrator's calculations the allowance for compaction and then one can get a valid answer to the question. This, the defendant had done before the action was commenced. It paid the plaintiff upon the footing that when this mistakenly included item is excluded the award reveals what the arbitrator found to be the extent to which the actual volume of compacted fill in embankment, necessary for the completion of the works, exceeded the volume stated in the Schedule of Quantities. It is for this reason that the plaintiff sues merely for what is claimed as a balance and so it is that it is unnecessary for me to exercise the duty of a Court when there has been an abortive arbitration and it may be seen, nevertheless, in what manner the rights of the parties should be adjusted : see Cameron v. Cuddy (17). I do this in effect by finding a verdict for the defendant.

I find a verdict and pronounce and direct judgment to be entered for the defendant with costs.

Solicitors for the plaintiff : Norman White & Reitano.

Solicitor for the defendant : S.H. Johnson, Crown Solicitor.

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(15) (1900), A.C. 452 at p. 463.
(16) (1868), L.R. 6 Eq. 429.
(17) (1914), A.C. 651 at p. 656.

E.N. Wright
associate
30/8/67