IN THE ROYAL COURT OF JERSEY

Before V.A. Tomes, Esq., Deputy Bailiff sitting as Single Judge.

Between **STEPHEN LENFESTY DUQUEMIN and SUSAN MARGARET McLEAN, his wife** **Plaintiffs**

And **KONTROL LIMITED** **Defendant**

Advocate G. Le V. Fiott for Plaintiffs
Advocate M.E. Whittaker for Defendant

On the 13th February, 1984, the Plaintiffs obtained an Order of Justice against the Defendant alleging negligence in the preparation of a survey report on the property 105, Rouge Bouillon, in the Parish of St. Helier, and claiming the costs of remedial works and general damages. The Defendant filed an Answer and Counterclaim and the Plaintiffs filed a Reply. On the 9th July, 1984, the action and counterclaim were set down for hearing.

In the event, the parties decided that by reason of its nature the dispute might be better dealt with before an arbitrator. Thus, in 1985, the parties entered into an Agreement, (the Agreement) signed by both parties but undated, to refer the dispute to the arbitration of a person to be nominated by the Royal Institution of Chartered Surveyors (the Arbitrator).

The Agreement contained, inter alia, the following provisions:-

"11. The parties hereto and their respective representatives will in all respects abide by, observe and perform and obey the said award which shall be final and without appeal.

"13. The Arbitrator shall have the right to award costs. Without prejudice to the generality of the word "costs", (sic) shall include costs and disbursements not only of the Arbitrator but also legal costs backdated to such date as the Arbitrator may award together with all professional fees incurred with the Surveyors, Engineers and Architects with regard to the present dispute and proceedings.

"14. That notwithstanding the aforementioned, the Arbitrator may wherever he considers it to be expedient and in the interests of the parties, conduct the proceedings in accordance with the Institution of Civil Engineers Arbitration Procedure (1983) Rules, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 22 and 27, a copy of which procedure is annexed hereto. If there is a conflict between the terms of this Agreement and the said Rules, the Arbitrator shall have unfettered jurisdiction as to which of the two procedures he wishes to adopt.

"15. Neither of the parties shall bring or prosecute any action against the other or the arbitrator for or in respect of the said matters in difference or for or in respect of the said award save and except the enforcement of the terms of the award of the Arbitrator".

Of the annexed Arbitration Procedure (1983) Rules, rules 17.2 and 18.1 are relevant (although rule 17.2 was not drawn to my attention by Counsel). These are as follows:-

"17.2. When the Arbitrator has made and published his Award he will so inform the parties in writing and shall specify how and where it may be taken up upon due payment of his fee.

"18.1. Whether requested by any party to do so or not the Arbitrator may at his discretion state his Reasons for all or any part of his Award. Such Reasons may form part of the Award itself or may be contained in a separate document".

Norman John Lurcook, Fellow of the Royal Institution of Chartered Surveyors, a Chartered Building Surveyor, was appointed to be the Arbitrator by the President of the Royal Institution of Chartered Surveyors on the 22nd July, 1985.

The Arbitrator signed and published his Award on the 6th December, 1985. He ordered that the Defendant should immediately pay to the Plaintiffs the sum of £9,124. He settled his fee at the sum of £1,300 and travelling and out of pocket expenses at £244.29, thus making total costs of £1,544.29. He directed that the Defendant should pay the costs.

On the same day, 6th December, 1985, the Arbitrator wrote to both parties giving notice that he had made and published his award. He further stated that: "It now lies at this office and will be delivered upon payment of my charges which amount to £1,544.29".

Halsbury's Laws of England, 4th Edition, Volume 2, at paragraph 612, page 324, states that: "As to delivery, actual delivery is essential, and there can be only one delivery, which must, in the absence of agreement, be to both parties, in the sense that the award must be equally available to both parties for taking up".

I find that delivery was to both parties, in the sense that the award must be equally available to both parties for taking up, because the Arbitrator wrote the identical letter to both parties. Rule 17.2 entitled the Arbitrator to make that delivery conditional upon the payment of his fee and he did so. It is true that he required the payment of the whole of his costs and not merely of his fee but this does not alter the fact that payment had to be made.

Although I did not hear evidence, I was informed by Mr. Fiott and it was accepted by Mrs. Whittaker that Mr. Duquemin approached Mr. William John George Bates, Managing Director of the Defendant to suggest that they should each pay one half of the Arbitrator's costs in order to take up the award jointly. This suggestion was rejected. Mrs. Whittaker argued that there was no obligation, legal or otherwise, upon the Defendant to pay and that it was perfectly proper to decline. There was no provision about costs, beyond Clause 13, in the Agreement about the Arbitrator's costs and there were no directions in the letter of the 6th December, 1985, from the Arbitrator for payment by both parties. In my judgment, the refusal of the Defendant to pay one half of the costs and thus to take up the award jointly with the Plaintiffs was contrary to the spirit of arbitration, of Clause 11 of the Agreement, and of Rule 17.2, and was unreasonable.

Following upon the Defendant's refusal, the Plaintiffs arranged to pay the Arbitrator's costs and, by letter dated the 16th December, 1985, the Arbitrator acknowledged receipt of the Plaintiffs' cheque to settle his costs, sent two copies of the Award to the Plaintiffs and asked them to arrange for one copy to be sent on to the Defendant.

On the 23rd December, 1985, Mr. Fiott wrote to Mrs. Whittaker in the following terms:-

"The award of Mr. Lurcook has been published and is held by me. My clients have paid the costs of the Report in the sum of £1,544.29.

"The award condemned your client Company to pay my clients the sum of £9,124.00 plus the Arbitrator's costs in the sum of £1,544.29, making a total of £10,668.29. On receipt of a cheque for that amount I shall make available to you a copy of the Report.

"Please inform your client Company that if the award is not implemented by return of post proceedings will be instituted without further delay".

Mrs. Whittaker for the Defendant criticised that letter. Mr. Fiott conceded that it was open to criticism. I agree. In my judgment the Defendant's copy of the award should not have been withheld. The letter should have transmitted the Defendant's copy and demanded payment of the whole amount due, within say seven days, in accordance with Clause 11 of the Agreement. In default of payment, the Plaintiffs would have been fully entitled to commence proceedings whether by Ordre Provisoire or otherwise without further notice or delay.

Equally, however, the Defendant had notice, by the letter in question, of the Arbitrator's decision. It was bound by paragraph 11 of the Agreement and, therefore, under a duty to perform and obey the Award. Quite clearly Mr. Fiott, as an Advocate of this Court, would not give false information as to the amount payable. The Defendant had merely to pay the amount claimed and demand its copy of the Award. In my judgment, to withhold payment was in breach of Clause 11 and unreasonable.

As a result, it seems, of a telephone conversation between Mr. Fiott and Mrs. Whittaker, Mr. Bates of the Defendant delivered to Mr. Fiott's office a cheque for £1,544.29 to settle the Arbitrator's costs, following which Mr. Fiott wrote to Mrs. Whittaker on the 20th January, 1986, as follows: "I enclose herewith a copy of the Award of Mr. Lurcook. I have taken proceedings to enforce the Award".

On the 17th January, 1986, the Plaintiffs had obtained an Ordre Provisoire from the Bailiff, to which was annexed an account for £9,124.00, the "balance outstanding under the Award of Mr. N.J. Lurcook, F.R.I.C.S., dated 6th December, 1985". On the 23rd January, 1986, one of the Viscount Substitutes attended at the Defendant's premises when, in order to avoid an arrest being made on its moveable property, the Defendant paid to the Viscount the sum of £9,124.00 by way of surety for the amount claimed and £35 by way of costs.

The matter came before the Court on the 31st January, 1986, when it was adjourned for one week. On the 7th February, 1986, the matter was placed on the pending list. In their particulars of claim the Plaintiffs sought (i) the sum of £9,124.00; (ii) General damages; (iii) interest on (i) and (ii); and (iv) costs on a full indemnity basis.

The Defendant filed an answer claiming that it required Reasons for, and clarification of, the Award and that the Plaintiffs were premature and precipitous in instituting proceedings before the Defendant had had the opportunity of considering the Award. It sought to be dismissed from the action with costs on a full indemnity basis. The Plaintiffs filed a reply.

On the 27th February, 1986, the case was set down for hearing. However, on the same day and immediately before the case was set down for hearing, the Judicial Greffier, after consultation with the parties' Advocates, made an act whereby it was ordered by consent, that the particulars of claim filed by the Plaintiffs be amended by deleting therefrom the claims for general damages and interest.

There is an ambiguity in that Act because it appears to strike out the claim for interest on the principal debt of £9,124, ((i) in the Particulars of Claim), as well as interest on general damages, ((ii) in the Particulars of Claim). Mr. Fiott says that that cannot have been the intention, was never discussed, and that the Plaintiffs are entitled to interest on the principal debt. He further says that if the parties cannot agree, the matter can be referred back to the Greffier. Mrs. Whittaker asks that rather than refer the matter back to the Greffier, I should deal with it and, because I believe that it will save time and inconvenience to the parties, I propose to do so.

On the 29th January, 1986, Mrs. Whittaker wrote to Mr. Fiott setting out in some detail the Defendant's wish to have clarification of, and reasons for, the Award and claiming entitlement thereto under Rule 18. She wrote to the Arbitrator on the 17th February, 1986, enclosing a formal Request for Reasons. On the 19th February, 1986, the Arbitrator hoped to write again within a few days when he would have had an opportunity to fully consider the request. In the event, he did not reply until the 15th April, 1986, when he said that at no time either before or during the Arbitration was a request made by either party for him to make a reasoned Award and, accordingly he did not propose to give reasons now.

As a result of the Arbitrator's refusal to give reasons, received by the Defendant's legal advisers on the 17th April, 1986, the Defendant has accepted the situation, has agreed that payment of the Award must be made and for that reason has authorised the Viscount to release the sum held by him. Accordingly, apart from the question of interest already referred to, I am asked to determine only the question of costs.

Mrs. Whittaker argues that the Defendant was entitled to reasonable time to consider the Award and make proposals for payment; that the action taken was draconian and contrary to the concept of natural justice; that the Defendant did not wish to avoid liability and had paid the amount claimed into the hands of the Viscount; that there was no mention in Rule 18 of any time limit within which a request for reasons must be made; that the final delay had resulted from the Arbitrator's dilatoriness in deciding whether or not to give reasons; that the action could have been adjourned 'sine die' because the money had been paid to the Viscount and that further pleadings had been unnecessary; in short, that the institution of proceedings was unreasonable and that costs had been unnecessarily incurred.

I deal first with the question of interest. I do not believe that the Judicial Greffier intended, without hearing argument, to strike out the claim for interest on the amount of the Award. His point was that general damages could not

be claimed upon an Ordre Provisoire and he could not set down the Action for hearing unless the claim for general damages was struck out. Consequently, the claim for interest on general damages had to be struck out also. I therefore construe the Act of the 27th February, 1986, as if the words "on such damages" were inserted after the word "interest". On the 23rd January, 1986, there was paid into the hands of the Viscount the sum of £9,124 which, under Clause 11 of the Agreement, the Defendant had bound itself to pay to the Plaintiffs. I order that the whole of the interest on that sum in the hands of the Viscount be paid over to the Plaintiffs.

I reject the argument advanced on behalf of the Defendant about the interpretation of Rule 18. Reasons must be asked for, in the words of the Arbitrator, "either before or during the Arbitration". In my judgment, the second sentence of Rule 18 can have no other meaning. The request must be made before or during the Arbitration in order that the Arbitrator may, if he thinks fit, include his reasons within the Award itself.

Costs are in the discretion of the Court and I have full power to determine by whom and to what extent they are to be paid. A party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice, and the judge ought not to exercise it against the successful party except for some reason connected with the case. (v. Halsbury's Laws of England, 4th Edition Vol. 37 para. 714 at page 549).

If in the exercise of its discretion the Court sees fit to make an order as to costs, then the Court must order the costs to follow the event except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs (v. Halsbury's Laws of England, 4th Edition, Vol. 37 para. 716 at page 552).

Counsel for the Defendant has failed to satisfy me that I should not make an order for costs and has failed to satisfy me that there are circumstances in this case to justify a departure from the ordinary rule that costs should follow

the event. In my judgment the defence contained in the Answer was without any hope of success. I regard Clause 11 of the Agreement as paramount; the Defendant bound itself to perform and obey the Award; its failure to pay the amount of the Award to the Plaintiffs, as opposed to into the hands of the Viscount, constituted a serious breach of Clause 11 and, in my judgment, was inexcusable.

However, the Plaintiffs are not entirely without blame - a copy of the Award should have been made available to the Defendant earlier than it was and the Ordre Provisoire was obtained before the Award was sent to Mrs. Whittaker. In these circumstances, I am not prepared to award costs on a full indemnity basis.

I order that the Plaintiffs shall have their taxed costs paid by the Defendant.

I should add a note to the effect that Mrs. Whittaker stated that the Defendant's decision to release the monies in the hands of the Viscount was without prejudice to the Defendant's Counterclaim against the Plaintiffs, which it would now pursue. The Arbitrator had stated that at the Hearing before him neither party made any mention of a debt by the Plaintiffs to the Defendant and neither party examined the other relative to that matter. In his Award he did not take note of the Defendant's claim. It may be that the Award gives rise to an estoppel inter partes and that the publication of the Award extinguishes any right of action in respect of the former matters in difference. However, I was not asked to decide this issue and I do not do so.