Fletcher Construction Co Ltd & Royco Amalgamated Ltd v Montfort Bros. of St. Gabriel

Supreme Court, Nuku'alofa
Hampton CJ
C.586/95

27 October, 1 November 1995

Arbitration - award - enforce as judgment - set aside ex parte orders
Building contract - arbitration award- enforcement - estoppel
Practice and procedure - arbitrators award - exparte order - set aside
Estoppel - arbitration award - final - estoppel inter partes

The plaintiffs having obtaining an arbitrators award (in relation to a building contract) in their favour applied, ex parte, to enforce the award as a judgment of the Supreme Court. Orders were made and judgment entered in favour of the plaintiffs with a reservation of leave, to the defendant, to apply to set aside, vary or amend. The defendant so applied; claiming first that the Supreme Court had no jurisdiction to hear an application to enforce an arbitrator's award let alone enter a judgment in terms of the award; secondly that the award was very narrow and restricted and did not cover the extent of the total amounts claimed and, in any event, the award was not in a form which could be enforced as a judgment; thirdly that, as an alternative, the award was incorrect, contained discrepancies and matters still in dispute and unheard and therefore it was not a final award (but no claim made of misconduct by the arbitrator or of the award having been improperly procured).

Held:

1. The court had jurisdiction to hear an application to enforce an award and to enter judgment.
2. As Tonga had no Arbitration Act or similar provisions by dint of the Civil Law Act (cap 25) the English procedure, adopted here, was applicable, appropriate and necessary - and not in breach of the Constitution.
3. The arbitrator had issued an award, intended to resolve the outstanding issues between the parties; its form and content were clear and it was in such a state and form as to be enforceable as a judgment.
4. Both parties had been given every opportunity by the arbitrator to put forward their views as to the areas in contention and their arguments thereon.
5. An arbitration, properly conducted, should put an end to disputes; finality is necessary. The parties knew that and had an obligation to bring all outstanding matters, and all matters which could have been raised by the exercise of reasonable diligence, to the arbitration.
6. Under the building contract the arbitration was a final and binding award. The

amended final architect's certificate reflected that award.

7. The award, being final and binding was enforceable as a judgment in the Supreme Court and gave rise to an estoppel inter partes as to the matters decided.

8. There was no basis to set aside the judgment based on the award that the award itself should be set aside as there had been a serious miscarriage of justice.

Cases considered: Henderson v Henderson (1843) 3 Hare 100
Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1QB 630

Statutes considered : Constitution, cl.56
Civil Law Act, ss.3, 4
Arbitration Act, 1950 (UK) s26

Regulations considered : Supreme Court Rules, O.22, O.27
Supreme Court Rules (UK), O.73 r.10

Counsel for plaintiffs : Mr Waalkens
Counsel for defendant : Mr Edwards

Judgment

On 3 August 1994 the Plaintiff construction companies, as a joint venture, entered into an agreement with the Defendant Order to build for the Defendant a Technical Institute.

As a result of certain disputes between the Plaintiff and the Defendant as to the building contract, and as the construction neared and then reached completion, the Plaintiffs and the Defendant agreed to arbitrate all matters in dispute between the parties.

The arbitration took place between 4 and 12 May 1995 and an award made on 2 June 1995 (by the Arbitrator, M.K.W. Williams, a Quantity Surveyor).

On 5 July 1995 the Plaintiffs issued proceedings in this Court for leave to enforce that Award and seeking Judgment for a total of $275,622.28 together with items of interest and costs.

On 24 July 1995 in this Court Mr. Justice Lewis made Orders as sought (in reliance upon the documents filed, being the Ex parte Application for leave to enforce Arbitration Award, the Affidavit (and the 12 exhibits) in support, the two memoranda of Counsel, and the Writ of Summons and Statement of Claim), with leave being given to the Defendant to apply to set aside vary or otherwise amend the Orders made.

On 28 July 1995 the Defendant paid to the Plaintiffs $200,000 "on account".

On 15 September 1995 the Plaintiffs applied to this Court to enforce the Judgment (by way of application for Garnishee and Charging Orders) and Orders Nisi were made (on each) on 21 September 1995 (for a balance of $80,754.68) with a hearing date for 6 October 1995, as to making the Orders Absolute.

On 5 October 1995 the Defendant applied to set aside, vary or otherwise amend the Orders of 24 July; "that the sum of $70,815.64 be deducted from the total amount claimed by the Plaintiff" (sic); and "alternatively that the subject matters herein be referred to arbitration in accordance with the Contract".

I interpolate by the time this application came on for argument on 27 October 1995 not only had the documentation grown volumnious but the amount the Defendant claimed (by and in an Affidavit of 26 October 1995 together with Exhibits of some 189 pages) should be deducted had grown to $76,297.55. That highlights an issue in this case which I will refer to later in this judgment; and much argument was taken by the Defendant discussing the factual minutiae of matters already arbitrated; of further disputed alleged variations; of alleged incomplete and unfinished works; of alleged oversights and work not done; of alleged work wrongly done or defective; of matters allegedly wrongly charged - (Defendant's words in it's first Affidavit: "defective workmanship or incomplete work requiring remedy-ing"). The extent of the Defendant's allegations (as well as the amounts claimed as deductions) seemed to be ever-growing, with the passage of time.

I remind myself that this is an application to set aside vary or otherwise amend the Orders of Lewis J. of 24 July 1995, pursuant to the leave specifically reserved at that time.

I am not sitting to conduct a review of the earlier arbitration and the factual matters therein; nor am I sitting to hear an application to set aside an arbitrator's award; nor am I sitting to hear a building dispute myself - nor to act as an arbitrator; nor am I sitting to hear a claim by the Defendant against the Architect, it's agent, with respect to its agent's alleged failures and alleged negligence in not properly protecting it's principals (the Defendant's) interests viz-a-viz the Plaintiffs.

Preliminary Issue

At the outset of the argument Mr Edwards, for the Defendant, made the surprising claim that this Court had no jurisdiction at all, in effect, to even entertain an application to enforce an arbitrator's award, let alone enter a judgment in terms of the award.

The procedure which the Plaintiffs had followed here was pursuant to the English method to summarily enforce an award as a judgment of the High Court - refer s.26 Arbitration Act 1950 ("an award ... may, by leave of the High Court .... be enforced in the same manner as a judgment or order to the same effect") and pursuant to the procedures as set out in Halsbury's 4th Edition Volume 2 at para. 713, (referring to the Rules of the Supreme Court, Order 73, rule 10). (The English procedure is that "An application to the High Court for leave to enforce the Award may be made by originating summons or ex parte on affidavit" - Halsbury as above).

The Plaintiffs' position was that, as Tonga had no Arbitration Act or arbitration provisions, (and Mr. Edwards accepts that that is so) then, because of that silence, regard should be had to the English position - sections 3 and 4 of the Civil Law Act (Cap. 25).

Mr Edwards says that the English procedures should not apply as we have our own Supreme Court Rules which provide, exclusively and exhaustively according to his argument, for the only way in which proceedings can be taken i.e. under Order 6 by Writ of Summons and Statement of Claim to be served within 12 months (and not ex parte).

That ignores the fact that matters can be commenced ex parte under our Supreme Court Rules (eg refer Orders 22 and 27) and secondly that these present proceedings were in fact commenced by a Writ of Summons and Statement of Claim.

Furthermore nothing additional can be made of the (i) ex parte, and (ii) failure to serve the Defendant before judgment, points because leave was specifically reserved to the Defendant in the Orders of 24 July 1995 and in pursuance of that the Defendant has had the opportunity to fully argue all issues outstanding, in its view, as to the award, what it means, and its enforceability.

Mr. Edwards argument also seems to ignore the provisions of our Supreme Court Rules Order 2 rule 2(2) which states that "where there is no provision in these rules the rules of procedure for the time being in England shall apply".

In my view there is a gap in the Tongan laws and there are no provisions to cover these circumstances; that resort can and should be had to the English law; that the English Arbitration Act of 1950 is a statute of general application; that the procedures therein and in the English Rules are applicable here; and those procedures have been followed, quite properly, by the Plaintiffs here. To follow such a procedure is not in conflict with, or in breach of, clause 56 of the Constitution, as Mr. Edwards also argued, saying that only the King and the Legislative Assembly had power to enact laws for Tonga. That is true, but it is by one of those very laws enacted by the King and the Assembly, viz. the provisions of sections 3 and 4 of the Civil Law Act, that this Court is not only empowered, but is directed, to apply Statutes of general application in force in England in circumstances such as these.

Not only is it appropriate and convenient to have a method, such as the English one, for enforcing arbitration awards - it is necessary.

I add that the building contract (in clause 33(5)) provided that the law of Fiji "shall be the proper law of this Contract and in particular .... shall apply to any arbitration under this Contract ....". The Fijian Arbitration Act (Cap 38) provides in Section 13 that "(1) An award .... may by leave of the Court be enforced in the same manner as a judgment or

order to the same effect". - (i.e. the same as the English, section 26).

The effect of those provisions do not alter my view of the matters here. In fact they reinforce my view that the English procedures (and it must be remembered that these are procedural matters which are being discussed here) are appropriate both generally in Tonga and specifically in relation to this case.

The Major Issues

For the Defendant it was said that what was being attempted to be enforced here was not the arbitrators award, which was, it was claimed, very narrow and restricted and certainly did not cover anywhere near the extent of the total amounts claimed (i.e. the matters which are included in and make up the total amounts claimed were not all arbitrated matters - but the award related to just a few specific matters only); and/or that the award, in any event, was not in a form which could be enforced as a judgment.

Secondly that, as an alternative, if the award did purport to cover all matters included in the total amounts claimed, that award was incorrect and there were not only discrepancies within it but that it contained, or covered, matters which were still in dispute and on which argument had not been heard on behalf of the Defendant; and/or that, because of various factual matters, the award could not be seen as a final and determinative one. I stress that the Defendant's argument, as put forward on this aspect, was based entirely on factual matters (and no claim of e.g. misconduct by the arbitrator or the award having been improperly procured was made).

Detailed Chronology - such a chronology is necessary and, in itself, is revealing.

3 August 1994 - Building contract entered into for $1,198,233 (subject to variation) and payable by progress payments as certified by the Architect (Jaimi Associates). The full contract is annexed as an exhibit amongst the originating documents, and brief reference only at this stage is made to some Clauses:- (and for the sake of brevity in this Judgment the clauses are not set out in detail and, I add, the remarks or summaries in brackets are mine):-

2 (Plaintiffs to comply with architect's instructions)
15 (practical completion - and certificate thereof)
26 (determination of contract by Plaintiffs and effects thereof)
30 (Certificates of architect, payment thereon, effect of interim and final certificates)
33 (arbitration - including 33(4): "The award of such Arbitrator shall be final and binding on the parties").

By interim certificate No.6, due 22 February 1995, the architect certified a sum, which after part payment, left $38,515.13 due and owing by the Defendant to the Plaintiffs.

2 March 1995 - the architect wrote to the Defendant advising that, under Cl.26, and "on the basis of non payment of the progress payment No.6" the Plaintiffs had lodged notice that, if the default continued for 7 days after the notice, the Plaintiffs "can take further action to determine the contract..... Please advise what action you intend to take to prevent determination by the (Plaintiffs)".

24 March 1995 - the architect wrote to the Defendant setting out details of "the main items that you are not happy with, and where you have made deductions from the payment certificate".

After listing those "main items" that letter contained the following extract:

"Before I comment on the above, I again reiterate my 'plea' that the payment certificate should be honoured and the 'fight' continued and resolved prior to the next certificate. Contractually you (client) create a breach by not honouring the certificate and leave the way open for claims from the contractor ..... Also, contractually, if the (Architect) has erred in the certificate, the Client has the right to claim from the (Architect). I feel confident that the sum in the last certificate, if paid fully, still leaves more than adequate allowance for adjustment of any contentions (sic) items. There is no overpayment to Fletcher Construction, though going on specific items, it may appear to be the case".

The architect issued Certificate No.7 requiring the Defendant to pay to the Plaintiffs $354,825.35 by 11 April 1995.

28 March 1995 - the Architect wrote to both the parties and to the Arbitrator, Mr. Williams, confirming the agreement to go to arbitration under Cl.33 and that "it remains for both parties to submit their case to the Arbitrator for resolution. Submission of all matters disputed by you should now be forwarded ....." (my underlining). "All parties will be given the opportunity to remark on matters raised by the other party in the dispute."

31 March 1995 - the project was completed and a "Certificate of Practical Completion" was issued by the architect to both Plaintiffs and Defendant. The Architect has deposed that prior to the issue of that Certificate the Defendant (through its Brother Director, Brother Kottoor) "had inspected the entire site/buildings with me and subject to the matters listed on the first of two Defects Lists, he accepted the buildings and works as satisfactory"; (my underlining); Brother Kottoor being, according to the architect, "very familiar with the construction works and quality of workmanship because he attended daily at the site throughout the works". The Certificate of Practical Completion also referred to the schedule of defects which "will be issued not later than 5th April '95". That Certificate was accompanied by a letter to the Defendant, from the architect, stating inter alia "A schedule of defects and remedial work list will be issued to the (Plaintiffs) not later than Wednesday 5th April 1995. A copy will be forwarded to you. As per discussed on site this morning with the (Plaintiffs), all remedial work and incomplete items will be completed by the end of April".

3 April 1995 - "Defects Schedule No.1 (Inspection on 31/3/95)" was issued by the architect to the Plaintiffs, covering in detail (and on 9 pages) a large number of matters. A copy went to the Defendant. The architect deposed that this list, along with the subsequent one of 23 May 1995 (which I will refer to later) "were prepared together with Brother Kottoor and to my knowledge, he was otherwise content with the work".

11 April 1995 - Brother Kottoor wrote to the architect re "progess claim No.7 final" and stating inter alia "with reference to the above the claims are not proper in the following in which you" (i.e. the architect) "have not noticed some errors". 6 such areas were listed, and the letter continued "Furtner we are not given the benefits for the works which are not done or altered" and went on to refer to non liability to pay interest "until (sic) the dispute is settled by Mr. Keith Williams ....." (i.e. settled by the Arbitrator - my underlining). That shows, in my view, a full appreciation of the position by the Defendant, and that all matters in dispute, not only those included in certificate 6, but also those included in certificate 7 as well, were to be the subject of the arbitration.

19 April 1995 - Brother Kottoor wrote to the architect in a singularly revealing way,

I find, as follows:

> "re ..... sub. progress claim No.7.
> With reference to the above it is not for us to show you all the mistakes in the payment claim when you are the one to detect all that. We are not going to show you the mistakes unless you want to come and clarify yourself. At the same time to mention one or two ..... As an approximate estimate we may have to pay the contractor another $225,000 to $250,000.... Therefore we are prepared to pay $175,000 now pending the settlement of dispute otherwise we fear the same thing as claim No.6 is going to happen."

Revealing in my view as to both a knowledge of disputes and other claims and an unwillingness to reveal the same fully to the Defendant's own agent.

19 April 1995 - the same day the architect replied to the Defendant expressing concern; and stating inter alia "The memo. of 12 April '95 was intended for you to be more specific in areas in which you claim there are 'errors'. You have a duty to act responsibly and to discuss these matters sensibly with us, and not to continue to waste time by vague and ill formed remarks. Both the (Plaintiffs) and ourselves have been willing to discuss these matters in detail but you have been less than cooperative. We urge you to enter into a spirit of genuine cooperation to ensure that these 'errors' can be sorted out and not left to the Arbitrator". (my underlining).... "Your offer to pay only $175,000 of the certified amount is unrealistic and unreasonable. We will pass on your offer to the (Plaintiffs) but we have no authority to accept it nor would we recommend it". (again my underlining). The letter goes on then to say the Arbitrator will be in Tonga "to resolve outstanding matters, week commencing 1 May 1995".

21 April 1995 - the architect passed on to the Plaintiffs the $175,000 offer ("the reason for the offer .... is the Brother's contention that there are errors in the assessment. The matter will now be referred to the (Arbitrator) for resolution which should occur week commencing 1 May 1995". A copy of that letter went to the Defendant.

4 - 12 May 1995 - the Arbitrator attended Nuku'alofa, met with the parties and the architect, and viewed the works.

22 May 1995 - a further defects inspection was carried out and a Defects Schedule No.2 (of 23 May) was issued by the Architects to the Plaintiffs. The list (on 2 pages) again covered a number of matters (as previously referred to in para. 32 above - the list prepared together with Brother Kottoor and "to my knowledge he was otherwise content with the work" - as deposed to by the Architect).

The Plaintiffs say (and apparently it is not diputed - see para.7 of Brother Kottoor's second Affidavit) that the items in the two Defects schedules were remedied by the Plaintiffs; and that the various other matters raised in the Affidavits, and in the argument, of the Defendant (as alleged defects and incomplete works) were not referred to in the two defect schedules; although (and importantly in my views) as the architect deposes "The disputes now raised by Montfort ..... were available to be raised by the Defendant prior to the arbitration ....".

2 June 1995 - the arbitrator issued what I hold to be an award. It is clear that he believed he was resolving the outstanding issues between the parties. It is my view that the parties knew quite clearly that this arbitration was to resolve outstanding matters between them (the architect had made that abundantly clear, particularly to the Defendant, as can be seen from the summary in the chronology above) in relation to the building

contract and especially matters arising from certificates Nos. 6 and 7.

The award made allowed certain deductions in favour of the Defendant and certain additions in favour of the Plaintiffs; the nett result was a deduction of $129,546.86 from the total contract price. In my view both its form and content are clear; and it is in such a state and form as to be enforceable as a judgment.

12 June 1995 - In accordance with that award the architect re-issued No.7 payment certificate (amended) certifying the sum of $246,446.46 nett as due and payable to the Plaintiffs by the Defendant, after deduction of the retention amount of $29,175.82 (otherwise a gross $275,622.28, i.e. the amount of judgment eventually entered would have been payable).

In my view that amended certificate did no more than set out, in the due contractual form, the result of the arbitrator's award.

I have no difficulty at all, and on the documentary evidence in particular, in finding that the arbitrators determination of 2 June 1995 was an award which did have the very effect (and was meant to have the very effect) as later set out in the amended Certificate No.7 (issued by the Defendant's own agent, the architect). It has been expected to, and did, resolve all those outstanding issues. Both parties had been given every opportunity to put forward their views as to the areas in contention and their arguments thereon. If matters were not raised, for whatever reason, by a party then that was, and is, that party's misfortune (as I will discuss later). Interestingly the architect deposes that "I consider the matters raised by Monfort have no substance. The final Certificate Number 7 (amended) accurately sets out the amount owing ..... except for ..... $3,048.53 ..... All adjustments as otherwise required by Mr. Williams were adopted in this final certificate. With the deduction .... the final Certificate should be $243,97.93".

Both the Award and the Final Certificate have significance under the building contract. The award is final and binding (Cl.33(4)). The Final Certificate (under Cl.30(7) is, inter alia, conclusive evidence of e.g. the architect's satisfaction as to quality of materials and standards of workmanship.

The contractual documents reflect the view, which I find is the view of the law generally, that an arbitration, properly conducted, should put an end to disputes; finality is necessary. The parties to the contract here knew that and had an obligation to bring all outstanding matters, and all matters which could have been raised by the exercise of reasonable diligence, to the arbitration.

13 June 1995 - i.e. the day after the revised Certificate 7 the Plaintiffs wrote to the Defendant "with regard to your breach of the payment terms of the contract.... this notice is to confirm that the contract has been determined by us". This letter referred back to the Plaintiffs' notice of the 2 March (para. 27 above).

14 June 1995 - the Defendant replied saying, inter alia, "You need not expect me to pay the claim unless the certified claim is in order and proper documents are enclosed. (The architects) were asked to do the proper verification and provide proper documents which they have not done. Once these things are done your payment, will be made accordingly". I repeat - the matter before me is not a claim or an argument between the Brothers and their architect.

19 June 1995 - a further letter in a somewhat similar vein is written to the architect by the Defendant.

20 June 1995 - architect wrote to Defendant stating "The matters in dispute have

been arbitrated ..... and the final award of the Arbitrator being final and binding on the parties, the certified claim must be paid. The (Plaintiffs have) determined the contract in accordance with Cl.26, and further correspondence or discussions would be to no avail".

20 June 1995 - letter by Plaintiffs' barrister to the Defendant advising that proceedings will be issued unless payment is made.

28 June 1995 - letter to Plaintiffs' counsel ("Waalkens") from Defendant's counsel ("Edwards") claiming the Defendant's objections to be soundly based and the differences "can be easily resolved without court proceedings".

29 June 1995 - letter Waalkens to Edwards indicating proceedings already dispatched to Tonga and seeking settlement proposals "without delay".

5 July 1995 - these proceedings were filed (para. 4 above).

24 July 1995 - Judgment entered as per para.5 above.

26 July 1995 - faxed letter Waalkens to Edwards enclosing judgment and stating "unless payment is made forthwith enforcement proceedings will follow without any further delay". The clearest warning of need for no delay, one would have thought.

28 July 1995 - letters Edwards to:

(a) Plaintiffs enclosing $200,000 "being payment on account of the judgment ..... if by Monday this matter is not sorted out then we will apply for variation of the judgment and relief from the Court. (The payment receipted as "part payment of final account .....") (The underlining is mine).

(b) Waalkens - restating as in (a) above and saying "We are instructed to apply for relief against the judgment .... (again my underlining).

(c) Architects - in effect summarising the Defendant's view and going on, significantly in my view, that, "our clients are holding you responsible and liable .... in this matter which has directly arisen as a result of your negligence and not protecting our clients' interest....." It may be that, if the Defendant does perceive it has a complaint, it is in relation to it's architect (and I make no comment - and certainly no finding - as to that) but, as I find, the Defendant is bound, in relation to the Plaintiffs, by the award and the amended certificate 7 founded thereon.

2 August 1995 - letter Waalkens to Edwards seeking payment of balance or enforcement action ".vill follow without further notice".

10 August 1995 - letter Waalkens to Edwards enclosing memorandum of costs claimed and warning that "formal court enforcement proceedings for the sale of the premises" may be taken.

16 August 1995 - Plaintiffs' costs for taxation served on Edwards.

5 September 1995 - letter Waalkens to Edwards expressing disappointment that no response had been received and advising of enforcement proceedings.

15 September 1995 - enforcement proceedings by Plaintiffs (applications for garnishee and charging order) filed (see para. 7 above).

21 September 1995 - garnishee and charging orders nisi made (see para. 7 above), for hearing on 6 October 1995.

26 September 1995 - Registrar taxes Plaintiffs' costs and fixes them at $4,270.63.

5 October 1995 - Defendant applies to set aside, vary or amend the orders of 24 July 1995 i.e. nearly some 2 1/2 months after the Orders were first made known to the

Defendant. A general comment - although not determinative here the delay has not helped - and cannot help - the Defendant's position and does affect my view of the validity of the many (and growing) complaints, claims and allegation now made.

Conclusions

As already expressed above I find the parties knew what the arbitration was about and the effects it would have. Under the contract it is a final and binding award. It was meant to, and did, settle the outstanding issues between the parties arising from the building contract and especially arising from and in the Certificates Nos.6 and 7. The amended No.7 (final Certificate) directly resulted and reflected the arbitrator's award.

The award was final and binding. It was able to be enforced as a judgment of this Court - quite appropriately in my view. The award does give rise to an estoppel inter partes with regards to the matters decided therein.

I find that there is no evidence at all that the arbitrator misconducted either himself or the proceedings. The parties had every opportunity to put forward to him all matters in contention. They had an obligation to do so and they had to exercise reasonable diligence to ensure all such matter were raised. The architect is clear that the matters now raised were available to be raised by the Defendant prior to the arbitration (see above). In the lead up to the arbitration there are clear indications that, in the architect's mind, the Defendant was not being forthcoming.

In light of that it is my view that the Defendant cannot be heard to raise these matters it now attempts to do (and the continuing growth of the matters, and the amounts, is disturbing, as I have already indicated (paras. 9 and 64 above).

The rule in Henderson v. Henderson (1843) 3 Hare 100 (see Mustill and Boyds: "The Law and Practice of Commercial Arbitration in England (2nd Ed)" at p. 412) in my view applies here. I refer to the discussion in Fidelitas Shipping Co. Ltd. v V/O Exportchleb [1966] 1 Q.B. 630 at pp. 640, 641 and 643. The principles discussed in Fidelitas clearly apply to arbitrations and as Lord Denning MR said "there must be an end of litigation sometime".

The Defendant had its opportunity here, in arbitration. The issues have been determined. The award of the arbitration is final and binding on the Defendant. There are elements in all this that seem to me to indicate that the Defendant is using these present proceedings and the delay to try and discover evidence to try and reargue afresh its case. The delays in the face of notice(s) to, and by, the Defendant also argue against the grant of any relief to the Defendant.

I find that there are no matters which would allow or lead me to set aside the judgment based on the award; or lead me to the view that that should be done because the award itself should be set aside as there has been a serious miscarriage of justice (refer Halsbury 4 Ed Vol 2 para. 693).

I accept that, on the basis of the architect's affidavit, there should be a variation of the judgment of the 24 July 1995 by reducing the amount contained in Order (2) from $246,446.46 to $243,397.93; i.e. by deducting the Port and Services Tax of $3,048.53 on the back hoe incorrectly included (in view of the arbitration award) in the amended Certificate No.7 by the Architect (not the Arbitrator's mistake - but the Architect's, significantly).

The effect of that reduction is as follows:-

Order 2 of judgment	$243,397.93

Interest (Order 2) of 28/7/95	4,107.60
	247,505.53
Less payment on account 28/7/95	200,000.00
	47,505.53
+ Interest 28/7/95-15/9/95	701.68
+ Order 3 of judgment	29,175.82
Balance as at 15/9/95	77,383.03
+ Costs as taxed	4,270.63
	$81,653.66

Given the determination of the building contract the retention moneys of $29,175.82 mentioned in the amended Certificate No.7 became properly payable and were an intergral part of the whole question of what was payable by the Defendant's under Certificate Nos.6 and 7, and which amount was finally determined by the Arbitrator's award.

The Defendant's application is declined saving to the agreed extent (i.e. agreed to by Plaintiffs and architect, following the Defendant's application) of the variation of Order 2 of the Judgment of 24 July 1995 by the deduction of $3,048.53 as set out above. The Judgment is varied accordingly; and the balance of $81,653.66 set out in para. 73 is the amount to be the subject of the garnishess and/or charging order proceedings which now must be determined.

The Plaintiffs are entitled to costs against the Defendant, as taxed by the Registrar.

On the release of this Judgment a date will be set for the hearing of the Notices to show cause, on both the Garnishee Order Nisi and the Charging Order Nisi.