

CASE IN BRIEF:

BSC CONSTRUCTION LTD V W

The High Court decision in BSC Construction Ltd v Withers [2015] NZHC 1988¹ represents a significant judicial endorsement of the Building Dispute Tribunal's 'on the documents' rules for expedited commercial arbitration.²

Facts

BSC had contracted with Mr Withers to build an accommodation lodge for him. Disputes arose as to the terms of their contract, and whether or not BSC was in breach. Claims and counterclaims were put forward.

The parties agreed to deal with the issues by arbitration. As the High Court judgment records, they wanted a prompt resolution. By an exchange of emails, they further agreed to conduct the arbitration under the Rules, which provide for an award to be given 'on the documents' (i.e., without any viva voce hearing). Both parties understood that the Rules excluded any ability to cross examine witnesses or to make oral submissions.

The Arbitrator made an award in favour of BSC.³ When BSC sought to enforce the award, however, Mr Withers opposed the application and initiated proceedings to have it set aside. His central arguments were that the absence of any opportunity to file evidence in reply to that filed by BSC on its claim amounted to unequal treatment of the parties (thus infringing the right to equal treatment in Article 18 of the First Schedule to the Arbitration Act 1996), and that he had not had a fair hearing as a result.

Decision

The Court held:

There is nothing in the Expedited Arbitration Rules to suggest that the parties contemplated any inequality of treatment. Although they did not provide for a response from Mr Withers to any sworn statements submitted by BSC in response to his counterclaim, that was no different from BSC's inability to reply to the evidence to be given on Mr Withers' defence. A symmetrical approach was taken to the evidence to be given in support of and in opposition to BSC's claim (on the one hand) and evidence in support of and in opposition to Mr Withers' Counterclaim (on the other).⁴

...

... there was no breach of the rules of natural justice by the Arbitrator. He gave both parties an opportunity to be fully heard (on the papers, as agreed between them)

and made factual findings on the evidence submitted in accordance with the arbitration agreement.⁵

The application to set the award aside was dismissed, and the application by BSC to enforce the award was granted.

Comment

The decision confirms that where the parties in an arbitration have agreed to the 'on the documents' procedures set out in the Rules in order to have a prompt outcome, then the Court will hold them to that.

In reaching its decision, the Court referred to and placed significance on the clauses of the Expedited Arbitration Rules which set out the purpose of the Rules (i.e., "*to ensure that the arbitration is conducted fairly, promptly and cost effectively and in a manner that is proportionate to the amounts in dispute and the complexity of the issues involved*"⁶) and the Overriding Objective (i.e., "*to enable the Arbitrator to produce a final award including as to costs within 45 working days after appointment*"⁷). As Heath J said:

The contractual provisions governing delivery of Points of Claim, Defence and Counterclaim, together with sworn statements and documentary evidence, contemplated that Mr Withers would put his best case forward on his counterclaim in sworn statements filed in support, but would not have any opportunity to reply to sworn statements and supporting documents provided by BSC in response. Those arrangements evidence an intention, on the part of both parties, to reduce procedural safeguards otherwise available to minimise the risk of incorrect factual findings. **That was the price that they were prepared to pay to obtain a prompt resolution of their dispute.**⁸

The judgment is a welcome confirmation that procedures in the BDT's Rules for Expedited Commercial Arbitration provide a dispute resolution mechanism that is both proportionate to what is in issue, and effective in the end result.

END NOTES:

¹ 21 August 2015 per Heath, J.

² The case concerned an agreement to arbitrate on the BDT's ECA 45 Agreement to Arbitrate and Rules for Expedited Commercial Arbitration on the Documents: see <http://www.buildingdisputestribunal.co.nz/ARBITRATION/ARBITRATION+RULES.html> (referred to as 'the Rules'). These are the same as the ECA 45 Agreement to Arbitrate and Rules for Expedited

Commercial Arbitration on the Documents, offered by the New Zealand Disputes Resolution Centre (NZDRC): <http://www.nzdrc.co.nz/ARBITRATION/ARBITRATION+RULES.html>.

3 There were in fact two awards: a partial award dealing with the substantive issues, and a final award dealing with costs. However, nothing turned on that in the High Court, and it is convenient to refer to both as one award for present purposes.

4 Para [50]; the judgment then addresses an argument that the Arbitrator had agreed to contact Mr Withers if he (the arbitrator) considered that any affidavits raised issues of credibility on which Mr Withers had not commented. The Court found that the Arbitrator had not placed any reliance on such evidence, which he (the Arbitrator) had not considered to be determinative of anything of importance.

5 Para [57] of the judgment.

6 Clause 1.1 of the Rules.

7 Clause 1.2 of the Rules.

8 Para [26] of the judgment; emphasis added.

Royden Hindle

Royden is an Arbitrator, Adjudicator and Mediator based in Auckland, New Zealand.

He is a Principal Panelist with Building Disputes Tribunal, NZDRC and NZIAC.



In 28 years' practice as a general civil and commercial litigation practitioner, Royden has been involved in cases covering a wide range of topics, including Arbitration; Commercial matters; Commissions of Inquiry; Companies; Competition Law; Construction; Contracts; Disciplinary matters; Employment; Energy; Fishing quotas; Forestry; Human Rights; Intellectual property; Judicial review; Land; NZ Bill of Rights Act; Practice and procedure; Property; Public law; Public reserves and roading; Summary judgment; Tax; and Trade practices.

Royden has appeared as amicus curiae in the Maori Land Court, and in the High Court. In addition he has been involved in a number of substantial arbitrations, both as counsel and as Arbitrator. Before taking on the role of Chairperson of the Human Rights Review Tribunal on a full time basis in 2005, he conducted a number of successful mediations.