JUDGMENT : White J : New South Wales Supreme Court, 5th August 2005

1 This matter was listed for hearing before me yesterday. After the evidence and the submissions for the plaintiff had been completed, the parties reached an agreement for the progress of the arbitration before Mr Callaghan SC which rendered it unnecessary for the plaintiff to pursue the claims in the amended summons. Accordingly the amended summons was dismissed. The only remaining issue is costs.

2 The principles upon which costs should be determined when a party elects not to pursue a claim because it has achieved the relief sought in the action by settlement or other extra-curial means were described by McHugh J in ***Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin*** (1996) 186 CLR 622 at 624-625 as follows: *"In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.*

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the cost of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. …...

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter has been fully tried. ... But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the Court will make no order as to the costs of proceedings."

3 The plaintiff submitted that there should be no order as to costs so that each party should bear its own costs. The defendant submitted that the plaintiff should pay its costs.

4 In substance counsel for the defendant submitted that having regard to the stage the matter had reached when it was resolved by settlement, I should feel confident that the defendant would have succeeded.

5 It was also submitted that the plaintiff had acted unreasonably in commencing the proceedings because;
(a) the proceedings on any view had doubtful prospects of success;
(b) the same result could have been achieved at less cost by the service of a new notice of dispute which did not suffer from the defects of the first notice;
(c) the agreement which the parties reached yesterday was no different in substance from that which the defendant had offered on 15, 18 and 27 July; and
(d) if the plaintiff had required further specificity in what it sought from the defendant, it should have continued discussions with it.

6 To that, one could add the consideration that even if the plaintiff had succeeded, the genesis of the dispute was an ill conceived notice of dispute which, even if valid or partially valid, was likely to complicate and delay the arbitration, or lead to a collateral challenge to determine to what extent the notice identified issues which could be arbitrated.

7 As this judgment is only on costs, I will dispense with a description of the events which gave rise to the proceedings, even though that may make the reasons difficult to follow for a reader not familiar with the background.

8 Had the proceedings not been resolved by agreement the merits of each party's position before Mr Callaghan SC would have been irrelevant to the relief sought by the plaintiff, although not irrelevant as to costs. There would have been two critical issues.

9 The first would be whether the notice of dispute of 11 April 2005 was valid, or partly valid, so as to activate the processes of cl 18.

10 Given that no issue was taken before me as to the validity of the condition stipulated by the Institute of Arbitrators and Mediators in their letter of 23 June 2005, the second issue would have been whether, if the notice was valid, or partly valid but sufficiently so as to trigger cl 18, grounds existed for the appointment of an arbitrator under s 10 of the *Commercial Arbitration Act*, or whether other orders could be made for the appointment of Mr Callaghan SC as arbitrator, if he was willing to accept the appointment, so as to give the plaintiff the substantive relief which it sought.

11 I have not concluded that the defendant would almost certainly have succeeded on those issues. It is clear that the first notice was defective. No notice of dispute or difference could properly be given whose effect would be to preclude an adjudicator from determining the defendant's adjudication application because the issues had been referred to arbitration, nor which identified as a dispute or difference to be decided by an arbitrator a matter which was solely within the province of the adjudicator.

12 There is force in the defendant's submission that that was precisely what the first notice sought to achieve. By the letter of 11 April, 2005, the plaintiff sought to halt the adjudication by reference to what it called jurisdictional issues raised in the letter of that date to the Institute. Moreover, the effect of s 34 (2) (a) of the *Building & Construction Industry Security of Payment Act* 1999 would be to render void any provision of the contract which purported to modify the operation of the Act. Therefore cl 18 of the agreement would have to be construed so as not to authorise the giving of a notice which purported to raise a dispute or difference for the purposes of the arbitration provisions of that clause, which would in any way modify the operation of the adjudication procedures under the Act.

13 Senior counsel for the plaintiff submitted that the question of what could be arbitrated did not affect the validity of the notice. Those were matters which the arbitrator, or if necessary the Court, could determine, without thereby affecting the validity of the notice. In my view that submission did not take account of the invalidating effect of s 34 (2) (a) on contractual provisions which purport to modify the operation of the Act, and hence the extent to which the contract could authorise the service of notices of dispute intended to be a trigger to arbitration.

14 Nonetheless, the question would remain whether the notice should be construed in such a way that invalid parts could be severed such that the valid parts of the notice were sufficient to trigger cl 18. That is not a question I am now called on to decide. I cannot say that the defendant would certainly have succeeded on it.

15 As to the other principal issue, it is enough to say that I am not persuaded that the plaintiff would almost certainly have failed to achieve substantive relief if the notice had been held to be partially valid.

16 I turn then to the question of whether the proceedings were unreasonably commenced. By 15 July 2005 the defendant through its solicitor, Mr Dorter, had said that if a new notice of dispute was served that morning for the defendant to consider, and if the defendant accepted it, then it would agree that the arbitration process would be fast-tracked, the nomination would be taken as read, and the defendant would accept the condition - see transcript page 26. This last, was a reference to the conditions stipulated by the Institute which the defendant says it did not accept on the basis that the nomination was defective being based on what it said was a defective notice of dispute. Mr Dorter also made it clear that the foundation of the arbitration would be the new notice, if it were acceptable to the defendant. The plaintiff, through its senior counsel, sought an assurance in advance of providing such a new notice that the defendant would proceed with the arbitration and that no more "technical points" would be taken. That was not a reasonable request. I do not understand how the defendant could be expected to confine itself in advance not to take "technical points". It seems that that disparaging term was intended to encompass any objection to the validity of the arbitration process.

17 Later on 15 July, the plaintiff gave a new conditional notice of dispute. It did so in a letter which prefaced the new notice of dispute with an accusation that the defendant was taking technical points as a delaying tactic. The author of the letter castigated the objections taken by the defendant as spurious and calculated to cause delay. In my view, given the defect in the first notice, it did not lie in the plaintiff's mouth to make such accusations. Nothing before me shows that they were reasonably based: quite the contrary. Had the defendant wished to delay the arbitration by taking issue with the notice of dispute there were ample grounds for it to do so. It appears to me, however, that it sought to avoid such a dispute. I have to say, regrettably, that the plaintiff's letter of 15 July was discourteous. Its hectoring tone did nothing to advance the plaintiff's case, or to resolve the issue which had been delaying the arbitration, but which was an issue of the plaintiff's own making.

18 The new notice was subject to conditions which rendered the document useless for the purpose for which it was intended. One was that Mr Callaghan issue directions that afternoon. It appears to me that on the failure of that condition, the new notice of dispute lapsed unless it was later revived. Another condition was that "*all further technical objections to the advancement of the arbitration would be withdrawn*". The meaning of that sentence is obscure. The reference to withdrawal would seem to indicate that the sentence was directed to technical objections already taken. However, the reference to further objections would seem to indicate that the plaintiff intended that if the new notice was accepted as the foundation of the arbitration, the defendant would be precluded in the future from taking any objection to the validity of the arbitration process. That was unreasonable.

19 The new notice was also said to be without prejudice to the plaintiff's contentions as to the validity of the old. At least on one view, this statement may have left it open to the plaintiff to contend that all of the issues raised by the old notice were also before the arbitrator.

20 The defendant did not accept the conditions. Nor did it accept that the new notice could be without prejudice to the old. Later in the afternoon of 15 July, it did agree to proceed with the arbitration on Monday 18 July, on the basis of the new notice being read without the conditions and without the “without prejudice” reservation.

21 On 18 July Mr Callaghan wrote a note, on the basis of which he was to enter on the reference. It was that the defendant agree to proceed on the arbitration with the new notice of dispute being the section of the letter of 15 July headed "Notice of Dispute” without the conditions and that the defendant agree to a part of another document dealing with fees and administrative matters.

22 By this time the plaintiff had proposed a new deed of arbitration but it would have incorporated the letter of 15 July in its entirety as the notice of dispute.

23 The plaintiff refused to proceed on the basis proffered by the defendant unless Mr Dorter assured the plaintiff that he was not going to take any more technical objections. That was a request to which Mr Dorter did not respond. In my view it was not a reasonable request.

24 It was in this unhappy state of affairs that the plaintiff filed the proceedings, rather than seek an assurance from the defendant that if the parties accepted the new notice of dispute free of conditions and without prejudice reservations, and proceeded with the arbitration with Mr Callaghan, the defendant would not contend that the arbitration had not been properly commenced or that Mr Callaghan had not been properly nominated.

25 There was a difference in the recollection of the solicitors who swore affidavits as to precisely what assurance was sought by Ms Mihail from Mr Dorter at the meeting of 18 July. Neither was cross-examined on his and her evidence, and it is not possible to resolve the difference. Plainly each solicitor has a different recollection. But whatever the position may be, if clarification of the defendant's position were needed the plaintiff should have courteously sought it. It did so on 26 July by letter of that date. It sought clarification that the two points in relation to Mr Callaghan's nomination which had been earlier raised were waived. The defendant replied that it was ready to proceed with Mr Callaghan entering on the reference on the basis of the two documents tabled at the meeting of 18 July, and that "*entering upon the reference resolves the nomination question*".

26 As this is a judgment only on costs, and as the point was not fully argued, I do not propose to decide whether by estoppel or by contract the defendant would have been precluded from later contending that the arbitration had not been properly commenced or Mr Callaghan had not been properly nominated, if the parties had acted on the basis of the defendant's written and oral statements. What is clear to me is that proper communication between the parties would readily have resolved the issue. The failure of such communication lies, in my view, in the insufficiently precise and unnecessarily aggressive stance taken by the plaintiff. In my view there was no need for these proceedings. They were not reasonably commenced.

27 For these reasons I order that the plaintiff pay the defendant's costs.

28 The exhibits may be returned.

Plaintiff: M S Jacobs QC, P J Bambagiotti instructed by Meriton Apartments Pty Ltd - Daniel Grynberg
Defendant: M Christie instructed by Allens Arthur Robinson