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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 71 of 1992

BETWEEN:

TMC CONSTRUCTIONS PTY LTD
(IN LIQUIDATION)
Plaintiff

AND:

COLLINS RADIO CONSTRUCTORS INC
Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 8 April 1992)

The application

By summons of 13 March 1992 the plaintiff sought an order under Rule 37.01 authorising it to enter on certain lands and arrange for such of its property presently on those lands to be moved to another place, there to be kept "until the dispute concerning legal title to that property is resolved." It also sought supporting orders by way of injunctions restraining the defendant from preventing its entry and removal of the property, and from dealing in any

way with the property; and a declaration that the plaintiff was entitled to immediate possession of its property.

When the application came on for hearing on 19 and 26 March 1992 the parties resolved the matters in issue between them on the summons by an Undertaking filed in Court in which the defendant undertook not to allow the items listed by the plaintiff in its summons as "the plaintiff's property" (except one), to become confused with other plant on the premises; not to allow that property to be removed from the premises; not to allow any dealing with the property; to protect it; and to make it available to the plaintiff for collection, upon completion of certain works. The further hearing of the summons of 13 March 1992 was adjourned, in order that the question of the costs of that application could be determined. That question was argued before me on 2 April; I now rule upon it.

The background

The background to the application of 13 March 1992, in broad terms, is as follows. On 13 March the plaintiff issued a Writ against the defendant. In a statement of claim endorsed on the Writ the plaintiff claimed that on 15 March 1991 it had agreed with the defendant to construct a complex of flats on Lot 7414 Stephens Road, Alice Springs; on 12 November 1991 Mr Perkins

was appointed provisional liquidator of the plaintiff and was appointed its liquidator on 12 December 1991; on 15 November 1991 the defendant gave notice to the plaintiff requiring it to show cause why it should not be terminated under the contract; on 17 December 1991 the defendant purported, under Clauses 18 and 31 of the contract, to terminate it, by notice. The plaintiff contended in its statement of claim that the issue of the notice to show cause on 15 November was not authorised by the contract, and the purported termination of the contract on 17 December under Clauses 18 and 31 was invalid, for reasons which it set out. It contended that the issue of the notice to terminate on 17 December and the engagement of another contractor by the defendant constituted fundamental breaches and repudiations of the contract; that it had accepted those repudiations; and that it had suffered loss and damage from those repudiations, which it set out.

We come next to the issue which gave rise to the application of 13 March. The plaintiff further contended in its statement of claim that it had a licence to occupy certain land adjacent to the construction site, for one year from 15 April 1991; that after the purported termination on 17 December 1991 the defendant had wrongfully occupied and used that adjacent land and prevented the plaintiff from having access to it; that the plaintiff owned certain plant

and equipment, which it then specified, which was stored on the adjacent land and on the construction site; that it had demanded the return of those items but the defendant had refused to return them and had wrongfully detained or converted them.

The plaintiff's case

Ms Philp appeared for the plaintiff. She contended that the plaintiff had demanded the return of its property, but the defendant had failed to do so. She referred in support to various letters. First there was the liquidator's letter to the defendant of 23 December 1991. In that letter Mr Perkins said that "certain items of equipment" on the site were the property of the liquidator; he asked the defendant not to deal with them and advised that he intended to remove "stock and site sheds" on the adjacent land in the near future; he requested that this not be obstructed.

Secondly there was a letter of 6 January 1992 by Bonnins, the solicitors for the liquidator, to the defendant. This letter dealt with the validity of the defendant's purported termination of 17 December 1991 and the consequences of that termination, which it contended was invalid. Bonnins also stated:-

"We are instructed that the duly authorised representatives of the liquidator have been refused access to the construction site to collect the property of the [plaintiff] company and that your security contractor's personnel have prevented our client's representatives from removing property of the company held on adjacent land which is leased to the company. The items of plant, equipment and goods include scaffolding, power boards, portable toilets, site sheds and the materials identified in paragraph 2 of the attachment to the letter from the liquidator to you dated 24th November 1991.

The action taken by your company in relation to the company's property is clearly unlawful. Given your breach of the contract, it is not open to you to rely on the provisions of the contract to justify your action. In any event, our client is required by section 471 of the Corporations Law to take into his custody all property to which the company is entitled. Your action is obstructing the liquidator in the discharge of his lawful duties as an officer of the Court.

Your action also constitutes wrongful detention of the goods and our client is entitled to bring action against you for damages.

The liquidator instructs us that he intends to arrange for the collection of items from the land leased to the company in the near future. We request you instruct the security guards not to obstruct the duly authorised representatives of the liquidator from entering upon the leased land and removing site sheds and stock. We also request you provide us with immediate written confirmation that such an instruction has been given.

We also request you confirm that the duly authorised representatives of the liquidator may enter upon the construction site to collect the property of the company.

If we do not hear from you regarding these matters by 12 noon on Friday 10th January 1992, our client will be compelled to institute proceedings against you for injunctions and other relief."

Third, the reply to that letter from Finlaysons, the solicitors for the defendant, dated 10 January 1992, which stated, inter alia:-

> "3. Wrongful detention of property
>
> By virtue of the operation of the provisions of the contract, the liquidator is not entitled to "possession of the construction work, the site and all materials, tools, and other properties erected or stored thereon as may be necessary in completing the work" and is not allowed to enter the work site.
>
> You refer to "collection of items from the land leased to the company" however you fail to identify the items that you say are "property to which the company is entitled". Without conceding that the liquidator is entitled to collect certain items, the liquidator's interests might better be served if you properly identify the said items."

Ms Philp contended that the plaintiff had previously adequately identified the items in question to the defendant.

Fourth, Bonnins' letter of 14 January 1992 to Finlaysons in reply, which stated, inter alia:-

> "It appears you have misunderstood our complaints regarding this aspect of the matter. Our client complains (inter alia) regarding the following matters;
>
> 3.1 The duly authorised representatives of the liquidator have been refused access to the

construction site to collect the property of the company.

3.2 Your client's security personnel are restricting the lawful access of the duly authorised representatives of the liquidator to the adjacent land which is leased to TMC.

3.3 Your client's security contractor's personnel have prevented our client's representatives from removing property of the company held on adjacent land which is leased to TMC.

3.4 Your client's (sic) has caused or permitted persons to enter upon the adjacent land which is leased to TMC and (inter alia) to break and enter the locked site sheds and locked container on that property.

3.5 Your client is using or permitting the use of the site sheds erected on the adjacent land which is leased to TMC as offices.

The provisions of the contract to which you refer have no application given the invalidity of the Notice to Terminate. Even if that notice was valid, the provisions of the contract would not sanction the conduct of your client referred to in paragraphs 3.2 to 3.5 inclusive. It is clear that your client has committed a number of torts for which it is liable to our client regardless of the validity of the termination.

The liquidator has already clearly identified the goods which are claimed to be owned by the company in written communications to your client. Your client's interest might be better served by providing you with full instructions so that the issues can be properly addressed rather than avoided.

Notwithstanding the prior provision of this information, we enclose a list of the items belonging to the company stored on the land leased to TMC and a list of the items belonging to the company which are on the construction site." (emphasis mine)

The letter also stated:-

> "We assume from the final paragraphs of your letter that your client still will not permit the duly authorised representatives of the liquidator;
>
> 5.1 to enter the construction site to collect the property of the company,
> 5.2 to enter upon the adjacent land which is leased to TMC.
> 5.3 remove the property of the company held on adjacent land which is leased to TMC or
>
> Would you kindly confirm the intentions of your client with respect to the collection of TMC property and access to the land leased by TMC adjacent to the site by no later than 3.00 p.m. on Wednesday 15th January 1992."

Fifth was Finlaysons' letter of 15 January 1992 in reply, suggesting, in essence, that the matters in issue be resolved by a Court.

Ms Philp submitted, on the basis of the foregoing material, that the defendant had never conceded that the plaintiff had any entitlement to the property, either immediately or upon completion of the works.

Ms Philp then referred to paras 3, 4 and 10 of Mr Martin's affidavit of 10 March 1992. Mr Martin, who assists Mr Perkins, deposed that he had entered on the adjacent land on 27 January 1992 and had noted that 8 tons of scaffolding, the property of the plaintiff, was then erected on the site. He said that he was prevented by the defendant's agent from removing the plaintiff's property

from the site and from the adjacent land. He then deposed to his belief that certain of the plaintiff's property had been removed by persons unknown as at 24 February 1992 and that he believed that the plaintiff would not be allowed to enter on the site or on the adjacent land to remove its property, until the respective legal advisers had been consulted.

There then followed the issue of the Writ and the summons 3 days later on 13 March 1992.

Ms Philp then referred to Finlaysons' letter of 18 March 1992 to Bonnins. Inter alia, this letter referred to the defendant's invocation of Clauses 18 and 31 in its notice of termination of 17 December 1991, three months before, and continued:-

> "Clause 31 prohibits your client from removing "any materials, tools or other properties which have been erected or stored at the work site for construction purposes". Further, clause 31 allows Collins Radio to "take possession of the construction work, the site and all materials, tools and other properties erected or stored thereon as may be necessary in completing the work, and may utilize such materials, tools and other properties either through its own forces or the employment of a third party". Collins Radio is therefore clearly entitled to take possession of the construction work, the site and all property it requires to complete the work, subject to the requirement that the property is "returned to your client immediately following the completion of the work". It is our view that the

> contractual distinction your client purports to draw between property located upon the "construction site" and upon "adjacent land" is an invalid and irrelevant distinction. Clause 31(a) is sufficiently wide to operate in respect of all property that is required "for construction purposes". This interpretation accords with common sense and logic so far as the contract and the project are concerned.
>
> The work has not been completed, it is our client's estimate that the work will not be completed for at least 12 weeks. The property is required to complete the construction work. The definition of "work" provides that the term means all the duties and obligations imposed on your client by the Contract. - - -
>
> Our client further disputes that all the scaffolding referred to in Mr Martin's affidavit is your client's property. The bulk of the scaffolding is the property of Cyclone Acrow. Your client provided some scaffolding for the project, but the bulk of the scaffolding was in fact hired by your client from Cyclone Acrow, and the hired scaffolding has been returned to Cyclone Acrow. There is some scaffolding provided by your client which remains on site. That scaffolding may be collected by your client at any convenient time.
>
> You have made no approach to our client to extract appropriate undertakings in relation to dealing with the items which your client claims as its own property. Had you done so, Collins Radio would have given the undertakings which it now offers to the Court and to your client. - - -"
> (emphasis mine)

The letter offered an undertaking along the same general lines as that ultimately incorporated in the Undertaking filed in Court.

Ms Philp submitted that this letter by the defendant's solicitors of 18 March 1992 contained the first admission or acknowledgment by the defendant that the property in question belonged to the plaintiff. She noted that the plaintiff had never conceded that the notice of termination of 17 December was valid and, accordingly, it had not conceded that the defendant could exercise its rights under Clause 31. She submitted that as far as the plaintiff was aware, until 18 March 1992, its equipment on the site and the adjacent land was no longer required for the contract works. For this contention she relied on what Mr Martin had deposed to in his affidavit of 10 March 1992, as to his observations when he visited the site on 27 January. She reiterated that it was not until receipt of Finlaysons' letter of 18 March 1992 that the plaintiff was positively informed that the contract works had not been completed, and would not be completed for at least 12 weeks; and that the plaintiff's property would be required by the defendant to complete those works. She stated that it was only in the light of that information, and only then, that the plaintiff decided to accept the defendant's undertaking of 18 March. Had the concession in the letter of 18 March been made before the Writ and summons were issued on 13 March, the summons may never have to be issued.

The defendant's case

Mr Stewart, for the defendant, submitted that the costs of the application of 13 March 1992 should either be adjourned for decision by the trial judge following the trial of the action or, alternatively, they should be costs in the proceeding. An order in the latter form would mean that the party in whose favour an order for costs was made following trial of the action, would thereby be entitled to its costs of the application of 13 March 1992; an order of the former type would leave the trial judge with a more complete discretion, and was therefore preferable in Mr Stewart's submission.

Mr Stewart referred to the defendant's Notice to Terminate of 17 December 1991. Inter alia, that Notice recited:-

> "D Clause 31 of the Contract provides for termination of the Contract if the Contractor [that is, the plaintiff] falls behind the approved construction schedule (or any revision thereto) and refuses or fails to prosecute the Work, or any separable part thereof, with such diligence as will reasonably insure its completion within the time specified in the Contract."

The Notice then notified the plaintiff to cease work and required it, inter alia, to -

"1.1.3 attend the site by appointment with a representative of Collins [the defendant] to jointly make a record of the quantity and value of work completed to date and an inventory of all materials, tools and other properties taken over from the Contractor."

The plaintiff was also given notice that -

"3. Collins has taken possession of the site, the Work and all materials, tools and other properties erected or stored thereon as may be necessary in completing the Work.

4. The Contractor is excluded from the site and from the Work.

6. The Contract is by virtue of Clauses 18 and 31 of the Contract terminated and any monies payable thereunder are absolutely forfeited to Collins as part payment of Collins' entitlement to payment pursuant to the Contract and to damages as set out in the Notice of Claim and Collins may exercise further rights conferred upon it in respect of the Work and the Contractor's obligations referred to in the Contract by the Contract or otherwise at law or in equity." (emphasis mine)

I note that Clause 31 of the general terms and conditions of the contract, which provides for termination for default, provides in para (a) that after taking the necessary steps and cancelling the contract:-

"Subject to the aforesaid, Collins may take possession of the construction work, the site and all materials, tools, and other properties erected or stored thereon as may be necessary in

> completing the work, and may utilize such materials, tools and other properties either through its own forces or the employment of a third party. Collins and the Contractor shall jointly make an exact record of the quantity and value of work completed on date of cancellation of Contract and an exact inventory of all materials, tools and other properties taken over from the Contractor as of that date. Neither the Contractor nor his representative shall be allowed to enter the work site thereafter."

Mr Stewart contended that by this provision, and assuming clause 31 had been properly brought into operation, the defendant was entitled to utilize the items in question to complete the works.

Mr Stewart also relied on a further sentence in Finlaysons' letter of 10 January 1992, in addition to the extract set out at pp.5 and 6, viz:-

> "Collins has lawfully terminated the contract and is thereupon entitled to proceed as set out in the Notice to Terminate."

Mr Stewart submitted that Finlaysons' letter of 10 January made it clear that there was no dispute about the ownership of the items in question. The defendant was clearly claiming only the right to possess and use those items, to complete the contract works.

He referred to the statement of claim; the gist of it is set out at pp.2 and 3. He said that the defendant relied on the notice of 15 November 1991 to show cause and the termination notice of 17 December 1991 as constituting valid and effective notices and as providing the basis for its right to possession of the items. The validity of those notices can only be determined at the trial.

He submitted that the question of the costs of the application of 13 March should not be decided at this point because the plaintiff's claim in para.1 of the summons of 13 March for the return of the items was premature, since the defendant alleged it had a contractual right to utilize them. In its summons of 13 March 1992 the plaintiff had sought in para.1 an order for the immediate delivery of the items; it had not been successful in that claim so far as the Undertaking went. Nor had it been successful in the Undertaking in its claim in para.4 for a declaration that it was entitled to immediate possession of the items. The plaintiff had, instead, accepted the defendant's undertaking; this allowed the defendant to remain in possession and to enforce what the defendant maintained were its lawful contractual rights following its lawful termination of the contract, until "completion of the work" (see para.4 of the Undertaking).

Mr Stewart submitted that it was implicit in the Notice of Termination of 17 December that the items in question were only being claimed to be utilized by the defendant pursuant to the contract; the defendant made no claim to the ownership of those items. The Undertaking was consistent with that approach. Whether or not the defendant was wrong in its claim to have a right to utilize the items, was a decision to be made by the trial judge; hence it was right that the trial judge should decide the question of the costs of the application of 13 March, which turned upon that question.

Conclusion

This is an application for the costs of an interlocutory application. The general principles relating to the award of costs in interlocutory applications were discussed by Martin J in *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, 29 May 1990); see also *Milingimbi Educational and Cultural Assn. Inc. v Davis & Anor.* (unreported, 12 October 1990 at pp.2-5); and *Yow v Northern Territory Gymnastic Assn. Inc.* (unreported, 2 October 1991). In *Yow*, where an award was made, the decision on the interlocutory application terminated the whole of the proceedings, for practical purposes.

The validity of the notices of 15 November 1991 and 17 December 1991 will be determined at the trial of the action. However, in my opinion, by its notice of termination of 17 December 1991 the defendant made clear to the plaintiff the nature of the claim to the items which it made. It is clear, in my opinion, that the defendant has never claimed ownership of the plaintiff's items; the plaintiff should always have been well aware of that. Mr Perkins' letter of 23 December 1991 clearly misapprehended the nature and basis of the defendant's claim, and its contractual consequences as a claim to be entitled to utilize the plaintiff's items. Bonnins' letter of 6 January 1992 proceeded on the basis that the termination of 17 December 1991 was an invalid "termination", a question which remains to be determined at the trial; until that question is resolved, it cannot be said, other than forensically, that the defendant's action in relation to the plaintiff's property "is clearly unlawful", and the defendant cannot "rely on the provisions of the contract to justify [its] action." Finlaysons' letter of 10 January put the basis of the defendant's actions quite clearly. Whether those parts of Bonnins' letter of 14 January 1992 which are emphasized, are correct, and if so, what their consequences may be, can only be determined at the trial.

Adopting that approach, I consider that there is no substance in Ms Philp's submission that the defendant had never conceded the plaintiff's entitlement to the property upon completion of the works, and did not concede until 18 March 1992 that the items belonged to the plaintiff. In fact, the defendant never put in issue those aspects of the plaintiff's rights. What is and was solely in issue between the parties was the extent to which Clause 31 of the contract, in the light of the facts to be established at trial, including the validity of the notices of 15 November and 17 December 1991, affected the plaintiff's right to immediate possession of its items in question.

The emphasized parts of Finlaysons' letter of 18 March 1992 did no more than spell out with crystal clarity what had already been sufficiently spelled out before.

It is, I think, with respect, somewhat disingenuous of the plaintiff to contend that it was not aware until 18 March 1992 (that is, until after it had issued its summons) that its equipment was required for the works. The reliance placed by the plaintiff on Mr Martin's affidavit of 10 March 1992 to support that contention is misplaced; in para 5 of his affidavit Mr Martin simply said

that he "was unable to form a view as to whether [the plaintiff's items were] being used by the [defendant]."

It is unnecessary to discuss in any detail Mr Stewart's submissions; in general I accept them. As is apparent from the foregoing analysis I consider that Mr Stewart is correct in his submission that the appropriate order is that the costs of the application of 13 March 1992 should be reserved for the consideration of the trial judge.

Order accordingly.