JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CHAMBERS

CITATION : **KNM PROCESS** SYSTEMS SDN BHD -v- MISSION NEWENERGY LTD FORMERLY KNOWN AS MISSION BIOFUELS LTD [2014] WASC 437 (S)

CORAM : MARTIN CJ

HEARD : ON THE PAPERS

DELIVERED : 30 JANUARY 2015

FILE NO/S : CIV 1906 of 2014

BETWEEN : **KNM PROCESS** SYSTEMS SDN BHD

Plaintiff

AND

MISSION NEWENERGY LTD FORMERLY KNOWN AS MISSION BIOFUELS LTD

Defendant

Catchwords:

Costs - Application for a stay of proceedings under the *International Arbitration Act 1974* (Cth) - Whether costs should be awarded on an indemnity basis for proceedings brought in breach of an arbitration agreement - Where party succeeded on one issue and failed on others - Turns on own facts

Legislation:

International Arbitration Act 1974 (Cth), s 7(2)
Rules of the Supreme Court 1971 (WA), O 66 r 1

Result:

Plaintiff pay defendant's costs of the stay application on an indemnity basis

Category: B

Representation:

Counsel:

Plaintiff : No appearance

Defendant : No appearance

Solicitors:

Plaintiff : Bennett & Co

Defendant : Clifford Chance

Case(s) referred to in judgment(s):

1 **MARTIN CJ**: For reasons given orally at the conclusion of argument on 14 October 2014,[13] I upheld the application of the defendant, Mission NewEnergy Ltd (Mission) for a stay of the proceedings brought against it in this court by the plaintiff, **KNM Process** Systems SDN BHD (KNM), and pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth) (the Act) directed that the dispute the subject of these proceedings be referred to arbitration to be conducted by the Singapore International Arbitration Centre on condition that Mission commenced arbitral proceedings within 35 days of the making of those orders, and upon the further condition that the parties take all reasonable steps to conduct and conclude the arbitration as expeditiously as possible. As there was a dispute between the parties with respect to the appropriate orders to be made regarding the costs of Mission's application for a stay, I directed that the parties exchange written submissions on that question, and further directed that the issue be resolved by me on the papers. These are my reasons for concluding that KNM should be ordered to pay Mission's costs of the application on an indemnity basis - that is to say, covering all costs reasonably incurred by Mission and which are not unreasonable in amount, such costs to be taxed if not agreed.

The guiding principle

2 In ***Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd***,[14] I applied the reasoning of Colman J in ***A v B***[15] to conclude that as a guide to the exercise of discretion in relation to the costs of an application for a stay of a dispute falling within an arbitration agreement, a party commencing legal proceedings in breach of the arbitration agreement should generally be ordered to pay all costs reasonably incurred by an innocent party applying for a stay of those proceedings. However, I emphasised that the principle was no more than a guide, and that the ultimate exercise of the discretion in any particular case would depend critically upon its particular circumstances. Nevertheless, for the reasons which I then expressed, that guiding principle provides an appropriate starting point for the consideration of the order most appropriately made with respect to the costs of these proceedings.

3 KNM submits that there are three reasons why the guiding principle should not be applied in the circumstances of this case. First it is submitted that Mission should not be awarded indemnity costs because it did not commence the arbitration proceedings in Singapore until the evening of the 35th day following the orders which I made on 14 October 2014. It is submitted that the commencement of the arbitral proceedings at the last minute constituted a contravention of the condition which I imposed to the effect that the stay was conditional upon the parties taking all reasonable steps to conduct and conclude the arbitration as expeditiously as possible.

4 I do not accept that submission. At the time I pronounced orders on 14 October 2014, I considered that 35 days was a reasonable period within which to require Mission to commence the arbitration proceedings, having regard to the provisions of the dispute resolution clause in the agreement between the parties which required mutual discussions between the parties, and which further provided that if the dispute could not be settled within 30 days by such mutual discussions, the matter was to be referred to arbitration. No evidence has been adduced with respect to the course of discussions over the period of 30 days to which reference is made in the dispute resolution clause, and it is therefore impossible to conclude that Mission was dilatory in the commencement of the arbitral proceedings. But in any event, Mission complied with the condition which I specified with respect to the time by which arbitral proceedings in Singapore were to be commenced. I do not accept that compliance with that aspect of my order could constitute breach of another aspect of the conditions to which the stay was made subject.

5 Second, KNM argued that Mission should not receive indemnity costs because it claimed damages in the Singapore arbitration in respect of KNM's commencement of proceedings in this court, including its costs of responding to those proceedings. However, Mission has now abandoned that aspect of its claim in the Singapore arbitration, as a result of which this aspect of KNM's argument falls away.

6 Third, KNM argues that Mission should not be awarded indemnity costs because it sought a stay of these proceedings on three grounds, only one of which was successful, being the ground based upon s 7(2) of the Act. Implicit in KNM's submission is the proposition that Mission should be denied a portion of its costs because it raised and relied upon discrete and severable issues in support of its applications and upon which it failed.

7 It is, of course, well established that while the court retains a general discretion with respect to the costs of any proceedings before the court, in general that discretion will be exercised on the basis that the successful party will recover its costs.[16] Order 66 r 1(3) of the Rules specifically provides that where a party though generally successful has, by the introduction of an issue or issues upon which that party has failed, increased the costs, the court may adjust the costs orders appropriately. It is, however, well established that the power to adjust costs orders to depart from the usual rule to the effect that costs follow the event will only be exercised where the generally successful party has failed upon an issue which is discrete and severable from the other issues in the relevant proceeding, and which significantly added to the costs of the proceedings in a readily discernible way.[17] Further, the power to depart from the general rule that costs follow the event because the successful party has failed on one or more issues will be exercised with caution for the reasons given in ***Bowen v Alsanto Nominees Pty Ltd***.[18]

8 In these proceedings, in addition to the ground upon which Mission succeeded, it sought a stay in the inherent jurisdiction of the court, and in respect of arbitral proceedings under way in Kuala Lumpur on the basis that Mission was a person claiming through or under a party to those arbitral proceedings, with the result that s 7(2) of the Act applied.

9 Mission's alternative claim to a stay in the inherent jurisdiction of the court added no discernible cost to the application, as it was unnecessary to give any specific consideration to that issue, because of my conclusion that Mission was entitled to a stay pursuant to s 7(2) of the Act. It therefore provides no basis for departing from the general principles relating to costs.

10 Mission's claim for a stay based upon rights derived from a party to the Malaysian arbitration was an alternative basis upon which it claimed to be entitled to a stay under the provisions of the Act which I ultimately concluded applied, although that conclusion was not drawn on the basis of the arbitral proceedings under way in Malaysia. Mission's claim to derive rights from a party to those proceedings was certainly arguable and could not be said to have been unreasonably brought. Further, consideration of the contractual relationship between the parties to the Malaysian proceedings, and the existence of those proceedings, were each matters necessarily and properly brought to the attention of the court, and which required consideration in the context of Mission's application for a stay. Because it was necessary to consider those factual issues in order to provide a context for Mission's application for a stay, the legal proposition to the effect that Mission derived rights from a related party did not add appreciably to the costs of the proceedings. Accordingly, in my view this is not one of those cases in which Mission should be deprived of any of its costs by reason of its failure on a discrete and severable issue which added significantly to the costs of the proceedings in a readily discernible way.

11 As KNM has failed to establish any good reason why the guiding principle to which I referred should not be applied, it is appropriate to order that KNM pay Mission's costs of the application for a stay on an indemnity basis - that is to say, KNM is to pay all costs reasonably incurred by Mission which are not unreasonable in amount, such costs to be taxed in default of agreement.

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[1] Less the deposit amount.

[2] [1990] HCA 8; (1990) 169 CLR 332.
[3] ***Tanning Research Laboratories Inc v O'Brien*** [1990] HCA 8; (1990) 169 CLR 332, 341.
[4] ***Tanning Research Laboratories Inc v O'Brien***, 342
[5] [2008] FCA 551; (2008) 168 FCR 169.
[6] ***BHPB Freight Proprietary Limited v Cosco Oceania Chartering Proprietary Limited*** [10].
[7] (1990) 20 NSWLR 100.
[8] ***BHPB Freight Proprietary Limited v Cosco Oceania Chartering Proprietary Limited*** [15].
[9] ***TCC Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*** [2014] FCAFC 83 [109].
[10] ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** [2013] WASCA 66 [56] [63] (Martin CJ, McLure P & Buss JA agreeing).
[11] [1995] HCA 36; (1995) 184 CLR 301, 310 (Brennan CJ, Gaudron & McHugh JJ), 318

(Toohey & Gummow JJ) .
[12] [2008] FCA 551; (2008) 168 FCR 189 [45].

[13] Subsequently published as ***KNM Process Systems SDN BHD v Mission NewEnergy Ltd formerly known as Mission Biofuels Ltd*** [2014] WASC 437.
[14] ***Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd*** [2014] WASC 10 (S).
[15] ***A v B*** [2007] EWHC 54.
[16] *Rules of the Supreme Court 1971* (WA) (Rules), O 66 r 1.
[17] ***Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Hannell*** [2007] WASCA 158 (S) [7].
[18] [2011] WASCA 39 (S) [6] [7].
