CASENOTES

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Computer Machinery Co Ltd v. Drescher [1983] 1 WLR 1379

The following lament of a Respondent to an arbitration proceeding is not infrequently heard. He appreciates the likelihood that the Claimant will succeed as to part, and will in most cases, therefore, receive an award of costs. The Court procedure of making a payment in is not available unless the parties have agreed to adopt rules such as the Rules for the Conduct of Commercial Arbitrations issued by the Institute of Arbitrators. If he makes an open offer to settle, this may be placed by the Claimant before the Arbitrator as an admission of some liability. See *Myers v. Kane Constructions*. If he makes a without prejudice offer which is not accepted this may not be disclosed to the Arbitrator, even on the qeustion of costs

Hudson (p. 862) and *Keating* (p.274) speak of a procedure in England of making a sealed offer which the Arbitrator will not open until after he has determined the principal dispute. But this is not a common practice in Australia, and, anyway, requires the consent of the parties. *Brooking* on *Building Contracts* (2nd Ed.) par. 18.19.

A recent decision of Megarry V-C points to a possible solution. It was not an arbitration case. It was a claim by the Plaintiff seeking to restrain the Defendants from making improper use of confidential information. Accordingly, the Plaintiff was primarily concerned to obtain an injunction rather than damages. If the case was a claim for damages the Defendant could have made a payment into Court in accordance with the Rules of Court. The fact of the payment in and its amount would then not have been disclosed to the judge until after all issues except costs had been resolved.

As is often the case in these actions, there was an application for interlocutory or temporary injunctions. Ultimately, the parties agreed upon the terms of these injunctions, but costs were reserved for the consideration of the trial judge. Before the date of the trial the Defendants made substantial payments into court and also wrote two letters which were expressed to be written with prejudice "but on the basis that the right was reserved to bring the letter to the attention of the Court after judgment, on the question of costs." The letters contained proposals to submit to certain orders or to give certain undertakings to desist from the conduct complained of. These proposals were not accepted by the Plaintiff and the case moved towards trial. On the eve of the trial the case was settled but no agreement was reached about the cost of the interlocutory application.

The Vice-Chancellor, therefore, had to decide this unresolved question of costs. He considered whether he might look at the letters written "without prejudice save as to costs".

There exists in English Family Law jurisdiction a procedure of making an offer without prejudice save as to costs: *Calderbank v. Calderbank* [1976] Fam 93, 106. The special problems of this jurisdiction were

discussed in *R. v. Lusink; ex parte Shaw* (1980) 32 ALR 47 where Stephen J deplored the raising of open offers in the Family Coufrt before the conclusion of the hearing. The Family Court Act was amended in 1983 to create a procedure analogous to the payment into Court rules where an offer of settlement in writing is made: Section 117C.

The Vice-Chancellor concluded:

"In my view, the principle in question is one of perfectly general application which is in no way confined to 'matrimonial causes', whether an offer is made 'without prejudice' or 'without prejudice save as to costs', the courts ought to enforce the terms on which the offer is made so as to encourage compromises and shorten litigation. The latter form of offer has the added advantage of preventing the offer from being inadmissible on costs, thereby assisting the court towards justice in making the order as to costs . . . What I have been saying is obiter . . .; but I hope that the attention of the profession (including authors and editors) will be generally directed to what seems to me to be a valuable procedural process that is too little used." [1983] 1 WLR at 1383."

These observations were obiter, that is, they were not necessary for the decision of the case and therefore not binding on English courts, but the views of such an eminent jurist cannot be ignored.

For arbitrations the implications of his views, if accepted by courts of Australia, are obvious. The dilemma of the Respondent who wants to cover the risk that he may lose in part could be overcome by an offer without prejudice save as to costs. The procedure might also be appropriate where the Respondent Builder is prepared to make an offer to go back and fix the defects but does not want formally to accept responsibility for them if this offer is declined.

It only remains to overcome the problem recognised by *Hudson*, that the role of the Arbitrator is to hand down one award dealing both in with the substance of the claim and with the question of costs. If a procedure could be devised whereby the document containing the Respondent's proposal could be placed before the Arbitrator after he has dealt with the main issue but before he makes any decision as to costs, the difficulties of the Respondent could be alleviated and realistic settlements encouraged.■

Quotation . . .

"I yield to no-one in my view that arbitrations are a useful weapon in dispute resolution. A necessary corollary of that proposition is that courts should be reluctant to the extreme in interfering with the conduct of arbitrations, whether by requiring a case to be stated or ordering an award to be set aside. Arbitrations can only be transacted speedily and inexpensively if arbitrators are permitted proper lattitude in going about their work, applying the expertise which provokes their appointment as arbitrators, rather than allowing a dispute to go to court."

(Supreme Court of New South Wales per Rogers J.)■