Parkmore Investments Pty Ltd v Acer Forester (Darwin) Pty Ltd
[2005] NTSC 9

PARTIES:	PARKMORE INVESTMENTS PTY LTD v ACER FORESTER (DARWIN) PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 11 of 2004 (20217004)
DELIVERED:	4 March 2005
HEARING DATES:	12 January 2005
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CIVIL

Appeal – appeal on costs – consent judgement for the plaintiff – costs where plaintiff abandoned substantial part of claim shortly before trial – Magistrate's orders – whether error of law – mistake as to facts – failure to have regard to material evidence – whether either party acted unreasonably – costs in settled proceedings – appeal dismissed

Tracy Village Sports and Social Club v Walker (1992) 111 FLR 32; *Wilson v Lowery* (1993) 110 FLR 142; *Young v Northern Territory of Australia and Gutsche* [2004] NTSC 16; *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA (NSW) 409, applied.

Re The Minister for Immigration & Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622, considered

Australian Securities Commission v Australian Home Investments Ltd (1993) 44 FCR 194; *Parkmore Investments Pty Ltd v Holyoak Investments Pty Ltd* (unreported, Supreme Court of the Northern

Territory, Mildren J, delivered 11 September 1997); *Yusuf Rizal v Minister for Immigration and Multicultural Affairs* [1999] FCA 334; *Aussie Red Equipment Pty Ltd v Antsent Pty Ltd* [2001] FCA 1641, applied.

Local Court Act 1989 (NT)

REPRESENTATION:

Counsel:

Appellant:	P Barr QC
Respondent:	M Grant

Solicitors:

Appellant:	Cridlands Lawyers
Respondent:	Michael Chin

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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No. LA 11 of 2004 (20217004)

BETWEEN:

PARKMORE INVESTMENTS PTY LTD (ACN: 009 621 541)
Appellant

AND:

ACER FORESTER (DARWIN) PTY LTD (ACN: 079 365 656)
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 4 March 2005)

[1] This is an appeal against orders made by a Magistrate in relation to costs of proceedings in the Local Court which were resolved by a consent judgment entered in favour of the plaintiff for $42,674.85 inclusive of interest.

Background

[2] In 2002 the parties entered into an agreement, or agreements, pursuant to which the appellant was to perform air conditioning works for the respondent. Although the terms of the agreement or agreements were in dispute, it was common ground that the appellant carried out air

conditioning work for which the respondent paid $129,574.50 to the appellant.

[3] On 3 September 2002 solicitors for the appellant wrote to the respondent demanding payment of the total amount of $43,613.12 pursuant to four invoices numbered 22252, 22258, 22421 and 22455 (the last invoice was incorrectly written in the letter as 22258). The respondent replied by facsimile dated 3 September 2002 denying that it owed the amounts demanded.

[4] On 12 September 2002 the respondent wrote a detailed letter to the appellant's solicitors asserting that the invoices upon which the appellant relied were not proper invoices. The respondent noted that the respondent having paid 95% of the agreed contract sum, the respondent could make further payments against approved variation amounts if correct invoices reflecting those amounts were rendered. The respondent requested that the appellant render appropriate invoices in accordance with the conditions of the contract, complete the contract by rectifying defects and review variation claims. The letter concluded with an observation that the respondent wanted to resolve the matter as soon as possible and awaited a response to the issues raised in the letter.

[5] There is nothing in the material before me to suggest that the respondent's response in the letter of 12 September 2002 was an unreasonable response. Nor is there any suggestion that the appellant attempted to satisfy the

concerns expressed by the respondent with respect to the invoices. On the material before me, the appellant's response to the letter of 12 September 2002 was to issue proceedings in the Local Court on 13 November 2002.

[6] The Statement of Claim of November 2002 and the amended Statement of Claim dated 10 March 2005 ("the Statement of Claim") pleaded two agreements between the parties. The first agreement was alleged to have been partly oral and partly in writing. It was pleaded that the appellant agreed to supply materials and labour to the respondent at a price of $590,836 plus GST and that on or about 17 April 2002 (amended to 17 May 2002) the appellant commenced work pursuant to the first agreement.

[7] Paragraph 6 pleaded that on about 1 May 2002 the first agreement was varied orally. In particular the appellant pleaded that the parties agreed the respondent would work with the appellant to achieve construction cost savings and that any savings identified would be shared between the parties.

[8] Paragraph 8 alleged a breach of the varied agreement while para 9 asserted that notwithstanding the breach the appellant elected to affirm the varied agreement and proceeded to complete the work.

[9] Paragraph 10 asserted that in June 2002 the respondent sought to further vary the varied agreement, but that request was refused by the appellant.

[10] Paragraphs 12 and 13 pleaded that the appellant submitted progress payment claims for work performed by the appellant "pursuant to the First Agreement

and Varied Agreement" and that the respondent had refused to pay for the work undertaken in breach of its contractual obligations pursuant to the first agreement and the varied agreement. The particulars pleaded were as follows:

"Particulars

Date	Invoice	Amount	Amount Paid	Balance Due
19/7/02	22252	$141,064.00	$129,574.50	$11,489.50
19/07/02	22258	$12,711.90	Nil	$12,711.90
07/08/02	22421	$17,024.72	Nil	$17,024.72
19/08/02	22455	$9,440.00	Nil	$9,440.00
Total				$50,666.12"

[11] The four invoices identified in the particulars were the same as those identified in the letter of demand dated 3 September 2002. In the Particulars pleaded, however, invoice 22252 is for $11,489.50 compared with $4,436.30 in the letter of demand. As a consequence the total claimed pursuant to the invoices increased from $43,613.12 to $50,666.12.

[12] Paragraph 14 of the statement of claim alleged that in further breach of the varied agreement the respondent had refused to pay the plaintiff a ten percent mark up on the contract price as shown in an attached schedule. Particulars pleaded in para 14 sought various amounts alleged to be due pursuant to the varied agreement including amounts calculated as the appellant's share of cost savings.

[13] Paragraph 15 alleged a further breach of the varied agreement, particulars of which were set out in an attached schedule. It was asserted that as a consequence of the further breach the appellant had suffered a loss of profits.

[14] The total of the damages claimed was almost $180,000. The claims were summarised at the conclusion of the Statement of Claim in the following terms:

> "AND THE PLAINTIFF CLAIMS:
>
> 1. The sum of $50,666.12 being debt due for the Work done pursuant to the First Agreement and the Varied Agreement;
>
> 2. Damages for breach of the Varied Agreement in the sum of $128,887.40 pursuant to Revised Scope 1 or, in the alternative, the sum of $127,565.40 pursuant to Revised Scope 2;"

[15] The statement of claim specifically pleaded that the appellant abandoned any amount in excess of $100,000 and claimed the amount of $100,000. This pleading was necessary in order to have the matter heard in the Local Court.

[16] The respondent's Defence was filed on 13 December 2002. The amended Defence was filed on 6 June 2003 and included a small Counterclaim. The first and varied agreements were denied as were the various claims made pursuant to those agreements. In substance the respondent pleaded the existence of an agreement reached in June 2002 for a total of $130,520 plus GST. The respondent asserted that the scope of the work was identified in a

letter of 25 June 2002 written by the appellant. The respondent also pleaded that the appellant had not submitted progress payment claims in accordance with the agreement between the parties.

[17] As to the particulars in para 13 of the Statement of Claim in which the invoices were identified, the respondent asserted that the appellant's progress payment claims had been assessed in accordance with the agreement and that "payments had been made accordingly". A later paragraph asserted that the claim for $50,666.12 based on the invoices as work done pursuant to an alleged first and varied agreements was denied and stated that the respondent had paid the appellant in accordance with the provisions of the agreement between the parties.

[18] The denial in the Defence was a denial that any amount was owing pursuant to the agreements pleaded in the Statement of Claim. It was not a denial that the respondent owed any amount for work done by the appellant pursuant to the different agreement pleaded by the respondent.

[19] A Reply and Defence to Counterclaim was filed on 10 February 2003.

New Particulars of Claim

[20] The trial was listed to commence on 1 December 2003. On 24 November 2003 the appellant filed amended Particulars of Claim claiming $42,098.56 ("the new Particulars").

[21] The appellant's new Particulars made no reference to an agreement between the parties of the type pleaded by the respondent. Similarly, no reference was made to a first or a varied agreement as pleaded by the appellant in the Statement of Claim. The new Particulars identified materials supplied and work done by the appellant for the respondent during 2002 under the following headings:

- Supply of mobile split system air-conditioning units with flexible hoses and couplings.
- Air conditioning upgrade.
- Dehumidification works.
- Remedial works.
- Additional materials and work – external duct wrapping to dehumidification duct work.
- Additional materials and work – purchase order 13438.
- Additional supply of materials.

[22] Paragraph 31 of the new Particulars identified specific amounts with respect to each heading of the claim which came to a total of $171,673.06. It was asserted that the respondent had paid to the appellant $129,574.50 leaving a balance owing of $42,098.56.

[23] On 1 December 2003 a Magistrate gave leave to the appellant to amend its particulars of claim by substituting the new Particulars, subject to withdrawal of two paragraphs under the "Additional supply of materials".

The respondent was given leave to discontinue the counterclaim. Both parties consented to judgment being entered for the appellant in the amount of $38,059.80 plus interest of $4,614.75 giving a total of $42,674.85. The question of costs was adjourned.

Summary

[24] In summary, the plaintiff commenced with a claim for $43,613.12 being for work done as specified in the four invoices. That claim was overtaken by the claim for damages pleaded in the Statement of Claim of approximately $180,000 based upon a first and varied agreements. Included in that total claim was a claim identified in para 13 for $50,666.12 based upon the same four invoices numbered 22252, 22258, 22421 and 22455. That amount of the claim was pleaded as owing for work undertaken by the appellant, but work undertaken pursuant to the first and varied agreements. The Statement of Claim did not include a separate claim of the type ultimately pleaded in the new Particulars filed in late November 2003. When the new Particulars were filed, in substance the appellant abandoned any claim based upon the first and varied agreements. The sole foundation of the entire claim for damages pleaded in the Statement of Claim, namely, the first and varied agreements, was abandoned.

[25] The new Particulars made no mention of the four invoices identified in the letter of demand of 3 September 2002 and pleaded in para 13 of the Statement of Claim. In addition, the amounts claimed were different. In the

letter of demand of 3 September 2002 the total claimed pursuant to the four invoices was $43,613.12. At para 13 of the amended Statement of Claim, the amount sought pursuant to those invoices was $50,666.12. The new Particulars sought $42,098.56. Judgment was eventually entered for the amount of $38,059.80 (plus interest).

Application for Costs

[26] The parties were unable to agree on the question of costs. On 23 December 2003 the appellant filed an application seeking an order that, subject to para 2 of the application, the respondent pay the appellant's costs of the proceedings. Paragraph 2 was in the following terms:

> "2. The plaintiff is not entitled to the costs of those causes of action pleaded at paragraphs 3 to 11 (inclusive) and 14 to 17 inclusive of the Amended Statement of Claim which were subsequently abandoned in the Substituted Particulars of Claim filed 21 November 2003."

[27] The effect of the application was to seek costs only in respect of paras 12 and 13 of the Statement of Claim which sought $50,666.12 calculated in accordance with the four invoices. It must be noted, however, that para 13 pleaded that the amounts were due for work undertaken pursuant to the first and varied agreements. When the Statement of Claim and the new Particulars are read in isolation from any other material, the claims based upon the first and varied agreements, including the claim made at para 13 identified as linked to the four invoices, were claims abandoned in the new Particulars. As I have said, the claim identified in the new Particulars was

not based upon any first or varied agreements and was not identified as founded upon or linked to the four invoices.

[28] In response to the appellant's application for costs, the respondent filed an application seeking an order that the appellant pay the respondent's costs of the proceedings or, in the alternative, that the appellant pay the respondent's costs thrown away in respect of the causes originally pleaded but abandoned in the November particulars of claim.

[29] The learned Magistrate who heard the applications faced a difficult task. His Worship was not the Magistrate who was listed to hear the trial. Submissions were made on 21 May and 4 June 2004. At the conclusion of submissions on 4 June 2004 the Magistrate ordered that the appellant pay the respondent's costs of work undertaken by the respondent in relation to the abandoned causes of action pleaded in paras 3-11 and 14-17 of the Statement of Claim being costs incurred until 24 November 2003. His Worship ordered that in relation to any other issue and from 24 November 2003 each party was to bear its own costs.

[30] As to the reasoning of the Magistrate, first his Worship concluded that the abandoned causes of action were hopeless. That was a conclusion open to him.

[31] In respect of a comparison between the claim pleaded at para 13 of the Statement of Claim (and linked to the four invoices) with the claim pleaded in the new Particulars (which made no mention of the invoices, but referred

to matters such as quotes and purchase orders), the Magistrate expressed the view that the casual observer could not identify that the issues were the same. In my opinion, based solely upon the pleadings, there was ample basis upon which his Worship could reach that conclusion.

[32] On this appeal the appellant complained that the Magistrate erred in having regard only to the pleadings. The appellant submitted that his Worship erred in ignoring affidavits of Jennifer Laurence dated 23 December 2003 and 6 February 2004. Ms Laurence was the solicitor who had the care and conduct of the proceedings on behalf of the appellant. The affidavits were filed in support of the application for costs.

[33] Ms Laurence stated that the appellant abandoned "those parts of its claim pleaded in paragraphs 3-11 and 14-17 of the Amended Statement of Claim" as a "result of advice from counsel". Ms Laurence asserted that although the claim as pleaded was "more extensive" than a claim for the unpaid monies claimed in the invoices, nevertheless "paragraph 13 of the plaintiff's Statement of Claim claimed the monies unpaid under the invoices". She then set out what she described as a "summary of the plaintiff's claim under its Substituted Particulars of Claim, cross-referenced" to the invoices.

[34] Although the summary by Ms Laurence set out a brief description of work done or materials supplied and the amount claimed for each item in the same way as the new Particulars, there were two differences. First, the new Particulars did not mention the invoices. It was Ms Laurence who, after

judgment and in support of a claim for costs, provided a cross reference for each item to a particular invoice. Secondly, the net figure claimed in the new Particulars was $42,098.56. The net figure provided in the summary by Ms Laurence was $38,059.80. The difference was accounted for by a line in Ms Laurence's summary which deducted $3,410. There is no explanation in the affidavit or the summary for that deduction.

[35] The purpose of the affidavit was to demonstrate that from the letter of demand of 3 September 2002 and throughout the appellant claimed that the respondent owed amounts identified in the invoices. The appellant argued that substantially the appellant succeeded with that claim when the respondent consented to judgment.

Question of law

[36] The appellant's right to appeal is founded on s 19 of the Local Court Act which provides that a party may appeal to the Supreme Court "on a question of law". The appellant's written outline of submissions summarised the manner in which the appellant submitted that the exercise of the discretion was "tainted by error of law" in the following terms:

> "8.1 mistook the facts (as to the matters which had been the subject of the plaintiff's claim prior to and throughout the conduct of the proceeding);
>
> 8.2 failed to have regard to material evidence to which he ought to have had regard, namely the evidence contained in exhibit 2, the affidavit of Jennifer Laurence sworn 6th February 2004 and the annexures; and exhibit 3, letter dated 25th June 2002, in respect of both of which he failed to make any findings;

8.3 acted on wrong principle in determining the issue of costs on the basis of his examination of the pleadings only, and not the evidence, on which he made no findings;

8.4 in examining the pleadings, used the test of "an outsider" and "a casual observer" (ie, an uninformed person reading the pleadings in the absence of any evidence), rather than as a judicial officer properly informed by the evidence before him;

8.5 appears to have punished the appellant by not awarding costs in relation to the reformulation of its claim and conduct of the reformulated claim from [on] or about 21 November 2004 – see *Latoudis v Casey* (1990) CLR 534 at 567.1 per McHugh J.: ".. The order is not made to punish the unsuccessful party. Its function is compensatory."

[37] During the hearing of the appeal the appellant was given leave to add two grounds of appeal, each of which asserted that the Magistrate made findings which amounted to speculation in the absence of any evidence upon which to base such findings. The appellant submitted that those findings amounted to errors of law.

[38] Generally speaking, neither a mistake as to facts nor a failure to have regard to material evidence involves a question of law or amounts to an error of law: *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Wilson v Lowery* (1993) 110 FLR 142; *Young v Northern Territory of Australia and Gutsche* [2004] NTSC 16. Similarly, if as alleged the Magistrate acted on the basis of an examination of the pleadings only and not evidence that had been presented in the form of affidavits, such an error was not an error of principle as to amount to an error of law. If the error occurred, while it was an error in the process of the reasoning of the

Magistrate, it related to the use of the material and evidence concerning facts and was not an error of law.

[39] If the Magistrate acted on a wrong principle of law in determining the question before him, an error of law would have occurred. Paragraphs 8.4 and 8.5 of the outline of submissions cited above each allege such an error. In my opinion, however, those allegations are not made out.

[40] As to para 8.4 and the references to an "outsider" and a "casual observer", it is necessary to have regard to the context in which his Worship used those expressions.

[41] During the course of his brief extempore reasons the Magistrate addressed himself to the question as to whether either party acted unreasonably. In particular he considered whether the appellant's claim was hopeless or the respondent's defence without merit. After concluding that the causes of action abandoned by the appellant were hopeless, his Worship compared the claim in the letter of demand for $43,613.12 based on the four invoices against the abandoned causes of action pleaded in the Statement of Claim. As his Worship properly found, "the sands shifted".

[42] Later in his reasons the Magistrate observed that the particulars of claim based on the abandoned cause of action "introduced different ideas" from those related to the claim founded on the four invoices. Having made that observation and identified some of the changes, his Worship said:

> "Now, from the perspective of an outsider, from a person just looking at and reading the pleadings, the issues are not the same. We jump from invoices in the statement [of] claim to purchase orders. We jump from identifying amounts unpaid pertaining to invoices to a shortfall, the shortfall being we add up the amount of the invoices – sorry, the purchase orders and the works undertaken pursuant to quotes accepted and requests and then we deduct $129,574.50 to get $42,098.56.
>
> I look at the $42,098.56, I then go back and I look at the amount claimed, $50,666.12, I scratch my head and I wonder, "what's going on?" The casual observer looking at these pleadings cannot identify that the issues are the same. I ask myself, "What was the defendant really required doing (inaudible)". It was not obvious that it was originally – sorry, it was required to answer a claim for the four invoices as originally pleaded in the original statement of claim.
>
> If it was obvious, it would have been pleaded. The amended was the substitute of particulars that are claimed would have repeated the pleadings, but it didn't happen, it's not obvious."

[43] The passage I have cited is taken directly from the transcript. It is readily apparent that there are errors of transcription probably brought about by difficulties associated with the recording of the Magistrate's remarks. In addition, it is appropriate to bear in mind that these were extempore remarks delivered immediately after the conclusion of submissions.

[44] In my opinion, in referring to an "outsider" and to "the casual observer", the Magistrate was not posing a legal test for the determination of the issues before him. When the Magistrate's reasons are read in their entirety, it is apparent that in comparing the nature of the claim based solely on the invoices with the claim based upon the pleaded first and varied agreements, his Worship used the impugned expressions as a means of illustrating how the complex nature of the pleadings in the Statement of Claim concealed or

confused any connection with the claim based solely on the invoices. In this context it should be borne in mind that as originally pleaded in the Statement of Claim, the claim linked in para 13 to the four invoices was said to be work performed pursuant to the first and varied agreements. The existence of such agreements was denied by the respondent and the appellant abandoned all claims based upon those alleged agreements only a few days before the trial.

[45] Ultimately the Magistrate concluded that the "casual reader of the pleadings is not able to discern the issues". Again his Worship was illustrating that to the extent that the appellant was now suggesting the claim eventually pursued in the new particulars was essentially the same as that pleaded at para 13 of the Statement of Claim, the pleadings were unsatisfactory and did not identify the issues in that manner.

[46] In my opinion, the conclusion drawn by the Magistrate as to the complex and confused nature of the pleadings was open on the evidence. In any event, as I have said, in using the impugned expression his Worship was not posing a legal test and any error in that regard is not an error of law.

[47] I turn to para 8.5 of the appellant's written submissions. There is nothing in the brief extempore reasons nor in any of the other material before me which would justify a conclusion that the Magistrate set out to punish the appellant as alleged in para 8.5. There is no basis upon which this Court could properly find that his Worship acted on a wrong principle in that regard.

[48] As to the complaint that the Magistrate made speculative findings in respect of which there was no evidence, the relevant remarks were as follows:

> "Now, in relation to the plaintiff's claim, which was initially, based on paragraphs 13 and 14 of each statement of claim and its amended statement of claim. I am unable to conclude that the defendant acted so unreasonably that the plaintiff should have the costs of the action in relation to paragraphs 13 and 14.
>
> The following reasons are applicable:
>
> (1) A consideration of this issue, the issue relating to paragraphs 13 and 14 could well, have been subsidiary or held in reserve as a bargaining point in relation to the larger issue pertaining to profit mark ups, cost sharing agreement and profit costs foregone.
>
> (2) It's not beyond the realms of possibility that it was simply overlooked as consideration was given to what I apprehend was the larger and abandoned issue eventually pertaining to profit mark ups, cost sharing agreements and profit costs forgone."

[49] There was no evidence that the respondent held back payment for work done as claimed in the invoices identified in para 13 as a bargaining point. Nor was there any evidence from which a conclusion in this regard could be inferred. If the respondent had adopted such an attitude, it would have counted against the respondent on the issue of costs.

[50] Similarly, there is no evidence from which it could be inferred that the respondent overlooked a debt based on the invoices. The appellant had demanded payment based on the invoices in the letter of 3 September 2002. In response by letter of 12 September 2002, the respondent acknowledged

that it had paid only ninety five percent of the agreed contract sum and stated it could make further payments against approved variation amounts if correct invoices reflecting those amounts were rendered. In its pleadings the respondent denied the existence of the first and varied agreements and any debt based upon those agreements. The respondent pleaded the existence of a different agreement from that alleged by the appellant and pleaded that it had paid the appellant in accordance with the agreement for which the respondent contended. Such a pleading left open the possibility that monies were owing and, as stated in the respondent's letter of 12 September 2002, would be paid if rectification work was completed and invoices were rendered in accordance with the agreement between the parties.

[51] In one sense, the Magistrate was making findings of fact by finding that it was possible that the issue was held in reserve and by finding that it was not beyond the realms of possibility that the issue was overlooked. The alternative view of his Worship's remarks is that he was speculating as to possibilities which he regarded as having a bearing upon his finding that he was unable to conclude that the respondent acted so unreasonably that the plaintiff should have the costs of the action in relation to the claim identified in para 13 of the Statement of Claim.

[52] The paragraphs from the remarks of the Magistrate to which I have referred must be viewed in the context of his Worship's reasons in their entirety. In my opinion his Worship was not making findings which, because there was

no evidence to support them, amounted to errors of law. Properly characterised, these remarks were nothing more than speculation which were of little influence in his Worship's reasoning; *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA (NSW) 409 at 419. The balance of the Magistrate's remarks demonstrate that his finding that the respondent did not act unreasonably was founded upon the nature of the appellant's pleadings.

[53] In my opinion, if the Magistrate erred, the errors were not errors of law. At best from the appellant's point of view there was a failure to take into account relevant evidence coupled with inadequate or even erroneous assessment of the evidence and inappropriate speculation of minimal significance. None of these matters either individually or in combination amounted to an error of law and the appeal must fail.

Merits

[54] As I have decided that the appeal should be dismissed because the appellant has failed to demonstrate any error of law, strictly speaking it is unnecessary for me to deal with the merits of the respective applications. In the particular circumstances of this matter, however, I have decided that I should indicate my views.

[55] It is well settled that following a hearing on the merits, generally speaking the successful party is entitled to costs. In the absence of a hearing on the merits, however, the court will rarely be in a position to assess the

respective merits: *Re The Minister for Immigration and Ethnic Affairs ex parte Lai Qin* (1997) 186 CLR 622 per McHugh J at 625.

[56] In the matter under consideration, it is a reasonable inference from the letter of demand dated 3 September 2002, the respondent's response by letter of 12 February 2002, the pleadings and the consent judgment both that the appellant had not been paid for work done prior to February 2002 and that the respondent knew it was indebted to the appellant to some extent. Subject to the question of rectification and the provision of appropriate invoices, the respondent's letter of 12 February 2002 recognised that monies were likely to be due.

[57] There is no material before the court from which any inference can be drawn as to the merits of the claim in the respondent's letter of 12 February 2002 that rectification work by the appellant was necessary. No evidence is before the Court which gives a clue as to whether any rectification work was subsequently carried out.

[58] There is nothing in the material to suggest that the respondent's claim in the letter of 12 February 2002 that appropriate invoices had not been rendered was unreasonable. There is no evidence as to whether invoices regarded by the respondent as appropriate were subsequently rendered.

[59] The appellant's claim for costs faced a number of significant difficulties. The first claim was for $43,612 for work done as specified in the four invoices. The second claim was for damages of approximately $180,000

based upon the first and varied agreements. Although that claim for damages included an amount based upon the same four invoices, that part of the claim was for a different amount of $50,666.12 and was also based upon the first and varied agreements.

[60] The appellant abandoned all causes of action based upon the alleged first and varied agreements. In those circumstances, it cannot be said that the conduct of the respondent in defending each part of the claim founded upon those alleged agreements was unreasonable. It is not to the point that the respondent owed monies to the appellant, assuming the truth of that assertion, for work done pursuant to an agreement different from that pleaded by the appellant.

[61] The final claim found in the new Particulars not only abandoned the claim based upon the first and varied agreements, it identified a claim based on a different cause of action which was not related in the new Particulars to the four invoices. In addition, the amount claimed of $42,098.56 was different from both of the previous amounts claimed and identified as based upon the invoices. The judgment sum of $38,059.80 was the fourth and least of the amounts claimed.

[62] In addition, as I have said there is no evidence from which an inference could be drawn that the response of the respondent in the letter of 12 September 2002 was unreasonable or that the respondent did not have a valid basis for denying liability at that time.

[63] In these circumstances, in my view it is unnecessary to examine the various authorities in which the principles and relevant factors applicable to claims for costs in settled proceedings are discussed. Relevant authorities include the following: *Australian Securities Commission v Aust-Home Investments Limited* (1993) 44 FCR 194; *Parkmore Investments Pty Ltd v Holyoak Investments Pty Ltd* (unreported, Supreme Court of the Northern Territory, Mildren J, delivered 11 September 1997); *Yusuf Rizal v Minister for Immigration and Multicultural Affairs* [1999] FCA 334; *Aussie Red Equipment Pty Ltd v Antsent Pty Ltd* [2001] FCA 1641.

[64] Bearing in mind the principles and factors discussed in those authorities, I am satisfied that on the merits the appellant's claim for costs should not succeed. The order made by the Magistrate was relatively favourable to the appellant. It would have been open to his Worship to order that the appellant pay the respondent's costs in their entirety, at least to the date of service of the new Particulars.

[65] The appeal is dismissed.
