

**LIVERPOOL CITY COUNCIL v CASBEE PTY LTD & ANOR  
[2005] NSWSC 590**

**Supreme Court of New South Wales – 24 June 2005**

**FACTS**

Liverpool City Council ('the Council') entered into two contracts with Casbee Pty Ltd ('Casbee') for drainage construction work at Hinchinbrook creek and stormwater pond construction work at Riverside Park, Chipping Norton. Casbee claimed \$1,668,671.80 for delay and disruption costs. The Council rejected this claim and 20 months later Casbee notified the Council of the dispute and referred the matter to arbitration under clause 47 of the general conditions. Thereafter the matter proceeded with "glacial speed", the slowness of which was attributed to in part to the loss of documents in a flood, and to the disorganized state in which many documents were returned from an inquiry by the Independent Commission Against Corruption ('ICAC').

Due to the delay, the Council sought orders from the Supreme Court pursuant to section 46 of the *Commercial Arbitration Act* 1984 ('the Act') that the arbitration between them be terminated, alternatively that the dispute be removed into court for determination. The Council also submitted that there the delay had caused a substantial risk of prejudice due its inability to call some witnesses as their employment had been terminated following a finding by ICAC of conflicts of interest.

Section 46(2) of the Act imposes a duty on each party to an arbitration agreement to exercise due diligence in prosecuting a dispute referred to arbitration. Further, under section 46(3) a court will not terminate an arbitration for delay unless it is satisfied that the delay has been inordinate and inexcusable and will give rise to a substantial risk of prejudice to the other party.

**ISSUE**

Whether the arbitration should be terminated.

**FINDING**

The Court found that the 20 month period which elapsed between the rejection of the claims and notification of the dispute constituted a delay which was inordinate in the circumstances for which there was no reasonable explanation. Casbee should have referred the dispute to arbitration promptly after receiving the Council's rejection of its claim. As to whether there was a real risk of prejudice, the Court found that the inconveniences would not cause serious prejudice to the Council. The Court said there was no basis for assuming that they witnesses would not attend under subpoena for examination, if necessary. Accordingly, the Court held that the arbitration should not be terminated.

**QUOTE**

Nicholas J held at paragraphs 43 and 50:

"[43] In my opinion the intention and effect of s 46(1) is to require a party to exercise due diligence by taking necessary steps, in the first instance, to refer a dispute to arbitration at the time it arises. Subject to the circumstances of the case it seems to me that it is not ordinarily open to a party to delay taking the positive steps involved in having the dispute referred until after, for example, such time as the preparation of its case for the purposes of a hearing has been completed."

"[50] In order to prove either a substantial risk of impossibility of a fair trial, or the likelihood of serious prejudice, it would ordinarily be necessary to demonstrate the disadvantage caused by the delay, for example, the unavailability of the testimony of a potential witness, or the loss of documents, or that sources of information had dried up. Accordingly, in my opinion in this case it is necessary for Council to show that the likely consequence of the delay is to deprive it of the opportunity of a fair trial, or that it was so seriously prejudiced that justice would not be done in the proceedings."

**IMPACT**

A party to an arbitration must exercise due diligence by referring a dispute to arbitration without delay. However, for an arbitration to be terminated a party must demonstrate that there has been an inexcusable delay and a serious risk of prejudice, that is by demonstrating the unavailability of witnesses and loss of documents or other sources of information.

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