IN THE COURT OF APPEAL [1998] QCA 088

SUPREME COURT OF QUEENSLAND

Appeal No. 6174 of 1997

Brisbane

[Shipowners' Mutual Protection and Indemnity Assoc. (Luxembourg) v. Hodgetts & Anor.]

BETWEEN:

THE SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG)
(Third Third Party) Appellant

AND:

PETER HODGETTS
(Defendant) First Respondent

AND:

QUEENSLAND MARINE AND GENERAL INSURANCE PTY. LTD. (ACN 010 887 653)
(First Third Party) Second Respondent

JOHN FRANCIS DAVIS
(Plaintiff)

RIVERS INSURANCE BROKERS PTY. LTD. (ACN 010 242 681)
(Second Third Party)

Fitzgerald P.
Davies J.A.
Dowsett J.

Judgment delivered 6 May 1998

Separate reasons for judgment of each member of the Court; Davies J.A. and Dowsett J. concurring as to the orders made, Fitzgerald P. concurring as to orders (3) and (4).

APPEAL ALLOWED. ORDER BELOW SET ASIDE AND THE FOLLOWING ORDERS MADE:

(1) LEAVE TO THE FIRST RESPONDENT TO AMEND ITS THIRD PARTY NOTICE TO THE APPELLANT IN ACCORDANCE WITH EXHIBIT BWR 26, THE AFFIDAVIT OF BRADLEY WAYNE RUSSELL, FILED BY LEAVE ON 7 NOVEMBER 1996, REFUSED.
(2) NOTICE DATED 7 NOVEMBER 1996 FROM THE SECOND RESPONDENT TO THE APPELLANT STRUCK OUT.
(3) PROCEEDINGS OF THE FIRST RESPONDENT AGAINST THE APPELLANT STAYED UPON THE CONDITION THAT SUCH STAY BE TERMINATED UPON APPLICATION BY THE RESPONDENTS IN THE EVENT THAT THE APPELLANT DOES NOT DO ALL THINGS NECESSARY TO BE DONE ON ITS PART TO HAVE THE MATTER WHETHER IT IS LIABLE TO INDEMNIFY THE FIRST RESPONDENT DETERMINED IN ACCORDANCE WITH RULE 63.1 OF THE RULES OF THE APPELLANT WITH REASONABLE EXPEDITION.
(4) RESPONDENTS TO PAY APPELLANT'S COSTS HERE AND BELOW.

CATCHWORDS: **CIVIL PROCEDURE - stay of proceedings - arbitration clause - whether proceedings should be stayed pending arbitration pursuant to s.7(2) International Arbitration Act 1974 (Cth) - whether District Court Rules permit a defendant to have an issue determined between it and a third party or a third party to have an issue determined between it and another third party where no relief is claimed - whether there was evidence showing the existence of a difference or dispute within the meaning of the arbitration clause - meaning of "matter" in s.7(2)(b) International Arbitration Act - whether matter is controversy between the first respondent and the appellant was also the matter in controversy between the first respondent and second respondent - whether the controversy between the appellant and the first respondent was "capable of settlement by arbitration" pursuant to s.7(2)(b) International Arbitration Act.**

Counsel: Mr. J. A. Griffin Q.C., with him Mr. I. R. Molloy, for the appellant
Ms. A. I. Philippides for the first respondent
Mr. K. A. Barlow for the second respondent

Solicitors: Hill & Taylor, town agents for Brian White & Associates, for the appellant
Murrell Stephenson for the first respondent
Phillips Fox Lawyers for the second respondent

Hearing Date: 30March1998

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(A.C.N. 010 242 681)
(Second Third Party)

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 6 May 1998

The first respondent (the "employer") is a defendant in an action for damages for negligence which has been commenced against it by a former employee. The appellant (the "insurer") and the second

respondent (the "insurance broker") are third parties in that action. The insurer is a former insurer and the insurance broker is a former insurance broker of the employer. The separate third party proceedings between the employer and the insurer and between the employer and the insurance broker involve a common issue, namely, whether the employer is entitled to indemnity from the insurer under a policy of insurance which was previously in force between them. That is the total matter in dispute between the employer and the insurer and one of the issues in the proceeding between the employer and the insurance broker.

The insurance policy included an arbitration clause. It is not in dispute that that arbitration clause continues to bind the employer and the insurer even if the policy of insurance is otherwise inoperative,[1] and constitutes an agreement between the employer and the insurer that the question whether the employer is entitled to indemnity from the insurer will be determined by arbitration.

Sub-section 7(2) of the International Arbitration Act 1974 (Cth) provides:

> "Subject to this part, where:
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
> on the application of a party to the agreement, the Court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter."

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[1] Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 C.L.R. 337.

In my opinion, the employer's third party proceeding[2] against the insurer, considered in isolation, plainly involves the determination of a matter that, in pursuance of the arbitration agreement in the insurance policy, is capable of settlement by arbitration.[3]

Nonetheless, the insurer's application for a stay of the employer's third party proceeding against it, pending the determination of the question whether the employer is entitled to indemnity from the insurer by arbitration, was refused by the District Court. This appeal is brought by leave from the order refusing the stay.

Shortly prior to the hearing of the insurer's application for a stay of the third party proceeding against it by the employer, the insurance broker filed an amended defence in the employer's third party proceeding against it, and served the insurer with a notice claiming that the issue whether or not the employer was entitled to be indemnified by the insurer should be decided not only between the employer and the insurer but between the employer and the insurance broker. At the hearing of the insurer's application for a stay, the employer was granted leave to amend his third party notice to the

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2 It was not argued that the employer's third party proceeding against the insurer was not a "proceeding" for the purpose of sub-s. 7(2) of the International Arbitration Act: cf. Halsbury's Laws of England, 4th ed., Vol. 2, "Arbitration", para. 623.

3 Tanning Research Laboratories Inc. v. O'Brien (1990) 169 C.L.R. 332, 351; Flakt Australia Ltd v. Wilkins & Davies Construction Co Ltd [1979] 2 N.S.W.L.R. 243, 250.

insurer to include a claim that the issue whether the employer is entitled to be indemnified by the insurer should be determined as between the employer, the insurer and the insurance broker. These steps were obviously tactical manoeuvres.

In my opinion, it does not matter that the insurer has not appealed against the order granting the employer leave to amend his third party notice to the insurer or that no application was made by the insurer to strike out the insurance broker's claim against it. The employer's claim in its third party notice against the insurer - that the issue whether the employer is entitled to be indemnified by the insurer should be determined as between the employer, the insurer and the insurance broker - is not a claim to contribution, indemnity, relief or remedy within the meaning of the District Court Rules.[4] Nor is there such a claim by the insurer against the insurance broker or by the insurance broker against the insurer.[5] However, these are matters of limited significance.

The issue of whether the insurer is liable to indemnify the employer is in dispute in the separate third party proceedings between the employer and the insurer and between the employer and the insurance broker. The question becomes: does the existence of that issue in the latter proceeding have the consequence that the former proceeding does not "involve the determination of a matter that, in pursuance of the [arbitration agreement between the employer and the insurer], is capable of settlement

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[4] r. 130.

[5] r. 134.

by arbitration" although it would otherwise meet that description?

It is extremely difficult to identify any basis for an affirmative answer to that question. It was not submitted for the employer and the insurance broker that the determination by arbitration between the employer and the insurer whether the insurer is liable to indemnify the employer will prevent that issue being separately litigated in the third party proceeding by the employer against the insurance broker. That means that there is a possibility of different answers to the same question in the separate proceedings, which limits the effectiveness of the third party procedure in this instance. That would probably be a material consideration if the power to order a stay under sub-s. 7(2) of the International Arbitration Act was discretionary, but that is not suggested. Perhaps of greater importance, if it were necessary to balance competing factors, would be the consideration that, if the contention of the employer and the insurance broker is correct, a party to an arbitration agreement could defeat its operation by raising the same issue against the other party to the arbitration agreement and a third party.

It is unnecessary to pursue these matters. The employer and the insurance broker accepted that the insurer was entitled to the stay applied for if paras. (a) and (b) of sub-s. 7(2) of the International Arbitration Act are satisfied.[6] As already stated, those requirements are plainly satisfied unless the circumstance that the matter between the employer and the insurer which is otherwise capable of settlement by arbitration loses that character because the same issue is raised between one of those parties (the employer) and another party (the insurance broker) in a separate third party proceeding. I have found no basis for such a conclusion, which would involve a substantial restriction of sub-s. 7(2) of the International Arbitration Act.

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[6] Cf. The Maria Gorthon (1976) 2 Lloyd's Rep. 720.

In my opinion, the appeal should be allowed and the order refusing the stay set aside. The employer and the insurance broker must pay the insurer's taxed costs, here and below. The insurer accepted that the stay should be conditional, and the following order which it proposed seems to me satisfactory and should be made. The third party proceedings, commenced by Third Party Notice from the first respondent to the appellant dated 8 July 1996 should be stayed upon the condition that such stay may be terminated upon application by the first respondent in the event that the appellant does not do all things necessary to be done on its part to have the matter of the applicability of the insurance over the "MV Regina" as at 11 March 1992 determined in accordance with the arbitration agreement between the appellant and the first respondent, with reasonable expedition.

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JOHN FRANCIS DAVIS
(Plaintiff)

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(Second Third Party)

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 6 May 1998

The appellant is the third third party to an action instituted by John Francis Davis against the first

respondent who is the defendant in that action. The appeal is against the refusal of an application by the appellant for a stay of proceedings between the appellant and the first respondent pending the determination of issues between them pursuant to an arbitration agreement contained in the terms of a policy of marine insurance between them. That application arose in the following way.

The first respondent is the owner of a fishing trawler. The plaintiff in the action in the District Court, from which this appeal is brought by leave, was employed by the first respondent as Master of the fishing vessel and in that capacity was injured on 11 March 1992. The action out of which these proceedings arise is one by Davis against the first respondent in respect of those injuries which he alleges were caused by the negligence or breach of statutory duty of the first respondent.

The first respondent alleges against the appellant, pursuant to third party proceedings, that the insurance policy, which had been issued by the appellant in favour of the first respondent and which, if in force on 11 March 1992, would require the appellant to indemnify the first respondent in respect of the plaintiff's injuries, was in full force and effect on that date.

The second respondent to the appeal is an insurance broker, the first third party in the action, who had been engaged by the first respondent to effect a renewal of the policy on 20 February 1993. The first respondent's claim against it was based on its failure to renew the policy on that date in consequence of which, it was alleged, the policy was cancelled by the appellant retrospectively.

The appellant's claim for a stay of the third party proceedings against it by the first respondent was based upon an arbitration clause contained in r.63.1 of its Rules which were terms of the policy of insurance. That rule provided as follows:

> "If any difference or dispute shall arise between a member or former member and the Association out of or in connection with these rules or arising out of any contract between the member or former member and the Association as to the rights or obligations of the Association or the member or former member thereunder or in

> connection therewith or as to any other matter whatsoever such difference or dispute shall in the first instance be referred to and adjudicated by the committee ... "
> Section 7(2) of the International Arbitration Act 1974 (Cth) provides:
>
> "Subject to this Part, where:
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter."

It was not disputed that the arbitration agreement between the appellant and the first respondent was an arbitration agreement to which s.7(2) applies.

Shortly prior to the hearing of the application for a stay, the refusal of which is the subject of this appeal, the second respondent filed an amended defence to the third party proceeding against it and served the appellant with a notice claiming that the question whether or not the first respondent was entitled to be indemnified by the appellant under the policy should be decided, not only between the appellant and the first respondent, but also between the appellant and the second respondent. At the hearing below, before giving the decision the subject of this appeal, the learned primary Judge granted leave to the first respondent to amend his third party notice to the appellant to include a claim that the issue whether the first respondent is entitled to be indemnified by the appellant under the policy should be determined as between the first respondent, the appellant and the second respondent.

At the time of the hearing below the appellant had not filed a defence to the third party claim against it. It relied on an affidavit by Mr. White, its solicitor, who deposed that the appellant disputed its liability to indemnify the first respondent and asserted that the policy was cancelled in or about February 1993. How this cancellation could have the effect that the policy was not in full force and

effect on 11 March 1992 was not explained in that affidavit. However that appeared from the third party pleadings already filed: the first respondent's third party notice to the second respondent paras.6 to 13; the second respondent's amended defence to that notice para.7(c); and the first respondent's third party notice to the second third party Rivers Insurance Brokers Pty. Ltd. paras.12, 18, 20 and 29. All of these were before his Honour and before this Court. In addition, as his Honour said in his reasons for judgment:

> "Counsel for the 3rd third party told me of an additional fact from the bar table, namely that the defendant had failed to pay a premium when it fell due in February 1993 which provided the 3rd third party with grounds for cancelling the policy pursuant to rule 46 of the policy. Pursuant to rule 47 of the policy one of the effects of cancellation pursuant to rule 46 is that the 3rd third party's liability under the policy is cancelled retrospectively."

His Honour then went on to say:

> "However, this additional fact, namely the non-payment of the premium, is not in evidence and Mr. Ryan, as he was entitled, took objection to evidence of it being given from the bar table. In light of that for the purposes of this decision I must ignore the additional alleged fact of the non-payment of the premium. In my view there is no dispute between the defendant and the 3rd third party that is capable of settlement by arbitration. I would refuse the application for a stay on that ground alone. However, for the benefit of the parties I should record that had the additional fact been proved by evidence admissible on the hearing of the application I would not have refused the stay on that ground."

Rules 46 and 47 of the Rules of the appellant, as appears from the third party notice to the second third party, are relevantly in the following terms:

> "**46 Cancellation of Insurance**
> When a Member has failed to pay, either in whole or in part, any amount due from him to the Association, the Managers may give him notice in writing requiring him to pay such amount by any date specified in such notice, not being less than 7 days from the date on which such notice is given. If the Member fails to make such payment in full on or before the date so specified, the insurance of the Member (whether the insurance is current on such date or has ceased by virtue of any other provisions of these Rules) in respect of any and all vessels entered in the Association by him or on his behalf shall be cancelled forthwith without further notice or other formality.

> **47 Effect of Cancellation of Insurance**
> When the insurance of a Member is cancelled in accordance with Rule 46 (which time is hereinafter in this Rule 47 referred to as 'the date of cancellation') then:
> 1. ...
> 2. ...
> 3. The Association shall with effect from the date of cancellation cease to be liable for any claims of whatsoever kind under these Rules in respect of any and all vessels entered in the Association by or on behalf of such Member and as from the date of cancellation any liability of the Association for such claims shall terminate retrospectively and the Association shall be under no liability to such Member for any such claims or on any account whatsoever:
>   A. Irrespective whether such claims have occurred or arisen or may arise by reason of any event which has occurred at any time prior to the date of cancellation, including during previous policy years."

In concluding, as he did, that there was no dispute between the appellant and the first respondent his Honour was saying, in effect, that there was nothing before him to show the existence of any difference or dispute within the meaning of r.63.1 there being only an assertion of a dispute by Mr. White with no basis for it shown. In reaching that conclusion I think his Honour must have overlooked the pleadings to which I have referred in which the respondents assert the nature of the dispute between the appellant and the first respondent. Indeed what counsel for the appellant told the court as to the nature of the dispute appears to be little more than that which is already contained in the pleadings. In my view therefore the learned primary Judge was wrong in concluding that there was no dispute between the appellant and the first respondent capable of settlement by arbitration. However there was a second basis for his Honour's decision to which I now turn.

That basis involved the following reasoning:

1. the issue of liability of the appellant under the policy is an issue not only in proceedings between the appellant and the first respondent but also in proceedings between the first respondent and the second respondent and between the second respondent and the appellant;

2. that issue is the matter to which s.7(2)(b) refers;

3. the determination of that matter in arbitration proceedings between the appellant and the first respondent will not determine it as between the first respondent and the second respondent or between the second respondent and the appellant;

4. therefore that matter is not one which is capable of settlement by arbitration.

The first two of the steps in that chain require further examination.

Whether the appellant is liable to indemnify the first respondent is an issue in proceedings between the first and second respondents (see para.7(b) of the second respondent's defence) for the second respondent will not be liable to the first respondent if the appellant is liable to the first respondent. But it does not mean that it is a matter the determination of which is involved in those proceedings. The word "matter" in s.7(2)(b) "denotes any claim for relief of a kind proper for determination in a court. It does not include every issue which would, or might, arise for decision in the course of determination of such a claim";[7] the expression "'matter ... capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision ... It requires that there be some subject matter, some right or liability in controversy which ... is at least susceptible of settlement as a discrete controversy".[8] The liability of the appellant to the first respondent is not a right or liability in controversy in proceedings between the first and second respondents which is susceptible of settlement as a discrete controversy; no relief can be given in those proceedings in respect of that issue. It is therefore not a matter in those proceedings in the sense in which that term is used in s.7(2)(b). The only matter in those proceedings is whether the second respondent is liable in damages

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[7] Flakt Australia Ltd. v. Wilkins & Davies Construction Co. Ltd. [1979] 2 N.S.W.L.R. 243 at 250.

[8] Tanning Research Laboratories Inc. v. O'Brien (1990) 169 C.L.R. 332 at 351.

to the first respondent. The resolution of that matter may involve the determination of a number of issues of which the appellant's liability to the first respondent may be one and whether the second respondent's failure to notify the first respondent of communications from the appellant within sufficient time to enable appropriate action to be taken in respect of them was the fault of the second respondent or of the first respondent may be another.

It may have been in an attempt to overcome this problem that the first respondent, by its amended third party notice to the appellant, purported to require that the appellant's liability to the first respondent be determined as between the appellant and both respondents and as between the respondents; and by its notice to the appellant the second respondent purported to require that the appellant's liability to the first respondent be determined as between the appellant and both respondents and between the respondents. But the second respondent makes no claim for relief against the appellant, nor could it, and, of course the appellant makes no claim against it.

The District Court Rules 1968, like their counterparts in the Supreme Court Rules, permit the issue of a third party notice by a defendant who claims against a person not already party to the action any contribution or indemnity or any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff: r.130. And they permit a third party to make a similar claim against another person: r.134. But they do not permit a defendant to have an issue determined between him and a third party or a third party to have an issue determined between it and another third party where no relief is claimed. In neither case here is any relief claimed in respect of the issue. Accordingly the amendment to the first respondent's third party notice to the appellant and the notice by the second respondent to the appellant are of no effect and should be struck out.

Once it is accepted that the matter in controversy between the appellant and the first respondent is not also the matter in controversy between the first respondent and the second respondent it must also be accepted that the former matter is capable of settlement by arbitration.

The mere fact, if it be correct, that the determination of the issue of the appellant's liability to the first respondent in proceedings between those parties would not determine that issue in proceedings between the first and second respondents is not sufficient to prevent the operation of s.7(2)(b). It would do so only if the matter in the first proceedings was thereby rendered incapable of settlement by arbitration. Whether that would be so if the matter involved other parties it is unnecessary to determine because here it does not. That result may give rise to inconvenience or even inconsistency but that would not render the matter incapable of settlement by arbitration. And once it is so capable the court must stay the proceedings, that is the proceedings between the appellant and the first respondent. It follows that the learned primary Judge, in my view, was wrong in refusing the stay.

The appellant accepted that if a stay were ordered it should be made subject to the condition stated below.

I would therefore allow the appeal, set aside the orders made below and make the following orders:

1. refuse leave to the first respondent, the defendant below, to amend its third party notice to the appellant, the third third party, in accordance with Exhibit BWR 26 to the affidavit of Bradley Wayne Russell filed by leave on 7 November 1996.

2. Strike out the notice dated 7 November 1996 from the second respondent, the first third party, to the appellant, the third third party.

3. Stay the proceedings of the first respondent against the appellant upon the condition that such stay may be terminated upon application by the respondents in the event that the appellant does not do all things necessary to be done on its part to have the matter whether it is liable to indemnify the

first respondent determined in accordance with r.63.1 of the Rules of the appellant with reasonable expedition.

4. Order that the respondents pay the appellant's costs here and below.

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REASONS FOR JUDGMENT - DOWSETT J.

Judgment delivered 6 May 1998

I agree with the reasons and orders proposed by Davies J.A.