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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

No. 5774 of 2005

LA DONNA PTY LTD — Plaintiff

v

WOLFORD AG — Defendant

JUDGE:	WHELAN J
WHERE HELD:	Melbourne
DATE OF HEARING:	23 August 2005
DATE OF RULING:	31 August 2005
CASE MAY BE CITED AS:	La Donna v Wolford
MEDIUM NEUTRAL CITATION:	[2005] VSC 359

ARBITRATION – Submission to arbitration – Application for stay of proceeding – *International Arbitration Act 1974* (Cth) s 7 – Waiver of right to arbitration by the conduct of the defendant in seeking security for costs – Arbitration agreement inoperative under s 7(5) of the *International Arbitration Act 1974* (Cth).

ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896, distinguished.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M L Sifris SC with Mr A P Trichardt	Michael Flemming & Associates
For the Defendant	Mr P Fary	Saxonia Partners

HIS HONOUR:

1 In this proceeding the plaintiff, La Donna Pty Ltd ("La Donna"), a Victorian company which has been selling women's lingerie on both a wholesale and retail basis for more than 20 years, seeks relief against the defendant, Wolford AG ("Wolford"), an Austrian company which designs, manufactures and sells high quality hosiery and lingerie.

2 By a summons filed 4 August 2005, Wolford seeks an order staying the proceeding pursuant to s 7 of the *International Arbitration Act 1974* (Cth), s 53 of the *Commercial Arbitration Act 1984*, or in the inherent jurisdiction of the Court. The focus of the application was on s 7 of the *International Arbitration Act 1974* (Cth). Counsel for Wolford conceded that if a stay could not be obtained under that Act, a stay would be unlikely to be ordered under the *Commercial Arbitration Act 1984*.

3 Wolford appointed La Donna as its Australian and New Zealand distributor under a Sole Distributorship Agreement dated 23 June 2003. One of the terms of that Distributorship Agreement reads as follows:

> "(1) All disputes arising out of this Agreement or related to its violation, termination or nullity shall be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or several arbitrators appointed in accordance with these rules. The place of arbitration shall be Bregenz, the language to be used in the arbitral proceedings is German. The award of the Arbitral Tribunal cannot be challenged, provided the mandatory provisions of the Austrian Code of Civil Procedure have been observed.
>
> (2) All legal issues arising from or in connection with this Agreement along with the Arbitration Clause set forth upon in paragraph (1), including the question of its valid conclusion and its preliminary and subsequent effects, shall be governed by and construed in accordance with Austrian law".

4 Section 7 of the *International Arbitration Act 1974* (Cth) relevantly provides:

> "(1) Where:
>
> (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of

the express terms of the agreement or otherwise, by the law of a Convention country; …

this section applies to the agreement.

(2) 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. …

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

5 La Donna opposes the application for a stay. It concedes that s 7 of the *International Arbitration Act 1974* (Cth) is applicable on the basis that the arbitration provision which I have quoted is an arbitration agreement governed by the law of a Convention country, being Austria.

6 The two principal issues raised in the application are whether the proceeding involves the determination of a 'matter' that, pursuant to the agreement, is capable of settlement by arbitration, and whether in the circumstances here the arbitration agreement is null and void, inoperative or incapable of being performed.

7 Amongst other things, La Donna's contention is that Wolford's conduct of the proceeding thus far has produced a position where the arbitration agreement is inoperative.

8 The proceeding began with a generally indorsed writ issued on 29 April 2005. On the same day a summons seeking interlocutory relief was issued and ex parte injunctions were granted by Harper J. A contested application for interlocutory

relief then followed. Interlocutory injunctions were granted by Hollingworth J on 13 May 2005.

9 The generally indorsed writ, the material in support of the interlocutory injunctions, and the reasons of Hollingworth J all indicate that the substance of the claim then made by La Donna was that Wolford should not be permitted to rely on the express terms of the Distributorship Agreement, and in particular the terms dealing with turnover targets, so as to terminate that agreement, as Wolford had purported to do by notices dated 31 March and 27 April 2005. In addition to the interlocutory injunctions granted by Hollingworth J, her Honour made directions as to the further conduct of the proceeding. Further directions have since been made.

10 By a summons dated 26 May 2005, Wolford sought security for its costs of the proceeding in the sum of $388,682. Its summons was supported by two affidavits; one by its solicitor, Dr Michael Wolff, and one by a costs consultant, Mr Gavin Wood. Those affidavits detailed the steps which were to be taken on Wolford's behalf in this proceeding, and set out the estimated costs which Wolford would incur in litigating the matter in this Court to the conclusion of the trial. There is no indication in that material of any intention to apply for a stay on the basis that the arbitration provision in the Distributorship Agreement is applicable. The application itself and the material in support of it proceed on the premise that the matter is to be litigated in this proceeding and that Wolford will be incurring substantial costs in that litigation.

11 The application for security for costs was initially adjourned whilst the parties went to mediation. The application was heard by Master Evans after the mediation had been completed without a resolution having been achieved. He dismissed the application. In the hearing before me, I was told he did so on the basis that Wolford had failed to establish that La Donna's financial position was such as to satisfy the relevant threshold before an order for security for costs might be made.

12 On 26 July 2005 La Donna filed its statement of claim. Its claim is now a lengthy one.

In addition to the Distributorship Agreement it alleges other agreements referred to as the "Preceding Agreement" and the "Further Agreement". It also alleges a variety of representations described as "Initial Representations", "Further Representations" and "Subsequent Representations". It makes claims on the basis of breaches of the alleged agreements, repudiation by Wolford of the Distributorship Agreement which La Donna alleges it has not accepted, misleading and deceptive conduct, negligent misrepresentation, breach of fiduciary duty, and unconscionable conduct.

13 Notwithstanding the complexity of the various claims, a fundamental element of each of them is the Distributorship Agreement itself and the relationship between La Donna and Wolford created by that agreement.

14 There is no material before me which indicates that this application for a stay has been referred to or foreshadowed in any manner prior to the issuing of the summons on 4 August 2005. It was suggested in an affidavit of Dr Wolff, sworn on 4 August 2005, that the matter had been raised previously, but that particular paragraph, paragraph 14, was not read. The explanation for the timing of this application was contained in paragraph 13 of Dr Wolff's affidavit of 4 August 2005. That paragraph reads as follows:

> "The defendant has waited until the filing of a statement of claim before making this application in order to determine whether the claims made by the plaintiff are capable of settlement by arbitration".

15 Section 7(2) of the *International Arbitration Act 1974* (Cth) provides that where proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, the court is required to stay the proceeding or so much of it as involves the determination of that matter, and refer the parties to arbitration.

16 Thus, on an application of this kind it is necessary to identify whether there is a "matter" involved in the proceeding which is capable of settlement by arbitration. This may be said to involve two steps. First, it is necessary to identify the matter or matters involved in the proceeding. The second step is to determine whether that

matter is, or those matters are, pursuant to the terms of the arbitration agreement, capable of settlement by arbitration.[1]

17 La Donna's written outline of submissions includes the following:

> "In the present proceeding the "matter" to be determined is the plaintiff's entitlement to continue as the sole distributor of the defendant's products in Australia, alternatively to recover damages, by reason of the Further Agreement between the parties entered into in July 2004 and the defendant's representations, upon which the plaintiff's claims under the TPA, in negligence, and unconscionable conduct and estoppel, are based."

18 It seems to me that that is a correct description of the matter raised for determination in this proceeding, save that reference must be added to the Distributorship Agreement and to the alleged Preceding Agreement, in addition to the reference to the Further Agreement.

19 The sole distributorship referred to in La Donna's submissions is created by the Distributorship Agreement. That agreement contains the arbitration provision. Subparagraph (1) of the arbitration provision regulates all disputes "arising out of this Agreement". It also regulates all disputes "related to" the Agreement's "violation, termination or nullity".

20 Applying Australian law, all of the claims made in this proceeding fall within the arbitration provision. There are now many cases addressing clauses of this width and claims of this character.[2] Such clauses should not be read narrowly. The terms of the clause in question here encompass all of La Donna's claims. I have reached this conclusion subject to a matter raised by La Donna's submissions concerning the relevance of Austrian law, to which I refer below.

21 The right to apply for a stay under s 7(2) is a private right and as such it may be waived.[3] The issue of whether such a waiver occurs by virtue of a party's conduct in

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1 See generally *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* [2000] FCA 547, [18]-[21].

2 See *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* [1998] VSC 103; *Stericorp Ltd v Stericycle Inc* [2005] VSC 203.

3 *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461.

litigation was considered in some detail by Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd*.[4] His Honour considered the various characterisations of such conduct by a party in litigation, being estoppel, election and waiver. His Honour concluded that there were two forms of waiver which might arise. One he referred to as "waiver in the stronger sense", arising where a party makes an unequivocal final choice between alternative procedures so that it could be said that the party had abandoned the right, if the right was thereafter asserted.

22 The second form of waiver, which he referred to as "waiver in the weaker sense", was conduct which might preclude a successful application based upon the exercise of the Court's discretion.

23 In this application, La Donna submitted that Wolford had abandoned its right to a stay by its failure to reserve its position or to foreshadow a stay application, by its conduct in contesting the injunction, by its conduct in acquiescing or agreeing to the directions, and by its participation in the mediation. It seems to me that this conduct was all relevantly similar to the kind of conduct considered by Austin J in *Tridon*, which he found to be insufficient to constitute an unequivocal abandonment. I am conscious of the distinction between *Tridon* and this case, in that in *Tridon* the relevant party had expressly reserved its position on a number of occasions, but I do not think that that circumstance alone makes a difference.

24 If all that was relied upon here were the steps taken on the interlocutory injunction, the directions and the mediation, I would find, as Austin J did, that there had been no abandonment, as a party could rationally take the view that it was desirable to participate in those steps even though one believed, and intended to persuade the Court at an appropriate time, that the dispute should be arbitrated.

25 The application for security for costs falls into an entirely different category, however. That application was based on the explicit premise that the litigation would proceed to trial in the absence of a settlement, and that the matters the subject

4 [2002] NSWSC 896.

of the proceeding would be determined by the Court.

26 Wolford sought an advantage, or at least sought to impose upon La Donna a burden, which was based upon the proposition that the litigation would proceed in this Court, that the defendant would take steps, and that the defendant would incur costs in taking those steps, in that litigation in this Court. This step was an unequivocal abandonment of the alternative course, being an application for a stay and a consequent arbitration.

27 To allow Wolford to rely on the arbitration provision now would be to permit it to approbate and reprobate. In my view, it has waived the provisions and thereby rendered them inoperative.

28 There were a number of other matters put on La Donna's behalf which I do not need to deal with, given my finding on the waiver issue. Included among those matters were a submission that the arbitration provision is void for, in substance, the reason adverted to by Emmett J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc*,[5] and a submission that my conclusion, based upon the application of Australian law to which I referred above, is not a sufficient foundation for a stay, it being incumbent upon Wolford to prove the content of Austrian law given the terms of subparagraph (2) of the arbitration provision.

29 Wolford also sought a stay pursuant to the *Commercial Arbitration Act 1984*, and under the inherent jurisdiction of the Court. For the reason given concerning the security for costs application, I reject those applications.

30 The application by summons filed 4 August 2005 should be dismissed for the reason that I have found, pursuant to s 7(5) of the *International Arbitration Act 1974* (Cth), that the arbitration agreement is inoperative, the right to insist upon arbitration having been waived by the unequivocal choice to pursue litigation, and the consequent abandonment of arbitration, which was necessarily involved in the application for security for costs.

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5 (1998) 90 FCR 1, 24.