Federal Court of Australia

Re White Industries Limited v JD Trammel v JO Kelley v Dravo Corporation v Tomago Aluminium Company Pty Limited [1983] FCA 363; 76 FLR 48 (29 December 1983)

FEDERAL COURT OF AUSTRALIA

Re: **WHITE INDUSTRIES** LIMITED
And: J.D. TRAMMEL
And: J.O. KELLEY
And: DRAVO CORPORATION
And: TOMAGO ALUMINIUM COMPANY PTY. LIMITED
No. G285 of 1983
Trade Practices
[1983] FCA 363; 76 FLR 48

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Lockhart J.(1)

CATCHWORDS

TRADE PRACTICES - Application to strike out statement of claim - allegation that the respondents acted in concert to hinder or prevent the supply of services from third respondent to applicant in contravention of s. 45D of the Trade Practices Act - whether "services" being supplied by the third respondent - whether first respondent and second respondent, as employees of the third respondent, are independant from the third respondent - whether respondents "hindered" or "prevented" - whether applicant suffered loss or damage - general principles governing strike out applications.

TRADE PRACTICES - application to stay proceedings - whether there is a "matter" capable of settlement by arbitration under para.7(2)(b) of the Arbitration (Foreign Awards and Agreements) Act 1974.

Trade Practices Act 1974 s. 45D Arbitration (Foreign Awards and Agreements) Act 1974 ss.4, 7.

Practice - Motion to strike out statement of claim - Applicant alleging boycott by its co-contractors contrary to s. 45D of the Trade Practices Act 1974 (Cth) - Whether case of applicant so clearly untenable that it could not possibly succeed - Rules of the Federal Court, O. 20, r. 2.

Conciliation and Arbitration - Contract between Australian company and American company -

American company described in contract as superintendent and principal - Contract containing arbitration clause - Proceedings instituted by Australian company in Federal Court - Application for stay by American company pending arbitration - Whether proceedings involved "a matter" capable of settlement by arbitration - Whether liability of American company as superintendent separate from its liability as principal - Arbitration (Foreign Awards and Agreement) Act 1974 (Cth), s. 7(2)

(b). The applicant ( **White Industries**  Ltd) entered into a contract with the third respondent (Dravo Corporation) to build works for an aluminium smelter. Dravo Corporation was incorporated in the United States. The smelter was being built by Dravo Corporation for the fourth respondent (Tomago Aluminium Company Pty Ltd) which was in turn the agent of the joint venturers for whom the smelter was being constructed. The first respondent (Trammel) and the second respondent (Kelley) were employees of the third respondent. Under the contract Trammel and Kelley were described as "Manager - Site Operations" and "Project Director" respectively of the smelter project. They were responsible under the contract for assessing any claims made by  **White Industries**  Ltd for, inter alia, extensions of time and cost increases before recommending what response Dravo Corporation should make to any claims. Dravo Corporation was described in the contract as both the "principal" and "superintendent". As superintendent it was required by the contract to investigate and determine whether any claims by contractors were to be borne by the principal.  **White Industries**  Ltd made a claim under the contract for additional costs and an extension of time. Trammel and Kelley recommended to Dravo Corporation that the claim be rejected.  **White Industries**  Ltd commenced proceedings in the Federal Court alleging that the actions of Trammel, Kelley and Dravo Corporation amounted to a secondary boycott contrary to s. 45D of the Trade Practices Act 1974 (Cth). The respondents applied to have the statement of claim struck out. The contract contained an arbitration clause. In the alternative to having the statement of claim struck out, the respondent sought an order that the proceedings in the Federal Court be stayed pursuant to s. 7 of the Arbitration (Foreign Awards and Agreement) Act 1974 (Cth).

Held: (1) On the application to strike out the statement of claim: (a) Before a statement of claim will be struck out as disclosing no reasonable cause of action the court must be satisfied that the applicant's case is so clearly untenable that it cannot possibly succeed.

General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125, per Barwick C.J., applied.

(b) That while the case presented by the applicant was novel it was not so clearly untenable that it could not possibly succeed.

(2) On the application to stay the proceedings pursuant to s. 7(2) of the Arbitration (Foreign Awards and Agreement) Act 1974 (Cth): (a) That before the court will order a stay pursuant to s. 7 of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) it must be satisfied, inter alia, that the proceedings before it "involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration".

(b) The fact that Dravo Corporation was both a party to the agreement with the applicant and also was supervisor of the agreement did not mean that its failure to agree to the claims of the applicant for time and cost increases was done in its capacity as supervisor rather than as a party to the agreement. It was only because Dravo Corporation was a party to the agreement that the applicant had a cause of action against it.

(c) The alleged breach by Dravo Corporation was a matter in pursuance of the agreement and capable of settlement by the arbitration provisions of the agreement.

(d) Therefore so much of the proceedings as did not involve the claim based on s. 45D of the Trade Practices Act 1974 (Cth) would be stayed.

HEARING

1983, October 28; December 8, 21, 29. 29:12:1983
NOTICE OF MOTION.

The respondents by notice of motion sought to strike out the statement of claim pursuant to Federal Court Rules, O. 20, r. 2, or in the alternative sought an order that the proceedings be stayed pursuant to s. 7 of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth).

R. J. Bainton Q.C. and J. D. Heydon, for the applicant.

A. M. Gleeson Q.C. and A. P. Whitlam, for the respondents

Cur. adv. vult.

Solicitors for the applicant: Stevens, Jaques, Stone, James.

Solicitors for the respondents: Allen, Allen & Hemsley.
T.V.H.

ORDER

(1) Order pursuant to s. 7 of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth.):-
(a) That so much of the proceeding in this Court as involves the matters alleged in paras. 35, 48, 49, 62, 63, 75 and 76 of the statement of claim be stayed upon the condition that such stay may be terminated upon application made by the applicant in the event that the respondents do not do all things necessary to be done on their part to have the matters referred to hereunder determined in accordance with the arbitration agreements between the parties with reasonable expedition; and

(b) That the parties be referred to arbitration in respect of the matters mentioned in (a) above;

(2) Order that so much of the application by the respondents as seeks the dismissal of the proceeding in this Court pursuant to order 20 rule 2 be dismissed;

(3) Order that the costs of this application by the respondents pursuant to order 20 rule 2 and for a stay pursuant to s. 7 of the Arbitration (Foreign Awards and Agreements Act) 1974 (Cth.) be costs in the proceeding;

(4) Order that each party be at liberty to apply on two days notice in respect of the stay granted by order 1(a) above.

Orders accordingly.

DECISION

The respondents to this proceeding seek to strike out the statement of claim pursuant to Order 20 Rule 2 on the ground that it discloses no reasonable cause of action. The statement of claim certainly seeks to take s. 45D of the Trade Practices Act 1974 ("the Act") to its outermost limits and shows considerable ingenuity. It reminds me of Charles Lamb's words - "I like you, and your book, ingenious Hone]"

Alternatively, the respondents seek a stay pursuant to sub-s. 7(2) of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth.) of so much of the proceeding as involves the determination of a matter that is capable of settlement by arbitration in pursuance of an arbitration agreement as defined in that Act.

The statement of claim contains 76 paragraphs. It is common ground that, for the purposes of this application, it is sufficient to look at paragraphs 1 to 5 because the remaining paragraphs follow the same scheme and allege causes of action which, although arising from different facts, are based on the same legal principles.

Paragraphs 1 to 4 allege matters which are said to establish first, that the first and second respondents have contravened s. 45D of the Act and second, that the third and fourth respondents were persons involved in that contravention within the meaning of s. 75B of the Act. The applicants seek damages pursuant to s. 2 and orders under s. 7. Paragraph 5 of the statement of claim alleges matters which enliven this Court's accrued jurisdiction.

The statement of claim is not an easy document to summarise. Rather than recite all the material paragraphs (1 to 5) in the body of my reasons for judgment I will make them an appendix.

For present purposes it is sufficient to say that there is an aluminium smelter in the course of construction in the Hunter alley of New South Wales. A consortium of companies namely, Aluminium Pechiney Australia Pty. Limited, Gove Aluminium Finance Limited, Toa Pty. Limited, AW Australia Pty. Limited and Hunter Douglas Limited are joint venturers for the purpose of constructing and operating the smelter. The fourth respondent, Tomago Aluminium Company Pty. Limited, is alleged to be the agent for the joint venturers in the construction and operation of the smelter. The third respondent is a company incorporated in the State of Pennsylvania in the United States of America. It executed two agreements for the construction of the smelter. The statement of claim alleges that it executed these agreements "as agent for the fourth respondent, as agent for the joint venturers" (paras. 7 and of the statement of claim). The third respondent is both "the principal" and "the Superintendent" as defined in each contract. The first respondent is an employee of the third respondent and the "Manager - Site Operations" for the third respondent in respect of the aluminium smelter site. The second respondent is an employee of the third respondent and its "Project Director" in respect of the aluminium smelter projects.

It is alleged that the third respondent, as "Superintendent", was required by the contracts to act "reasonably and equitably" in making determinations as to whether variations to the contract works were necessary, whether claims for delay should be permitted and extensions of time granted, and in performing various other tasks under the contracts including valuation of relevant variations to the contract (para. 2). The applicant lodged a claim "with the first respondent on behalf of the third respondent in its capacity as Superintendent" for additional costs for certain contract work amounting to 14,62 .72 and claimed for extension of time (para. 25). Two or more of the first respondent, the second respondent and other employees of the third respondent, acting in concert recommended to the third respondent in its capacity as Superintendent that it reject the claim (para. 26). The third respondent notified the applicant that the claim was rejected (para. 27).

The applicant claims in paras. 1 to 4 in essence that the first and second respondents, in concert with each other and other employees of the third respondent, engaged in conduct that hindered or prevented the supply of services by the third respondent to the applicant and that the conduct was engaged in for the purpose and would have or be likely to have the effect of causing substantial loss or damage to the business of the applicant (sub-para. 45D(1)(b)(i) of the Act). The third and fourth respondents are alleged to have aided, abetted, counselled, procured or induced the first and second respondents to have contravened s. 45D and to have been knowingly concerned in each relevant contravention.

Counsel for the respondents submitted that the s. 45D claim of the applicants was based on four propositions each of which must be established to enable it to proceed. I shall state each proposition in turn together with the submissions of counsel for the applicants in answer thereto.

The first proposition was said to be that when the third respondent as Superintendent under the two contracts was considering and dealing with claims made by the applicant as contractor it was supplying "services" to the contractor within the meaning of the Act. "Services" is defined by the Act (sub-s. 4(1) by an inclusive definition as including:
"any rights . . . benefits privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under -

(a) a contract for or in relation to -

(i) the performance of work (including work of a professional nature), whether with or without the supply of goods;

. . . .

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service."

It was submitted on behalf of the respondents that any relevant rights, benefits, privileges or facilities were conferred when the two contracts were entered into and that it was no part of the role of the third respondent as Superintendent or otherwise to provide, grant or confer any rights, privilege, benefits or facilities to anybody. All the Superintendent did was to perform its contractual obligations. The task of the third respondent as Superintendent was to decide whether under the terms of the contracts the applicant was entitled to certain things. The relevant rights, benefits, privileges or facilities were conferred by the contracts and not otherwise.

Counsel for the applicant submitted that, when the third respondent as Superintendent dealt with claims submitted by the applicant, it made determinations with respect to those claims including directions as to variations, valuation of variations and the granting of extensions of time and thereby provided "services" within the meaning of that expression in the Act. Counsel pointed to the wide import that the word "services" has according to its ordinary and natural meaning and to the fact that the statutory definition of the word is an inclusive definition and in terms include matters themselves of very wide import. Reliance was placed by counsel for the applicant upon the udgment of Macfarlan J. in Perini Corporation v. Commonwealth of Australia (1969) 2 N.S.W.R. 530.

The second proposition referred to by counsel for the respondents was that the first and second respondents are both employees of the third respondent and that, when they made recommendations to the third respondent, including recommendations that it re ect the relevant claims made by the applicant, they must be shown by the respondents to have made those recommendations separately and independently from the third respondent itself. He submitted that it is inappropriate to regard the first and second respondents as separate from their employer, the third respondent. He said that the very people who would be most likely to make relevant recommendations within the structure of the third respondent would be the first and second respondents as the manager site operations and the pro ect director respectively in respect of the smelter pro ect at Tomago. In these circumstances he submitted that they were the people who made the relevant decisions on behalf of the third respondent, so that s. 45D cannot apply because their conduct is the conduct of the third respondent. It is essential for the operation of s. 45D that the conduct of the first and second respondents, in concert with each other, should hinder or prevent the supply of services by the third respondent to the applicant. This cannot occur if the conduct of the first and second respondents is in truth that of the third respondent itself.

Counsel for the applicants said in answer to this submission that there is nothing in the language of s. 45D that requires that the persons engaging in the relevant conduct should be separate from the third person referred to in the section: sub-s. 45D(1). The first and second respondents are not employees of the person referred to in sub-s. 45D(1) as the "fourth" person who is specifically described in that sub-section as the "fourth person (not being an employer of the first-mentioned person)" which, so it was said, is a pointer to the conclusion that the fact that the first or second persons mentioned in the sub-section may be employees of the third person is not intended to oust the operation of the sub-section.

The third proposition upon which the s. 45D claim of the applicant was said to be based was that, in making recommendations to the third respondent, the first and second respondents must have engaged in conduct that hindered or prevented the supply of services by the third respondent to the applicant. But, so it was said, the only conduct alleged in the statement of claim to constitute the hindering or preventing of the supply of services by the third person to the applicant is the making of recommendations by the first and second respondents to the third respondent to reject the relevant claims (paras. 26 and 2 of the statement of claim and perhaps para. 2). There is no allegation that there was any obligation on the part of the third respondent to comply with that recommendation; hence making a recommendation to one's employer cannot constitute hindering or preventing the employer from doing anything.

Counsel for the applicant submitted that, as it is necessary to assume the truth of the allegations in the statement of claim for the purposes of an application to strike out, it is plain that the relevant allegations are made in the statement of claim that the recommendations to reject the claims were made by the first and second respondents to the third respondent (para. 26); that the third respondent notified the applicant that the claim was rejected (para. 27); and that this conduct of the first and second respondents hindered or prevented the third respondent from supplying to the applicant the relevant service (para. 2). Whether the relevant conduct did in fact hinder or prevent the supply of this service is a question of fact to be determined at the trial; but the allegation is made in the clearest terms in the statement of claim.

The fourth proposition on which counsel for the respondents said the s. 45D claim rested was that the relevant conduct must have been engaged in for the purpose or had or be likely to have the effect of causing substantial loss or damage to the business of the applicant. It was said that it is impossible for someone in the position of the applicant to suffer damage as the consequence of the decision by the third respondent as Superintendent of the project to reject a claim, that the contractual consequences of such rejection is that the matter proceeds to a third party for arbitration to be adjudicated in accordance with the provisions of the contracts.

Counsel for the applicant submitted that there are at least five heads of damage which could be suffered by the applicant in addition to damage which they may recover by an award based upon the arbitration provisions of the contracts being invoked. He identified two such heads of damage as the arbitration costs themselves and the lapse of time which inevitably occurs after a matter is referred to arbitration and before an award is made which can have disastrous affects on the business of a party to the arbitration. Notwithstanding that interest may be awarded in appropriate cases by an arbitrator this is not in truth compensation for damage under this head.

The principles governing applications to dismiss or stay proceedings on the ground that no reasonable cause of action is disclosed are referred to in many cases. I do not propose to restate them as they are well known. See Dev v. ictorian Railways Commissioners [1949] HCA 1; (1949) 7 C.L.R. 62 especially per Dixon J. (at p. 91): General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 C.L.R. 125 especially per Barwick C.J. (at pp. 129-1 0). Hanimex Pty. Limited v. Kodak (Australasia) Pty. Limited (19 2) A.T.P.R. 40-2 7 (at p. 4 999) and Universal Telecasters (ueensland) Limited v. Ainsworth Consolidated Industries Limited (19) A.T.P.R. 40- 4 (at pp. 44-525-6).

In the General Steel Case Barwick C.J. posed the relevant test (at p.130) as being whether the plaintiff's case " . . . is so clearly untenable that it cannot possible succeed", a passage that has been followed more than once and recently by a Full Court of this Court in the Universal Telecasters Case (at p. 44,526).

Although the s. 45D claim in this proceeding is novel, I am not satisfied that, as pleaded, it manifestly does not admit of reasonable argument or that it is so clearly untenable that it cannot possibly succeed. I think that this conclusion sufficiently appears from my summary of the rival contentions of counsel. I see no useful purpose in my analysing in depth the various propositions of law that were the subject of argument. This would be, in the circumstances of the present case, to embark upon an exercise that is more appropriate for the trial Judge on the final hearing of the case.

I am not, of course, determining in this application the ultimate strength or weakness of the applicant's case. All I am deciding is that the exercise of this Court's summary jurisdiction to dismiss a proceeding should not be invoked.

I turn now to the alternative claim by the respondents for a stay pursuant to sub-s. 7(2) of the Arbitration (Foreign Awards and Agreements) Act 1974 ("the Arbitration Act"). The long title to the Arbitration Act states that it is "an Act to approve Accession by Australia to a Convention of a Recognition and Enforcement of Foreign Arbitral Awards, to give effect to that Convention, and for related purposes".

The "Convention" is defined by sub-s. 3(1) as meaning the 1958 Convention on the recognition and enforcement of foreign arbitral awards, a copy of the English text of which is set out in the Schedule to the Act.

By s. 4 approval is given to accession by Australia to the Convention. Section 7, so far as relevant to the present application, provides:-
"7(1) Where . . .

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention Country, this section applies to the agreement.

(2) Subject to this Act, 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.

. . . . .

(4) For the purposes of sub-ss. (2) and (3), a reference to a party includes a reference to a person claiming through or under a party . . ."

It is common ground between the parties that:-

(a) The contracts expressed to be between the applicant and the third respondent are "arbitration

agreements" within the meaning of the Arbitration Act;

(b) The third respondent, being a corporation incorporated in the U.S.A., is a person who was at the time when the Arbitration agreements were made domiciled or ordinarily resident in the U.S.A.;

(c) The U.S.A. is a Convention Country;

(d) Paragraph 7(1)(d) of the Arbitration Act therefore applies;

(e) Paragraph 7(2)(a) of the Arbitration Act applies.

The only dispute is whether para. 7(2)(b) applies. Counsel for the respondents submitted that the proceedings in this Court do not involve the determination of a matter that, in pursuance of the arbitration agreements, is capable of settlement by arbitration. He did not dispute that the third respondent was a party to the agreements mentioned in the statement of claim and that it was liable as a principal to the applicant as the other contracting party. Counsel argued that it was an accidental circumstance that the third respondent was also the "Superintendent" under the agreements. The breach of contract alleged against the third respondent in para. 35 of the statement of claim was said to be a breach of its obligations as Superintendent not as a principal contracting party. If the third respondent had been the Superintendent only and not a party to the agreements then it could not be said to have been in breach of any obligations under the agrement; nor could any party itself be said to be in breach of the agreements. In these circumstances counsel argued that the material provisions of clause 49 of the agreements were not applicable. Clause 49, dealing with settlement of disputes, provides, so far as relevant:-
"All disputes or differences arising out of the Contract or concerning the performance or the non-performance of either party of his obligations under the contract, whether before or after the completion of the works, shall be determined as follows . . . . "
There follows detailed provisions designed to refer matters in dispute to arbitration under the agreements.

It was said that the fact that in the present case the Superintendent and the principal contracting party were one and the same person, namely the third respondent, was not to the point.

I reject this argument. Accidental circumstance or not, the fact is that the third respondent is both a principal contracting party and the Superintendent under the agreements. If the third respondent had not been a contracting party the applicant would have no cause of action against it pursuant to para. 35 of the statement of claim which asserts that one party to the relevant agreement (the third respondent) has breached his contractual obligations and is liable accordingly. It is only because the third respondent is a party to the relevant agreements that it can be sued for its breach. It is plain that the opening words of the relevant part of cl. 49.1 of the agreements are satisfied. There is a dispute or difference arising out of the agreements or concerning the performance or the non-performance by either party of his obligations under the agreements. There is no warrant for reading down the plain language of these opening words. Indeed, even if it were permissible to distinguish between the role of the third respondent as a contracting party on the one hand and as the Superintendent on the other hand, I am satisfied as at present advised that the opening words of cl. 49.1 would still apply. There would still be a dispute or difference arising out of the contract namely, a dispute or difference between the applicant as builder and the third respondent as Superintendent in relation to the third respondent's alleged failure and neglect to act in a reasonable and equitable manner in determining and valuing the relevant claims and granting extensions of time. The second leg of the opening words of clause 49.1 "All disputes or differences . . . . concerning the performance or the non-performance of either party of his obligations under the contract" may not, however, apply on this hypothesis.

In these circumstances I am satisfied that para. 7(2)(b) of the Arbitration Act applies. No other

argument was put against the making of the order required by sub-s. 7(2). Accordingly, I propose to make appropriate orders.

I was referred in argument to the orders made by McLelland J. in Flakt Australia Limited v. Wilkies & Davies Construction Co. Limited (1979) 2 N.S.W.L.R. 243 (at p. 251). In my opinion the orders made in that case by his Honour may appropriately be made in the present case.

It was not disputed that, if the respondents succeed in their application for a stay pursuant to sub-s. 7 (2) of the Arbitration (Foreign Awards and Agreements Act 1974, the stay should apply to the matters mentioned in paras. 35, 48, 49, 62, 63, 75 and 76 of the statement of claim, being the paragraphs which relate to so much of the applicant's claim as is based on the pendant or accrued jurisdiction of this Court, not the claims based on s. 45D of the Act.

The orders of the Court are as follows:-

(1) Order pursuant to s. 7 of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth.):- (a) That so much of the proceeding in this Court as involves the matters alleged in paras. 35, 48, 49, 62, 63, 75 and 76 of the statement of claim be stayed upon the condition that such stay may be terminated upon application made by the applicant in the event that the respondents do not do all things necessary to be done on their part to have the matters referred to hereunder determined in accordance with the arbitration agreements between the parties with reasonable expedition; and

(b) That the parties be referred to arbitration in respect of the matters mentioned in (a) above;

(2) Order that so much of the application by the respondents as seeks the dismissal of the proceeding in this Court pursuant to order 20 rule 2 be dismissed;

(3) That the costs of this application by the respondents pursuant to order 20 rule 2 and for a stay pursuant to s. 7 of the Arbitation (Foreign Awards and Agreements Act) 1974 (Cth.) be costs in the proceeding;

(4) Order that each party be at liberty to apply on two days' notice in respect of the stay granted by order 1(a) above.
