Stericorp Ltd v Stericycle Inc [2005] VSC 203 (30 May 2005)
Last Updated: 16 June 2005

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST
No. 2043 of 2005
F5818

STERICORP LTD Plaintiff

v

STERICYCLE INC Defendant

JUDGE:	WHELAN J.
WHERE HELD:	MELBOURNE
DATE OF HEARING:	27 May 2005
DATE OF JUDGMENT:	30 May 2005
CASE MAY BE CITED AS:	**Stericorp** Ltd v Stericycle Inc
MEDIUM NEUTRAL CITATION:	[2005] VSC 203

ARBITRATION – Submission to Arbitration – Arbitration clause under *International Arbitration Act* 1974 (Cth) – whether contractual disputes properly referrable to arbitration – not all claims referable – whether arbitration waived, rejected or abandoned – whether *Commercial Arbitration Act* 1984 (Vic) applies – proceeding stayed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Bick QC with Mr D Farrands	Meerkin & Apel
For the Defendant	Mr J Digby QC with Dr M Collins	Baker & McKenzie

HIS HONOUR:

1 In August 2001, the plaintiff ("**Stericorp**") agreed to purchase from the defendant ("Stericycle"), medical waste treatment and recycling equipment pursuant to a supply agreement ("the Supply Agreement"). The purchase was financed in part by a series of convertible note agreements entered into between **Stericorp** and Stericycle. Disputes

have arisen as to the capacity and performance of the equipment. Stericycle has given notices of default under the convertible note agreements.

2 Stericycle is a company incorporated in the State of Delaware in the United States of America. In this proceeding, **Stericorp** alleges that there were breaches by Stericycle of an express performance warranty in the Supply Agreement (Amended Statement of Claim, paragraphs 3 to 13); alleges conduct by Stericycle which was misleading and deceptive concerning the capacity, the performance, the licensing compliance, and the costs of operating the equipment (paragraphs 14 to 23 and 48 to 49); and alleges that Stericycle was not entitled to give the notices of default under the convertible note agreements (paragraphs 24 to 47).

3 The Supply Agreement contains the following provision:

"10.1 Dispute Resolution: Subject to all limitations set forth in the foregoing articles, which shall expressly bind all mediators, arbitrators and other dispute resolution officials:

(a) If at any time there is any dispute, question or difference of opinion between the parties concerning or arising out of the Agreement or its construction, meaning operation or effect or concerning the rights, duties, or liabilities by a party ('a dispute'), then the party shall forthwith confer in an endeavour to settle it in good faith. If the parties fail to resolve the dispute within 14 days after first conferring then either party may refer the to mediation in accordance with Clause 10.1(b).

...

(c) Any dispute whatsoever arising out of or in connection with the Agreement which has not been resolved by mediation shall be submitted to arbitration in accordance with this clause, and subject to, the Institute of Arbitrators and Mediators Australia Rules of Conduct for Commercial Arbitrations."

4 Stericycle has filed a conditional appearance. By letters dated 27 April 2005, its solicitors advised **Stericorp**'s solicitors that certain of the claims made in this proceeding must be stayed under the *International Arbitration Act* 1974 (Cth) ("the Act") and gave notice of an application to that effect. On Friday 27 May 2005, I heard that application. The provision of the Act which is relied upon is section 7. It relevantly provides as follows:

"(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 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 On the hearing of this application, counsel for Stericycle sought a permanent stay under the Act of the claims made in the Amended Statement of Claim in paragraphs 3 to 23, that is, the claims under the express performance warranty and the claims concerning the alleged misleading and deceptive conduct. Orders were also sought concerning the other claims, which I will address separately.

6 Stericycle submitted that the conditions provided for in the Act existed here in relation to the specified claims and that the Act thereby required the Court to stay so much of the proceeding as raised those claims. More specifically it submitted that:

clause 10.1(c) of the Supply Agreement is an arbitration agreement within the meaning of the Act;

Stericycle is a person resident in a convention country as defined being the United States of America;[1]

this is a proceeding instituted by a party to the arbitration agreement;

the claims in the specified paragraphs involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration; and

accordingly, the Court is subject to the mandatory requirement to stay so much of the proceeding as involves the determination of that matter.

7 **Stericorp** resisted a stay of the specified claims. Detailed submissions were made both in writing and orally, on its behalf. In summary, the submissions put in opposition to the stay were:

Stericycle is precluded from relying upon the arbitration provision in the Supply Agreement because it has chosen to reject, abandon or waive arbitration. In the words of its counsel, it has "invited" the court proceedings that it now seeks to stay.

Clause 10.1(c) does not encompass the misleading and deceptive conduct claims. (The written submission and the oral submission differed in this respect.) On any view, clause 10.1(c) was said not to encompass the convertible note claims.

Even if the clause does encompass the misleading and deceptive conduct claims, an arbitrator cannot give the full range of remedies open to a Court in relation to those claims and the Court's jurisdiction to give those remedies cannot be ousted by the agreement between the parties.

The parties have contracted out of the Act. In this respect, reliance was placed upon what was said to be a manifest intention to exclude the Act in clause 10.1 and upon the provisions of the convertible note agreements concerning governing law and jurisdiction. That being so, it was submitted that the *Commercial Arbitration Act* 1984 (Vic) applies and that a stay ought to be refused under the *Commercial Arbitration Act* in the exercise of the Court's discretion.

8 It is convenient to address the issues raised by this application by reference to the submissions made as to why the Act does not apply. I will deal with each of those matters in turn.

Stericycle has abandoned arbitration

9 Stericycle's abandonment or waiver of its right to arbitrate was said to arise from a letter written by its then solicitors dated 17 December 2004 and from its conduct thereafter. It is necessary to give some brief background to that letter.

10 The dispute between the parties over the performance of the equipment has a long history. Prior to 23 November 2004, there had been an attempt to settle the matter at a mediation before mediator Mr Henry Jolson QC. On 23 November 2004, **Stericorp**'s solicitors wrote a letter to Stericycle's then solicitors that stated, in part:

"Pursuant to Article 10 of the Supply Agreement and in particular 10.1(b)(7) and 10.1(c) the matter is automatically referred to Arbitration on the expiration of 30 days after the failure of mediation (which has occurred). ... For the avoidance of any doubt, our client formally calls on your client to participate in the arbitration process pursuant to Article 10 of the Supply Agreement. The arbitration process having commenced, we will shortly submit to you the name of a proposed Arbitrator under Article 10."

11 A letter in reply of 25 November 2004 stated, amongst other things:

"We note that your client now wishes to progress arbitration of the dispute between our clients under the Supply Agreement. Please submit the name of a proposed arbitrator. We will obtain instructions and provide a name or names to you shortly."

12 **Stericorp**'s solicitors relevantly responded on 30 November 2004 in these terms:

"We are in the process of preparing a short list of proposed Arbitrators and will provide the same to you shortly as requested. You have indicated that you are gathering names of proposed arbitrators. Please provide these as soon as you have them."

13 By a letter of 3 December 2004, Stericycle's then solicitors put forward the names of three suggested arbitrators.

14 Under cover of a letter dated 8 December 2004, **Stericorp**'s solicitors served a Notice of Dispute. The notice expressed itself to be under the *Commercial Arbitration Act* and included in the questions to be determined questions as to the express performance warranty, as to misleading and deceptive conduct, as to the convertible note agreements and as to unconscionability. The response of Stericycle's solicitors was by a fax of 17 December 2004. I set it out in full:

"We note your letter dated 8 December 2004 and the enclosed Notice of Dispute ("Notice").

The Notice appears to us to be defective for a number of reasons. In particular:

(a) it seeks the resolution of disputes, some of which do not arise out of or have any relevant connection to the Supply Agreement, and which are therefore beyond the scope of clause 10.1(c); and

(b) the Notice purports to have been issued in accordance with the *Commercial Arbitration Act* 1984 (Vic), without regard to the application of the *International Arbitration Act* 1974 (Cth) or the UNCITRAL Model Law on International Commercial Arbitration 1985.

Without prejudice to our client's position with respect to the validity or effectiveness of the Notice, we acknowledge receipt of same.

Finally, we invite your client to confirm that if an arbitration of some type is to be instigated or proceed in relation to appropriate issues arising under the Supply Agreement (clause 10.1(c)), your client would accept Sir Daryl Dawson as the Tribunal, or a member of a Tribunal of three Arbitrators, constituted as we earlier suggested."

15 **Stericorp**'s solicitors replied on 23 December 2004 as follows:

"We refer to your facsimile of 17 December 2004 received at approximately 4.18 p.m. in relation to arbitration and the notice served on you on 8 December 2004.

We and our client are in the process of considering matters contained in your letter and given the complexity of the issues surrounding arbitration and the time of the year, we propose to revert to you in the New Year in regard to arbitration related matters.
Our client reserves all of its legal rights."

16 It was common ground that thereafter, until this proceeding was instituted on 14 April 2005, no step was taken by either party to advance an arbitration. Material was filed by both parties concerning negotiations, or the absence of negotiations, during that period, and concerning a complaint made to the Takeovers Panel.

17 Whilst I accept that the parties might so conduct themselves as to produce a position where no arbitration agreement then exists or is operative, and that the mandatory stay provision in the Act would not then apply (see s.7(5) of the Act), and I also accept (as was conceded by counsel for Stericycle) that a party could so conduct itself as to become subject to a procedural estoppel precluding an application for a stay, I can see nothing here which produces either such outcome.

18 Stericycle made two points about the validity of the notice. One was that "some" of the disputes were beyond the scope of clause 10.1(c). Before me it was common ground that the convertible note disputes, which were included in the notice, are outside clause 10.1(c). In effect, **Stericorp** now agrees that Stericycle was correct about that. The other was the application of the *Commercial Arbitration Act*. In my view, Stericycle was also correct about that. I cannot see how any abandonment or waiver can arise from correctly pointing out deficiencies in the notice that was given. Further, I do not read the letter as suggesting that Stericycle took the view that the matters which are within clause 10.1(c) should not be arbitrated, and from **Stericorp**'s solicitors' letter of 23 December 2003 I do not consider that they took that view at that time either. The parties' conduct after the letter of 23 December 2004 does not give rise to any waiver or abandonment in my view.

Claims under clause 10.1(c)

19 Both parties submitted that the convertible note disputes were not within clause 10.1(c). In the circumstances, I will proceed on the basis that that is correct.

20 **Stericorp**'s written submission suggested that it was "arguable" that clause 10.1(c) encompassed the claim under s.52 of the *Trade Practices Act* 1974 (Cth). In oral submissions, **Stericorp**'s counsel submitted that these claims were not within clause 10.1(c), because clause 10.1(c) must be read down by reference to clause 10.1(a). **Stericorp**'s counsel did concede in oral submissions that if clause 10.1(c) stood alone, on the current state of the authorities a conclusion that the *Trade Practices Act* claims were encompassed by the provision would be "the better view".

21 In my view, clause 10.1(c) encompasses the misleading and deceptive conduct claims, whether one reads it with clause 10.1(a) or not. Such provisions are not to be read narrowly.[2] Whilst clause 10.1(a) and clause 10.1(c) are expressed differently, they are each wide enough to encompass these claims. If it matters, it seems to me that clause 10 provides for a process of dispute resolution through conferring with the option of mediation and, thereafter, arbitration, so that clauses 10.1(a), (b) and (c) ought to be read and construed together. Clause 10.1(a) covers disputes concerning the Supply Agreement, and clause 10.1(c) covers disputes in connection with that agreement. The *Trade Practices Act* claims both concern and are connected with the Supply Agreement.

Both sub-clauses cover disputes "arising out of" the Supply Agreement, which expression also encompasses the *Trade Practices Act* claims, in my view.

Ousting the Court's Jurisdiction

22 The submission that the arbitrator will not have power to give the full range of remedies under the *Trade Practices Act* and that such claims cannot be removed from the Court is inconsistent with the decision of the New South Wales Court of Appeal in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*.[3] Reliance was placed on the observations of Emmett J made obiter in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No.5)*.[4] These observations seem to me to concern the possibility that an arbitration clause might purport to exclude, or have the effect of excluding, the operation of the *Trade Practices Act*. That is not the position here and was not the position in *Francis Travel*. I do not read Emmett J's observations as being inconsistent with the New South Wales Court of Appeal decision in *Francis Travel*. To the extent that there is any inconsistency, I adopt the approach of the New South Wales Court of Appeal (see also *Abigroup Contractors Pty Ltd v Transfield Ltd* [1998] VSC 103 at [156]). The *Trade Practices Act* claims can and should be arbitrated, as the parties have agreed.

Contracting Out of the Act

23 **Stericorp** submitted that the Supply Agreement manifests an intention to exclude the Act. In this respect, it relied upon the references to the Institute of Arbitrators and Mediators Australia, upon the requirements that the arbitration must be held in Victoria contained in clause 10.1 and also upon the choice of law provision in clause 10.5. I do not consider that the provisions relied upon manifest any such intention. Similar submissions were put and rejected by Gillard J in *Abigroup* at [117] to [122]. It was also submitted on behalf of **Stericorp** that the convertible note agreement must be read with the Supply Agreement and that, as in those agreements the parties expressly submit to the non-exclusive jurisdiction of the courts of Victoria, a conclusion should be drawn that the parties intended to exclude the application of the Act to the arbitration provision of the Supply Agreement. I cannot draw that conclusion.

Conclusions

24 The conditions provided for in s.7 of the Act apply here and, in my view, a stay is mandatory.[5] I will accordingly make an order staying the claims in paragraphs 3 to 23 of the Amended Statement of Claim and referring the parties to arbitration in respect of those matters.

25 In view of the conclusions I have reached, it is unnecessary to consider whether a stay would have been granted had the *Commercial Arbitration* Act applied.

26 As for the balance of the claims, some are conceded by Stericycle to be, in effect, contingent on the outcome of the arbitration. **Stericorp** says that none of the convertible note claims are able to proceed until the issues to be arbitrated are determined. At present this does not clearly emerge from **Stericorp**'s Amended Statement of Claim. Counsel for **Stericorp** applied for leave to amend the Amended Statement of Claim in the course of argument. I will grant leave to amend and will consider what claims if any can proceed before the arbitration is concluded when the pleadings have closed.

27 (A short discussion ensued.)

28 Orders:

So much of this proceeding as involves determination of the matters alleged in paragraphs 3 to 23 inclusive of the Amended Statement of Claim is stayed and the parties are referred to arbitration in respect of those matters.
The plaintiff has leave to amend its Amended Statement of Claim.
The plaintiff is to file and serve its Further Amended Statement of claim by 3 June 2005.
The defendant is to file and serve its Defence and any Counterclaim by 17 June 2005.
The plaintiff is to file and serve its Reply and Defence to Counterclaim by 24 June 2005.
The summons for directions is adjourned to 30 June 2005.
29 (Short submissions on costs ensued.)
30 HIS HONOUR: I think the costs should follow the event here, notwithstanding the matters put by Mr Farrands. The principles on these applications are now fairly well established and it seems to me that the plaintiff's opposition to a stay was in large part prompted by a fairly jaundiced interpretation of Stericycle's solicitors' letter of 17 December 2004. So in all the circumstances, I don't think there is any reason to depart from the ordinary principle that costs should follow the event. So, in addition to the six orders that I have already referred to, I will also order that the plaintiff pay the defendant's costs of the application for a stay.

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[1] As to the status of the United States of America as a convention country see *Halsbury's Laws of Australia* para 25-225 fn 7; United Nations Commission on International Trade Law (UNCITRAL) Status of Conventions and Model Laws, at <http://www.uncitral.org>.
[2] *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 477; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165; *Abigroup Contractors Pty Ltd v Transfield Ltd* [1998] VSC 103 at [129].
[3] (1996) 39 NSWLR 160; see also *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466.
[4] (1998) 90 FCR 1 at 23-24; (1998) 159 ALR 142 at 163.
[5] See *Abigroup* at [80].