ELDERS CED LTD v DRAVO CORPORATION
DRAVO CORPORATION v ELDERS CED LTD

SUPREME COURT OF NEW SOUTH WALES — COMMON LAW DIVISION

FOSTER J

28 March 1984 — Sydney

Arbitration — Place of residence — Domicile of ordinary resident — Place of incorporation — Place where parties undertake to submit to arbitration agreement capable of settlement by arbitration — Summons by party to arbitration agreement — Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) s 7(2)(b).

Dravo, a company incorporated in the United States of America, and Elders, an Australian company, were the parties to an agreement relating to the construction of a smelter and certain ancillary facilities at Tomago in New South Wales. Clause 49 of the agreement provided that an arbitrator should be appointed to settle disputes between the parties.

A dispute arose over the construction of certain portions of the agreement between the parties and Elders commenced proceedings in the Supreme Court of New South Wales seeking certain declarations as to the construction of the agreement.

Dravo sought a stay of proceedings relying on the provisions of s 7(2)(b) of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) (the Act) on the ground that Dravo was not a resident of Australia at the time the agreement was made. If the Act applied then Elders would be obliged to resort to the arbitration clause in the agreement.

Dravo also claimed that the court had an inherent discretion to grant such a stay. It was common ground between the parties that if s 7(2)(b) applied the court would be obliged to stay the proceedings.

At the time the agreement was made Dravo was registered in New South Wales under the Business Names Act 1962 (NSW); and Elders relied on this fact to claim that Dravo was a company resident in New South Wales and that the Act therefore did not apply.

Held, the stay of proceedings should be granted because:—

(i) The fact that the company was registered under the Business Names Act did not militate against the decision that it was properly to be regarded as a resident of the United States of America.

(ii) The proceedings had been instituted by a party to an arbitration to which s 7(2)(d) of the Arbitration (Foreign Awards and Agreements) Act 1974 applied and which were capable of settlement by arbitration.

Originating Summons

This was a summons brought by the plaintiff in respect of prior proceedings commenced by the defendant whereby the plaintiff sought a stay of proceedings on the ground that the dispute between the parties was a matter properly to be resolved pursuant to an arbitration clause contained in a contract between the parties.

R C P Allaway, for the plaintiff (Dravo Corporation).

A R Abadee, for the defendant (Elders CED Ltd).

Foster J. The matter before me for determination is initiated by a summons in which the plaintiff Dravo Corp seeks orders that proceedings No 9976 of 1984 commenced by the defendant Elders CED Ltd against it be stayed. It seeks certain consequential orders. The proceedings No 9976 of 1984 are proceedings by way of summons in which the plaintiff claims certain declarations as to the construction of portions of an agreement between the plaintiffs and defendant relating to the construction of a smelter and certain ancillary facilities at Tomago in this State.

The declarations sought are set out in the summons. It is not necessary for me to refer to them in detail.

The plaintiff through its counsel indicated that it proposed to submit that proceedings No 9976 of 1984 should be stayed on three bases. The first basis was that the court was mandatorily obliged to stay the proceedings having regard to the provisions of s 7(2)(b) of the Commonwealth Arbitration (Foreign Awards and Agreements) Act 1974. The other bases upon which a stay was sought were discretionary in nature.

As it was common ground that, if the first basis was in fact made good, I would have no option but to stay the proceedings, argument in the matter has been confined to that ground alone. In the event it is unnecessary for me to hear argument in relation to the two other grounds that the plaintiff wished to put forward, and I expressly make no decision in relation to those.

Section 7 of the Arbitration (Foreign Awards and Agreements) Act 1974, so far as relevant, provides as follows:—

"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."

It is submitted on behalf of the plaintiff, Dravo Corp that on the material before me this section applies with the result that I must stay the proceedings commenced by summons No 9976 of 1984.

A number of matters arise for consideration under the provisions of the section to which I have just made reference. In the first instance it is asserted that the plaintiff corporation was at the time when the agreement was made domiciled or ordinarily resident in a country that is a convention country. It appears quite clearly on the evidence that at the relevant time the corporation was in fact a body corporate incorporated in the State of Pennsylvania in the United States of America, which is a convention

country within the meaning of the Act. The question of whether a body corporate is ordinarily resident in a country is in fact dealt with in s 3(3) of the Act where it is stated that a body corporate shall be taken to be ordinarily resident in a country if, and only if, it is incorporated or has its principal place of business in that country.

I am quite satisfied, as I have said, that the plaintiff is a body corporate incorporated in the United States and consequently is to be taken as ordinarily resident in that country. It seems also that it has its main registered office in that country which, on ordinary principles, would require that I find its domicile to be there.

"Arguments have been put to me based upon its registration in New South Wales under the Business Names Act 1962 of this State. On the material before me it is clear that it is properly registered in this State as a foreign company and I do not find that the material relating to its registration under the Business Names Act in any way militates against the decision that it is properly to be regarded as resident in the United States. It may have residence in New South Wales for certain purposes as a foreign company but in my view this does not take it out of the provisions of s 3(3) or s 7(d) of the Act.

The agreement relied upon as being the relevant arbitration agreement is set out in para 8 of the affidavit of Mr J D Trammell of 20 March 1984. It is cl 49(1) of the general conditions forming part of the contract between the parties. The clause reads as follows:—

"49(1) *Procedure for settlement of disputes:* Notwithstanding the succeeding provisions of this clause, the Contractor shall if the work under the Contract has not been completed, and subject as otherwise provided for in the Contract continue without delay to perform and execute such work and in so doing shall comply with all directions given by the Superintendent pursuant to the Contract.

"All disputes or differences arising out of the Contract or concerning the performance or the non-performance by either party of his obligations under the Contract, whether before or after the completion of the Works, shall be determined as follows:—

(a) One or both of the parties shall notify the superintendent in writing that a dispute under this clause has arisen and shall within twenty-eight days of such notification submit the matter at issue in writing with detailed particulars to the superintendent for determination and the superintendent shall, within 28 days after receipt thereof, give his determination to both parties to the contract.

(b) If either party is dissatisfied with the determination given by the Superintendent, or if he fails to give his determination, pursuant to (a) of this clause, the dissatisfied party may not later than two months after the Superintendent is required to give his determination give notice in writing to the other party requiring that the matter at issue be referred to arbitration and specifying with detailed particulars the matter at issue and thereupon the matter at issue shall be determined by arbitration. If, however either party does not within the said period of two months give a notice to the other party requiring that the matter at issue be referred to arbitration the determination given by

Superintendent pursuant to (a) in this clause shall not be subject to arbitration.

(c) Arbitration shall be effected:—

(i) by a single arbitrator mutually agreed upon in writing between the principal and the Contractor;

or failing such agreement upon such an arbitrator within one month after the notice in writing aforesaid is received by one party from the other party,

(ii) by a single arbitrator nominated in writing by the President of The Institute of Arbitrators Australia, such nominee not being an employee of the principal or of the Contractor or having had any association with the works;

or if the President fails or refuses so to nominate such a person within one month after having been requested by either party to make such a nomination,

(iii) by an arbitrator appointed in accordance with the provisions of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto.

(d) A reference to arbitration under this cl 49 shall be deemed to be a reference to arbitration within the meaning of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto and the arbitration proceedings shall be conducted in that State or Territory. The arbitrator shall have all the powers conferred by those laws and it shall be competent for him to enter upon the reference without any further or more formal submission than is contained in this clause."

An arbitration agreement is defined in the Act as "an agreement in writing of a kind referred to in sub-article 1 of Article 2 of the convention". The convention is a schedule to the Act.

Article 2 sub-art 1 reads as follows:—

"1 Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

By sub-art 2 it is provided that the term "agreement in writing" shall include an arbitral clause in a contract. Clearly enough cl 49(1) qualifies as an agreement in writing or a clause in a contract. I have had some slight hesitation as to whether the agreement is one by which the parties "undertake to submit to arbitration all or any differences" etc, or as to whether, regarding it as a clause in a contract, it is relevantly arbitral in nature.

Those hesitations were based upon certain passages in the judgment of Menhennit J in *Hammond v Wolt* [1975] VR 108 at 117. I have come to the conclusion, however, that reading cl 49(1) as a whole it can properly be characterized as an agreement in writing under which the parties undertake to submit to arbitration all or any differences within the meaning of sub-art 1 of Art 2. That being so, I have before me in the proceedings commenced by summons No 9976 of 1984 proceedings which have been instituted by a party to an arbitration agreement to which the section applies against another party to the agreement. Also, those proceedings are pending in court within the meaning of the section.

The final matter for consideration is whether those proceedings involve the determination of a matter that in pursuance of the agreement is capable of settlement by arbitration.

The meaning of the phrase "matter that is capable of settlement by arbitration" received some consideration in the case of *Flakt (Aust) Ltd v Wilkins and Davies Construction Co Ltd* (1979) 25 ALR 605 at 613. At that page McLelland J expressed himself thus:

"In my opinion, 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 the determination of such a claim. The use of the word 'settlement' provides support for the view. 'Settlement' is an apt term to be used in relation to a claim for relief — it is less apt in relation to a mere issue."

In my view the very nature of the proceedings which are sought to be stayed indicate that they constitute a matter within the meaning of the section. What is sought in the summons is declaratory relief and declaratory relief is of course relief of a kind proper for determination in this court.

I am quite satisfied that the relevant sections of the Act apply in this case. The result is that I have no option but to order the stay that is sought. I do so with some reluctance as having regard to the nature and content of the arbitration agreement constituted by cl 49 it would seem fairly obvious that pursuant to sub-para (d) thereof it is, to say the least, not unlikely that the very matters sought to be determined by this summons will be raised during the course of the arbitration and may very well find themselves back in this court by way of stated case. However, that is a consideration which can have no influence whatever in my construction of the section and in my application of it as so construed in these proceedings.

(The plaintiff undertakes that it will not object to the hearing and determination by an arbitrator of the issue raised between the parties by summons No 9976 of 1984 by virtue of the operations of cll 23(2) and 49 of the contract between the parties. It is agreed between the parties that there be liberty to apply to his Honour.)

I make an order staying proceedings No 9976 of 1984 and refer the matter the subject of those proceedings to arbitration. I make that order conditional upon compliance with the undertaking that has already been noted on behalf of the plaintiff.

I order the defendants to pay the plaintiff's costs of these proceedings but, in the circumstances, indicate that those costs should be costs appropriate to a notice of motion in the proceedings.

Solicitors for the plaintiff: *Allen Allen & Hemsley*.

Solicitors for the defendant: *Hunt & Hunt*.

MICHAEL AITKEN
BARRISTER-AT-LAW