

IN THE DISTRICT COURT HELD AT CAIRNS

CIVIL JURISDICTION

Plaint No. 267 of 1993

BEFORE HIS HONOUR JUDGE WHITE

JUNE 1997

BETWEEN: JOHN FRANCIS DAVIES

Plaintiff

AND: PETER HODGETTS

Defendant

AND: QUEENSLAND MARINE & GENERAL INSURANCE  
PTY.LTD.

1st Third Party

AND: RIVERS INSURANCE BROKERS PTY.LTD.

2nd Third Party

AND: THE SHIPOWNERS' MUTUAL PROTECTION  
AND INDEMNITY ASSOCIATION (LUXEMBOURG)

3rd Third Party

#### REASONS FOR JUDGMENT

The plaintiff brings this action against the defendant claiming damages for personal injuries caused by negligence and breach of duty on the part of the defendant during the course of the plaintiff's employment with the defendant as master of a fishing trawler the "Reinga". The defendant has issued three third party notices. The defendant claims against the 3rd third party to be indemnified pursuant to a contract of marine insurance between the

defendant and the 3rd third party, the 3rd third party (the Association) having refused to provide any such indemnity to the defendant. The defendant's claims against the 1st third party and the 2nd third party are really alternative claims to that brought against the 3rd third party. The defendant claims against the 1st and 2nd third parties essentially for professional negligence as insurance brokers in failing to properly advise or take other steps to ensure that the defendant was covered by an appropriate policy of marine insurance in respect of the plaintiff's claim at the relevant time.

This is an application by the 3rd third party brought pursuant to s.7 of the International Arbitration Act 1974 (Commonwealth) for a stay of the proceedings between the defendant and the 3rd third party pending the determination of the issues between them pursuant to an Arbitration Agreement contained in the terms of the contract of marine insurance involved. Just prior to the hearing of the application there was a flurry of activity between the defendant and the 1st third party. The 1st third party delivered to the defendant an amended defence to the defendant's claim against it, specifically pleading as a defence that the defendant was entitled to be indemnified in respect of the plaintiff's claim by the 3rd third party pursuant to the relevant contract of marine insurance. The 1st third party also served the 3rd third party with a notice claiming that the question of whether or not the defendant was entitled to an indemnity under the contract of insurance be decided, not only as between the defendant and the 3rd third party, but also between the 3rd third party and the 1st third party. Although it was suggested that such notice may require leave before it may be served, I am of the view that pursuant to rule 133 the 1st third party was entitled to serve such a notice on the 3rd third party without leave.

The defendant has also applied for leave to amend its third party notice to the 3rd third

... would a notice requiring that the issue of whether or not the defendant is entitled to an indemnity from the 3rd third party in respect of the claim by reason of the contract of marine insurance should also be determined as between the defendant, the 3rd third party and the 1st third party. I am not entirely sure whether the defendant would need leave to amend its third party notice to the 3rd third party in this way but there being no good reason why such leave should not be granted, I formally order that the defendant have leave to amend the 3rd third party notice directed to the 3rd third party in accordance with exhibit "BWR2" of the Affidavit of Bradley Wayne Russell filed by leave on the 7th November, 1996.

I now turn to consider the application for a stay by the 3rd third party. The 3rd third party has not delivered a defence to the defendant's claim against it and therefore all of the relevant facts put forward in support of the application are to be ascertained from the affidavit of Brian Denis White filed in support thereof. Section 7 of the International Arbitration Act (Commonwealth) sets out a number of requirements in ss.(1) thereof as conditions precedent to the application of the section. The various matters set out in the affidavit of Mr. White up to and including paragraph 9 thereof prove the various pre-conditions required. The rules of the 3rd third party exhibited to Mr. White's affidavit contain the terms and conditions of the relevant contract of marine insurance. There is no dispute that rule 63 thereof fits the description of an arbitration agreement within the meaning of that term in the relevant act. Subsection 2 of the Act, so far as is relevant, provides as follows:-

"(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 sees 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 also necessary to set out some of the terms of the arbitration clause. So far as is relevant rule 63.1 provides:-

"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.----"

Mr. Ryan, on behalf of the defendant, supported by Mr. Barlow for the 1st third party advances two arguments against the application for a stay. The first argument is that on the evidence put before me in support of the application I could not be satisfied that there is any difference or dispute between the parties relevant to the proceedings. Mr. Malloy for the 3rd third party argues on the other hand that it would be enough if the 3rd third party had simply refused to indemnify the defendant in order to give rise to a difference or dispute thereby requiring the stay of proceedings. I do not accept this latter submission. In my view the applicant for the stay must satisfy the court that the proceedings before the court involved the determination of a matter that in pursuance of the agreement is capable of settlement by arbitration. That means the 3rd third party must satisfy me that there is a "difference or dispute" between the defendant and the 3rd third party involved in the current action.<sup>3</sup> Although there is no defence to the defendant's claim against the 3rd third party filed in the proceedings as yet, I am able to ascertain the various admissions and assertions by the 3rd third party from the affidavit of Mr. White. In paragraph 13 of that affidavit Mr. White deposes as follows:

"The association disputes its liability to indemnify the defendant in respect of the plaintiff's claim and asserts that the cover in respect of the said vessel was cancelled in or about February, 1993."

In my view it may be taken from that passage that the dispute between the parties asserted by the 3rd third party is that it is not liable to indemnify the defendant in respect of an incident which occurred on the 11th March, 1992 because the contract of insurance was cancelled in February 1993. Looked at in that light and on that material alone, there is no relevant matter in dispute concerning the 3rd third party's liability under the policy. I should say this. 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. 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 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.

The second argument advanced by counsel for the defendant and the 1st third party is that the issue of the liability of the 3rd third party under the contract of marine insurance is now not only in issue in the proceedings between the defendant and the 3rd third party, but an

issue in the proceedings between the defendant and the 1st third party and proceedings between the 1st third party and the 3rd third party. In my view, this is correct. The submission therefore is that the 1st third party not being a party to the arbitration agreement, the matter relied upon by the applicant is not one that, in pursuance of the agreement, is capable of settlement by arbitration. It seems to me that the issue falls to be determined by ascertaining the meaning of the word proceedings in paragraph (b) of ss. 7(2) of the Act. If the word proceedings refers only to the proceedings between the parties to the arbitration agreement then, in my view, the requirement of that paragraph is fulfilled. If the word proceedings means the whole of the action involving the parties and not just the defendant and the 3rd third party, then the submission made on behalf of the defendant and the 1st third party is valid and the stay should be refused. I should say that I am unpersuaded by the applicant that a determination of the liability of the 3rd third party to indemnify the defendant by arbitration proceedings would be finally conclusive of that issue as between the defendant and the 1st third party. It seems to me that even if the arbitration proceedings were to determine that the 3rd third party was not liable to indemnify the defendant it would still be open to the 1st third party to defeat the defendant's claim for professional negligence against it on the grounds that the defendant was entitled to be indemnified by the 3rd third party. Put shortly, the 1st third party cannot be bound by a determination in arbitration proceedings when it is not a party to the proceedings and not a party to the arbitration agreement which led to the proceedings. None of the authorities on the construction of the relevant subsection of the Arbitration Act are of any decisive assistance because none deal with the particular circumstances which prevail in this case. However, I do get some assistance from the judgment of McLelland J. in *Flakt Australia Ltd. -v- Wilkins & Davies Construction Co.Ltd.*



s.7(2) NSWLR s 243. In that case His Honour held the following:-

- (a) 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 determination in the course of the determination of such a claim.
- (b) The use of the word "settlement" in s.7(2)(b) supports this view because "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."

His Honour concluded that unless the claim made in the proceedings was capable of resolution by arbitration there should be no stay. In other words the subsection contemplates a stay when arbitration proceedings will bring about a final determination of the matter. In my view, therefore, the claims by the 1st third party in its defence to the defendant's claim and the notice delivered to the 3rd third party would not necessarily take the matter beyond one capable of settlement by arbitration. If it were the case that the resolution of the matter between the defendant and the 3rd third party would be conclusive as to the liability of the 3rd third party to the defendant and be conclusive in respect of the allegation made by the 1st third party in its defence to the defendant's claim against it, it seems to me that it can fairly be said that "the proceedings involve the determination of a matter, that in pursuance of the agreement is capable of settlement by arbitration." However, where in this case the identical matter could remain an issue in the proceedings in spite of a determination by an arbitrator, in my view, the necessary conditions to entitle the 3rd third party to a stay have not been met. In my view, therefore, the application should be refused.