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Federal Court of Australia

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Re Dodwell and Co (Australia) Pty Limited v Moss Security Limited; Moss Security Pty Limited (Formerly Wilrac Pty Limited) and Kevin Mcdonnell [1990] FCA 110 (11 April 1990)

FEDERAL COURT OF AUSTRALIA

Re: **DODWELL** AND CO. (AUSTRALIA) PTY LIMITED
And: MOSS SECURITY LIMITED; MOSS SECURITY PTY LIMITED (formerly Wilrac Pty Limited) and KEVIN McDONNELL
No. G649 of 1989
FED No. 130
Arbitration

COURT

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

CATCHWORDS

Arbitration - International arbitration - Application for stay of proceeding and reference to arbitration in England - Alleged arbitration agreement covering disputes between applicant and only one of the three respondents and some only of the disputes between the applicant and that respondent - Possibility of duplication of proceedings - Lack of discretion in Court to refuse order if statutory pre-conditions met - Whether there was any arbitration agreement in force between the parties - Whether the present disputes are covered by the terms of the alleged agreement.

International Arbitration Act 1974 ss.3, 7

HEARING

SYDNEY
11:4:1990

Counsel for the Applicant: Mr J.B. Maston

Solicitors for the Applicant: Conway Maccallum

Counsel for the Respondents: Mr J Thomson

Solicitors for the Respondents: Townsend and Edstein

ORDER

1. The Notice of Motion dated 5 February 1990 be dismissed.

2. The first respondent, Moss Security Limited, pay to the applicant, **Dodwell** and Co. (Australia) Pty Limited, its costs of the motion.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

Before the court is an application by the first respondent for the stay of a proceeding commenced in this Court in order that it may be submitted to arbitration in England. The particular orders sought in the Notice of Motion are as follows:
"1. That these proceedings be stayed pursuant

> to section 7(2) of the Arbitration (Foreign Awards and Agreements) Act 1974 (Comm) or alternatively that the proceedings be stayed in so far as they involve the determination of those matters covered by the provisions of clause 15 of the draft agreement referred to in paragraph 10 of the statement of claim.
> 2. That the whole of these proceedings be stayed generally upon condition that the respondents and each of them consent to appear in any proceedings or arbitration commenced by the applicant commenced in London raising the same issues as those raised in the statement of claim herein and upon such other terms and conditions as may be appropriate."

The statutory context

2. Following amendments made by the International Arbitration Amendment Act 1989, the Arbitration (Foreign Awards and Agreements) Act 1974 is now known as the International Arbitration Act 1974. A critical provision in that Act is s.7 which relevantly reads as follows:

> "7. (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;
(b) ...
(c) ...
(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.
(3) ...
(4) ...
(5) A court shall not make an order under
sub-section (2) if the court finds that the
arbitration agreement is null and void,
inoperative or incapable of being performed."

3. The term "arbitration agreement" is defined by s.3 of the Act as meaning "an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention." The Convention referred to is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration. A copy of the English text of that Convention is set out in Schedule 1 of the Act. Article II of the Convention relevantly provides:

"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.
> 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
> 3. ..."

4. The applicant in the principal proceeding, **Dodwell** and Co (Australia) Pty Limited ("**Dodwell**"), is a company incorporated in Australia. There are three respondents to the principal proceeding: Moss Security Limited ("Moss"), an English company allegedly engaged in the marketing of automotive security alarms and devices, Moss Security Pty Limited (Moss Security"), an Australian company previously known as Wilrac Pty Limited and said to be controlled by Moss, and Kevin McDonnell, the managing director of Moss Security. Moss contends that **Dodwell** is bound by an "arbitration agreement," within the meaning of the International Arbitration Act, to submit to arbitration some of the claims made against it in the present proceeding. It concedes that **Dodwell** is not bound to submit all of the present claims to arbitration. Some of those claims arise out of s.52 of the Trade Practices Act 1974 or in tort. Moss's argument extends only to the contractual claims made by **Dodwell**. Moreover, Moss concedes that the alleged arbitration agreement has no relevance to the dispute between **Dodwell** and Moss Security.

5. Section 7(2) of the International Arbitration Act does not require the court to stay a proceeding except to the extent that that proceeding involves the determination of a matter agreed to be submitted to arbitration: see Tanning Research Laboratories Inc v. O'Brien [1990] HCA 8; (1990) 64 ALJR 211 at p 216, per Brennan and Dawson JJ, with whom Toohey J agreed on this question. It should be noted, however, that Brennan and Dawson JJ went on to comment that where the issues in the subject proceedings "extend beyond the matter which can be referred to arbitration ... the whole of the proceedings must be stayed until an award is made on the matter referred". No doubt a court could take this course in the exercise of its general powers to control its own proceedings. In their dissenting judgment, at p 219, Deane and Gaudron JJ discussed the meaning of the word "matter" in s.7(2), suggesting that it may have a narrower meaning than when used in chapter III of the Constitution. Their Honours referred to Fencott v. Muller (1983) 152 CLR 570 at p 603 and Philip Morris Inc v. Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457 at p 475. They concluded that

> "the expression 'matter ... capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. ... It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

6. Even applying the wide interpretation of the word "matter", in s.7(2), favoured by Deane and Gaudron JJ, it is clear that the relevant "matter" does not extend to claims made by **Dodwell**

against Moss which do not arise out of contract and so are conceded not to be covered by the alleged arbitration agreement. These claims may be part of the same "matter" in the chapter III sense, as is shown by Fencott v. Muller itself. But they are not claims which, on any view, **Dodwell** has agreed to submit to arbitration. A fortiori the claims made by **Dodwell** against Moss Security and Mr McDonnell are not claims constituting a "matter that ... is capable of settlement by arbitration". By concession, there is no relevant arbitration agreement.

7. This application therefore raises the spectre of two separate proceedings--one curial, one arbitral, on opposite sides of the world--arising out of closely associated facts. Realising the unattractiveness of this prospect, Moss has offered to accept arbitration of all the claims **Dodwell** has made against it, whether falling within the original "arbitration agreement" or not. Similarly, Moss Security and Mr McDonnell, who are represented by the same counsel and solicitors, have offered to submit to arbitration by the same arbitrator all of the claims **Dodwell** makes against them. The result may seem to smack of "the tail wagging the dog", but these offers provide a way of avoiding double litigation, provided that **Dodwell** is prepared to accept them. **Dodwell** cannot be forced to submit to arbitration claims other than those which it is already contractually bound to have determined in that way. The alternative method of avoiding double litigation, a discretionary decision not to make orders under s.7(2) because on balance it would be more convenient to deal with all of the claims in one proceeding in Australia, is a course which appears to be foreclosed by the mandatory form of s.7(2). As I read that subsection, once it appears that a particular proceeding involves the determination of a "matter" -- that is a claim, not merely an issue -- which is the subject of an "arbitration agreement" binding the parties and which is otherwise capable of settlement by arbitration, the court must stay so much of the proceeding as involves the determination of that matter and refer it to arbitration. The court is not entitled to refuse such an order on the ground of comparative inconvenience or expense.

8. Accordingly, if Moss' argument is well founded, it will be my duty to stay so much of **Dodwell**'s present claims as fall within the alleged "arbitration agreement" and refer those claims for arbitration. If such an order should be made, it will be for **Dodwell** to decide whether to accept the offers made by the three respondents regarding the other claims. But, to the extent that **Dodwell** elects not to accept those offers, subject to any discretionary order which the Court may make, it will be free to continue the present proceeding. In considering any discretionary order, it might be appropriate to distinguish between **Dodwell**'s claims against Moss -- with whom, on this hypothesis, **Dodwell** has an arbitration agreement covering some part of its total claims -- and **Dodwell**'s claims against the other respondents -- with whom there is no arbitration agreement at all.

9. In this situation it is necessary to analyse the claims made by **Dodwell**, as set out in the Statement of Claim, and to consider the nature and scope of the "arbitration agreement" upon which Moss relies.

The allegations made by the Statement of Claim

10. I set out a summary of the major allegations contained in the Statement of Claim. In or about July 1986, **Dodwell** commenced purchasing automotive security alarms and devices from an agent of Moss, Inchcape Export Limited ("Inchcape"). At that time Inchcape was the distributor of Moss products throughout the world, excluding the United Kingdom. Inchcape and **Dodwell** were then related corporations and **Dodwell** purchased Moss products from Inchcape on the understanding that it was the exclusive distributor of these products in Australia. Subsequently,

Dodwell purchased directly from Moss. It advertised the products at its own expense and sold them in packaging bearing the name "Moss". By these means, **Dodwell** developed a valuable goodwill and reputation in relation to the name "Moss". These facts were known to Moss. Also, Moss knew that **Dodwell** was carrying out its promotional activity in the belief that it was the exclusive Australian distributor. Mr McDonnell was manager of the Automotive Division of **Dodwell** from December 1986 until September 1988 and, in that capacity, he obtained confidential information about **Dodwell**'s automotive business.

11. Paragraph 11 of the Statement of Claim specifies a series of agreements or representations which Moss allegedly made with or to **Dodwell** in consideration of **Dodwell** purchasing products from Moss, establishing its Automotive Division and promoting these products in Australia. In a letter of particulars, **Dodwell**'s solicitors indicated that the agreements and representations referred to in para 11 were partly oral and partly written -- the written elements comprising certain telex and facsimile transmissions. Paragraph 12 of the Statement of Claim alleges that, pursuant to the agreements and/or in reliance upon the representations alleged in para 11, **Dodwell**, to the knowledge of Moss, continued to purchase and to promote Moss products.

12. The Statement of Claim goes on to allege, in para 13, that, in September 1988, **Dodwell** decided to sell its automotive business to Jarol Pty Limited ("Jarol") and so informed Moss. In November 1988 Moss agreed and represented to **Dodwell** that it would appoint Jarol as its exclusive Australian distributor, subject to a reasonable business plan being presented to it. At that time, Moss made some particular representations about its future actions. This agreement and these representations are said to be partly implied and partly contained in a facsimile transmission. The Statement of Claim alleges (para 16) that **Dodwell** procured Jarol to submit a reasonable business plan to Moss but that Moss decided to establish its own distributorship in Australia and, for that purpose, with Mr McDonnell, procured the incorporation of Moss Security (para 17). Paragraph 17 also alleges that Moss has refused to appoint Jarol as its Australian distributor, that Moss Security has commenced business supplying Moss products in Australia and that, for this purpose, Mr McDonnell has used confidential information.

13. The claims made by **Dodwell** are: breach of contract, contravention of each of ss.52 and 53 of the Trade Practices Act 1974 and ss.42 and 44 of the Fair Trading Act 1987 (NSW), conspiracy, wrongful use of confidential information and inducement of breach of contract. In addition, it is claimed that some products supplied by Moss to **Dodwell** were defective.

14. During the course of its narrative of facts the Statement of Claim contains paragraph 10, as follows:

> "10. In or about October, 1987 Moss forwarded to **Dodwell** a draft agreement appointing **Dodwell** the exclusive distributor of the automotive products for Australia and conferring on **Dodwell** (inter alia) the exclusive right to purchase those products from Moss for re-sale in Australia. That draft agreement also contained restrictions prohibiting Moss from selling the automotive products

> within Australia or outside Australia with a view to re-sale of the products within Australia. **Dodwell** refers to that draft agreement in full when produced."

15. The allegations made in para 10 appear to be intended merely to bolster the claim that Moss recognized **Dodwell**'s exclusive Australian rights. The Statement of Claim does not contain any suggestion that the document Moss forwarded to **Dodwell** became an operative agreement. There is no claim of breach of any such agreement. Moreover, it is common ground that **Dodwell** did not accept the draft, in the form submitted to it, but that it responded by forwarding to Moss an alternative draft, which was not accepted. Both drafts contained an arbitration clause in identical terms, although there was a variation in the clause number:

> "15. (a) Any dispute difference or question which may arise at anytime hereafter between the Company and the Distributors touching the true construction of this Agreement or the rights and liabilities of the parties hereto shall except as provided by paragraphs (b) and (c) of this clause or unless otherwise herein expressly provided be referred to the decision of a single Arbitrator in London to be agreed upon between the parties or in default of agreement for 14 days to be appointed at the request of either party by or on behalf of the President for the time being of the Law Society in accordance with and subject to the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force
> (b) In the event of any dispute concerning the amount of any monies due or payable by either party to this Agreement to the other under this Agreement a certificate as to the amount signed by the Auditors for the time being of the Company shall be conclusive and binding on both parties"

In neither draft was there any para. (c).

16. In a letter seeking particulars, dated 9 November 1989, the solicitors for Moss enquired as to "what reliance is placed on the pleading in paragraph 10 of the Statement of Claim concerning the draft agreement forwarded in October 1987". They asked for a copy of the document and what, if any, of its provisions "are said to reflect or record the terms of the agreement sued upon". The solicitors for **Dodwell** replied to this enquiry on 7 December 1989:

> "As to your general enquiry as to the reliance placed on the draft agreement referred to in paragraph 10 of the Statement of Claim, it will be alleged that the terms of the draft agreement were performed by the parties, by mutual consent. A copy of the amended draft prepared by our client is attached, as well as the initial draft prepared by Moss Security Limited."

Subsequently, two days after the present Notice of Motion was filed, **Dodwell**'s solicitors wrote a further letter:

> "We refer to our letter of 7 December 1989. In amplification thereof the applicant does not allege that the draft agreements themselves were ever entered into by either party. What is alleged is that the main terms of the drafts reflect and reduce to writing an agreement that already existed between the parties at that time. The main term/terms we refer to are those pleaded in the statement of claim. It is not alleged that any arbitration agreement ever came into existence between the parties either orally or in writing or by virtue of the draft agreements or otherwise. If, however, your clients (that is all respondents) are prepared to admit that one or other of the draft agreements is binding by and between the respondents and the applicant for the purpose of the proceedings, then we would take instructions as to whether our client too was prepared to make the same admission. At the moment this does not form part of the applicant's case."

17. The evidence does not disclose any reply to this letter.

The existence of an "arbitration agreement"

18. Moss does not suggest that either of the draft agreements became binding on the parties. Nonetheless, for the purposes of this motion, it relies upon the draft arbitration clause, contending that it constitutes an "agreement in writing" within the meaning of Art.II(2) of the Convention and that it is, therefore, an "arbitration agreement" within the definition contained in the International Arbitration Act. The argument is that **Dodwell** itself contends that there was an agreement in existence, that it is possible for parties to an existing unwritten agreement to agree in writing to submit to arbitration any disputes which might arise between them arising out of that agreement and that, if this happened, the agreement for arbitration would fall within the statutory definition. To quote from his written submissions, counsel says that

> "(p)arties who have or contemplated commercial dealings with each other which are otherwise quite undefined, unconcluded, disputed and unwritten may exchange documents in identical terms recording agreement that they will have any dispute or difference concerning their rights and liabilities arbitrated ... The parties if otherwise eligible will thereupon become entitled to the protection of the ... Convention."

Counsel refers to Heyman v. Darwins Limited (1942) AC 356 at p 392.

19. Counsel for **Dodwell** does not dispute any of the propositions just mentioned but he says that the parties did not in fact reach an agreement to submit their differences to arbitration. According to him, all that can be said is that, at one stage, they were conducting negotiations about a formal written contract during the course of which each of them contemplated that their eventual agreement would contain an arbitration clause and that, for the purpose of their negotiations, **Dodwell** was prepared to accept the form of clause submitted to it by Moss. Counsel says that it was never contemplated that there would be an agreement for arbitration otherwise than as part of an overall written agreement and that, since the overall agreement never came to fruition, there was never an agreement for arbitration.

20. Counsel for Moss replies that **Dodwell** has already admitted that there was an agreement between the parties in the terms contained in the document Moss submitted. And, since this document contains an arbitration clause, **Dodwell** has admitted that there is in operation an agreement for arbitration.

21. It is true, as submitted by counsel for Moss, that parties may agree to submit to arbitration disputes arising out of any contract betweem them, whether a presently existing contract or a contract to be made in the future. If they do so agree, there will be an "arbitration agreement" within the meaning of the Convention and the Act; the application of that agreement to any particular dispute being a separate question. But, as is trite law, no legally enforceable agreement to act in any particular way arises unless the parties have manifested an intention to be bound to so act. Heyman does not suggest otherwise. That case was concerned with the question whether an arbitrative clause in a contract covered a dispute whether the contract had been repudiated. At p 392 Lord Porter said that he saw no reason why parties,

> "if at the time when they purport to make the contract they foresee the possibility of such a dispute arising (that is, a dispute as to whether the contract was voidable because of fraud, misrepresentation or concealment in the negotiations) they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so."

Lord Porter said there would need to be "very clear language" to effect that result. But, of course, even in that case, there would be a manifestation of the mutual intention of the parties.

22. There is an element of ambiguity in the letter of 7 December 1989, but I do not think that it should be read as admitting that there came into existence an agreement in the terms of the Moss draft. **Dodwell**'s solicitors' actual words were that it would be alleged "that the terms of the draft agreement were performed by the parties, by mutual consent". This is not a statement that the terms of the document were formally adopted but rather that the parties conducted themselves, by consent, upon the basis of its "terms". The solicitors did not identify the relevant terms but it is clear that those terms could not include the arbitration clause, which has not previously been invoked. The solicitors must have been referring to terms related to events which had in fact occurred during the relationship between the parties, such as orders for goods, delivery, payment, etc. This is consistent with the explanation given in the subsequent letter; a letter which, admittedly, was sent at a time when the importance of the point had become obvious. Going back further in time, to when the draft agreements were being exchanged, there is nothing to suggest that either of the parties intended to be bound, at that time, by any of their elements. The respective drafts constituted an offer and a counter-offer, neither of which was accepted. Contrary to the submission for Moss, it is not enough that the parties were ad idem as to one element of a complex agreement. Before that element could constitute a binding agreement it would have to appear either that the parties had agreed upon the remaining terms, so that this element took effect along with the remaining terms of the agreement, or that the parties intended to bring into effect an agreement in terms of that element in advance of the total agreement. There is no evidence of either intention in the present case.

23. The short answer to the claim made by Moss for a stay of the proceeding is that there is no arbitration agreement in existence between the parties.

Other submissions

24. Under these circumstances it is necessary to do no more than note some additional submissions made on behalf of **Dodwell**. Counsel for **Dodwell** concedes that, if there was an arbitration agreement, s.7 would apply to it. In particular, he concedes that each of paras (a) and (d) of s.7(1) is satisfied. But he points to s.7(5) and says that any such agreement is inoperative or incapable of performance because there was no principal agreement in relation to which the arbitration clause was to apply. I think that this argument is a mere variation of the argument which I have already upheld. But, there is no reason why any concluded written agreement, in terms of the arbitration clause, could not apply to an operative principal (though unwritten) agreement between the parties.

25. Counsel also says that, if the clause did apply, it would not lead to a stay of the present proceeding. The submission is that the present proceeding does not involve the determination of a matter submitted to arbitration by that clause.

26. I think that this submission is correct. In order to identify the matter submitted to arbitration, one must go to the arbitration clause itself. That clause refers to a dispute touching one of two subjects viz. "the true construction of this Agreement" or "the rights and liabilities of the parties hereto". It is not suggested that the principal proceeding raises, or arises out, any question of construction of the agreement. It is true that the proceeding raises questions as to the rights and liabilities inter se of **Dodwell** and Moss. But I think that the reference to "rights and liabilities of the parties" must be read as a reference to their rights and liabilities under the agreement itself. It could not have been intended, for example, that if the two companies happened to be in dispute over a matter arising out of a totally different context, they would be bound to submit that dispute to arbitration under this clause.

27. As my analysis demonstrates, none of the claims made in the Statement of Claim depend upon the rights and liabilities of the parties under the draft agreement. Indeed, it is common ground that this agreement, as such, never came into operation. Accordingly, no rights or liabilities could arise out of it. Some of the claims do depend upon an alleged contractual relationship between the parties. But, although it is contended that this relationship involves terms similar to some of the provisions of the draft agreement, the alleged agreement out of which the dispute arises is an agreement other than that which was proposed to be constituted by the draft agreement.

28. The Notice of Motion should be dismissed, with costs.

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