SUPREME COURT OF QUEENSLAND

CITATION: *In the matter of: ACN 103 753 484 Pty Ltd (in liq) formerly Blue Chip Development Corporation Pty Ltd* [2011] QSC 64

PARTIES: **TERRY GRANT VAN DER VELDE AND DAVID MICHAEL STIMPSON AS JOINT AND SEVERAL LIQUIDATORS OF ACN 103 753 484 PTY LTD (IN LIQUIDATION) FORMERLY BLUE CHIP DEVELOPMENT CORPORATION PTY LTD**
(Applicants)

v

PRIME PROPERTY INVESTMENT PTY LTD ACN 058 336 940
(First Respondent)

and

PRIME EXECUTIVE APARTMENTS (QLD) PTY LTD ACN 117 058 947
(Second Respondent)

and

CALOUNDRA CENTRAL APARTMENT HOTEL PTY LTD FORMERLY QUEST CALOUNDRA PTY LTD ACN 104 357 342
(Third Respondent)

and

NATIONWIDE DEVELOPMENT CORPORATION AUSTRALASIA PTY LTD ACN 109 685 261
(Fourth Respondent)

and

NATIONWIDE DEVELOPMENT CORPORATION PTY LTD ACN 100 695 663
(Fifth Respondent)

and

ENDEAVOUR ACT PTY LTD
(Sixth Respondent)

and

PRIME GROUP AUSTRALASIA PTY LTD ACN 107 959 286

(Seventh Respondent)

and

PRIME PROJECT DEVELOPMENT PTY LTD
ACN 111 674 670
(Eighth Respondent)

and

PNP REALTY PTY LTD
ACN 092 304 633
(Ninth Respondent)

and

RUTH CAMPBELL PTY LTD
ACN 072 854 178
(Tenth Respondent)

and

SIDNEY CHARLES KNELL
(Eleventh Respondent)

and

GREGORY IRWIN CAMPBELL
(Twelfth Respondent)

FILE NO/S:	654 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2011
JUDGE:	Boddice J
ORDER:	**The application for leave to disclaim is allowed.**
CATCHWORDS:	CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – POWERS – TO DISCLAIM OR ADOPT CONTRACTS – Where the liquidators of the applicant company applied for leave to disclaim arbitration agreement – Where no international trade or communication engaged in between the parties to the agreement – Whether the agreement creates undue and burdensome financial obligations for the company to the detriment of its creditors ARBITRATION – SUBMISSION AND REFERENCE – SUBMISSION AS A DEFENCE AND AS A GROUND

FOR STAY OF PROCEEDINGS – STAY OF PROCEEDINGS – POWER OF COURT TO STAY – INTERNATIONAL AGREEMENTS – Where right to stay proceedings under s 7(2) *International Arbitration Act* 1974 (Cth) - Where parties agreed dispute to be settled in accordance with Model Law on International Commercial Arbitration - Whether Court obliged to stay proceedings

Corporations Act 2001 (Cth)

International Arbitration Act 1974 (Cth)

Re Real Investments Pty Ltd [2000] 2 Qd R 555

Sims v TXU Electricity Ltd (2005) 53 ACSR 295

Tanning Research Laboratories v O'Brien (1990) 169 CLR 332

The Atlantic Star [1974] AC 436

COUNSEL: D Savage SC and C Wilkins for the Applicants

R O'Hair for the Respondents

SOLICITORS: Rodgers Barnes Green for the Applicants

Hemming & Hart for the Respondents

[1] By application filed 20 January 2011, Prime Property Investment Pty Ltd and PNP Realty Pty Ltd ("the defendants") sought orders that proceedings brought by ACN 103 753 484 Pty Ltd (in liq) formerly Blue Chip Development Corporation Pty Ltd ("the company") be stayed on the basis the claim is governed by an arbitration agreement dated 14 June 2006, and that that agreement falls within the provisions of the *International Arbitration Act* 1974 (Cth) ("the Act"). By application dated 1 February 2011, the liquidators of the company applied for leave to disclaim the arbitration agreement. Both applications were heard together. It was agreed the application to disclaim should be considered first.

Background

[2] The company was incorporated in 2003. On 23 April 2008, it appointed voluntary administrators. They subsequently became its liquidators. On 6 August 2008, those liquidators were removed by order of this Court and the applicants were appointed as liquidators. That order was made on the basis the winding up could more efficiently be conducted in Queensland.

[3] The defendants were incorporated in 1992 and 2000 respectively. Sidney Charles Knell and Gregory Irwin Campbell were directors of the company from February 2003. Mr Knell was also a director of the first defendant. Mr Campbell was a director of the second defendant.

[4] The applicants first became aware of the existence of the arbitration agreement when served with an affidavit of Mr Campbell on 20 January 2011. That affidavit, which enclosed a copy of the arbitration agreement, was served at the same time as

the defendants' application seeking a stay of the proceeding brought by the company.

The arbitration agreement

[5] Relevantly, the arbitration agreement[1] provided:

> "RECITAL
>
> The parties wish to resolve any disputes by arbitration.
>
> OPERATIVE PART: The parties agree, as follows:-
>
> 1. This is an agreement by the parties to submit to commercial arbitration all or any disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> …
>
> 3. It is hereby agreed by and between the parties to refer all disputes and matters in difference whatsoever (whether already arisen or as arise in the future – including any dispute under this contract) between them to international arbitration in Dunedin, New Zealand.
>
> 4. To the award order and final determination of such person as Sidney Charles Nell may appoint (whether generally or respecting a particular dispute or difference).
>
> …
>
> 12. The party seeking to require another party to this agreement to submit to a commercial arbitration must pay to the party they require submitting to arbitration the sum of AUD$20,000 being that party's anticipated costs of the arbitration. This payment must be made to the party being required to submit to commercial arbitration no later than 30 days prior to the arbitration in cleared funds.
>
> 13. The party seeking to require another party to this agreement to submit to commercial arbitration must pay 100% of the arbitrator's anticipated costs of the arbitration no later than fourteen (14) days prior to the arbitration or at the arbitrator's direction in cleared funds whichever is the earlier.
>
> …"

[6] The parties to the agreement were set out in the schedule. They were numerous corporations having their registered offices at Canberra in the Australian Capital Territory as well as two corporations having their registered office at Currimundi in

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[1] Affidavit of Gregory Irwin Campbell, Exhibit A

the State of Queensland. The corporate entities included the company and the defendants. Mr Knell and Mr Campbell were also parties to the agreement. Their addresses were listed as Canberra, in the Australian Capital Territory, and Currimundi, in the State of Queensland, respectively.

[7] There is no suggestion there was international trade or commerce between the parties to the arbitration agreement. All parties were resident in Australia, and conducted business in Australia. The defendants contend the arbitration agreement falls within the Act as the agreement specifies Dunedin, New Zealand as the place of arbitration.

The Act

[8] Pursuant to the Act, the UNCITRAL Model Law on International Commercial Arbitration[2] adopted by the United Nations Commission on International Trade Law and amended by the United Nations Commission on International Trade Law has the force of law in Australia.[3] That law is designed to ensure that Australia recognises and enforces international arbitration agreements. By Article 1(3) of the Model Law, an arbitration is international if, amongst other things, the place of arbitration specified in the arbitration agreement is situated outside the country in which the parties have their places of business.

[9] The objects and purpose of the Act include the facilitation of international trade and commerce by encouraging the use of arbitration as a method of resolving disputes and the facilitation of the recognition and enforcement of arbitral awards made in relation to international trade and commerce.[4] A Court, when considering exercising powers under the Act, must have regard to the objects of the Act and the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and that awards are intended to provide certainty and finality.[5]

Application to disclaim

[10] A liquidator of a company has power to disclaim specified transactions. The liquidator otherwise cannot disclaim a contract except with the leave of the Court.[6] The applicants accept that in order to disclaim the arbitration agreement it is necessary for them to obtain the leave of the Court. The respondents concede the arbitration agreement is an agreement the applicants are entitled to disclaim, with leave, pursuant to their powers under the *Corporations Act*.

[11] In *Sims v TXU Electricity Ltd and anor*.[7] Spigelman CJ, with whom Sheller JA and Brownie AJA agreed, said of those powers to disclaim:

> "[16] The general legislative intent of Div 7A has been referred to in a number of authorities.

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2 UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

3 s 16 *International Arbitration Act* 1974 (Cth)

4 *International Arbitration Act*, s 2D.

5 *International Arbitration Act*, s 39.

6 *Corporations Act 2001*, Division 7A; s 568(1A)

7 (2005) 53 ACSR 295.

[17] In *Re Middle Harbour Investments Ltd (in liq) (No 2)* [1977] 2 NSWLR 652 at 657; (1976) 2 ACLR 303 at 305 Bowen CJ in Eq said:

> 'The purpose of providing for disclaimer by an official receiver or trustee in bankruptcy or by a liquidator in winding up seems clear enough. It is to enable him to rid himself or, in the case of liquidation, the company, of burdensome financial obligations which might otherwise continue to the detriment of those interested in the administration; it is given to enable the official receiver, or trustee, or the liquidator to advance the prompt, orderly and beneficial administration of the bankrupt estate or, in the case of a company, of the winding up of its affairs ...' [Citation omitted]

…

[30] In *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70; [1996] 1 All ER 737, Lord Nicholls of Birkenhead expressed the purpose of a disclaimer under the *Insolvency Act* 1986 (UK) in a manner which took into account the express provision in that Act, which is in the same terms as s 568D(1), when he said at AC 86-7; All ER 745-6:

> "The fundamental purpose of these provisions is not in doubt. It is to facilitate the winding up of the insolvent's affairs ...
>
> Equally clear is the essential scheme by which the statute seeks to achieve these purposes. Unprofitable contracts can be ended, and property burdened with onerous obligations disowned. The company is to be freed from all liabilities in respect of the property. Conversely, and hardly surprisingly, the company is no longer to have any rights in respect of the property. The company could not fairly keep the property and yet be freed from its liabilities.
>
> Disclaimer will, inevitably, have an adverse impact on others: those with whom the contracts were made, and those who have rights and liabilities in respect of the property. The rights and obligations of these other persons are to be affected as little as possible. They are to be affected only to the extent necessary to achieve the primary object: the release of the company

> from all liability. Those who are prejudiced by the loss of their rights are entitled to prove in the winding up of the company as though they were creditors."

[31] "I agree with this passage."

[12] The applicants contend it is appropriate for the Court to grant leave to disclaim the arbitration agreement because it creates undue and burdensome financial obligations for the company to the detriment of its creditors in circumstances where there was no international trade or communication being engaged in between the parties and the arbitration agreement is merely a device to deter creditors from making claims. The applicants rely on the terms of the arbitration agreement to support the claim it is unduly burdensome. Clause 12 requires that if the company refers the dispute to arbitration, it must pay $20,000 to each of the defendants and all of the arbitrator's anticipated costs. Further, the company would be required to participate in an arbitration held in Dunedin, incurring costs associated with travel and accommodation, when the claim is based on Queensland legislation. The applicants also rely on the requirement that the arbitrator be a person appointed by Mr Knell. There is no requirement the arbitrator be a suitable person to determine the dispute, or that the arbitrator be a lawyer.

[13] The respondents submit there is nothing unusual in the terms of the arbitration agreement. The requirement that the company pay the arbitrator's costs together with the costs of the parties is akin to security for costs which is not an unusual order to be made in such circumstances. Any concerns as to the appropriateness of the person to be appointed, and as to that person's independence, can be met by conditions being imposed by this Court in respect of a stay.

[14] The respondents contend it is not appropriate for the Court to grant the applicants leave to disclaim the arbitration agreement as to do so would be contrary to the objects and purposes of the Act. They rely upon *Tanning Research Laboratories v O'Brien*[8] in support of a contention that courts will find international arbitration agreements binding on a company's liquidator where the claim the subject of that arbitration is a general claim, subject to general law.

[15] In *Tanning*, Brennan and Dawson JJ, in a joint judgment, said:

> "A liquidator who defends his rejection of a proof of debt on the ground that, under the general law, the liability to which the proof relates is not enforceable against the company takes his stand on a ground which is available to the company. A liquidator who resists a claim made by a creditor against the assets available for distribution on the ground that there is no liability under the general law thus stands in the same position vis-a-vis the creditor as does the company. If the creditor and the company are bound by an international arbitration agreement applicable to the claim, there is no reason why the claim should not be determined as between the creditor and the liquidator in the same way as it would have been determined had no winding up been commenced. To exclude from the scope of an international arbitration agreement binding on a

[8] (1990) 169 CLR 332.

> company matters between the other party to that agreement and the company's liquidator would give such agreements an uncertain operation and would jeopardize orderly arrangements: see Scherk v Alberto-Culver Co. [1974] USSC 173; (1974) 417 US 506, at pp 516-517. But it is otherwise if the liquidator supports his rejection of a proof of debt in reliance on a ground which allows him, and him alone, to go behind the judgment, account stated, covenant or estoppel on which the company's liability is founded. The entitlement of a liquidator to go behind a judgment, account stated, covenant or estoppel is unaffected, either substantially or procedurally, by the existence of an international arbitration agreement binding on the company. To stay proceedings which involve only matters outside the scope of an international arbitration agreement would be to frustrate the provisions for winding up. Thus the application of s. 7(2) to proceedings for the reversal of a liquidator's rejection of a proof of debt must depend on the ground or grounds on which the liquidator seeks to support his rejection of the proof of debt. By attributing such a discriminatory operation to s. 7(2), conflict is avoided between the attainment of the objects of the Act and the procedures appropriate to a winding up."

[16] The respondents submit the power to disclaim the agreement must be viewed in the context of the legislature's requirement that leave be obtained, and that this should be contrasted against the power to disclaim unprofitable contracts without leave.[9]

[17] Having considered the various authorities and the submissions of the parties, I am satisfied it is appropriate to grant leave to the applicants to disclaim the arbitration agreement.

[18] The arbitration agreement imposes harsh and unnecessary burdens upon the applicants to the detriment of creditors in the winding up of the company. Those burdens require the company to pay large sums to the defendants, as well as to pay all the arbitrator's costs. The defendants are related to Mr Knell who has the sole power to appoint the arbitrator. Whilst it is contended arbitration will be cheaper than Court proceedings, that contention does not have regard to the fact that as there is no connection between the proposed place of arbitration and the proceeding, which relates solely to Queensland and governed by Queensland law, costs are likely to be significant.

[19] In that respect it is noteworthy that the defendants did not, and do not, seek to refer the matter to arbitration pursuant to the arbitration agreement. To do so would trigger financial obligations on them to the plaintiff, namely, the payment of $20,000 pursuant to cl 12 of the arbitration agreement and payment of the arbitrator's costs. The defendant's failure to seek to refer the dispute to arbitration is a relevant factor in my conclusion that leave ought be given to the applicants to disclaim the arbitration agreement.

[20] Further, there is no suggestion there was ever any international trade or commerce in the activities undertaken by the parties to the agreement. Against that background, to allow the applicants leave to disclaim will not contravene the objects

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[9] See, generally, *Re Real Investments Pty Ltd* [2000] 2 Qd R 555.

of the Act or its purposes. It will also not jeopardise international trade and commerce.

[21] Granting leave to disclaim in this case does not amount to a parochial return to old values.[10] It gives due recognition to the unusual features of this case, and does not conflict with the attainment of the objects of the Act in appropriate cases.

[22] The application for leave to disclaim is allowed.

Application for stay

[23] In view of my conclusion in the application to disclaim, it is unnecessary to determine the defendant's application for a stay of the proceedings.

[24] Had it been necessary to consider that application to stay, I would only have been prepared to consider granting a stay if the defendants agreed to refer the proceeding to arbitration pursuant to the agreement, necessitating that they pay the required sum of $20,000 to the plaintiff pursuant to cl 12 of the arbitration agreement and the arbitrator's costs. Any grant would have been subject to other conditions, including a requirement that the person appointed as arbitrator be legally qualified and admitted to practise as a legal practitioner.

[10] See *The Atlantic Star* [1974] AC 436 at 453.