SUPREME COURT OF SOUTH AUSTRALIA

(Magistrates Appeals: Civil)

VETRERIA ETRUSCA SRL v KINGSTON ESTATE WINES P/L

[2008] SASC 75

Judgment of The Honourable Justice Duggan

14 March 2008

PRIVATE INTERNATIONAL LAW - STAY OF PROCEEDINGS - FOREIGN JURISDICTION CLAUSES

Appellant appealed against refusal of a judge of the District Court to stay proceedings in that Court - respondent claims damages against the appellant for breach of contract by reason of the supply of faulty products - appellant relied upon jurisdiction clause in translated document providing for the jurisdiction of an Italian court in disputes "arising from the interpretation, execution or application" of the contract – contract provided that, in the event of dispute as to the wording of the contract, the original Italian document which included the jurisdiction clause was to prevail - original Italian document not in evidence - whether "execution" was intended to mean "performance" - whether present dispute within scope of jurisdiction clause.

Held: There is nothing in the contract which would necessarily require that the word "execution" should be understood as referring to performance – the District Court judge was entitled to have regard to the fact that the clause was ambiguously worded and that the Italian document containing the jurisdiction clause was not before the court – appeal dismissed.

Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502; *Akai Pty Ltd v People's Insurance Company Limited* (1996) 188 CLR 418; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; *PMT Partners Pty Ltd v Australian National Parks and Wildlife Services* (1995) 184 CLR 301, discussed.

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HIS HONOUR JUDGE MEUCKE) [2007] SADC 102; DCCIV-07-654

Appellant: VETRERIA ETRUSCA SRL Counsel: MR M HOILE - Solicitor: CRAWFORD LEGAL
Respondent: KINGSTON ESTATE WINES PTY LTD (ACN 063 167 813) Counsel: MR P MCNAMARA QC WITH MR A DAL CIN - Solicitor: MERCORELLA MARKS LAWYERS

Hearing Date/s: 14/12/2007

File No/s: SCCIV-07-1463

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VETRERIA ETRUSCA SRL v KINGSTON ESTATE WINES P/L
[2008] SASC 75

Magistrates Appeal

1 **DUGGAN J.** The appellant has appealed against the refusal of a judge of the District Court to stay proceedings in which the respondent claims damages against the appellant for breach of contract. In applying for a stay of the District Court proceedings, the appellant relied upon a jurisdiction clause in an agreement whereby, according to the case for the appellant, the parties agreed that disputes answering the description of the current proceedings were to be determined by an Italian court.

2 The respondent is a winemaker incorporated in South Australia and the appellant is a glass manufacturer incorporated in Italy. In May 2005 the parties entered into an agreement whereby the appellant agreed to supply wine bottles of a specified type to the respondent. The appellant supplied the bottles to the respondent but, according to the respondent, they were faulty and were prone to crack on the production line during the bottling process.

3 The respondent commenced the proceedings in the District Court of South Australia with the filing of a summons on 23 April 2007. It claims that the bottles did not comply with the standard required by the contract. The appellant had commenced proceedings against the respondent in the Court of Florence, Italy on 9 October 2006 claiming the sum of $173,000 allegedly owed by the respondent to the appellant for the supply of bottles.

4 Solicitors for the parties have sworn affidavits setting out the history of the dispute and exhibiting copies of the agreement between the parties. The District Court judge relied on these affidavits in summarising the relevant facts for the purposes of the application before him. There is no dispute as to the judge's summary.

5 It would appear that the parties entered into an agreement entitled "Supply Agreement" which provided that the appellant would supply the bottles "in accordance with its General Sales Conditions". The affidavit of Leneen Veronica Ford, a solicitor acting for the appellant, has exhibited to it copies of the Supply Agreement and a document entitled "General Sales Conditions" signed by the parties. The Supply Agreement provides that the bottles are to be supplied in accordance with the General Sales Conditions.

6 The General Sales Conditions are endorsed as follows:

> The present document is an accurate translation of the original document written in Italian. For any controversy, the original Italian document prevails.

7 The original Italian document comprising the General Sales Conditions was not tendered at the hearing before the District Court judge and it was not placed before me on the hearing of the appeal. The District Court judge stated in his reasons for judgment that it had never been made available to the respondent.

8 The jurisdiction clause relied upon by the appellant is contained in the General Sales Conditions. It states:

> For any disputes, none excluded, arising from the interpretation, execution or application of this contract, the competent court of law shall be the Florence court, section of Empoli, even in the case the payment has been agreed against a draft and this, with express exclusion of any other conventional court of law or court mentioned by the law.

9 The District Court judge concluded that the parties appear to have chosen the Florence court as the court for any disputes arising from particular and specific aspects of their contract. He continued:

> . . . It would have been easy for the contracting parties to provide that the Florence Court be the competent court to decide any and all disputes arising between them that relate in any way to their contract. That is not what Clause 11 provides. By choosing particular and specific aspects of their contract which they agreed, if there is a dispute, would be decided by the Florence Court, they may well be said to have made a positive choice to limit disputes which were to be heard by the Florence Court, allowing or envisaging disputes arising otherwise to be heard by courts situated elsewhere.
>
> Whatever one may say about those matters, I have no doubt that the English translation of Clause 11 is at least ambiguous and unclear. Certainly, all the words after "section of Empoli" make little sense grammatically, and they read as if the original Italian may be difficult to translate easily into English.
>
> (I set aside the issue as to the law of what country should be applied in construing Clause 11 of the General Sales Conditions of the Sale Agreement. I note that Mr Hoile submitted that I should construe Clause 11 by applying Australian law.)
>
> The Sale Agreement, by the General Sales Conditions that are incorporated in it, has, at least on the bottom of two of the four pages of the General Sales Conditions, provided that *"The present document is an accurate translation of the original document written in Italian. For any controversy, the original Italian document prevails."*
>
> The original Italian document was not before me. It has never been made available to the plaintiff. That is one of the bases upon which the plaintiff wishes to argue in the Florence Proceedings that Clause 11 is invalid. The absence of the original Italian document has precluded the plaintiff from the opportunity of checking whether what is said to be the English translation of Clause 11 is an accurate one. It appears to me to be important not only to be able to check the accuracy of the words, but also of the punctuation and of the sense of the words before the clause can be properly construed.
>
> Whatever else can be said about it, the English translation seems to make it clear that where there is a controversy about the document the original Italian document will prevail. I have no doubt that there is a controversy about Clause 11 and its proper construction. In those circumstances, and where the original Italian document is not before me, my conclusion is that I cannot say whether, on a proper construction of the

> Sales Agreement, the parties have chosen a particular forum or jurisdiction in which the dispute of the plaintiff's claim is to be resolved.

10 His Honour went on to say that, if he was required to decide the issue of construction on the English version alone, he would find that the present proceedings did not involve a dispute "arising from the interpretation, execution or application" of the contract. After noting that the allegation in the statement of claim was that the appellant had breached the Supply Agreement, his Honour said:

> The interpretation of the contract is not alleged to be in dispute. There is no allegation that either party has not properly executed the contract. There is no dispute as to whether or not the contract applies as between the two parties. In my view, a suit by the plaintiff that the defendant is alleged to have breached its contractual obligations is not a dispute that I would find was contemplated by the parties as being one which was to be the subject of the exclusive jurisdiction of the Florence Court.

11 In making these observations it is clear that the learned judge accepted the interpretation of the clause put forward by counsel for the respondent and, in particular, that the use of the term "execution" in the exclusive jurisdiction clause was a reference to the formalities associated with the signing of the agreement by the parties.

12 Before proceeding further, it is appropriate to have regard to some general principles referred to in relevant authorities dealing with jurisdiction and arbitration clauses.

13 A jurisdiction clause of this nature does not exclude the forum court's jurisdiction but, as Gaudron J pointed out in *Oceanic Sun Line Special Shipping Co Inc v Fay*[1], it may constitute a ground for that court to refuse to exercise its jurisdiction by ordering a stay of proceedings.

14 The general approach to be taken if there is an exclusive jurisdiction or arbitration clause which applies in the circumstances of the case is well settled. In *Huddart Parker Ltd v The Ship Mill Hill*[2] Dixon J referred to the starting point as being a recognition of the fact that the parties had made a special contract which justified a strong bias in favour of keeping them to their bargain.

15 In *Akai Pty Ltd v People's Insurance Company Limited*[3] Dawson and McHugh JJ referred to the remarks of Dixon J in *Mill Hill* and continued:

> Those remarks led Brennan J to observe in *Oceanic Sun Line Special Shipping Co Inc v Fay*[4]:

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1 (1988) 165 CLR 197 at 259.
2 (1950) 81 CLR 502 at 508.
3 (1996) 188 CLR 418 at 428.
4 op cit at 224.

"Where the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its performance, the courts of this country regard that agreement as a submission of such disputes to arbitration and will, in the absence of countervailing reasons, stay proceedings brought here to decide those disputes".

In the same case, Gaudron J said[5]:

"Where there is an agreement to submit to another jurisdiction, the power to grant a stay rests on the principle that the courts will, except where the plaintiff adduces strong reasons against doing so, require the parties to abide by their agreement."

Nor, where there is an application for a stay to enforce an exclusive jurisdiction clause, should the case be assimilated to a case in which a stay is sought on the principle of forum non conveniens. As Brennan J pointed out in *Oceanic Sun Line Special Shipping Co Inc v Fay*[6]:

"A case where the plaintiff seeks the exercise of a discretion to refuse to give effect to a contractual stipulation that a nominated court should have exclusive jurisdiction requires justification of a different order from that required in a case where the plaintiff has simply chosen to sue in one forum rather than another, both being available to him."

Even though there is "a strong bias in favour of maintaining the special bargain"[7] where there is a submission to the exclusive jurisdiction of the courts of another country, the courts of this country nevertheless retain a discretion to refuse a stay of proceedings here if sufficient cause is shown. The relevant principles were identified by Brandon J in *The Eleftheria* as follows[8]:

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case."

Brandon J went on to consider a number of circumstances which might be relevant, but emphasised[9] that "the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement" and should "be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience".

16 The first task is to attempt to determine the agreement between the parties as to jurisdiction. The nature of this task was described by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[10]:

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5 op cit at 259. See also *The "Makefjell"* [1976] 2 Lloyd's Rep. 29; *The* "*Kislovodsk*" [1980] 1 Lloyd's Rep 183; *The* "*El Amria*" [1981] 2 Lloyd's Rep 119 at 122,123.

6 op cit at 230-231.

7 *Huddart Parker Ltd v The Ship Mill Hill* op cit at 509.

8 [1970] P 94 at 99.

9 op cit at 103.

10 [2006] FCAFC 192 at [162].

> The ascertainment of the scope of the clause is a question of the construction of a contract. Its meaning is to be determined by what a reasonable person in the position of the parties would have understood it to mean, having regard to the text, surrounding circumstances, purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas*[11].

17 The District Court judge's main concerns were the ambiguous wording of the translated clause and the lack of material before him which might have assisted in its proper construction, including the original Italian version of the General Sales Conditions. However, as has been pointed out, he did make some observations concerning the wording of the translated document and the appeal by the appellant focussed on this aspect of the judgment. In particular, counsel for the appellant challenged the judge's interpretation of the word "execution". It was submitted that this term referred to the performance of the contract and not the formal signing or adoption of it.

18 It is clear that "execution" is used in two senses in the law of contract. In Black's Law Dictionary (8th ed) "executed" is defined as meaning:

> 1 (Of a document) that has been signed <an executed will>.
>
> 2 That has been done, given, or performed <executed consideration>.
>
> "[T]he term 'executed' is a slippery word. Its use is to be avoided except when accompanied by explanation … A contract is frequently said to be *executed* when the document has been signed, or has been signed, sealed and delivered. Further, by executed contract is frequently meant one that has been fully performed by both parties." William R Anson, *Principles of the Law of Contract* 26 n* (Arthur L Corbin ed., 3d Am ed 1919).

19 It is also the case that one of the meanings of "execution" in its ordinary sense is the performance of some task.

20 However, there is nothing in the contract which would necessarily require that the word "execution" should be understood as referring to performance. At the most the clause is ambiguous in this respect.

21 The tendency to adopt a liberal approach to the interpretation of an exclusive jurisdiction or arbitration clause which is couched in general words[12] does not apply with equal force in a case such as the present where specific areas of dispute are identified in the jurisdiction clause.

22 Most jurisdiction clauses considered by the courts in the reported cases have been couched in general terms, for example a clause stipulating that any dispute arising out of a contract will be heard in the courts of a particular country. It is far from clear that this was the intention of the parties in the present case. The particular aspects of the contractual relationship referred to in

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[11] [2004] 218 CLR 451 at 462.
[12] *Comandate Marine Corp,* op cit at [164] – [166].

the clause do not, in their combined effect, encompass all disputes which might arise out of the agreement between them.

23 The question remains whether the dispute as pleaded in the District Court falls within the wording of the clause. The English version of the clause is ambiguous in more than one respect and, on the face of it, the accuracy of the translation is open to some doubt. Although it is stated on the signed document that the transaction is accurate, this statement is accompanied by the qualification that the wording of the original Italian document is to prevail in the event of controversy.

24 The function of the court on the interlocutory application before it was not simply to determine the rights and obligations of the parties under the agreement, but rather to determine the proper exercise of the discretion to grant a stay of proceedings and, in doing so, to consider any agreement between the parties. In my view, the District Court judge was entitled to have regard to the fact that the clause was ambiguously worded and that the original Italian document, which the parties had agreed by their contract was relevant to the interpretation of the contract, was not before the court. Furthermore, the judge did not have available to him extrinsic evidence which might have been relevant by reason of the ambiguity of the clause.

25 The effect of a permanent stay would be to prevent these issues being ventilated before a court in this jurisdiction. In *PMT Partners Pty Ltd v Australian National Parks and Wildlife Services*[13] Brennan CJ, Gaudron and McHugh JJ observed that:

> It may be accepted that contracts will only be construed as limiting the rights of the parties to pursue their remedies in the courts if it clearly appears that that is what was agreed.[14]

26 In view of the ambiguity in the clause and the absence of material which would be of potential relevance to the construction of it, I am of the opinion that the District Court judge acted correctly in deciding that it should not operate to prevent litigation in this jurisdiction.

27 The appellant raised a further issue. It was pointed out that in the respondent's defence filed in the Italian proceedings it was denied that the Italian original of the general sales conditions was signed and it was claimed that, as a consequence, the document had no effect. It was argued on appeal that this evidenced a dispute concerning the execution of the agreement which, even on the judge's reasoning, came within the meaning of "execution".

28 In my view, this is an irrelevant consideration. The application before the District Court was for a stay of proceedings of the action commenced before it.

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[13] (1995) 184 CLR 301 at [21].

[14] See also *Delhi Petroleum Pty Ltd v Santos Ltd & Ors* [1999] SASC 37.

The issue of whether the relevant documents were adopted by signature has not been raised in those proceedings. The characterisation of the present proceedings cannot be determined by reference to the issues raised in the Italian proceedings.

29 The appeal will be dismissed.