23/90

SUPREME COURT OF VICTORIA

SBI SALES PTY LTD v AB & MA CHICK PTY LTD

Marks J

6, 7 March 1990

CIVIL PROCEEDINGS – APPLICATION TO STAY PROCEEDINGS PENDING COMMERCIAL ARBITRATION – NATURE OF AGREEMENT BETWEEN PARTIES – ARBITRATION NOT INITIATED – WHETHER MAGISTRATES' COURT'S POWER OUSTED – COUNTERCLAIM FILED – LEAVE OF COURT NOT SOUGHT – WHETHER APPLICATION TO STAY PROPERLY MADE: *COMMERCIAL ARBITRATION ACT* 1984, S53; *MAGISTRATES' COURTS ACT* 1971, S53(2).

1. Pursuant to s53 of the *Commercial Arbitration Act* 1984 an application may be made to a Magistrates' Court to stay proceedings where the parties have agreed in writing to refer a dispute to arbitration. However, unless leave is given by the court, such an application shall not be made if pleadings have been delivered or steps have been taken in the proceedings other than the entry of an appearance.

2. Where a clause in a written agreement provided that at the instance of either party any dispute would be submitted to arbitration, if neither party initiated arbitration, a Magistrates' Court had power to resolve the dispute.

3. Where a defendant to a civil action filed a notice of defence, set-off and/or counterclaim but did not seek the Court's leave to make an application for a stay of proceedings, a Magistrate was in error in ordering that the proceedings be stayed and that the matter be referred to arbitration.

MARKS J: **[1]** This is the return of an order nisi, made by Cummins J on 3 January 1990 to review the orders made by the Magistrates' Court at Melbourne on 11 December 1989, that the action of the plaintiff be stayed; that the matter be referred to arbitration; that the plaintiff pay costs of the application fixed at $500 which orders were stayed for one month.

The plaintiff had issued, on 9 October 1989, a special summons claiming money alleged to be due from the defendant pursuant to two contracts for the supply and installation of certain kitchen equipment, stainless steel shelving and the like. The amount of money involved was fairly small and a substantial amount of the claim related to interest alleged to be due on the unpaid balances. The summons was served on 26 October 1989. The defendant filed and served a notice of defence, attached to which were particulars which comprised in effect a statement of defence and counter claim with particulars and a notice of set off and/or counter claim.

On 27 November 1989, approximately one month later, the defendant took out a chamber summons seeking a stay of the summons and an order for referral to arbitration pursuant to s53 of the *Commercial Arbitration Act* 1984. The orders were made by the Magistrates' Court at Melbourne. When the chamber summons came on before the Magistrate, a submission was made that the application to stay should have been made on the return of the special summons and not **[2]** by chamber summons. However, the Magistrate ruled against that submission and it must be taken that he ordered that the application, represented by the chamber summons, be permitted to be made.

The background of this submission does not appear in the material, but when recourse is had to s53(2) of the *Magistrates' Courts Act* 1971 the reason for it might be understood. Section 53(2) provides:

> "The provisions of s53 of the *Commercial Arbitration Act* 1984 shall, with such adaptation as are necessary, apply to proceedings commenced before a Magistrates' Court and any application under that section shall, unless the Court otherwise orders, be made on the return day of the summons."

Accordingly, the application was to have been made on the return day of the summons

unless the Court otherwise ordered. It would seem that the court did otherwise order and entertain the application as empowered by that section. However, no ground of the order nisi seems to raise this point. The provisions of s53(2), however, are pertinent to the grounds of the order nisi. I set out the grounds as follows but it must be noted that there were, in the order, typing errors which reduce the sense of them. I will recount the orders as they appear on the order nisi but, in the course of doing so, note what appears to be, at least, one important typing error. The grounds read:-

> (a) The Magistrates' Court did not have jurisdiction to make the said orders.
>
> (b) The Magistrate erred in the exercise of his discretion in granting the said stay.
>
> (c) The Magistrate erred in law in granting the said stay.
>
> (d) The Magistrate erred in ruling that the agreement on which the claim was based was an arbitration on agreement. (This should read, I should think, simply 'an arbitration agreement.')
>
> **[3]** (e) The Magistrate erred in granting the said stay when the defendant had taken a step in the proceedings, other than entry of an appearance.
>
> (f) The Magistrate erred in law in awarding costs against the plaintiff.
>
> (g) The Magistrate erred in the exercise of his discretion in awarding costs against the plaintiff.

I deal, shortly, with ground (a). It was originally submitted by Mr Newton of counsel for the plaintiff that the Magistrate had no jurisdiction to entertain an application under s53 of the *Commercial Arbitration Act* 1984 because the word 'Court' in that section is defined by s3 so as not to mean a Magistrates' Court. He submitted that the only resort open to the plaintiff under s53 was to a court other than a Magistrates' Court.

Mr Gibbons of counsel for the defendant referred me to s53(2) of the *Magistrates' Courts Act* 1971, which I have set out above. It is obvious that s53(2), which was amended by Act number 10167, s3(1), to incorporate the new *Commercial Arbitration Act* 1984 s53 invested a Magistrates' Court with the necessary jurisdiction. In reply, Mr Newton of counsel conceded he had no answer to this point and that he could no longer put forward any argument in support of ground (a). Accordingly, ground (a) fails.

Grounds (b) and (c) do not, in the light of the view I express hereafter, need to be discussed. They are expressed in general terms and are unclear as to what is meant. However, in the upshot, I do not propose to say anything about them. Ground (d) is inspired by the argument that the Magistrate did not have before him proof of an arbitration agreement within the meaning of the *Commercial Arbitration Act* 1984. **[4]** The expression "arbitration agreement" is defined in s4(1) of the *Commercial Arbitration Act* 1984 to mean "an agreement in writing to refer present or future disputes to arbitration." Mr Newton submitted that the clause relied on by the defendant was number 24 in the subject agreements. There is no dispute that this is the relevant clause, which reads as follows:-

> "Arbitration. Any dispute that may arise hereunder, or in any way in connection with the works and whether before or after the completion or determination hereof, shall be, at the instance of either party, submitted to arbitration, in accordance with the laws of the State or Territory in which the works are carried out, by a person appointed by the President of the Master Builders' Association of the State or Territory in which the works are being carried out, whose decision shall be final and binding on all parties."

Mr Newton submitted that this clause was not an arbitration agreement as defined because the parties were left, on its proper interpretation, with an option to submit a dispute to arbitration. He contended that the true meaning of clause 24 was that a dispute was agreed to be arbitrated only on the fulfilment of a condition that one of the parties initiated, by notice or in some other appropriate way, an arbitration. He submitted that this contrasted with clauses which required automatic arbitration of any dispute which arose between the parties.

In support of his submission, Mr Newton relied on *Hammond v Wolt* [1975] VicRp 10;

(1975) VR 108, a decision of Menhennitt J. His Honour there discussed the relevant principles and concluded, in that case, that, where a provision for arbitration was dependent on the exercise of an option by one of the parties, the provision did not constitute a **[5]** submission within the meaning of s3 of the *Arbitration Act* 1958.

The definition of "submission" in the legislation considered in *Hammond v Wolt* is to the same effect as the definition of "arbitration agreement" in the *Commercial Arbitration Act* 1984. Alternatively, there is no difference of significance for the purposes of this review. Mr Gibbons of counsel for the defendant submitted that the matter turned on the proper interpretation of clause 24. He submitted that clause 24 did mean that the parties were bound, automatically, to submit any dispute between them to arbitration. I consider that Mr Gibbons is right to the extent that whether the ground (d) is made out does depend on interpretation of clause 24. I am unable to agree, however, with the interpretation for which he contends.

In my opinion, clause 24 means that a dispute may be resolved by a court if neither party initiates arbitration. The clause means that if a party does initiate arbitration then a dispute between them must be arbitrated. The clause does not say, and is not capable of being understood to say, that any dispute between the parties is to be resolved only by arbitration. Words to that effect simply do not appear in the clause. It is common ground that neither party initiated arbitration before the issue of the summons and there was no initiation, apart from the application by chamber summons, on behalf of the defendant. In my opinion, ground (d) is made out.

It is desirable, I think, that I say something about ground (e). The Magistrate does not appear to have **[6]** considered s53(2) of the *Commercial Arbitration Act*, which provides:-

> "An application under sub-section (1) shall not, except with leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance."

Strictly speaking, there are no pleadings in the Magistrates' Court, but s53(2) of the *Magistrates' Courts Act* 1971 contains the words "with such adaptations as are necessary." In my opinion, the defence and notice of set off and counter claim delivered by the defendant on 26 October 1989 are properly to be regarded as pleadings, if not steps in the proceedings, if one adapts the procedures in the Magistrates' Court to the words of s53(2) of the *Commercial Arbitration Act*. Accordingly, the application for a stay was barred by s53(2) unless the Magistrates' Court granted leave to the defendant to make it. It is conceded that no such leave was sought or granted. It follows, I think, that ground (e) also is made out.

In the circumstances it is unnecessary to consider grounds (f) and (g) which go to the matter of costs. The order nisi is made absolute with costs. The orders made by the Magistrates' Court at Melbourne on 11 December 1989 are set aside. The special summons issued 9 October 1989 on behalf of the plaintiff is remitted to the Magistrates' Court at Melbourne for hearing and determination according to law. I will grant to the defendant a certificate pursuant to the *Appeal Costs Fund Act*.

APPEARANCES: For the plaintiff SBI Sales: Mr S Newton, counsel. Keith Hercules & Sons, solicitor. For the defendant AB & MA Chick: Mr P Gibbons, counsel. Kirby & Co, solicitors.
