HIGH COURT OF AUSTRALIA

BRENNAN, DEANE, DAWSON, TOOHEY AND GAUDRON JJ.

TANNING RESEARCH LABORATORIES INC. APPELLANT

AND

JOHN O'BRIEN RESPONDENT

O R D E R

Appeal dismissed with costs.

Application for special leave to cross-appeal refused with costs.

6 March 1990
F.C. 90/008

Solicitors for the Appellant: *Blake Dawson Waldron*

Solicitors for the Respondent: *Hunt & Hunt*

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

BRENNAN AND DAWSON JJ. The respondent is the liquidator of Hawaiian Tropic Pty. Limited ("Hawaiian"). He rejected a proof of debt lodged by the appellant, Tanning Research Laboratories Inc. ("Tanning"), a Florida corporation. By summons issued out of the Supreme Court of New South Wales, Tanning sought an order that the liquidator's decision to reject Tanning's proof of debt be reversed. Cohen J. ordered that the liquidator's rejection be varied by allowing the proof in the sum of $55,502.63, but that order was set aside by the Court of Appeal which ordered that -

> "the proceedings be stayed pursuant to s.7(2) of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) and the determination of the matter of the amount, if any, by which Hawaiian Tropic Pty Limited (in liquidation) is indebted to [Tanning] be referred to arbitration in accordance with the agreement between the parties of 24 June 1975."

The primary question for decision is whether the conditions governing the application of s.7(2) of the *Arbitration (Foreign Awards and Agreements) Act* 1974 (Cth) ("the Act"), now called the *International Arbitration Act*, are satisfied. Section 7(2) read as follows:

> " Subject to this Act, 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."

Sub-section (4) provides that:

> " For the purposes of sub-sections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party."

To ascertain the application of this provision, it is necessary to refer briefly to the relationship between Tanning and Hawaiian. Tanning and Hawaiian were parties to an agreement dated 24 June 1975 whereby Tanning granted Hawaiian an exclusive licence "to produce, manufacture, promote, distribute, and sell" certain suntan products within Australia and New Zealand. The agreement provided for the sale of products by Tanning to Hawaiian and for the payment of royalties by Hawaiian. The agreement was expressed to "bind and inure to the benefit of the parties to this Agreement, their legal representatives, successors, and permitted assigns": cl.16g. It contained an arbitration clause in the following terms:

> " 10. Arbitration. Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof."

The arrangement evidenced by the agreement continued for some years.

In April 1981, Hawaiian was ordered to be wound up in the Supreme Court of New South Wales and subsequently the respondent was appointed liquidator. At some time thereafter, Tanning purported unilaterally to revoke the licence agreement. The liquidator then gave instructions to commence proceedings in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County in Florida in the name of

Hawaiian seeking, inter alia, a "declaratory judgment reinstating [Hawaiian's] rights under the ... license agreement ... and awarding damages against [Tanning] ... ". On Tanning's application, the Court ordered the matter to be settled by arbitration in accordance with the arbitration clause.

On 8 January 1985, the arbitrators awarded (so far as material) as follows:

> " 1. Claimant, Hawaiian Tropic Pty., Ltd., breached the license agreement dated June 24, 1975, as amended, by failing to timely pay the amounts due for products received which we find to be $ 179,000.00, and by incurring liquidation (bankruptcy) under Australian law, but Respondent by its course of conduct waived the breaches for purposes of enforcing the termination provisions of the license agreement.
>
> 2. Respondent, Tanning Research Laboratories, Inc., breached the license agreement dated June 24, 1975, as amended, by improperly selling products in the licensed area to entities other than the licensee, and by improperly terminating the license agreement in 1981. The license agreement is hereby reinstated to Hawaiian Tropic Pty., Ltd., or its successors, trustees, or liquidators. The claimant failed to prove any resulting damages which were proximately caused by the breach and therefore claimant's claim for damages is denied.
>
> 3. The evidence presented was insufficient to establish conspiracy as alleged by claimant and Hawaiian Tropic Pty., Ltd.'s claim for punitive damages is denied.
>
> 4. ...
>
> 5. ...

This Award is in full settlement of all claims submitted to this arbitration."

On 6 May 1985 the Circuit Court -

" ORDERED AND ADJUDGED that the award of arbitrators be, and the same is hereby confirmed in accordance with its terms. It is further

ORDERED AND ADJUDGED that the License Agreement is reinstated to Hawaiian Tropic Pty., Ltd., or its successors, trustees, or liquidators. The defendants did not seek and none of the parties were awarded any monetary damages in said proceeding, and the claims of both parties for attorney's fees were disallowed and are denied."

By proof of debt lodged by John H. Froman dated 12 April 1985, Tanning claimed that Hawaiian was indebted to it in the sum of at least $323,132 for goods sold pursuant to the licence agreement and certain associated charges. Alternatively, Tanning claimed $US179,000 in reliance upon the arbitrators' award claiming that that award "collaterally estops both parties thereto to claim that a different amount is due".

The liquidator gave Tanning a notice dated 26 July 1985 rejecting in whole the proof of debt. The liquidator's grounds for rejection were stated as follows:

"(1) (a) the claim has not been submitted to arbitration under the laws of Florida as required by the Licence Agreement and is statute barred in that jurisdiction being the proper law of and jurisdiction for the contract; and

(b) [Tanning] elected not to pursue any amounts owing as a counter-claim in the original arbitration proceedings but merely to establish that claim as an offset and the Award of

Arbitrators and the Final Judgment confirming the award operate so as to deprive [Tanning] of the right to make such a claim at any time; and

(2) the Proof of Debt and the statement of account accompanying the Proof of Debt do not

(a) disclose any basis for the imposition of interest; and

(b) disclose any evidence establishing delivery of any product to [Hawaiian] or the sale of any produce for the benefit of [Hawaiian]; and

(c) appear consistent with the Statement of Affairs executed by Mr Cleary, a director of [Hawaiian]; and

(3) I am not satisfied that the indebtedness of [Hawaiian] (if any) to you is accurately set out in the statement of account annexed to the proof of debt; and

(4) the Proof of Debt contains claims for debts which even if verified would be statute-barred in the State of New South Wales should that jurisdiction be applicable."

On 12 August 1985 the summons seeking an order reversing the liquidator's decision was issued.

In determining whether to admit or reject a proof of debt, a liquidator has been said to act in a quasi-judicial capacity (*Re Britton & Millard Ltd.* (1957) 107 L.J.601) according to standards no less than the standards of a court or judge: *Commr for Corporate Affairs v. P.W. Harvey* [1980] V.R.669, at p.696. This description of the liquidator's function reflects his duty to distribute the assets in his hands or under his control among the persons truly entitled. That duty

was stated by Viscount Simonds in *Government of India v. Taylor* [1955] A.C.491, at p.509:

> "I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides."

The principles which determine enforceability of the liability to which a proof of debt relates are, in the main, the same as the principles which would be applied in an action brought directly against the company to enforce that liability. Those principles include the law relating to the barring of actions by time: see, for example, *Motor Terms Co. Pty. Ltd. v. Liberty Insurance Ltd.* (1967) 116 C.L.R.177. But this general rule is qualified. As the parties whose interests are affected by admission of a proof of debt are the general body of creditors and the contributories rather than the company in liquidation, there are some liabilities which would be enforceable against the company but which a liquidator is not bound to admit to proof of debt lest the interests of creditors and contributories may be unjustly affected. A liquidator may properly reject a proof of debt if the liability, though enforceable against the company, is not a true liability of the company but is founded merely on some act or omission on the part of the company which unjustly prejudices the interests of the creditors or contributories in the assets available for distribution. In this respect, there is no reason to distinguish between the position of a liquidator and that of a trustee in bankruptcy: see *Ayerst v. C. & K. (Construction) Ltd.* [1976] A.C.167. In *In re Van Laun;*

Ex parte Chatterton [1907] 2 K.B.23, at p.31, Buckley L.J. said:

> "Whether the creditor alleges that there has resulted, and that he relies upon an account stated, or a covenant entered into by the debtor, or a judgment which he has obtained, the principle, I apprehend, is exactly the same, and is this - that the trustee is not the person who has stated the account, is not the covenantor, is not the judgment debtor, but is entitled to say, 'It is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate.' If there be a judgment it is not necessary to shew fraud or collusion. It is sufficient, in the language of Lord Esher, to shew miscarriage of justice - that is to say, that for some good reason there ought not to have been a judgment. Exactly the same, I think, is true of an account stated or of a covenant."

The same approach is equally applicable to estoppels which would defeat the distribution of assets among the true creditors of the company: *In re Exchange Securities Ltd.* [1988] Ch.46, at pp.59-60; and cf. *In re South American and Mexican Company; Ex parte Bank of England* [1895] 1 Ch.37, at p.45. The occasions when it is right to reject a proof of debt in respect of what is not a true liability of the company may not be susceptible of exhaustive definition. Perhaps some guidance may be found in the terms employed by Barwick C.J. in *Wren v. Mahony* (1972) 126 C.L.R.212, at p.223, in reference to the grounds on which a court of bankruptcy will go behind a judgment:

> "Circumstances tending to show fraud or collusion or miscarriage of justice or that a compromise was not a fair and reasonable one, in the sense that even if not fraudulent it was foolish, absurd and improper, or resulted from an unequal position of the parties (see *In re Hawkins; Ex parte Troup* [[1895] 1 Q.B.404, at p.409]) offer occasions for the exercise by the

Court of Bankruptcy of its power to inquire into the consideration for the judgment."

It is not necessary in this case to determine the scope of this qualification. It suffices to note that it qualifies the principles governing the admission or rejection of a proof of debt by arming the liquidator with grounds for rejecting a proof of debt additional to any grounds available under the general law. For present purposes, the relevant consideration is that no liability which is unenforceable against the company by the general law can found a debt admissible to proof in a winding up.

If the liquidator, in performing his function of considering the admissibility of proofs of debt, decides to reject a proof of debt, the ordinary remedy of the person claiming to be admitted as a creditor is to apply to the court to reverse or modify the decision: *Companies Act* 1961 (N.S.W.), s.279; r.160 of the Supreme Court Rules 1968 (N.S.W.) promulgated under the *Companies Act*; see now Companies (New South Wales) Regulations, reg.126(2). The proceedings thus instituted, though often referred to as an "appeal" from the liquidator's decision to reject, are originating proceedings which the court hears de novo: *In re Bird's Stores Pty.Ltd.* (1931) 37 Arg.L.R.94; *In re Kentwood Constructions Ltd.* [1960] 1 W.L.R.646; [1960] 2 All E.R.655; *In re Trepca Mines Ltd.* [1960] 1 W.L.R.1273; [1960] 3 All E.R.304. In such a proceeding, a liquidator who defends his decision to reject a proof of debt is no longer acting in a quasi-judicial capacity; he is cast in the role of an adversary, defending the assets available for distribution against a liability which, according to the view he formed when acting quasi-judicially, is not legally enforceable. The liquidator may defend those assets against the creditor's claim on any ground on which the company might have defended the claim had it been sued by the creditor. If the liquidator relies on those special defences which allow him to go behind a judgment, an account stated, a covenant or an estoppel in order to ascertain the true liability of the company, he is none the less in the role of an adversary. The issue in the proceeding is whether the liability referred to in the proof of debt is a true liability of the company enforceable against it.

The issue is contested between the putative creditor on the one hand and the liquidator on the other; the liquidator is a party litigant. And none the less so though the liquidator is required to act fairly in conducting the litigation.

Of course, a liquidator is not the company and legal title to the assets of the company is not vested in him: *Franklin's Selfserve Pty.Ltd. v. Federal Commissioner of Taxation* (1970) 125 C.L.R.52, at pp.69-71; *Ayerst v. C. & K. (Construction) Ltd.*, at p.180; and see *Growden v. Wiltshire* (1935) 52 C.L.R.286. Nor is the liquidator in the present case a party to the arbitration agreement contained in cl.10 of the agreement of 24 June 1975. But s.7(4) of the Act brings within the ambit of sub-s.(2) a person who claims "through or under a party". Although a person who was not a party to the arbitration agreement is not bound by the contract to submit to arbitration, a person who claims "through or under a party" is so bound by force of the statute: see *Bonnin v. Neame* [1910] 1 Ch.732, at p.738. In statutes similar to s.7 of the Act, the phrase "through or under a party" or its equivalent has been construed to apply to, inter alios, a trustee of a bankrupt's estate (*Piercy v. Young* (1879) 14 Ch.D.200), an assignee of a debt arising out of a contract containing an arbitration clause (*The "Leage"* [1984] 2 Ll.R.259, at p.262), a company being a subsidiary of a parent company which is party to an arbitration agreement (*Roussel-Uclaf v. Searle* [1978] 1 Ll.R.225; but cf. *Mount Cook (Northland) v. Swedish Motors* [1986] 1 N.Z.L.R.720) and a company being a parent of a subsidiary company which is party to an arbitration agreement when claims are brought against both companies based on the same facts: *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.* (1988) 863 F.2d 315. However, there is no case to which our attention has been drawn in which the phrase has been held to affect the liquidator of a company which is party to an arbitration agreement, and the position of a liquidator can be distinguished from a trustee, an assignee, a subsidiary company or a parent company referred to in the respective cases cited. The meaning of the phrase "through or under a party" must be ascertained not by reference to authority but by reference to the text and context of s.7(4).

In the first place, as sub-s.(2) speaks of both parties to an arbitration agreement, a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions "through" and "under" convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankrupty may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt.

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 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) 417 U.S.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.

In the present case, the liquidator does not seek to uphold rejection of Tanning's proof of debt on grounds which are available to the liquidator alone; he relies on grounds of defence available to Hawaiian under the general law. The liquidator thus relies on a ground of defence against Tanning's claim which is available to the company. In respect of each ground advanced for rejecting the proof of debt and relied on in the proceedings to uphold the rejection, the liquidator is claiming "through or under" Hawaiian. Each of those grounds raises a "controversy or claim arising out of, or relating to" the agreement of 24 June 1975 and thus falls under cl.10 thereof (the arbitration clause). To determine the proceedings instituted by Tanning in the Supreme Court, it is necessary to determine whether Hawaiian owes Tanning an enforceable debt for moneys due under the agreement of 24 June 1975. That question is clearly a "matter" (however the term "matter" be defined) the determination of which is involved in those proceedings. Section 7(2) of the Act requires that those proceedings be stayed. The order to stay made by the Court of Appeal was correctly made as between the liquidator and Tanning and the matter to be referred to arbitration was, in our opinion, correctly identified. Tanning submits that, even if it be right to refer a matter to arbitration, the order should be made on condition that the liquidator does not raise the Florida statute of limitations. If that submission were accepted, the liquidator's decision to reject

Tanning's proof of debt might be reversed or varied to admit to proof a debt which is unenforceable. A creditor whose debt is statute-barred at the commencement of the winding up is not a creditor entitled to prove in the winding up: *Motor Terms Co. Pty.Ltd. v. Liberty Insurance Ltd.*, at pp.190-191,195-197. The condition which Tanning seeks to have imposed is inappropriate.

There are several subsidiary points which should be mentioned. First, Tanning's claim for interest, rejected specifically in ground (2)(a) appears to be based on an alleged contractual obligation to pay interest; it is not a claim against the liquidator for interest on the amount which, it is claimed, he ought to have admitted as a debt provable in the winding up. A claim for interest on the former basis falls within the arbitration clause and the matter in issue must be referred to arbitration. A claim for interest on the latter basis does not, but such a claim for interest would be misconceived: see *Re A. Forsyth* (1975) 1 A.C.L.R.274. Next, by its alternative claim Tanning sought to rely on an alleged issue estoppel based on the finding in the award that $US179,000 was due by Hawaiian to Tanning for products received and for other money payable under the contract. The question whether there is an issue estoppel which requires Hawaiian's liability for this amount to be accepted as correct and enforced is itself a question involved in determining whether Hawaiian is indebted to Tanning and in what amount. As Hawaiian's indebtedness under the contract falls within the arbitration clause, the alleged issue estoppel is an issue in the matter to be referred to arbitration. It is therefore unnecessary and inappropriate to discuss the competing arguments as to the alleged issue estoppel.

Thirdly, the matter to be referred to arbitration cannot extend to issues which could not arise in proceedings between Hawaiian and Tanning or which are unrelated to the contract containing the arbitration clause: *Allergan Pharmaceuticals Inc. v. Bausch & Lomb Inc.* (1985) 7 A.T.P.R. 40-636, at p.47,173. The ultimate question whether the liquidator's decision should be reversed or modified cannot itself be referred to arbitration though the answer to the question will follow inevitably upon a determination of

the matter of Hawaiian's debt to Tanning. Although the issues in the "proceedings" extend beyond the matter which can be referred to arbitration under cl.10, so that the proceedings are not wholly congruent with the "matter" which is to be referred to arbitration, the whole of the proceedings must be stayed until an award is made on the matter referred: *Flakt Aust. v. Wilkins & Davies Const.* [1979] 2 N.S.W.L.R. 243, at p.250. Had the liquidator asserted a right to go behind the award, that question could not have been referred to arbitration, yet its determination would have had to await the determination of the matter falling within the arbitration clause.

Finally, there is one general question which the liquidator raises by application for special leave to cross-appeal. The question is whether Tanning is now estopped from pursuing any debt allegedly owing by Hawaiian because of Tanning's failure in the Florida arbitration to counterclaim that debt from Hawaiian. By his notice of cross-appeal, the liquidator seeks an order that Tanning's summons be dismissed here and now. In the earlier Florida arbitration Tanning raised the alleged debt by way of defence, contending that the debt "greatly exceeds any claim which [Hawaiian] purports to assert" in the Florida proceedings and that Hawaiian's claims "are therefore barred under the doctrine of recoupment". Tanning also relied on the debt by way of set-off. In the result, as we have seen, the arbitrators found that Hawaiian failed to prove any damages and the Circuit Court's order stated that Tanning did not seek any monetary damages. The liquidator seeks to argue that it was unreasonable of Tanning not to have counterclaimed for the debt and that Tanning should now be held estopped from asserting that the debt is enforceable. Reliance is placed on the majority judgment in *Port of Melbourne Authority v. Anshun Pty.Ltd.* (1981) 147 C.L.R.589, at pp.602-603.

If the estoppel which the liquidator seeks to raise in reliance on *Port of Melbourne Authority v. Anshun Pty.Ltd.* were a mere issue estoppel, the availability of the estoppel would fall for consideration in the arbitration and it would be unnecessary to consider it further in these proceedings. It may be that *Port of Melbourne Authority v. Anshun Pty.Ltd.* is a case of mere issue estoppel (see the views expressed in

Chamberlain v. Deputy Commissioner of Taxation (1988) 164 C.L.R.502) and, if that be so, the cross-appeal must be dismissed. But if that case recognizes an estoppel which precludes the litigation of a cause of action (rather than an estoppel which merely compels the determination of an issue in litigation), it is necessary to consider whether Tanning is precluded from enforcing the debt allegedly owing by Hawaiian. If, according to the law of New South Wales, any debt owing by Hawaiian is unenforceable, the cross-appeal should be allowed and the summons should be dismissed. There would be no live "matter" involved in the proceedings which would be "capable of settlement by arbitration". In our opinion, there is no such estoppel.

A plaintiff who has an unadjudicated cause of action which can be enforced only in fresh proceedings (*Duedu v. Yiboe* [1961] 1 W.L.R.1040, at p.1046) cannot be precluded from taking fresh proceedings merely because he could have and, if you will, should have counterclaimed on that cause of action in a forum chosen by the opposite party in proceedings in which the opposite party sued him. We do not read the majority judgment in *Port of Melbourne Authority v. Anshun Pty.Ltd.* as holding the contrary, except in a case where the relief claimed in the second proceeding is inconsistent with the judgment in the first: see especially at pp.599-601. That is not the present case. Here, as the award stated, the claims in settlement of which the award was made were only those claims submitted to the arbitration, not including the debt allegedly owing to Tanning. Tanning's claim for a debt owing by Hawaiian did not merge in and was not extinguished by any award or judgment. As the Florida proceedings, giving them full faith and credit, did not give rise to a cause of action estoppel precluding Tanning from enforcing any debt owing by Hawaiian, it is unnecessary to consider the question whether a foreign judgment is capable of founding such an estoppel: see *Hall v. Odber* (1809) 11 East 118 [103 E.R.949] and cf. *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No.2)* [1967] 1 A.C.853, at pp.966-967. In these circumstances, we would think that the appropriate order would be to grant special leave to the respondent to cross-appeal but to dismiss the cross-appeal with costs. However, as the other members of the Court would refuse special leave, that is the order which

will be made. We join in refusing special leave to cross-appeal but with costs against the respondent.

We would dismiss the appeal with costs.

DEANE AND GAUDRON JJ. The appellant, Tanning Research Laboratories Inc. ("TRL"), is a company incorporated and carrying on business in the United States of America. On 24 June 1975 TRL entered into a licence agreement with an Australian company, Hawaiian Tropic Pty. Limited ("Hawaiian"). The respondent, Mr O'Brien ("the liquidator"), is liquidator of Hawaiian, which company was ordered to be wound up by the Supreme Court of New South Wales in April 1981.

The agreement between TRL and Hawaiian contained a clause ("cl.10") in the following terms:

> "Arbitration. Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof."

In February 1984 arbitration proceedings were commenced in Florida, U.S.A., by or on behalf of Hawaiian against TRL. In those proceedings it was claimed that TRL had wrongfully terminated the licence agreement. Relief was sought by way of "damages in excess of Five Thousand ($5,000.00) Dollars and declaratory judgment". The claim for declaratory judgment was a claim for a declaration "reinstating [Hawaiian's] rights under the ... license agreement". TRL filed various defences to the claim, including a defence of recoupment - a defence analogous to set-off - alleging indebtedness for goods sold and delivered to Hawaiian by TRL "in an amount exceeding $350,000, including interest". TRL did not cross-claim in respect of that or any other amount claimed to be owing. Nothing presently turns on other issues which were in dispute in the arbitration proceedings.

An award was made in the arbitration proceedings on 8 January 1985. The award was later confirmed by judgment of the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida. So far as is presently relevant, the award contained a finding that both TRL and Hawaiian had breached the licence agreement. Hawaiian's breach was found to consist of

"failing to timely pay the amounts due for products received which we find to be $179,000.00, and ... incurring liquidation ... under Australian law". In the result, the agreement was reinstated but Hawaiian's claim for damages was dismissed.

In April 1985 TRL lodged a proof of debt with the liquidator, asserting that Hawaiian was indebted to it for goods sold and delivered under the licence agreement in the sum of $US280,205. In the proof of debt TRL acknowledged and relied upon a "collateral estoppel" by virtue of the award made in the arbitration proceedings and claimed to prove the amount which was the subject of the finding of breach in the award, namely, $US179,000. The liquidator rejected the proof of debt on the following grounds:-

> "(1)(a) the claim has not been submitted to arbitration under the laws of Florida as required by the Licence Agreement and is statute barred in that jurisdiction for the contract; and
>
> (b) TRL elected not to pursue any amounts owing as a counter-claim in the original arbitration proceedings but merely to establish that claim as an offset and the Award of Arbitrators and the Final Judgment confirming the award operate so as to deprive TRL of the right to make such a claim at any time; and
>
> (2) the Proof of Debt and the statement of account accompanying the Proof of Debt do not
>
> (a) disclose any basis for the imposition of interest; and
>
> (b) disclose any evidence establishing delivery of any product to [Hawaiian] or the sale of any produce for the benefit of [Hawaiian]; and

(c) appear consistent with the Statement of Affairs executed by Mr Cleary, a director of [Hawaiian]; and

(3) I am not satisfied that the indebtedness of [Hawaiian] (if any) to you is accurately set out in the statement of account annexed to the proof of debt; and

(4) the Proof of Debt contains claims for debts which even if verified would be statute-barred in the State of New South Wales should that jurisdiction be applicable."

The grounds relied upon by the liquidator put the amount of Hawaiian's indebtedness in issue and asserted that, either by reason of an estoppel similar to that considered in *Port of Melbourne Authority v. Anshun Pty. Ltd.* (1981) 147 C.L.R. 589 (ground (1)(b)) or by the operation of cl.10 and the application of Florida law (ground (1)(a)), the debt, if any, was not enforceable. In the alternative, it was asserted that, should New South Wales law apply, some part of the debt was statute barred.

Upon the liquidator's rejection of the proof of debt, TRL commenced proceedings in the Supreme Court of New South Wales seeking an order that the decision of the liquidator be reversed ("the proof of debt proceedings"). TRL, by its reply to the liquidator's amended defence, again asserted that it was entitled to the benefit of an estoppel by virtue of the award and subsequent judgment and by which the liquidator was precluded from denying Hawaiian's indebtedness in the sum of $US179,000. Shortly prior to the hearing, the liquidator claimed that the proceedings should be stayed pursuant to s.7(2) of the *Arbitration (Foreign Awards and Agreements) Act* 1974 (Cth) ("the Act"), now called the *International Arbitration Act*.

The Act implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and relevantly provided:-

"7.(1) Where -

...

(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 Act, 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.

...

(4) For the purposes of sub-sections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

..."

It has been common ground throughout the proof of debt proceedings that cl.10 is an arbitration agreement

and that TRL, a party to that agreement, was, at the time the agreement was made, ordinarily resident in a Convention country. That being so and having regard to the mandatory terms of s.7(2) - "the court shall ... stay the proceedings or so much of the proceedings as involves the determination of that matter" - the question of the application of s.7(2) should have been determined prior to any hearing of TRL's claim to have the liquidator's decision reversed. However, presumably because it was perceived that, if either of the estoppels claimed by TRL and the liquidator was made out, there would be no dispute to submit to arbitration, the matter proceeded to a hearing before Cohen J. in the Supreme Court of New South Wales. The question of the application of s.7(2) of the Act was treated as but one issue in the case. Both TRL and the liquidator acquiesced in this course. His Honour held that s.7(2) of the Act had no application and that neither estoppel was made out. His Honour further held that the proof of debt should be allowed to the extent of $55,502.63. The liquidator appealed and TRL cross-appealed to the Court of Appeal of the Supreme Court of New South Wales. In the Court of Appeal s.7(2) was again treated as but one issue in the appeal, the other principal issues then argued being the estoppels claimed respectively by TRL and the liquidator. In the judgment of Kirby P., with whose proposed orders McHugh J.A. agreed, neither estoppel was established but s.7(2) of the Act applied to the proof of debt proceedings. In the result, the cross-appeal was dismissed, the appeal allowed, the judgment and orders of Cohen J. set aside and, in lieu thereof, it was ordered that the proceedings be stayed and "the determination of the matter of the amount, if any, by which [Hawaiian] is indebted to [TRL] be referred to arbitration in accordance with the agreement ... of 24 June 1975". TRL now appeals to this Court and the liquidator seeks special leave to cross-appeal. By the appeal and by the application for leave to cross-appeal, each of TRL and the liquidator seeks to have the question of the admission of the proof of debt determined by reference to the different estoppels claimed to result from the award and subsequent judgment. Additionally, TRL seeks by its appeal to have the other questions in issue between it and the liquidator determined in proof of debt

proceedings rather than by way of arbitration under cl.10.

As earlier mentioned, s.7(2) of the Act is mandatory in its terms. Thus, it is only if the different estoppels claimed by TRL and the liquidator fall outside the scope of s.7(2) that they can fall for determination in the proof of debt proceedings or in any appeal in such proceedings.

To ascertain whether s.7(2) operates in respect of proceedings pending in a court it is necessary to first identify the subject matter of the controversy which falls for determination in those proceedings. Only when that has been done is it possible to identify whether the proceedings "involve the determination of a matter ... capable of settlement by arbitration": s.7(2)(b). That process of identification is also necessary to ascertain whether, if a party to the proceedings is not a party to the arbitration agreement, he or she is a person "claiming through or under a party": s.7(4).

It was contended on behalf of TRL that the subject matter of the proof of debt proceedings was whether and, if so, in what amount the indebtedness of Hawaiian to it should be admitted in the winding up. That matter, it was argued, is not "a matter ... capable of settlement by arbitration". So much may be accepted as correct. Even so, it is clear from the proof of debt and the notice of rejection (and, as events have transpired, from the course which the proceedings have taken) that a decision as to the admission of any debt in the winding up depends entirely upon the determination of the amount, if any, owing and enforceable as a debt for goods sold and delivered by TRL to Hawaiian pursuant to the licence agreement.

Even if some issue in addition to the amount of enforceable indebtedness must be determined before the proof of debt proceedings can be finally decided, that would not oust the operation of s.7(2) of the Act. By requiring that the proceedings or so much of the proceedings as involves the determination of a matter capable of settlement by arbitration be stayed, s.7(2) clearly contemplates that the proceedings may encompass issues additional to those constituting "a matter ...

capable of settlement by arbitration". See *Flakt Aust. v. Wilkins & Davies Const.* [1979] 2 N.S.W.L.R. 243; *Allergan Pharmaceuticals Inc. v. Bausch & Lomb Inc.* (1985) 7 A.T.P.R. 40-636.

The word "matter" is not defined in the Act. In the quite different context of Ch.III of the Constitution, it has been held that the word "matter" means "the whole matter" and encompasses "all claims made within the scope of the controversy": *Fencott v. Muller* (1983) 152 C.L.R. 570, at p.603. See also *Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd.* (1981) 148 C.L.R. 457, at p.475. However, in any context, "matter" is a word of wide import. In the context of s.7(2), the expression "matter ... capable of settlement by arbitration" may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, 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. See *Flakt*, at p.250. 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. The words "capable of settlement by arbitration" indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power. See Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed. (1989), pp.149-150, where it is noted that "English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not" but that the powers of an arbitrator "are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state".

The substance of the controversy between TRL and the liquidator is the amount, if any, enforceable as a debt for goods sold and delivered to Hawaiian under the

licence agreement. That controversy is susceptible of settlement as a discrete controversy. And, when stated in those terms, the controversy is readily seen as one arising out of or relating to the licence agreement and thus encompassed within the agreement to arbitrate contained in cl.10. Moreover, the controversy is as to a matter of a kind which is frequently the subject of arbitration proceedings and which could not be said to require determination only by the exercise of judicial power.

There is one aspect of the controversy as to the amount enforceable as a debt for goods sold and delivered under the licence agreement that requires further consideration. The different estoppels asserted by TRL and the liquidator are asserted by reason of the earlier arbitration and, in that sense, arise out of or relate to the arbitration rather than the licence agreement. Moreover, as the course of this litigation shows, the asserted estoppels are themselves capable of determination as discrete issues. If the asserted estoppels are viewed independently, it is arguable that they do not constitute "a matter ... capable of settlement by arbitration". However, the asserted estoppels are but aspects of the wider controversy as to the amount enforceable as a debt for goods sold and delivered under the licence agreement. That question necessarily involves a determination of the estoppels, but is not necessarily answered by that determination. If neither estoppel is made out, the question will involve other considerations. Accordingly, the estoppels are properly to be seen, not as separate issues falling outside cl.10, but as part of the controversy as to the amount enforceable as a debt. That controversy is, as earlier indicated, a matter capable of settlement by arbitration.

It was further argued on behalf of TRL that s.7(2) has no application to the proof of debt proceedings because the liquidator does not claim through or under Hawaiian. It was pointed out that a liquidator does not succeed to the rights and liabilities of a company, but assumes a responsibility, as an officer of the court, to administer the statutory scheme for the winding up of a company. The proof of debt proceedings, it was argued, were proceedings for the review of a quasi-judicial decision taken

by the liquidator in the course of discharging that responsibility. Thus, the argument ran, the liquidator, in defending his decision, could not be said to be claiming anything - much less claiming through or under Hawaiian.

Section 7(2) of the Act is concerned with "proceedings [which] involve the determination of a matter ... capable of settlement by arbitration". Its operation is thus not confined to proceedings in which the parties seek the same relief as might have been sought in arbitration proceedings. Because s.7(2) has this wider operation, the question whether a person is claiming through or under a party to the arbitration agreement is necessarily to be answered by reference to the subject matter in controversy rather than the formal nature of the proceedings or the precise legal character of the person initiating or defending the proceedings.

The substance of the controversy between TRL and the liquidator is as to the amount, if any, enforceable as a debt for goods sold and delivered by TRL to Hawaiian under the licence agreement. In the proof of debt proceedings TRL asserts an enforceable obligation on the part of Hawaiian and seeks to have the liquidator recognize that obligation. The liquidator, on the other hand, denies the existence of that obligation and, if it exists, disputes the amount. In so doing, the liquidator stands precisely in the position in which Hawaiian would have stood if it were in a position to require and did require a determination of the amount, if any, of its enforceable indebtedness to TRL. So standing, the liquidator claims the benefit of the defences and answers which would otherwise have been available to Hawaiian, and thus claims through or under Hawaiian. It is not suggested on behalf of the liquidator that there are any grounds upon which the liquidator would be entitled, as a matter of discretion, to refuse to admit the proof of the debt if it would have been otherwise enforceable as against the company.

The acquiescence by TRL and the liquidator in a course involving argument and decision on all issues has resulted in decisions being given at first instance and in the Court of Appeal on the claimed estoppels

which are but aspects of the controversy capable of settlement by arbitration, namely, the amount, if any, owing and enforceable as a debt for goods sold and delivered to Hawaiian under the licence agreement. It is that matter, rather than, in the terms of the order of the Court of Appeal, "the amount, if any, by which [Hawaiian] is indebted to [TRL]" which, in accordance with s.7(2) of the Act, must be referred to arbitration and, on the arbitration of that matter, the arbitrator will not, in our view, be bound to pay regard to the views expressed in the courts below or in this Court on the validity or otherwise of the various alleged estoppels.

The appeal should be allowed to the extent necessary to allow a reference to arbitration of the entire controversy as to the amount, if any, owing and enforceable as a debt for goods sold and delivered to Hawaiian, including the various alleged estoppels, and to provide that the parties should bear their own costs of the proceedings at first instance and in the Court of Appeal referable to the different estoppels that each asserted. The application for special leave to cross-appeal should be dismissed. As the liquidator has substantially succeeded on the question of the operation of s.7(2) of the Act, the appellant should pay the respondent's costs of that issue in this Court. Otherwise, because the parties again sought to raise in this Court the estoppels which are but aspects of the matter which must be referred to arbitration, there should be no order as to the costs of the appeal or the application for special leave to cross-appeal.

TOOHEY J. I have read the judgment of Brennan and Dawson JJ. and agree generally with their Honours' conclusion that the appeal be dismissed and their reasons for reaching that conclusion. There is, however, one matter on which I would comment and that is in relation to the respondent's application for special leave to cross-appeal.

The question raised by that application is in essence whether the appellant is estopped from pursuing any debt owing by Hawaiian Tropic Pty. Limited ("Hawaiian") because of the appellant's failure in the arbitration proceedings to counterclaim in respect of that debt. Brennan and Dawson JJ. express the view that no principle of law, whether derived from *Port of Melbourne Authority v. Anshun Pty. Ltd.* (1981) 147 C.L.R. 589 or otherwise, would prevent a plaintiff from pursuing a claim against a defendant merely because he might have sought the same relief by way of cross-claim in earlier proceedings between the parties.

I prefer to express no view on that matter and for the following reason. The Court of Appeal ordered that proceedings between the parties be stayed and that determination of the amount owed by Hawaiian to the appellant be referred to arbitration in accordance with the agreement between the parties. Once it is accepted that the Court of Appeal was right in the orders it made, it follows that all issues bearing on that indebtedness are referred to arbitration. As Brennan and Dawson JJ. point out in their judgment, the question whether there is an issue estoppel based on the finding in the award that $US179,000 was due by Hawaiian to the appellant is an issue in the matter to be referred to arbitration. Equally, in my view, the question whether the appellant is precluded from asserting an indebtedness on the part of Hawaiian because it (the appellant) failed to counterclaim in the arbitration is an issue in the matter to be referred to arbitration.

In all the circumstances it seems to me preferable to express no view as to the consequences of the respondent's failure to cross-claim in the arbitration. It is true that if the respondent can make good the proposition that the appellant is precluded, by its failure to counterclaim in the arbitration, from

asserting any indebtedness on the part of Hawaiian, there is no longer any matter to be referred to arbitration. But the proposition is not one that necessarily turns only on a question of law. There may be facts not before this Court which are relevant to the absence of a cross-claim. The application for leave to cross-appeal suggests that the respondent may seek to rely, not only on the absence of a counterclaim in the arbitration proceedings, but also on the presence in those proceedings of a defence of recoupment or set-off unaccompanied by a counterclaim. The precise scope of *Anshun* is itself a matter of some debate: see *Chamberlain v. Deputy Commissioner of Taxation* (1988) 164 C.L.R. 502. None of these aspects was canvassed fully before this Court.

I agree with their Honours that the appeal should be dismissed with costs. The application for special leave to cross-appeal should also be refused with costs.