FEDERAL COURT OF AUSTRALIA

JUDGMENTS AND ORDERS - settlement of orders - previous determination that Australian proceedings be stayed and the disputes referred to arbitration in London - conditions on which stay granted - whether order as to costs in the stay proceedings should be made - whether order as to security in respect of arbitration should be made

PRACTICE AND PROCEDURE - application for leave to appeal from interlocutory judgments - whether substantial injustice would result if leave were refused - whether decisions attended with sufficient doubt

Federal Court of Australia Act 1976 (Cth), ss 24(1A), 43
International Arbitration Act 1974 (Cth), s 7(2)
Admiralty Act 1988 (Cth), s 29

Federal Court Rules, O 52 r 10

Decor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397, applied
House v The King (1936) 55 CLR 499, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited

HI-FERT PTY LIMITED & CARGILL FERTILLIZER INC v
KIUKIANG MARITIME CARRIERS INC. &
WESTERN BULK CARRIERS (AUSTRALIA) LTD

NG 778 OF 1996

TAMBERLIN J
SYDNEY
12 DECEMBER 1997

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NG 778 of 1996**
IN ADMIRALTY

BETWEEN:	**HI-FERT PTY LIMITED** **FIRST PLAINTIFF**
	CARGILL FERTILIZER INC **SECOND PLAINTIFF**
AND:	**KIUKIANG MARITIME CARRIERS INC** **FIRST DEFENDANT**
	WESTERN BULK CARRIERS (AUSTRALIA) LTD **SECOND DEFENDANT**
JUDGE:	**TAMBERLIN J**
DATE OF ORDER:	**12 DECEMBER 1997**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. On the conditions in par 2, the whole of the proceedings against the first defendant be stayed and referred to Arbitration in respect of that matter in London;

2. The conditions referred to in par 1 are:-

   (a) That the arbitration as between the first defendant and the plaintiffs be treated as if it had been commenced with the appointment of the plaintiffs' arbitrator on the same day as the commencement of these proceedings, namely 20 September 1996. The plaintiffs shall commence such proceedings within six months from the date of these orders.

   (b) That the First Defendant furnish security in respect of the arbitration, in the form annexed and marked "A".

3. The whole of the proceedings against the second defendant be stayed and referred to arbitration in respect of that matter in London.

4. Leave to appeal is refused.

5. The plaintiffs shall pay the defendants' costs of the stay application, including costs of and incidental to the settling of these orders, and the costs of the application for leave to appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NG 778 of 1996**
IN ADMIRALTY

BETWEEN: **HI-FERT PTY LIMITED**
FIRST PLAINTIFF

CARGILL FERTILIZER INC
SECOND PLAINTIFF

AND: **KIUKIANG MARITIME CARRIERS INC**
FIRST DEFENDANT

WESTERN BULK CARRIERS (AUSTRALIA) LTD
SECOND DEFENDANT

JUDGE: **TAMBERLIN J**
DATE: **12 DECEMBER 1997**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

There are two matters before me for determination. The first is the settlement of orders to be made pursuant to judgments delivered by me in this matter on 4 December 1996 and 30 June 1997. In those judgments I gave reasons for my determination that certain Australian proceedings in this Court should be stayed and that the disputes be referred to arbitration in London in accordance with the terms of the agreement between the parties. The second matter is whether leave to appeal should be granted in respect of my reasons.

Settlement of orders

As between the plaintiffs and the **first** defendant, the plaintiffs seek the following orders:

"A. ***BETWEEN PLAINTIFFS AND FIRST DEFENDANT***

1. Order that, on the conditions following, the whole of the proceedings against the First Defendant be stayed and referred to Arbitration in respect of that matter in London;

2. The conditions referred to in 1. are:-

(a) That the First Defendant shall take no objection as to the time within which the arbitration has been commenced.

(b) That the First Defendant furnish security in respect of the arbitration, in the form annexed hereto and marked "A".

(c) That in the determination of the matter referred by this order to Arbitration the parties agree to vary the Arbitration Agreement to the effect that from the date of the making of these orders the disputes between the parties submitted to Arbitration should be determined in accordance with the law of Australia.

(d) That the arbitrators in London shall have the power and authority to determine the extent to which the costs of the Australian proceedings are to be paid by either and if so which of the parties.

3. Insofar as leave to appeal is required grant leave to appeal in respect of each of the Judgments of the Court dated 4 December 1996 and 30 June 1997 pursuant to Federal Court Rules Order 52 Rule 10.

4. Costs reserved."

The first defendant agrees that the whole of the proceedings should be stayed but does not agree with the conditions proposed in O 2.

In relation to O 2(a) the first defendant says that it should be in no worse position as a result of its successful stay application than it would have been if the arbitration proceedings had been commenced at the time when proceedings were instituted in this Court, namely on 20 September 1996. In my view, this submission should be accepted because it **preserves** the rights of the parties. It operates to avoid the conferring of any possible additional benefit on either party beyond the rights and obligations which would have prevailed if the arbitration proceeding provided for in the agreement had been commenced.

However, I consider that a time limit should be fixed within which arbitration proceedings must be commenced. Otherwise, the matter may be left in indefinite abeyance.

Accordingly, in my view, O 2(a) should provide:

> "*(a) That the arbitration as between the first defendant and the plaintiffs be treated as if it had been commenced with the appointment of the plaintiffs' arbitrator on the same day as the commencement of these proceedings, namely 20 September 1996. The plaintiffs shall commence such proceedings within six months from the date of these orders."*

In relation to condition 2(b), the position is that, subject to one matter, the parties agree. The annexure, which is a proposed letter from the Swedish Club Service Centre Limited ("the Swedish Club"), adds a qualifying phrase to the letter presently in force by adding the words "at any material time" to a warranty that the vessel was not under demise charter. The first defendant resists this and points out that the letter currently in force, which was accepted on the release of the vessel, has no such qualification. In my view, the *status quo* should be preserved and I see no need to depart from the terms of the earlier letter of 10 September 1996, given by the Swedish Club.

Condition 2(c) is not pressed against the first defendant.

Condition 2(d) relating to costs is opposed by the first defendant. The condition which the plaintiffs seek is that the London arbitrator shall have "power and authority" to determine the extent to which the costs of the Australian proceedings are to be paid as between the parties. The first defendant says that this Court has no power to confer jurisdiction or authority on the London arbitrators to resolve the question of costs on the stay application between the parties heard and decided in this Court. Nor is it appropriate to do so, whether as a condition of the stay or otherwise.

The plaintiffs submit that the Court has ample power to make the order conferring power on the London arbitrators to decide costs. They refer to *Donald Campbell & Co v Pollak* [1927] AC 732 and the general power of the Court to award costs under s 43 of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act").

Section 43 confers on the Federal Court jurisdiction to award costs in all proceedings "before the court". The power is discretionary. It does not, in my view, give power to confer on arbitrators the "power and authority" to determine costs of a hearing in a stay application before this Court.

The powers and functions of the arbitrators are derived from the agreement between the parties and it is not for this Court to impose, delegate or confer jurisdiction or authority on London arbitrators to make determinations on such matters.

The decision in the *Donald Campbell* case does not provide any support for the proposition advanced. It was concerned with the circumstances in which an appeal will be entertained on a question of costs in the House of Lords. There is a general reference in the decision to a court's extensive jurisdiction to award costs and the principles which should control the judicial exercise of its discretion. This does not in any way advance the plaintiff's case on the question before me.

For these reasons I entertain a strong doubt that the Court has either power, or jurisdiction, to make an order in the terms set out in proposed order 2(d).

Nor do I consider that, even if there were power, such an order should be made. This Court heard the stay proceedings over several days and is in a far better position to determine the questions of costs than arbitrators in London.

In Submissions in Reply the plaintiffs suggest an alternative order to the effect that the costs of the stay proceedings should abide the result of the arbitration proceedings on the merits. Such an order, in contrast to proposed order 2(d), does not purport to delegate or confer power or authority by the Court on the arbitrators. Such an order may be within jurisdiction but, in the circumstances of this case, it is not an order which ought to be made.

The plaintiffs advance four reasons why the successful first defendant should not be awarded costs. These are:

"(a) The first defendant refused to provide security for the claim, it being registered in Panama a flag of convenience country, and noted in the Lloyd's Registry search as a one ship operation, with no other assets anywhere else. Substantial expenses were incurred in arresting the vessel.

(b) Both defendants concede Hi-Fert reasonably commenced proceedings in the Federal Court. This had benefits for all parties in identifying and narrowing the issue on the merits to be litigated, in fact gathering and also in providing security for the London arbitral proceedings which could not have been obtained apart from Court order.

(c) The usual consideration applying in cases of remitter or transfer is a useful guide in admiralty cases of this type, that consideration being that costs should be costs in the cause to abide the decision on the merits; the Court frames an order to achieve this result.

(d) The Court should, in the proper exercise of its discretion, reflect the view that parties should not be penalised for commencing action in the Federal Court of Australia particularly if its is ultimately successful on the merits, and particularly where the circumstances of the case (witnesses, principal events etc) relate to Australia."

The first ground is not relevant to the stay of proceedings. As to the second, the collateral and consequential advantages to the parties resulting from the arrest proceedings do not outweigh the central consideration that the defendants succeeded and the plaintiffs lost on the question of a stay. The third ground is simply a broad generalisation and does not bear on the circumstances of this particular case. As to the fourth ground there is no suggestion of any penalty.

In addition to the foregoing, the possible ultimate success of the plaintiffs is speculative at the moment

The two considerations which persuade me against making the order are that (a) the defendants have been substantially successful in all major respects, and (b) that the stayed proceedings in this case are discrete from, and independent of, the issues on the merits to be determined in the arbitration.

Accordingly, my conclusion is that the plaintiffs should pay the first defendant's costs of the stay application including the costs of and incidental to this hearing as to settlement of the appropriate orders.

Before dealing with the question of leave to appeal which is sought, somewhat oddly, in the Short Minutes of Order, I will consider the appropriate orders in relation to the dispute as between the plaintiff and the **second** defendant concerning the stay proceedings.

The plaintiffs seek the following orders:

> ***"B. BETWEEN PLAINTIFFS AND SECOND DEFENDANT***
>
> *5. Order that on the conditions following, the whole of the proceedings against the Second Defendant be stayed and referred to Arbitration in respect of that matter in London;*
>
> *6. the conditions referred to in 1. are:-*
>
> *(a) That the Second Defendant shall give further security in the form annexed hereto and marked "B".*
>
> *(b) That in the determination of the matter referred by this order to Arbitration the parties agree to vary the Arbitration Agreement to the effect that from the date of the making of these orders the disputes between the parties submitted to Arbitration should be determined in accordance with the law of Australia.*
>
> *(c) That the arbitrators in London shall have the power and authority to determine the extent to which the costs of the Australian proceedings are to be paid by either and if so which of the parties.*
>
> *7. Insofar as leave to appeal is required grant leave to appeal in respect of each of the Judgments of he Court dated 4 December 1996 and 30 June 1997 pursuant to Federal Court Rules Order 52 Rule 10.*
>
> *8. Costs reserved."*

Order 5 sought is appropriate subject to what is said below as to conditions.

As to proposed condition 6(a) there is no reason why the plaintiffs, having made an unsuccessful application for a stay, and having failed to proceed to arbitration in accordance with their contractual obligations, should be given benefit of security from the second defendant.

The plaintiffs submit that power to require security from the second defendant is conferred by s 7 of the *International Arbitration Act 1974* ("the Arbitration Act") and s 29(3) of the *Admiralty Act 1988* (Cth).

Section 7(2) of the Arbitration Act relevantly provides:

> *"(2) Subject to this Part, where:*
>
> *(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*
>
> *(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;*
>
> *on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings..."*

The question raised by this provision is whether the imposition of a requirement that security be provided by the second defendant in circumstances where no prior security was provided, is an appropriate condition. The mere fact that proceedings are stayed against a defendant does not of itself warrant the requirement of security. Any arbitral award can be enforced against the assets of the second defendant in Australia under the provisions of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958. Section 4 of the Arbitration Act itself approves the accession by Australia to the Convention. In addition, the plaintiffs have the benefit of security of the full amount of the claim from the first defendant. There is no evidence that the second defendant is without financial substance or may be unable to meet any awards.

Nor does s 29 of the *Admiralty Act* assist the submission that security should be provided by the second defendant. That section relevantly reads:

"29(1) Where:

(a) it appears to the court in which a proceeding commenced under this Act is pending that the proceeding should be stayed ... on the ground that the claim concerned should be determined by arbitration (whether in Australia or elsewhere) ....; and

(b) a ship or other property is under arrest in the proceeding;

the court may order that the proceeding be stayed on condition that the ship or property be retained by the court as security for the satisfaction of any award...

...

(3) The power of the court to stay ... a proceeding includes power to do so ***on such conditions*** *as are just, including a condition:*

(a) with respect to the institution or prosecution of the arbitration or proceeding in the court of the foreign country; and

(b) that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of the foreign country." (Emphasis added)

Although there is a wide discretion in s 29(3) to impose such conditions as are just, it is evident that the section is concerned with the retention of a ship or other property under arrest. The section expressly refers to the "retention of a ship or property" and to "equivalent security". Both these references presuppose circumstances in which security is held at the time the proceedings are stayed. The section is not directed to imposing a requirement that new or fresh security should be given for the first time by a party who has not previously given security.

Independently of these observations, however, I am not satisfied that it can be said to be "just" to require security from the second defendant for the reasons given earlier in discussion of the Arbitration Act provisions.

Condition 6(b) is a matter for the arbitrators to decide. This Court has no power to, nor should it, direct the parties to agree to vary their arbitration agreement so as to require that Australian law should apply. I have already considered the relevant matters concerning this

issue in my earlier judgment of 4 December 1996 and I will not repeat my conclusions or reasons.

In addition to the foregoing, the effect of the directions sought would be to confer a collateral windfall advantage on the plaintiffs which would not have accrued if they had observed their agreement to submit the disputes to arbitration. This anomalous result, which would arise if the plaintiffs' submissions were accepted, lends further support to the case for not imposing this condition.

As to proposed orders 6(c) and 8 relating to costs, I do not make those orders, for the reasons given earlier in relation to the orders concerning the first defendant. My conclusion is that the plaintiffs should pay the second defendant's costs of the stay application including the costs of and incidental to this hearing as to settlement of the appropriate orders.

Leave to appeal

The decision on the stay is interlocutory. Therefore leave to appeal is required pursuant to s 24(1A) of the Federal Court Act and O 52 r 10 of the *Federal Court Rules*. The discretion is wide and unfettered but the authorities indicate that two important guidelines are (a) whether the decision is attended with sufficient doubt to warrant it being reconsidered, and (b) whether substantial injustice would result if leave were refused on the assumption that the decision at first instance was wrong. The suggested guidelines are not exhaustive. Nor are they universally appropriate but they are helpful in the circumstances of the present case. See *Niemann v Electronic Industries Ltd* [1978] VR 431, which was approved and applied by the Full Federal Court in *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399.

The plaintiffs submit that the two decisions involve questions of public importance relating to the constitutional validity of the Arbitration Act; the application of the *Carriage of Goods by Sea Act 1991* (Cth), and the construction of the arbitration clause.

While I accept that these questions are of public importance the Court's discretion is wide and unfettered. The fact that a question of public importance arises in proceedings is, of

course, not in itself determinative. The question raised must be attended with sufficient doubt to warrant an appeal in an interlocutory matter.

The consequence of the two decisions in this matter is that the plaintiffs are required to comply with their agreement to submit to arbitration . This does not appear to me to give rise to any substantial injustice.

As an additional matter, in relation to the question of substantial injustice, the plaintiffs seek to rely on possible inconveniences which may be occasioned to them if the dispute is heard in England. Mention is made of possible difficulties in arranging attendance of witnesses; the inadequacy of a video link; the possible unsympathetic appreciation of English arbitrators to contamination of Australia's wheat crop; increased cost to Hi-Fert, and the suggested unavailability of the trade practices Act cause of action.

In my view these assertions as to general possibilities carry little weight in circumstances where the plaintiffs have agreed to refer the disputes to London arbitration.

As regards the first defendant the decision involved discretionary elements and in assessing the prospects of success on appeal, if leave were granted, it is necessary to bear in mind the caution normally exercised by an appellate court in considering the prospects of a successful appeal in a matter involving the exercise of discretion: see *House v The King* (1936) 55 CLR 499 at 505, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 47.

I was not referred by the plaintiffs to any decision to the effect that a stay could not or should not be granted in circumstances similar to those in the present case. On the other hand, the decision of the New South Wales Court of Appeal in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 is an important authority in support of the conclusion reached on the trade practices submission. Independently of the conclusion as to substantial injustice I do not consider that the grounds of appeal or the submissions of the plaintiffs are persuasive, nor do I consider that the reasoning in the two judgments is attended with sufficient doubt to warrant the grant of leave in respect of either judgment.

Accordingly, I do not grant leave to appeal in this matter. The defendants should have the costs of the application for leave to appeal.

The orders of the Court are:

1. Order that, on the conditions in par 2, the whole of the proceedings against the first defendant be stayed and referred to Arbitration in respect of that matter in London;

2. The conditions referred to in par 1 are:-

   (a) That the arbitration as between the first defendant and the plaintiffs be treated as if it had been commenced with the appointment of the plaintiffs' arbitrator on the same day as the commencement of these proceedings, namely 20 September 1996. The plaintiffs shall commence such proceedings within six months from the date of these orders.

   (b) That the First Defendant furnish security in respect of the arbitration, in the form annexed and marked "A".

3. Order that the whole of the proceedings against the second defendant be stayed and referred to arbitration in respect of that matter in London.

4. Leave to appeal is refused.

5. The plaintiffs shall pay the defendants' costs of the stay application including costs of and incidental to the settling of these orders, and the costs of the application for leave to appeal.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin

Associate:

Dated: 12 December 1997

Counsel for the Plaintiff:	Mr P E King Mr M J Watts
Solicitor for the Plaintiff:	Withnell & Co
Counsel for the First Defendant:	Mr G J Nell
Solicitor for the First Defendant:	James Neill
Counsel for the Second Defendant:	Dr A S Bell
Solicitor for the Second Defendant	Ebsworth & Ebsworth
Date of Hearing:	7 November 1997
Date of Judgment:	12 December 1997

ANNEXURE

"A"

(THE SWEDISH CLUB SERVICE CENTRE LTD)

LETTER OF UNDERTAKING

TO: HI-FERT PTY LIMITED

C/-: WITHNELL & CO
SOLICITORS
LEVEL 8
167 MACQUARIE STREET
SYDNEY
NSW 2000 AUSTRALIA

VESSEL: M.V. KIUKIANG CAREER

VOYAGE: TAMPA, FLORIDA, USA, TO NEWCASTLE, NEW SOUTH WALES, AUSTRALIA. MARCH/APRIL 1996.

CARGO: PHOSPHATES

CLAIM: Damages for contamination to cargo carried under Bills of Lading TPA-1, TPA-2 andTPA-3 issued at Tampa, Florida on 24 March 1996 by Sea and Land Shipping Inc as authorised agent for the Master.

IN CONSIDERATION of your consenting to the release from arrest and/or refraining from taking action resulting in the arrest or restraint of the ship M.V. "Kiukiang Career" and/or any other ship or property owned by, demise chartered by, managed by or in the associated ownership of KIUKIANG MARITIME CARRIERS INC as at 26 April 1996 in any place in the world, and that you refrain from commencing and/or prosecuting legal or arbitration proceedings (otherwise than as referred to below) against KIUKIANG MARITIME CARRIERS INC or any other vessel or property owned by, demise chartered by, managed by or in the associated ownership of KIUKIANG MARITIME CARRIERS INC for the purposes of founding jurisdiction and/or obtaining security in respect of the abovementioned claim against KIUKIANG MARITIME CARRIERS INC as owners of the abovenamed ship concerning the cargo referred to above, WE, THE SWEDISH CLUB, Sveriges Angfartygs Assurans Forening of Gullbergs Strandgata 6 Goteborg, Sweden, do hereby irrevocably and unconditionally undertake to pay to your abovenamed Solicitors on your behalf on demand such sums as may be adjudged by the Federal Court of Australia (including any appeal therefrom) or as may be awarded in any arbitration in London or elsewhere or as may be agreed to be recoverable from the owner of the abovenamed ship in respect of the said claims, interest and costs PROVIDED THAT our total liability hereunder shall not exceed the sum of EIGHT MILLION AUSTRALIAN DOLLARS (AUST$8,000,000.00) plus interest and agreed or taxed costs.

AND FOR THE CONSIDERATION aforesaid we:-

(i) Warrant that the abovenamed ship was not under demise charter.

(ii) Undertake that we will within fourteen days of the receipt of a request form you or your Solicitors to do so, instruct Solicitors on behalf of the owner of the abovenamed ship to accept service of proceedings brought by you in the Federal Court of Australia, and to file an appearance thereto and we warrant that we have received irrevocable authority from the owner of the abovenamed ship to instruct Solicitors accordingly.

This undertaking shall be governed by and construed in accordance with Australian law and we submit to the exclusive jurisdiction of the Australian Courts for the purposes of any action for the enforcement hereof.

It is noted that nothing hereto is to be construed as a waiver or limitation of any of the provisions contained in the bills of lading numbered TPA-1, TPA-2 and TPA-3 in so far as they are applicable and this letter of undertaking shall be without prejudice to any rights of defences available to KIUKIANG MARITIME CARRIERS INC with respect to any claims arising out of the bills of lading or otherwise, including but not limited to the right to apply for limitation of liability and to argue that the bills of lading require arbitration in the United Kingdom.

....

The Swedish Club Service Centre Limited, Hong Kong
For and on behalf of Sveriges Angfartygs Assurans Forening, Goteborg, Sweden

Dated this day of 1997.