FEDERAL COURT OF AUSTRALIA

Trina Solar (US), Inc v Jasmin Solar Pty Ltd [2016] FCA 159

File number(s):	QUD 1160 of 2015
Judge(s):	**GREENWOOD J**
Date of judgment:	26 February 2016
Catchwords:	**PRACTICE AND PROCEDURE** – consideration of an application for leave to appeal from an interlocutory decision of the primary judge **APPEAL AND NEW TRIAL** – consideration of an application for leave to appeal from an interlocutory decision of the primary judge
Legislation:	*International Arbitration Act 1974* (Cth), ss 2D, 3, 7
Cases cited:	*Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd* [2013] FCA 175 – cited *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121; [2004] 1 Lloyd's Rep 603 – cited *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303 – cited *Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161 – cited *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 – cited *Bienstein v Bienstein* (2003) 195 ALR 225 – cited *Samsung Electronics v Apple Inc* (2011) 286 ALR 257 – cited *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564 – cited
Date of hearing:	On the papers
Registry:	Queensland
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Sub-area:	International Commercial Arbitration

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Number of paragraphs:	32
Solicitor for the Applicant:	Ms E Costello, King & Wood Mallesons
Solicitor for the Respondents:	Mr D Fitzpatrick, Fitzpatrick Legal

ORDERS

QUD 1160 of 2015

BETWEEN:	**TRINA US SOLAR (US), INC** Applicant
AND:	**JASMIN SOLAR PTY LTD ACN 158 644 225** Respondent
JUDGE:	**GREENWOOD J**
DATE OF ORDER:	**26 FEBRUARY 2016**

THE COURT ORDERS THAT:

1. Leave to appeal from the interlocutory judgment of Edelman J delivered in Chambers on 17 December 2015 is granted to the applicant, Trina Solar (US), Inc pursuant to s 24(1A) of the *Federal Court of Australia Act 1976* such appeal to be conducted on the footing of the notice of appeal exhibited to the affidavit of Emma Susan Costello sworn 23 December 2015.
2. The costs of and incidental to the application for leave to appeal are reserved for determination by the Full Court.
3. Pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) and rr 1.32 and 1.36 of the *Federal Court Rules 2011*, these orders are made from the Chambers of the Honourable Justice Greenwood and published electronically, with the consent of the parties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GREENWOOD J:

1 These proceedings are concerned with an application by the second respondent to the principal proceedings, Trina US Solar (US) Inc ("Trina US"), for leave to appeal from an interlocutory decision of the primary judge granting the applicant in the principal proceeding, Jasmin Solar Pty Ltd ("Jasmin"), leave to serve on Trina US in the United States of America an originating motion, a statement of claim, an application for leave (to serve Trina US in the United States), and all supporting affidavits.

2 The application before the primary judge was made under r 10.43(2) of the *Federal Court Rules 2011*. That rule provides that a party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country.

3 Rule 10.43(4) provides that, for the purposes of sub-rule (2), the party "must satisfy the Court" of these three matters: (a) the Court has jurisdiction in the proceeding; (b) the proceeding is of a kind mentioned in r 10.42; and (c) the party has a *prima facie* case for all or any of the relief claimed in the proceeding.

4 The Court must be satisfied that each of the r 10.43(4) factors are made out, by the applicant, in the determination of the application for leave.

5 The primary judge characterised an application under r 10.43(2) as conferring upon the Court a "residual discretion" to refuse leave even if the sub-rule (4) factors are made out to the Court's satisfaction. The primary judge cited five authorities in support of that proposition and observations of the authors of the 9th Edition of *Nygh's Conflict of Laws in Australia* at 49.

6 That characterisation adopted by the primary judge is entirely uncontroversial.

7 In *Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd* [2013] FCA 175, McKerracher J observed that one of the grounds upon which a Court may, in the exercise of the residual discretion, decline to grant leave to serve a proceeding out of the jurisdiction is where the proceeding is liable to be stayed. Trina US contended before the primary judge that the proceeding would be stayed on the footing that Jasmin is a party to a "Supply Agreement" which constitutes an "arbitration agreement" within the meaning of s 3 of the

International Arbitration Act 1974 (Cth) (the "Act") and if leave were to be granted, Trina US would commence proceedings in reliance upon s 7(2) of the Act for a stay. That section provides, relevantly and put simply, that where Jasmin's proceeding involves the determination of a matter that, in pursuance of the agreement (assuming Jasmin is a "party" to the "arbitration agreement"), is capable of settlement by arbitration, the Court "shall", by order, "stay" Jasmin's proceeding.

8 Trina US contended that such a result was inevitable and thus leave to serve Jasmin's originating proceeding ought to be refused in the exercise of the discretion.

9 Section 7(4) of the Act provides that for the purposes of s 7(2), a reference to "a party" includes a reference to a person claiming through or under a party.

10 At [72], the primary judge observes that it was uncontroversial that cl 11.1 of the Supply Agreement is an arbitration agreement within the definition in s 3 of the Act being an agreement in writing of the kind referred to in sub-article 1 of Article II of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations Conference on International Commercial Arbitration, a copy of the English text of which is set out in Sch 1 to the Act.

11 At [65], the primary judge observes that the question of whether the residual discretion should be exercised to refuse leave to serve out of the jurisdiction (and in the United States) became the "only real issue" on the application.

12 It is not necessary to recite in these reasons the elements of the pleaded case Jasmin ultimately seeks to agitate. It is enough to note the contentions that: Jasmin conducts a business of installing solar photo voltaic power generation; in July 2012 Jasmin and Trina US concluded an agreement for Trina US to supply particular panels to it; a purchase order of $7.5M issued on 25 July 2012; negotiations then ensued "to formalise" the July agreement by concluding a "Supply Agreement"; various representations were made by Trina US leading up to the July agreement and other representations were made by Trina US during the latter negotiations; in the negotiations for the Supply Agreement, propositions emerged that purchase orders would be submitted to Trina US by a selected US purchasing entity ("JRC") as agent for and "sister company of" Jasmin so as to avoid GST obligations arising in Australia; JRC was authorised by Jasmin to enter into a supply agreement with Trina US.

13 Simply as a matter of context these matters should be noted as set out at [43] to [46] of the primary judge's reasons:

> 43 On 13 May 2014, Trina US commenced arbitral proceedings in New York against both JRC and Jasmin. Trina US relied upon an arbitration clause contained in the Supply Agreement.
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> 44 On 15 May 2015, Jasmin filed a motion in the arbitration seeking orders that it be removed from the arbitration on the basis that it was not a named party to the Supply Agreement.
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> 45 After a hearing on 5 June 2015, the arbitrator handed down her preliminary award on this issue. The arbitrator determined that Jasmin was a party to the Supply Agreement and was therefore bound by the arbitration clause. Jasmin did not challenge that preliminary award.
>
> 46 The final hearings for the arbitration took place between 27 October and 29 October 2015 in New York City. Jasmin did not file any materials in advance of the hearing, but JRC's pre-hearing memorandum asserted that JRC was entitled to, among other relief, rescission of the Supply Agreement on the basis of alleged fraudulent misrepresentations made by Trina US, which JRC allege caused JRC and Jasmin to pursue the deal, and caused JRC to enter into the Supply Agreement. The arbitrator has requested further submissions before handing down her award, including from JRC identifying what representations it asserts are the basis for its claims of fraudulent misrepresentations.

14 In addressing the application, the primary judge addressed a number of questions. The first was: what is the proper law to apply to determine whether Jasmin is a "party" to the Supply Agreement and thus a party to the "arbitration agreement"?

15 Put simply, the primary judge answered that question by accepting that the law of the forum must be applied to answer the question of *whether* agreement has been reached between parties. Moreover, the primary judge regarded two other matters as decisive. *First*, the law of the forum must *identify* the factors by which that question in issue is to be answered. *Second*, the proper law of a contract said by X not to have been made by him or her with Y cannot answer, itself, the question of whether X is a party to an agreement with Y due, put simply, to the circularity in using that which is expressly in issue as the instrument of the resolution of the issue itself.

16 In reaching these conclusions, the primary judge respectfully disagreed at [85] with a contrary view expressed by the Australian Law Reform Commission.

17 Trina US contends for a distinction to be drawn between a circumstance where a contract is *in existence* between particular parties and *a question* is whether X is also a party to that contract, on the one hand, and a circumstance where there is *no contract* in existence at all

and the *foundation question* is whether agreement or consensus has been reached between parties.

18 The primary judge rejected the notion that any such distinction arises as a matter of principle.

19 Trina US also relied upon a line of authority which is said to reject the law of the forum approach as the answer to the question: *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121; [2004] 1 Lloyd's Rep 603; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303; and *Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161.

20 It is not necessary in these reasons, on an application for leave to appeal, to analyse the discussion in those cases and form any particular view about the merits of the contentions. The principles governing an application for leave (to which I will turn shortly) require an answer to a different question. In any event, the primary judge, having examined those cases, concluded that these authorities do not make good the proposition advanced by Trina US.

21 The primary judge therefore answered the question by concluding that the proper law to apply in determining *whether* Jasmin is a party to the Supply Agreement and thus a party to the arbitration agreement is governed by the law of the forum.

22 In determining the application, the primary judge asked three other questions before turning to the question of the exercise of the residual discretion. The primary judge also notes that in the course of the hearing, counsel for Jasmin abandoned agitating issues reflected in some of these questions.

23 For example, the second issue considered by the primary judge was whether Jasmin was a party to the Supply Agreement or properly characterised as "a person claiming through or under a party" to the agreement. The issue was not thoroughly explored and only a preliminary opinion was expressed by the primary judge. The primary judge observed that he did not accept that Australian law, as the law of the forum, would treat Jasmin as a party to the arbitration agreement within the meaning of s 7(2) of the Act and that view included the operation of the extension of s 7(2) to "a person claiming through or under a party". Three reasons were given for that conclusion supported by an analysis of the relevant authorities.

24 The third issue was whether the proceedings involve a determination of a matter that, in pursuance of the agreement, "is capable of settlement by arbitration". The primary judge

notes at [149] that in the course of oral submissions counsel for Jasmin "ultimately conceded this issue".

25 The primary judge also observed that a further issue was whether the power to set aside a contract under the *Australian Consumer Law* is a "sovereign act vested explicitly in Australian courts". At [162], the primary judge observes that counsel for Jasmin abandoned its submissions on this question.

26 Issue 5 was whether it is appropriate to decide the question in issue as part of the residual discretion or should the issue be agitated after service of the process in the United States. At [163], the primary judge observed that for the reasons he had already given, if it were necessary to decide that Trina US was entitled to a stay of the proceedings, then the primary judge would refuse that stay. The primary judge observed that he did not consider that it was sufficiently clear that the proceedings would be stayed "for me to exercise a residual discretion to refuse leave". At [165], the primary judge considered that serious obstacles would arise in any application by Trina US for a stay in reliance upon s 7(2) of the Act.

27 The litmus test for whether leave to appeal from an interlocutory judgment will be granted is made up of two integers: *first*, whether, in all the circumstances of the case, the decision is attended by sufficient doubt to warrant its being considered by the Full Court; and *second*, whether substantial injustice would result if leave were refused supposing the decision to be wrong: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-400, Sheppard, Burchett and Heerey JJ; *Bienstein v Bienstein* (2003) 195 ALR 225 at [29], McHugh, Kirby and Callinan JJ.

28 These principles, however, are not to be applied as if they represent some sort of "hard and fast rule": *Samsung Electronics v Apple Inc* (2011) 286 ALR 257 ("*Samsung*") at 266 [29], Dowsett, Foster and Yates JJ; as to the principles generally, see *Samsung* at [26] to [34].

29 Interlocutory orders cover a "spectrum" from those concerned solely with mechanical orders (such as case management orders and practice and procedure orders) to those which may, for one reason or another, have a significant impact upon the scope and outcome of proceedings (*Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564, French J (as his Honour then was) at [43]–[44])) and which may raise serious questions which ought to be given consideration by the Full Court.

30 The order the subject of the application for leave to appeal is such an order because its effect is to engage Trina US in superior court proceedings in this country and it is likely to give rise to a consequential application for a stay in reliance upon s 7(2) of the Act which seeks, as objects (among others), to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes and to facilitate the use of arbitration agreements made in relation to international trade and commerce: s 2D of the Act. Thus, questions of importance in the construction and application of the Act arise in the context of the primary judge's decision.

31 Having regard to the recognition by the primary judge that the conclusion he reached on the *lex fori* issue is one about which the Australian Law Reform Commission takes a different view, I am satisfied that the test discussed at [27] to [29] of these reasons is satisfied and thus leave is to be given to appeal from the decision of the primary judge on the basis of the notice of appeal exhibited to the affidavit of Emma Susan Costello sworn 23 December 2015.

32 The costs of the application for leave to appeal are reserved to the determination of the Full Court.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 26 February 2016