FEDERAL COURT OF AUSTRALIA

Electra Air Conditioning BV v Seeley International Pty Ltd ACN 054 687 035

[2008] FCAFC 169

PRACTICE AND PROCEDURE – application for leave to appeal and appeal – exclusive distribution agreement existing between parties outlined arbitration as means of dispute resolution – respondent sought an order that the proceeding be stayed – primary judge held that agreement as to arbitration did not empower party to apply to an arbitrator for a declaration or injunction but rather empowered the party to apply to a court for that relief – leave to appeal refused.

TRADE PRACTICES – interpretation of exclusive distribution agreement – appellant was obliged to accept purchase orders from respondent – credit insurance could not be obtained as required – whether appellant was required to accept purchase orders regardless of insufficient credit insurance being available – held primary judge was correct in finding no ambiguity in agreement regarding requirement for appellant to accept purchase orders – appeal dismissed.

Commercial Arbitration Act 1984 (Vic) s 33, s 53(1)
Federal Court of Australia Act 1976 (Cth) s 31A
International Arbitration Act 1974 (Cth) s 7, s 16, s 18, Schedule 2
Trade Practices Act 1974 (Cth) s 52, s 87
Institute of Arbitrators and Mediators Arbitration Rules 2007

Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission (2001) 203 CLR 645 referred to
Decor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397 referred to
General Steel Industries Inc v Commissioner for Railways (New South Wales) (1964) 112 CLR 125 cited
Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture (1981) 146 CLR 206 referred to
IBM Australia Ltd v National Distributions Services Ltd (1991) 22 NSWLR 466 cited
Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd (2008) 167 FCR 372 referred to
Premium Nafta Products Ltd v Fiji Shipping Co Ltd [2007] 4 All ER 951 cited
Rolls and Son (Produce) Ltd v J Alastair McGregor & Co Pty Ltd (1973) 6 SASR 358 referred to
Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 cited

ELECTRA AIR CONDITIONING BV v SEELEY INTERNATIONAL PTY LTD ACN 054 687 035
SAD 16 OF 2008

GRAY, BRANSON AND LANDER JJ
8 OCTOBER 2008
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 16 OF 2008**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **ELECTRA AIR CONDITIONING BV**
Appellant

AND: **SEELEY INTERNATIONAL PTY LTD ACN 054 687 035**
Respondent

JUDGES: **GRAY, BRANSON AND LANDER JJ**
DATE OF ORDER: **8 OCTOBER 2008**
WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. The application for leave to appeal be dismissed.
2. The appeal be dismissed.
3. Electra Air Conditioning BV pay the respondent's costs of the application for leave to appeal and of the appeal.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 16 OF 2008**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**ELECTRA AIR CONDITIONING BV** **Appellant**
AND:	**SEELEY INTERNATIONAL PTY LTD ACN 054 687 035** **Respondent**
JUDGES:	**GRAY, BRANSON AND LANDER JJ**
DATE:	**8 OCTOBER 2008**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

THE COURT

1 This is an application for leave to appeal and an appeal by the respondent to a proceeding against orders made by a judge of this Court. Seeley International Pty Ltd (Seeley) was the applicant and Electra Air Conditioning (Electra) the respondent before the primary judge. Seeley had brought a proceeding against Electra seeking declarations in relation to Electra's obligations arising out of an agreement between Seeley and Electra. Seeley sought, in the alternative, a declaration that Electra had engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the TPA Act) and an injunction pursuant to s 87 of the TPA Act.

2 Shortly after the commencement of the proceeding, Seeley filed a notice of motion seeking judgment in the terms of the relief sought in the application pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act).

3 Electra, for its part, filed a notice of motion seeking an order that the proceeding be stayed pursuant either to s 7(2) of the *International Arbitration Act 1974* (Cth) (the International Arbitration Act) or s 53(1) of the *Commercial Arbitration Act 1984* (Vic) (the Commercial Arbitration Act). Electra did not seek to challenge the jurisdiction of this Court to hear the proceeding either on the ground that no federal matter was raised or on the ground

that the parties had agreed to submit the subject matter of the agreement between the parties to the courts of Victoria. In those circumstances, the jurisdiction of this Court to hear and determine the proceeding and the notices of motion was not under challenge.

4 Electra is incorporated in the Netherlands and manufactures refrigerated air conditioners under the brand name "Airwell" and exports its products to Australia and New Zealand. Prior to 30 June 2007 Electra sold its products in Australia and New Zealand through a subsidiary, ECP (Australia) Pty Ltd. Seeley manufactures and distributes evaporative air conditioners and other products.

5 On 15 May 2007 Electra and Seeley entered into an exclusive distribution agreement (the agreement) whereby Electra appointed Seeley as its exclusive distributor of Airwell brand products in Australia and New Zealand to commence from 1 July 2007, and to continue for a period of at least three years with the right of the parties to agree upon an extended period.

6 In accordance with the agreement, Seeley was obliged to submit to Electra purchase orders in writing setting out the quantity of the product to be delivered to it and the requested time of shipment: section 4.1 of the agreement. Electra, for its part, was obliged within two business days of receipt of a purchase order to notify Seeley in writing whether Electra accepted the purchase order. Section 4.3 required Electra to accept a purchase order "except to the extent that Electra is unable to accept that order due to a breakdown or failure of Electra's manufacturing facilities in China or any other relevant country or some other act of Force Majeure as defined in **Section 15**".

7 The parties provided in the agreement for a minimum volume of sales for the products in Australia and New Zealand. The agreed minimum volume for the first year of the term was $20 million total sales and the parties agreed that Seeley must meet an annual growth rate of 10% per annum in respect of the agreed minimum sales of products for each of the second and third years of the term.

8 Section 7 of the agreement addressed the question of the terms of payment.

9 Section 7.1 provided:

> 7.1 The parties agree that payment for each Purchase Order will be on a ninety (90) day payment term from the date of the relevant bill of

lading, subject to the following allowances for the first three (3) years of the Term:

(a) 1st year: 180 day payment term from the date of the relevant bill of lading, with interest payable at 1% for each thirty (30) day period or part thereof above the standard 90 day payment term.

(b) 2nd year: 150 day payment term from the date of the relevant bill of lading, with interest payable at 1% for each thirty (30) day period or part thereof above the standard 90 day payment term.

(c) 3rd year: 120 day payment term from the date of the relevant bill of lading, with interest payable at 1% for each thirty (30) day period or part thereof above the standard 90 day payment term.

10 The terms of payment for the first three years of the contract were, from Seeley's point of view, quite generous. The agreement provided that if Seeley failed to make its payments as specified in section 7.1 Electra would have the right to immediately terminate the agreement.

11 Sections 7.4 and 7.5 of the agreement addressed the question of credit insurance to protect Electra in the event that Seeley failed to make its payments and Electra was unable to recover those payments. Sections 7.4 and 7.5 read:

7.4 As year 1 insurance is in place, during the 2nd year and 3rd year of the Term the credit line provided to the Distributor by Electra under this Agreement is conditional upon the Distributor satisfying the requirements of an insurance provider, thereby allowing Electra to arrange suitable credit insurance. In the event that suitable insurance cannot be obtained the parties must agree on other ways of protecting payments and, in this process, the parties must act in good faith and use all reasonable endeavours to achieve a commercial outcome.

7.5 No later than three months prior to each of the 2nd and 3rd year Electra must seek to arrange the credit insurance referred to in **Section 7.4** and the Distributor must seek to satisfy the requirements of the relevant insurance providers approached by Electra. If by the commencement of the relevant year such insurance has not been obtained, or alternative arrangements have not been entered into, such that the credit line can be provided in that year, then the Distributor may, by notice to Electra, terminate this Agreement. It is a requirement under this **Section 7.5** that in undertaking their obligations the parties must

> act in good faith and use all reasonable endeavours to achieve an agreed commercial outcome.

12 The construction of those sections was a matter under consideration by the primary judge for the purpose of determining whether the declarations which were sought should be made.

13 Section 10 of the agreement identified Seeley's obligations. Relevantly, section 10.2 provided that when Seeley has not paid the agreed price to Electra, Seeley would hold the products as bailee and fiduciary of Electra. Section 10.3 provided that the title in any products consigned to Seeley by Electra would not pass to Seeley until Seeley made payment in accordance with section 7.1. Section 10.6 prevented Seeley from charging, mortgaging, assigning, pledging, transferring or otherwise encumbering the products unless authorised by Electra.

14 Section 19 of the agreement provided for the termination of the agreement otherwise than in accordance with, relevantly, sections 7.2 or 7.5.

15 Section 20 of the agreement addressed the question of disputes. It provided:

> **20. Dispute Resolution**
>
> 20.1 If at any time there is a dispute, question or difference of opinion ("Dispute") between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party, one party may serve a written notice on the other party setting out details of the Dispute. Thereafter:
>
> (a) senior management of each party will try to resolve the Dispute through friendly discussions for a period of thirty (30) days after the date of receipt of the notice; and
>
> (b) if senior management of each party are unable to resolve the Dispute under **Section 20.1(a)**, it shall be referred to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. The number of arbitrators shall be 1. The place of arbitration shall be Melbourne, Australia. The language of arbitration shall be English. The arbitral award shall be final and binding upon both parties.

> 20.2 Pending the resolution of the Dispute under **Section 20.1**, the parties shall continue to perform their obligations under this Agreement without prejudice to a final adjustment in accordance with any award.
>
> 20.3 Nothing in this **Section 20** prevents a party seeking injunctive or declaratory relief in the case of a material breach or threatened breach of this Agreement.

16 The last section which is relevant to this proceeding is section 25 of the agreement which provided:

> **25. Governing law and Jurisdiction**
>
> This Agreement is governed by the laws of Victoria, Australia. Subject to **Section 20**, the parties irrevocably submit to the courts of Victoria, and any courts of appeal from such courts, in relation to the subject matter of this Agreement.

17 In August of 2007 (the first year of the contract), Electra advised Seeley that they were experiencing problems with one of their two credit insurers. In September 2007 Electra emailed Seeley advising that it was having difficulties reaching the maximum credit amount of credit insurance and enquiring whether Seeley would be able to provide an insurance or temporary back-up guarantee for volume exceeding the then insured amount of $6 million.

18 On 9 September 2007 Electra advised Seeley:

> Please note that although acknowledging receipt of the above listed orders, we are currently unable to place the orders for production due to Credit Line limitations. I know that this matter is currently being discussed and I hope a solution will be found soon.
>
> Moreover, as we have supplied so far goods from our Australian stock (invoiced to you by EAP) in a value of 3.62 Million AUD, and also shipped from our factories goods in the value of 738 K AUD, we will only be able to proceed with the shipping of orders up to the total Credit Line limit of 6 Million AUD. That leaves us with available Credit Line in the sum of 1,642,000 AUD.
>
> I am raising this point as we currently have orders which were placed in our production IT system in a value of 2,067,478 AUD (In fact there were more, but we canceled (sic) as per your instruction, orders in the value of more than 1 Million AUD) while we can only ship up to the agreed Credit Line limits of 6 Million AUD.

> In order to meet your most urgent needs, please advise which products among those which were already ordered and which we have placed a production order for (You have all details in the tables Joelle sent you) are your top priority and we will do our best to use the remaining Credit facility to supply you first with the urgent needs.
>
> Hopefully once the Credit line matter will be finalized (sic), we shall continue producing and shipping the pending orders and will place your new orders as well.

19 On 17 September 2007 Seeley wrote to Electra disputing Electra's right to withhold goods on accepted purchase orders and requiring Electra to perform its obligations in accordance with section 4.3 of the agreement. Electra took issue with Seeley's assertion which gave rise to the proceeding before the primary judge.

20 Seeley sought a declaration that Electra was obliged to accept all purchase orders submitted pursuant to the agreement and supply was not conditional upon the amount of credit insurance that Electra had in place.

21 There were two notices of motion before the primary judge. Logically, the first matter which had to be addressed was whether Electra was entitled to a stay of the proceeding on either of the grounds in the notice of motion.

22 The primary judge found, contrary to Electra's contention, that section 20 of the agreement did not prevent Seeley seeking a declaration or an injunction from the Court. He found that section 20.3 did not empower a party to the agreement to apply to an arbitrator for a declaration or injunction but rather empowered the party to apply to a court for that relief. The primary judge held that the agreement contemplated that the parties would treat a dispute to which section 20.3 refers differently from the regime for arbitration specified in section 20.1. He held that section 25 of the agreement did not help in informing the meaning and application of section 20. He therefore dismissed Electra's notice of motion seeking a stay of the proceeding.

23 The primary judge addressed Seeley's notice of motion seeking summary judgment under s 31A of the Federal Court Act. He noted that a party might be entitled to summary judgment even though the Court was required to embark upon a careful consideration of a detailed contract and, in that respect, relied upon *General Steel Industries Inc v*

Commissioner for Railways (New South Wales) (1964) 112 CLR 125 per Barwick CJ at 129-130.

24 The primary judge construed section 7 of the agreement as not entitling Electra to avoid its responsibility to supply in the first year of the contract if it were unable to secure credit insurance. He found that sections 7.4 and 7.5 did not address the first year of the contract.

25 Logically, like the primary judge, this Court must first consider Electra's application for a stay. It therefore follows that the first matter that needs to be considered is whether leave to appeal ought to be granted.

26 Two matters need to be established by Electra before an order would be made giving Electra leave to appeal from the interlocutory order refusing Electra a stay. Electra needs to persuade this Court that the primary judge's decision is attended with sufficient doubt to warrant this Court reconsidering the application for a stay and that Electra would suffer substantial injustice if leave to appeal were refused supposing the decision to be wrong: *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397. It is impossible to think that if his Honour's conclusion on the construction of section 7 of the agreement is thought to be right that Electra would suffer any substantial injustice or any injustice. Electra would have the opinion of a judge of this Court which has been confirmed by the Full Court of this Court. However, in any event, Electra has not persuaded us that the primary judge's decision in relation to the proper construction of section 20.3 is wrong or attended by any doubt. For both those reasons, leave to appeal should be refused.

27 Section 7(2) of the International Arbitration Act 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 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.

28 This section applies if s 7(1) of the International Arbitration Act is satisfied. The parties accepted that the section applied. An "arbitration agreement" is defined in s 3 of the International Arbitration Act to mean "an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention".

29 The Convention there referred to is the recognition and enforcement of foreign arbitral awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting.

30 Article II of that Convention relevantly provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

31 It was argued before the primary judge that there was no arbitration agreement within the meaning of sub-article 1 of Article II of the Convention. However, that argument was not pursued on this appeal.

32 Section 20.1(b) of the agreement provides that a dispute is to be referred to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrators of the Institute of Arbitrators and Mediators Australia. It also provides for one arbitrator to be appointed and for the arbitration to take place in Melbourne, Australia.

33 The Rules in force at the time this dispute arose were the *Institute of Arbitrators and Mediators Arbitration Rules 2007*.

34 Rule 22 of those Rules provided that the "Model Law" shall apply to any international arbitration conducted under the Rules. The reference to the "Model Law" is a reference to

the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985. The Model Law has the force of law in Australia: s 16 International Arbitration Act. It is included in the International Arbitration Act as Schedule 2. Relevantly, s 18 of the International Arbitration Act provides:

> **18.** The following courts shall be taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in that article:
>
> (a) if the place of arbitration is, or is to be, in a State—the Supreme Court of that State;
>
> (b) if the place of arbitration is, or is to be, in a Territory:
>
> (i) the Supreme Court of that Territory; or
>
> (ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory.

35 The Model Law permits the parties to an arbitration agreement to determine the number of arbitrators: Article 10 of the Model Law.

36 In this case, the parties agreed in section 20.1 of the agreement to a sole arbitrator. Article 11(3)(b) of the Model Law provides:

> (3) Failing such agreement,
>
> (a) ...
>
> (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

37 Article 6 provides:

> The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

38 By virtue of s 18 of the International Arbitration Act and section 20.2 of the agreement, which provides that the place of arbitration shall be Melbourne, Australia, the function in article 11(3) of the Model Law is to be performed by the Supreme Court of Victoria.

39 Therefore, if the parties cannot agree on the sole arbitrator, a party must apply in the Supreme Court of Victoria for the appointment of that arbitrator.

40 The appellant contended that the proper construction of section 20.3 of the agreement meant that the parties were empowered to apply only to an arbitrator for injunctive or declaratory relief. Electra contended that would be consistent with "one stop" adjudication. The appellant relied upon a number of authorities for the proposition that in the construction of an arbitration clause the commencing point is that the parties would have intended that all disputes arising out of the contractual relationship would be decided by the same tribunal: *Premium Nafta Products Ltd v Fiji Shipping Co Ltd* [2007] 4 All ER 951; *IBM Australia Ltd v National Distributions Services Ltd* (1991) 22 NSWLR 466 at 483 per Clarke JA; *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102.

41 We would accept that proposition but, in the circumstances of this case and for the reasons that follow, the presumption has been rebutted. The parties intended by the insertion of section 20.3 that either party was free to apply to the Court for relief of the kind mentioned in that section.

42 It may be assumed that an arbitrator can make an award which contains injunctive or declaratory relief provided that the arbitration agreement signed by the parties gives the arbitrator that power: *Rolls and Son (Produce) Ltd v J Alastair McGregor & Co Pty Ltd* (1973) 6 SASR 358 at 378; *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206.

43 Article 17 of the Model Law provides:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

44 We think the Model Law gives an arbitrator appointed under that law power to make an order in the nature of an injunction and, if necessary, a declaration. But because an arbitrator appointed under section 20.1(b) of the agreement does have that power, it does not necessarily follow that the parties intended the arbitrator to be the sole repository of that power.

45 The purpose of section 20.3 is to preserve to the parties the right to obtain injunctive or declaratory relief in the case of a material breach or threatened breach of the agreement in circumstances where urgency dictates that relief should be granted.

46 It is difficult to think that the parties objectively intended that section 20.3 only permitted the party seeking the declaratory or injunctive relief to apply to an arbitrator appointed under section 20.1(b).

47 Clearly, if Electra's argument were correct, a party seeking relief under section 20.3 could only seek that relief from an arbitrator appointed under section 20.1(b). However, the parties are not entitled to seek the appointment of an arbitrator under section 20.1(b) until a party has given written notice to the other party setting out details of the dispute and senior management of each party has tried to resolve the dispute through friendly discussions over a period of 30 days after the date of receipt of the notice.

48 It is not until those events have occurred and the dispute has not been resolved that a party is entitled to refer the matter to arbitration in accordance with section 20.1(b). If the parties then refer the matter to arbitration, the arbitrator is appointed in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. We have already noted that a dispute as to the appointment of the sole arbitrator would require an application to the Supreme Court of Victoria.

49 It can be seen, therefore, that the regime which has been adopted by the parties pursuant to section 20.1 of the agreement would not enable either of the parties to seek urgent relief from an arbitrator pursuant to section 20.3. That rather suggests that the parties had in mind that a party could seek injunctive or declaratory relief from a court.

50 Moreover, an arbitrator does not exercise judicial power. An arbitrator's powers are defined by the agreement of the parties: *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658. Whilst it may be accepted that an arbitrator can make an order in an award in the nature of a declaration or an injunction, that declaration or that injunction so made can only be enforced through proceedings in an appropriate court. In the case of the agreement the subject of this proceeding, any award would be enforced under s 33 of the Commercial Arbitration Act. Leave is required for enforcement under that section.

51 If, therefore, a party wishes to obtain an injunction in circumstances where the other party is threatening to breach an agreement, it is unlikely that the parties would have intended that the party must apply to an arbitrator for an injunction and then later have to apply to a court for the enforcement of that injunction. That again points to a construction that section 20.3 of the agreement permits the parties to apply to the Court.

52 The third reason for giving the section the construction contended for by the respondent and arrived at by the primary judge is that a court is in a position to make a declaration or an injunction which is immediately binding upon the parties.

53 The fourth reason why, in our opinion, section 20.3 has the construction at which the primary judge arrived is that, if the parties intended that they should be limited to applying to the arbitrator for the relief mentioned in section 20.3, there would be no need to include section 20.3 at all. If as the appellant contends, rightly in our view, an arbitrator can make a declaration or grant an injunction and it was intended that the parties be entitled only to apply to an arbitrator for that relief, there would be no need to have included section 20.3. The right to apply to an arbitrator for the relief provided for in section 20.3 would have been given by section 20.1(b).

54 The final reason to reject the appellant's construction is that the opening words to section 20.3, "nothing in this **section 20** prevents ...", must mean that the parties reserved to themselves the right to apply to a court for the relief mentioned in section 20.3. If it were otherwise, those words have no work to do. If section 20.3 had the meaning contended for by the appellant, there would be no reason to include those opening words. There is nothing in section 20 which, on the appellant's contention, would prevent a party seeking injunctive or declaratory relief from an arbitrator. In our opinion, the words mean what they say. They mean that the reference of the dispute to arbitration does not prevent the parties applying to the Court for the relief mentioned in section 20.3.

55 For those reasons, we agree with the construction arrived at by the primary judge. In those circumstances, he was right to refuse the application for a stay. Leave to appeal should be refused.

56 Electra has also appealed against the declaration made by the primary judge. Both parties assumed that the making of the declarations by the primary judge were final orders entitling Electra to appeal as of right: s 25 of the Federal Court Act. In those circumstances,

this Court was not called upon to consider whether a declaration made by the Court in favour of an applicant to a proceeding on an application under s 31A of the Federal Court Act is a final order: see *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372. Electra contends that section 7 entitled it to refuse to supply when one of its credit insurers went off risk. The primary judge found that section 7.4 did not apply in the first year of the contract.

57 The primary judge's construction is plainly right. Section 7.4, in its terms, assumes that credit insurance is in place during the first year of the contract. It provides no rights to either party in respect of that issue in the first year of the term of the contract. Section 7.5 reinforces the assumption inherent in section 7.4 because it only applies, again in its terms, to the second and third years of the contract. Section 7.5 obliges Seeley to satisfy the requirements of any relevant insurance provider approached by Electra in the second and third years of the contract. It imposes no such obligation on Seeley in the first year of the contract.

58 Moreover, under section 7.4 it is the "credit line" provided to Seeley by Electra that, during the second and third years of the term of the contract, is conditional on Seeley satisfying the requirements of an insurance provider. Electra accepted that the "credit line" referred to is the allowances contained in section 71 for payment during the first three years of the contract on terms more favourable to Seeley than the ninety day payment term otherwise applying. Nothing in section 7 qualifies other obligations imposed on the parties by the contract such as Seeley's obligation under section 5.2 of the agreement to meet the agreed Minimum Volume of sales for the first year and Electra's obligation under section 4.3 to accept a purchase order.

59 There is no ambiguity inherent in section 7.4 and the primary judge was right to make the declaration which he made.

60 The appeal must be dismissed.

61 The appellant must pay the respondent's costs.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment

herein of this Honourable Court.

Associate:

Dated: 8 October 2008

Counsel for the Appellant:	Mr P Murdoch QC with Mr J Styning
Solicitor for the Appellant:	Deacons
Counsel for the Respondent:	Mr R J Whitington QC and Mr M Blue QC with Mr M Burnett
Solicitor for the Respondent:	Johnson Winter & Slattery
Date of Hearing:	13 August 2008
Date of Judgment:	8 October 2008