

HELLER FINANCIAL SERVICES LTD V THIESS CONTRACTORS PTY LTD [2000] FCA 802

Federal Court of Australia – 16 June 2000

FACTS

Thiess was the head contractor on three separate contracts and engaged KF Air as a subcontractor for each contract. Thiess allegedly owed money to KF Air for progress claims and retention monies. KF Air had assigned its book debts to Heller and Heller had given notice to Thiess of the assignment of the debts. KF Air went into receivership and then liquidation and the debts allegedly owed by Thiess to KF Air remained unpaid.

Heller issued legal proceedings against Thiess seeking payment of the outstanding debts. Heller also claimed that Thiess had breached a duty of care owed to Heller and had also engaged in misleading and deceptive conduct in breach of section 52 of the Trade Practices Act 1974.

The subcontracts between Thiess and KF Air included an arbitration clause and Thiess applied for a stay of the court proceeding on the basis that the dispute should be referred to arbitration.

ISSUES

Was Heller bound by the arbitration clause in the contracts between Thiess and KF Air?

Should the Court stay the legal proceedings?

FINDING

While Heller was not a party to the arbitration agreement it was bound by the agreement as it was a “party” to the arbitration agreement for the purpose of the Commercial Arbitration Act. The definition of “party” in section 4 the Commercial Arbitration Act provides that a party is “any person claiming through or under a party to the arbitration agreement.” Heller was claiming through a party to the arbitration agreement.

Heller had issued separate legal actions against Thiess that arose not from the debts outstanding but from the process of the assignment of the debts. Heller had those causes of action independently of KF Air’s actions against Thiess and those claims were not covered by the Commercial Arbitration Act.

The claims for payment of the outstanding debts were covered by the Act and a stay could be ordered. However, the Court considered that all the claims were all related and should be heard together in the Court. Therefore, the Court decided not to order a stay of the proceedings.

QUOTE

Heerey J said:

“Were the present proceeding confined to KF Air’s claims and Heller’s claims as assignee of KF Air’s debts, there is no doubt that a stay should be granted.”

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However, Heller also has separate claims arising out of the alleged negligence and misleading and deceptive representations of Thiess. These are independent causes of action which Heller has in its own right, they are not derived 'through or under' KF Air. Therefore, the Heller negligence and s 52 claims cannot be the subject of a stay.

They are not caught by the Commercial Arbitration Act because in respect of them Heller is not 'a party to an arbitration agreement'."

IMPACT

A person may be bound by an arbitration agreement in respect of some claims but not others.

In that circumstance the Court has a discretion about staying legal proceedings. Usually the most convenient forum for the claims will determine whether an arbitration will be ordered or whether the litigation will continue.

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