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**IOOF AUSTRALIA TRUSTEES LTD v SEAS SAPFOR FORESTS LTD -  
BC9200285**

SUPREME COURT OF SOUTH AUSTRALIA CIVIL  
ANDERSON J

SCGRG-92-1623

29 July 1992, 17 August 1992

*BC9200285 at 1*

**EQUITY -- EQUITABLE REMEDIES Claim by plaintiff for specific performance of CL3(e) of Trust Deed to which plaintiff and defendant were parties -- defendant alleged plaintiff not entitled to relief as has not come with clean hands -- refused. ARBITRATION Defendant sought to have "dispute" with plaintiff referred to arbitration pursuant to Deed or upon exercise of discretion -- refused. Relief sought granted.**

Commercial Arbitration Act 1986 s53(1).

CRUSADER RESOURCES NL v SANTOS LTD and ORS 155 LSJS 449 and  
SPRY, "EQUITABLE REMEDIES" 4th Edn at p167, considered.

Anderson J

The plaintiff is the trustee for covenant-holders who are entitled pursuant to a 1964 Trust Deed in relation to a commercial pine planting and treatment scheme. The defendant is the company which sells to the covenant-holders and has the management of all matters concerned with such plantations and treatment.

Pursuant to the Deed certain obligations are cast upon each of the plaintiff and the defendant in their respective capacities.

In recent times there have developed several areas of disagreement between the parties. I shall return to identify them subsequently. On 29 June, 1992 the plaintiff, through its solicitors, wrote to the defendant's solicitors and confirmed an oral request "to be provided with a list of the names and addresses of covenant-holders". The request was made pursuant to CL3(e) of the Trust Deed which is in the following terms: "3(e) If required so to do supply to the Trustee the full name address and occupation of each person who is and who has agreed to become a Covenant-holder and the number of Covenants held or agreed to be acquired by each individual as aforesaid and will if required monthly thereafter make available to the Trustee the full name address and occupation of each person who during each month shall have become or agreed to become the holder of any of the said Covenants and notify the Trustee of the number of Covenants

purchased or agreed to be purchases (sic) by each such person and the planting years thereof."

The request sought the information within 7 days.

*BC9200285 at 2*

On 6 July, 1992 the defendant's solicitors wrote to the plaintiff's solicitors in reference to this request. Notwithstanding some complaint that letter undertook "to provide it [the list] as soon as possible and expected that it would become available in the next several days". The letter went on to refer to other matters between the parties where there may be disagreement.

By letter of 9 July, 1992 the plaintiff's solicitors advised the defendant's solicitors that should the list not be received "by the end of this week" their instructions were to issue proceedings to achieve that object.

This information is to be found in the exhibits to the affidavit of Mr D'Arcy sworn 16 July, 1992 and filed herein.

On 13 July, 1992 the defendant company secretary sent a letter to Mr Williams, the Group Corporate Manager of the plaintiff, which advised him inter alia that your "fellow directors have requested that the covenant-holders' names and addresses not be forwarded to you contrary to my earlier advice".

It is apparent from the letter that this decision was taken because of dissatisfaction by those directors with the failure of the plaintiff to seek to compromise "outstanding issues between Manager and Trustee".

This letter is annexed to Mr D'Arcy's affidavit of 21 July, 1992 and to that of Mr Kerr, secretary of the defendant.

These proceedings were issued on 16 July, 1992 and after all affidavits were in I heard submissions on 29 July, 1992. By that time, in addition to the plaintiff's claim for immediate relief in relation to the list of covenant-holders there was also on the file an application by the defendant that these proceedings be stayed.

*BC9200285 at 3*

It is convenient to consider the plaintiff's submission first even though Mr Bleby, Q.C., of senior counsel for the defendant, addressed first on the basis that the defendant's application should be determined before the plaintiff's.

Mr Blue, of counsel for the plaintiff, submitted that the obligation on the defendant as contained in CL3(e) was absolute. It was, he said, designed to enable the plaintiff to ascertain the names of those persons for whom it was trustee and who are entitled under the Deed. It did not go to the rights as between the plaintiff and the defendant but rather to the obligation upon the plaintiff to protect the interests of the covenant-holders. He submitted that this obligation upon the defendant was not in any way dependent upon any action by the plaintiff and consequently there was no basis upon which the relief sought should not be granted.

Mr Bleby, QC submitted that these proceedings be stayed. Firstly, he submitted that the plaintiff could not seek an order from the Court when it itself was in breach of the Trust Deed. It could only come to seek an order of the nature of specific performance of a clause of the Deed if it was not in any adverse position. He relied upon the equitable maxim that he who comes to equity must approach the Court with clean hands.

Apart from a dispute between the parties as to the provision of a list of covenant-holders, Mr Bleby, QC submitted that there were the following other disputes between the parties: (1) As to the defendant's entitlement to deduct rates and taxes, etc. from income before any distribution to the covenant holders. (This dispute involves approximately \$5 million.) (2) As to the allocation of settlement monies received by the defendant from ETSA following certain losses caused by bushfire. (3) As to what the covenant holders should be told about these disputes. (4) As to whether the plaintiff has power to call a meeting of covenant holders which was one object of requiring the list of covenant holders as set out in para8.5 of the affidavit of Mr Williams sworn 16 July, 1991 and filed herein. In addition, there is the suggestion that the plaintiff is in breach of its obligations pursuant to the Deed as it has failed to provide certain annual

figures to the defendant so as to enable a report to be despatched by the defendant to the covenant holders within the time laid down in the Trust Deed.

*BC9200285 at 4*

He submitted that the fact that these matters are in issue between the parties, and for present purposes I accept that that is so, is a breach of the plaintiff's obligations under the Deed, and hence should preclude the relief sought being granted.

Mr Bleby, QC drew attention to CL26 - the arbitration clause which is in these terms: "26. THAT should any doubt difference or dispute arise at any time between the parties as to anything herein contained or implied or the operations or construction hereof or touching any clause matter or thing herein contained or the rights duties obligations or liabilities of either party hereunder such doubt difference or dispute shall be referred to two (2) arbitrators one (1) to be appointed by each party in difference and in case of their disagreement then to an umpire to be chosen by the arbitrators before entering on the consideration of the matter or matters referred to them and this provision shall be deemed to be a submission to arbitration within the meaning of 'The Arbitration Act 1891' (South Australia) and shall be read construed and held binding upon the parties hereto accordingly." and criticised the plaintiff for not submitting all these disputes to arbitration in accordance therewith.

*BC9200285 at 5*

He contended these breaches were substantial and referred to several well known cases in support of his principal submission that the plaintiff's behaviour disentitled it to seek the relief sought in the application. They are *Fullers Theatres v Musgrove* 31 CLR 524; *Green v Somerville* 141 CLR 594 and *Mehmet v Benson* 113 CLR 295.

In response to these submissions Mr Blue put the plaintiff's position as I have earlier set out. He dealt with each of the alleged disputes relied upon by Mr Bleby, QC as evidencing a position where the plaintiff was prevented from obtaining the relief sought. Without setting out those submissions in extenso the effect of them was that in each instance there was no substance in the allegation made by the defendant, e.g: (a) there is no requirement that the defendant not report to the covenant holders until it has the plaintiff's report, (b) whether or not the plaintiff may call a meeting of the covenant-holders has nothing to do with the plaintiff's rights pursuant to CL3(e). (The defendant, if such a meeting is called, may seek to prevent it occurring by subsequent action, but not yet); (c) the failure to refer other matters to arbitration pursuant to CL2(b) has nothing to do with the plaintiff's present application.

*BC9200285 at 6*

Mr Blue suggested that having previously agreed to provide the information the later decision to refuse shows that the defendant is without bona fides and seeks to do nothing other than delay the plaintiff whilst all the while having the use of the funds in dispute and others. He further suggested that the attempt to colour this request with the other so-called disputes was a "red herring" designed to achieve such delay.

Mr Blue submitted that the equitable maxim relied upon by Mr Bleby, QC had no application here. He relied upon the discussion of this principle in *Spry, "Equitable Remedies"*, 4th Edn., at 167 where the learned author says, when discussing the use of the maxim: "Indeed, to speak of a requirement of clean hands is misleading if it is intended to suggest an abstract moral examination of the actions of the plaintiff. In no circumstances is an examination of this kind appropriate; and in cases of this nature it must be shown, in order to justify a refusal of relief, that there is such an 'immediate and necessary relation' between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief. *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 319, 29 ER 1184 at 1185, *Moody v Cox* [1917] 2 Ch 71."

I note that there is no suggestion of fraud or misrepresentation in this matter.

In my opinion the defendant cannot succeed with this submission. I can see no relationship between the plaintiff's request for the CL3(e) information and the matters upon which the defendant relies (both in the letter of 13 July, 1992 and here) in opposition thereto. I do not see that the defendant is entitled to rely upon the equitable maxim as against the

plaintiff at this point. The other disputes are "red herrings" to my mind and the bona fides of the defendant in this regard may well be open to question. The merits of the application, to this time, are plainly with the plaintiff and it should have its order unless there is some other basis for refusing it. I am not of the opinion that the suggestion that, because of the alleged breaches by the plaintiff, the defendant has an as yet unexercised right to require the resignation of the plaintiff as Trustee is a sufficient basis from which to conclude that the defendant's refusal of the CL3(e) request either creates a dispute or links such a dispute (if created) with the other disputes so as to somehow assist the defendant to apply the maxim upon which it relies.

*BC9200285 at 7*

Mr Bleby, QC had a second leg to his argument. He relied upon CL26 of the Deed and S53 of the Commercial Arbitration Act, 1986 which is the successor to the Act referred to in that clause. In so far as it is relevant S53 is as follows: "53(1) If - (a) a party to an arbitration agreement (not being a prescribed arbitration agreement) commences proceedings in a court against another party to the agreement in respect of a matter agreed to be referred to arbitration; (b) an application for a stay of the proceedings is made by another party to the arbitration agreement; (c) the application is made - (i) before the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance; or (ii) by leave of the court - at some later stage in the proceedings; (d) the court is satisfied - (i) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and (ii) the applicant was at the commencement of the proceedings and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, the court may make an order staying the proceedings and may give such directions with respect to the future conduct of the arbitration as it thinks fit."

*BC9200285 at 8*

He submitted that this request by the plaintiff was in dispute and, hence, CL26 must apply as it is essential to hold the parties to their bargain. I have some difficulty in seeing how a clause such as 3(e) which gives to one party an absolute right at the expense of another can be held to be in "dispute" by that other. After all, as Mr Bleby, QC said, the parties should be held to their agreement.

In any event, he submitted that the requirements of each of subs(1)(a), (b) and (c) were satisfied here and so the discretion referred to in subs1(d) should be exercised in favour of the defendant so as to ensure that the agreement by the parties is invoked. He referred me to authorities both as to the onus upon the plaintiff to show that that should not be so and as to the discretion. As to the latter, he submitted that the dispute between the parties is not collateral to the Deed. The subject matter of the dispute is within the contemplation of the parties and so there should be a stay of these proceedings whilst the dispute(s) go to arbitration.

*BC9200285 at 9*

Mr Blue took issue that this was a matter to which S53(1)(a) applied in that the words "in respect of a matter agreed to be referred to arbitration" were not words applicable to this circumstance. He repeated his earlier submission that the right given to the plaintiff by CL3(e) was absolute and not dependent upon any other right of the defendant. Thus, it was not possible for the defendant to manufacture a dispute so as to invoke CL26. In any event, Mr Blue submitted that a proper exercise of the discretion requires that the matter not be sent to arbitration.

I agree with the submission in relation to S53(1)(a) and the words relied upon by the plaintiff in the context of this case. I do not agree with the defendant's submission that the facts establish that this is a matter within that subsection. Consequently, the defendant fails as to the alternative basis upon which it seeks a stay of proceedings.

If I am wrong as to the meaning of those words in the present context I would not in any event exercise the discretion within subs1(d) in favour of the defendant. The plaintiff relied upon the decision of Bollen J in *Crusader Resources NL v Santos Ltd* and Ors. 155 LSJS 449 where his Honour held at 460 that there was "no sufficient reason why the matter should be referred to arbitration in accordance with the agreement" (if s53 of the Act was applicable).

*BC9200285 at 10*

In my opinion, if a dispute does exist in relation to the obligations which flow from CL3(e) (bearing in mind that none of the other disputes are yet the subject of "commenced" proceedings) it is more appropriate, due to its legal nature and the extra time and expense involved if referred to arbitration, that it remain in this Court and not go to a lay arbitrator even though such a person may be able to dispose of it. In this regard, I find myself in accord with Mr Blue's submission.

**Order**

Accordingly, I refuse the defendant's application and order that the defendant forthwith comply with the terms of CL3(e) of the Trust Deed and make available to the plaintiff within 7 days the full name, address and occupation of each person who is and who has agreed to become a covenant holder and the number of covenants held or agreed to be acquired by each such individual.

I shall hear counsel as to costs. The Minutes may be brought into chambers.

REPRESENTATION

PLAINTIFF IOOF AUSTRALIA TRUSTEES LTD

Counsel : MR M BLUE WITH MR A A D'ARCY

Solicitors : FISHER JEFFRIES

DEFENDANT SEAS SAPFOR FORESTS LTD

Counsel : MR D J BLEBY QC WITH MR L G WALSH

Solicitors : PIPER ALDERMAN

---- End of Request ----

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