RCD Holdings Ltd v LT Game International (Australia) Ltd Exclusive Jurisdiction Clauses — Whither Inconvenience?

By Dr Sarah McKibbin

In the recent decision of *RCD Holdings Ltd v LT Game International (Australia) Ltd*,[1] Davis J of the Supreme Court of Queensland dismissed proceedings brought in breach of an exclusive jurisdiction clause that had been expressed in 'an arm's length agreement reached between commercial entities'.[2] In deciding whether to exercise his discretion not to stay or dismiss proceedings, Davis J examined whether procedural disadvantages and 'inconvenience' in the jurisdiction nominated in the clause were relevant considerations.

In 2013, the parties entered a contract setting up a scheme to promote a computer betting game at casinos in Melbourne, Nevada and Melbourne.[3] The contract, which was signed and to be partially performed in Australia, included a clause entitled 'Governing Law' by which the parties agreed that:[4]

> *any dispute or issue arising hereunder, including an alleged breach by any party, shall be heard, determined and resolved by an action commenced in Macau. The English language will be used in all documents.*

A dispute arose and, notwithstanding the clause, the plaintiffs commenced proceedings in Queensland alleging breaches of the contract in connection with the scheme's implementation at Crown Casino in Melbourne. The defendant, LT, entered a conditional appearance seeking to strike out the claim or, alternatively, have it stayed based on the exclusive jurisdiction clause. The plaintiffs' submissions focused on the inconvenience of having to litigate in Macau and the perceived procedural advantages secured by LT in doing so.[5] The plaintiffs further submitted that the COVID-19 pandemic prevented them from commencing proceedings in Macau.[6]

The decision reinforces that 'strong reasons'[7] are required to enliven the court's discretion not to grant a stay of proceedings brought in breach of an exclusive jurisdiction clause. This reflects a fundamental policy consideration that '"parties who have made a contract should be kept to it"'.[8] Here, the parties differed on the circumstances relevant to the exercise of this discretion.[9] The plaintiffs relied upon the list of circumstances identified by Brandon J in *The Eleftheria*, which included 'the relative convenience and expense of the trial' and '[w]hether the plaintiffs would be prejudiced by having to sue in the foreign court'.[10] As Davis J marked, subsequent English and Australian decisions have questioned the role of procedural disadvantages and inconvenience in the nominated jurisdiction, 'at least when they are factors which should have been known at the time the exclusive jurisdiction clause was agreed.'[11]

In that respect, Davis J followed the judgment of Bell P in the recent New South Wales Court of Appeal decision of *Australian Health & Nutrition Association Ltd v Hive Marketing Group*,[12] which endorsed the critical observations of Allsop J in *Incitec Ltd v Alkimos Shipping Corp*[13] and Waller J in *British Aerospace plc v Dee Howard Co*.[14] In *Incitec*, Allsop J perceived 'financial and forensic inconvenience' to the party bound by the clause to be the direct consequence of the bargain entered.[15] In a similar vein, Waller J in *British Aerospace* considered that these factors 'would have been eminently foreseeable at the time that [the parties] entered into the contract'.[16]

Setting issues of 'inconvenience' to one side, however, Davis J attached greater significance to the fact that the parties upon contracting presumably 'considered the commercial wisdom of agreeing' to the inclusion of the clause.[17] The factors relied upon by the plaintiffs were in existence and could have been taken into account by the parties at the time of contracting.[18] Indeed, evidence demonstrated that the courts of Macau: (1) could deal with the claim; (2) could provide the remedy sought by the plaintiffs; and (3) would accept court documents in the English language.[19] Issues of inconvenience 'can hardly be weighty in the exercise of discretion where one party seeks to deny the other the benefit of the covenant.'[20] Finally, Davis J observed that 'there is little, if any, evidence at all as to the impact of the pandemic upon any litigation in Macau'.[21] Yet, 'if the pandemic developed so as to effectively prevent, or unduly frustrate' litigation in Macau, this discretionary consideration would be taken into account together with 'any other relevant considerations' in a subsequent application.[22]

[1] [2020] QSC 318.

[2] Ibid, [56].

[3] Davis J observes that '[t]he scheme is clearly to be targeted at casinos throughout the world': at para [7].

[4] *RCD Holdings* (n 1) [8].

[5] Ibid, [54].

[6] Ibid, [33].

[7] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 259 (Gaudron J). *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 429 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

[8] Ibid, quoted in *RCD Holdings* (n 1) [57].

[9] Ibid, [58].

[10] Ibid.

[11] See, eg, *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368; *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496, 506; *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419.

[12] *Australian Health & Nutrition* (n 7).

[13] (2004) 138 FCR 496, 506 [49].

[14] [1993] 1 Lloyd's Rep 368, 376.

[15] *Incitec Ltd v Alkimos Shipping Corp* (n 11) 506 [49].

[16] *British Aerospace plc v Dee Howard Co* (n 12) 376.

[17] *RCD Holdings* (n 1), [65].

[18] Ibid.

[19] Ibid, [32].

[20] Ibid, [65].

[21] Ibid, [70].

[22] Ibid.