CONFIDENTIALITY OF ARBITRATION PROCEEDINGS SECOND EDITION

Supreme Court of Victoria, Unreported
Brooking Tadgell & Smith JJ
17 May 1993

ESSO Australia Resources Ltd & Ors v. The Minister for Energy and Minerals & Ors

The facts in this matter have been recorded at page 200 of The Arbitrator in the February 1993 edition.

An appeal from the decision from Marks J was heard in April 1993 and Judgment was handed down on 17 May 1993.

The principal decision was that of Brooking JJ with whom Tadgell & Smith JJ concurred.

Brooking J carried out a deep analysis of the various authorities dealing with confidentiality of private arbitrations and noted "that it is and has been for many years, if not indeed ever since the emergence of arbitration, the practice for arbitrations to be conducted in private not only in Victoria but also in the other Australian States and in England and in the United States of America. I speak of proceedings being conducted in private in the sense that strangers are absent and I would define strangers as persons whose presence is not necessary or expedient for the proper conduct of those proceedings. It might be said that the fact that the hearing is to take place in premises which the parties provide, either directly or indirectly through the arbitrator whom they appoint or cause to be appointed, is inconsistent with there being present at the hearing someone who has no right to enter the premises except at the invitation of the parties. It has never been suggested that the publicity which should in general attend legal proceedings in the courts of justice should attend an arbitration and there are many dicta suggesting that this publicity is avoided by going to arbitration.... I think we should recognise a rule of law that it is an implied term of arbitration agreements (which the parties may exclude if they choose) that arbitrations should be heard in private in the sense of in the absence of strangers as just defined unless the parties consent to the presence of a stranger. Using the language of Viscount Simonds in *Lister v. Romford Ice and Cold Storage Co Limited* (1957) A.C. 555 at pp. 576-7, I would found the rule of law upon "the general custom of the country which is the basis of the law" and upon broad equitable considerations."

The argument that was advanced in favour of the implied term of confidentiality was that privacy is innate in the notion of an arbitration and so it is an incident of all arbitrations not only that the hearings shall be in private but that the parties shall keep confidential what takes place in the course of the arbitration.

His Honour was prepared to accept the first conclusion i.e. that privacy is innate in the notion of an arbitration in the sense referred to by His Honour

above. He accepted that the implied term could be rested on the "custom of the country"; it could be precisely formulated; it is supported by judicial dicta uttered over many years and the opinions of text writers; there are no practices and no judicial dicta which conflict with the term; it is an "equitable" one; and it derives support from the consideration that the room for the hearing is private in the sense that the parties provide it either directly or through their arbitrator.

He held that the second implied term i.e. that the parties shall keep confidential what takes place in the course of the arbitration could not be rested on "the custom of the country" and he was not satisfied that it is reflected in any uniform course of conduct in Victoria or for that matter any other common law jurisdiction. His Honour indicated that it was manifestly untenable to suggest that it would be a breach of confidence in the necessary sense for one of the parties to disclose or use otherwise for than for purpose of the arbitration any document or other information which was not "in the public domain" and which had been disclosed for the purpose of an arbitration under a relevant agreement made between the parties.

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COURTS ATTITUDE TO SPECIAL REFEREES REPORTS

New South Wales Court of Appeal
(Gleeson CJ, Mahoney and Clarke JJA), Unreported
18 December, 1992

Super Pty Ltd v. SJP Formwork (Aust) Pty Ltd

It has become increasingly common in recent years, particularly in New South Wales, to refer matters to referees pursuant to the Rules of Court. This decision states authoritatively the attitude a Court should take when presented with a referee's report.

The matter arose out of a dispute between the builder and a sub-contractor in the construction area with the builder claiming monies owing on three building projects and the builder cross claiming for damages for alleged delay. The whole of the proceedings were referred out of the Construction List to an architect acting as a referee. The hearing proceeded before the referee over a number of days. The referee handed down an eight page report in which he awarded the sum of $351,470 to the sub-contractor indicating in his view there was no merit in the builder's cross claim.

Giles J. adopted the referee's report and entered judgment for the sub-contractor. He ordered the builder to pay costs including the referee's costs. The builder appealed against this decision to the Court of Appeal.
The builder contended that it was entitled to a re-hearing by a Judge on all issues where it was not satisfied with the referee's report and in particular that