CASE NOTES

CONFIDENTIALITY AND ARBITRATION

Esso Australia Resources Ltd. v. Plowman
High Court of Australia (1995) 128 ALR 391
Mason CJ, Brennan, Dawson, Toohey, McHugh JJ

The earlier proceedings in the above case before the Supreme Court of Victoria have previously been noted in this Journal (see (1993) Vol 11, 200 and (1993) Vol 12, 88). In the earlier proceedings the Supreme Court of Victoria held that there was no implied term in arbitration agreements or a rule of law as to the confidentiality of material disclosed in the course of private arbitration proceedings [1994] VR1.

The High Court refused to allow the appeal by Esso Australia Resources Ltd ("Esso") and held that although a private arbitration may be conducted in private between the parties and those persons allowed to be present by the parties it does not follow that documents or information supplied by any of the parties to any other party thereto is to be treated as subject to confidentiality.

The Court considered a number of matters including:

1. The nature of the information to be disclosed by the Bass Strait energy producers for the purpose of the arbitrations.
2. The nature of the arbitration process and whether the fact that it is conducted in private means that the proceedings are cloaked with confidentiality.
3. The question of confidentiality itself.
   The Court did not follow the approach of the English Courts in the cases of *Dolling-Baker v. Merrett [1990], WLR 1205 and Hassneh Insurance v. Mew [199312 Lloyds Rep.* 243. The Court found that in Australia and the United States there was no support in the decided cases for the existence of such an obligation of confidence as was contended for by Esso. Rather the Court found that there were cases in both the United States and Australia which would deny the existence of an obligation of confidentiality.

With respect to the argument that there should be an implied term that each party would not disclose information provided in and for the purposes of the arbitration the Court said there was no basis for such an implied term. This was because there was nothing inherent in the nature of arbitration contracts in Australia which would give rise to such an obligation.

Another matter referred to by the High Court was the protection of confidential information. The Court noted that there was reference to the principles governing the protection of confidential information. It accepted that these principles could have application to information in

arbitration proceedings but they did not support the broad claim for confidentiality made by the appellants.

The foregoing is a very brief summary of the main reasons given by Chief Justice Mason with whom Dawson and McHugh J.J. both concurred.

Brennan J. was prepared to hold that in an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purposes of the arbitration and in which no other provision for confidentiality is made that the other party will keep the documents produced and the information disclosed confidential except:

(a) where disclosure of the otherwise confidential material is under compulsion of law;
(b) where there is a duty (albeit not a legal duty) to the public to disclose;
(c) where the disclosure of the material is fairly required for the protection of the parties legitimate interests; and
(d) where disclosure is made with the express or implied consent of the party producing the material.

However in the result he held that the Minister had a statutory right to obtain information from the State Electricity Commission ("SEC") and it was the duty of the SEC to furnish the Minister with the information required and that duty could not be defeated by any contractual duty to keep documents or information confidential.

Toohey J. found that confidentiality was a necessary incident of the privacy attaching to an arbitration hearing. He was prepared to follow what Colman J. said in the Hassneh case, that is, by implication parties to an arbitration must accord documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their disputes as distinct from arbitrating them. The holding by Toohey J. was that he would find an obligation to be a term implied as a matter of law in commercial arbitration agreements. The term is implied from the entry by the parties into a form of dispute resolution which they choose because of the privacy they expect to result. If this confuses privacy and confidentiality the answer is that the characteristics are not distinct.

THE NEED FOR AN AGREEMENT ABOUT CONFIDENTIALITY IN THE ARBITRATION

The result of the High Court's decision in *Esso Australia Resources v Plowman* is that unless the parties' agreement contains an express requirement of confidentiality, there is no assurance that information disclosed during the course of the arbitration will not be used outside the arbitration or made public.

Chief Justice Mason stated:

> "I do not consider that, in Australia ... confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration. "

Mason CJ considered that if parties wish to secure confidentiality of materials prepared for or used in arbitration or of the transcripts and notes of evidence given, such provision could be inserted in an arbitration agreement. It would be prudent for those concerned with advising clients or drafting arbitration clauses to consider the question of confidentiality and see that if required it is appropriately addressed. The same comment would apply to ad hoc arbitrations.

SHORTCOMINGS OF AGREEMENTS - WITNESSES

Mason CJ also made the significant observation, that even an express term of confidentiality would not bind witnesses called during the course of the arbitration. Therefore a practical shortcoming is that contractual obligations between the parties would not be enough to prevent information becoming public through disclosure by a witness.

DUTIES OF CONFIDENTIALITY MAY OTHERWISE ARISE

- The High Court's decision does not impact upon the question whether a duty of confidentiality may arise regarding information which would otherwise attract an equitable duty of confidence. That is, information which the Law protects against disclosure because of its confidential character and the relationship between the parties who are privy to the information.
- Nor does the decision seem to preclude the implication of a contractual term requiring confidentiality in specific cases. For example, in order to give business efficacy to a particular contract an obligation of confidentiality may be implied in relation to an arbitration. This issue would have to be decided on a case by case basis but examples might include arbitrations between partners in a partnership where, arising from the underlying nature of the relationship between the parties, obligations of confidentiality may extend to the arbitration of a dispute between those parties.
- An obligation of confidentiality will also arise in respect of documents discovered in an arbitration. Mason CJ expressed agreement with the principle that an implied obligation arises which is similar to the implied undertaking on discovery in court proceedings. The undertaking is implied in respect of documents or information disclosed under compulsion by court process such as discovery or interrogation and binds the party receiving the information in such circumstances not to use the information for any purpose not connected with the litigation. That obligation would therefore arise only in relation to documents which are produced by a party pursuant to a direction by an arbitrator. It is also subject to exceptions, for example, where the public had an interest in obtaining information about the affairs of a public authority which is a party to the arbitration. Mason CJ also observed that the implied undertaking in court proceedings is subject to the qualification

that once material is adduced as evidence in court proceedings, it becomes part of the public domain, unless the court restrains publication of it.

Finally, it should be noted that the significance of the decision in the Esso case to international commercial arbitrations has been brought to the attention of the Commonwealth Attorney General by the Australian Centre for International Commercial Arbitration. Consideration is being given to the potential impact of the decision with reference to international commercial arbitrations that may be conducted in Australia. It may be that legislation could be necessary to provide some protection in such proceedings otherwise foreign disputants may prefer not to arbitrate their international disputes in Australia.

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APPOINTMENT OF ARBITRATOR SEC. 10.

Supreme Court of New South Wales 31 March 1995
Giles CJ Comm D
Thiess Contractors Pty Ltd v Holiday Villages (Australia) Pty Ltd

FACTS

Contract between Plaintiff and Defendant for renovation works at a Lindeman Island Resort. Contract sum $37,675,000.00. Contract involved building and other civil engineering works, landscaping etc. Disputes arose involving claims by Thiess for delay, disruption, variations and other matters. Counterclaim by proprietor for defective works.

Mediation and non-binding expert appraisal were unsuccessful.

Pursuant to general condition 45 of the Contract (form unidentified), disputes were to be resolved by arbitration. The Arbitrator was to be :-

(a) agreed upon by the parties within 28 days;
(b) in the absence of agreement, appointed by the contractor from a list of not fewer than three persons put forward by the Principal;
(c) in the absence of selection, appointed pursuant to the laws relating to arbitration in force in the relevant State (New South Wales).

The parties were incapable of agreeing on an Arbitrator, neither was any appointment made from a proprietor's list.

The appointment of the Arbitrator was referred to the Supreme Court pursuant to S.10 of the *Commercial Arbitration Act* 1984 (NSW).

THE ISSUE

Pursuant to S.10 of the *Commercial Arbitration Act*, on what basis should the Court select a person to act as Arbitrator for the purposes of making an appointment to fill a vacancy in the office of Arbitrator?