

CASE NOTES

THE POWER OF THE COURT BY DECLARATION AND OTHERWISE TO SUPERVISE INTERLOCUTORY ORDERS OF AN ARBITRATOR

Supreme Court of New South Wales – Court of Appeal

27 June 1995

Kirby P; Priestley & Meagher JJA

Commonwealth of Australia v Cockatoo Dockyard Pty Ltd

“The Commonwealth of Australia asserts that the orders of the arbitrator... go beyond his power, unreasonably and inconveniently purport to interfere in its governmental rights and duties and that the Court has the power and duty to provide relief.”

“The Court should give that relief, it does not involve interference in the arbitration. It involves confining the arbitration to its proper bounds. By doing so, the Court upholds the important public interest in the generally free flow of information upon matters of public concern which the direction of the arbitrator, undisturbed, would inhibit.”

The headnote to the judgment provides a useful summary of the same:

“**ARBITRATION** – commercial arbitration – powers of arbitrator – procedural power to conduct a proceeding in the manner thought fit – power to give directions as to confidentiality of documents and materials – power to give directions providing for confidentiality of documents produced for inspection on discovery is uncontested – power to give directions addressed to the Commonwealth controlling its use of its own documents by providing same to a State environmental agency or otherwise is disputed – Rolfe, J. dismisses claim holding Supreme Court has no power to intervene to provide relief – on appeal to the Court of Appeal (by leave) – held:-

1. (By the Court): The Supreme Court has no power under the Act to intervene in interlocutory orders of an arbitrator prior to an award except in determination of preliminary point of law under s.39 of the *Commercial Arbitration Act* 1984 or in proceedings for the removal of the arbitrator for his conduct under s.44 of the Act. (Per Kirby P and Meagher JA affirming Rolfe J; Priestley JA reserving the point):

Specifically, the Supreme Court does not have a power to supervise interlocutory orders under ss.38, 43 or 47 of the *Commercial Arbitration Act* 1984: *South Australian Superannuation Fund Investment Trust v. Leighton Contractors Pty. Limited & Ors* (1990) 55 SASR 327 (FC) [see *The Arbitrator*, Vol 9, p175] not followed; *Imperial Leatherware Co. Pty. Limited v. Macri & Marcellino Pty. Limited* (1991) 22 NSWLR 653 (SC) [see *The Arbitrator*, Vol 10, p20] and *Nauru Phosphate Royalties Trust v. Matthew Hall Mechanical and Electrical Engineers Pty. Limited & Butterworth* (1994) 10 BCL 179 (VSC) [see *The Arbitrator*, Vol 11, p147] approved;

2. (Kirby P and Priestley JA; Meagher JA dissenting): The Supreme Court has power under the inherent power or under s.23 of the *Supreme Court Act* 1970 to

intervene in interlocutory orders of a procedural character such as made in this case as going outside the arbitration: *Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corp. Limited* (1981) AC 909 (HL) not followed: *John Fairfax & Sons Limited v. Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (CA) considered; *Esso Australia Resources Limited & Ors v. Plowman & Ors* (1995) ALJR 404 (HC) [see *The Arbitrator*, Vol 14, p99] applied.

PRACTICE AND PROCEDURE

Supreme Court – review of commercial arbitration – limits on powers of review – observance of principle of restraint – directions given by arbitrator as to confidentiality of use of parties' documents – directions go beyond restricting use of documents produced for the purpose of arbitration – directions addressed to the Commonwealth which wishes to use documents in inter-agency co-operation allegedly for protection of the environment and public health – whether direction of the arbitrator too wide – whether Supreme Court may intervene to provide relief – whether facility of application to arbitrator for amendment of directions an adequate answer to the contest of the power to make them – **held** (Kirby P and Priestley JA; Meagher JA dissenting): The directions given by the arbitrator were outside his power to conduct the proceedings as he though fit under s.14 *Commercial Arbitration Act* 1984 and the Supreme Court had power to disturb the directions and should do so by declaration: *Esso Australia Resources Limited and Ors v. Plowman & Ors* (1995) 69 ALJR 404 (HC) applied.

PRACTICE AND PROCEDURE

Supreme Court – inherent power – power pursuant to s.23 *Supreme Court Act* 1970 – limits of power – whether excluded by specific statutory provision – whether exclusion of Supreme Court's general supervisory jurisdiction sufficiently clear by *Commercial Arbitration Act* 1984 – whether residual power exists to confine arbitrator to matters within arbitration agreement and to prevent orders affecting wider use by parties of documents belonging to them – limits of confidentiality orders discussed: *Esso Australia Resources Limited & Ors v. Plowman & Ors* (1995) 69 ALJR 404 (HC) applied.

CONFIDENTIALITY

Arbitration – use of documents and materials – limitations on powers of arbitrator to make directions governing confidentiality – whether within powers to conduct proceedings as arbitrator thinks fit – boundaries and limits of such powers – whether Supreme Court has residual power to intervene – whether such power is excluded by terms of *Commercial Arbitration Act* 1984 – consideration of the general principle of restraint in curial intervention in commercial arbitrations: *Promenade Investments Pty. Limited v. New South Wales* (1990) 26 NSWLR 203 (CA) [see *The Arbitrator*, Vol 11, p144]; *Natoli v. Walker* (Court of Appeal, unreported 26 May 1994); (1994) NSWJB 42 (see *The Arbitrator*, Vol 13, p163] considered.

J.A. MORRISEY