

AN ILLUSORY DISTINCTION – THE AUSTRALIAN & ENGLISH APPROACHES TO CONFIDENTIALITY IN ARBITRATION: *TRANSFIELD PHILIPPINES INC & ORS v PACIFIC HYDRO LTD & ORS* [2006] VSC 175

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The distinction between the Australian and English approaches to confidentiality in arbitration is well known.¹ It has long been assumed to be implicit in the choice to arbitrate in England that privacy and confidentiality will be assured throughout the process. Confidentiality and privacy are manifestations of the parties' power to control the scope of the tribunal's power embodied within the notion of party autonomy. Does the same hold true where parties have chosen to arbitrate in Australia? The purpose of this note is to examine the Australian approach in light of the decision of the Victorian Supreme Court in *Transfield Philippines Inc & Ors v Pacific Hydro Ltd & Ors* (the Transfield case)² and to assess whether parties who choose to arbitrate in Australia are in fact more likely to lose the desired degree of confidentiality in those arbitral proceedings than parties who choose England as their forum.

1 The Approaches to the Obligation of Confidentiality & Privacy

The fact that the *Arbitration Act* 1996 (UK) is silent on the question of confidentiality does not detract from the premise that the obligation is assumed to be implicit in the choice to arbitrate in England. What then is the nature of the obligation? The obligation imposes a duty not to use documents obtained in the course of an arbitration for any purpose other than the dispute in which they were obtained.³ The juridical basis of this obligation is said to arise from an implied term attaching as a matter of law as a necessary incident of the contract to arbitrate.⁴ As so described, the English formulation of the juridical basis of the obligation has been accepted in Singapore⁵ and also, but perhaps only tacitly, in Hong Kong.⁶ New Zealand is also in accord with the English approach, indeed giving it a statutory basis,⁷ whilst the Canadian Courts have not yet felt it necessary to express a particular view one way or the other.⁸

By contrast, the High Court of Australia has concluded that confidentiality is not an essential attribute of private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of arbitration.⁹ The rationale for the approach of the High Court is, essentially, that confidentiality is unachievable because:

1. no obligation of confidentiality attaches to witnesses, and
2. there are various ways in which an award may come before a court involving disclosure to the court by a party to the arbitration and publication of the court proceedings.

In other words, it is futile to purport to impose an obligation of confidence which, in reality, cannot be enforced. Such a simplistic recitation of the decision in *Eso Australia Resources Ltd v Plowman* is to misstate the position. The consequence of the Australian approach is not that no confidentiality attaches to anything produced in the course of arbitration. The High Court was clear that documents produced by a party compulsorily pursuant to a direction of the arbitrator would attract the same confidentiality that would attach to them if they were litigating their dispute, subject only to the legitimate interest of the public in obtaining information about the affairs of public authorities.¹⁰

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¹ Derrington, SC & Turner, JM, *The Law & Practice of Admiralty Matters* (2007), 11.23-11.29.

² [2006] VSC 175.

³ *Dolling-Baker v Merrett* [1990] 1 WLR 1205, 1213.

⁴ *Ibid*; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314.

⁵ *Myanma Yaung Chi OO Co Ltd v Win Win Nu* [2003] 2 SLR 547.

⁶ *Oriental Press Group Ltd v Next Magazine Publishing Ltd* [1998] 40 HKCU 1.

⁷ *Arbitration Act* 1996 (NZ), s 14.

⁸ *Adesa Corporation v Bob Dickenson Auction Services Ltd* (2002) 73 OR (3d) 787.

⁹ *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 34 per Mason CJ, 34 per Brennan J.

¹⁰ *Ibid* 33 per Mason CJ, 47 per Toohey J.

2 The Transfield Case

It is in the context of documents produced compulsorily that a consideration of the Transfield Case is warranted. The case arose out of the construction of the Bakun AC Hydro Electricity Power Station on the Bakun River in the Philippines in the late 1990s. Numerous disputes arose out of the project including two arbitrations, the first of which is relevant for present purposes.

The Supreme Court of Victoria was asked, *inter alia*, to order preliminary discovery of certain documents which, it was alleged by Transfield, might show that there had been judicial or governmental impropriety in proceedings which had been conducted in the Philippines. The question before Hollingworth J was whether certain documents which had been obtained during the course of the first arbitral proceedings could form part of the evidence to support Transfield's application for preliminary discovery. In this case there was no question but that an obligation of confidence attached to them; some had been produced pursuant to subpoena and others pursuant to an order for discovery. On this point then there is no relevant distinction between the English and Australian approaches to confidentiality. What is of interest, however, was Transfield's position that it should be excused from any implied undertaking not to use the documents other than for the purposes of the arbitration. Two questions arise from such a proposition:

1. can a party be excused from an implied undertaking not to use the documents for ulterior purposes and, more interestingly,
2. what power, if any, did the Supreme Court of Victoria have to release a party from the undertaking?

The answer to the first question is relatively straightforward. In order to be released from an undertaking, special circumstances are required and it must be demonstrated that the release would not cause injustice **to the party who produced the document**. The discretion to relieve a party from the undertaking is one to be exercised sparingly even where there might be special circumstances.¹¹ At the time when the application was first made, the arbitral tribunal was not *functus officio*. Hollingworth J would not have been inclined to exercise the discretion having regard to the facts that: large commercial parties had entered into a contract; that contract was governed by foreign law; the contract related to a foreign construction project; the parties had agreed not to make interlocutory applications to the Victorian Supreme Court in relation to the arbitration; and Transfield consciously chose not to make any such application to the tribunal in the face of strong arguments that that was the appropriate forum for the application.¹²

But what if the tribunal had in fact been *functus officio*? The answer to the second question is less straightforward. What is being sought in such circumstances is for a court to release a party from an implied undertaking given to a completely different forum; namely an arbitral tribunal. In some circumstances this may not be quite so problematic if, for example, the arbitration is being conducted in London pursuant to the supervisory powers of the High Court as prescribed in the *Arbitration Act* 1996 (UK). In the Transfield Case, it was the fact that the subpoenas had been issued by the Victorian Supreme Court pursuant to the *Commercial Arbitration Act* 1984. Prima facie, it was arguable that the Victorian Supreme Court would have the power to release Transfield from the undertakings given in relation to the subpoenaed documents at least. However, the arbitration agreement required the arbitration to be conducted in Singapore on ICC Terms. It was therefore subject to Singaporean procedural law. The matter had ended up before the Victorian Supreme Court because, for the parties' convenience, some of the arbitral hearings had been held in Melbourne. In addition, the parties had amended the arbitration agreement specifically to provide that there would be no right of appeal or right to bring an application on a question of law under the *Commercial Arbitration Act* 1984 and there would be no right to bring certain applications under that Act to the Victorian Supreme Court, including an application to set aside an award, to remove an arbitrator or for an extension of time. Most significantly, the parties had agreed that there would be no right to make any application for interlocutory orders to the Court in relation to arbitration proceedings. Hollingworth J was therefore content to dismiss Transfield's application to be released from the undertaking on the basis that it was brought in breach of the arbitration agreement.¹³

Nevertheless, Hollingworth J considered whether the Court had any inherent jurisdiction to hear such an application. Typically, there are four specific roles served by the inherent jurisdiction:

¹¹ [2006] VSC 175, [106].

¹² Ibid [134].

¹³ Ibid [118].

1. Ensuring convenience in legal proceedings
2. Preventing steps being taken that would render judicial proceedings inefficacious
3. Preventing abuse of process
4. Acting in aid of superior courts and in aid or control of inferior courts and tribunals.¹⁴

The closest relevant category on the facts of the present case was said to be the second; namely, the inherent jurisdiction to prevent steps being taken that would render judicial proceedings inefficacious. The types of orders that generally are said to fall within this category are Mareva or freezing orders and Anton Piller orders.¹⁵

It is easy to see how those types of orders could be seen as preventing the process of the Court being rendered nugatory. It is less easy to see how one could say that releasing one party from an obligation to keep certain documents confidential could render the Court process inefficacious. If the documents were “directly relevant” to a matter in dispute and are within the possession or power of a party, they will be required to be disclosed on ordinary principles relating to discovery. Alternatively, an application for non-party or third-party discovery may need to be made. As Hollingworth J observed, the types of orders falling within this category of the inherent jurisdiction all involve the preservation of some thing pending a final court decision so that the final court decision is not frustrated by the destruction or dissipation of that thing. The present application simply did not fall within this rationale.¹⁶ She was therefore not persuaded that the Court has inherent jurisdiction to release a party such as Transfield from the implied undertaking given in separate arbitral proceedings.

3 Conclusion

In 1996, Lord Neill QC wrote:

If some Machiavelli were to ask me to advise on the best method of driving international arbitration away from England I think that I would say that the best way would be to reintroduce ... all the court interference that was swept away ... The second best method but the two boats are only separated by a canvas would be for the House of Lords to overthrow *Dolling-Baker* and to embrace the majority judgment of the High Court of Australia in *Esso/BHP*. This would be to announce that English law no longer regarded the privacy and confidentiality of arbitration proceedings (using that term in the broadest sense) as a fundamental characteristic of the agreement to arbitrate. Lawyers and businessmen in France, Germany, Switzerland and in the countries of the Commonwealth and elsewhere would take note and there would be a flight of arbitrations from this country to more hospitable climes.¹⁷

Despite this criticism, and rather alarmist view, the Transfield case demonstrates that there is no real danger to confidentiality if parties choose to arbitrate in Australia. The circumstances in which documents will not fall under the cloak of confidentiality for having been produced outside the usual discovery process or pursuant to subpoena will be relatively rare. Even in such rare circumstances, Australian courts are likely to hold that such documents have been produced subject to an implied undertaking not to use them other than for the purposes of the arbitration. Courts will be loathe to relieve a party from that undertaking, either pursuant to their supervisory powers, if they are applicable, or pursuant to any supposed head of inherent jurisdiction. This conclusion is in complete accord with the view of the House of Lords in the decision of *Bremer Vulkan v South India Shipping Corpn Ltd*,¹⁸ namely, that the source of judicial powers over arbitrators is wholly statutory and not inherent. The practical effect of the distinction between the English and the Australian approaches to confidentiality in arbitration is largely illusory.

¹⁴ Mason, K, ‘The Inherent Jurisdiction of the Court’ (1983) 57 *Australian Law Journal* 449.

¹⁵ [2006] VSC 175, [121]-[122].

¹⁶ *Ibid* [123].

¹⁷ Lord Neil QC ‘Confidentiality in Arbitration’ (1996) 12 *Arbitration International* 287, 316.

¹⁸ [1981] AC 909.