

FEDERAL COURT OF AUSTRALIA

Hui v Esposito Holdings Pty Ltd (No 2) [2017] FCA 728

File numbers: VID 1192 of 2016
VID 1220 of 2016

Judge: **BEACH J**

Date of judgment: 26 June 2017

Catchwords: **ARBITRATION** – international commercial arbitration – application to set aside parts of partial arbitral awards – application to remove arbitrator – applications granted – form of orders – power of court to rewrite an arbitral award – orders made

Legislation: *International Arbitration Act 1974* (Cth) ss 2D, 39
UNCITRAL Model Law on International Commercial Arbitration arts 5, 32, 34

Cases cited: *AKN v ALC* [2015] SGCA 18
AKN v ALC [2015] SGCA 63
Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd [2009] 5 HKC 1
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1) [2012] 4 HKLRD 1
Hui v Esposito Holdings Pty Ltd [2017] FCA 648

Date of hearing: Heard on the papers

Date of last submissions: 23 June 2017

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: International Commercial Arbitration

Category: Catchwords

Number of paragraphs: 14

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1220 of 2016:

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1192 of 2016 and First and
Second Applicants in VID
1220 of 2016: Mr MR Scott QC with Mr CP Young

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Third Respondents in VID
1192 of 2016 and First and
Second Applicants in VID
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Counsel for the First
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2016 and VID 1220 of 2016: Mr GP Harris QC with Mr TB Maxwell

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Respondent in VID 1220 of
2016: The third respondent in VID 1220 of 2016 did not appear

ORDERS

VID 1192 of 2016

BETWEEN: **WILLIAM YAN SUI HUI**
Applicant

AND: **ESPOSITO HOLDINGS PTY LTD (ACN 079 763 303)**
First Respondent

**UPD HOLDINGS PTY LTD (ACN 167 100 692) (RECEIVERS
AND MANAGERS APPOINTED) (SUBJECT TO DEED OF
COMPANY ARRANGEMENT)**
Second Respondent

**5 STAR FOODS PTY LTD (ACN 005 714 616) (RECEIVERS
AND MANAGERS APPOINTED) (SUBJECT TO DEED OF
COMPANY ARRANGEMENT)**
Third Respondent

JUDGE: **BEACH J**

DATE OF ORDER: **26 JUNE 2017**

THE COURT ORDERS THAT:

1. The following parts of the partial award made on 12 September 2016 be set aside:
 - (a) in paragraph 1, the word “only”, which is implied between the words “subject” and “to”;
 - (b) in paragraph 3, the word “only”, which is implied between the words “subject” and “to”; and
 - (c) subparagraphs 4(b), (c) and (d).
2. Paragraph 1 of the partial award made on 15 September 2016 be set aside.
3. The mandate of the arbitrator be terminated.
4. There be liberty to apply within 28 days in the event that the parties have not agreed on the appointment of a substitute arbitrator.
5. The first respondent pay the applicant’s costs of the proceeding on a party-party basis.
6. The first respondent pay the second and third respondents’ costs of the proceeding on a party-party basis.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 1220 of 2016

BETWEEN: **UDP HOLDINGS PTY LTD (ACN 167 100 692) (RECEIVERS AND MANAGERS APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)**
First Applicant

5 STAR FOODS PTY LTD (ACN 005 714 616) (RECEIVERS AND MANAGERS APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)
Second Applicant

AND: **ESPOSITO HOLDINGS PTY LTD (ACN 079 763 303)**
First Respondent

WILLIAM YAN SAN HUI
Second Respondent

[THE ARBITRATOR]
Third Respondent

JUDGE: **BEACH J**

DATE OF ORDER: **26 JUNE 2017**

THE COURT ORDERS THAT:

1. The following parts of the partial award made on 12 September 2016 be set aside:
 - (a) in paragraph 1, the word “only”, which is implied between the words “subject” and “to”;
 - (b) in paragraph 3, the word “only”, which is implied between the words “subject” and “to”; and
 - (c) subparagraphs 4(b), (c) and (d).
2. Paragraph 1 of the partial award made on 15 September 2016 be set aside.
3. The mandate of the arbitrator be terminated.
4. There be liberty to apply within 28 days in the event that the parties have not agreed on the appointment of a substitute arbitrator.
5. The first respondent pay the applicants’ costs of the proceeding on a party-party basis.

6. The first respondent pay the second respondent's costs of the proceeding on a party-party basis.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 On 9 June 2017, I delivered my reasons in these two proceedings (*Hui v Esposito Holdings Pty Ltd* [2017] FCA 648) and directed that the parties file and serve minutes of proposed orders and short submissions directed to the relief giving effect to those reasons. The present reasons are to be read with my earlier reasons.

2 In my earlier reasons, I proposed that I would set aside relevant aspects of the first partial award and aspects of the second partial award. Having now considered the further submissions of the parties, I propose to make orders substantially to the effect of Esposito's submissions, which were largely in agreement with Hui's submissions save as to one aspect concerning paragraph 3 of the first partial award. I have rejected the approach of UDP and 5 Star Foods, which in some respects was opportunistic. This is a characterisation, not a criticism.

3 Let me begin with a few general themes.

4 First, I have power under art 34 of the UNCITRAL Model Law to set aside *part* of an award.

5 Second, an award consists of both its express provisions and its implications. By analogy with contractual theory, an implication arising from the proper construction of an award is as much part of the award as any provision couched in express language. To hold otherwise is conceptually incoherent if not a hermeneutical heresy.

6 Third, in the first partial award it is apparent that the arbitrator can be taken to have intended, on any reasonable construction thereof, that:

- (a) the word "only" was to be implied between the words "subject" and "to" in paragraph 1; and
- (b) the word "only" was to be implied between the words "subject" and "to" in paragraph 3.

7 If I set aside the first partial award by deleting such implications, and also delete paragraphs 4(b), (c) and (d), in my view that will achieve a result that:

- (a) is consistent with the proper scope of the preliminary hearing before the arbitrator that I have found;

- (b) does no more than is necessary to remove the vices that I have described in my earlier reasons; and
- (c) does not travel beyond what the arbitrator determined on the merits, in terms of that part of the permissible purview of the preliminary hearing that was transposed into his determination.

8 I reject the submissions of UDP and 5 Star Foods who have asserted that the whole of both of the partial awards must be set aside. In large part I agree with the submissions of Mr Greg Harris QC for Esposito on this aspect.

9 First, UDP and 5 Star Foods assert that I must set aside the whole of both awards because anything short of that step would involve an impermissible rewriting of the awards, which it is said that I do not have the power to undertake. It is said that I do not have the power to substitute my own view of what should have been the correct outcome on the merits by rewriting an award. I agree with those sentiments in the generality with which they have been expressed (see *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1 at [7]), but their emphasis by UDP and 5 Star Foods is misplaced in the present context. I am entitled to set aside part of an award in a way that does not impermissibly rewrite the award to give it a merits complexion beyond what the arbitrator determined (in other words, injecting my own merits assessment under the guise of the addition or deletion of words), and that is all that I propose to do.

10 Relatedly, and as a boundary condition, I am only entitled to set aside those parts of an award that are infected by the substantiated art 34 grounds(s) (*AKN v ALC* [2015] SGCA 18 at [80] and *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd* [2009] 5 HKC 1 at [75] and [124]). But to accept the assertions of UDP and 5 Star Foods would be to go beyond what I am empowered to give and what they are entitled to receive. More generally, it would infringe the precept of minimal curial intervention that is enshrined in arts 5 and 34 of the UNCITRAL Model Law and ss 2D, 16 to 21 and 39 of the *International Arbitration Act 1974* (Cth) (see also *AKN v ALC* [2015] SGCA 18 at [37]).

11 Now UDP and 5 Star Foods have asserted difficulties in a partial setting aside arising from what they describe as the interconnectedness and inseparability of the first partial award. But these problems are not insurmountable. Moreover, my orders will achieve a commercial result that binds UDP and 5 Star Foods to a result that they should be bound to, given that such a result was otherwise within the proper purview of the preliminary hearing that they

chose to be absent from. I must also say that their assurances contained in [7] of their written submissions, if I was to accede to their broader orders, hardly instilled me with confidence notwithstanding the observations in *AKN v ALC* [2015] SGCA 63 at [61] and [62]. There could be no *res judicata* or issue estoppel as such if the determinations were set aside in the manner for which UDP and 5 Star Foods have contended. Moreover, it may be queried how an *Anshun* estoppel could apply to a later arbitral proceeding (given that an *Anshun* estoppel has a different juridical basis), let alone where the *determinations* in the first arbitral proceeding would have been set aside. Further, Mr Martin Scott QC's assertion, on behalf of UDP and 5 Star Foods, that to "subsequently change their position" would amount to an "abuse of the arbitral procedure" and an "abuse of the process of the Court" was nebulous, although it had a superficial allure.

12 Further, UDP and 5 Star Foods have asserted that one of the benefits flowing from their proposal is that the issues that I had adverted to in [255] to [258] of my earlier reasons would disappear. But it seems to me that the solution advanced by Esposito readily addresses the matter. As I am dealing with partial awards and then only setting aside part thereof, the termination provision of art 32 does not apply. Accordingly, the arbitration should be treated as still on foot in terms of the relevant claims, defences and set offs to the extent that they have not been finally disposed of in the first partial award (as modified by my orders). Moreover, for that purpose it should be clear that I am not also making any formal remittal order under art 34 (in addition to the setting aside order(s)) as this was only an option if I had not exercised my power to set aside. The parties, or at least some of them, appear to accept that even in the absence of remittal, which I cannot order given the disjunction in art 34(4), the arbitration nevertheless "returns to the point" before the publication of the award. I will accept that to be so for present purposes. And on that foundation, I will make the necessary orders to replace the arbitrator.

13 Finally, although Esposito should pay the costs of the two proceedings, I do not consider that it is appropriate to make a lump sum costs order in favour of UDP and 5 Star Foods as they have sought. First, I do not see much advantage in making such an order particularly given that as between Hui and Esposito no such order has been sought. Second, it would seem that costs questions may be the subject of contest and duelling material in any event, even if I was to entertain the proposal for a lump sum order. Third, no issue has been raised concerning the financial capacity of Esposito to meet any additional costs of taxation. Finally, if the parties perceive that there is the potentiality for yet further dispute between them and expense

arising from being condemned to a taxation, then that perception should act as a discipline on their behaviour to resolve the quantum of costs commercially.

14 I will make orders in the terms sought by Esposito in each proceeding.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

A handwritten signature in black ink, appearing to be 'J. Beach', written over a light blue rectangular background.

Dated: 26 June 2017