Re MEDIA, ENTERTAINMENT AND ARTS ALLIANCE, Ex parte HOYTS CORPORATION PTY LTD

HIGH COURT OF AUSTRALIA

MASON CJ, BRENNAN, DEANE, DAWSON and GAUDRON JJ

12, 13 August 1993, 9 February 1994 — Canberra

Industrial law — Australian Industrial Relations Commission — Apprehension of bias by member of Full Court — Proceedings for award — Commissioner made consent award involving competitors of employer — No disclosure to employer in disputed proceedings — Whether consent agreement relevant to proceedings — Whether reasonable apprehension of bias — (CTH) Industrial Relations Act 1988 ss 94, 95, 134E, 134F.

The applicant employers were parties to proceedings before the Australian Industrial Relations Commission concerning the making of an award regulating the wages and conditions of persons employed in Hoyts cinemas. While the proceedings were before the Full Bench, one of the members of the bench made a consent award in settlement of a dispute between a union and two other theatrical employers, Greater Union and Village Roadshow. The applicants discovered this after the Hoyts proceedings were nearly completed. The member refused to disqualify himself, and the Full Bench handed down its decision to make an award. An application for an order nisi for writs of prohibition and certiorari was refused at first instance in the High Court of Australia, and the applicant sought leave to appeal.

Held, *per curiam*, refusing leave:

(i) Given the process of certification under ss 134E and 134F of the Industrial Relations Act 1988, and the terms of s 95 of the Act, which prima facie, at least, prevented the Full Bench from taking the Greater Union Agreement into account, and given that no one relied on the agreement, there was no basis whatsoever for apprehension by the parties or the public that the agreement would in any way influence the Full Bench or the relevant member in reaching a decision on the matters in issue between the applicants and the respondents.

(ii) There was no basis whatsoever for any apprehension that the member favoured Greater Union at the expense of the applicants.

(iii) There was no basis for a suggestion that the member should have disclosed the fact that he had certified the Greater Union Agreement and, hence, no reasonable basis for apprehension that he was protecting the union case from attack.

Application

This was an application for leave to appeal to the Full Court of the High Court of Australia from a decision of Toohey J.

A H Goldberg QC and *L Kaufman* for the applicants.

J W Nolan for the Media, Entertainment and Arts Alliance and the Theatre Managers' Association.

Mason CJ, Brennan, Deane, Dawson and Gaudron JJ. The Hoyts Corporation Pty Ltd, Delarene Pty Ltd and Rampton Pty Ltd (the

applicants) applied to Toohey J for an order nisi for writs of prohibition and certiorari with respect to a decision by the Australian Industrial Relations Commission (the Commission) to make an award regulating the wages and conditions of persons employed in the applicants' cinemas (Hoyts cinemas). The application was refused. The applicants then lodged a notice of appeal and an application for leave to appeal.

Separate proceedings were instituted, it seems, because the applicants were not sure whether the judgment of Toohey J was final or interlocutory. They now concede – and rightly so – that the decision was interlocutory.[1] As there is no appeal from an interlocutory decision except by leave of the court,[2] the notice of appeal must be struck out as incompetent.

The Commission's decision to make an award followed lengthy hearings relating to several disputes between the applicants and the respondents, the Media, Entertainment and Arts Alliance (the Media Alliance) and the Theatre Managers' Association (the TMA). So far as concerns this matter, the first dispute occurred in 1988. Until then, wages and conditions of employees in Hoyts cinemas were governed by awards of the Australian Conciliation and Arbitration Commission (the Conciliation Commission)[3] and an overaward agreement, known as the "Canberra Agreement". The awards and agreement also applied to persons employed in the theatres of the Greater Union Organization Pty Ltd (Greater Union) and Village Roadshow Corporation Ltd (Village Roadshow). The Canberra Agreement came to an end in 1988. It was renewed by Greater Union and Village Roadshow, but not by Hoyts. That led to industrial action by Hoyts' employees and, in due course, to the notification of an industrial dispute under the Conciliation and Arbitration Act 1904 (Cth) (the Conciliation Act).[4] There was no immediate resolution of the matter and various other notifications were given and various proceedings instituted, initially under the Conciliation Act and, later, under the Industrial Relations Act 1988 (Cth) (the Act).

It seems that the decision not to renew the Canberra Agreement was based, at least in part, on the view that the wages and conditions which applied generally in the cinema and drive-in industry were no longer appropriate for Hoyts cinemas. Eventually, one of the applicants, The Hoyts Corporation Pty Ltd (Hoyts), commenced proceedings with a view to obtaining a separate award for persons employed in Hoyts cinemas and binding on the Media Alliance and the TMA. That application was referred

1. See *Coles v Wood* [1981] 1 NSWLR 723 and, more generally, *Hall v Nominal Defendant* (1966) 117 CLR 423; *Licul v Comey* (1976) 50 ALJR 439; 8 ALR 437; *Carr v Finance Corp of Australia Ltd (No 1)* (1981) 147 CLR 246; 34 ALR 449
2. See the Judiciary Act 1903 (Cth), s 34(2)
3. The Theatrical Employees (Cinema and Drive-In Industry) Award 1983 applied to employees who were or were eligible to be members of the Australian Theatrical and Amusement Employees Association, which amalgamated with other organisations of employees to become the Media Alliance; the Theatre Managers' Award 1986 applied to employees who were or were eligible to be members of the TMA. Note that these awards have continued to have effect for employees of The Hoyts Corporation Pty Ltd, but have no effect for employees of Delarene Pty Ltd and Rampton Pty Ltd as those companies are not respondents to those awards.
4. The applicants operate cinemas in various States and it is clear that this dispute was an interstate dispute

to a Full Bench of the Commission, along with various other proceedings involving the applicants and the respondents. At all times, Commissioner Fogarty has been a member of that Full Bench.

Various matters were in issue in the proceedings before the Full Bench, including overtime and penalty rates. Between March and July 1992, the applicants entered into individual industrial agreements with a number of their employees, and applications by those employees to have their agreements certified under s 115 of the Act were also referred to the Full Bench.[5] The agreements contained overtime and penalty rates which, in the view of the respondents, did not conform to general award standards. The agreements became a prominent feature in the proceedings with the applicants arguing, contrary to the original application by Hoyts, that no award should be made and that they should be free to contract with individual employees. Alternatively, they claimed that the terms and conditions in any award made by the Commission should be the same as those in the agreements. The respondents proposed other terms and conditions and, in particular, opposed the applicants' proposals with respect to overtime and penalty rates.

While the proceedings were before the Full Bench, one of the organisations of employees which later amalgamated to form the Media Alliance, the Australian Theatrical and Amusement Employees Association, created a dispute with Greater Union and Village Roadshow by serving a log of claims which was not acceded to. In December 1991, Commissioner Fogarty made a consent award in settlement of that dispute.[6] The applicants applied to have the award set aside, apparently out of concern that it might have some flow-on effect. That application, which ultimately was not successful, was also referred to the Full Bench.[7]

The Full Bench handed down an interim award on 12 June 1992 and proceedings continued during the latter part of that year with respect to the various matters still in issue between the applicants and the respondents. The evidence was complete, counsel for the applicants had spoken to his written submissions and the advocate for the TMA, Mr Weidner, was speaking to his written submissions when, on 25 September, there was an exchange with a member of the bench, Polites DP, concerning some aspect of the renewed Canberra Agreement. It seems that the question was then answered, but perhaps not fully. Mr Weidner returned to the question on 5 October, saying:

> And as I indicated in my address . . . , that since that time and at quite recent times, the Theatre Managers' Association has completed a comprehensive agreement on conditions of employment [and] rates of pay with the Greater

5. See this court's earlier decision on this aspect of the matter: *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Pty Ltd* (1993) 67 ALJR 389; 112 ALR 193. Note that s 115 was repealed by the Industrial Relations Legislation Amendment Act 1992 (Cth) and replaced by s 134C and s 134E with effect from 23 July 1992. Note also s 19 of that amending Act which is the transitional section allowing s 115 applications to be dealt with under the new regime.

6. The Theatrical Employees (The Greater Union Organisation and Village Roadshow) Award 1991

7. See *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Pty Ltd [Hoyts, Delarene and Rampton Award]* (1993) 67 ALJR 723, 115 ALR 321

> Union organisation, and that agreement has been completed and signed by all parties, and it is for a period of two years, and does delete that cl 4 from the 1989 agreement. It does not contain any ceiling whatsoever. The salary package in that new agreement which I have conveyed to Mr Caldwell, the instructing solicitor, by telephone when he was asking me about the agreement, does contain a salary scale which relates to managers responsibility, depending on the size of the auditorium.

Mr Weidner gave some other details of the new agreement between Greater Union and the TMA (the Greater Union Agreement). Counsel for the applicants asked:

> Could we ... ask that Mr Weidner make that agreement available. He has spoken to it and indicated what is in it. We do not have a copy of it and have asked for and have not been afforded one. If any of those submissions are to be relied upon then the agreement should be made available so that we can tender it to the Commission.

Mr Weidner said that he was not relying on the agreement and would have to obtain instructions as to counsel's request. Counsel persisted with the request and the presiding member of the bench, Boulton J, announced that they did not intend, at that stage, to make any ruling on the matter, but would "consider the matter and announce any ruling that [they] wish to make". The request was renewed the following day and the parties were asked to discuss the matter. Boulton J added that "if necessary it can be raised when we sit again in these matters". It was not raised again until 8 January 1993.

On 6 January, the applicants learned as a result of searches in the registry of the Commission that the Greater Union Agreement had been certified by Commissioner Fogarty on 17 September 1992. The proceedings were then complete, save for supplementary written submissions as to the jurisdictional basis of certain claims which the respondents claimed should be included in an award. On 8 January 1993, a letter was sent to Commissioner Fogarty submitting that, as he had failed to disclose that he had certified the agreement, it was inappropriate for him to continue as a member of the Full Bench. The Full Bench sat to hear argument on the question on 25 January.

On 1 April 1993, Commissioner Fogarty announced that he would not disqualify himself. He published reasons for his decision. Immediately afterwards, the Full Bench handed down its decision to make an award having effect from 1 May and containing terms and conditions as then announced. The applicants sought prohibition and certiorari, claiming a reasonable apprehension of bias on the part of Commissioner Fogarty. There is no suggestion of actual bias.

The applicants claim that the Greater Union Agreement was relevant to the issues in the proceedings before the Full Bench. And on that basis, they argue that the failure by Commissioner Fogarty to disclose his knowledge of the agreement, as would have occurred had he disclosed that he certified it, is analogous with the situation where a judge "hear[s] evidence or receive[s] representations from one side behind the back of the other".[8] A slightly

8. *Re JRL; Ex parte CJL* (1986) 161 CLR 342, at 346; 66 ALR 239. See also *Kanda v Government of Malaya* [1962] AC 322, at 337

different version of the argument puts emphasis on particular terms of the Greater Union Agreement, especially those relating to overtime and penalty rates. It is said that the agreement of the TMA to these terms casts doubt on the bona fides of the TMA in opposing similar conditions when sought by Hoyts.

The rule against bias is directed to ensuring that a judge or a member of a tribunal that is bound to act judicially brings and is seen to bring "an impartial and unprejudiced mind to the resolution of the question" to be decided.[9] One aspect of the rule, and the only one that is relevant for immediate purposes, is that the decision should be made on the basis of the evidence and the argument in the case, and not on the basis of information or knowledge which is independently acquired. That aspect of the rule is similar to but not identical with the rule of procedural fairness which requires that a person be given an opportunity to meet the case against him or her. However, in the case of the rule against bias, the question is not whether there is or was an opportunity to present or answer a case, but whether, in the circumstances, the parties or the public might entertain a reasonable apprehension that information or knowledge which has been independently acquired will influence the decision.

As a general rule, a judge or a member of a tribunal that is bound to act judicially should disclose his or her independent knowledge of factual matters that bear or may bear on the decision to be made.[10] In some cases, it may be that he or she should stand down from the proceedings.[11] However, precisely what should be disclosed and what, if any, other action should be taken may involve a consideration of the nature of the tribunal, its composition and organisation.[12]

The primary question raised by the argument for the applicants is whether the Greater Union Agreement was of any relevance to the decision to be made by the Full Bench. In this regard, it may be accepted that, notwithstanding their original claim that Hoyts cinemas should be separately regulated, the applicants take the view that what happens in the theatres of Greater Union is of direct relevance to them. And in the light of their application to set aside the consent award made in December 1991 with respect to the Greater Union and Village Roadshow theatres, it may be taken that their views in this regard were known to the Full Bench. However, the question is not whether the matter is of relevance to the applicants, but whether it was relevant to the decision to be made by the Full Bench.

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9. *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, at 294; 47 ALR 45 at 48. See also *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, at 262; 9 ALR 551; *Vakauta v Kelly* (1989) 167 CLR 568; 87 ALR 633; *Grassby v R* (1989) 168 CLR 1; 87 ALR 618; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; 93 ALR 435; *Re Polites; Ex parte Hoyts Corp Pty Ltd* (1991) 173 CLR 78, at 91-2; 100 ALR 634; *Re Finance Sector Union of Australia; Ex parte Illaton* (1992) 66 ALJR 583; 107 ALR 581
10. See, for example, *R v Industrial Appeals Court; Ex parte Maher* [1978] VR 126, at 143
11. ibid, at 144
12. See, with respect to the Commission, *Re Polites; Ex parte Hoyts Corp Pty Ltd* (1991) 173 CLR, at 86-8. See also *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, at 151

It was suggested in argument, but only faintly, that the Greater Union Agreement was relevant to the question whether an award should be made for Hoyts cinemas, as distinct from what its terms should be. It is to be remembered that the existence of the agreement was disclosed to the Full Bench and to the applicants, as were some of its terms. What was not disclosed was the fact that it had been certified. But certification could have no bearing on the question whether the applicants' employees should or should not have an award, particularly as there was no agreement between the applicants and the respondents with respect to matters in issue before the Full Bench. Thus, the only question is whether the terms of the Greater Union Agreement were relevant to the provisions to be included in an award, if, as happened, the Commission should decide on that course.

The terms and conditions which apply in one undertaking or enterprise may well be relevant to a determination by the Commission as to those that should apply in another. For example, there may be some recognised nexus whereby wages or conditions in one automatically flow to the other.[13] Even if there is no nexus, it may be that the terms and conditions can be taken into account, either specifically or as part of a general pattern, in determining what is appropriate for the other enterprise. Moreover, in the case of establishments in the same industry, s 94 of the Act directs the Commission to "provide, so far as possible and so far as the Commission considers proper, for uniformity throughout an industry carried on by employers in relation to hours of work, holidays and general conditions in the industry". However, that direction is subject to s 95 which relevantly provides:

> The Commission is not empowered to include terms in an award ... that are based on the terms of a certified agreement unless the Commission is satisfied that including the terms in the award, or making the award, would not:
>
> (a) be inconsistent with principles established by a Full Bench that apply in relation to the determination of wages and conditions of employment; or
>
> (b) otherwise be contrary to the public interest.

In the light of s 95 of the Act, the Commission could not have regard to the terms and conditions of the Greater Union Agreement for the purpose of reaching a decision as to the terms and conditions to be included in the award unless positively satisfied as to the matters specified in paras (a) and (b). And those matters were not satisfied merely by certification. Certification is governed by s 134E and s 134F of the Act. Apart from formal requirements with respect to consultation,[14] the period of operation[15] and, in the case of an agreement relating to a single business, the identity of the parties[16] and the method of negotiation,[17] s 134E requires the Commission to be satisfied, before certifying an agreement, that it does not disadvantage

13. Note, however, the structural efficiency principle in the *National Wage Case 1988* (1988) 25 IR 170; 30 AILR 327; *National Wage Case 1989* (1989) 30 IR 81; 31 AILR 281. See also *Review of Wage Fixing Principles October 1993*, Print K9700, 25 October 1993, p 20

14. s 134E(1)(c) and (d), see also s 134E(3)

15. s 134E(1)(f)

16. s 134E(1)(e)(i), (4) and (5)

17 s 134E(1)(e)(ii)

the employees who are covered by it[18] and that it contains dispute resolution procedures.[19] If those conditions are satisfied, an agreement which applies only to a single business (as is the case with the Greater Union Agreement) must be certified unless the Commission "thinks that any of the terms is one that the Commission would not have power to include in an award (disregarding section 95)".[20]

Given the process of certification and the terms of s 95 of the Act which, prima facie at least, prevented the Full Bench from taking the Greater Union Agreement into account and given that no one relied on the agreement, there was no basis whatsoever for apprehension by the parties or the public that the agreement would in any way influence the Full Bench or Commissioner Fogarty in reaching a decision on the matters in issue between the applicants and the respondents. The only question that could possibly arise is whether the applicants should have been afforded some further opportunity to use the Greater Union Agreement in support of their own case. And that, in essence, is what is involved in the second version of their argument.

In the second version of their argument, the applicants rely on specific terms of the Greater Union Agreement, pointing out that there is no provision for overtime payments, that penalty rates are payable only on Christmas Day and that the agreement involves side agreements with individual employees. The side agreements were apparently provided to Commissioner Fogarty before being placed in sealed envelopes. The applicants do not know the terms of the side agreements and do not claim that the Greater Union Agreement puts them at a competitive disadvantage. However, they claim that the Greater Union Agreement allows for more flexibility than do the terms of the award announced by the Full Bench. And they say that, if they had known its terms, they would have "[sought] leave to recall [the TMA witnesses] for cross-examination, [to] put to them these [questions] ... 'Why is it that with Greater Union you are prepared to have individual letters of agreement, but with Hoyts, you want an award that covers managers? Why is it you are prepared not to have overtime with Greater Union, but you want overtime with Hoyts, penalty rates and so on?'."

The significance of the submission with respect to the more flexible arrangements permitted by the Greater Union Agreement is not readily apparent. Presumably, it is directed to suggesting that there is a reasonable apprehension that Commissioner Fogarty favoured Greater Union at the

18. s 134E(1)(a). See also s 134E(2) which provides:

"For the purposes of paragraph (1)(a), an agreement is only taken to disadvantage employees in relation to their terms and conditions of employment if:

(a) certification of the agreement would result in the reduction of any entitlements or protections of those employees under:

(i) an award; or

(ii) any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and

(b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest."

19 s 134E(1)(b)

20 s 134F(1)(a)

expense of the applicants. If so, it does not withstand scrutiny. The agreement was the product of negotiations between Greater Union and the TMA; it was not in any way the product of Commissioner Fogarty's efforts. And as already explained, its certification was virtually automatic if it complied with s 134E. Certification could only be refused in the limited circumstances already outlined. Given the nature of the exercise involved in certification of an agreement and the quite different exercise involved in determining by arbitration what provisions should be included in an award, there is no basis whatsoever for any apprehension that Commissioner Fogarty favoured Greater Union at the expense of the applicants.

The submission relating to the course the applicants would have adopted had they known what was in the Greater Union Agreement is directed to establishing that there is a reasonable apprehension that Commissioner Fogarty protected the TMA case from attack. It is to be emphasised that the hypothesised attack depends on a knowledge of the terms of the agreement, and not on knowledge of its certification. Quite apart from that, the submission depends on there being an obligation to afford the applicants an opportunity to counter the TMA case by pointing to the terms of the Greater Union Agreement.

As already indicated, the proceedings were virtually complete when the Greater Union Agreement was first mentioned. By then, the applicants had presented evidence and submissions on the merits of their proposals, including those with respect to individual work agreements, overtime and penalty rates. Even at that late stage, the Commission held that they could raise the question whether the agreement should be produced. They did not do so. In these circumstances, the most that can be said of Commissioner Fogarty's silence is that, had the applicants known that the agreement had been certified, they may have taken earlier steps to ascertain its terms by inspecting it in the registry, if that course was open to them,[21] and, if so, they may have refined or in some way re-fashioned their case to take account of its terms.

Outside a criminal trial,[22] there is no requirement that a judge or member of a tribunal do more than afford a party a reasonable opportunity to present his or her case. In particular, there is no requirement to point to arguments or evidence that may assist in making the case. A fortiori, when the evidence is not tendered, is not relied upon and is subject to a prohibition of the kind found in s 95 of the Act. That being so, there is no basis for a suggestion that Commissioner Fogarty should have disclosed the

21. Section 143 requires the Commission in certain circumstances to publish awards, including certified agreements (s 4), and make them available for inspection. Section 143A, which was introduced with other amendments in 1992, provides an exception to the requirement to publish where a certified agreement applies "only to a single business, part of a single business or a single place of work". The sections do not explicitly deal with the question whether a copy of such an agreement must be available for inspection even though it need not be published. As noted above, the detail of the agreement was in fact obtained by the solicitor for the applicants searching the registry files.

22. See *R v Hopper* [1915] 2 KB 431, at 435; *Van Den Hoek v R* (1986) 161 CLR 158, at 161-2; 69 ALR 1 as to the obligation in a criminal trial with respect to defences which are open on the evidence but not raised

fact that he had certified the Greater Union Agreement and, hence, no reasonable basis for apprehension that he was protecting the TMA case from attack.

Leave to appeal should be refused.

Order

Application for leave to appeal in matter No M43 of 1993 refused.

Notice of appeal in matter No M46 of 1993 struck out as incompetent.

Solicitors for the applicants: *Mark G Caldwell.*

Solicitors for the Media, Entertainment and Arts Alliance: *K T Nomchong.*

Solicitors for the Theatre Managers' Association: *Scarfone & Co.*

MATTHEW SMITH
BARRISTER