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Recent High Court decision on binding nature of implied undertakings in litigation including upon non-parties

In the course of proceedings before courts and tribunals, a party and its lawyers may be given access to information recorded in documents made available by the other party or other persons. If such access is obtained under compulsory court or tribunal process, it will be subject to an implied undertaking prohibiting use or disclosure of the material except for the purposes of the proceedings themselves. Depending upon the circumstances, that undertaking can extend to and bind a person who is not a party to the proceedings. Any person so bound, who, knowing that the material was generated in legal proceedings, uses it for purposes other than those of the proceedings, is liable to be found guilty of contempt.

The underlying rationale for this obligation is often described as being that disclosure compelled by a court in the interests of securing justice in particular proceedings is an invasion of the right to keep private one's own documents and so should be confined to what is strictly required for securing justice in those proceedings. It is an obligation which arises from a court's processes and so is controlled by the court through the sanction of contempt.

The recent decision of the High Court of Australia in *Hearne v Street* [2008] HCA 36 (6 August 2008) is a strong affirmation of the important role played by an implied undertaking in the conduct of litigation, and the binding effect of the undertaking beyond the parties themselves to other persons in some way involved with the parties in the conduct of the litigation, ranging from the parties' lawyers to expert witnesses and even court officials.

Background

Two residents close to the Luna Park amusement park on Sydney Harbour foreshore were annoyed by allegedly high noise levels from amusement activity at the park. They brought proceedings in the NSW Supreme Court for injunctions against the operator of the park and the company which was the operator's largest shareholder. These proceedings were aimed at reducing the noise levels. The residents claimed that the noise levels were a nuisance to the enjoyment of their properties.

While the proceedings were in their preliminary stages, the Court gave directions for the filing of affidavits and the exchange of expert reports. It was common ground that these were the subject of implied undertakings or obligations to the Court imposed on the parties by law.

Two persons, one the managing director of Luna Park's operator, and another, who held official positions with companies related to the operator and was active in serving the operator's business interests, disclosed documents covered by the implied undertaking or obligation to the NSW Minister for Tourism, Sport and Recreation and her staff. The object of this was to have the NSW parliament enact legislation to protect the operations of Luna Park from claims for noise nuisance. As it turned out, this objective was successful, with such legislation coming into being.

The residents, who were plaintiffs to the proceedings, moved to have these two persons dealt with for contempt of court for breaching the implied undertaking or obligation applying to the documents.

In the New South Wales Court of Appeal

At first instance, it was held that the two persons were not personally bound by the undertaking or obligation. However, on appeal by the plaintiffs to the NSW Court of Appeal, this ruling was overturned by a majority. The two persons then obtained special leave to appeal to the High Court seeking restoration of the decision at first instance.

In the High Court

The High Court unanimously dismissed the appeal, rejecting the argument that the persons, as non-parties to the proceedings, were not bound by the undertaking.

In the main judgment of the Court, Hayne, Heydon and Crennan JJ said:

> [the] obligation would be of very limited protection if it were only personal to the litigant, which is why it is often said to be extended also to a litigant's solicitor, industrial advocate or barrister, and also to third parties like a shorthand writer or court officer. For that reason the authorities recognise a broader principle by which persons who, knowing that material was generated in legal proceedings, use it for purposes other than those of the proceedings are in contempt of court (see para [103]).

They went on to reject the proposition that there must be specific knowledge of the undertaking on the part of those bound by it of its existence, saying:

> There is no support in the authorities for the idea that knowledge of anything more than the origins of the material in legal proceedings need be established. In particular, there is no support for the idea that knowledge of the 'implied undertaking' and its consequences should be proved, for that would be to require proof of knowledge of the law, and generally ignorance of the law does not prevent liability arising (see para [112]).

It was not contended that a disclosure of the documents to a minister of the Crown with a view to the parliament changing relevant legislation constituted an exemption from the undertaking, nor involved any issue of parliamentary privilege (see paras [84] and [85]). Kirby J, though, thought that there were issues in these areas that warranted argument (see para [45]).

Implications

The decision affirms that an implied undertaking is an involuntary obligation of substantive law arising from circumstances in which the material was generated and received. It also affirms the important role played by implied undertakings in the conduct of litigation, and the binding

effect of these undertakings beyond the parties themselves to other persons in some way involved with the parties in the conduct of litigation.

AGS Legal Briefing on implied undertakings

For further information on implied undertakings, please see AGS Legal Briefing No. 75, 'Implied undertakings in litigation' (14 September 2005), authored by AGS Chief Counsel, Litigation, Tom Howe QC.

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