Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich (Bermuda) [2003] UKPC 11 (29 January 2003)

ADVANCE COPY

Privy Council Appeal No. 93 of 2001

Associated Electric & Gas Insurance Services Limited *Appellant*

v.

European Reinsurance Company of Zurich *Respondent*

FROM

THE COURT OF APPEAL OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 29th January 2003

Present at the hearing:–

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hobhouse of Woodborough
Lord Millett
Sir Christopher Staughton

*[Delivered by **Lord Hobhouse of Woodborough**]*

---

1. This appeal concerns the scope of the principle of privacy in commercial arbitration. The parties are two insurance companies. By an agreement dated 31 March 1980 Associated Electric & Gas Insurance Services Ltd of Hamilton Bermuda, a company incorporated under the laws of Bermuda, ("Aegis") entered into an automatic facultative reinsurance agreement with European Reinsurance Company of Zurich ("European Re"). The agreement included an arbitration clause providing for a panel of three (two arbitrators and an umpire) with Bermuda as the *situs* of the arbitration. Two separate disputes regarding the obligation of European Re to indemnify Aegis were referred to arbitration under this clause. The first in time was referred to a panel chaired by Mr Stewart Boyd QC which issued a speaking award (entitled "First Partial Award", but in fact final and decisive of the critical dispute in that arbitration) dated 19 January 2000. The second dispute was referred to a differently constituted panel chaired by Miss Phillippa Rowe. In the Rowe arbitration, European Re want to rely upon the award in the Boyd arbitration. Aegis contend that they are not at liberty to do. Aegis submit that European Re may not show any part of the Boyd

award to the Rowe arbitrators as it would breach the confidentiality of the Boyd arbitration. Aegis obtained an *ex parte* injunction to restrain European Re. European Re applied to discharge the injunction. Mr Justice Dennis Mitchell refused the application and continued the injunction. European Re appealed. The Court of Appeal allowed the appeal and discharged the injunction. Aegis have appealed to your Lordships' Board seeking the reinstatement of the injunction. Both before the Court of Appeal and before this Board appropriate steps were taken to protect the claimed confidentiality pending the decision of the appeal.

2. The injunction restrained European Re "from disclosing any part of the First Partial Award dated 19 January 2000 rendered by Stewart Boyd QC, Thomas V A Kelsey and Francois Negrier to any third party including the arbitral tribunal consisting of Phillippa C Rowe, Caleb L Fowler and John Butler". Aegis have to demonstrate that they are entitled to this injunction.

3. Aegis is a mutual insurance company. Its business is to issue excess of loss liability policies to its members, mostly United States utility companies. From about 1978 to 1984, it took out reinsurance cover with European Re. In 1978 and 1979 this was done by way of specific facultative certificates; from January 1980 it was done under an "Automatic Facultative Reinsurance Agreement". This was the agreement which contained the arbitration clause under which both of the arbitrations were held. It provided:

> "Article X ARBITRATION
>
> Any disputes arising out of this agreement or concerning its interpretation or validity shall be resolved on a friendly basis and in accordance with current reinsurance practice rather than strictly according to the letter of the law.
>
> All such disputes shall be referred to a Court of Arbitration which shall consist of two arbitrators, one to be appointed by each party, and an umpire who shall be appointed by the arbitrators before they have studied the case material. The arbitrators and the umpire shall be active or retired officials of companies or underwriters carrying on a similar type of insurance or reinsurance business to that covered hereunder.
>
> If either party fails to appoint an arbitrator within three weeks after being requested in writing by the other party to do so, or in the event of the arbitrators failing to agree as to the appointment of the umpire within an identical period after their own appointment, such arbitrator or umpire shall be appointed by the Secretary General at the time of the Court of Arbitration of the International Chamber of Commerce at the written request of either party.
>
> The procedure shall be at the discretion of the Court of Arbitration appointed for a particular dispute, whereby it shall dispense as far as possible with all legal formalities. It shall pronounce on the distribution between the parties of costs and charges. The ruling of the Court of Arbitration shall be in writing, stating the reasons for its decision and be signed. If one of the arbitrators refuses to sign the decision, this shall have no bearing on its validity. The decision shall be reached within three months after the constitution of the Court of Arbitration.
>
> Otherwise the stipulations of the law of the country in which the Company is domiciled shall be applicable to this arbitration clause and to the agreement of which this clause

forms a part, and the appointed Court of Arbitration shall have its situs in that same country."

4. This clause, besides providing for disputes to be referred to arbitration also contained provisions stating on what basis those disputes should be determined. Thus the first paragraph provides that it shall be "in accordance with current reinsurance practice rather than strictly according to the letter of the law" and the final paragraph provides that "otherwise" the law of the country in which "the Company" is domiciled is to be applied, that is to say, Aegis and the law of Bermuda. The correct interpretation and application of these provisions was an important and, in the submission of European Re, a critical and ultimately decisive dispute in the first, the Boyd, arbitration between Aegis and European Re. It is the dispute which is dealt with and determined in the relevant paragraphs of the Boyd award. What European Re say is that the same dispute has again been raised on the pleadings in the second, the Rowe, arbitration between the same parties. The purpose and effect of the injunction obtained by Aegis was to stop European Re referring to the award in which the Boyd arbitrators had decided the issue and thereby preclude European Re from raising a plea of issue estoppel in the second arbitration.

5. Aegis raise two arguments in support of the injunction. First they say that to disclose the Boyd Award or any part of it to the Rowe arbitrators would involve a breach both of the ordinary principles of the privacy of arbitrations and more specifically of the stipulations of an express agreement made during the Boyd arbitration itself. Second, although they do not challenge the *bona fides* of European Re, they submit that the plea of issue estoppel is so lacking in merit that it is an abuse of process to raise it in the Rowe arbitration and negatives any justification for referring to it in that arbitration.

Confidentiality:

6. In support of their claim to be entitled to the injunction Aegis relied upon the general principle of privacy in arbitration proceedings: *Dolling-Baker v Merrett* [1990] 1 WLR 1205, analogous to the duty of secrecy as between banker and customer. But, more particularly, they relied upon an express provision which had been included in agreed procedural directions given in the Boyd arbitration on 6 February 1998. This provision thus represented both the agreement of the parties, Aegis and European Re, and the direction of the arbitrators. The directions were signed both by the parties and by the arbitrators. The provision read:

"Confidentiality

30.The parties, their lawyers, and the Court of Arbitration agree as a general principle to maintain the privacy and confidentiality of the arbitration. In particular they agree that the contents of the briefs or other documents prepared and filed in the course of this proceeding, as well as the contents of the underlying claim documents, testimony, affidavits, any transcripts, and the arbitration result will not be disclosed at any time to any individual or entity, in whole or in part, which is not a party to the arbitration between AEGIS and European Re.

31.The parties acknowledge that certain AEGIS' claims documents and information, such as coverage opinions and communications with defense counsel, may be subject to attorney-client, work product, and or other privileges and immunities. Any disclosure by AEGIS to European Re of such documents and information will be made with the expectation of privacy and for the sole purpose of this arbitration. By disclosure of underlying claims information to European Re for this purpose, AEGIS does not intend to

waive, nor should be construed to waive, any privilege that may apply to such documents and information as to third-parties to this dispute.

32.It is understood that, despite this confidentiality agreement, parties to this arbitration may consult with their experts and share necessary information with those experts and that parties to this arbitration may contact, interview, and request documents from non-parties. It is understood that any documents obtained from third parties must be produced to the other party in order to be submitted to the Court of Arbitration.

33.In the event members of the Arbitration Tribunal retire and new members are appointed, information described in paragraphs 30 and 31 above can be shared with the new Court of Arbitration without violating the confidentiality provision.

34.If either party receives a subpoena from anyone seeking information concerning this arbitration, notice of that subpoena shall be provided immediately to lawyers for the other party so as to afford the opposing party the opportunity to oppose or seek protection from such subpoena.

35.Nothing in this Order shall be construed to preclude European Re from reporting to its retrocessionaires, compliance with rights of inspection (if any), or otherwise enforcing its rights against retrocessionaires, subject to European Re taking reasonable steps to ensure that retrocessionaires respect the confidentiality of that information.

36.Nothing in this Order shall be construed to preclude either party from sharing information with its auditors or regulatory authorities, subject to the party taking reasonable steps to ensure that the recipients of this information respect the confidentiality of that information.

37.Within thirty (30) days of the final disposition of the last gradual pollution claim subject to arbitration, each party will destroy all material obtained from the other party in discovery, and will provide assurances at that time to each other that these materials have been destroyed."

7. A striking feature of these series of paragraphs is that, besides the statements of principle in the first two paragraphs, there are included a number of detailed paragraphs creating express exceptions to what has gone before. Thus paragraph 33 even deals with the situation should an arbitrator retire and be replaced. Likewise, other paragraphs make express provision for the destruction of material (paragraph 37) or the resistance of subpoenas (paragraph 34). The clear impression is that the confidentially agreement is, as a whole, intended to be exhaustive. Aegis rightly point out that it grants no permission to communicate anything or provide any documents relating to the Boyd arbitration to the arbitrators in any other arbitration. Indeed, paragraph 30 expressly provides that "the arbitration result will not be disclosed at any time to any individual or entity, in whole or in part, which is not a party to the arbitration". These are powerful arguments but they have to be evaluated having regard to the surrounding circumstances in which this confidentiality agreement was made and the basic principles and purpose of arbitration.

8. The relevant circumstances arise from the fact that the insurances were liability insurances. The original assured were the members of Aegis who had received claims from third parties and

might well receive further claims; Aegis were indemnifying their members in respect of their liabilities; European Re had provided reinsurance in respect of those risks. The documentation exchanged or generated during the arbitration would inevitably include material which might be of value to persons with interests adverse to Aegis or their members and European Re. Hence the need to preserve confidentiality and lawyer/client privilege. But the otherwise legitimate use of an earlier award in a later, also private, arbitration between the same two parties would not raise the mischief against which the confidentiality agreement is directed.

9. The other factor to be taken into account is more fundamental. The essential purpose of arbitration is to determine disputes between the parties to the arbitration. Historically this was what the function of arbitrators was – to say who was right. The decision of the arbitrators could, as a result of the authority given to the arbitrator by the parties' agreed submission to arbitration, declare what were the rights and liabilities of the parties and bind the parties by that declaration. Enforcement lay with the courts. Common law remedies were available besides statutory ones. It is possible to sue on the award or for damages for failing to honour the award; or to rely upon the award as having conferred a right or determined a fact. An example of the latter from 1836 is the case of *Sybray v White* 1 M & W 435, where the horse of one of the parties had been killed by falling down an unsafe mine shaft. The other party disputed that he was the owner of the shaft and that dispute was by agreement referred to the arbitration of a 'jury' of 5 miners. They found that the defendant was the owner of the shaft. The plaintiff was entitled to rely upon this finding in his action against the defendant for the loss of the horse. Statutes and International Conventions have since facilitated the direct enforcement of awards with a minimum of formality but still ultimately requiring the assistance of the judicial system. But the situation remains that the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties. As section 58 of the UK Arbitration Act 1996 says, "... an award made by the tribunal pursuant to an arbitration agreement is final and binding ... on the parties". It is an implied term of an arbitration agreement that the parties agree to perform the award. In *Bremer Oeltransport Gmbh v Drewry* [1933] 1 KB 753, 760 the Court of Appeal adopted the statement "A submission by consent ... implies an agreement to perform the award; upon which an action will lie for non– performance. The action may be in the form of a claim for debt or damages, or for specific performance". Slesser LJ added at p 764 "in an action on the award the action is really founded upon the agreement to submit the difference of which the award is the result".

10. Proceedings in both of the arbitrations were and are governed by the law of Bermuda, the situs of the arbitration and the domicile of Aegis. Under the law of Bermuda, the relevant provision for an international arbitration is the UNCITRAL Model Law on International Commercial Arbitrations of 1985. (The Bermuda International Conciliation and Arbitration Act 1993, section 23 and Schedule 2). The Model Law contains provisions to the same effect as those their Lordships have already cited from the English law.

> "Article 7(1)
>
> 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. …"
>
> Article 31(2)
>
> The award shall state the reasons upon which it is based …"
>
> Article 35

> (1) An arbitral award irrespective of the country in which it was made shall be recognised as binding and, upon application to the competent court, shall be enforced.
>
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof ..."

Sections 45 and 46 of the Bermudan Act empower a court hearing any proceedings under the Act to hear those proceedings otherwise than in open court and to restrict any reporting or publication of the proceedings or any information divulged. The rights of privacy of the parties can accordingly be protected notwithstanding the court proceedings. The New York Convention on the Recognition and Enforcement of Foreign Arbital Awards, 1958, is also part of the law of Bermuda (Part IV and Schedule 3 of the Act) and makes similar provision for the recognition and enforcement of arbitral awards using similar phraseology. Section 40(2) of the Act indeed uses more specific language:

> "Any Convention award which would be enforceable under this Part shall be treated as binding *for all purposes* on the persons as between whom it was made, and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bermuda and any reference ⋯ to enforcing a Convention award shall be construed *as including references to relying on such an award*." (emphasis supplied)

The Act and the Model Law thus confirm the duty to perform the award, *ie* recognise and respect the rights which it declares.

11. Taking these factors into account in construing this confidentiality agreement, that is to say, the mischief at which the clause is directed and the fundamental purpose of an arbitration agreement, it becomes clear that it should not be construed so as to prevent one party from relying upon an award as having given him rights against the other. But that is what the application for an injunction sought to achieve.

12. Aegis however also relied upon the Model Law as supporting several counter arguments. They submitted that it showed that there could be no such thing as issue estoppel in arbitration in Bermudan law since, in contra-distinction to cause of action estoppel, issue estoppel was no more than an evidentiary principle and procedural and evidentiary matters were wholly within the control of the arbitrators and created no substantive rights. They further submitted that the mere decision of an issue in the course of an arbitration was not part of the actual decision of the arbitrators and therefore they were not bound by it. These submissions were used to support both the first and the second of their arguments.

13. It will be appreciated that, if the prohibition in the first paragraph of the confidentiality agreement that any disclosure of the arbitration result to any individual or entity was to be given an unrestricted construction, it would mean that any award would be unenforceable. The result of the arbitration is embodied in the award or awards of the arbitrator. If the winner is precluded from referring to the award, he cannot enforce it whether as a declaration of his rights or as a monetary award. This would be fundamentally inconsistent with and frustrate the purpose of the arbitration. Mr Stephen Moriarty QC, who appeared for the appellants, Aegis, accepted in argument that he could not as a matter of the construction of the clause go that far. He accepted that the clause would not stop a party from applying to a court for the enforcement of the award. But, he said, that was not the case here. Reliance upon an issue estoppel was not the enforcement of the award; showing the award to arbitrators in a separate and later arbitration was not the same as showing it to a court in legal proceedings to which it was germane.

14. For the purpose of evaluating this argument, one must assume that the plea of issue estoppel is prima facie sound – that the issue was decided in the previous award as part of the necessary reasoning of the arbitrators in determining the dispute submitted to them. On this hypothesis, the decision was a decision which decided as between Aegis and European Re what was the correct construction of Article X of the reinsurance agreement. It established what were the rights of the parties under that Article. *Ex hypothesi*, Aegis are seeking in the second arbitration to dispute that the parties have those rights, contrary to the earlier award. How can European Re enforce the earlier decision? The answer is by pleading an issue estoppel.

"Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute which is referred to that tribunal." (per Diplock LJ [1966] 1 QB 630 at 643, *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1QB 630, 643 per Diplock LJ: see also Lord Denning MR in the same case at p 640)

European Re's case in the Rowe arbitration is that the decision of the Boyd arbitrators in the Boyd arbitration was relevant to, indeed, decisive of the Boyd Arbitrators' determination of the dispute referred to them. Thus, they say, it gave rise to an issue estoppel which they can rely upon in the Rowe arbitration; for Aegis to raise again the same dispute in the Rowe arbitration amounts to a failure by Aegis to recognise and perform the earlier award and therefore does not infringe the stipulations of the confidentiality agreement properly construed.

15. Their Lordships consider that, on the stated hypothesis, the argument of European Re is correct. The Boyd award has conferred upon them a right which is enforceable by later pleading an issue estoppel. It is a species of the enforcement of the rights given by the award just as much as would be a cause of action estoppel. It is true that estoppels can be described as rules of evidence or as rules of public policy to stop the abuse of process by relitigation. But that is to look at how estoppels are given effect to not at what is the nature of the private law right which the estoppel recognises and protects. For example, a party who has attorned to another is estopped from denying that he holds the relevant goods for that other; the attornment has created a legal relationship and legal rights which the attorning party must recognise. The same applies to where arbitrators have, pursuant to the submission of a dispute to them, decided an issue; that decision then binds the parties and neither party can thereafter dispute that decision. Aegis submitted that Bermudan arbitration law and the Model Law contradicted this. Their Lordships do not accept this submission. It was closely examined by the Court of Appeal and their Lordships agree with their conclusion.

16. For the sake of completeness, it should be added that the use in later distinct proceedings of the *Henderson v Henderson* principle *(1843) 3 Hare 100* may fall on the other side of the line since that principle relates to issues that might have been raised but were not and therefore depends not upon matters of decision but upon matters which might have been decided but were not. In further stages of the same set of proceedings no distinction need be made. But in distinct unrelated proceedings, it is essentially an abuse of process concept not an established right concept and includes an element of the evaluation of the circumstances and the exercise of a discretion which is not present in issue estoppel properly so called. It is upon issue estoppel that European Re seek to rely in the Rowe arbitration. Here the relevant issue was strongly in contention in the Boyd arbitration and the subject of full argument on both sides and a reasoned

decision by the Boyd arbitrators. (*cf* the situation postulated by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] AC 853 at 917; and see Lord Denning MR *loc cit sup*). Therefore any qualifications which may need to be introduced to accommodate some uses of the *Henderson v Henderson* principle are not relevant here.

17. As mentioned earlier, Aegis argue that the decision of the Boyd arbitrators on the Article X point was not, on the correct reading of their award, actually part of the decision of the dispute submitted to them. This argument appears to be based upon the submissions that a decision regarding the law to be applied is not a decision as to any substantive right and that it was in any event not a material part of their reasoning since it appears, so they argue, that the arbitrators would have decided against them on other grounds as well. These are arguments which go to the merits of European Re's issue estoppel plea not to its characterisation.

The Second Argument: the merits of the estoppel plea:

18. The present is not a case where Aegis are alleging that European Re are acting in bad faith in raising the issue estoppel plea. Aegis's second argument is that the plea was bound to fail so it ought not to be allowed to go ahead. It should not be treated as part of the enforcement of the Boyd award and therefore should not be treated as falling outside the ambit of the confidentiality agreement and should be restrained by injunction. Their Lordships do not accept this argument. If, as is their Lordships' opinion, the first of Aegis's arguments is not sound, the second can only succeed, absent bad faith, if the plea is obviously unarguable. If it is arguable, then it is for the Rowe arbitrators to consider its merits and rule upon it, not for the courts to preempt it by injunction nor for the courts to decide it in substitution for the Rowe tribunal. All the arguments advanced before the Board upon the merits of the plea will be open to Aegis in the Rowe arbitration. In these circumstances their Lordships do not think it desirable to enter upon a discussion of the merits of the plea nor upon the merits of the counter-arguments of Aegis. To do so would risk prejudicing the decision of the Rowe arbitrators.

Ali Shipping v Shipyard Trogir:

19. In the Court of Appeal and in argument before the Board, extensive reference was made to the judgment of Potter LJ in the English Court of Appeal in *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314 and it is desirable to explain shortly why their Lordships have not chosen to refer to it in the main part of this judgment.

20. The present case involves the construction of an express confidentiality agreement and whether the later use of the award to support an issue estoppel comes within the scope of enforcement. For this reason more general statements concerning the privacy of arbitration proceedings and the duty of one party to respect the confidentiality of the other are of less assistance and relevance. The *Ali Shipping* case, like the present case, concerned the use in one arbitration of material obtained in an earlier arbitration with a view to supporting a plea of issue estoppel in the later arbitration. The parties were not however the same and the decision of the Court of Appeal to grant an injunction restraining the use of the material was based upon the view that the plea was clearly unsustainable. However Potter LJ, who delivered the leading judgment, having followed *Dolling-Baker v Merrett* (*sup*) affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term (p 326) and then to formulate exceptions to which it would be subject (pp 326-7). Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial

arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings (as Aegis referred to it for the purposes of the present injunction proceedings) or for the purposes of enforcing the rights which the award confers (as European Re seek to do in the Rowe arbitration). Generalisations and the formulation of detailed implied terms are not appropriate. But in any event, the *Ali Shipping* case provides no assistance for either argument of Aegis. It is interesting to note that the reasoning in the above referred to passages of the judgment of Potter LJ seem to have been strongly influenced by the description of the duty of confidentiality a banker owes to his customer given in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 both in the implied term and the exceptions to the duty. The *Tournier* case was not cited or expressly referred to in *Ali Shipping*. But the use of parallel reasoning in both cases shows that the court in *Ali Shipping* was not considering what rights an award gave rise to nor any question of what is involved in the enforcement of an award.

Conclusion:

21. Neither of the arguments advanced by Aegis suffice to justify the reimposition of the injunction and their Lordships therefore humbly advise Her Majesty that the appeal be dismissed with costs.

22. Their Lordships discharge the order made on 28th October 2002 postponing reports of the proceedings in this appeal and impose no restriction upon the publication of this judgment.