Unveiling the Veil of Arbitration Secrecy: The Supreme Court of Western Australia in Wright Prospecting v Hancock Prospecting

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Introduction

The issue of confidentiality in arbitration proceedings has been a subject of considerable debate and judicial scrutiny. The recent case of Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [2023] WASC 285 issued on 31 July 2023 in the Supreme Court of Western Australia provides a compelling backdrop to explore this complex issue. This article will delve into the nuances of confidentiality in arbitration, with a particular focus on the Wright Prospecting case, while also referencing other seminal cases that have shaped this area of law.

The Essence of Confidentiality in Arbitration: A Case Spotlight

Confidentiality is often cited as one of the key advantages of arbitration over traditional litigation. In the case of Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd, the court grappled with the issue of whether interim suppression or non-publication orders were necessary to prevent prejudice to the proper administration of justice. The case serves as a vivid

illustration of the delicate balance courts must strike between upholding confidentiality and ensuring open justice.

Judicial Tests for Confidentiality: The Wright Prospecting Lens

In Wright Prospecting, the court applied several judicial tests to assess the scope of confidentiality. One such test was the "necessity test," which is often used to weigh the need for confidentiality against the public interest in open justice. This test has its roots in the case of Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10, where the court held that the efficacy of private arbitration could be compromised if proceedings were made public.

Another judicial test is the "reasonable purpose test," which allows for the disclosure of confidential information if it is necessary for the establishment or protection of a party's legal rights in relation to a third party. This test was highlighted in the context of s 27F(5) of the Commercial Arbitration Act, a provision that was also considered in Wright Prospecting.

Caselaw Shaping Confidentiality: The Interplay with Wright Prospecting

The Wright Prospecting case does not exist in a vacuum; it is part of a rich tapestry of jurisprudence on the subject of arbitration confidentiality. In EBJ21 v EBO21, the court summarized the uniform confidentiality provisions of commercial arbitration legislation, emphasizing the importance of confidentiality but also noting that parties could opt out.

In R v Legal Aid Board; Ex parte Kaim Todner [1998] EWCA Civ 958; [1999] QB 966, the court emphasized that the parties' agreement on confidentiality was not determinative, thereby preserving the court's supervisory role. This principle was also evident in Wright Prospecting, where the court had to consider whether the orders sought were in the public

interest.

The Public Interest Conundrum: Lessons from Wright Prospecting

The Wright Prospecting case serves as a poignant reminder that while the principle of confidentiality is generally upheld, there are instances where the public interest in the administration of justice may necessitate a departure from this norm. The principle of open justice was a significant consideration in the court's decision, echoing sentiments expressed in Scott v Scott, where the House of Lords held that the court had no power to hear a suit in camera solely based on the parties' agreement.

Conclusion

The case of Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd serves as a crucial touchstone in the ongoing debate about the scope and limitations of confidentiality in arbitration proceedings. While the court upheld the general principle of confidentiality, it also made it clear that this is not an absolute right and must be balanced against other considerations, such as the public interest in open justice. This nuanced approach is consistent with earlier caselaw and provides valuable insights for parties considering arbitration as a dispute resolution mechanism.

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