File note

Telecom Arbitration

Date: 18 February 1994 **Matter no:** 1673136

On 17 February 1994, between the hours of 9:00 a.m. and 1:00 p.m., I attended the offices of Hunt & Hunt for the purpose of having a discussion in relation to the arbitration rules prepared by Hunt & Hunt (the "Rules").

The meeting started at 9:30 a.m. and in attendance were Gordon Hughes, Peter Bartlett, Ann Garms, Graham Schorer and myself.

Record of Meeting

Ann Garms started by attempting to read from a letter by R Davey (Austel) but was interrupted.

The history of the negotiations leading up to the fast track settlement procedure ("FTSP") was discussed.

Ms Garms stated that all the Cot Claimants wanted was a commercial settlement of the matter, not an arbitration. The FTSP came out of a proposal put by Mr Schorer to John Holmes and I Campbell.

Mr Schorer stated that the Cot Cases had wanted a loss assessor and not an assessment procedure prone to "fine print". The proposal put forward by the Cot Cases was not backed by Telecom and subsequently negotiations got off the rails. Then the Austel investigation began and the media became involved. R Davey acted as a facilitator between Telecom and the Cot Cases. Previously, a draft agreement had been put to the Cot Cases which Telecom had stated would not be changed (which turned out to be incorrect).

The FTSP came out of several meetings and was put forward by R Davey.

Mr Schorer and Ms Garms agreed that the FTSP was the agreed way to resolve the dispute between Telecom and the Cot Cases.

Mr Schorer advocated that instead of having a claim, a break and then a defence being filed, both parties ie. the Cot Case and Telecom should do their presentation at the same time to the assessor. Mr Schorer did not like the arbitration procedure and the procedure he advocated was consistent with his understanding of the FTSP.

It should be noted that the FTSP does not refer to an arbitrator but an "assessor".

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Mr Hughes expressed his view that the powers of an arbitrator under the Commercial Arbitration Act made an arbitration a more effective way of determining the issues in dispute between the parties.

Mr Hughes stated the problems with an "assessor" were that it was a toothless position and that he was not convinced that it could guarantee the result as either party could withdraw or would not be bound by the result.

Mr Schorer asked if he could pull out of an "assessment" during the process if he did not like the way it was going. Mr Hughes and Mr Bartlett advised that this was not the case as he was contractually bound by whatever the terms of the assessment were.

Mr Hughes stated that an arbitrator had more powers and considering the current facts surrounding the Cot Cases ie. suspicions and the long period of antagonistic negotiations, the adjudicating party would need powers to ensure that all material relevant for the decision was obtained.

Mr Bartlett stated that Telecom and the Cot Cases wanted a method of resolution as a final settlement of the problem - no right of appeal, no resource to the Courts.

Ms Garms agreed with this conclusion.

Mr Schorer stated that he needed documents from Telecom to prepare his case and without this material, he could not go to arbitration. Mr Schorer had raised the issue of documents with Austel and was unsatisfied with Telecom's response.

Mr Schorer stated that there was nothing in the Rules which provided that the Cot Cases were to get the relevant documents. Mr Schorer was disappointed at this stage that since 18 November 1993 2 of the Cot Cases did not have any documents.

Mr Bartlett stated that this was a reason for starting the arbitration as the arbitrator could order the production of documents.

Mr Hughes stated that he was aware of the dispute between the parties but did not have any idea as to the nature and indicated that from this point in time, there were two ways to proceed in relation to the problem of outstanding documents:

(1) the procedure is put on hold until all the documents are exchanged in accordance with the FOI procedure; or

(2) the arbitration procedure commences and then the arbitrator gives appropriate directions for the production of documents.

Mr Hughes indicated that one party can ask for documents once the arbitration has commenced. Mr Hughes advocated this course of action as more effective and that as arbitrator, he would not make a determination on incomplete information.

Mr Schorer asked Mr Bartlett why the FOI law was not as broad as the discovery procedure.

Mr Bartlett did not answer this question directly but confirmed that he believed it was wider and that documents would not be partially deleted as was claimed by Mr Schorer.

Ms Garms stated she had three concerns about the Rules as drafted:

(1) causal link;

(2) flow on effects of treatment by Telecom - adequately compensated; and

(3) Telecom's liability amended to give assessor the right to make recommendations.

Causal Link

In relation to this matter, Ms Garms stated that it was agreed that there would not be a strict application of legal burdens of proof, etc., in relation to the proving of the loss suffered by the Cot Claimants. Reference was made to discussions with Ian Campbell and two Senators. Ian Campbell admitted that Telecom had been remiss. Ms Garms stated that Telecom was in a difficult position and queried the current drafting of the Rules in relation to a requirement that the strict causal approach be applied.

Mr Schorer stated that Telecom was in a difficult position because a lot of the relevant documents either did not exist or had been destroyed.

Mr Bartlett referred to clause 2(c), (f), and (g) of the FTSP in relation to the causal connection. Ms Garms had received advice from R Davey that there was a difference between the FTSP and the old rules that had previously been prepared by Telecom, (not the Hunt & Hunt Rules).

Mr Schorer accepted that W Smith had been appointed as administrator. W Smith had invited the Cot Cases to talk to the TIO and had requested input in relation to the rules beforehand. Mr Schorer was disturbed that once Mr W Smith was in place, there was a document prepared by Telecom of proposed rules for the arbitration. Mr Schorer considered Telecom was already moving away from the spirit of the FTSP.

Mr Bartlett and Mr Hughes both stated that they had not received this document and had not read it and that it was irrelevant.

Ms Garms returned to discussion about causation which was her point no. 1.

She stated that clause 10.2.3 was not consistent with the FTSP.

Mr Schorer agreed with this and stated that "accepted legal principles" were narrower than the "reasonable burden" that had previously been discussed between R Davey and himself. Mr Schorer believed that R Davey had said that the "assessor" would look at the whole history and would base his decision on reasonable evidence.

Mr Hughes queried whether clause 10.2.3 was deleted, this would reflect what the Cot Cases believed was the result in relation to the issue of causation.

Mr Schorer stated that he did not like all of clause 10.2.3, not just the reference to accepted legal principles.

Ms Garms stated that she had spoken to R Davey re causation and that R Davey should contact Mr Hughes to explain what was agreed in relation to the causation issue.

Mr Schorer referred to Lovey's Restaurant by way of example of the problem when one party alleges that telephone calls did not come through, how it is necessary in relation to a legal burden to prove the loss from each telephone call.

Mr Bartlett asked how would the assessor be expected to calculate the quantum of the claim?

Mr Schorer replied there were several ways, for example the arbitrator could:

(1) look at the incoming and outgoing calls and the volume of the business and look at the background to the business; or

(2) look at similar businesses and breakdown of calls coming in and look at the positioning in the market etc. of the business.

Mr Hughes said that he would consider the Cot Cases position on the causation issue at a later time.

Clause 2.C

Ms Garms states that the Rules should be amended particularly schedule A to reflect clause 2.C of the FTSP which seemed to relate to her claim that the assessment of the damage suffered by the claimants should include "flow on" losses, including pain and suffering, etc.

Ms Garms stated that if Telecom had taken different action in relation to the settlement of this matter Ms Garms would have adopted a different approach and subsequently damage would have been reduced.

Mr Schorer stated that if the past treatment or lack of processes or behaviour by Telecom had caused further losses beyond the mere business losses relating to the faulty telephone services, then they should be assessed.

Mr Schorer agreed that what he was trying to say was that if the "flow on losses" due to the past relationship between Telecom and the claims were proved to be caused by Telecom's behaviour then the arbitrator could decide that they should be compensated.

Mr Bartlett referred to Schedule A(3) of the Rules.

Mr Hughes suggested that if paragraph 2(c) of the FTSP was inserted in the Schedule then it would remedy the Rules in relation to the flow on losses.

Mr Schorer queried whether the assessor's role was only to establish the legal liability and quantum, whatever the cause of action, not just the quantum in torts but the total liability including other causes of action.

Mr Hughes stated that the clause 10.1.1 did not limit Telecom's liability to Telecommunications Act and it was queried whether it would be appropriate to insert in clause 10.1 after the expression "liability" the phrase "in the procedure".

Ms Garms stated that previously Telecom had pleaded that Telecommunications Act in defence to the actions by the Cot Cases.

Mr Hughes stated that Telecom is in a position to plead the Act.

Ms Garms queried whether because of the history of the complaint whether Telecom was entitled to rely on the exemption as its defence.

Mr Bartlett and Mr Hughes stated that the arbitrator could make an order notwithstanding the fact that statutory liability would prevent the award of damages.

Mr Hughes suggested that the word "demonstrated" in clause 10 should be deleted and that clause 10 should incorporate paragraph 2(g) of the FTSP.

Both Mr Bartlett and Mr Hughes were to review the Rules.

Mr Schorer referred to clause 11 of the Rules and stated that he did not like it.

Mr Hughes stated that "compensatory" referred to actual loss where "punitive" implies some form of punishment of the guilty party. Mr Hughes stated that in determining the amount payable by Telecom, it was the loss suffered that was relevant, not the fact that Telecom's behaviour was deserving of punishment.

Ms Garms stated that the manner in which things have been conducted in the past was relevant to the quantification of the loss. Ms Garms stated that her problems went back to 1984. Ms Garms referred to the fact that her husband could no longer work and suffered from agoraphobia, has panic attacks, is withdrawn and unhappy.

Ms Garms stated that Telecom knew of her anxiety in relation to her husband's behaviour and asked how his personal claim would be dealt with.

Mr Bartlett referred to "losses" and the FTSP.

Mr Schorer said that there should be an ability in the arbitration to add to the liability and that "loss" was not just to be based on trading documents. He had raised this question with R Davey who had replied that "loss" was the widest possible term and it would cover things like pain and suffering.

R Davey gave verbal advice. Telecom was not present during this meeting.

Mr Bartlett stated that the Rules and that the FTSP was focused on "compensation" and that the actual loss that was to be compensated would include the monetary loss plus any other loss capable of compensation.

Mr Bartlett stated that compensatory damages and not punitive damages were appropriate.

Ms Garms stated that she wanted the full loss that was proved to be compensated and not just commercial loss.

Paragraph 2(c) of the FTSP was referred to.

Mr Hughes advised that "punitive" damages should not be payable by Telecom.

Mr Hughes advised them that "compensatory" was the appropriate measure and it would be a matter for the arbitrator what amount of loss should be recovered.

Ms Garms stated that R Davey, after she had expressed her dissatisfaction with her previous treatment and that she was not happy with the settlement, etc. and that these matters should be taken into account in determining the "loss".

Mr Hughes advised that what loss was compensated by the FTSP was open to argument.

Mr Schorer referred to a letter of understanding that was sent to R Davey.

R Davey had rung up Mr Schorer about the letter of understanding.

Mr Schorer admitted that he was stuck with the FTSP.

Mr Schorer stated that J McMahon had also been present in the room when R Davey had referred to the question of loss.

R Davey had asked whether he should send the "letter of understanding" to Telecom and had objected to the use of a tape recorder.

Mr Bartlett stated that any loss claimed should be set out in the points of claim document and evidence should be given if the word "losses" was meant to be wider than monetary losses.

Ms Garms stated that she had trusted R Davey and that the assessment of the losses were up to the assessor.

Mr Hughes stated that it was his opinion that this matter should be left to the arbitration at which time he would hear submissions on the meaning on the word "losses" in the arbitration procedure and at that point he would make his determination as to what sort of losses would be compensated by Telecom.

Mr Schorer again referred to the fact that he had considered a joint presentation would be more appropriate.

Mr Bartlett confirmed that he believed a joint presentation would be unhelpful as Telecom would not have an appreciation of the Cot Claimants' claims.

Mr Bartlett stated that the proposed procedure would be faster than the method proposed by Mr Schorer.

Mr Schorer stated that the current procedure as proposed takes the onus off the plaintiff and the procedure should accept that losses have occurred.

Mr Hughes stated that as arbitrator, he must have all relevant information that after he received the claim, he would look at Telecom's defence and look at what other evidence he needed to satisfy himself that he had everything.

Ms Garms stated that to date, the procedure of the dispute had been long and drawn out and that Telecom knew the substance of the claimants' defence and that she wanted the time frames shortened.

Mr Hughes stated that he would be happy to reconsider the time frames issue after submission.

Ms Garms referred to a letter where it was stated that these matters were to be settled by the end of April.

Ms Garms requested an explanation of the Commercial Arbitration Act 1984.

Mr Bartlett and Mr Hughes agreed that Mr Bartlett would send to Ms Garms Queensland legal advisers a copy of the Victorian Commercial Arbitration Act.

Mr Schorer was still unhappy with the structure of the procedure on the basis that Telecom knew what everything was about and therefore he would be unhappy for any departure from the joint presentation method that was discussed with him prior to signing the settlement.

Mr Hughes said that he disagreed with the method proposed by Mr Schorer and that it would be appropriate to have a claim document and then a defence document filed.

Ms Garms referred to the fact that she had attempted to contact Coopers & Lybrand and they had advised her that she was no longer to approach them for documents and that it was appropriate for her to go to Telecom and not Coopers & Lybrand.

Mr Schorer put forward a proposition of the compromise in relation to the joint presentation but Mr Hughes confirmed that a claimant can always come back and reply to the loss submissions of the other party considered appropriate by the arbitrator.

Mr Hughes asked when Ms Garms and Mr Schorer would be in a position to file claim documents.

Ms Garms stated that she needed documents that were currently being sought through an FOI application but that she was currently preparing her claim.

Mr Hughes indicated that he would be happy to receive documentation and a letter explaining her claim and a letter from Telecom broadly stating its claim and documents dealing with it and then he would meet with Mr Bartlett and discuss the appropriate time frame.

Ms Garms stated that she was putting together her claim and that she had written to Telecom re the Bell Canada and Cooper & Lybrand reports. Ian Campbell had promised that Telecom would give Telecom's response to the reports and further testing results to her. Telecom had not complied with this.

Mr Schorer indicated that he would not start the arbitration until he had the full documents and that was his present position.

Mr Hughes argued that once the procedure was up and running, it would be easier for him to obtain documents.

Mr Schorer was emphatic that he would not waive any rights in relation to documents that could be obtained under the FOI request if they were obtained in the litigation by way of "discovery".

Mr Schorer reiterated that he would not waive his rights.

Mr Bartlett queried the effect of the confidentiality of the arbitration in relation to this stance.

Mr Schorer argued that Telecom had been playing ducks and drakes in relation to the FOI application and that he had no intention to sell himself "down the river".

Mr Schorer stated that Telecom was denying access to documents to cover documents by the arbitration.

Ms Garms stated that Telecom had made concessions in relation to its statutory liability and that there should be a sense of give and take between itself and the Cot Cases.

Mr Schorer maintained its position that he should not waive his rights in relation to any documents he got under the arbitration which should have been provided by Telecom under the FOI application.

Mr Bartlett indicated that it would be difficult if after the submissions were made by the claimants and Telecom, if the matter was then debated in the press.

I stated that the request for confidentiality was fundamental to the arbitration although I have no instructions expressly in relation to the particular clauses.

Ms Garms stated that there was a lot of anger in the Cot Claimants which had been enhanced by Telecom's reluctance to provide the documents under the FOI application which had not been dealt with in a businesslike manner.

Mr Schorer maintained that he would not weaken his position as he considers himself in total conflict with Telecom until the matter was resolved.

Mr Schorer stated that both parties were not fully co-operating and it was like pulling teeth and that he was not going to weaken his position and that he was not going to give away anything as to what his concerns were but he would not give away his rights under the FOI Act. There were allusions to the fact that Mr Schorer believed he would discover incriminating things against Telecom that would give him further rights to be compensated.

Mr Schorer stated that if Telecom had acted in a reasonable manner he would have all the relevant documents and the documents would be his documents and any document obtained under FOI would be available to be used later and he was not going to remain silent on certain information for example, police tapping.

Mr Schorer stated that he believed Telecom had engaged in industrial espionage and he would not remain silent in relation to documents evidencing this.

Mr Bartlett indicated that in relation to a Court proceeding, if documents were used for other purposes than the actual proceeding, it would be contempt.

Mr Bartlett stated that if the evidence indicated illegal tapping and unfair means had been used then there may be some "moral" duty on the party to go forward.

I again confirmed the essential nature of confidentiality.

Ms Garms stated that she believed that from her sources a senate inquiry was definitely going to happen in relation to the telephone bugging.

Mr Schorer would not elaborate on his concern any further.

Mr Bartlett indicated that there may be a duty to disclose to the police criminal matters.

As there seemed to be a stumbling block in relation to this clause, Mr Schorer and Mr Bartlett went out of the room to draft a particular clause for him.

Ms Garms advised in Mr Schorer's absence that Mr Schorer's strained mental state was because of his rather tragic life which included his wife leaving him and a car accident subsequently that rendered one of his sons, now approximately 22-23 years old, a quadriplegic. Ms Garms stated that Mr Schorer's related anxiety was his family.

Mr Bartlett and Mr Schorer returned into the room and put forward the following proposal which was that:

> "If Mr Schorer believes that he should go to public in relation to a particular document or information, then he would ask Mr Bartlett and provide Mr Bartlett with reasons as to why he should go public, if Mr Bartlett says no, then Mr Schorer has a right of appeal to Mr Hughes whose determination will be absolutely final."

Mr Bartlett was asked as to what criteria he would apply and indicated that going to the press would have to "sit together" with the integrity and neutral position of himself and the arbitrator and the paramount concern of the arbitration being that the integrity of the fast track procedure should be maintained.

Ms Garms indicated that she would not require such a clause in relation to her and that she would not go to the press as she considered the arbitration procedure would be a final binding resolution of her dispute with Telecom. It appeared that Ms Garms spoke on behalf of the other claimants and that Mr Schorer was in a special position.

Subject to the above issue, Mr Schorer and Ms Garms agreed with Mr Hughes that if the amendments suggested were made they would be happy with the Rules. Mr Schorer indicated that this was subject to him receiving legal advice in relation to the final draft of the Rules.

Mr Hughes would send out a summary of today's meeting and suggested changes once he had received Telecom's suggested amendments and then he would deal with them.

Mr Schorer queried whether in the preparation of the claim they should be entitled to go to the Research Unit to see if the documents were put together properly. Mr Hughes indicated that he considered there was a risk that this would interfere with the independence of the research unit and therefore it was inappropriate. All the parties seemed to agree.

Points of Issue

Set out below are the main points of issue that were to be considered by Mr Hughes:

1. clause 10.2.3 should be deleted;

2. paragraph 2(c) of the FTSP was not reflected in the agreement and should be inserted in Schedule A;

3. the issue of "loss" covered by the arbitration should be left to submissions at the arbitration;

4. the question of confidentiality and Graham Scorer to be resolved;

5. in section 10, the word "demonstrated" should be deleted and that clause 2(g) of the FTSP should be included.

Robert McGregor

I subsequently had a meeting with S Chalmers and briefly went through the above.