SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2016 0008

JOSEPH ISAAC GUTNICK & ANOR

v

INDIAN FARMERS FERTILISER COOPERATIVE LTD & ANOR

JUDGES:	WARREN CJ, SANTAMARIA AND BEACH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	5 February 2016
DATE OF JUDGMENT:	9 February 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 5
JUDGMENT APPEALED FROM:	*Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (Croft J)

ARBITRATION – Enforcement of foreign award – Public policy ground for refusing enforcement – Whether enforcement of a foreign award that allows for double recovery would be contrary to public policy – Discretion to enforce where enforcement otherwise contrary to public policy – Role of the courts – *International Arbitration Act 1974* (Cth) ss 8(2), 8(7)(b) – *UNCITRAL Model Law on International Commercial Arbitration*, art 36(1)(b)(ii) – *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art V(2)(b).

EQUITY – Rescission of contract for the purchase of shares for fraudulent misrepresentation – Meaning of rescission – Whether consequential orders required to effect restitution – Revesting of equitable ownership of shares – *Alati v Kruger* (1955) 94 CLR 216 – *Kramer v McMahon* [1970] 1 NSWR 194.

APPEARANCES:	Counsel	Solicitors
For the Applicants	B W Walker SC with	Herbert Smith Freehills

P Kulevski

For the Respondents	N J Young QC with C J Horan SC and T Clarke	Ashurst Australia

WARREN CJ
SANTAMARIA JA
BEACH JA:

Introduction

1 On 21 December 2015, the judge in charge of the Arbitration List in the Commercial Court acceded to an application by the respondents, Indian Farmers Fertiliser Cooperative Ltd ('IFFCO') and Kisan International Trading Fze ('KIT'), under s 8(2) of the *International Arbitration Act 1974* (Cth) ('the Act') to enforce a foreign arbitral award handed down on 7 May 2015.[1] The award declared certain agreements involving the sale of shares to be rescinded and ordered the return of the purchase price with interest and costs.

2 The applicants, Joseph Isaac Gutnick ('Gutnick') and Legend International Holdings Inc ('Legend'), now seek leave to appeal from the orders made by the judge. Before the judge, and in this Court, the applicants contended that the award should not be enforced because enforcement would be contrary to public policy. In making that submission, the applicants relied, and rely, upon s 8(7)(b) of the Act, which provides:

> In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
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> …
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> (b) to enforce the award would be contrary to public policy.[2]

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1 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 ('Reasons').

2 They also rely upon art 36(1)(b)(ii) of the *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) ('Model Law'). The Model Law had its origins in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('the New York Convention'). On the relationship between the Act and the Model Law, see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 545–47 [6]–[11] (French CJ and Gageler J). In that case, the High Court dismissed a contention that the Act was contrary to Chapter III of the Constitution in so far as it required judges of the Federal Court to act in a manner that impaired the institutional integrity of the Court by not allowing it to consider an error on the face of the award as a valid reason to refuse enforcement.

3 Under the award, the arbitral tribunal made orders rescinding agreements relating to the purchase of certain shares as a result of fraudulent misrepresentations. The applicants contended that the award permits 'double recovery' by the respondents in so far as the award allows the applicants to have their money back and keep the shares.[3] Double recovery was then said to be contrary to public policy, and a ground for refusing to enforce the award. The respondents contended that the award did not involve any element of double recovery, the arbitral tribunal having declared the relevant purchase agreement rescinded and having ordered the repayment of the purchase price with interest. In the alternative, they contended that, even if the applicants could establish that the enforcement of the award was contrary to public policy, there were discretionary considerations that militated against the refusal of the respondents' application.

4 The judge accepted that the enforcement of an award which allowed for double recovery would likely be contrary to public policy.[4] However, the judge concluded that the award did not allow for double recovery.[5] The applicants now seek leave to appeal. Each of their proposed grounds of appeal is directed to the issue of whether the judge was correct in concluding that the award did not provide for double recovery by the respondents. While the judge acceded to the respondents' application to enforce the award, he held that the discretionary considerations relied upon by them would not have been relevant in the event that the public policy defence had been made out.[6] The respondents contended that the primary judge had a discretion to enforce the award, notwithstanding that it may be contrary to public policy and that, for various reasons, the discretion should be exercised in this case. The primary judge accepted that there was such a discretion, one to be exercised 'in the most exceptional of cases'.[7] Ultimately, he found it was not necessary to decide

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3 Reasons [38].

4 Ibid [39], [105].

5 Ibid [39], [122].

6 Ibid [121].

7 Ibid [111].

this point.[8] However, he said that, if it had been necessary, he would not have been satisfied that the discretion should be exercised in this case.[9] The judge's rejection of the respondents' arguments that the primary court's discretion should be exercised notwithstanding that the award may be contrary to public policy are pursued by the respondents in this Court by way of a notice of contention.

Background to the dispute

5 On 14 July 2008, IFFCO and Legend entered into a Share Options Agreement whereby IFFCO acquired the option to purchase shares in Legend. On the same day, IFFCO and Gutnick entered into a Shareholders' Agreement in order to regulate their relationship as shareholders in Legend. By an Affiliate Deed of Adherence, KIT agreed to be bound by the terms of the Shareholders' Agreement. Pursuant to the terms of these agreements, the respondents purchased 20 million shares in Legend for a total price of US$40.4 million.

6 The parties later fell into dispute, and subsequently referred their disputes to arbitration. The juridical seat and venue of the arbitration was Singapore, and the governing law of the agreements was that of England.[10]

7 An arbitral tribunal was appointed, and the tribunal conducted a hearing in May 2014. The tribunal rendered its final award on 7 May 2015. In the arbitration, the applicants were found to have induced, by fraudulent misrepresentation, the purchase by the respondents of the relevant shares in Legend by their entry into the Share Options Agreement and Shareholders' Agreement. The tribunal made the following award and orders:

> a. A declaration that the Shareholders Agreement and the Share Options Agreement are rescinded.
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> b. An order that [Gutnick] pay to the [respondents] the sum of US$28,050,000.00 together with interest from 14 July 2008 calculated at

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8 Ibid [108].

9 Ibid [119].

10 Ibid [7].

the rate of 5.33% per annum until the date of the Award.

c. An order that [Legend] pay to the [respondents] the sum of US$12,350,000.00 together with interest from 7 August 2008 calculated at the rate of 5.33% per annum until the date of the Award.

d. An order that the [respondents] are to pay the [applicants] the sums of SG$96,262.65 and US$35,250 as costs necessitated by or thrown away as the result of the amendments and the vacation of the original evidential hearing dates.

e. An order that the [applicants] pay to the [respondents] 80% of their legal and other costs for the conduct of the arbitration, to be taxed by the Registrar of SIAC if not agreed.

f. An order that the [applicants] bear 80% and the [respondents] bear 20% of total costs of arbitration which is SG$596,170.89, as determined by the Registrar of SIAC.

8 Subsequently, the High Court of Singapore granted the respondents leave to enforce the award in the same manner as a judgment of that court. However, the applicants have not complied with the tribunal's award and order, and KIT continues to hold the legal title to the 20 million shares in Legend purchased pursuant to the terms of the Share Options Agreement and the Shareholders' Agreement.[11]

The relevant legislative provisions

9 Section 8 of the Act relevantly provides:

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

…

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

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11 Ibid [10]–[11].

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

10 In the present case, the applicants' only ground for resisting the enforcement of the award was, and is, that the enforcement would be contrary to public policy. The applicants do not make any suggestion that the award was induced or affected by fraud or corruption or that any breach of the rules of natural justice occurred in connection with the making of the award.[12]

11 Section 39 of the Act requires a court considering the exercise of a power under s 8 to enforce a foreign award to have regard to 'the objects of the Act'[13] and 'the fact that … awards are intended to provide certainty and finality'.[14]

12 Section 2D sets out the objects of the Act as follows:

(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and

(e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and

(f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by

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12 Cf s 8(7A) of the Act.

13 *International Arbitration Act 1974* (Cth) s 39(2)(a).

14 Ibid s 39(2)(b)(ii).

Australia on 24 March 1975.

Proposed grounds of appeal

13 In support of their application for leave to appeal, the applicants contended that the trial judge departed from the established understanding of the equitable doctrine of rescission in respect of executed transactions by not recognising that rescission is not achieved until specific orders are made unwinding the transaction. Specifically, they contended that he erred in refusing to follow the 'correct and nuanced' approach of Helsham J in *Kramer v McMahon*,[15] which, they said, has been endorsed by subsequent decisions. Instead, they said that the trial judge adopted the illogical and general approach in *Horsler v Zorro*,[16] which was subsequently overruled by the House of Lords, primarily for being inconsistent with the judgment of Dixon J in *McDonald v Dennys Lascelles Ltd*.[17]

14 The applicants propose the following grounds of appeal:

1. The learned trial judge erred in holding that the declaration in paragraph 1 of the award effected *restitutio in integrum* as a matter of meaning and effect;

2. Further to ground 1 above, the learned trial judge erred in holding that, in an executed contract for the sale of shares in a foreign company, equitable relief to set aside the transaction is achieved by a declaration that the contract is rescinded simpliciter, and, further, that administration of the equitable remedy of rescission for an executed contract refers only to the declaration of rescission itself.

3. Further to grounds 1 and 2 above, the learned trial judge erred when he characterised, for the purposes of an executed contract for the sale of intangible property, the 'equitable remedy of rescission' with 'consequential orders which may be appropriate in any given case in order to restore the parties to their previous positions' as distinct matters of principle.

4. Further to grounds 1, 2, and 3 above, the learned trial judge erred in holding that the relief granted by the Tribunal in paragraph 1 of the award constituted equitable relief such that appropriate consequential

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15 [1970] 1 NSWR 194.

16 [1975] 1 Ch 302.

17 (1933) 48 CLR 457.

orders as contemplated in *Alati v Kruger*[18] were not necessary to give effect to the rescission and consequently holding that the declaration of rescission in the award necessarily entails the avoidance of the transactions from the beginning and the restoration of the parties to their previous positions;

5. Further to grounds 1, 2, 3 and 4 above, the learned trial judge erred in applying the decision of Megarry J in *Horsler v Zorro*[19] which was overruled by the House of Lords in *Johnson v Agnew*[20] because it was inconsistent with the more 'attractive' and 'logical' reasoning contained in the decision of Dixon J in *McDonald v Dennys Lascelles Ltd*.[21]

6. Further to grounds 1, 2, 3, 4 and 5 above the learned trial judge erred in holding that the 'purported rule' in *Kramer v McMahon*[22] did not restate the then existing doctrine of rescission, but rather extended the existing doctrine of rescission or, alternatively, added an element to the doctrine of rescission, such extension or addition being unsupported by the established authorities. His Honour should have applied *Kramer v McMahon* as representing the law on the equitable doctrine of rescission;

7. Accordingly, the learned trial judge ought to have held that the award provided for double-recovery by the present respondents, and that to enforce the award would be contrary to the public policy of Australia, for the purposes of s 8(7)(b) of the *International Arbitration Act 1974* (Cth).

Contentions of the applicants

15 The applicants said that, in applying the law, the arbitral panel did not exercise their most important role — to restore the parties to their pre-transaction state. Looking forward to the enforcement of the award, they pointed out that no order had been made for the return of the shares. They contended that the relevant authorities require that, for rescission to be effective, each party must be 'rehabilitated' and 'restored' to the position they occupied before the contract was made and that 'the entire contract be rescinded' i.e. unwinding the transaction and 'restoring' the parties with what they had before the transaction.[23] In his Reasons,

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18 (1955) 94 CLR 216.

19 [1975] 1 Ch 302.

20 [1980] AC 367.

21 (1933) 48 CLR 457.

22 [1970] 1 NSWR 194.

23 They referred to *Brown v Smitt* (1924) 34 CLR 160, 164 (Knox CJ, Gavan Duffy and Starke JJ), 169 (Isaacs and Rich JJ); *AH McDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506, 512 (Rich,

the trial judge said:

> Rescission is the act of a party, not the court, or other competent authority such as an arbitral tribunal. If rescission is effective in equity, equitable title revests upon the rescission. The Tribunal declared that the Shareholders Agreement and the Share Options Agreement 'are rescinded' — that is, that the Applicants validly rescinded them. Therefore, equitable title in the shares has revested in, and is now held by, the Respondents. Restitution in equity has therefore been achieved. To suggest that legal ownership must also pass in order for the declaration of rescission to be effective is to overlook the fact that *restitutio in integrum* is complete in equity. Indeed, equity looks on that as done which ought to be done.[24]

The applicants said that the statement of principle was unimpeachable. However, the conclusion adopted by the trial judge did not follow. In order that there be complete restitution, it was necessary that they be restored to the legal ownership of the shares, rather than simply given an equitable entitlement to such restoration.

16 Having made a declaration that the agreements were rescinded, it was incumbent upon the tribunal to make appropriate consequential orders restoring all parties to their pre-contractual positions: consequential orders are the process by which equity is administered.[25] The revesting of equitable title was insufficient; full relief should have been provided by the tribunal making an order for transfer or reconveyance of the shares. The applicants relied upon *Kramer v McMahon*.[26] There can be no valid rescission unless there is complete restoration or restitution.[27]

17 While accepting that the identification of error in the tribunal's application of the law plays no part in the decision whether to enforce a judgment, the applicants said that, in the absence of such consequential orders, the award was 'contrary to public policy'.[28] 'Public policy', as deployed in s 8(7)(b) of the Act and art 36(1)(b)(ii) of the

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Starke and Dixon JJ); *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 477 (Dixon J).

24 Reasons [76] (citations omitted).

25 *Alati v Kruger* (1955) 94 CLR 216.

26 [1970] 1 NSWR 194, 207 (Helsham J).

27 During oral argument, the applicants eschewed reliance upon an earlier passage in Helsham J's reasons (at 206) that might be taken to suggest that rescission is not valid until the *status quo ante* is in fact restored. The applicants contended that, before a court would order rescission, it must be satisfied that restitution is available.

28 The applicants adopted the analysis of the public policy exception contained in Reasons [31]–

UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') they said was a 'category of indeterminate reference',[29] the content of which would be filled on a case-by-case basis. The relevant public policy of all Australian jurisdictions was to prevent double recovery which, in the present case, was brought about in so far as the award provided that the respondents be repaid the purchase price paid by them for the shares without their being under any obligation to retransfer those shares to the applicants.

18 In an application to enforce an award, it is not open to the Court to repair the award or to supply anything which is otherwise defective in it. The applicants further submitted that it was not their role to approach the tribunal to require the making of consequential orders providing for the return of the shares.

Resolution of this application

19 The question before the primary judge was whether he should find that to enforce the award 'would be contrary to public policy'. In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,[30] the Full Court of the Federal Court held that, while the relevant 'public policy' was that of the forum, 'public policy' was to be construed narrowly as referring to the most basic, fundamental principles of morality and justice in the jurisdiction.[31] The primary judge held that an award that

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[35], [99]–[107].

29 Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications Pty Ltd, 1964) 263.

30 (2014) 232 FCR 361.

31 Ibid 380–1 [64] (Allsop CJ, Middleton and Foster JJ). The Court referred to *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, 215–16 (Bokhary PJ), 232–33 (Sir Anthony Mason). For example, s 103 of the *Arbitration Act 1996* (UK) deals with the enforcement of New York Convention awards in English courts. Section 103(3) provides that enforcement may be refused 'if it would be contrary to public policy to recognise or enforce the award'. As a matter of municipal law, English courts will not enforce contractual penalties: *Cavendish Square Holding BV v Tala El Makdessi* [2015] 3 WLR 1373. In *Pencil Hill Ltd v US Citta Di Palermo SpA* (Unreported, EWHC, Bird J, 19 January 2016), Bird J held that an award made under Swiss law that provided for penalties should be enforced in so far as it was not contrary to public policy within the meaning of s 103(3).

In the Act, Parliament has, to a limited extent, determined the content of 'public policy'. Section 8(7A) provides: '[t]o avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural

permitted double recovery would be contrary to 'public policy'.[32] At the hearing of the appeal, the respondents did not contend otherwise.

20 Both parties accepted that the trial judge had correctly described the role of the Court when exercising its jurisdiction under the Act to enforce a foreign arbitral award. He had said:

> At this stage, it is necessary to make the following observations and comments about the proper approach to take to the consideration of the parties' submissions. As discussed above, the limited role of the courts under the Act does not extend to determining substantive disputes between the parties as to fact or law, or otherwise reviewing the determination of an arbitral tribunal. In the context of this application, this relevantly means that it is impermissible to consider whether the Tribunal correctly applied the doctrine of rescission of contract for fraudulent misrepresentation under the governing law. This point is clearly uncontroversial between the parties.
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> It is equally uncontroversial between the parties that, in an enforcement or setting aside application, it is necessary to read and understand the award in question in the context of its governing law. This is necessary in order to determine what effect the award may or may not have. In this instance, this is necessary in order to determine whether enforcement would be contrary to public policy. More specifically, this is necessary in order to ascertain whether the Award allows for double recovery, being the first proposition that the Respondents must establish.
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> Similar logic would apply to other grounds for refusing enforcement under s 8 of the Act. For example, for the purposes of sub-s (5)(d), in order to determine whether an award deals with a difference not contemplated by the submission to arbitration, it would first be necessary to read and understand the award in order to determine what the award 'deals with'. This means that – in the context of the governing law – the court must consider both what has been decided and the effect of what has been decided by the arbitral tribunal. This does not, however, involve 'second guessing' the tribunal in any way, or considering the merits of the tribunal's decision in any respect.
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> As set out above, the Tribunal found that the purchase of the shares was induced by fraudulent misrepresentation and made a declaration that 'the Shareholders Agreement and the Share Options Agreement are rescinded.' The governing law of these agreements is the law of England and the Tribunal applied English law. As a result, in order to understand the effect of the Tribunal's declaration of rescission and to ascertain whether the Award allows for double recovery, it is necessary to examine the doctrine of rescission for fraudulent misrepresentation of a contract for the purchase of shares in English law. As will become apparent, this is an entirely different exercise to considering whether the Tribunal correctly applied that doctrine

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justice occurred in connection with the making of the award'.

32 Reasons [99]–[107].

or not – which is clearly impermissible under the Act.[33]

21 In so far as the agreements were governed by English law, it is necessary to identify the effect of the declaration of rescission under that law. In their submissions, the applicants accepted that: (a) rescission is the act of a party; (b) where the rescinded contract had involved the transfer of property, rescission is effective in equity to revest equitable title in the original transferor; and (c) the possession of such equitable title gives the original transferor the right to require delivery of the property thus possessed. Where shares are involved, orders such as (a) that a fully executed transfer be delivered, or (b) that the register of the corporation be rectified do not themselves perfect legal title. Legal title is perfected only when the necessary alterations have been made to the register.

22 We accept the contention of the respondents that it is simply not possible either for a court order or an arbitral award to perfect a party's legal ownership of shares. It is not until the order of the court or tribunal is executed by alteration of the register that legal ownership is restored.

23 Rescission is the act of the parties. A court order is not a condition precedent to the effectiveness of rescission. As much as a court does is to 'confirm' the act of the rescinding party: to declare that the anterior act of rescission was justified and is valid. A court order may also make ancillary or consequential orders that may be needed to restore the parties to the *status quo ante*.[34] In *Alati v Kruger*,[35] Dixon CJ, Webb, Kitto and Taylor JJ said:

> It is not that equity asserts a power by its decree to avoid a contract which the defrauded party himself has no right to disaffirm, and to revest property the title to which the party cannot affect. Rescission for misrepresentation is

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33 Ibid [43]–[46].

34 The orders that a court of equity may make include requiring the rescinding party to account for any profit derived from the use of the property or, if the property has deteriorated, to make compensation for that deterioration: *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278 (Lord Blackburn). They will also include requiring the party taking back the property to make proper allowance (by way of compensation) for any improvements in the value of the property while it was in the hands of the rescinding party: *Brown v Smitt* (1924) 34 CLR 160, 165 (Knox CJ, Gavan Duffy and Starke JJ).

35 (1955) 94 CLR 216.

> always the act of the party himself. The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction *ab initio*, and, if it is valid, to give effect to it and make appropriate consequential orders. The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of *restitutio in integrum*, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognize as admitting of rescission. Of course, a rescission which the common law courts would not accept as valid cannot of its own force revest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property revests upon the rescission.[36]

In *Brown v Smitt*,[37] Knox CJ, Gavan Duffy and Starke JJ said that, where a contract is rescinded, '[t]he parties being relieved of the contractual obligations, each must give back all that he obtained under the contract'.[38]

24 In fact, the availability of restitution is a precondition to lawfully rescinding a contract.[39] Where full or precise restoration at law or approximate restoration in equity cannot be achieved, rescission is not possible. In *A H McDonald and Company Pty Ltd v Wells*,[40] Rich, Starke and Dixon JJ said that:

> The result is that the appellant cannot obtain relief save upon the footing of innocent misrepresentation, and this means that he is limited to rescission. But rescission requires *restitutio in integrum* and it cannot be granted unless the parties can be restored substantially to the position which they occupied before the transaction was entered upon. No doubt it is not necessary to restore them precisely, and Courts of equity give relief by way of rescission when by the exercise of their powers they can do practically what is just in the restoration of the parties.
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36 Ibid 224 (citations omitted).

37 (1924) 34 CLR 160.

38 Ibid 164.

39 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278 (Lord Blackburn): 'It is, I think, clear on principles of general justice, that as a condition to a rescission there must be *restitutio in integrum*. The parties must be put *in statu quo*.' See also *Brown v Smitt* (1924) 34 CLR 160, 169 (Isaacs and Rich JJ): 'Rescission, therefore, means restoration of the parties to the situation they respectively occupied immediately before the contract was made'.

40 (1931) 45 CLR 506.

> We think that the case is one in which restoration of the parties to their previous position is not possible, and no relief can be moulded which will accomplish an approximate restoration that will be just. We are, therefore, of opinion that the appellant Company cannot succeed in its counterclaim for rescission.[41]

25 Rescission of a transaction operates to rescind the entirety of the transaction. The applicants accepted that, by reason of the (declaration of) rescission, they had acquired rights, enforceable in equity, in respect of the shares. In *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd*,[42] McLelland AJA (with whom Priestley and Meagher JJA agreed) said:

> In general, where there is a contract for the sale of property by A to B made in breach of a fiduciary duty owed to A by B (or by C in whose breach B knowingly participated), pursuant to which the legal title to the property has been transferred from A to B, the transaction is in equity voidable at the instance of A, who may (if necessary) obtain an order for rescission setting it aside. Unless and until A effectively avoids the transaction and (if necessary) obtains an order for rescission, B's property rights as a result of the transaction remain unaffected. However if A does effectively avoid the transaction and (if necessary) obtain an order for rescission, the parties will be treated in equity as if the transaction had never been effected; in other words equity will treat B as if he had held the property in trust for A, that is, as a constructive trustee, ab initio. A constructive trust arises in such circumstances as a consequence of the effective avoidance or rescission of the transaction. Where, for whatever reason, the transaction has not been and cannot be effectively avoided and rescission is unavailable, it remains effective and no constructive trust can arise.[43]

26 Accordingly, in so far as the act of rescission, confirmed in the award, had the effect of vesting equitable rights to the shares in the applicants, there is no basis for saying that the declaration was a nullity until the applicants had been restored their legal title.

27 Further, in determining whether the effect of the award is contrary to the public policy of Australia, it is necessary to consider the effect of an order by the Court under the Act. Section 8(2) provides that 'a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court'. In

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41 Ibid 512–13.

42 (1996) 39 NSWLR 143.

43 Ibid 153 (citations omitted). The repeated references to '(if necessary)' underscore the principle that rescission at law and in equity is fundamentally a form of self-help.

compliance with s 8(2), the order of the Court below was that the award 'be enforced as if it were a judgment or order of the Supreme Court of Victoria'. Thereafter, the order incorporated the exact provisions of the award. Given that the award has become in effect an order of the Court, all the powers of the Court in aid of its proper execution become available. Those powers include powers to prevent double recovery. In *Michael Wilson & Partners Ltd v Nicholls*,[44] Gummow ACJ, Hayne, Crennan and Bell JJ said:

> First, to the extent to which the submissions about abuse depended upon the proposition that prosecution of the New South Wales proceedings to judgment, or the subsequent execution of that judgment, might lead to MWP recovering compensation for more than it had lost, the submissions ignored the equity which the respondents (and Mr Emmott) *would have to prevent enforcement of an award or judgment against them where to do so would lead to double recovery*. The respondents (and Mr Emmott) would have an equity to prevent enforcement of a judgment (or an award) to the extent to which the claim or claims for compensation for which judgment (or the award) was obtained had been satisfied. And as between Mr Emmott and the respondents the doctrine of contribution would regulate the ultimate allocation of the burden of satisfying the particular claims. The spectre of double recovery and unjust allocation of responsibility for satisfaction of liabilities to compensate MWP for loss it suffered must therefore be put aside from consideration in connection with the allegation of an abuse of process.[45]

28 Under s 29 of the *Supreme Court Act 1986*, the Court has equitable jurisdiction to restrain a plaintiff from recovering more than the sum claimed.[46] Similarly, the inherent powers of the Court are available to prevent any abuse of its process and enable it to make some order which would prevent a plaintiff from proceeding twice to execution.[47]

29 It needs to be recalled that the applicants are contending that the award should

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44 (2011) 244 CLR 427.

45 Ibid 455–6 [101] (emphasis added).

46 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635, 661 [62] (Gummow and Hayne JJ).

47 *Registrar-General (NSW) v Behn* (1981) 148 CLR 562, 569 (Gibbs CJ with whom Mason J agreed), 571 (Murphy, Aickin and Brennan JJ). See also *Boncristiano v Lohmann* [1998] 4 VR 82, 89 (Winneke P, with whom Charles and Batt JJA agreed): 'The law, which now embraces equity, will not permit a plaintiff, whatever procedural device is used, to recover more than the damages which have been suffered, no matter what the cause of action upon which he proceeds against the various defendants'; *Franklin Self Serve Pty Ltd v Wyber* (1999) 48 NSWLR 249, 254 (Mason P).

not be enforced because it would fundamentally offend principles of justice and morality. We accept the contention of the respondents that the effect of para 180 of the award (which expresses the orders as set out above), was that both the Shareholders' Agreement and the Share Options Agreement were set aside ab initio and that the parties were restored to the positions that they were in before the agreements were entered into. As the applicants themselves conceded, the effect of the order that the agreements 'are rescinded' was to revest equitable title in the shares in the applicants. We also accept the contention of the respondents that for the applicants to have made good the proposition that enforcement of the award would be contrary to public policy, they would have had to have established that the primary declaration of rescission would or should not have been made under the domestic law of Australia or England without express consequential orders providing for the revesting of the shares.

30 When the tribunal made its award declaring that the agreements had been rescinded, it did not declare that the respondents were entitled to retain ownership of the shares; nor did it say anything that implied such an entitlement. It is plain from the award that the respondents' case was a conventional claim for rescission involving the return of what was purchased with a refund of the purchase price. The arbitral tribunal accepted those claims and made an award and order accordingly. As the judge put it, 'the declaration of rescission in the award necessarily entails the avoidance of the transactions from the beginning and the restoration of the parties to their previous positions'.[48] With respect, we agree. Far from being contrary to public policy, we consider that the award conforms with the public policy of Australia.

Notice of contention

31 At trial, the respondents contended in the alternative that, notwithstanding that the Court considered that the enforcement of the award was contrary to public policy, it retained a discretion to enforce the award. In support of this contention,

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[48] Reasons [98].

they referred to the use of the word 'may' in s 8(7)(b) of the Act.[49] The respondents pointed to a series of considerations that the Court could take into account in exercising its discretion to enforce the award notwithstanding that it considered it contrary to public policy: (a) the respondents were prepared to give an undertaking or to accept a condition that reflected their obligation to return the shares; (b) the applicants had not taken any steps to approach the original tribunal, as they were empowered to do so, to request an interpretation of the award; and (c) the applicants had not opposed the respondents' successful enforcement application in Singapore or taken any other relevant steps at the seat of the arbitration, including seeking to set aside the award.

32 However, the trial judge ruled that the fact that the award has already been enforced in Singapore, or that the rules of the arbitration may have allowed for recourse to be had to the Tribunal were not relevant considerations to the exercise of the Court's discretion under s 8(7)(b) of the Act to enforce an award, in the event that the public policy defence has otherwise been established.

33 In their notice of contention, the respondents sought to contend that the trial judge had misconstrued the discretion conferred by s 8(7)(b). Given the conclusion that the enforcement of the award is not contrary to public policy, it is not necessary to rule on the respondents' notice.

Conclusion

34 The application for leave to appeal, having no real prospect of success, must be refused.[50]

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49 Ibid [108]–[121].

50 See s 14C of the *Supreme Court Act 1986*.