NEW SOUTH WALES SUPREME COURT

CITATION: M1 & Ors v L1 & Ors [2007] NSWSC 346

JURISDICTION: Equity Division
Commercial List

FILE NUMBER(S): 50161/06

HEARING DATE{S): 11/04/07

JUDGMENT DATE: 13 April 2007

PARTIES:
M1 (First Plaintiff)
M2 (Second Plaintiff)
M3 (Third Plaintiff)
M4 (Fourth Plaintiff)
L1 (First Defendant)
L2 (Second Defendant)
L3 (Third Defendant)
L4 (Fourth Defendant)

JUDGMENT OF: Einstein J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Mr F Douglas QC, Mr D Kell (Plaintiffs)
Mr B McClintock SC, Mr D Studdy (Defendants)

SOLICITORS:
Baker & McKenzie (Plaintiffs)
Minter Ellison (Defendants)

CATCHWORDS:
Courts
Jurisdiction-Practice
Contract-Construction
Expert determination
Arbitration

‘Wise Man’ Dispute Resolution mechanism
Commercial deed providing for appointment of "Wise Man" to have plenary powers to resolve in binding and final fashion disputes of any nature
Deed identifying a range of candidates for appointment as Wise Man all being former justices of Supreme Court of New South Wales or of Federal Court of Australia
Whether deed constituted appointee an arbitrator or an expert
Whether if appointment be that of an expert, agreement to that extent would be contrary to public policy and void as an ouster of the jurisdiction
Commercial Arbitration Act 1984
Application for leave to appeal from arbitration
Manifest error of law
Whether strong evidence that Wise Man made an error of law and that determination may add or may be likely to add substantially to the certainty of the commercial law

LEGISLATION CITED:
Commercial Arbitration Act 1984 (NSW)
Industrial Relations Act 1996 (NSW).

CASES CITED:
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277
Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130
Bos v Helsham (1866) L.R. 2 Ex. 72
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153
Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd [1989] 1 Qd R 8
Re Carus-Wilson & Greene (1886) 18 Q.B.D. 7
Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643
Fletcher Construction Australia Ltd v MPN Group Pty Ltd [Unreported, Supreme Court of New South Wales, Rolfe J, 14 July 1997]
Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310
HIH Casualty and General Insurance (NZ) Limited (in liquidation) v General Reinsurance Australia Limited [2004] NSWSC 659
International Fina Services AG v Katrina Shipping Ltd ("The Fina Samco") [1995] 2 Lloyd's Rep 344
Investors Compensation Scheme Pty Ltd v West Bromwich Building Society [1998] 1 WLR 896
Ipswich Borough Council v Fisons Plc [1990] 1 Ch 709:
Lakatoi Universal Pty Ltd v Walker [2000] NSWSC 113
Lee v The Showmen’s Guild of Great Britain [1952] 2 QB 329
London Export Corporation Ltd v Jubilee Coffee Roasting Co. [1958] 1 W.L.R. 271
Magill v National Australia Bank Ltd [2001] NSWCA 221
Maggbury Pty Limited v Hafele Australia Pty Limited (2001) 76 ALJR 246; (2001) 210 CLR 181
Meehan v Jones (1982) 149 CLR 571
Natoli v Walker [(1994) 217 ALR 201
Panmal Constructions Pty Ltd v Warringah Formwork Pty Ltd [2004] NSWSC 204
Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd [2004] NSWCA 114
Prenn v Simmonds [1971] 1 WLR 1381

Promenade Investments Pty Ltd v State of New South Wales (1992) 26 NSWLR 203;
(1991) 26 NSWLR 184;
Re Dawdy and Hartcup (1885) 15 QBD 426
Savcor Pty Ltd v State of New South Wales and Another (2001) 52 NSWLR 587
Sea Containers Ltd v ICT Pty Ltd [2006] NSWSC 134
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] QSC 135

DECISION:
Upon its proper construction deed provided that the Wise Man would as an expert proceed to determine all issues on a final basis

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST

Einstein J

Friday 13 April 2007

50161/06 M1 & Ors v L1 & Ors

JUDGMENT – in redacted form

[This is a redacted version of the Judgment delivered in a confidential form on 13 April 2007. Orders have been made permitting the parties' identification to be masked by use of pseudonyms and perpetuating the confidentiality regime adopted during the pre-trial and closed court final hearing]

The proceedings

1 These proceedings concern a clause in a document entitled 'Deed and Agreement of Settlement' ["the Deed"] under cover of which the parties agreed to a 'Wise Man' dispute resolution mechanism. The first and threshold issue concerns whether or not in the events which then occurred the decision made by that person [The Hon Robert Ellicott QC] involved his acting as an expert or as an arbitrator. If the former then the *Commercial Arbitration Act 1984* ["the Act"] is not engaged and this Court has no jurisdiction to entertain the Summons which seeks leave to appeal from what is described as 'part of an award' made on 28 September 2006.

2 If the latter then the following questions arise:

i. Could the determination of the questions of law substantially affect the rights of the plaintiffs (s.38(5)(a) of the Act)?

ii. If so, is there a manifest error on the face of the award (s.38(5)(b)(i) of the Act)?

iii. If there is not a manifest error, is there strong evidence that Mr Ellicott made an error of law and that the determination may add, or may be likely to add, substantially to the certainty of the commercial law (s.38(5)(b)(ii) of the Act)?

3 Both parties have submitted that:

i. if the Court has jurisdiction and leave is granted, then the three issues referred to above will have been substantively determined;

ii. whilst the relief in the Summons is limited to the granting of leave, the issues the Court has to determine in deciding whether to grant leave are the identical ones if leave is granted;

iii. therefore, the consideration of the question of leave will also decide these three issues;

iv. although there are three distinct steps in the resolution of the issues referred to above, it is clearly in the parties' interests that the Court decides all issues, even if the plaintiffs do not establish the threshold issue that the Court has jurisdiction.

4 Notwithstanding this joint approach it has been said that it is entirely inimical to the purposes of the *Commercial Arbitration Act* to permit there to be argued at one and the same time an application for leave to appeal as well as the appeal [*Promenade Investments Pty Ltd v State of New South Wales* (1991) 26 NSWLR 184 at 187 and 188 [per Rogers CJ Com Div]. However I have myself expressed the view that although it is not necessarily an invariable practice never to be departed from, it is correct to say that where leave to appeal under sections 38 (4) and 38 (5) is required, the usual practice of the Court is to hear the question of leave in advance and not at the same time as the hearing of the substantive appeal: *Panmal Constructions Pty Ltd v Warringah Formwork Pty Ltd* [2004] NSWSC 204 at [8]. The matter will be returned to below in these reasons.

5 In the event that this Court does have jurisdiction under the Act it is appropriate to note that the parts of the decision [for convenience at this early stage in these reasons presently described as "the Award"] from which the application for leave to appeal is brought involves the determination that:

i. the words *"relevant taxation authorities"* in clause 12.1(v) of the Deed and Agreement of Settlement [ ]("*the Deed*") are confined to the Australian Tax Office and the United States Inland Revenue Service and do not include any court or tribunal which considers any appeal or review from those bodies, including the Administrative Appeals Tribunal and the Federal Court of Australia [see eg award of Mr Ellicott QC at [155], [176]];

ii. the parties' rights of appeal or review implicitly allowed by clause 12.1(v) of the Deed are restricted by clauses 6.5, 6.6 and 8.3 of the Deed so as to prevent an appeal by the plaintiffs to the Federal Court of Australia if such appeal involves the disclosure of damaging confidential information of the defendants in Australia [see eg award of Mr Ellicott QC at [177], [178]]; (See Summons, Appeal Grounds, para 1).

6 To be more precise the relief sought includes an order that leave to appeal be granted (Summons, Relief Claimed, para 1) and, further, if leave be granted:

i. an order setting aside or varying such part of the Award of Mr Ellicott QC by which he made the determinations referred to in paragraph 1 of the Relief Claimed in the Summons and, in its place, a declaration or determination that:

(a) the words "relevant taxation authorities" in clause 12.1(v) of the Deed and Agreement of Settlement dated [ ] are not confined to the Australian Tax Office and the United States Inland Revenue Service and include any court or tribunal which considers any appeal or review from those bodies, including the Administrative Appeals Tribunal and the Federal Court of Australia;

(b) the parties' rights of appeal or review allowed by clause 12.1(v) of the Deed are not restricted by clauses 6.5, 6.6 and 8.3 of the Deed.

ii. alternatively, an order remitting the award, together with the Court's opinion on the question of law the subject of the appeal, to Mr Ellicott QC for reconsideration.

The relevant factual background

7 The parties during this present litigation were able to agree upon a statement of the relevant background facts. That statement was as follows:

i. The relevant factual background is largely set out in the reasons for decision of the Mr Ellicott.

[I interpolate to note that those reasons extend across some 67 pages so that for present purposes it is efficient to adopt the short summary of the factual background agreed to by the parties]

ii. The first plaintiff, [ ], relevantly controlled the operations of the second plaintiff [ ] the third plaintiff [ ] and the fourth plaintiff [ ].

iii. The [defendant] Group is a large international financial group. [ ]
The first plaintiff was, at the relevant time, a director and the senior executive of [the defendant Group's] Australian operating company, [the fourth defendant] [ ].

iv. Pursuant to various agreements, the first plaintiff's companies provided various services to what may be referred to as the [defendant] Group including managing the [ ] business of [the defendant Group] in Australia, involving employing staff and securing premises and equipment. Under the management agreement, each of the parties could terminate the agreement on 30 days' notice.

v. Problems between the parties arose [ ].

vi. [

].

vii. [

].

viii. [

].

ix. [

].

x. [

].

xi. Clause 8 of the Deed provided for referral of disputes to a Wise Man. Mr Ellicott QC accepted appointment as the Wise Man in accordance with cl. 8.1.

xii. [

].

xiii. [ ] a mediation took place between the parties [ ] before Mr Trevor Morling QC.

xiv. At and before the mediation the plaintiffs had propounded claims against the defendants to the effect that the plaintiffs had suffered very substantial loss or damage by reason of the breakdown in the relationship with [the defendants] and the claimed repudiation of the arrangements by [the defendants]. [ ] Components of the claim are set out in paragraph 51 of the Reasons of Mr Ellicott QC.

xv. As a consequence of the mediation of the plaintiffs' claims a Deed and Agreement of Settlement ("the Deed") was executed. [ ]. In settlement of the plaintiffs' claims, [ ], the defendants promised to (and did in fact) make payments to the defendants [ ].

xvi. The Deed also had the effect of bringing to an end the commercial relationship between the parties and provided for the resignation of the first plaintiff from all positions that he then held with [the defendants]. The first plaintiff also became subject to a restraint, for a period of one year, from directly or indirectly establishing or being involved in or having any interest in the [ ] business in Australia and various countries in the Asia Pacific region.

xvii. Subsequent to the mediation and the making by the defendants of the requisite payments under the Deed, the present dispute arose when, as Mr Ellicott records, the plaintiffs began making submissions to the Australian Taxation Office in relation to the assessability to Australian tax of amounts paid to them under the Deed.

xviii. The proceedings before Mr Ellicott followed on from various preliminary hearings and took place on 15 to 17 June and on 18 July 2006 in Sydney. As Mr Ellicott further records, at the hearing the parties were represented by counsel, the hearing was preceded by written submissions and statements of witnesses who then gave evidence at the hearing. The hearing took place by reference to documented issues to be determined and cross-examination of witnesses took place.

xix. Mr Ellicott delivered his reasons for decision on 28 September 2006.

xx. On 26 October 2006 the present Summons was filed in the Commercial List of the Equity Division of the Supreme Court.

xxi. The only two matters that are presently relevant are the findings made by Mr Ellicott that are identified in paragraph 4 above (and in the Summons, Appeal Grounds) and are the subject of the present challenge by the plaintiffs. There is no challenge by either party to any other part of the reasons and findings of Mr Ellicott.

8 [ ]:

i. [ ];

ii. [ ].

9 The plaintiffs further seek to rely upon the following findings by Mr Ellicott QC:

i. [

]

ii. Mr Ellicott found that, at the time the deed was entered into it would have been clear to the parties that issues might arise with respect to the assessability (from the plaintiffs' perspective) or deductibility (from the defendants' perspective) of the lump sum payments made by the defendants to the plaintiffs. Clause 12.1(d)(v) of the Deed expressly exempted, from the confidentiality restrictions otherwise applying, any disclosure *"to the relevant taxation authorities"* of specified confidential material including *"the non-public activities or affairs of, and information of other parties to this deed."* The exception in clause 12.1(d)(v) was said, by Mr Ellicott, to have *"acknowledged the importance of tax considerations to the parties."* (see Reasons of Mr Ellicott at [56],[123])_.

The provisions of the Deed relevant to the threshold issue

10 Naturally the whole of the Deed is taken into account in determining the questions of construction which presently arise. However the principal provision Clause 8 entitled "Referral to Wise Man" relevant to the threshold issue is in the following terms:

8.1 Dispute

In the event of any dispute of any nature whatsoever involving, on the one hand, the [plaintiffs] and, on the other hand, the [defendant] Group, including without limitation any dispute related to the interpretation or enforcement of the terms of this Deed, any failure by the [plaintiffs] or the [defendant] Group to honour the releases of any released person or entity, any issue over whether the [monetary] threshold has been met in substance, and any future dispute between the [plaintiffs] and the [defendants] of any nature whatsoever, [shall be referred to] [see award of Mr Ellicott at [2] noting that, in clause 8.1, words *"such as 'shall be referred to' appear to have been omitted before 'a Wise Man' where the words 'Wise Man' first appear. I shall read the clause as if it so provided"*] a 'Wise Man' who shall exercise plenary powers to resolve in a binding and final fashion any such matter on such terms as the Wise Man finds appropriate in his or her sole discretion, and the [plaintiffs] and the [defendant] Group agree to be bound by any such resolution of the Wise Man. The proceedings before the Wise Man shall be confidential. The Wise Man shall be Robert Ellicott QC, or if such person is not available, Honorable Mr Andrew Rogers, or if such person is not available, Sir Laurence Street QC or if such person is not available, a person designated by Trevor Morling QC, of if Trevor Morling QC is unable to make such designation, the person designated by the President for the time being of the New South Wales Bar Association. In the event no such person is available to serve as Wise Man, the matter shall be referred to binding arbitration in Sydney, Australia under the *Commercial Arbitration Act* (NSW). Fees of the Wise Man (or the arbitrator) shall be split fifty-fifty.

8.2 Exclusive Jurisdiction

The Wise Man dispute resolution mechanism is agreed by all the parties to this Deed and is exclusive of any and all other means of dispute resolution.

8.3 Inappropriate conduct

The parties agree not to engage in any inappropriate conduct, which shall mean any conduct (a) which is inconsistent with the purpose of this Deed or any of the provisions hereof, or (b) except for ordinary commercial activity not prohibited by clause 2.2(b) of this Deed, which is injurious to the commercial or reputational interests of the [defendant] Group or the

> [plaintiffs], as the case may be. The Wise Man in his or her sole discretion shall make any and all determinations of whether any party's conduct is inappropriate and, without limiting his plenary powers, shall have complete discretion to eliminate or reduce any payment to the [plaintiffs] pursuant to Section 3.2 of this Deed - recognizing that the commitment not to engage in any such inappropriate conduct was an essential pre-condition to the [defendant] Group's willingness to pay such amounts.

11 It will be seen as the defendants have pointed out that the language of clause 8.1 is extremely broad and the powers given to the Wise Man pursuant to the clause are extensive:

> (a) "any dispute of any nature whatsoever";
>
> (b) "including without limitation any dispute related to the interpretation or enforcement of the terms of this Deed";
>
> (c) "any failure by the [plaintiffs] or the [defendant] Group to honour the releases…";
>
> (d) "…any future dispute between the [plaintiffs] and the [defendant] Group of any nature whatsoever…";
>
> (e) "a 'Wise Man' who shall exercise plenary powers…";
>
> (f) "to resolve in a binding and final fashion any such matter on such terms as the Wise Man finds appropriate in his…sole discretion…";
>
> (g) "after employing such procedures as the Wise Man finds appropriate in his…sole discretion…";
>
> (h) "and the [plaintiffs] and the [defendant] Group agree to be bound by any such resolution of the Wise Man".

12 An important consideration concerns the common denominator shared by each of Mr Ellicott QC, Mr Rogers QC, Sir Lawrence Street QC and Mr Morling QC. Each was in his time a judge: Mr Ellicott on the Federal Court of Australia, Mr Rogers as Chief Judge of the Commercial Division of this Court; Sir Lawrence Street as Chief Justice of this Court and Mr Morling on the Federal Court. Prior to their appointments each had been a leader of the Bar appearing in substantial litigation in numerous jurisdictions. It is unnecessary to recite their respective fields of work following their departure from the courts to which they had been appointed but it is clear that each continue to have a close relationship with the law, Mr Ellicott continuing at the bar and the other named persons generally being involved in mediations or arbitrations or similar.

The proper approach to the threshold question

13 Plainly the question of whether or not a contractual clause provides for an arbitration or expert determination raises a question of construction of the Deed. And in that regard the Court may take account of the commercial purpose of the Deed and the context in which it was entered.

Construction of a commercial contract

14 The court is dealing with a commercial document. In endeavouring to discern the parties' intent and in construing the meaning of the words used, the Court will strive to give the document a commercial, reasonable and rational operation: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310.

15 There is of course no doubt but that the Court is entitled to inquire beyond the language and to "see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view": *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384 per Lord Wilberforce: *Lakatoi Universal Pty Ltd v Walker* [2000] NSWSC 113 at paragraph [1039].

16 In *Investors Compensation Scheme Pty Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 - 913, Lord Hoffman said that:

> "The background knowledge which a reasonable person in the position of the parties will be regarded as having, for the purposes of the construction of contracts, includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man with the proviso that it should have been reasonably available to the parties."

17 To similar effect is the observation of Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Limited v Hafele Australia Pty Limited* (2001) 76 ALJR 246 at 248 (para 11), quoting with approval Lord Hoffmann in *Investors Compensation Scheme* [1998] 1 WLR 896 at 912-913 to the effect that interpretation of a written contract involves the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contracting.

18 Clearly primacy must be given to the actual words used in a written contract per McColl JA in *Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd* [2004] NSWCA 114 at [66] et seq.

19 Gibbs J's statement in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 that "the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", finds reflection in the statement in *International Fina Services AG v Katrina Shipping Ltd ("The Fina Samco")* [1995] 2 Lloyd's Rep 344 at 350 per Neill LJ (with whom Roch and Auld LJJ agreed) that the primary focus is the agreement itself which "must speak for itself, but must do so in situ and not be transported to a laboratory for microscopic analysis".

20 There is abundant authority that "the court should be astute to adopt a construction which will preserve the validity of the contract": per Mason J, *Meehan v Jones* (1982) 149 CLR 571 at 529; *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132, per Kirby P. Further the court will strive in dealing with a commercial contract to discern the objective intent of the business relationship or other parameters of a contract in order to give effect to that which the parties may be seen to have bargained for. But always it is to the words of the document that the court must attend looking in that regard to the whole of the document to discern the parties' intent.

21 Hence I take it as axiomatic that:

i. the Court endeavours to give primacy to unambiguous words used in a written contract, this matter generally being approached in the manner outlined by McColl JA in *Peppers Hotel Management* supra;

ii. the proper approach seeks the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract (*Maggbury Pty Ltd v Hafele Australia Pty Ltd (*2001) 210 CLR 181 at 188 citing Lord Hoffmann, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912; [1998] 1 All ER 98 at 114; *Peppers Hotel Management Pty Ltd* supra at [66 et seq].

Dealing with the threshold question

22 The Act defines an "arbitration agreement" as meaning *"an agreement in writing to refer present or future disputes to arbitration"* (s 4(1)). However, the Act does not provide a specific definition of the expression "arbitration".

23 The plaintiff submits, and I accept, that other than the general proposition that the presumed intention of the parties is the key element, in the search for the discerning of such intention there is no single touchstone as to whether a person is acting as an arbitrator or as an expert in any given case.

24 In my view the objective intention of the parties as discerned from the words which they used and from the context in which the Deed came into existence was that the Wise Man would *as an expert*, proceed to determine all issues on a final basis. Indicators underpinning this as having been the objective intention were:

i. the use of language to be found both in clause 8.1 as well as 8.2 that the Wise Man procedure was *exclusive* of "all other means of dispute resolution";

ii. the conferral upon the Wise Man of the right "to exercise plenary powers to resolve in *a binding and final fashion* any such matter on such terms as the Wise Man finds appropriate in his or her *sole discretion* after employing such procedures as the Wise Man finds appropriate in his or her sole discretion";

iii. the fact that the parties expressly agreed that if the designated persons could not act as the Wise Man *then*, and *only then*, the "matter shall be referred to binding arbitration in Sydney, Australia under the *Commercial Arbitration Act* (NSW)". As the defendant has contended, the parties contractually bound themselves to <u>two alternative forms of dispute resolution</u> depending on the circumstances:

(a) If a designated person was available, then, as the Wise Man, he or she would act as an independent expert.

(b) If no person with the relevant expertise was available to act as the Wise Man, then the alternative procedure of arbitration under the Act would be instigated.

[In short the regime agreed to by the parties had a commercial rationale.]

[Shades of this same reasoning is apparent in the decision in *Re Dawdy and Hartcup* (1885) 15 QBD 426 referred to below.]

iv. Hence the language makes clear that the role of the Wise Man is different from that of an arbitrator under the Act. The three candidates named for the Wise Man in clause 8.1 are all well-known and very experienced barristers and former judges. They all have a particular expertise in law, as does Mr Morling QC, who would nominate another person with such expertise if the three candidates were not available. The process would be continued by the designation of an expert by the President of the New South Wales Bar Association.

v. In this case the Wise Man's personal expertise embraces not only the law but also the ability to decide questions of fact. As exemplified in *Savcor Pty Ltd v State of New South Wales and Another* (2001) 52 NSWLR 587 at [37] per Barrett J, it is permissible for an expert to determine questions of law.

vi. As the defendants have contended, as to the nature of the process to be undertaken and the functions to be performed by the Wise Man, clause 8.1 is an indicator that the Wise Man has been appointed to make a decision *"solely by the use of his eyes, his knowledge and his skill"*: In *Re Dawdy and Hartcup* (1885) 15 QBD 426 at 430 the

> parties decided that the procedure to be employed by the Wise Man was entirely his decision. Such a right vesting with the Wise Man is inconsistent with the parties expecting that there would be a judicial determination in accordance with known procedures, for instance those set out in the UCPA and the Rules.
>
> [For example, the Wise Man could decide to resolve the issues by employing mediation leading to a binding agreement. Alternatively, the Wise Man could have made a decision based upon submissions, whether written, oral or both, without any evidence. Alternatively, the Wise Man could conduct a hearing in a more conventional sense.]

25 To my mind another likely indicator to the same end concerns the context where pointed emphasis was given in the Deed to the significance to the parties of confidentiality being observed in relation to any disputes between them. This further suggests a crucial significance in the distinction between the appointment of the Wise Man whose deliberations would be private and on the other hand even the slightest possibility that arbitral proceedings could in one way or another end up eroding the prospects of maintenance of that confidentiality.

26 In *Re Dawdy and Hartcup* there was before the Court an agreement between landlord and tenant for the letting of a farm which provided that the tenant should be paid at the expiration of the tenancy, the usual and customary valuation, as between outgoing and incoming tenant, in the same manner as he had paid on entering the premises. It was agreed between the parties that, when any valuation of the covenants should be made between the tenant and landlord, or his incoming tenant, the persons making such valuation should take into consideration the state, condition and usage of the farm, and if not left in a proper and creditable state, should determine what sum of money should be paid to the landlord as compensation and should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord and tenant respectively appointed a valuer. The valuers could not agree upon the amount of the valuation, and they appointed an umpire, who held a sitting and heard witnesses, and then made and published an award in writing. The holding by the Court of Appeal was that the agreement did not contain any submission to arbitration but that it provided only for the appointment of valuers.

27 Lord Esher MR [with whose reasons Mathew J and Lord Coleridge CJ concurred] observed that the question was whether there was at any time, a written submission to arbitration.

28 Lord Esher MR made the point that the proceedings could be clearly distinguished from *In Re Hopper* Law Rep 2 QB 367 and in doing so made the following observations (at 431):

> "In the present case, I come to the conclusion, on the construction of the agreement, that the two persons who are indicated are to be mere valuers, not arbitrators. A material provision contained in the agreement in *In Re Hopper* is wanting in the present case; there was there a distinct provision in the agreement that, if the two valuers appointed by the landlord and tenant should disagree in their valuation, the amount of compensation to be paid to the tenant should be referred to the umpirage of such person as the valuers should in writing appoint. The parties had agreed that, in case of difference, an umpire should be appointed to determine as arbitrator, and he was an arbitrator, if the valuers were not. We have no right to insert such a provision in the present agreement, unless it is a matter of necessary implication; it is not enough to say that there is a reasonable inference that the parties intended it. There is no such necessary implication, and therefore there is no agreement in writing to submit the matter in dispute between the parties to arbitration."

29 I do not accept that the absence of the words "expert determination" converts the Wise Man into an arbitrator.

30 I do not accept that the fact that an expert has to afford the parties natural justice is necessarily *always* suggestive of an arbitral process. In *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* [Unreported, Supreme Court of New South Wales, Rolfe J, 14 July 1997] Rolfe J held at 20 that:

> "In devising procedures the expert is no doubt obliged to ensure that he or she affords natural justice to both parties but, subject to that, he or she is to enter upon the determinative task as an expert and not as an arbitrator."

31 It is fair to say that in submissions before this Court the plaintiffs strenuously endeavoured to establish that on the authorities, an appointment of an expert to resolve *all disputes* as distinct from *answering a question*, was likely to amount to an ouster of the jurisdiction of the Court. It was for this reason that the contention was put forward that the proper construction of the Deed required that the Wise Man be regarded as an arbitrator.

32 The principal authority relied upon in this regard was *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1997) 14 BCL 277 a decision of Heenan J in the Supreme Court of Western Australia.

33 Before turning to that and other authorities it is appropriate to observe that the Deed clearly contemplated that a decision made by the Wise Man was intended to be enforceable by the ordinary processes of the courts hence putting paid to the notion that any ouster of jurisdiction was intended by the parties [see for example the express references made in clause 8.1 to the conferral upon the Wise Man of plenary powers to deal with any issue over whether the [monetary] threshold had been met in substance].

34 Clause 12.1(iii) expressly excepted from the confidentiality regime, the entitlement of any party to enforce or take any steps under the Deed.

35 In turning to some of the authorities it is appropriate to commence with the decision of Chesterman J in *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135. The holding was as follows:

i. That the Court had an inherent discretionary power to stay a proceeding where the parties had contracted for their dispute to be determined by an independent expert.

ii. That the starting point for a consideration of an exercise of the discretion was that the parties should be held to their bargain.

iii. That there was a heavy onus on a party opposing such a stay to persuade the Court that there was good ground to allow the action to proceed.

iv. That ordinarily that onus could be discharged only by showing that in view of the procedure, if any, for which the parties had contracted and the qualifications of the expert, the dispute was not amenable to resolution by the mechanism they had chosen.

v. That accordingly the proceeding would not be stayed in circumstances in which some of the matters an accountant would have been required to decide, in the absence of any agreed procedure, involved disputed questions of fact and law.

36 It is convenient to set out the following observations made by Chesterman J at [10] - [11]:

> "The plaintiffs' submissions take as their starting point the well known proposition which finds expression in such cases as *Lee v The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 at 342:
>
> > "If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void …"

The principle *is not to be too readily invoked, nor should courts be too astute to construe contracts so as to conclude that they are deprived of jurisdiction with respect to the relevant dispute*. As Rich, Dixon, Evatt and McTiernan JJ. said in *Dobbs v National Bank of Australasia Ltd* (1935) 53 C.L.R. 643 at 652:

> "A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them …
>
> *Parties may contract … but yet make the acquisition of rights under the contract dependent upon the … discretionary judgment of an ascertained … person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction …*
>
> What no contract can do is to take from a party to whom a right actually accrues … his power of invoking the jurisdiction of the Courts to enforce it."

Their Honours also said (at 654):

> What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award … But it was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend."

[Emphasis added]

37 Later in this judgment Chesterman J made the following observations at [27]:

> "The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because *the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar*. The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed." [Emphasis added]

38 Returning for a moment to the decision of Rolfe J in *Fletcher Construction* [supra], his Honour in discussing the reasons for judgment given by Starke J in *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 made the following observations at 14-15:

> "Starke J, after considering various circumstances in which there was no ouster of the jurisdiction of the Court by reference of disputes to a third party, said, at p657:-
>
> "*In none of these cases is the jurisdiction of the Court ousted: all that has been done or attempted is to provide for the ascertainment of rights or facts by the parties or by*

> *some agreed person or tribunal and to leave the enforcement of the parties' rights, so ascertained or flowing from the facts so found, to the determination of the Courts of law*. The clause in question here contains no stipulation, express or implied, that any party shall not resort to the Courts of law: it is an evidentiary stipulation for use before those Courts." (Rolfe J's emphasis)

The words I have emphasised state clearly that the parties may agree that a person, other than the Judge of a Court, may determine matters in issue. The parties cannot exclude the jurisdiction of the Court, but because of their agreement they have limited the matter for consideration by the Court to the question whether the agreed decider has acted conformably with the agreement of the parties and not in such a way as to vitiate his or her decision."

39 *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8 is a decision by McPherson J dealing inter alia with the factors relevant to the distinction between arbitration and appraisement.

40 The reasons (at 15) include the following:

> "There is no doubt that on occasions courts have selected the existence of a dispute requiring resolution or determination as the feature distinguishing arbitration from appraisement or valuation, which is said to be a process which prevents or precludes disputes from arising: see *Bos v Helsham* (1866) L.R. 2 Ex. 72; *Re Carus-Wilson & Greene* (1886) 18 Q.B.D. 7. But the existence of a "dispute", although a factor, *is not necessarily a decisive factor* in determining whether arbitration or appraisement is involved. It is quite possible for parties to become involved in a dispute about something, such as the value of premises or goods, which they agree to submit for appraisal without intending that an arbitration should follow." [Emphasis added]

41 Later [still at 15] in the reasons McPherson J makes the points that:

i. the distinction depends upon a range of factors of varying importance and way depending on the circumstances;

ii. generally what must be in contemplation is that there will be an inquiry in the nature of a judicial inquiry.

42 The reasons further include the following at [at 15 – 16]:

> "Mr Drummond Q.C. in effect challenged the statement of Real J. in the Full Court in [*Re King & Acclimatisation Society* [1913] St.R.Qd. 10,] that "such an arbitration is a quasi-judicial proceeding" pointing to the fact that, in the London commodity markets, there are associations of traders who conduct arbitrations without any of the panoply of a judicial or quasi-judicial hearing or proceeding: see *London Export Corporation Ltd v Jubilee Coffee Roasting Co.* [1958] 1 W.L.R. 271; Mustill & Boyd: *Commercial Arbitration*, at 50–51. *No doubt cases of that kind can be found*, but as a general proposition it remains true that the proceeding is an arbitration if the parties intend that they should have the right to be heard if they so desire: *Hammond v Wolt* [1975] V.R. 108, 112." [Emphasis added]

43 Dealing with the decision in *Balderstone* it suffices to observe that clearly the Court has a jurisdiction in a particular case to determine that a purported submission of a dispute for the determination of an expert may, depending upon particular circumstances, be against public policy if it purported to oust the jurisdiction of the Court and if the prescribed procedure was entirely unsuited to the resolution of disputes arising out of a contract. The decision was one on its own facts. If the decision be regarded as authority for the proposition that *in every circumstance* the purported submission of a dispute for the determination of persons eminently capable of determining the dispute by reason of their specialised knowledge *must be* regarded as an ouster of the jurisdiction of the Court, in my respectful view that proposition does not reflect the state of the law.

44 Clearly enough the ultimate question requires one to look at the instrument by which the parties have stipulated the measure of agreement which has been reached. And equally clearly, the question of whether or not the parties have elected to appoint an expert or an arbitrator in the particular circumstances treated with in the authorities has often been found to be one of some difficulty. At the end of the day the decision in the present reasons rests upon:

i. the words used in the Deed;

ii. the specialised knowledge held by the persons identified as the candidates to be the Wise Man;

iii. the very particular circumstances of the dispute resolved by the Deed;

iv. the other particular circumstances recited in these reasons.

Post-contractual conduct

45 In my view post-contractual conduct is not admissible in the question of what the Deed meant as distinct from the question of whether it was formed: cf *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [26] per Heydon JA; *Magill v National Australia Bank Ltd* [2001] NSWCA 221 at [50] – [51] per Ipp AJA.

46 Otherwise than making a formal submission to the contrary the plaintiffs conceded that in the present state of the law the above authorities bind this Court at first instance.

Dealing with the grant of leave under the Act

47 In the circumstances it is unnecessary to determine whether leave should be granted under the Act to appeal from the decision of Mr Ellicott. However against the possibility that the above construction be incorrect, it seems appropriate to deal with the leave issue.

48 For the reasons which follow that leave would not have been granted.

The section 38(5)(a) requirement

49 The principles regarding s 38(5) are relatively well settled. It is clear that the section is, to an extent, intended to narrow the range of arbitratral decisions that can be challenged in the courts.

50 Section 38(5)(a) of the 1984 Act provides that the Court shall not grant leave to appeal unless, relevantly, "the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement…"

51 In my view at this point in time and for the reasons given by the defendants the plaintiff's have failed to establish that the determination of the question of law concerned could substantially affect the rights of one or more of the parties. Those reasons are as follows:

i. The plaintiffs contended before Mr Ellicott that the expression *"the relevant taxation authorities"* in clause 12.1(d)(v) of the Deed included the AAT, the Federal Court and the High Court (Reasons, pars.136 and 142). Whilst Mr Ellicott did not accept the plaintiffs' contention (par.156), he did decide that the plaintiffs could make an application to the AAT to review an ATO decision on their objection to an assessment to tax by the ATO of the plaintiffs' receipts under the Deed (par.180).

ii. As to the Federal Court, Mr Ellicott held that such an appeal by the plaintiffs may infringe either clause 6.5 or clause 8.3 of the Deed but if an appeal could be undertaken without damaging the defendants it could be prosecuted. Importantly, for present purposes, Mr Ellicott stated that the question whether the plaintiffs could file such an appeal is *strictly hypothetical* and he did not think it wise to decide it *at this stage* whether it would be prejudicial to the defendants. He stated that the issue should be determined as a matter of substance and commercial reality and *when it arises* (par.179).

ii. The decision of Mr Ellicott from which the plaintiffs wish to appeal has no actual currency as the ATO's consideration of the matter is continuing. The ATO has not made a decision from which the plaintiffs seek to have reviewed. There are several possible outcomes of the ATO's consideration.

(a) First, the ATO may accept the plaintiffs' contentions.

(b) Second, the ATO and the plaintiffs may reach a commercial settlement.

(c) Third, the plaintiffs may abide by the ATO's decision for a variety of reasons.

(d) Fourth, the plaintiffs may seek a review of the ATO's decision in the AAT or appeal from it to the Federal Court.

iii. The first three outcomes would mean there is no need to appeal from Mr Ellicott's decision.

iv. The fourth outcome may also mean an appeal is unnecessary for two reasons.

(a) First, Mr Ellicott has decided that the plaintiffs are not precluded from commencing proceedings in the AAT.

(b) Second, if the proceedings in the Federal Court become necessary, Mr Ellicott decided that *at that point in time* it would be necessary to determine whether such proceedings would be precluded by the obligations of good faith in the Deed. Mr Ellicott's decision may be that proceedings can be commenced in the Federal Court, in which case, there would be no need for the plaintiffs to appeal his decision. It would only be where Mr Ellicott decided that the plaintiffs could not commence proceedings in the Federal Court that they would need to appeal his decision.

52 The holding is that the plaintiffs cannot presently satisfy the threshold question that Mr Ellicott's decision could substantially affect their rights. It cannot in so far as the AAT is concerned and the Federal Court position is hypothetical.

Manifest error of law

The scheme of the act

53 The authority's support the following propositions:

i. "*The Commercial Arbitration Act 1984* (NSW) Pt 5 provides a plain indication that leave to appeal against an award should not readily be given": *Natoli v Walker* (1994) 217 ALR 201 at 217; see also 219.

ii. "The purpose of the amendment to the Act effected by section 38(5) was to further limit intervention by the Courts in the arbitration process, even beyond the restrictions on the ground of leave to appeal imposed by the pre 1990 legislation": *HIH Casualty and General Insurance (NZ) Limited (in liquidation) v General Reinsurance Australia Limited* [2004] NSWSC 659 at [17].

54 In the Second Reading Speech extracted in *HIH Casualty* [2004] NSWSC 659 at [18] in relation to the 1990 amendments to the Act which gave the Act its present form the Attorney General said:

> "One of the major objectives in this uniform legislation is to minimise judicial supervision and review. If arbitration is to be encouraged as a settlement procedure and not as a dry run before litigation, a more restrictive criterion for the granting of leave is desirable and the parties should be left to accept the decision of the arbitrator whom they have chosen to decide the matter in the first place".

55 In *Natoli v Walker* (1994) 217 ALR 201 Kirby P stated [at 202]:

> "As will be explained, that Act amended s 38…to confine most narrowly the cases in which appeals to the Supreme Court from an award of an arbitrator would be permitted. The policy behind the amendment, as explained in *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203 at 221 ff (Promenade), was to promote the finality or arbitral awards even at the price of denying a party its usual entitlement to the determination of the dispute by a court of law, that, is the precise assignment of the parties legal rights after a detailed scrutiny of the relevant facts and application of the relevant law." [See also 212-214]

56 A manifest error of law is "evident or obvious rather than arguable": *Promenade Investments Pty Ltd v State of New South Wales* (1991) 26 NSWLR 184 at 226F. It was also held in that case that there "should…before leave is granted be powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law. As Kirby P said in *Natoli* (1994) 217 ALR 201 at 214:

> "What is in issue is a preliminary impression. It should not require a great deal of argument. The precondition to curial intervention is the easy demonstration that the primary decision-maker was 'clearly wrong'…".

57 The policy considerations were also examined in *Panmal Constructions Pty Ltd v Warringah Formwork Pty Ltd* [2004] NSWSC 204 at [7] et seq.

Dealing with the issue

58 Here again the submissions advanced by the defendant are of substance and are adopted.

The first question of law: "The relevant taxation authorities"

59 Mr Ellicott had to decide whether the expression *"the relevant taxation authorities"* in clause 12.1(d)(v) of the Deed meant the ATO and the IRS, [as contended for by the defendants], or whether it included the AAT, the Federal Court and the High Court, [as contended for by the plaintiffs]. Mr Ellicott, after having received detailed written and oral submissions, decided that the phrase meant the ATO and the IRS (par.156). His decision was based on reading the words in their context in the Deed (par.157).

60 Mr Ellicott's decision is not seen to contain a manifest error. The Deed Poll executed pursuant to clause 7.2 of the Deed referred to the ATO and the IRS (clause 4.2(e)). He held that the parties had, in effect, provided their own dictionary as to the meaning of *"the relevant taxation authorities"*. Notwithstanding Clause 8 of the Deed Poll having provided that it was to be read in conjunction with the Deed and that to the extent of any inconsistency, the Deed was to prevail:

(i) it is frequently necessary to construe instruments entered into at the same time, by taking both into account;

(ii) Mr Ellicott is not shown to have committed a manifest error when construing the subject phrase in the context of the whole of the two interrelated instruments.

61 I accept that there appears to be no commercial sense in the parties agreeing to limit disclosure to the ATO and the IRS pursuant to the Deed Poll but at the same time permitting disclosure under the Deed on a far wider basis to the AAT, the Federal Court and the High Court (and similarly in the United States). Such a construction would seem to defeat the purpose of the confidentiality clauses in the Deed Poll and the Deed.

That reasoning also leads into Mr Ellicott's reasoning in relation to reading the words in their context in the Deed.

62 Mr Ellicott's other reason was the use of the word *"to"* in the phrase *"to the relevant taxation authorities"*. That is, tax payers make a disclosure to the ATO. In contrast an appeal or the seeking of a review in the court or the AAT is not ordinarily a disclosure to the court or the AAT.

63 In the result the plaintiffs have not established a manifest error of law on the face of what they contend to be the award. If there was an error of law, it was not manifest "in the sense that there was little or no doubt that error it was" [cf Mahoney JA in *Natoli v Walker* at 223].

The second question of law: the operation of clauses 6.5, 6.6 and 8.3 of the Deed on the rights of appeal or review

64 Mr Ellicott did not decide that, as matters currently stand, clauses 6.5, 6.6 and 8.3 of the Deed prevented an appeal by the plaintiffs to the Federal Court. It was an issue he specifically declined to answer [par.179]. Therefore, as there was no decision, there can be no manifest error of law.

65 The reasoning was that clauses such as 6.5, 6.6 and 8.3 may constrain the appeal or review procedures the parties may adopt. He stated that if the plaintiffs appealed to the Federal Court they might infringe either clauses 6.5 or 8.3 because it might, directly or indirectly, harm the defendants' business or their relationship with their clients or prospective clients or it may be injurious to their commercial or reputational interests because it would involve the disclosure of damaging confidential material.

66 The reasoning is clear and to my mind likely does not throw up any, let alone any 'manifest', error. Mr Ellicott stated that clauses 6.5, 6.6 and 8.3 and 12 must be read together [par.174].

67 He then reasoned that [par.175]:

i. if an exception to clause 12.1 applied, then the disclosure was not intended by the parties to be a breach of utmost good faith (cls.6.5 or 6.6) or inappropriate conduct (cl.8.3);

ii. either party in making a disclosure will bear in mind those obligations and would not make disclosures needlessly, unreasonably or carelessly;

iii. how far these clauses impact on clause 12.1 beyond such matters was difficult and perhaps unwise to speculate about because they were essentially hypothetical situations;

iv. Mr Ellicott has simply expressed a view based upon the correct application of the authorities on the construction of a commercial agreement. The fact that the plaintiffs contend for a construction different from that of Mr Ellicott again demonstrates that there was no manifest error of law.

68 Here again, if there was an error of law, it was not manifest in the sense that there was little or no doubt that error it was.

Whether there is strong evidence that Mr Ellicott made an error of law and that the determination may add, or may be likely to add, substantially to the certainty of the commercial law: s38(5)(b)(ii) of the Act

69 In *HIH Casualty* [2004] NSWSC 659 at [59], I adopted the following passage from the decision of Lord Donaldson MR in *Ipswich Borough Council v Fisons Plc* [1990] 1 Ch 709 at 724:

> "So how strong is strong? No meter can be applied or indeed devised. It is a matter of relative values. If the chosen arbitrator is a lawyer and the problem is purely one of construction, the parties must be assumed to have had good reason for relying upon his expertise and the presumption in favour of finality or, to put it the other way round, the strength needed to rebut it will be greater."

70 The plaintiffs have not satisfied the requirements of the above subsection having failed to establish strong evidence of an error [indeed having failed in my view to establish evidence of an error]

71 Further and as the defendants have contended, whether the requirement for strong evidence relates to both limbs of section 38(5)(b)(ii), as held in *HIH Casualty* [2004] NSWSC 659 at [67], or only in relation to the first limb [see the comments of Rein AJ in *Sea Containers Ltd v ICT Pty Ltd* [2006] NSWSC 134 at [24]]; it cannot be sustained that the two questions of law set out in paragraph 11 of the Summons may add, or may be likely to add, substantially to the certainty of commercial law.

72 There is quite simply no evidence that *"relevant taxation authorities"* is a term regularly used in commercial contracts. The construction of the phrase in the Deed and the construction of the other clauses arising under the second question are *"one-off clause[s] in the context of a particular agreement between the parties"* [Emphasis added]: *Promenade Investments Pty Ltd v State of New South Wales* (1992) 26 NSWLR 203 at 226F.

Short Minutes

73 The parties are to bring short minutes of order on which occasion costs may be argued.

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