IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S67 of 2011

BETWEEN: **MICHAEL WILSON & PARTNERS LIMITED**
Appellant

AND:

ROBERT COLIN NICHOLLS
First Respondent

DAVID ROSS SLATER
Second Respondent

TEMUJIN SERVICES LIMITED
Third Respondent

TEMUJIN INTERNATIONAL LIMITED
Fourth Respondent

TEMUJIN INTERNATIONAL FZE
Fifth Respondent

APPELLANT'S SUBMISSIONS IN REPLY

PART I: INTERNET PUBLICATION CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. The order in which the respondents address the three issues before the Court is not obviously correct: contra respondents' submissions at [2]. As a result of the Court of Appeal's orders, the applicant is currently prohibited in any re-trial from making submissions inconsistent with the London award. The first issue therefore directly arises for consideration even if this Court determines the second and third issues against the appellant.

3. Accordingly, the appellant proposes to deal with the three questions in the order set out in the Notice of Appeal and its submissions in chief.

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Abuse of process

4. The respondents point to no prior authority in which the principle of abuse of process has been applied to bind a litigant to findings made in a prior arbitral award between itself and a non-party.

5. It does not advance matters to say that the principle of abuse of process is concerned with the courts' control of their own processes: cf respondents' submissions at [36(a)]. That principle has as its basis the public policy of preserving confidence in and respect for the authority of the courts.[1] That policy is not called into play in this case: see appellant's submissions in chief at [26] – [28].

10 6. There was no attempt by the appellant and Mr Emmott to "exclude or limit the operation of [applicable] principles by subscribing to arbitration clauses or resorting to arbitration": respondents' submissions at [36(b)]. Likewise, there was no choice made by the appellant at the time the arbitration agreement was executed or proceedings in NSW were commenced to "limit the parties against whom litigation is or may be conducted": respondents' submissions at [36(c)].

7. Both of these submissions by the respondents ignore the fact that the trial judge was satisfied that Mr Emmott was liable to the appellant for breach of fiduciary duty and that the respondents were liable in an accessorial capacity. In reaching those conclusions, his Honour had the benefit of evidence from, and extensive cross-examination of, Mr
20 Emmott. In these circumstances, the appellant cannot be accused of limiting or qualifying the matters to which the trial judge was required to give consideration.

8. So far as [42] of the respondents' submissions is concerned, the appellant has accepted that the issue of abuse of process was not directly raised in *Sun Life Assurance Company v Lincoln National Life Insurance Company* [205] 1 Lloyd Rep 606: see appellant's submissions in chief at [24]. However, it is clear from paragraph [63], read with [66] – [68], that Mance LJ considered that abuse of process was unlikely to be available for the reasons he set out. Those reasons have analogous application in the present case.

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[1] See eg *Sea Culture International Pty Limited v Scoles* (1991) 32 FCR 275 at 279. Even then, the power to stay or dismiss a proceeding where there appears to be an abuse of process "ought to be very sparingly exercised and only in exceptional cases": ibid.

9. The reference by French J in *Sea Culture* to "another court or Tribunal" in the passage cited by the respondents at [40] was made in the context of proceedings involving the Western Australian Industrial Relations Commission, not private arbitration proceedings.

Waiver

10. The appellant notes that the respondents have made no submissions in support of the approach adopted in *Barton v Walker* [1979] 2 NSWLR 740, nor any submissions against the contrary approach set out in *Brooks v The Upjohn Company* (1998) 85 FCR 469. As indicated in its submissions in chief, the appellant contends that the latter approach should be preferred to the former.

10 11. The fact that leave to appeal is required from an interlocutory order is not to the point: cf respondents' submissions at [26]. Such leave could, and should, have been sought by the respondents – particularly given the invitation to do so by the trial judge, which invitation contemplated the making of an order so as to neutralise the effect of *Barton v Walker*. The alternative was to impose upon the parties, and the court system, a significant inconvenience – namely, the conduct of a lengthy hearing at substantial expense which would all be to no avail if the respondents' bias objection was ultimately to be upheld.

12. To the extent that the respondents invite this Court to overrule *Barton v Walker* prospectively, rather than retrospectively,[2] such a course is not open: *Ha v State of New South Wales* (1997) 189 CLR 465 at 503-504, 515.

20 13. The respondents have failed to explain why the appellant's decision not to consent to the primary judge recusing himself has any relevance to the question of waiver at issue in this case.[3] It was for the respondents to demonstrate that the principles of apprehended bias were enlivened in this case.

Apprehended bias

14. The respondent wrongly characterise observations made by Basten JA in his reasons below as factual findings. For example, it is artificial to treat his Honour's conclusions that the primary judge "failed to deliver persuasive reasons for judgment" and that the primary judge "might not be able to bring an open mind to the issues raised in the trial" as uncontroverted findings of fact: see respondents' submissions at [5(h)], [5(q)]. The same

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[2] Cf respondents' submissions at [29(e)], [30]; see also [29(c)].

[3] Respondents' submissions at [31].

point can be made in relation to [5(d)], [5(e)], [5(f)], [5(i)], [5(n)], [5(o)], [5(p)] and [5(r)] of the respondents' submissions.

15. The respondents' attempt to discount the significance of Basten JA's characterisation of the test in *Johnson v Johnson* (2000) 201 CLR 488 as "unnecessary" and "wholly artificial" should not be accepted: cf respondents' submissions at [17]. It is tolerably clear from the balance of his Honour's reasons that he proceeded on the basis that his own personal apprehension of bias on the part of the primary judge was sufficient unless persuaded to the contrary: see [94]. Lindgren AJA's unqualified acceptance of Basten JA's reasons means that two of the three judges in the Court of Appeal failed to apply the test mandated by this Court.

16. In these circumstances, this Court should approach the question of apprehended bias afresh. For the reasons articulated in the appellant's submissions in chief,[4] the Court ought not conclude that a fair-minded lay observer might have apprehended that the primary judge might not bring an impartial and unprejudiced mind to the resolution of the questions he was required to decide.

17. The respondents' 'affirmative' case on the question of apprehended bias is, with respect, largely circular in nature: cf respondents' submissions at [22] – [23]. It proves nothing to assert that the trial judge's decisions are "consistent" with bias merely because they happened to be unfavourable to the respondents: cf respondents' submissions at [22(e)]. The same point may be made about the judge's refusal to recuse himself: respondents' submissions at [22(g)]. Such conduct cannot itself give rise to an apprehension of bias unless it is separately demonstrated that the judge was wrong to do so.

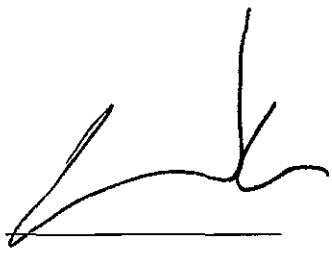
18. More fundamentally, the respondents' submissions repeat the error of Basten JA in eliding the distinction between apprehended and actual bias. The respondents variously assert that: (a) the judge "manifested a predisposition" to see the proceedings through the prism presented to him by the appellant (at [22(f) and (g)]); (b) his Honour's decisions were consistent with "a bias in the judge" against the respondents (at [22(e)]); (c) his Honour possessed "a predisposition" to see the case as one "involving a grand world wide conspiracy" (at [22(f)(ii)]); (d) his Honour possessed "a predisposition" to characterise the proceedings in a manner favourable to the appellant (at [22(f)(iii)]); (e) his Honour "insisted on retaining … appointment as the trial judge" despite being on notice of the respondents'

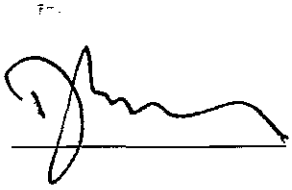
[4] At [68]ff.

bias objection (a criticism which apparently implies some improper or questionable motivation on the part of the primary judge) (at [22(d)]); (f) his Honour "saw" the proceedings "through the prism of a predisposition in favour of the Appellant" (at [23]); (g) his Honour's "manifestation of a pre-disposition" was reinforced by his refusal to recuse himself; and (g) his Honour's damages award was "unsupported, and unsupportable" (at [23(b)]).

19. Having eschewed an allegation of actual bias below, it is inappropriate for such criticisms of the primary judge to be levelled in this Court. Contrary to the unstated assumption underlying the respondents' submissions, apprehended bias is not a 'lesser form' of actual bias but, rather, a separate and distinct basis upon which a judgment or order may be set aside. As submitted by the appellant in chief, apprehended bias is concerned with divining an apprehension of bias on the part of a lay observer. It is not concerned with determining whether the reasoning process of a judicial officer was, in fact, infected by bias. Submissions directed to the latter do not support a conclusion in relation to the former.

DATED: 15 April 2011





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