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

RESPONDENTS' SUBMISSIONS

PART 1: INTERNET PUBLICATION CERTIFICATION

1. In the Respondents' assessment, these submissions are in a form suitable for publication on the internet. However, the Respondents draw to the attention of the Court that, based on past experience, the Appellant may seek orders for non-publication or redaction of statements relating to its affairs.

PART II: ISSUES IN THE APPEAL

2. In the order in which they logically arise, the appeal raises three primary issues:

   (a) Apprehended Bias: Whether the Orders made by the Primary Judge on 11 December 2009 (supported by Principal Reasons for Judgment published as [2009] NSWSC 1033 (6 October 2009) and Supplementary Reasons published as [2009] NSWSC 1377 (11 December 2009)) were affected by a reasonable apprehension that his Honour was biased, arising from (but not limited to) events before the commencement of the trial.

   (b) Waiver: Whether, notwithstanding the Respondents' express maintenance of an objection to the Primary Judge presiding at the trial, there could and should be imputed to them an intention to waive that objection because

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they did not, before commencement of the trial on 15 June 2009, apply to the Court of Appeal for leave to appeal against the refusal of his Honour (recorded in Reasons published as [2009] NSWSC 505 (4 June 2009)) to recuse himself or subsequent directions for the conduct of the trial.

(c) Abuse of Process (the London Arbitration): Whether the Court of Appeal was entitled to hold that it would be an abuse of the processes of the Supreme Court for the Appellant (having used the proceedings in the Court in aid of arbitration proceedings conducted in London between itself and Mr Emmott, alleged by it to be liable to it as the principal wrongdoer in what was represented by it to the Court as substantially the same case[1]) to seek:

i. to litigate in the Court claims for relief against the Respondents (as alleged secondary wrongdoers) upon which it failed against Mr Emmott in the London Arbitration; and

ii. to recover against the Respondents judgments, ostensibly for "compensation", notwithstanding that any loss the subject of the Appellant's claims were found by the London Arbitrators either (A) not to have been made out against Mr Emmott; or (B) to be liable to be set off against Mr Emmott's entitlements against the Appellant[2].

PART III: *JUDICIARY ACT*, 1903 (CTH), SECTION 78B CERTIFICATION

3. The Respondents certify that, in the opinion of their counsel, there is no necessity for notices to be given in compliance with s. 75B of the *Judiciary Act*, 1903 (Cth).

PART IV: A STATEMENT OF RELEVANT FACTS

4. The Appellant's Statement of Facts is deficient because it is presented at a level of generality which obscures issues for determination.

Facts Relevant to Apprehended Bias

5. Primary facts found by the Court of Appeal, and not challenged in this appeal, include the following:

(a) Before the commencement of the trial, the Primary Judge entertained a large number of ex parte applications by the Appellant (on seven separate days) in closed court: [2010] NSWCA 222 at [93](a), read with [12], [31], [32], [33], [34], [38], [47], [49], [50] and [85].

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[1] Eg, KJ Dixon's Affidavit sworn 26 March 2007, paragraphs 5-6 and 8, esp 8(b)-(c), referred to in *Emmott v MWP* [2008] Lloyd Rep 616 at [13]-[14], [59] and [111]-[112]. The Primary Judge granted ex parte relief to the Appellant on the express basis that there was "an enormous commonality" between all the proceedings (including the London Arbitration and the NSW proceedings) instituted by the Appellant throughout the world: "Confidential Judgment" (26 March 2007, revised 5 April 2007) at [37]. He referred again to the "commonality" of the Appellant's proceedings in allowing the Appellant to use documents from the NSW proceedings overseas: [2008] NSWSC 521 (23 May 2008) at [3.13]; [2008] NSWSC 605 (6 June 2008) at [12].

[2] [2010] NSWCA 2222 at [295]-[313], esp [305]-[311].

(b) Those applications were of an unusual nature: [93](b), read with [65]. The Primary Judge described the "circumstances" of the case as "unusual in the extreme": "Confidential Judgment" 26 March 2007 (revised 5 April 2007) at [2].

(c) The Primary Judge allowed the Respondents no opportunity to challenge the ex parte orders he made on the Appellant's application: [93](c), read with [40] and [65].

(d) In making ex parte orders, the Primary Judge gave no consideration to:

i. the existence of a power, and the appropriateness of its use, to make orders in aid of the Appellant's criminal complaints in foreign jurisdictions (for the principal, if not sole, purpose of providing information for further civil action): [93](d), read with [22].

ii. the power of the Court, on an ex parte hearing, to vary orders made by consent (pursuant to an agreement between the parties), thus unilaterally, and without hearing from affected parties, varying the orders which resulted from the agreement: [93](e), read with [20], [40] and [65].

(e) By his ex parte orders for confidentiality, the Primary Judge permitted the Appellant, over a lengthy period (in excess of a year), to conceal from the Respondents the fact that the Court had permitted the confidential disclosure affidavits they had provided to the Court to be used in support of criminal complaints made by the Appellant in foreign jurisdictions: [93](f), read with [40] and [65].

(f) In the course of hearing the Appellant's ex parte applications, the Primary Judge appeared to have formed at least a tentative view that the individual Respondents had conducted themselves in a manner giving rise to a reasonable suspicion that they were involved in criminal activities (including embezzlement, money laundering, forgery and disloyal management), without permitting them an opportunity to present material to the contrary: [93](g), read with [43] and [120].

(g) The Primary Judge formed that view on the basis of evidence of Mr Wilson (of the Appellant) in circumstances where Mr Wilson's credit was likely to be a significant issue at trial: [93](h), read with [13]-[14], [17]-[18], [23], [25]-[26], [36] and [120].

(h) The Primary Judge failed to deliver persuasive Reasons for Judgment on the Respondents' recusal applications; he failed to explain events that had occurred in the absence of the Respondents and he failed to engage with their concerns about those events: [93](i), read with [91] and:

i. in respect of the first recusal application (on 12 May 2008): [52]-[53], [66] and [73].

ii. in respect of the second recusal application (on 4 June 2009): [57]-[74].

(i) Although the ex parte hearings (from March to October 2007) concluded some 20 months before the first day of the trial (on 15 June 2009), the Primary Judge's refusal of the first recusal application without giving reasons (on 12 May 2008) and the further refusal (on 4 June 2009) was accompanied by reasons which, in some respects, might have failed to allay any existing concern and may indeed have exacerbated some concerns: [86].

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(j) At the hearing of the first recusal application on 12 May 2008 the Primary Judge made remarks about secreting documents in chambers which, as it happened, had an unhappy foundation in fact, and underscored that his Honour went on to make an important interlocutory decision (published as [2008] NSWSC 501 (23 May 2008)) with the benefit of materials not disclosed to the Respondents: [93](k), read with [53]-[56].

(k) The confidentiality regime instituted by the Primary Judge during ex parte hearings (and allowed to continue indefinitely until Bergin CJ made orders
20 on 13 June 2008 for it to be set aside) centrally involved the retention of the Appellant's documentation, and transcript, in the Judge's chambers rather than the Court Registry: [31], [33] and [47]-[50].

(l) No urgency attached to the Appellant's ex parte applications except the convenience of the Appellant in using documents obtained through the Supreme Court in aid of its strategy of international litigation: [12], [17]-[25], [36], [40] and [50].

(m) Proceedings in the Supreme Court were conducted by the Appellant in aid
30 of its international litigation, including the London arbitration proceedings between it and Mr Emmott: [19](i), read with [23] and [36(29)].

(n) The Primary Judge so closely associated himself with the case for which the Appellant contended during the ex parte hearings that he invited counsel for the Appellant to prepare statements of reasons which he could formally adopt: [27], [39], [44] and [62].

(o) The circumstances in which the ex parte hearings took place rendered it quite possible that the Primary Judge's mind became familiar with the
40 character of the Appellant's case to an extent that, consciously or subconsciously, there would be a tendency for him to place further evidence within that pre-existing mental structure: [85] and [121]-[123].

(p) The following factors (enumerated in [80]) might have led an observer to apprehend the possibility of pre-judgment: The material placed before the Primary Judge on the Appellant's ex parte applications was not entirely supportive of the Orders made; some of the orders were, in their nature, contestable; neither the transcripts, nor the various ex parte judgments, revealed full and proper disclosure and consideration of the weaknesses of
50 the Appellant's applications; it might be thought that the confidentiality

regime was maintained beyond a justifiable period; his Honour acted on a basis as to the credibility and possible criminality of the individual Respondents which they had no opportunity to rebut; and his Honour made orders on the basis of material put on through the affidavits of Mr Wilson, which he accepted for the purposes of the interlocutory applications, a factor which could have caused him embarrassment when invited to make adverse credit findings against Mr Wilson at trial.

(q) The Primary Judge might not be able to bring an open mind to the issues raised in the trial, particularly an assessment of the credibility of Mr Wilson on the one hand and the individual Respondents on the other: [94].

(r) The judgments given by the Primary Judge following the trial tended to enhance, rather than diminish, the apprehension of bias that would otherwise arise[3]: [94], read with [85] and [121]-[123] (relating to the extent to which the Judge's thinking may have been conditioned in favour of the Appellant); [88] (relating to the failure of the Judge to address 11 separate matters put to him by the Respondents as supporting adverse findings on Mr Wilson's credit[4]); [90] (relating to the failure of his Honour to address, in a serious and realistic manner, the Respondents' submissions about the significance of his acceptance of the evidence of Messrs Sinclair and Schoonbrood)[5].

Facts Relevant to the London Arbitration

6. The "London Arbitration Award" comprises (as noted in [2010] NSWCA 222 at [295] and [375]) documents entitled "Second Interim Award" made 22 February 2010; "Seventeenth Procedural Order" made 2 March 2010; and "Clarification" dated 6 April 2010. Those documents were prepared by the Arbitrators: Lord Millett, Mr CR Berry and Ms V Davies.

7. The London Arbitration was, in substance, the determination of questions of liability affecting the taking of accounts between the Appellant and Mr Emmott as former partners or quasi-partners. Its subject matter was in large part the Appellant's attempt both: (a) to avoid bringing into account in favour of Mr

[3] To these examples identified by the Court of Appeal might be added the fact that his Honour made an arbitrary award of $4 million "compensation" against the Respondents on a supposed "principle that no man can take advantage of his own wrong" and a supposed "presumption against the wrongdoer" not supported by the Appellant in the Court of Appeal: [2009] NSWSC 1033 at [544]-[557] and [2009] NSWSC 1377 at [59]-[60] and [96]. By Ground 3 of its Notice of Cross Appeal in the Court of Appeal, the Appellant alleged error on the part of the Primary Judge. The Court of Appeal held that the Primary Judge's award of $4 million could not be supported: [2010] NSWCA 222 at [178]-[184], read with [111] and [373].

[4] A full understanding of the significance of this failure requires consideration of the Respondents' submissions on credit, which were graphically to the effect that, on his own evidence, Mr Wilson was a dishonest man.

[5] Both the Primary Judge (in his Principal Reasons, [2009] NSWSC 1033 at [244]-[270]) and the London Arbitrators ([2010] NSWCA 222 at [305]-[306]) accepted the evidence of Messrs Sinclair and Schoonbrood. The Arbitrators held that evidence to be fatal to a substantial part of the Appellant's claims against Mr Emmott: "Second Interim Award" paragraphs 4.103, 4.108, 4.129, 4.144(h) and (l), and 8.22; "Clarification", p. 4. The Primary Judge accepted the Appellant's contention that (on a claim for equitable compensation, as on a claim for an account of profits) it was not encumbent on it to prove that it would have obtained any business opportunities found to have been diverted by the Respondents. The Court of Appeal held that that approach was wrong: [2010] NSWCA 222 at [174]-[176] and [186]-[187], read with [111] and [373].

Emmott shares in Steppe Cement Limited which the Appellant acquired in the course of the business in which Mr Emmott had an interest; and (b) to insist that shares in Max Petroleum PLC owned by a friend and client of Mr Emmott, Mr Sinclair, should be brought into account against Mr Emmott on the alleged basis that (contrary to the uncontradicted evidence of Messrs Emmott and Sinclair) the "Max Shares" were held on trust by Mr Emmott's trust company, Eagle Point Investments Limited for Mr Emmott rather than Mr Sinclair. The Appellant's contention that Mr Emmott, in breach of fiduciary duties, diverted the work of clients focussed on: (a) entities associated with Mr Sinclair; (b) entities associated with Mr Schoonbrood; and (c) two very much smaller entities, Kangamuit Seafoods and the Lancaster Group.

8. In substance, the Arbitrators found for Mr Emmott in relation to the Steppe Cement shares (which were found to have been owned by the Appellant and liable to be taken into account in favour of Mr Emmott); the Max shares; and claims referable to entities associated with Messrs Sinclair and Schoonbrood; but not in relation to claims referable to Kangamuit Seafoods and the Lancaster Group. The Arbitrators ordered that, on this basis, accounts be taken between the Appellant and Mr Emmott and that their respective entitlements be set off: [2010] NSWCA 222 at [310]-[311].

9. As it emerged during the course of the trial before the Primary Judge, the Appellant's core claim for compensation was a claim calculated by a reference to fees invoiced by the Third Respondent to its clients for work done by it between 9 January 2006 and 31 January 2008 (as summarised in a "Spreadsheet of Invoices" reproduced as "Appendix 2" to the "Plaintiff's Closing Written Submissions" dated 7 September 2009). Those clients were: (a) entities associated with Mr Sinclair; (b) entities associated with Mr Schoonbrood; and (c) the two smaller clients, Kangamuit Seafoods and the Lancaster Group[6].

10. If the Appellant is held not to be entitled to any compensation referable to the entities associated with Messrs Sinclair and Schoonbrood respectively, such (if any) entitlements it might have to compensation will be limited to claims associated with Kangamuit Seafoods and the Lancaster Group (to the extent not satisfied by setoff on the taking of accounts between it and Mr Emmott).

11. The whole of the transcript and documentary evidence adduced before the Arbitrators was in evidence before the Primary Judge: [2010] NSWCA 222 at [295]. The Court of Appeal, in addition, admitted the Arbitrators' Award into evidence: [390] and [407].

[6] The fees claimed referable to Kangamuit totalled £39,750. Those referable to the Lancaster Group totalled $US19,504.

PART V: APPLICABLE STATUTORY PROVISIONS

Relating to the Issue of Waiver

12. The *Supreme Court Act*, 1970 (NSW):

    (a) Section 101(1)(a): Subject to legislation, provision for appeals to the Court of Appeal from a judgment or order of the Supreme Court in a Division.

    (b) Section 101(2)(e): Leave to appeal required from Court of Appeal to appeal from an interlocutory judgment or order.

    (c) Section 19(1): No definition of "judgment" or "order" (a definition of "judgment" having been repealed in 1989).

13. The *Civil Procedure Act*, 2005 (NSW):

    (a) Section 4: Act applied to civil proceedings in the Supreme Court.

    (b) Section 5: Nothing in the Act or the UCPR limited the jurisdiction of the Supreme Court, and nothing in the UCPR extended the jurisdiction of the Court.

    (c) Section 10: "Rules of Court" taken to include UCPR.

    (d) Section 3: Definition of "judgment".

    (e) Section 16: Court could give directions with respect to any aspect of practice or procedure for which rules of court or practice notes did not provide.

    (f) Section 90: The Court was required, at or after trial or otherwise as the nature of the case required, to give such judgment or make such order as the nature of the case required.

14. The *Uniform Civil Procedure Rules,* 2005 (NSW):

    (a) Part 51 governed proceedings assigned to Court of Appeal: rule 51.1(1).

    (b) Rule 51.2: definition of "appeal proceedings" included summons for leave to appeal.

    (c) Part 51 Division 4 (rules 51.10-51.15) governed applications for leave to appeal.

    (d) Rule 51.44: filing summons did not operate as a stay of proceedings.

Relating to the Issue of Abuse of Process (the London Arbitration)

15. The *Arbitration Act,* 1996 (UK), ss. 68 and 69.

PART VI: A STATEMENT OF THE RESPONDENTS' ARGUMENT

THE FIRST ISSUE: APPREHENDED BIAS

Alleged Refusal to Follow High Court Test (Appellant's Submissions, paragraphs 62-67)

16. The Appellant's essential submission is that the Court of Appeal (deliberately) did not apply the test of the fair-minded lay observer stated in *Johnson v Johnson* (2000) 201 CLR 488 at [11]: Appellant's Submissions [62]-[63] and [67].

17. That submission should not be accepted because:

    (a) It is, simply, not correct. On a fair reading of the Reasons of the Court of Appeal, the Court clearly intended to apply the fair-minded lay observer test, and did so.

    (b) Basten JA stated the applicable test, by reference *inter alia* to *Johnson v Johnson*, at the outset of his Reasons: [2010] NSWCA 222 at [2]-[10]. In his analysis of the facts, he made several express references to the fair-minded lay observer: [43], [61], [62], [66], [72], [80], [86] and [91]. His conclusion was expressly stated in terms of the fair-minded lay observer test: [94]. The fact that he explored what was involved in adoption of the perspective of a fair-minded lay observer (as he did in [10]) and the fact that he expressed agreement with the view that he held must be attributed to the fair-minded lay observer (which he did in [94]) highlight that it was the fair-minded lay observer test, not some other test, that he applied.

    (c) Young J, in agreeing with Basten JA (at [117]-[127]), did so by express reference to the fair-minded lay observer: [121] and [127].

    (d) Lindgren AJA agreed with Basten JA without further elaboration: [317].

    (e) The fact that Basten JA contemplated (in [91]) that the facts of the case might be thought to have demonstrated, not merely an apprehension of bias by way of prejudgment, but the crystallisation of that apprehension in a demonstration of actual prejudgment, cannot be indicative of any error in circumstances in which he expressly confined his process of reasoning to an application of the test for an apprehension of bias and did so expressly by reference to the fair-minded lay observer.

Allegation of No Apprehended Bias in Fact (Appellant's Submissions, paragraphs 68-80)

18. The Appellant's essential submissions appear to be that:

    (a) A consideration of some (but not all) of the factors identified by Basten JA in [80] and [93] of his Reasons[7] and, in particular, the Primary Judge's determination of the Appellant's ex parte applications between 26 March

[7] The Appellant's Submissions appear to correlate with each of the sub paragraphs of [80] and possibly with sub paragraph (c) of [93]. They do not appear to address any of the sub paragraphs of [93] other than (c).

and 18 October 2007 indicates that Basten JA was wrong to conclude that apprehended bias existed "with respect to those matters": Appellant's Submissions [68].

(b) Basten JA elided the concepts of actual and apprehended bias: Appellant's Submissions [76]-[77].

(c) Basten JA placed insufficient weight on statements of the Primary Judge indicative of an absence of prejudgment: Appellant's Submissions [79].

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(d) Basten JA failed "to identify a 'logical connection' between the matters identified by him and a feared deviation by the Primary Judge from the course of deciding the case on its merits": Appellant's Submissions [80].

19. The case sought to be made by the Appellants under this heading appears to be deficient in a number of respects:

(a) Although the Appellant's submissions are introduced (in [68]) by a broad assertion that there was "no apprehended bias on the facts" (and they might
20 be taken implicitly to be asserting that it was not open to the Court of Appeal to make any finding of an apprehension of bias), they do not comprehensively address the Court of Appeal's reasoning. They appear to focus upon paragraph [80] of Basten JA's Reasons without any substantial reference to [93]-[94].

(b) Quite apart from the selective and incomplete nature of that approach, the Appellant pays no attention at all to Basten JA's statement (in [94]) that his conclusion was based upon the cumulative effect of the several considerations he identified.

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20. The Appellant has not identified (either in its Notice of Appeal or in its Submissions) any challenge to any primary finding of fact made by the Court of Appeal. Accordingly, the Respondents proceed on the basis that no such challenge is made.

21. The Appellant's submission that there was "no apprehended bias on the facts" should not be accepted because:

(a) No challenge is made by the Appellant to the Court of Appeal's primary
40 findings of fact.

(b) The Appellant's submission is defective because of its selective and incomplete character.

(c) Basten JA did not elide the concepts of actual and apprehended bias but, on the contrary (as illustrated in his Reasons at [91]) he was conscious of the distinction between the two concepts and (as contended above) he applied the fair-minded lay observer test associated with a finding of apprehended bias.

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(d) It is not correct to say that Basten JA placed "insufficient weight" on statements and conduct of the Primary Judge indicative of an absence of pre judgment[8] but, in any event, a submission that "insufficient weight" was given to particular matters falls short of identification of appellable error.

(e) The Appellant's submission that Basten JA's reasoning was defective because he did not identify a "logical connection" in terms of the discussion in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8] and *Smits v Roach* (2006) 227 CLR 423 at 445 [58]-[59] – both of which cases were "interest" cases rather than "prejudgment" cases – is misconceived and flows, perhaps, from the failure of the Appellants' to address the substance of Basten JA's reasoning in [93]-[94]. Having identified 10 "critical factors" in [93], his Honour concluded that the cumulative effect of those factors was such that a fair minded lay observer, apprised of the facts, might well apprehend that the Primary Judge might not be able to bring an open mind to the issues raised in the trial, and particularly an assessment of the credibility of central witnesses.

<u>The Respondents' Case Affirmatively Stated</u>.

22. There was throughout the trial, and there remains, a reasonable apprehension of bias in that a fair-minded lay observer would find it difficult, if not impossible, to attribute judicial impartiality of any kind to a judge (in these proceedings, the Primary Judge) in circumstances in which, in hotly contested proceedings:

(a) before the commencement of the trial, on the *ex parte* application of one party (in these proceedings, the Appellant) and actively concealed by both the applicant and the judge from absent opposing parties (in these proceedings, the Respondents), the judge conducted highly contentious business (exposing the absent parties to criminal investigation in a foreign jurisdiction, using information provided by the absent parties to the Court and the applicant on an expressly confidential basis in and only for the purpose of the proceedings) on seven separate occasions over several months.

(b) in the course of hearing those secret applications the judge:

i. delegated to the applicant a substantial role in the preparation of Reasons for Judgment placed on the Court record, but not published to the absent parties affected by them; and

ii. acquiesced in the making and maintenance of "confidentiality orders" – concealing the nature of the business transacted against the absent parties – to facilitate forensic advantage to the applicant.

(c) in the course of, and after, the conduct of that secret business the judge expressed views about:

[8] See, for example [25], [39], 979], [83] and [86].

i. the nature of the case, as one in which the applicant had an entitlement to "trace" assets of the absent parties, notwithstanding the absence of any determination of that hotly contested entitlement; and

ii. the credit, honesty and reliability of the absent parties[9].

(d) in the absence of any suggestion that there were no other judges available to conduct the trial of the proceedings, the judge accepted, and insisted upon retaining, appointment as the trial judge on notice of the fact of a reasoned, and reasonable, objection to his conducting any substantive hearing in the proceedings.

(e) decisions made by the judge, at both interlocutory and final stages of the proceedings, were consistent with a bias in the judge against the parties against whom he had in the early stages of the proceedings made "confidential" *ex parte* coercive orders.

(f) the judge manifested a predisposition to see the proceedings through a prism presented to him by the applicant during the course of the secret interlocutory hearings initiated by the applicant, including a predisposition:

i. to see the case as "large and complex" rather than as a case of modest proportions.

ii. to see the case as one involving a grand world wide conspiracy against the applicant.

iii. to characterise the proceedings as a "tracing exercise" in favour of the applicant upon a presumption that the applicant was entitled to trace assets (of the absent parties and clients of the absent parties) as if those assets, and any associated "commercial opportunities", belonged to the applicant.

(g) that manifestation of a pre-disposition was reinforced by the Judge's failure during a pre-trail application that he recuse himself for apprehended bias to disclose fully his involvement in earlier closed court proceedings: [2010] NSWCA 222 at [70]-[72].

23. The fact that the Primary Judge, before and throughout the trial of the proceedings, saw the proceedings through the prism of a predisposition to favour the Appellant is confirmed by:

(a) his findings as to the credit of Mr Wilson and the First and Second Respondents (in [2009] NSWSC 1033 at [214]-[243]), and his express (albeit qualified) acceptance of Mr Wilson as "a witness of truth" (in [2009] NSWSC 1033 at [221]), despite (as found in [2010] NSWCA 222 at [88]) the absence of any consideration by his Honour of the transparent dishonesty and unreliability of Mr Wilson as catalogued in the 11 examples

[9] "Confidential Judgment" (26 March 2007, revised 5 April 2007) at [2], [6], [7]-[8], [19] and [22]-[26]; "Confidential Judgment" (12 April 2007) at [4], [7]-[8], [14]-[15] and [19]-[21]; "(Confidential) Judgment" (18 October 2007) at [3]-[4].

set out in paragraphs 118-208 (on pages 48-76) of "The Defendants' Closing Written Submissions (Revised)" dated 10 September 2009, which remained unanswered in the Appellant's closing submissions.

(b) his Honour's unsupported, and unsupportable, award of $A4 million in favour of the Appellant (supposedly on an exercise of equitable jurisdiction) based upon a presumption against the Respondents as wrongdoers and an arbitrary, unreasoned award of "equitable compensation" in the nature of an award of punitive or exemplary damages: [2009] NSWSC 1377 at [22]-[24], [30]-[32] and [52] –[60].

(c) the orders for costs made in favour of the Appellant (in [2009] NSWSC 1377 at [69] and [78]) and indemnity costs orders without any allowance for the facts that substantial costs were thrown away as a result of conduct of the Appellant in connection with vacation of the first dates fixed for trial and abandonment of the bulk of the Appellant's evidence and late service of evidence at the trial[10].

THE SECOND ISSUE: WAIVER (Appellant's Submissions, paragraphs 39 – 61)

24. The essence of the Appellant's submissions appears to be a contention that the Respondents waived any entitlement they otherwise had to challenge the Primary Judge's final judgment (on the basis of facts and matters occurring prior to the trial) because they did not, before commencement of the trial, take up the Judge's invitation to formulate an order that he could make so as to found an application to the Court of Appeal designed to test his refusal to recuse himself: Appellant's Submissions [39]-[40].

25. That contention appears to be grounded upon: (a) an acceptance that the prevailing judicial authority in New South Wales (based on *Barton v Walker* [1979] 2 NSWLR 740 at 747-751) is largely to the effect that a judge's refusal to recuse himself or herself does not give rise to a judgment or order on which an appeal can be founded; and (b) a submission that the High Court should overrule that authority to the extent necessary to establish that a refusal by a judge to recuse himself or herself constitutes a "judgment or order" within the meaning of s. 101(1)(a) of the *Supreme Court Act* 1970 (NSW): Appellant's Submissions [41], [43], [49] and [56].

26. Insofar as the Appellant submits (in [57]) that it was open to the Respondents to "appeal" from the making of procedural directions and orders following the Primary Judge's second refusal to recuse himself, it invites the court to disregard the fact that (under SCA ss. 101(1)(a) and 101(2)(e)) the Appellants had no right of appeal from any such pre-trial directions, but would have been required to make a speculative application to the Court of Appeal for leave to appeal, in circumstances in which the filing of a summons for leave did not operate as a stay of any proceedings (UCPR rule 51.44) and the Appellant was pressing for the trial to commence.

[10] [2009] NSWSC 548 (16 June 2009); [2009] NSWSC 669 (14 July 2009).

27. Given the long-standing authority of *Barton v Walker* as the leading authority on the proper construction and operation of SCA s. 101 in the context of a refusal to recuse, it is unclear from the Appellant's Submissions whether they maintain that, in order to have avoided any allegation of waiver, the Respondents would have been required to apply to the High Court for a grant of special leave to have *Barton v Walker* overruled. The fact that question can be asked highlights the unreasonableness of the Appellant's Submissions.

28. The Appellant's restriction of its allegation of waiver to "the right to challenge the final judgment on the basis of facts and matters occurring prior to the trial" (in the Appellant's Submissions [39] note 21) provides a further demonstration of the flawed character of the Appellant's Submissions. The Appellant apparently accepts that it was open to the Respondents to appeal from the Primary Judge's final judgment on the ground of apprehended bias, but suggests that such a ground of appeal would have to be determined without reference to events occurring prior to the trial. Why that should be so, and how it could operate in practice, is left unexplained.

29. The Appellant's Submissions to the effect that the Respondents waived any entitlement they otherwise had to challenge the final judgment on the ground of apprehended bias should not be accepted because:

(a) The Respondents made, and maintained, an express objection to the Primary Judge presiding at trial: [2010] NSWCA 222 at [52], [57] and [75]. There is no factual basis upon which any waiver can be implied. The Respondents cannot be fixed with any intention to limit their rights.

(b) No waiver should be imputed to the Respondents because they did not make a speculative application for leave to appeal in circumstances in which the prevailing, orthodox view within the Supreme Court of New South Wales was that an appeal against a refusal of a judge to recuse himself or herself must, and should, await a final judgment.

(c) Unless and until the High Court overrules *Barton v Walker* (as the Appellant invites the Court to do in these proceedings) the Respondents could not fairly be said to have been under any obligation to make an application for leave to appeal to the Court of Appeal so as to ground a finding of imputation of an intention to limit their rights of appeal after final judgment.

(d) Within the framework of the then state of the law and ordinary practice, the reasoning of Basten JA in [2010] NSWCA 222 at [76]-[78] (with which Young JA agreed at [119] and Lindgren AJA agreed at [317]) could not be regarded as erroneous.

(e) Even if the High Court were to overrule *Barton v Walker*, the Court's decision could not retrospectively impose on the Respondents an obligation to apply for leave to appeal to the Court of Appeal breach of which limited their rights of appeal.

30. If the High Court is minded (prospectively) to overrule *Barton v Walker*, it should be slow to do so by reference to the exigencies of "modern case management principles" (to paraphrase the Appellant's Submissions, paragraphs 53-54) without due recognition that it was those very types of consideration that weighed heavily with the Court of Appeal in reaching the conclusions it reached in *Barton v Walker*: [1979] 2 NSWLR 740 at 751B-D and 758D-759B.

31. The Court should also be slow to act on the Appellant's faint suggestions (in paragraphs 39(b) and 52 of its Submissions) that it was unfairly subjected to a lengthy trial by reason of the Respondents' "failure" to make an application for leave to appeal to the Court of Appeal. By their letter dated 9 June 2009 the Respondents invited the Appellant to make a joint application to the Primary Judge to recuse himself; that invitation was declined[11]. Moreover, the course and length of the trial was greatly affected by the Appellant's late discovery of materials relating to the London arbitration[12], the rejection of Mr Wilson's entire affidavit evidence because of its inadmissible form[13] and the need for Mr Wilson to give his evidence orally over several days[14]. If one side of the record has been more adversely affected than the other by the Primary Judge's refusal to recuse himself, plainly it has been the Respondents, particularly as they have lacked the resources commanded by the Appellant.

THE THIRD ISSUE: ABUSE OF PROCESS, the London Arbitration (Appellant's Submissions, paragraphs 19-38)

Overview

32. The reasoning of the Court of Appeal was, in substance, correct:

    (a) Lindgren AJA dealt with the topic in [2010] NSWCA 222 at [293]-[313] and [388]-[403], especially at [391]-[403].

    (b) Basten JA dealt with it in [2010] NSWCA 222 at [99]-[109], especially at [103]-[105] and [108].

    (c) Young JA did not specifically address the topic, but implicitly agreed that the London Arbitration should be determined before the NSW proceedings: [2010] NSWCA 222 at [128]-[129] and [188]-[189], especially [189].

33. There is no dispute that (subject to the Appellant's pending application to the English High Court of Justice under ss. 68-69 of the *Arbitration Act*, 1996 (UK) the London Arbitration Award was final and binding as between the Appellant and Mr Emmott and that, as between them, it was capable of giving rise to an estoppel: [2010] NSWCA 222 at [103] and [391]-[392].

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[11] Clayton Utz letter dated 10 June 2009.
[12] [2009] NSWSC 548 (16 June 2009); [2009] NSWSC 669 (14 July 2009).
[13] Transcript, 23 June 2009, page 164 (line 24) – page 165 (line 22); page 167 (line 4) – page 168; page 221.
[14] 29-30 June; 13, 27-30 July; and 17 August 2009.

34. Nor does the Appellant challenge: (a) the jurisdiction of the Supreme Court to make orders to prevent abuses of process[15]; or (b) the existence of principles discussed in the cases identified by Lindgren AJA in [2010] NSWCA 222 at [399]-[400]: *Reichel v Magrath* (1889) 14 App. Cas. 665 (at 668); *Haines v ABC* (1995) 43 NSWLR 404 (at 410-415, esp. 410B and 414B-D); *Rippon v Chilcotin Pty Limited* (2001) 53 NSWLR 198 (at [15], [28], [32] and [36])[16]; *Rogers v The Queen* (1994) 181 CLR 251 (at (255-256); and *State Bank of New South Wales v Stenhouse Limited* (1997) Aust. Torts Reports 81-423 (at p. 64, 089).

10 35. To the extent that the Appellant failed in its claims for relief against Mr Emmott in the London Arbitration, and those claims were substantially the same as, or provided a foundation for similar, claims made by the Appellant against the Respondents in the NSW proceedings, it would be an abuse of the processes of the Supreme Court for the Appellant to maintain those claims (or any judgment of the Primary Judge referable to those claims) against the Respondents.

36. Nothing turns on the fact that any estoppel arising against the Appellant *vis à vis* Mr Emmott arises as the outcome of arbitration proceedings between them (Appellant's Submissions [26]-[32]):

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(a) Principles governing the prevention of abuses of court process have at their centre the courts' control of their own processes.

(b) Parties cannot exclude or limit the operation of those principles by subscribing to arbitration clauses or resorting to arbitration.

(c) The fact that parties may choose, whether at the time of contract or at the time of commencement of proceedings, to limit the parties against whom litigation is or may be conducted cannot constrain an application of
30 principles by courts designed to protect their own processes and to prevent unfairness, oppression or vexation of other parties.

(d) If (contrary to the Respondents' submissions) any significance lies in the involvement of a curial process as distinct from a merely arbitral one, the fact is that the London Arbitration has been supervised by proceedings in the English High Court of Justice on various occasions from the outset[17], and the Appellant has returned to that Court for the purpose of a challenge

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[15] Apart from the inherent jurisdiction of the Supreme Court (classically described in *Witliams v Spautz* (1992) 174 CLR 509 at 518-521 and *Walton v Gardiner* (1993) 177 CLR 378 at 392-396, reference might be made to statutory powers such as s. 67 of the *Civil Procedure Act* 2005 (NSW) or rule 36.1 of the *Uniform Civil Procedure Rules,* 2005 (NSW) and jurisdiction derived from Equity (*CSR Limited v Signa Insurance Australia Limited* (1997) 189 CLR 345 at 392-394).

[16] An application for special leave to appeal from this decision was refused on the basis that it "turned on the application of established principles to the facts and circumstances of the particular case": [2002] HCA Trans 304 (21 June 2002) per Gleeson CJ and McHugh J.

[17] Almost contemporaneously with commencement of the Arbitration the Appellant obtained a search order from the High Court against Mr Emmott in support of the arbitral proceedings in August 2006: KJ Dixon Affidavit sworn 26 March 2007, paragraph 8(a)-(b); *Emmott v MWP* [2008] 1 Lloyds Reports 616 at [6]. Other judgments of the High Court relating to the proceedings have been published: [2008] EWHC 2684 (Comm); [2009] EWHC 1 (Comm).

to the Arbitrators' Award under ss. 68 and 69 of the *Arbitration Act*, 1996 (UK)[18].

37. The central point remains that the Australian Courts' focus for attention is the use of their processes, not the English proceedings *per se*. That point was correctly made by Lindgren AJA in [2010] NSWCA 222 at [394], [398] and [401].

38. The force of that observation is strengthened in this case by the fact that, on several occasions, the Appellant obtained leave to use documents obtained in the NSW proceedings (including confidential discovery affidavits and discovered and subpoenaed documents) in aid of its conduct of the London Arbitration on the basis that the case being litigated against Mr Emmott in the arbitration and the case being litigated in the NSW proceedings against the Respondents were, in substance, the same case[19].

39. Having substantially lost its case against Mr Emmott in the London Arbitration, the Appellant cannot in fairness re-litigate that same case against the Respondents in NSW or claim against the Respondents a "loss" (relating to claims referable to Kangamuit Seafoods and the Lancaster Group) likely to have been extinguished by set off in the taking of accounts between it and Mr Emmott.

The Appellant's Submissions on "Principle", particular points (Appellant's Submissions, paragraph 20-34)

40. The power of the Supreme Court to prevent abuses of its processes (of which *Reichel v Magrath* is but an illustration) is not limited to conduct that is inconsistent with prior court proceedings. "The possible varieties of abuse of process are only limited by human ingenuity and the categories are not closed.... An attempt to litigate in the court a dispute or issue which has been resolved in earlier litigation in ... another court or tribunal may also, according to the circumstances, constitute an abuse of process even if not attracting the doctrines of *res judicata* or issue estoppel"[20].

41. The Appellant's reliance (in its Submissions at [21]) upon the statement that "[there] cannot be '*re*-litigation' if there has not been litigation" in *R v O'Halloran* [2000] NSWCCA 528; 182 ALR 431 at [103] is misdirected, as appears from [103] and [108]-[110]. That was a case in which an attempt was made (unsuccessfully) to constrain a party (the DPP) who was not a party to earlier litigation. It was expressly distinguished from a case, such as the present, where a losing party seeks to re-agitate issues in other proceedings.

42. The English cases relied upon by the Appellant (in its Submissions at [23]-[25], [27] and [29]-[33]) in support of its contention that the London Arbitral Award could have no bearing on the question whether proceedings in the NSW Supreme Court constitute an abuse of process (namely, *Sun Life Assurance Company v Lincoln National Life Insurance Company* [2005] 1 Lloyds Rep 606 and *Simms v*

[18] [2010] NSWCA 222 at [308].
[19] Eg, Ms Dixon's affidavit sworn 26 March 2007, paragraphs 8(b)-(c).
[20] *Sea Culture International Pty Limited v. Scoles* (1991) 32 FCR 275 at 279 per French J, referred to in the Appellant's Submissions at [28] n 12.

Dadourian Group International Inc [2009] EWCA 169 at [142]-[143]) do not support the contention. Neither case concerned, or considered, *Reichel v Magrath*. The foundation case, *Sun Life*, expressly disclaimed consideration of arguments about "abuse of processes of the Court": [63], [65], [68], [71] and [88]. It considered only "issue estoppel": [1], [6], [8], [38]-[51], [53], [64], [65], [77], [83] and [85]. And that question arose in the context of successive, private arbitrations between different parties (not this case): [1], [86] and [87](b).

43. The Appellant's reference to the possibility that arbitral awards may be confidential to the parties to a particular dispute (Appellant's Submissions [33]) presents no foundation for criticism of the Court of Appeal's reasoning, but it does highlight an aspect of the Appellant's conduct of the NSW proceedings that aggravates the abuse of process affecting the NSW proceedings. The Appellant has used the NSW proceedings to obtain information and documentation in aid of the London Arbitration. It tendered the Principal Judgment of the Primary Judge (Einstein J) as evidence in the Arbitration in support of its case against Mr Emmott[21]. On the other hand, in both the Equity Division and the Court of Appeal, it resisted disclosure to the Respondents of information relating to, evidence adduced in and awards made in the Arbitration. Its arguments have been predicated on assertion of an entitlement to obtain relief against Mr Emmott in the Arbitration and against the Respondents in the NSW proceedings whether or not that might involve inconsistency in outcomes or double recovery of "compensation" on its part. Mr Wilson has been obsessively secretive about the conduct of the Appellant's affairs, but anxious to use openly any forensic victories the Appellant might have along the way[22].

44. The power of the Court to prevent abuses of its processes cannot be constrained (as the Appellant would constrain it) by private claims to confidentiality asserted by a party abusing those processes.

The Appellant's Submissions on "Facts of this case" (Appellant's Submissions, paragraphs 35-38)

45. The Appellant's submission that "the doctrine of abuse of process" could not apply in the present case should not be accepted for the following reasons:

(a) The Appellant's contention (in its Submissions [36]) that "the doctrine" has a temporal limit is misplaced. If (as is presently contemplated by the Court of Appeal's orders) there is to be a retrial, any final judgment in the NSW proceedings will post date the Arbitrators' Award. In any event, if the Court were satisfied that enforcement of a judgment against the Respondents would involve an abuse of process (eg, because rights asserted against the Respondents on any ancillary liability they might be found to have had have been satisfied as a result of the outcome of the

[21] Second Interim Award (made 22 February 2010), paragraph 4.144(s) on page 79; paragraph 6.2 on page 138; and paragraph 8.12 on page 154.

[22] See, eg, [2010] NSWCA 222 at [199], together with references in Basten JA's Reasons to the "confidentiality orders" associated with the Appellant's ex parte applications to the Primary Judge, and the strategy of "world wide litigation" attributed to Cohen QC (referred to in [23] and [125]).

London Arbitration) it would be open to the Court to stay any further proceedings on the NSW Judgment.

(b) The Appellant's contention that "the doctrine" is only enlivened where a prior determination is final in nature (Appellant's Submissions [37]) is flawed because its focus is on the Arbitration (rather than on the proper conduct of proceedings in NSW) and it fails to acknowledge that (subject to the outcome of the Appellant's challenge to the Award under ss. 68-69 of the *Arbitration Act*, 1996 (UK)) the Award is final and binding in nature. The fact that a process of taking of accounts is involved in working out the orders made by the Arbitrators does not detract from the character of the Award as final rather than interlocutory[23].

(c) The Appellant's contention (in its Submissions [38]) that its conduct was not "vexatious, oppressive and unfair" is misplaced because it fails to focus on the gravamen of the conduct presently under consideration – that is, the attempt by the Appellant to litigate against the Respondents a case which (by virtue of the Arbitrators' Award) has been lost as against Mr Emmott.

PART VII: THE RESPONDENTS' NOTICE OF CONTENTION

46. The Respondents' Notice of Contention requires no separate consideration as it simply seeks, formally, to preserve arguments to be advanced in the Court of Appeal if (in accordance with the relief sought in the Notice of Appeal) the proceedings are remitted to that Court.

PART VIII: CONCLUSION

47. The Appeal should be dismissed with costs.

Date: 8 April 2011

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[23] *Derrawee Pastoral Co Pty Ltd v McConochie* (Handley JA, 24 February 1995) BC 200305683 at [13], approved and applied in *Kara Kar Holdings Pty Ltd v Brookton Holdings Ltd* (1997) BC 9700922 at [10]; *Pollicino v Pollicino* [2000] NSWCA 4 at [2] and [7]; *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146 at 153[35]-[36]; and *Bromley v Forestry Commission of NSW* [2003] NSWCA 252 at [13].