Supreme Court

New South Wales

Case Name:	Kennedy Miller Mitchell Films Pty Limited v Warner Bros. Feature Productions Pty Limited
Medium Neutral Citation:	[2017] NSWSC 1526
Hearing Date(s):	11 October 2017
Decision Date:	9 November 2017
Jurisdiction:	Equity - Commercial List
Before:	Hammerschlag J
Decision:	The application is dismissed.
Catchwords:	COMMERCIAL ARBITRATION – International Arbitration Act 1974 (Cth) s 7(2) – CONTRACT – construction – application by first defendant for an order that it and the plaintiffs be referred to arbitration in California – whether the plaintiffs and the first defendant are parties to an arbitration agreement under which they have undertaken to submit to arbitration the dispute to be quelled by the proceedings – whether a provision of their Letter Agreement for the production of the motion picture Mad Max-Fury Road includes an arbitration provision as a consequence of the incorporation of standard terms for "A" list directors and producers – whether the arbitration clause in Certificates of Employment executed by the first plaintiff, the first defendant and two directors of the first plaintiff covers the present dispute – whether the law of California is to be applied – application by the second plaintiff for a stay of the proceedings on forum non conveniens grounds – HELD: not established that the plaintiffs and the first defendant agreed to arbitration by the Letter Agreement – HELD: the arbitration clause in the Certificates of Employment does not cover the dispute – questions of stay on other grounds do not

	arise.
Legislation Cited:	International Arbitration Act 1974 (Cth)
Cases Cited:	Cione v Foresters Equity Services Inc. 58 Cal. App. 4th 625 (1997) Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337 Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (2006)157 FCR 45 Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389 Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 Fiona Trust & Holding Corporation v Privalov [2008] 1 Lloyd's Rep 254 Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 Hampton Court v Crooks (1957) 97 CLR 367 IBM Australia Ltd v National Distribution Services Pty Ltd (1999) 22 NSWLR 466 International Air Transport Association v Ansett Australia Holdings Ltd (2008) 234 CLR 151 Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 Oceanic Sun Line Shipping Co Inc v Fay (1988) 165 CLR 197 Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522
Category:	Principal judgment
Parties:	Kennedy Miller Mitchell Films Pty Limited – First Plaintiff Kennedy Miller Mitchell Services Pty Limited – Second Plaintiff Warner Bros. Feature Productions Pty Limited – First Defendant Warner Bros. Entertainment, Inc. – Second Defendant
Representation:	Counsel: R.A. Dick SC with A.M. Hochroth - Plaintiffs A.S. Bell SC with S.J. Free - Defendants Solicitors: Simpsons Solicitors - Plaintiffs

Gilbert + Tobin - Defendants

File Number(s): 2017/268450

JUDGMENT

BACKGROUND

1 HIS HONOUR: ***Mad Max - Fury Road*** (Mad Max or the Picture) is, I am given to understand, a theatrical motion picture.

2 The first plaintiff and the second plaintiff (together KMM) are New South Wales corporations. Messrs George Miller (Miller) and Doug Mitchell (Mitchell) are directors of KMM.

3 The first defendant, Warner Bros. Feature Productions Pty Ltd (WB), is a New South Wales corporation. It was formed for the purposes of producing motion pictures in Australia. It is a subsidiary of, and is under the control and direction of, the second defendant (Warner Bros.), a United States corporation.

4 In February 2009, KMM submitted to WB a screenplay, including storyboards, for Mad Max.

5 KMM and WB then entered into a written agreement, in the form of a letter (the Letter Agreement), stated to be "As of February 12, 2009".

6 The introductory paragraph of the Letter Agreement reads:

> This will confirm the agreement between Warner Bros. Feature Productions Pty Ltd. ("WB"), on the one hand, and Kennedy Miller Mitchell Films Pty Limited ACN 128 081 425 and Kennedy Miller Mitchell Services Pty Limited (individually and collectively, "KMM"), on the other hand, with respect to the theatrical motion picture entitled "FURY ROAD" (the "Picture"), the proposed anime related to the Picture featuring "Praetorian" (the "Anime") and the services of George Miller ("Miller") and Doug Mitchell ("Mitchell") in connection therewith.[1]

7 The Letter Agreement contains comprehensive provisions for Miller to direct, and for Mitchell to produce the Picture for a combined fee to KMM. KMM was to produce and deliver the Picture by 25 October 2013. KMM would be entitled to a percentage of the proceeds of the Picture. If the Picture was not produced within a budget approved by WB, KMM's participation in the proceeds was to

[1] An anime is a style of Japanese film and television animation.

be reduced in accordance with a stated formula until the amount in excess of the approved budget was recouped from the proceeds.

8 Clause 21 of the Letter Agreement provides:

> **Balance of Terms:**
>
> The balance of terms will be WB and WB standard for "A" list directors and producers, subject to good faith negotiations within WB's and WB's customary parameters.[2]

9 The Letter Agreement was amended thrice; "as of" 20 August 2009, 4 January 2012 and 6 June 2012 respectively. The third amendment made provision that if the final net cost of the Picture was US$157 million or less, KMM would be entitled to an additional US$7 million bonus. Provision was made for how the approved budget was to be determined. Certain categories of costs (excluded costs) were to be excluded from the overbudget calculation.

10 The Letter Agreement provides that if WB intends to seek a co-financier for the Picture (other than two named entities), it will first offer KMM the opportunity to provide that financing on terms comparable to those for similar financing deals of WB.

11 When the Letter Agreement was entered into, each of the first plaintiff and Miller, and the first plaintiff and Mitchell respectively, provided WB with an executed, somewhat lengthy instrument, entitled "Certificate of Employment (Loanout)" (COE). At the foot of each COE, WB provided its acknowledgement and agreement. The COE for Miller records that WB had engaged the first plaintiff ("Employer") to furnish the services of Miller ("Employee") in connection with the Picture. The COE for Mitchell records that WB had engaged the first plaintiff ("Employer") to furnish the services of Mitchell ("Employee") in connection with the Picture. Each COE records that for good and valuable consideration, Employer and Employee acknowledge that all results and proceeds of services rendered by Employer and Employee and any material created shall be deemed to be works made for hire for WB. They contain provisions granting WB waivers and consents in respect of moral rights in the Picture. They contain representations and warranties that Employer and Employee are free to grant all rights. They contain indemnities against liability,

[2] The two references to "and WB" are otiose.

damages, costs and expenses in connection with third party claims or actions arising out of breach of representations, warranties or agreements.

12 Both COEs include the following provision:

> Any and all controversies, claims or disputes arising out of or related to this agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate ("Dispute"), except as otherwise set forth below, shall be resolved according to the following procedures which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under $250,000) or the JAMS Comprehensive (for claims over $250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor ("JAMS") in effect at the time the request for arbitration is made (the "Arbitration Rules"). The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages.

13 JAMS (apparently previously known as Judicial Arbitration and Mediation Services) is an American organisation which provides, amongst others, judicial arbitration facilities.

14 On 4 September 2017, KMM started proceedings in this Court against WB and Warner Bros.

15 On WB's calculations Mad Max went over budget. If these calculations are right, KMM does not get a bonus. KMM claims that WB made a series of decisions which caused substantial changes and delays to Mad Max, which led to additional costs and expenses and that WB wrongly took them into account in its overbudget calculation. If those costs are left out of account, KMM says that Mad Max came in under budget. KMM also claims that WB entered into a co-financing arrangement with an organisation called Ratpac for 12.5% of the funding of Mad Max and that WB breached the obligation first to offer such an arrangement to KMM. KMM also brings a claim of misleading and deceptive conduct under s 18 of the *Australian Consumer Law* asserting that WB and Warner Bros. did not inform them of the fact that they did not intend the additional costs incurred by the changes and delays to Mad Max brought about

by them, to be excluded costs for the purposes of the budget calculation. They make a claim against Warner Bros. of knowing and intentional interference with KMM's contractual rights to be offered co-financing, by causing WB to contract with Ratpac.

16 WB contends that the WB standard terms for "A" list directors and producers incorporated into the Letter Agreement by cl 21 contain an arbitration clause.

17 Section 7(2) of the *International Arbitration Act 1974* (Cth) (the Act) provides:

> (2) Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

18 Section 3(1) of the Act defines ***arbitration agreement*** to mean an agreement in writing of the kind referred to in sub-article I of Article II of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations Conference on International Commercial Arbitration (the Convention). The section provides that ***agreement in writing*** has the same meaning as in the Convention.

19 Sub-article I of Article II of the Convention provides that each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

20 Sub-article II of Article II of the Convention provides that the term ***agreement in writing*** shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

21 WB makes application, under s 7(2), for a stay of the proceedings and their referral to arbitration. It relies on the arbitration clause said to be incorporated by cl 21 of the Letter Agreement and separately, on the arbitration clause in each COE.

22 On the footing that the claim against WB must go to arbitration, and the claim against it is so clearly related to that claim, Warner Bros. seeks a permanent stay of the proceedings against it on the grounds that New South Wales is a clearly inappropriate forum. As an alternative, it seeks a temporary stay pending the outcome of arbitration between KMM and WB.

23 KMM argues that, without further agreement between the parties, cl 21 of the Letter Agreement does not have the effect of incorporating any WB standard terms for "A" list directors and producers. It also argues that WB has not proved the existence and identity of such WB standard terms (including any arbitration provision).

24 KMM puts that the dispute is not covered by the arbitration clause in the COEs because it neither arises out of nor is related to the COEs, their interpretation, performance or breach.

25 KMM argues that this Court is not a clearly inappropriate forum for determination of the proceedings against Warner Bros. given that its claims are under a Commonwealth statute and a contract to which Australian corporations are parties, that the contract was to be performed substantially in Australia and the damage they suffered was suffered in this jurisdiction.

26 On 5 September 2017, WB filed with JAMS and served a demand for arbitration. On 14 September 2017, it extended its demand to include Warner Bros.

THE LETTER AGREEMENT

27 The first question is whether by the words the parties used in cl 21, they intended immediately to be bound by terms meeting the description WB standard terms for "A" list directors and producers. This is a question of law.

28 The second question is whether WB has proved a set of contractual terms fitting the description WB standard terms for “A” list directors and producers, which include an arbitration clause. This is a question of fact.

Intention to be bound

29 WB argues that the words of cl 21 convey an intention that the parties will be immediately bound, but impose on them an obligation to engage in good faith negotiations (should either party want them) with a view to amending the standard terms, but limited to changes which fall within the description of WB’s customary parameters.

30 It argues the words of cl 21 disclose an intention that the balance of terms will be the standard terms, subject to any agreed variation of those terms within the specified parameters.

31 KMM argues that words such as “subject to negotiations” traditionally connote an intention not to be immediately bound. They also argue that the provision is void for vagueness because no customary parameters for negotiation are self-evident or have been established.

32 In my view, WB’s position is correct. Clause 21 conveys that the standard terms (if they exist) prevail unless they are varied. The balance of terms “will be” the standard terms, subject to negotiation. Whilst the parties are obliged to engage in good faith negotiations, if those negotiations do not result in any amendment, the unamended standard terms apply. The fact that the customary parameters may not exist or have not been established, simply denudes the negotiation obligation of content leaving the standard terms to apply. If there is no negotiation, the application of the standard terms is subject to nothing.

WB standard terms for “A” list directors and producers

33 WB read the affidavit of Mr Richard S. Levin. Mr Levin describes his position as Senior Vice-President and General Counsel of Warner Bros. Pictures, a division of WB Studio Enterprises Inc. (which Mr Levin refers to as WB Pictures). That entity is the holding company of WB and Warner Bros. Mr Levin heads a legal department of ten lawyers. They report to him. He has ultimate oversight over all matters relating to agreements considered for production as

theatrical motion pictures, including agreements with talent (actors, producers, directors, etc).

34 Mr Levin says that most agreements with talent begin with what is referred to as a "deal memo", an internal WB Pictures memo prepared by a business affairs executive at WB Pictures and which summarises the major deal points (for example the role, compensation, credit) of an agreement reached with the representatives of talent. Deal memos are ordinarily directed to his department, and in most situations, one of the lawyers who reports to him will prepare a "long form" agreement based on the major deal points covered in the deal memo, supplemented by what he describes as his department's form agreements.

35 Mr Levin says that while most agreements with talent end up in the "long form" format, some, like the Letter Agreement, do not, and may end up being documented in a shorter "deal letter." This can be due to factors such as the need to close the deal quickly, established prior practice with the talent, or the fact that the deal has a feature (such as a copyright transfer) that requires a signature in order to be legally effective.

36 Mr Levin says that deals which are not “papered” in the "long form" format (such as those that are governed by a deal letter) will often incorporate WB Pictures' standard terms used in the "long form" agreements by reference to those standard terms. He says that this is typically accomplished by, amongst others, including a paragraph headed "Balance of Terms".

37 He says that "long form" agreements are prepared by the lawyers in his department using internal form agreements that his office maintains in a form file on a shared drive that the other attorneys in his department can access. Mr Levin’s assistant is responsible for maintaining the internal form agreements on the shared drive, under Mr Levin’s direction, and his assistant is the only person within Mr Levin’s department that has rights to change any document on the shared drive. The internal form agreements are reviewed and updated from time to time and the old versions of the form agreements are maintained in four sub-folders on the same shared drive - "old forms pre-2000," "old forms 2000-2005," "old forms 2006-2010” and "old forms".

38 He exhibits to his affidavit what he describes as the 2009 Director Form Agreement and the 2009 Producer Form Agreement which he says are WB Pictures' internal form agreements for "A" list directors and internal form agreements for "A" list producers that were in use during the first half of 2009 and which are contained in his department's "old forms 2006 – 2010" sub-folder on the shared drive.

39 The exhibited Director Form Agreement is entitled Director Loanout Agreement. The Producer Form Agreement is headed [Executive] Producer Loanout Agreement.

40 Mr Levin says that these "long form" agreements contain a combination of "deal terms" - i.e., terms that are specific to the deal to be negotiated with the director or producer as recorded in the deal letter - and "standard terms" which are essentially the same in every deal, subject to approved negotiating parameters. He says that the "deal terms" relate to those provisions that are negotiated by business affairs executives and would typically be addressed in the deal memo, such as "Compensation" and "Credit". He says that the fact that these are "deal terms" is reflected in the form "long form" agreements by the fact that the paragraphs that address them contain a number of blanks to be filled in. He says that the "standard terms" are provisions such as "Rights", "Services Unique", "Contingencies" (including termination) and "Miscellaneous", which vary little from deal to deal. The forms contain brackets in various places. The arbitration provisions in the "A" list director and producer form agreements contain a few provisions in bold print and enclosed in brackets. He says that the bracketed material reflects pre-approved additions or changes that the attorneys who report to him are authorised to make if the other side requests them during negotiations. His approval would be required for any substantive change to the Arbitration Provision other than the addition of the pre-approved bracketed language from the form agreement.

41 He says that the standard terms of the 2009 Form Agreements (as at the date of the Letter Agreement) contain provisions requiring arbitration before JAMS applying California law. The arbitration clause appears in the Director Form Agreement as cl 20(c) and the Producer Form Agreement as cl 18(c), under

the heading “Miscellaneous” and the sub-heading “Governing Law/Dispute Resolution”:

> Governing Law/Dispute Resolution: This Agreement shall be governed and construed in accordance with the laws of the State of California applicable to contracts entered into and fully performed therein. Any and all controversies, claims or disputes arising out of or related to this Agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate (“Dispute”), except as otherwise set forth below, shall be resolved according to the following procedures which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under $250,000) or the JAMS Comprehensive (for claims over $250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor (“JAMS”) in effect at the time the request for arbitration is made (the “Arbitration Rules”). **[Rule 17(c) of the JAMS Comprehensive Rules and Procedures shall be modified to provide that each Party, as such term is defined in the Arbitration Rules, may take three depositions of an Opposing Party or of individuals under the control of the Opposing Party. Rule 17(c) shall otherwise remain unchanged and in full force and effect.]**
>
> The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages.
>
> The arbitrator will provide a detailed written statement of decision, which will be part of the arbitration award and admissible in any judicial proceeding to confirm, correct or vacate the award. Unless the parties agree otherwise, the neutral arbitrator and the members of any appeal panel shall be former or retired judges or justices of any California state or federal court with experience in matters involving the entertainment industry. If either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County. The party seeking enforcement of any arbitration award shall be entitled to an award of all costs, fees and expenses, including [reasonable outside] attorneys’ fees, incurred in enforcing the award, to be paid by the party against whom enforcement is ordered.
>
> Notwithstanding the foregoing, either party shall be entitled to seek injunctive relief (unless otherwise precluded by any other provision of this Agreement) in the state and federal courts of Los Angeles County. Any Dispute or portion thereof, or any claim for a particular form of relief (not otherwise precluded by any other provision of this Agreement), that may not be arbitrated pursuant to applicable state or federal law may be heard only in a California court (state or federal) of competent jurisdiction in Los Angeles County. Any process in such proceeding may be served upon Employer and Employee by, among other methods, delivering it or mailing it, by registered or certified mail, directed to

> such address Employer and Employee designated in this Agreement. Any such delivery or mail service shall have the same effect as personal service within the State of California.

(I interpolate that it is common cause that the terms of this arbitration provision would cover the controversy to be quelled by the proceedings.)

42 Mr Levin says that arbitration provisions like those reflected in the 2009 Form Agreements have been used in WB Pictures' "A" List director and producer form agreements since the early 2000s, including during all times that he has been General Counsel of WB Pictures.

43 He exhibits previous agreements from 2005 to 2009. He exhibits 16 agreements for 2005, (eight Producer Agreements and eight Director Agreements); 14 agreements for 2006 (six Producer Agreements and eight Director Agreements); five agreements for 2007 (one Producer Agreement and four Director Agreements); 16 agreements for 2008 (seven Producer Agreements and nine Director Agreements) and five agreements for 2009 (one Producer Agreement, two Director Agreements and two Producer/Director Agreements).

44 He concludes by observing that a number of the agreements exhibited are unsigned and some contain redlining. In fact only six of the exhibited agreements are signed. He says that many of the agreements are unsigned because WB Pictures does not employ what is referred to in the motion picture business as a "signed deal policy." In practice, this means that the parties exchange drafts until all material issues are deemed resolved, with the final exchanged unsigned draft (which sometimes contain redlines) being treated as the operative version of the agreement.

45 The notion of WB standard terms for “A” list directors and producers comprises two elements:

(1) terms which are standard for WB;

(2) for contracts with “A” list directors and producers.

46 Mr Levin does not make explicit what he takes (or assumes) the phrase “standard terms” to connote. He does refer to standard terms as being “essentially” the same in every deal, subject to “approved” negotiating

parameters. He does not identify any document, which on its face enables it to be said to be the standard terms for “A” list directors or producers which the parties had in contemplation. Indeed, in most instances, he cited unexecuted documents.

47 I take the term “standard”, in its ordinary grammatical meaning, to mean used in a sufficient preponderance of cases, where WB contracts with “A” list directors and producers, to make its use usual. Its use does not have to be invariable. WB bears the burden of showing (as at the time of the Letter Agreement) that where it contracted with “A” list directors and producers, it had done so with sufficient regularity on the terms which it says are standard, so as to make that course usual. This requires a comparison of the universe of instances where WB had contracted with “A” list directors or producers with the instances where it contracted with them on the asserted standard terms.

48 None of the contracts relied upon as instances of contracting on standard terms are contracts to which WB is party. They are contracts to which WB Pictures is a party. There is no evidence of any regularity of contracting on standard terms by WB itself.

49 Faced with this difficulty, WB put that where cl 21 refers to WB, this should be read as, or as including, WB Pictures. This submission is untenable. WB is unambiguously defined in the introductory paragraph of the Letter Agreement as the Australian entity Warner Bros. Feature Productions Pty Ltd and only that entity. There is no claim for rectification or warrant for reading cl 21 as nonsense or self-evidently in error. WB correctly conceded that the evidence did not establish standard terms used by WB itself.

50 This is sufficient to dispose of the contention that the parties bound themselves to arbitration by the Letter Agreement.

51 However, even assuming the reference to WB in cl 21 is to be read as, or to include, a reference to WB Pictures, the evidence does not establish standard terms for “A” list directors and producers in any event.

52 Mr Levin’s evidence refers to standard terms as being essentially the same subject to approved negotiating parameters, but does not establish the ambit of

those parameters. He says that his subordinates have authority to negotiate the bracketed portions. He does not deal with the approved parameters with respect to his own authority.

53 He does not explain what is meant by "A" list directors and producers. Presumably this is a category of persons whose names appear on a particular list of priority. He does not identify any such list. He does not state that each sample agreement is with a person who appeared on such a list at the time of the agreement or otherwise can be identified as an "A" list director or producer.

54 Mr Levin does not reveal for any particular period, or at all, the number of agreements entered into by WB Pictures with "A" list directors and producers in the long form (which he says prevailed as at the date of the Letter Agreement or otherwise) – so as to enable a comparison to be made with the number of agreements said to have been entered into with "A" list directors and producers on terms not including what he says are standard terms. He provides no information to enable an assessment to be made of the numerical significance of the sample he provides.

55 These omissions from Mr Levin's evidence are significant. Evidence is to be assessed according to the ability of a party to bring it. All the facts are within the knowledge of the WB camp. I consider that an inference is properly to be drawn that Mr Levin's evidence on the omitted matters would not have assisted them: *Hampton Court v Crooks* (1957) 97 CLR 367 at 371-2; *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418.

56 WB also read the affidavit of Ms Sandra Smokler, one of the lawyers working under Mr Levin's supervision. Ms Smokler was responsible for negotiating the terms of the Letter Agreement. She traced the history of those negotiations identifying precedent documents she used. She also identified what she described as a number of "A" list director and producer agreements with KMM's representatives at Creative Artists' Agency and KMM's American lawyers, Gang Tyre Ramer & Brown Inc. in relation to other projects (not involving KMM, Miller or Mitchell) said to contain the arbitration provision. This

affidavit evidence does not fill the lacunae in WB's evidence which I have identified above.

THE COEs

57 The issue which arises for determination is whether the controversy or dispute between KMM and WB arises out of, or is related to, the COEs or their interpretation, performance or breach, so as to be covered by the arbitration clause in those instruments. This is a question of contractual construction.

58 The scope of the dispute is to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including the defence, are based. No defence has yet been filed.

59 WB contended that this question falls to be decided according to the law of California.

60 There was evidence from experts on both sides as to the state of the law in California. Particular reference was made to *Cione v Foresters Equity Services Inc.* 58 Cal. App. 4th 625 (1997) in which the Californian Court of Appeal said that doubts as to whether an arbitration provision applies to a particular dispute are to be resolved in favour of sending the parties to arbitration, that the Court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute and that a heavy presumption weighs the scales in favour of arbitrability and that an order directing arbitration should be granted unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favour of coverage.

61 Where an analysis of the possible issues in a dispute reveals that it could come within an arbitration clause, I understand an approach (indeed I would adopt it) that favours sending the parties to arbitration.

62 But I do not read the Californian authorities to stand for the proposition that the parties are to arbitrate when the dispute does not fall within the terms of an arbitration clause properly construed.

63 The present application is one under the Act. It requires the Court to determine whether, under a statute in force in this jurisdiction, there is a written arbitration

agreement under which the parties have undertaken to submit the difference which has arisen between them to arbitration. This, I think, must be a question to be decided under the law of the forum. It is for the municipal law to determine whether the parties reached a consensus ad idem and what that consensus was; see *Oceanic Sun Line Shipping Co Inc v Fay* (1988) 165 CLR 197 at 225, 260-1.

64 However, I do not think that if the law of California applied, the outcome would be any different.

65 Arbitration provisions, are, when it comes to this construction, no different to any other provision in a commercial agreement.

66 The meaning of the words used is to be determined objectively, that is, by what a reasonable person would have understood them to mean. It requires attention to the language used by the parties, the commercial circumstances which the document addresses, the purpose of the transaction and the objects which it was intended to secure. The whole of the instrument has to be considered. Preference is given to a construction supplying a congruent operation to the various components of the whole and which does not make commercial nonsense or work commercial inconvenience: *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 at 350-352; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 529; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117.

67 Australian courts have repeatedly held that words such as “arising out of”, “arising under”, “in connection with” or “connected with” and “related to” have a wide ambit and that when commercial parties choose a forum for the resolution of disputes which may arise between them, such provisions should be liberally construed so as to further their ultimate intent, namely, that their disputes should be susceptible to the forum which they have chosen; see *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *IBM Australia Ltd v National Distribution Services Pty Ltd* (1999) 22 NSWLR 466;

Comandate Marine Corporation v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; 157 FCR 45; *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254 at 256.

68 Phrases such as "in connection with" or "related to" have a wide ambit but they do not have unlimited reach. They are to be construed in the context of the agreement of which they form part, having regard to other cognate instruments.

69 The dispute as revealed by the Commercial List Statement is one which arises out of, and is related to, the Letter Agreement and its performance. The COEs are undoubtedly related to the Letter Agreement. But a dispute which arises out of, or is related to, the Letter Agreement does not arise out of, nor is it related to, the COEs because the Letter Agreement is related to the COEs. There is no controversy, claim or dispute about anything done or not done pursuant to or under the COEs. The Commercial List Statement makes no reference to the COEs and it is difficult to see how their existence or terms will play any role in the determination of the issues in the proceedings. WB did not suggest any.

70 Moreover, the second plaintiff is not a party to the COEs, and Miller and Mitchell (who are parties to the COEs) are not parties to the Letter Agreement.

71 The COEs have a specific and limited role in the overall transaction and they have their own arbitration clause.

72 It would be surprising if a reasonable person in the position of the parties to the Letter Agreement, would have understood that by the COEs (to which one of the plaintiffs is not a party) it was, by virtue of an arbitration clause contained in the COEs, choosing compulsory arbitration as the forum for a dispute about breach of the Letter Agreement, especially where there is no arbitration clause in the Letter Agreement itself. That is not an object which I consider the arbitration clause in the COEs was intended to secure. Even less is it its object to capture a claim of misleading or deceptive conduct under the *Australian Consumer Law* upon which the COEs have no bearing.

73 It follows that WB's application under the Act must be dismissed.

74 Questions of a stay on other grounds do not arise for consideration.

CONCLUSION

75 The application is dismissed.

76 I will hear the parties on costs should it be necessary.

77 I will make directions for the further conduct of the proceedings.

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DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.