Court of Appeal
Supreme Court

New South Wales

Case Name:	Ku-ring-gai Council v Ichor Constructions Pty Ltd
Medium Neutral Citation:	[2019] NSWCA 2
Hearing Date(s):	13 September 2018
Date of Orders:	5 February 2019
Decision Date:	5 February 2019
Before:	Bathurst CJ at [1]; Beazley P at [87] Ward CJ in Eq at [88]
Decision:	(1) Dismiss the application for leave to appeal as incompetent. (2) Order the applicant to pay the respondent's costs of the application, including the costs of the objection to competency.
Catchwords:	COMMERCIAL ARBITRATION – Role of court – Commercial Arbitration Act 2010 (NSW) – judge of the Supreme Court dismissed summons seeking declarations that mandate of arbitrator had not been terminated – whether summons sought an "interim measure" under s 17J or was a request for a decision under s 14(2) COMMERCIAL ARBITRATION – Role of court – Commercial Arbitration Act 2010 (NSW) – applicant sought to appeal from decision of judge of the Supreme Court made under s 14(2) – whether appeal to the Court of Appeal precluded by s 14(3)
Legislation Cited:	Commercial Arbitration Act 2010 (NSW) Housing Act 1958 (Vic) International Arbitration Act 1974 (Cth)

	Supreme Court Act 1970 (NSW)
Cases Cited:	Achilleos v Housing Commission [1960] VR 164 Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (2015) 246 FCR 479; [2015] FCA 1028 Swift-Fortune Ltd v Magnifica Marine SA [2006] SGCA 42
Texts Cited:	UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (2012)
Category:	Principal judgment
Parties:	Ku-ring-gai Council (applicant) Ichor Constructions Pty Ltd (respondent)
Representation:	Counsel: C Birch SC with B Debuse (applicant) S Robertson with L Corbett (respondent) Solicitors: HWL Ebsworth Lawyers (applicant) BCP Lawyers & Consultants (respondent)
File Number(s):	2018/160051
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Citation:	[2018] NSWSC 610
Date of Decision:	8 May 2018
Before:	McDougall J
File Number(s):	2018/110112

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Ku-ring-gai Council and Ichor Constructions Pty Ltd were parties to a construction contract. Disputes arose under the contract and were referred to an arbitrator pursuant to an arbitration agreement. On the final day of the arbitration, the arbitrator asked the parties, in an “off the record” discussion, whether they would consent to him putting forward a proposal for settlement. The parties agreed and a handwritten document was prepared stating the consent of each party to this course of action.

After an adjournment, the arbitrator and the parties met in a “breakout room” different from the room where the hearing was being conducted for the arbitrator to put his proposal to the parties. The proposal was quickly rejected by both parties. The arbitration then resumed, with each of counsel for the Council and Ichor Constructions making closing submissions to the arbitrator. There was no reference by the arbitrator or either party to the need for any consent, written or otherwise, prior to the resumption of the arbitration.

Several days after the arbitration had concluded, the solicitors for Ichor Constructions wrote to the solicitors for the Council, indicating that their client did not consent to the arbitrator continuing to conduct the arbitration proceedings since the mandate of the arbitrator had been terminated pursuant to s 27D(6) of the *Commercial Arbitration Act 2010* (NSW) (the Act). The stated reason for the termination was that the arbitrator had “acted as a mediator” when putting his proposal to the parties, and that the written consent of both parties was therefore required under s 27D(4) prior to the resumption of the arbitration.

The Council commenced proceedings in the Supreme Court of New South Wales for a declaration that the mandate of the arbitrator had not been terminated. Four grounds were relied upon: first, that the arbitrator had not

“acted as a mediator”; second, that the parties had in fact given written consent to the arbitrator continuing the arbitration; third, that Ichor Constructions had waived its right to object to the arbitrator continuing the arbitration; fourth, that Ichor Constructions was estopped from asserting that the requirements of s 27D(4) were not met. The primary judge dismissed the proceedings on the basis that the arbitrator had “acted as a mediator” and that no written consent had been provided to his continuing the arbitration in accordance with s 27D(4).

The Council filed an application for leave to appeal from the decision of the primary judge. However, Ichor Constructions filed a notice of motion to dismiss the application for leave to appeal as incompetent by reason of s 14(3) of the Act.

There were two main issues which were decided by the Court of Appeal:

1 Whether the power of the Supreme Court to hear and determine the proceedings arose under s 14(2) or s 17J of the *Commercial Arbitration Act 2010* (NSW); and

2 If the power arose under s 14(2) of the *Commercial Arbitration Act 2010* (NSW), whether s 14(3) precluded an appeal from the decision of the primary judge.

Whether power arose under s 14(2) or s 17J

(i) The Supreme Court was exercising the power under s 14(2) of the Act to hear and determine the proceedings. A decision on whether the mandate of an arbitrator had been terminated was not an “interim measure” within the meaning of s 17J. Rather, it was a decision on whether an arbitrator was “unable to perform” the arbitration within the meaning of s 14(1). Therefore, the power of the Court to hear and determine the proceedings arose under s 14(2): [65]-[66] (Bathurst CJ); [87] (Beazley P); [88] (Ward CJ in Eq).

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; *Swift-Fortune Ltd v Magnifica Marine SA* [2006] SGCA 42; *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* (2015) 246 FCR 479; [2015] FCA 1028, referred to.

Whether s 14(3) precluded an appeal

(ii) Section 14(3) precluded an appeal from a decision of a judge of a Division of the Supreme Court to the Court of Appeal. Taking the text, context and purpose of the provision into account, as well as the extrinsic materials relating to the equivalent provision in the UNCITRAL Model Law on International Commercial Arbitration, the word "final" meant "subject to no appeal". Therefore, no appeal could be brought from the decision of the primary judge and the application for leave to appeal was incompetent: [69]-[75] (Bathurst CJ); [87] (Beazley P); [88] (Ward CJ in Eq).

JUDGMENT

1 **BATHURST CJ:** This is an application for leave to appeal from the decision of a judge of the Equity Division of the Supreme Court dismissing proceedings brought by Ku-ring-gai Council (the applicant) seeking a declaration that the mandate of Mr John Tyrril (the arbitrator), who had been appointed to arbitrate a construction dispute between the applicant and Ichor Constructions Pty Ltd (the respondent), had not been terminated, as well as a final injunction restraining the respondent from purporting to terminate that mandate.

2 The proceedings primarily involved the application of s 27D of the *Commercial Arbitration Act 2010* (NSW) (the Act). In essence, s 27D(1), which I have set out below, provides that an arbitrator may "act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement" if each party has "consented in writing" to the arbitrator so acting. Conversely, s 27D(4) provides that an arbitrator who has "acted as a mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings".

3 The primary judge stated that the "essential questions raised for decision" were:

(1) Did the Arbitrator act as a mediator, so as to engage s 27D of the Act? The primary judge answered this question in the affirmative.

(2) If the Arbitrator did so act, did the parties give their written consents before he resumed the conduct of the arbitration?

In formulating the second question in this way, the primary judge was referring to the requirement in s 27D(4). He answered this question in the negative.

(3) If those consents were required and had not been given, has [the respondent] nonetheless waived its right to object to the Arbitrator's having resumed the conduct of the arbitration?

The primary judge answered this question in the negative.

(4) Alternatively, is [the respondent] estopped from asserting that the requirements of s 27D(4) were not met?

The primary judge also answered this question in the negative.

4 In those circumstances, the primary judge dismissed the proceedings.

5 The applicant, in its draft notice of appeal, has sought leave to appeal to this Court contesting each of the answers to the questions to which I have referred at [3] above. Prior to the hearing, the respondent filed a notice of motion to dismiss the application for leave to appeal as incompetent, relying on s 14 of the Act.

6 At the hearing, submissions from both parties were heard on each of the application for leave to appeal, the grounds of appeal, and the notice of motion.

Factual background

7 There was no dispute between the parties as to the factual findings made by the primary judge, and the summary below is taken from those findings.

8 The applicant and the respondent were parties to a construction contract. Disputes arose under the contract and were referred to the arbitrator pursuant to an arbitration agreement.

9 The arbitration hearing commenced on 2 March 2018 and continued over twelve hearing days to 29 March 2018. Before the luncheon adjournment on the last day, the arbitrator had an "off the record" discussion with the parties. In substance, the arbitrator asked whether the parties would consent to his putting forward a proposal for settlement.

10 The parties agreed to this course of action and the luncheon adjournment was shortened so that the proposal could be put to the parties immediately after the

adjournment had concluded. The primary judge noted that it was common ground between Mr Taylor, one of the solicitors representing the applicant, and Mr Keene, one of the solicitors representing the respondent, that, in the course of that discussion, the arbitrator said that he would like to put something for the parties' consideration, but would only do so "under the cloak of mediation".

11 When the arbitration hearing resumed, the arbitrator referred to the need for written consent to him adopting this course. Counsel for the applicant, Mr Debuse, prepared a handwritten document which was signed on behalf of each of the applicant and the respondent. Relevantly, it provided as follows:

> "The parties consent to [the arbitrator] acting as mediator pursuant to s 27D of the Commercial Arbitration Act for the purpose of putting forward a proposal for the resolution of the dispute between the parties."

12 Once the document had been signed, the arbitrator suggested that everyone move from the hearing room to a "breakout room", expressing a preference "to conduct the mediation in a less formal room". They did so.

13 The primary judge accepted that a file note prepared by Mr Keene accurately recorded what took place in the breakout room. The note was headed "Mediation: s 27D Application (29 March 2018)". The note then described those who were present, including representatives of each of the applicant and the respondent.

14 The note records the arbitrator making the following statements in the breakout room:

> "1. Expressed his concern about the complexity of the matter. Out of proportion with respect to the quantum of what is claimed. Every minute the case goes on the more complex it gets.
>
> 2. He believes that both parties believe their case is a good one but he believes that each party bears significant risks and both parties will be unlikely to be happy with the result. He later said that one party could be very unhappy.
>
> 3. Mr Tyrril had originally blocked out December 2017, January 2018 and February 2018 to hear the case but as a result of the vacation that was superfluous, notwithstanding that he had rejected various expert determinations, mediations and arbitrations to do so. It was unfortunate that that had happened.
>
> 4. He now has other commitments pending, some overseas (through May 12th), some as President of the Dispute board (for some red-line matters about some civil works) and it will be some time until he gets to it and it will

take him months to decide. He has considerable work to do on those other matters.

5. Has done close to 400-500 mediations on bridges, roads and tunnels etc.

6. He prognosticated that his decision will no doubt lead to an appeal which will result in further litigation on behalf of the parties.

7. He said that he was not giving an insight to his decision. He said that his advice was not prejudicial to his decision but just an assessment of what he had absorbed over the Hearing. It was in no way an indication of the side; he was going to come down on. He still needs to sift through all the evidence.

8. Barristers had been wonderful and extremely helpful.

9. Advice: He suggested a course which he believed was reasonable, being: Council drop its claim for liquidated claims, Ichor drops its delay claim and each party walk away and 'stomach its cost'. He understood that that position would no doubt be unpalatable and rejected.

10. Ultimately, it was a decision for Council to consider and a question for Ichor as to whether it wanted to make a commercial decision and 'move on'.

11. Mr Tyrril departed the room and so did Council."

15 The proposal was not accepted, but the arbitration resumed and Mr Debuse continued his closing submissions. At the conclusion of his submissions, the arbitrator called on Mr Duggan, who said "Thank you, I will be relatively brief. Can I just hand this out. This is a schedule for the site diaries that we promised earlier". At a subsequent point in his submissions, Mr Duggan said "I don't want to endanger finishing today". It should be noted that the day in question was on the day before Good Friday.

16 Up to the conclusion of the hearing on 29 March 2018, no reference was made by either of the parties or the arbitrator to the requirements in s 27D(4). However, on 6 April 2018, the solicitors for the respondent wrote to the solicitors for the applicant, referring to s 27D(4) of the Act, and stated that their client did not consent to the arbitrator "conducting any further arbitration proceedings as the Arbitrator in relation to the Dispute", and that consequently, by operation of s 27D(6) of the Act, the arbitrator's mandate was taken to have been terminated under s 14 of the Act and a substitute arbitrator needed to be appointed in accordance with s 15. The primary judge noted that it was the unchallenged evidence of the respondent, including its principal, Mr Filis, that until the date of that letter, he was not aware of the requirements of s 27D(4) of the Act.

The legislation

17 To understand the reasons of the primary judge and the submissions of the parties, it is necessary to have regard to the following provisions of the Act.

18 Section 1C sets out the "paramount object" of the Act. Section 1C(1) states that the paramount object of the Act is to "facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense", while s 1C(3) provides that the Act "must be interpreted … so that (as far as practicable) the paramount object of [the Act] is achieved".

19 Relevantly, for the purpose of this appeal, s 2 defines the expression "interim measure" by reference to s 17, and defines the "Model Law" as the "UNCITRAL Model Law on International Commercial Arbitration". It also defines the expression "the Court" as, subject to s 6(2), "the Supreme Court".

20 Section 2A is an interpretation provision. So far as it is relevant, it provides as follows:

> "**2A International origin and general principles** (cf Model Law Art 2A)
>
> (1) Subject to section 1C, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.
>
> ...
>
> (3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of:
>
> (a) the United Nations Commission on International Trade Law, and
>
> (b) its working groups for the preparation of the Model Law."

21 Section 4 is of importance in relation to the waiver claim. It is in the following terms:

> "**4 Waiver of right to object** (cf Model Law Art 4)
>
> A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating the party's objection to such non-compliance without undue delay or, if a time-limit is provided for stating the party's objection, within such period of time, is taken to have waived the party's right to object."

22 Section 5 provides that, in matters governed by the Act, "no court must intervene except where so provided by [the Act]".

23 Section 6 provides for certain functions referred to in the Act to be performed by the Supreme Court, or in limited circumstances, by the District Court or Local Court. It is in the following terms:

> "**6 Court for certain functions of arbitration assistance and supervision** (cf Model Law Art 6)
>
> (1) The functions referred to in sections 11 (3) and (4), 13(4), 14(2), 16(9), 17H–17J, 19(6), 27–27B, 27H–27J, 33D, 34 and 34A are, subject to subsection (2), to be performed by the Supreme Court.
>
> (2) If:
>
> (a) an arbitration agreement provides that the District Court or Local Court is to have jurisdiction under this Act, or
>
> (b) the parties to an arbitration agreement have agreed in writing that the District Court or Local Court is to have jurisdiction under this Act and that agreement is in force,
>
> the functions are to be performed, in relation to that agreement, by the District Court or Local Court, as the case requires."

24 Section 8(1) obliges a court before which a matter is brought which is the subject of an arbitration agreement to refer the parties to arbitration on the request of any one of them.

25 Section 9 is in the following terms:

> "**9 Arbitration agreement and interim measures by court**
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure."

26 Section 14 deals with the termination of an arbitrator's mandate. It provides as follows:

> **14 Failure or impossibility to act** (cf Model Law Art 14)
>
> (1) If an arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from office or if the parties agree on the termination.
>
> (2) Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court to decide on the termination of the mandate.
>
> (3) A decision of the Court under subsection (2) that is within the limits of the authority of the Court is final.

(4) If, under this section or section 13(3), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12(3).

Note: Section 14 (other than subsection (3)) is substantially the same as Art 14 of the Model Law. Subsection (3) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded."

27 Section 17 deals with interim measures. It is in the following terms:

"**17 Power of arbitral tribunal to order interim measures** (cf Model Law Art 17)

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An ***interim measure*** is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) maintain or restore the status quo pending determination of the dispute, or

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself, or

(c) provide a means of preserving assets out of which a subsequent award may be satisfied, or

(d) preserve evidence that may be relevant and material to the resolution of the dispute."

28 Section 17J deals with court-ordered interim measures. It provides as follows:

"**17J Court-ordered interim measures** (cf Model Law Art 17J)

(1) The Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.

(2) The Court is to exercise the power in accordance with its own procedures taking into account the specific features of a domestic commercial arbitration."

29 Section 27D contains the power of an arbitrator to act as a mediator, conciliator or other non-arbitral intermediary. So far as it is relevant, it provides as follows:

"**27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary**

(1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (***mediation proceedings***) if:

(a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or

(b) each party has consented in writing to the arbitrator so acting.

(2) An arbitrator acting as a mediator:

(a) may communicate with the parties collectively or separately, and

(b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.

(3) Mediation proceedings in relation to a dispute terminate if:

(a) the parties to the dispute agree to terminate the proceedings, or

(b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or

(c) the arbitrator terminates the proceedings.

(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.

(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.

(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2)(b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.

(8) In this section, a reference to a ***mediator*** includes a reference to a conciliator or other non-arbitral intermediary between parties.

The primary judgment

30 The primary judge set out the issues in the proceedings and the background facts in the manner which I have outlined above.

31 In dealing with the first question, namely, "Did the arbitrator act as a mediator, so as to engage s 27D of the Act?", the primary judge pointed out that the Act contained no definition of mediation. He stated that, "most helpfully for present purposes", s 27D(8) extended the concept of a "mediator" to include "a conciliator or other non-arbitral intermediary between parties". He stated that the subsection suggested that the "essential contrast between the function of an arbitrator and that of a mediator is that the latter is acting in a 'non-arbitral'

capacity". He stated that, by contrast to an arbitrator, "a mediator is not required … to decide [the parties'] dispute", but rather, that his or her "core function" was to "seek to bring the parties to agreement so as to resolve their dispute". He stated that, in the case before him, when the arbitrator conducted the mediation and put the specific proposal to the parties, he was acting in a "non-arbitral capacity".

32 The primary judge referred to the conversation in the "off the record meeting" between the arbitrator and the lawyers before the luncheon adjournment to which I have referred at [9] above, and the arbitrator's reference to a "need for writing" when the proceedings resumed after the luncheon adjournment. The primary judge stated that this could only have been a reference to s 27D(1).

33 The primary judge noted that the arbitrator put a "specific settlement proposal for the parties' consideration", but, because the parties rejected it, the mediation came to an end. However, he pointed out that, when the parties agreed to participate in the mediation and to the arbitrator acting as a mediator, they did not know what it was that he proposed to put to them "under the cloak of mediation". He noted that they "did not know how the mediation would develop", and he stated that the parties were not to know, when they agreed to participate, that the mediation would "not progress beyond the parties' reception, consideration and rejection of the proposal" put by the arbitrator.

34 The primary judge referred to the submissions that both parties had made on the operation of s 27D. He noted that the applicant, in contending that the arbitrator had not "acted as a mediator", submitted that the arbitrator "had not acted in a way that mediators frequently did and do", and pointed to various dissimilarities between the conduct of the arbitrator and what might usually occur in a mediation. By contrast, he noted that the respondent submitted that such an approach would "not promote certainty" and would "undermine the utility of s 27D", and that it was sufficient, broadly speaking, that the conduct of the arbitrator and the parties, viewed objectively, demonstrated that "everyone thought that they were participating in a mediation, and acted accordingly".

35 The primary judge pointed out that the Act was to be construed "so far as possible as to promote simplicity and certainty of operation". He stated that the

construction contended for by the applicant would mean that "no one will know whether consent under s 27D(4) is required, to avoid the arbitrator's losing his or her mandate, until something happens in an extra-arbitral … meeting that crosses a line, nowhere defined expressly in the Act, that marks the start of mediation". He stated that, by contrast, the respondent's construction "promotes simplicity and clarity of operation", namely, that "[w]hen parties to an arbitration intend to mediate, with the arbitrator acting as mediator, sign the consent … and thereafter engage in a process which they believe to be mediation", the arbitrator cannot continue to act unless the requirements of s 27D(4) are met.

36 In those circumstances, the primary judge concluded that the arbitrator did "act as a mediator".

37 In dealing with the second question, namely, whether consent to the arbitrator resuming the arbitration was given in writing pursuant to s 27D(4) of the Act, the primary judge stated that, when the mediation terminated, the parties overlooked the requirements of s 27D(4) and the effect of s 27D(6). He noted the submission by the applicant that the comments by the respondent's counsel to which I have referred at [15] above amounted to consent. However, he accepted the submission that it was necessary that "there be an express consent in writing to the resumption of the arbitration, just as it was necessary for there to be such a consent for the arbitrator to act as mediator". He stated that the Act should be construed so as to "promote certainty of operation", and that, where "written consent is required for something to happen, what is needed to satisfy that requirement is a written expression of consent signed for or by, or otherwise attributable to, the party whose written consent is required".

38 The primary judge pointed to a number of other provisions of the Act where the parties might have agreed upon something or were free to agree upon something. He stated that, in those provisions, there was "no provision for the form or authentication of the parties' agreement". He contrasted this with the specific provision for written consent in s 27D(4).

39 The primary judge also referred to the provisions of s 27D(7), which expressly contemplated that "an arbitrator, acting as mediator, may receive confidential

information from one or more of the parties". He stated that the subsection helped "to explain why the legislature thought it was important to provide that an arbitrator who has acted as mediator cannot thereafter resume acting as arbitrator unless the parties consent".

40 The primary judge also said that it was "significant that the requirement for written consent … is reinforced by the deemed termination of mandate for which subs (6) provides". He pointed out that, once a mediation terminates pursuant to that subsection, the arbitrator "cannot resume acting as arbitrator unless the parties have given their written consent". He stated that the provision "tells strongly against acceptance of the proposition that consent may be inferred, not just from conduct recorded in writing before the arbitration resumes, but from conduct recorded in writing that occurred after the purported but unauthorised resumption of the arbitration".

41 So far as waiver was concerned, in relation to the third question, the primary judge noted that the applicant was relying on the "statutory waiver" contained in s 4 of the Act. He noted that the records of the United Nations Commission on International Trade Law (UNCITRAL) demonstrated that s 4, as originally drafted in the Model Law, commenced by referring to "a party who knows or ought to have known", and that UNCITRAL decided to delete the words "or ought to have known" since "they might create more problems than they solved". He said that, in the absence of knowledge of s 27D(4) on the part of the respondent, there was "no possibility for s 4 to operate during the continuation of the arbitration, following termination of the mediation".

42 Although it only seemed to be a tentative view, the primary judge stated that s 27D was not a provision "from which the parties may derogate" within the meaning of s 4. He stated that the effect of s 27D(4) was that "[t]he only way" that the arbitrator could regain his or her mandate after the termination of the mediation was with the written consent of all parties. He stated that it would be an "extraordinary construction of s 4 together with s 27D that permitted the parties to derogate from the requirement for prior written consent through some course of conduct undertaken in ignorance of" s 27D(4) and s 27D(6).

43 So far as estoppel was concerned, in relation to the fourth question, the primary judge identified the conventional estoppel relied upon as "a common assumption, held by each of the parties and known by each party to be held by the other, that if the mediation failed to secure agreement, the arbitrator could proceed with the arbitration". He stated that he did not see how that conventional assumption could overcome the need for written consent to the arbitration continuing where neither party was aware of the need for such consent.

44 The primary judge stated that, to the extent that an estoppel by representation was relied upon, it must have been "a representation to the effect that no matter what might be said or done in the mediation, if the mediation failed then [the respondent] would agree to [the arbitrator's] continuing to act as arbitrator". He pointed out that this was not the pleaded representation and that it was not "consistent with common sense". He stated that, "even accepting at face value all [the applicant's] evidence and so much of [the respondent's] evidence as supports [the applicant's] case", such a representation was not established. However, in that context, he rejected the evidence of Mr Taylor that, at the "off the record meeting", the arbitrator had stated expressly that "if the parties did not accept his proposal then they would continue with the arbitration". This finding was not disputed on the appeal.

45 In those circumstances, the primary judge dismissed the applicant's claim for a declaration and an injunction.

The objection to competency

46 It is convenient to first deal with the notice of motion filed by the respondent objecting to the competency of the application for leave to appeal. The respondent contended that s 14(3) of the Act precluded the application. It submitted that the decision of the primary judge was made under s 14(2) of the Act. It submitted that the subsection operated on a decision of the Supreme Court and expressed it to be "final", which, in context, could only mean that it could not be subject to appeal.

47 Counsel for the respondent submitted that the subsection could not be read as "final", subject to an "internal appeal" in the Court from a Division to the Court

of Appeal. He submitted that s 14(3) operated on a decision which "has been made".

48 Counsel for the respondent submitted that the words "the limits of the authority of the court" in s 14(3) were inserted to take account of the possibility of jurisdictional error, and pointed to the fact that decisions of the District Court and the Local Court made under s 6(2) of the Act could be reviewed on that basis. Counsel for the respondent pointed out that these words did not appear in the equivalent provision in the Model Law, and had been inserted by the legislature when the Model Law was adapted into the Act.

49 Counsel for the respondent submitted that "final" meant "last". He submitted that the word "final" was not being used in contrast to "interlocutory" because the decisions which would be made under s 14(2) would "finally determine" a dispute as to the arbitrator's mandate.

50 In dealing with the meaning of the word "final", counsel for the respondent pointed to what was said by Dean J in *Achilleos v Housing Commission* [1960] VR 164 at 168, where his Honour stated, in the context of s 56(6) *Housing Act 1958* (Vic), which provided that a decision of a Court of Petty Sessions on appeal from a determination of the Housing Commission that a house is unfit for human habitation shall be "final and conclusive", that there could be no appeal from such a decision because, if there were, the decision would no longer be "final and conclusive".

51 Counsel for the respondent submitted that the construction for which he contended was supported by the context in which the Act came into existence and the travaux préparatoires connected with the Model Law. He pointed to the fact that s 2A(3) of the Act authorised the Court to have regard to the Model Law, and s 2A(1) required that regard be had for the "need to promote so far as practicable uniformity between the application of [the Act] to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth)".

52 In that context, he pointed out that the equivalent provision to s 14 of the Act in the Model Law used the words "which decision shall be subject to no appeal"

rather than “final”. He submitted that the construction of s 14 contrary to that which he submitted was correct would lead to a “lack of uniformity” between the Act and the Model Law, as applied by the *International Arbitration Act 1974* (Cth).

53 Counsel for the respondent pointed out that the Model Law, as originally drafted, was in the same terms as s 14 of the Act. He pointed out that, at the meeting of UNCITRAL held on 4 June 1985, the representative for the Union of Soviet Socialist Republics, Mr Lebedev, sought clarification of whether “final” meant “final for the parties”, or alternatively, a decision “not subject to appeal to a higher court”. The Chairman of the meeting stated that “the drafting committee, if one was appointed, would attempt to find a form of words to make it clear that there was no appeal”, but that if that proved “impracticable”, then “final” would be retained. Counsel for the respondent also pointed to the report of UNCITRAL on the work of its 18th session, which contained the following statement at [132]:

> “132. As regards the words ‘which decision shall be final’, the Commission was agreed that the wording was intended to mean that no appeal was available against that decision and that that understanding might be made clear by appropriate wording. Subject to those modifications, paragraph (3) was adopted by the Commission.”

54 Counsel for the respondent also pointed out that, in s 11, s 13 and s 16 of the Act, which confer certain powers on the Court, the expression “a decision … within the limits of the authority of the Court… is final”, or a similar expression, is used, while the equivalent provisions in the Model Law use the expression “subject to no appeal”. He submitted that this was consistent with what was said in the explanatory notes for the Bill which ultimately became the Act, which he said made it clear that the legislature, in general terms, was seeking to “adopt the Model Law” with appropriate modifications for domestic commercial arbitration.

55 Counsel for the respondent submitted that it was incorrect to say that the Court, in dealing with the matter in the present case, was exercising a power conferred by s 9 of the Act to make an order for an “interim measure”. He pointed out that such a power was contained in s 17J of the Act. He submitted

that on no available view could the decision by the primary judge be described as an “interim measure”.

56 Senior counsel for the applicant submitted that the proceedings did not involve the exercise by the Court of the power conferred by s 14(2) of the Act. However, he accepted that the scope of the power to deal with the matter in the present case had to be derived from the Act. That submission is undoubtedly correct, having regard to the provisions of s 5.

57 Senior counsel for the applicant submitted that the source of the power for the Court to entertain the action in the present case was s 9 of the Act. He submitted that the expression “interim measure” referred to in that section included a measure such as that described in s 17(2)(b), namely, taking action that would “prevent … current or imminent harm or prejudice to the arbitral process”. However, he ultimately accepted that s 9 did not confer any such power, but rather, that the power to make interim measures was conferred by s 17J of the Act.

58 Senior counsel for the applicant submitted that the power that was exercised in the present case was one conferred by s 17J because of the way the controversy “unfolded”. He submitted that the words “if a controversy remains” in s 14(2) suggested that there had to be some controversy before the arbitrator before the section came into operation. He submitted that this did not happen in the present case because the respondent “frustrated” the process by seeking to tell the arbitrator that his mandate was terminated, and that the proceedings before the primary judge were a response to that threat to frustrate the arbitration. He submitted that, in those circumstances, the proceedings fell within s 17J. He submitted that the determination made by the primary judge was made “in aid of the arbitral process” because it related to the “status of the arbitrator”.

59 In relation to s 14(2) of the Act, senior counsel for the applicant said that “final” in that section did not mean that there was no appeal, but rather, that the word was making clear that the decision was not “interlocutory”. He submitted that, irrespective of the general policy of the Act, the fact that it used different words

to those in the equivalent provisions of the Model Law demonstrated that an appeal was available.

Consideration

60 It is convenient to deal first with the source of the power exercised by the primary judge in making the orders. It was common ground between the parties that the powers were derived from the Act: the applicant contended that the power was derived from s 17J of the Act on an application made to the Court under s 9, while the respondent contended that it was derived from s 14 of the Act.

61 The relationship between s 9 and s 17J is not entirely clear. First, s 9, unlike s 17J, does not refer to the defined term "Court", nor does it expressly confer any right to make an application to the Court for an "interim measure of protection", or confer power on the Court to grant such a measure. Rather, it states that such an application and a grant of such relief is "not incompatible with an arbitration agreement". Further, s 9 is confined to an "interim measure of protection" which, at least on its face, may be narrower than the "interim measures" contemplated by s 17(2) of the Act, particularly having regard to the terms of s 17(3).

62 Apart from stating that s 17J was relied upon, no authority was cited by the applicant dealing with the scope of that section or its intersection with s 9. However, in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] SGCA 42 (*Swift-Fortune*), the Court of Appeal of Singapore, correctly, in my respectful opinion, concluded that s 9 did not confer any jurisdiction on a court. In that context, the Court made the following remarks at [31]-[33]:

> "[33] … Counsel for Magnifica has helpfully provided us with a vast amount of preparatory references and writings on the genesis of Art 9 of the Model Law, including the working papers of the UNCITRAL Model Law Working Group and related academic commentaries. These materials show that Art 9 was not intended to confer jurisdiction but to declare the compatibility between resolving a dispute through arbitration and at the same time seeking assistance from the court for interim protection orders. In its 'Report of the United Nations Commission on International Trade Law on the work of its eighteenth session' at paras 96 and 169, UN Doc A/40/17, reprinted in [1985] YB of UNCITRAL, vol XVI, UNCITRAL reported as follows:
>
> > 96. … It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely

> expressed the principle that a request for any court measure *available* under a given legal system and the granting of such measure by a court of 'this State' was compatible with the fact that the parties had agreed to settle their dispute by arbitration.
>
> …
>
> 169. … It was noted … that article 9 … did not regulate *whether and to what extent* court measures were available under a given legal system but only expressed the principle that any request for, and the granting of, such interim measure, *if available in a legal system*, was not incompatible with the fact that the parties has agreed to settle their dispute outside the courts by arbitration. [emphasis added]

[32] These observations on Art 9 are reflected in 'Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General', UN Comm on International Trade Law, 18th Sess, UN Doc A/CN.9/264 (25 March 1985), reprinted in [1985] YB of UNCITRAL, vol XVI, as follows:

> 1. Article 9 relates – like article 8 – to recognition and effect of the arbitration agreement but in another respect. It lays down the principle, disputed in some jurisdictions, that resort to a court and subsequent court action with regard to interim measures of protection are compatible with an arbitration agreement. It, thus, makes it clear that the 'negative' effect of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regard to such interim measures. The main reason is that the availability of such measures is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results.
>
> 2. Article 9 expresses the principle of compatibility in two directions with different scope of application. According to the first part of the provision, a request by a party for any such court measures is not incompatible with the arbitration agreement, i.e. neither prohibited nor to be regarded as a waiver of the agreement. This part of the rule applies irrespective of whether the request is made to a court of State X or of any other country. Wherever it may be made, it may not be invoked or treated as an objection against, or disregard of, a valid arbitration agreement under 'this Law', i.e. in arbitration cases falling within its territorial scope of application or in the context of articles 8 and 36.
>
> 3. However, the second part of the provision is addressed only to the courts of State X and declares their measures to be compatible with an arbitration agreement irrespective of the place of arbitration. Assuming wide adherence to the model law, these two parts of the provision would supplement each other and go a long way towards global recognition of the principle of compatibility, which, in the context of the 1958 New York Convention, has not been uniformly accepted.

[33] The purpose of Art 9 is clear. It is to declare the compatibility between arbitrating the substantive dispute and seeking assistance from the courts for interim protective measures. For this reason, Art 9 can have no bearing on the meaning and effect of a domestic law providing for interim measures, such as s 12(7) of the [*International Arbitration Act* (Singapore)]. It can neither subtract nor add to the meaning and effect of s 12(7) which has to be determined by

> reference to its own language and structure, as well as any other relevant extrinsic matters. We will now examine these matters."

See also UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) at 52-54 (the Digest of Cases on the Model Law).

63 In dealing with the scope of the expression "interim measures of protection", the Digest of Cases on the Model Law states that "the *travaux préparatoires* show that the 'range of measures covered by the provision [is] a wide one' and includes pre-award attachments, measures relating to the protection of trade secrets and proprietary information, measures relating to the protection of the subject-matter of the dispute and measures intended to secure evidence". All of these measures could be said to be designed to facilitate and protect the arbitration process. In that context, in considering Article 9 of the Model Law or its domestic equivalent, courts have adopted what was said by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 358:

> "But a national court may also be invited, as in the present case, to play a secondary role, not in the direct enforcement of the contract to arbitrate, but in the taking of measures to make the work of the chosen tribunal more effective. Here, the matter is before the court solely because the court happens to have under its own procedural rules the power to assert a personal jurisdiction over the parties, and to enforce protective measures against them. Any court satisfying this requirement will serve the purpose, whether or not it has any prior connection with the arbitral agreement or the arbitration process."

64 In *Swift-Fortune*, it was held that s 12(7) of the *International Arbitration Act* (Singapore) did not confer power on a Court to grant a "Mareva injunction" restraining a foreign company from dealing with its assets in Singapore pending arbitration proceedings in London. Further, the Court held that the existence of the Court's personal jurisdiction over the defendant in itself did not give power to the Court to grant the injunction in aid of a foreign arbitration. Article 17J was included in the Model Law in 2006 to make it clear that the Court had that power. However, it did not operate to extend in any way the type of relief which could be granted by the Court. This was made clear by Edelman J in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* (2015) 246 FCR 479; [2015] FCA 1028. In dealing with the equivalent provision to s 17J in the Model Law, his Honour made the following remarks at [102]-[104]:

> "[102] *Secondly*, Art 17J provides for the power of the Court to issue an interim measure in relation to arbitration proceedings. An interim measure might include matters such as an interim injunction. The concept of an "interim measure" does not include making a procedural order that the [arbitral tribunal] has consciously refused to make.
>
> [103] *Thirdly***,** the approach to Art 17J suggested by Sino Dragon is inconsistent with the narrow purpose for that provision. It is really a provision which clarifies the existence of power rather than expands power. As Mr Holmes QC and Dr Brown explain, when Art 17J was introduced in the 2006 amendments adopted by UNCITRAL, it was included 'to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures': Holmes M and Brown C, *The International Arbitration Act 1974: A Commentary* (LexisNexis, 2011) 201 citing UNCITRAL Explanatory Note 2006, p 31 [30]. As the UNCITRAL Working Group II (Arbitration and Conciliation) explained, in some States the law and the courts had no power to issue interim measures for protection in arbitration: See UNCITRAL Working Group II, *Settlement of Commercial Disputes - Preparation of Uniform Provisions on Interim Measures of Protection*, 36th sess, A/CN.9/WG.II/WP.119 (4-8 March 2002), [8]-[9], [20], [75].
>
> [104] Simply removing a potential obstacle to the power of the Court to issue interim measures does not mean that the power should be exercised or that any power would be expanded. In the *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session,* GAOR, 61st sess, Agenda Item 77, Supp No 17, A/61/17 (19 June - 7 July 2006) [139]-[142] it was said:
>
> > 139. … It was clarified that the purpose of article 17 *undecies* was to preserve the power of courts to issue interim measures in support of arbitration, but should not be understood as expanding the powers of the court for interfering in the arbitral process. The Commission agreed that that matter should be clarified in any explanatory material to that provision.
> >
> > …
> >
> > 142. The commission agreed that any explanatory material to article 17 *undecies* should clarify that the court could exercise jurisdiction on arbitration matters, whether the place of arbitration is located in the enacting State or in another State and that the provision should not be construed as expanding the territorial jurisdiction of courts."

65 In the present case, the original summons sought a declaration that the arbitrator's mandate "had not been terminated", a declaration that the respondent had "consented … to the continuation' of the arbitrator, or alternatively, a declaration that "no mediation took place", or alternatively, an injunction "restraining [the respondent] from terminating or purporting to terminate the mandate of the arbitrator". This was sought by way of final relief for the purpose of resolving a controversy that had arisen on the question of whether the arbitration had been terminated. The proceeding did not involve

"interim measures" within the meaning of s 17J, but rather, was a matter falling within s 14(2) of the Act.

66 In these circumstances, although the source of the power of the primary judge to make the orders was not the subject of submissions in the Court below, in my opinion, it is plain that the primary judge was exercising the power conferred by s 14(2) of the Act. The case involved the question of whether the arbitrator had become in law "unable to perform" the arbitration, in circumstances where the arbitrator had not withdrawn and the parties had not agreed on the termination. These were circumstances falling within s 14(1), as a result of which the Court's power under s 14(2) to determine the question was enlivened upon the request of one of the parties.

67 The question remains whether, by virtue of s 14(3) of the Act, the decision is "final" in the sense of "not subject to an appeal".

68 The applicant contended that the word "final" was used in contradistinction to the word "interlocutory". Some support for this proposition may be derived from the fact that any decision under s 14(2) will not determine the future of the arbitration. If it were found that the arbitrator was not in law "unable to perform" his or her functions, then the arbitration would continue with that arbitrator. If he or she was found unable to do so, then s 15 of the Act provides for the appointment of a substitute arbitrator "according to the rules that were applicable to the appointment of the arbitrator being replaced".

69 Notwithstanding, I do not think that the word "final" is used in contradistinction to the word "interlocutory". This is because s 14(2) is directed to a particular controversy and the decision of the Court resolves that controversy. In the present case, it was resolved by the dismissal of the summons. If that is correct, it lends support to the conclusion that the word "final" means "not subject to appeal", including, in the present case, an appeal from a Division of the Court to the Court of Appeal. Otherwise, it is difficult to see what work the word "final" is performing in the section.

70 The applicant placed particular reliance on the absence of the words "which decision shall be subject to no appeal" which are contained in the equivalent

provision of the Model Law. He submitted that the legislature, by omission of these words, intended to preserve a right of appeal.

71 Although there is force in this argument, I do not think that it is correct for a number of reasons. First, s 14(3) states that a decision of the Court that is "within the limits of the authority of the Court" is "final". The use of the words "within the limits of the authority of the Court" envisage the possibility of review of a purported decision under s 14(2) for jurisdictional error, which could be relevant in circumstances where the District Court or the Local Court are exercising the jurisdiction conferred by s 6(2) of the Act. However, the inclusion of those words tends to suggest that the legislature considered that only a limited form of review should be available.

72 Second, s 2A(1) requires that, in interpreting the Act, "regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth)". As the respondent submitted, it would be anomalous if an appeal was available from a decision in a domestic arbitration, but none from a decision of the same Court in an international arbitration.

73 Third, the construction which I prefer is supported by a consideration of the extrinsic materials relating to the Model Law prepared by UNCITRAL and its working groups, to which regard can be had by virtue of s 2A(3). I have set out the relevant material at [53] above. It shows that the words "subject to no appeal" were inserted to avoid any ambiguity which might arise from the word "final".

74 Fourth, the construction which I prefer promotes the "paramount object" of the Act stated in s 1C(1), namely, to "facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense". As I have indicated at [68] above, s 15 requires the appointment of a substitute arbitrator if a determination is made under s 14(2) that an arbitrator is "unable to perform" his or her functions. Appeals on this issue would only delay the process.

75 Finally, the note to s 14, while not forming part of the Act, pursuant to s 2(5) of the Act, can be used as an aid to construction in accordance with *Interpretation Act 1987* (NSW) s 34. It confirms the meaning of the text of s 14(3) which I prefer, namely, that the decision of the Court under s 14(2) is "not subject to appeal".

76 Of course, this conclusion does not affect the power of the High Court of Australia to hear appeals from a decision of the Supreme Court under s 14(2) by virtue of s 73(ii) of the *Constitution*.

77 It follows that the application for leave to appeal is incompetent and should be dismissed on that basis.

Other matters

78 Even if the application was competent, leave to appeal would nonetheless be required by virtue of s 101(2)(i) of the *Supreme Court Act 1970* (NSW). In the present case, I would not have granted leave. I can state my reasons shortly.

79 Apart from the competency question, the application does not raise any matter of general importance or principle. The Court should be wary of granting leave in such cases, where appeals can only delay the progress of the arbitral process to which the parties have agreed to resolve their dispute. Further, the matters raised by the applicant in my opinion have little merit.

80 First, the primary judge was plainly correct in concluding that the arbitrator was "acting as a mediator" within the meaning of the Act. The parties formally consented to a mediation as required by s 27D(1), the arbitrator sought to put a proposal to them "under the cloak of mediation" and did so. Although the mediation did not get very far, the arbitrator was, during its course, performing the function of a "non-arbitral intermediary between parties", to use the language of s 27D(8).

81 Second, no written consent was given to the arbitrator resuming the arbitration as required by s 27D(4). The reason for a degree of formality being required is self-evident when regard is had to the fact that the arbitrator may have received confidential information during the mediation and may have expressed views as to the merits of the proceedings during its course. A

statement by counsel recorded in a transcript and not directed to the requirements of s 27D(4) of the Act does not amount to such consent.

82 Third, there was no "statutory waiver". Section 4 of the Act expressly requires knowledge that a provision of the Act has not been complied with. As the respondent pointed out, the Model Law, as originally drafted, included in the equivalent provision to s 4 the expression "or ought to have known". The words were deleted following consideration of the provision at the 308th meeting of UNCITRAL held on 4 June 1985.

83 There was no evidence that any of the parties were aware of the existence of s 27D(4) prior to the conclusion of the arbitration proceedings on 29 March 2018. In these circumstances, there was no waiver.

84 The estoppel pleaded seemed to be either an estoppel by representation or a conventional estoppel. It was pleaded as follows:

> "C18 By their silence and by their indication of assent to the arbitrators proposal the defendant either agreed with the plaintiff not to refuse their written consent to allowing the arbitrator to continue as arbitrator following the delivery of the mediation proposal (**the agreement**) or represented that it would not take objection or refuse its written consent to the arbitrator continuing as arbitrator following the putting of the mediation proposal in the proposed mediation (**the representation**).
>
> C18 Both parties had, at the time of the proposal, spent substantial sums of money in excess of $500,000 each in the preparation and hearing of the arbitration.
>
> C19 If either party had the ability unilaterally to refuse to allow the arbitrator to continue all or a substantial portion of the costs occasioned in the hearing would be wasted.
>
> C20 As neither party knew the contents of the mediation proposal and neither party proposed at that time to take any further steps in a mediation other than to hear the proposal the parties proceeded on the common assumption:
>
> > i. that the parties would not use the event of the delivery of the mediation proposal as an opportunity to refuse to continue with the existing arbitrator having heard the proposal.
>
> …
>
> C30 In preparation for the hearing and in the course of the hearing the plaintiff has expended in excess of $250 000 (excluding the preparation of witnesses statements and expert reports).
>
> C30 If the defendant is permitted to resile from the representation, the agreement or the common assumption or from its conduct in continuing with the arbitration before the arbitrator following delivery of the mediation proposal the plaintiff will suffer detriment."

85 The difficulty is that there was no evidence that either party turned its mind to what would occur if the mediation failed, and certainly not to the question of whether they would return to the arbitration regardless of what happened during the mediation. In these circumstances, neither the representation nor the common assumption necessary to ground the estoppel has been made out.

Conclusion

86 In the result, I would make the following orders:

(1) Dismiss the application for leave to appeal as incompetent.

(2) Order the applicant to pay the respondent's costs of the application, including the costs of the objection to competency.

87 **BEAZLEY P:** I have had the advantage of reading in draft the reasons of the Chief Justice. I agree with his Honour's reasons and proposed orders.

88 **WARD CJ in Eq:** I agree with Bathurst CJ.

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