NEW SOUTH WALES SUPREME COURT

CITATION: ACD Tridon v Tridon Australia [2002] NSWSC 896

CURRENT JURISDICTION: Equity

FILE NUMBER(S): 5738/01

HEARING DATE{S): 4 July, 2 August 2002

JUDGMENT DATE: 04/10/2002

PARTIES:
ACD Tridon Inc (P/R)
Tridon Australia Pty Ltd (D1/A)
Richard Wellesley Lennox (D2/A)
Sandra Lennox (D3/A)
Tridon New Zealand Ltd (D4/A)

JUDGMENT OF: Austin J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
T F Bathurst QC with TGR Parker (P/R)
M S Jacobs QC with P Bambagiotti (D1/A,D2/A,D4/A)
S D Robb QC (D3/A)

SOLICITORS:
Allens Arthur Robinson (P/R)
Cutler Hughes & Harris (D1/A,D2/A,D4/A)
Michell Sillar (D3/A)

CATCHWORDS:
ARBITRATION - construction of arbitration clauses - whether arbitration clauses were confined to contractual disputes or extended to disputes under Corporations Act and equitable principles - meaning of 'matter' in s 7(2) of International Arbitration Act - whether disputes under Corporations Act capable of settlement by arbitration under arbitration clauses - PRACTICE AND PROCEDURE - waiver of right to refer to arbitration - meaning of 'waiver' - whether defendants waived their rights - whether disputes can and should be referred to referee under SCR Part 72

ACTS CITED:

Commercial Arbitration Act 1984 (NSW) ss 4, 25, 53
Conveyancing Act 1919 (NSW) s 163
Corporations Act 2001 (Cth) ss 175, 233, 247A, 1071B
International Arbitration Act 1974 (Cth) ss 3, 7, 24
Supreme Court Rules Pt 72

DECISION:
See under heading 'Conclusion'

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

AUSTIN J

FRIDAY 4 OCTOBER 2002

5738/01 ACD TRIDON INC V TRIDON AUSTRALIA PTY LTD & ORS

JUDGMENT (revised on 16 & 17 October 2002)

1 **HIS HONOUR**: The plaintiff, which was and may still be a minority shareholder in the first defendant, seeks orders for access to corporate documents of the first defendant and its controlled entities (including the fourth defendant), orders invalidating a transfer of shares in the first defendant and rectifying the share register accordingly, and orders to address allegedly oppressive conduct in the management of the first defendant's affairs, including an order that the first defendant be wound up. In seeking this relief, the plaintiff relies partly on statutory remedies under the Corporations Act 2001 (Cth), and partly on the provisions of a shareholders' agreement between itself and the second defendant. The plaintiff also seeks to establish its right to terminate a distribution agreement between itself and the first and fourth defendants.

2 Broadly speaking, proceedings of this kind are staple fare in any Australian court that conducts a Corporations List. What makes the present case unusual is that the Shareholders' Agreement and the Distribution Agreement each contain an arbitration clause, and the question has arisen whether this proceeding should be wholly or partly stayed because the dispute or part of it is capable of settlement by arbitration pursuant to those clauses. This judgment relates to applications by each of the four defendants for orders staying the proceeding so that arbitration can take place.

3 The plaintiff ("Tridon") is a company formed in Canada, which emerged from a process of amalgamation under the laws of that country. The first defendant ("TAPL") is a company incorporated in Australia. The fourth defendant, Tridon New Zealand Pty Ltd ("TNZL"), is a company incorporated in New Zealand.

4 This proceeding began by a summons filed on 29 November 2001. Initially the only relief sought was access by Tridon to the books and records of TAPL. By virtue of some events occurring in January 2002, which I shall describe, the originating process was amended to claim relief against the transfer of shares, held by Tridon in TAPL, to the second defendant, Richard Lennox. There have been subsequent

amendments to the originating process and the current pleading is Tridon's Third Further Amended Originating Process, filed, pursuant to leave, in June 2002.

5 Questions have been raised, in the course of argument and in correspondence between the parties, as to whether those who have purported to represent TAPL before the Court have proper authority to do so. There are three directors of TAPL, one of them representing the interests of Tridon, and the others being Mr Lennnox and his wife, Sandra Lennox, the third defendant. Until January 2002 Mr Lennox controlled two-thirds of the shareholding of TAPL, and Tridon held the other third. Mr Lennox claims that he has validly acquired Tridon's holding, by virtue of some procedures which Tridon challenges in this proceeding. In the circumstances, it seems to me appropriate for the Court, for the time being, to allow counsel for Mr Lennox to represent TAPL (and also its wholly-owned subsidiary, TNZL). There has been no formal challenge to counsel's retainer. If a challenge is made in future, it will be necessary to look at the issue more closely.

6 Before describing Tridon's claims, and the applications before me today, it will be helpful if I set out some background facts.

Background facts

7 The business of Tridon includes the manufacture and distribution of motor vehicle accessories and certain other hardware products (including windscreen wipers and hose clamps). Prior to 1988 TAPL was a wholly-owned subsidiary of a company called Tridon Limited, and was the Australian distributor of Tridon's products. Mr Lennox was its managing director. Among TAPL's subsidiaries is TNZL, which distributes the products in New Zealand.

8 In 1988 Tridon Limited sold two-thirds of the shares in TAPL to Mr Lennox for a consideration of over $1 million. Tridon Limited and Mr Lennox entered into a shareholders' agreement, which purported to regulate the conduct of TAPL's affairs for the future ("the Shareholders' Agreement"). Tridon Limited and TAPL also entered into a 99 year distributorship agreement pursuant to which TAPL and TNZL were granted exclusive rights to distribute Tridon's products in Australia and New Zealand and the Pacific Islands ("the Distribution Agreement").

9 Thereafter the board of TAPL consisted of Mr and Mrs Lennox, and a nominee of Tridon. Currently that nominee is Harry Arkin of Denver Colorado. Mr Lennox continued as managing director and he and his family have since 1988 been in day-to-day control of the operations of TAPL and its subsidiaries.

10 Tridon Limited, which was incorporated in Canada, and a company called Tomkins Canada Acquisition Corporation, part of the Tomkins Group of Canada, were the subject of a process of amalgamation under s 177 (1) of the Business Corporations Act of Ontario, effective on 30 August 1999. As part of that process, Tridon Limited resolved that upon the endorsement of a certificate of amalgamation under s 178 (4) of the Business Corporations Act, all of its shares were to be cancelled without the repayment of capital. There is some contention between the parties as to the effect of the amalgamation, and in particular, whether the amalgamation involved any reduction of capital by Tridon Limited, and whether it involved an assignment of Tridon Limited's contractual rights under the Distribution Agreement and the Shareholders' Agreement to another entity. However, as I understand them, the parties before me agree that the amalgamation had the effect that the business formerly carried on in the name of Tridon Limited came to be carried on in the name of Tridon, the plaintiff in the present proceeding.

11 Mr and Mrs Lennox, on the one hand, and Tridon, on the other hand, have had a falling out. Mr Lennox is concerned about the amalgamation, because some subsidiaries in the Tomkins Group, namely companies referred to as Gates, Trico, Ideal and Stant, are in direct competition with TAPL. He has formed the view that Tridon now wants to destroy TAPL and TNZL, so as to promote the interests of the Tomkins subsidiaries that compete with those companies.

12 On 3 July 2000 Tridon gave notice to TAPL under the Distribution Agreement, that it had ceased to manufacture all classes of products named in the second schedule to the Agreement, and consequently under the terms of the Agreement it purported to vary the second schedule by withdrawing all of the products in it. Tridon then required TAPL to obtain comparable products from subsidiaries of the Tomkins Group which were TAPL's competitors in Australia. Mr Lennox is concerned that these arrangements give his competitors sensitive commercial information about TAPL's turnover of products and the cost of products to TAPL, information which can be used for competitive advantage against TAPL.

13 For some time Tridon has been attempting to obtain access to the records of TAPL and its subsidiaries. It is concerned that there may have been some financial irregularities in the conduct of the affairs of TAPL, including irregularities regarding related party loans and directors' remuneration. It has obtained limited access and claims to have identified certain aspects of the conduct of TAPL's affairs which it considers to be irregular and improper. It says that full access has not been provided. As I have said, it commenced the present proceeding in November 2001, seeking orders for access to records of TAPL.

14 It commenced a proceeding against TNZL, TAPL and Mr Lennox in the High Court of New Zealand in December 2001, seeking orders for disclosure of information concerning the affairs of TNZL and injunctions concerning dealings with its assets. In April 2002 orders were made by consent for the indefinite adjournment of the New Zealand proceeding, after TNZL was joined as a defendant in the present proceeding. TNZL initially asserted that this Court has no jurisdiction over it. It entered an appearance while reserving its right to challenge the Court's jurisdiction, and filed and served an application for summary judgment or for a stay of the present proceeding. The application for summary judgment relied (inter alia) on an alleged lack of jurisdiction. However, TNZL later changed its position. On 2 August 2002 I made orders, by consent, dismissing TNZL's application so far as it was an application for summary judgment, so that it remains only as an application for a stay on grounds relating to arbitration. This seems to imply that there is no longer a contest about the joinder of TNZL as a defendant in the present proceeding or this Court's jurisdiction over it.

15 The Shareholders' Agreement provides for the compulsory acquisition of the shares of a party who is in "default" as defined in the Agreement. The relevant provision constitutes the non-defaulting party the agent and attorney of the defaulting party for the purpose of effecting the acquisition. In January 2002, purporting to rely upon this provision, Mr Lennox presented a form of transfer of Tridon's remaining shares in TAPL to the board of TAPL and sought to have the transfer approved and registered. By majority (Mr and Mrs Lennox voting in favour and Mr Arkin voting against) the transfer was approved and Tridon's shares were purportedly transferred to Mr Lennox. These events led to the amendments to the originating process to which I have referred.

16 Mr Arkin, as a director of TAPL, has also been seeking access to various documents held by TAPL. In April 2002 a resolution was passed by the directors of TAPL to provide him with access. However, Mr Arkin says that when he travelled to Australia to conduct his inspection, access was refused. He then commenced a proceeding in the Federal Court against TAPL, seeking orders for access in accordance with the resolution. That proceeding is being defended by TAPL and has been set down for hearing in December 2002.

17 There is also an arbitration proceeding before the Hon John Clarke QC between TAPL and Tridon. That proceeding was commenced by TAPL in 2000. The principal issue raised by the points of claim in their present form is whether Tridon could validly notify TAPL, as it purported to do on 3 July 2000, that it had ceased to manufacture all classes of products named in the second schedule to the Distribution Agreement and consequently that it varied the second schedule by withdrawing all of the products in it. Other issues include whether Tridon breached the Distribution Agreement by supplying products not produced by it at its Canadian plants; whether Tridon has an obligation to supply TAPL with the equipment necessary for TAPL to manufacture products not supplied by Tridon; and whether TAPL is entitled under the Agreement to obtain products from another source in replacement for products not supplied by Tridon. All these issues are commercial contractual issues having to do with the supply of products under the Distribution Agreement. The questions for the arbitrator will be questions in fact about the supply of

products and questions of construction of the Distribution Agreement. There are presently no allegations of oppression or bad faith.

18 The proceeding became dormant in 2001 but was reactivated in May 2002 by TAPL. On 30 April 2002 TAPL sought leave to file amended points of claim in the arbitration, which would greatly expand the scope of the disputes before the arbitrator, so as to produce a substantial overlapping with the disputes which are the subject of this proceeding. Annexed to the draft amended points of claim was a document broadly in the nature of points of defence to the originating process in the present proceeding, although no defence has been filed in the present proceeding.

19 On 7 May 2002 TAPL sought, pursuant to s 25 of the Commercial Arbitration Act 1984 (NSW), to have the scope of the arbitration proceeding extended to include the disputes and differences referred to in the proposed amended points of claim, comprising most of the matters which are raised in the present proceeding. TAPL's application has been opposed by Tridon and has not been determined by the Arbitrator. It has been stood over pending the determination of the applications presently before this Court.

A summary of Tridon's claims

20 In its written submissions dated 19 June 2002, Tridon provided the following summary of its claims in the present proceeding:

> "16. First, there are claims for access to documents of TAPL and its controlled entities. The claims, which will be referred to as the 'Document Access Claims', are made pursuant to:
> (a) provisions of the Shareholders' Agreement;
> (b) section 233 (1) (j) of the Corporations Act (on the basis that the failure to allow Tridon access to the records is oppressive); and
> (c) in the case of TAPL, under section 247A of the Corporations Act.
>
> "17. The Defendants against whom the Document Access Claims are made are :
> (a) to the extent that they are based on the Shareholders' Agreement: Mr Lennox;
> (b) to the extent that they are based on oppression: TAPL, Mr Lennox and Mrs Lennox;
> (c) to the extent that they are based on section 247A: TAPL.
>
> "18. Second, there are claims relating to the transfer of Tridon's shares in TAPL. These claims, which will be referred to as the 'Share Divestiture Claims', are as follows:
> (a) Tridon alleges that the execution of the transfer forms was not authorised by it. On the pleadings as they currently stand, the potential issues are not yet defined, because it will be for Mr Lennox (and any other party who seeks to support the validity of the transfer forms) to plead the authority relied upon. Presumably Mr Lennox will rely upon the default provisions of the Shareholders' Agreement, whereupon Tridon will join issue by way of reply. This would give rise to various issues as to whether the default provisions have been triggered and if so whether Mr Lennox was entitled to rely upon them, which would be contractual issues; but the dispute may not be limited to contractual issues: for instance, Tridon expects that it will rely upon the failure to register the power of attorney as required by section 163 of the Conveyancing Act 1919.
> (b) In any event, Tridon alleges as against TAPL that the registration was invalid because:
> (i) the transfer forms were not 'proper instruments of transfer' as required by section 1071B of the Corporations Act - this is both because of the lack of authority and because they were not stamped prior to transfer; and
> (ii) the transfer resolution was passed for a collateral and improper purpose.

"19. The Relief sought under this head includes an order for the rectification of TAPL's share register pursuant to section 175 of the Corporations Act.

"20. The Defendants against whom the Share Divestiture Claims are made are:
(a) to the extent that relief is sought under the Shareholders' Agreement: Mr Lennox; and
(b) to the extent that relief is sought on the basis of oppression, failure to comply with section 1017B or collateral and improper purpose: TAPL, Mr Lennox and Mrs Lennox.

"21. Third, there are claims against Mr Lennox or Mr and Mrs Lennox, that Mr Lennox or Mr and Mrs Lennox, caused TAPL and TNZL to enter into various transactions which were not in the best interests of TAPL/TNZL and were designed instead to further their own interests and those of their family and associates. These claims will be referred to as the 'Directors' Misconduct Claims' and are said to amount to:
(a) breaches by Mr Lennox of the provisions of the Shareholders' Agreement; and
(b) conduct oppressive of Tridon's interests as a shareholder of TAPL.

"22. Relief is sought in the form of an account from Mr Lennox for the losses caused to TAPL/TNZL by reason of the impugned transactions. That relief is sought pursuant to provisions of the Shareholders' Agreement and also pursuant to section 233 (1) (j) of the Corporations Act. Alternatively, orders are sought pursuant to section 233 (1) (f) that TAPL institute proceedings or cause TNZL to institute proceedings against Mr Lennox and other persons concerned for compensation.

"23 The Defendants against whom the Directors' Misconduct Claims are made are:
(a) to the extent that they are based on the Shareholders' Agreement: Mr Lennox; and
(b) to the extent that they are based on oppression: TAPL, Mr Lennox and Mrs Lennox.

"24. Fourth, Tridon also claims that there have been further instances of oppressive conduct. These include the failure by TNZL to pay dividends, and consequent failure of TAPL to pay dividends. They also include the allegations introduced by recent amendments to the Originating Process that Mr Lennox, in conducting the legal proceedings against Tridon on behalf of TAPL, has caused TAPL to act oppressively. Relief is sought in respect of these claims under section 233 (1). Furthermore, additional and alternative relief is sought under section 233 (1) against TAPL, Mr Lennox and Mrs Lennox in respect of all of the oppressive conduct both under this head and earlier heads, in the form of:
(a) an order that TAPL be wound up;
(b) an order for the compulsory purchase of Mr Lennox's shares in TAPL by Tridon.

"25. These claims, which will be referred to as the 'Further Oppression Claims' are not based on the Shareholders' Agreement: they are purely statutory. The Defendants against whom they are made are TAPL, Mr Lennox and Mrs Lennox.

"26. Fifth, there are claims as to the circumstances in which Tridon can terminate the Distribution Agreement. TAPL has signalled that it will argue that, even if Mr Lennox is found to have breached the Shareholders' Agreement in the manner alleged by Tridon, Tridon would not be entitled to terminate. The Defendants against whom these claims, which will be referred to as of the

'Distribution Agreement Termination Claims' are made are TAPL and TNZL, the other parties to the Distribution Agreement."

21 I adopt this summary as an accurate summary of Tridon's claims, for the purposes of the present applications.

The stay applications

22 TAPL, Mr Lennox and Mrs Lennox and TNZL have each applied for a stay of the present proceeding against them. The first stay application was made by Mr Lennox on 28 March 2002, and was subsequently amended. He seeks a stay of the proceeding initiated by Tridon pending determination of all disputes pursuant to s 7 (2) (b) of the International Arbitration Act 1974 (Cth). The form of orders sought by Mr Lennox, staying the proceeding "pending determination of all disputes" under the Act, tends to obscure the process required by s 7 of the Act. Section 7 (2) requires the Court, when certain pre-conditions have been met, to stay the proceeding (or so much of it as it involves the determination of the arbitrable matter) and refer the parties to arbitration in respect of that matter. There is no existing arbitral proceeding under the Shareholders' Agreement, and Mr Lennox is not a party to the arbitral proceeding under the Distribution Agreement, as he is not a party to the Agreement. Section 7 requires the Court, in those circumstances, to do two things if it concludes that the section applies, namely to stay the proceeding or part of it, and to make an order referring the proceeding or the appropriate part to arbitration.

23 In the alternative, Mr Lennox seeks a stay of Tridon's proceeding against him pending an award in the arbitration proceeding between Tridon and TAPL that may come about if I grant the stay applications brought by TAPL or TNZL. This alternative order is similar to one of the orders made by Merkel J in *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* [2000] FCA 547 (30 May 2000). In that case his Honour exercised his discretion to stay non-arbitrable claims until further order, while granting a stay under s 7 (2) in respect of arbitrable claims.

24 In written submissions supporting the application, counsel for Mr Lennox sought to rely, in the further alternative, on s 53 (1) of the Commercial Arbitration Act 1984 (NSW), and also on the Court's general jurisdiction under s 23 of the Supreme Court Act 1970 (NSW).

25 TAPL's interlocutory process was filed on 1 May 2002. It invokes s 7 (2) (b) of the International Arbitration Act (Cth) and s 53 (1) of the Commercial Arbitration Act (NSW). Insofar as it may be held that TAPL has taken a step in the proceeding, leave is sought under s 53 (2) of the latter Act to make the interlocutory application.

26 TNZL's interlocutory process was also filed on 1 May 2002. Insofar as it is an application for a stay of the present proceeding, it seeks relief in identical terms to TAPL's interlocutory application. As I have said, the application also sought summary dismissal of the proceeding against TNZL, but that part of the application was dismissed by consent, so only the application for a stay remains.

27 The applications by Mr Lennox, TAPL and TNZL sought, in the alternative, to invoke article 8 of the UNCITRAL Model Law. Tridon contended in its initial submissions in response to Mr Lennox's application that the Model Law has no application to the Shareholders' Agreement because it was not part of Australian law at the time. The same would be true of the Distribution Agreement, which was entered into at the same time. In their latest submissions, Mr Lennox, TAPL and TNZL do not develop any argument based on the Model Law. In its final written submissions, Tridon said it would assume that the defendants accept that the Model Law does not apply. Nothing was said at the hearing to contradict that assumption. I therefore take it that article 8 is no longer relied upon. It is therefore unnecessary for me to decide whether the Model Law has any application to the arbitration agreements in this case.

28 Mrs Lennox filed her application for a stay on 9 May 2002. The grounds upon which that relief is sought are not stated in her interlocutory process. The application is not based on any arbitration agreement, since she is not party to the Shareholders' Agreement or the Distribution Agreement. Essentially, her case is that if the stay applications against the other defendants succeed, then as a matter of convenience the proceeding against her should also be stayed.

29 The various applications for a stay of the proceeding rely on the arbitration clauses in the Distribution Agreement and the Shareholders' Agreement. I shall set out relevant provisions of the arbitration legislation relied upon by the applicants, and then deal with the proper construction of the arbitration clauses.

The arbitration legislation

The International Arbitration Act

30 The International Arbitration Act 1974 (Cth) relates to the recognition and enforcement of foreign arbitral awards and the conduct of international commercial arbitrations.

31 Part II deals with the enforcement of foreign awards. Section 3 (1) defines "arbitration agreement" to mean an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, a copy of which is Schedule 1 to the Act. I note that the Convention is often referred to as “the New York Convention”.

32 Sub-article 1 of Article II refers to "an agreement 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".

33 Sub-article 3 of Article II states:

> “The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

34 Section 7 applies, inter alia, where a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country: s 7 (1) (d). "Convention country" is defined in s 3 (1) to mean a country (other than Australia) that is a Contracting State within the meaning of the Convention. Section 3 (3) provides that a body corporate shall be taken to be ordinarily resident in a country if, and only if, it is incorporated or has its principal place of business in that country.

35 Section 7 (2) states:

> "(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."

36 Section 7 (5) states:

> "(5) A court shall not make an order under subsection (2) if the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

37 Section 24 of the Act authorises a party to an arbitral proceeding before an arbitral tribunal to apply to the tribunal for an order consolidating that proceeding with another arbitral proceeding.

The Commercial Arbitration Act

38 The Commercial Arbitration Act 1984 (NSW) makes various provisions where parties have entered into an "arbitration agreement", defined in s 4 (1) to mean an agreement in writing to refer present or future disputes to arbitration. The Act makes provisions for the appointment of arbitrators, the conduct of arbitration proceedings, awards and costs, and the powers of the Court.

39 One of the provisions of Part 3 of the Act, which deals with the conduct of arbitration proceedings, is s 25, which allows the arbitrator to make an order directing that the arbitration be extended to include another dispute between the parties to the arbitration agreement.

40 Section 53 (1) and (2) provide:

> "(1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied:
> (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
> (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,
> may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.
> "(2) An application under subsection (1) shall not, except with the leave of the Court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance."

The Distribution Agreement

41 The Distribution Agreement is between Tridon Limited, TAPL and TNZL, and is dated 4 October 1988. It is expressed to operate for a term of 99 years, and thereafter from year to year. By clause 1 Tridon Limited (called "the Company") grants to TAPL and TNZL (called together "the Distributor") the exclusive right to purchase and resell products specified in the second schedule to the Agreement ("the Products"), in the territories specified in the first schedule to the Agreement. During the term of the Agreement, the Distributor is granted the full and unfettered use of the Tridon trade name, trademark and logo (clause 10).

42 The Distribution Agreement contains detailed provisions with respect to the placing of orders, pricing, the licensing of equipment, the duties of the Company and the Distributor and their respective rights. The duties of the Distributor include a duty to pass on any useful information to the Company, and another is to provide reports and returns (clauses 7 (f) and (g)). The duties of the Company include a duty to safeguard the Distributor's exclusive rights and to prevent infringement of those rights, and a duty to give

the Distributor at least six months' prior notice of its intention to discontinue production of any item forming part of the Products (clauses 8 (d) and (e)).

43 Clause 9 (b) reserves to the Company the right to alter the schedule of Products by withdrawing a class or classes of Products in the event that the Company ceases to manufacture them (subject to the duty to give six months' notice).

44 Clause 11 deals with determination of the Distribution Agreement. It gives each party the right to give notice terminating the Agreement forthwith, for breach or if the other party enters into liquidation or compounds its debts with creditors or has a receiver appointed.

45 Clause 18 of the Agreement is in the following terms:

> "18. ARBITRATION
>
> 18.1 Any dispute, difference or question which may arise at any time hereafter between the Company and the Distributor with respect to the true construction of this Agreement or the rights and liabilities of the parties hereto shall, unless otherwise herein expressly provided, be referred to the decision of a single arbitrator in New South Wales to be agreed upon between the parties or in default of agreement for fourteen days to be appointed at the request of either party by the President for the time being of the Institute of Chartered Accountants in accordance with and subject to the provisions of the Commercial Arbitration Act of New South Wales or any statutory modification or re-enactment thereof for the time being in force."

46 Clause 19 states that the Distribution Agreement is deemed to have been made in the State of New South Wales, and the construction, validity and performance of the Agreement is governed in all respects by the laws of this State.

The Shareholders' Agreement

47 The Shareholders' Agreement is between Tridon Limited and Mr Lennox, and is also dated 4 October 1988. The Agreement recites that Tridon Limited has agreed to sell to Mr Lennox the shares set forth in a schedule to the Agreement, at the price stated in the schedule, and that the parties wish to enter into the Agreement to make provisions concerning their shareholding in and management of the company.

48 Clause 3 deals with the composition of the board of directors, giving Mr Lennox the power to appoint two directors and Tridon Limited the power to appoint one director. Clause 5 imposes various obligations of good faith on the parties. Clause 6 provides that Mr Lennox will be the chief executive of the company, responsible for day-to-day management. There are provisions for the funding of future working capital, dividend policy, and the acquisition by Mr Lennox of manufacturing and assembly equipment in certain circumstances, and there are provisions with respect to default and termination.

49 Clause 14 deals with the transfer of shares. It contains a provision restricting each party from charging their shareholding without the consent of the other party. It prevents each party from selling or transferring their shareholding except by following a procedure for the sale of the whole of the shares, under which the selling party must offer the shares to the other party.

50 Clause 16 deals with default. It provides that a party shall be deemed in default of the Agreement on the happening of any of the events specified in the clause. One of those events is as follows:

> "16.1 … (a) if a petition is presented or a resolution passed for its winding up (other than for the purposes of reconstruction or amalgamation) or for the reduction of its capital".

Upon the happening of an event of default, the non-defaulting party is empowered by clause 16.2 to require the defaulting party to sell all of its shares in TAPL to the non-defaulting party or its nominees at a fair valuation, and for that purpose the non-defaulting party is constituted the agent and attorney of the defaulting party for the purpose of executing all documents and doing all things necessary to be done to effect the sale.

51 Clause 19 is in the following terms:

> "19. DISPUTES
>
> All disputes or differences between the parties hereto touching and concerning the construction or effect of this Agreement or the rights and liabilities hereunder which cannot be amicably settled within three (3) months from the date such dispute or difference first arose shall be referred to arbitration pursuant to the provisions of the Arbitration Act 1982 as amended."

52 Clause 20 states that the Shareholders' Agreement is to be governed by and construed in accordance with the laws of the State of New South Wales.

Tridon's allegations of waiver

53 Where s 7 (2) otherwise applies, the Court is not to make an order if it finds that the arbitration agreement is, inter alia, "inoperative": s 7 (5). In *Australian Granites Ltd v Eisenwerk Hensel Bayreuth GmbH* [2001] 1 Qd R 461 the Queensland Court of Appeal held (at 466-7) that, as the right to apply for a stay under s 7 (2) is a private one, it may be waived. Waiver renders the arbitration agreement "inoperative" for the purposes of s 7 (5). That reasoning was not challenged before me and I respectfully accept it, though there is a difficult question as to the meaning of "waiver" in this context. It seems plain, as the Court commented at 466, that "Parliament could hardly have intended that the Court's obligation to grant a stay must be exercised in favour of an applicant even if the application is made at the end of a lengthy trial, no earlier suggestion of reliance on an arbitration clause having been made". The legal doctrinal basis for excluding such an application is far less plain.

54 Their Honours expressed the view (at 468-9) that the principle of estoppel identified by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 did not apply to litigants who failed to raise the relevant matter in an interlocutory context. No reliance is placed on *Anshun* estoppel in the present case.

55 Tridon relies on "waiver" by the defendants, through their conduct of various phases of the proceeding to date. The word "waiver" is frequently used in the law, but it is often used imprecisely. As McHugh J (dissenting) pointed out in *Commonwealth v Verwayen* (1990) 170 CLR 394, 491, most of the cases which purport to apply the doctrine of waiver are really cases of contract, estoppel or election: see also Mason CJ at 407, Brennan J at 421ff, and Toohey J at 472. Tridon does not rely on equitable estoppel, because it does not contend that the defendants' relevant conduct has caused it any detriment that cannot be addressed by an order for costs. There is no suggestion that the defendants' omission to raise the arbitration clauses at an earlier time was attributable to a contract.

56 In *Verwayen*, Brennan J (dissenting) offered this definition of election (at 421; see also Toohey J at 472):

> "Election consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights."

As Gaudron J emphasised (at 481), the essence of this concept is the assertion of two inconsistent rights, a much narrower proposition than the assertion of two inconsistent positions.

57 In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J said (at 646) that "the words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other"; though he added later that "less unequivocal conduct, only providing some evidence of election, may suffice if coupled with actual knowledge of the right of election".

58 In the present case the defendants had a choice to insist on arbitration or to allow their disputes with Tridon to be determined curially. The making of that choice would not involve election between inconsistent rights. It would simply involve selecting one of two procedures for the adjudication of the dispute. In any event, the defendants did not, prior to the hearing of the stay applications, make any unequivocal or final choice between alternative procedures. At various stages in the history of the litigation prior to the hearing, the defendants adopted positions which, if maintained concurrently, would be inconsistent positions, but they have not persisted concurrently with inconsistent positions, and even if they had, doing so would not constitute an unequivocal choice between inconsistent rights. This is not a case of election, as that word was explained in *Verwayen's* case.

59 There are, however, two other uses of the word "waiver" which are recognised by some of the High Court in *Verwayen*. One of them was explained by Toohey J at 472, quoting from *Halsbury's Laws of England* (4th ed (1976), vol 16, para 1471):

> "Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge."

The difference between election and waiver in this sense, noted by Brennan J at 424, is that a right may be waived though there is no alternative right inconsistent with it.

60 Another sense of the word "waiver" was identified by Dawson J in *Verwayen* (at 457). His Honour suggested that the word "waiver", except where it was used in case law to describe what was properly an election or estoppel, was used "loosely to indicate non-insistence upon a right either by choice or by default". His Honour appears to have had in mind a matter going to the exercise of the court's discretion, rather than a legal doctrine. The exercise of the discretion would presumably arise in some such context as an application for a stay, or leave to amend, or to strike out the relevant pleading. The discretionary matter is whether a party, having failed to insist upon his right at an appropriate time, should later be allowed to do so. His Honour regarded such well-known cases as *Ketteman v Hansel Properties Ltd* [1987] AC 189 as authorities relevant to the issue he had in mind. That case, and others cited by his Honour, go to whether the Court should grant leave to amend a pleading at a very late stage, to raise (for example) a limitation point. While the Court is disposed to grant leave to amend subject to addressing the other side's prejudice by an order for adjournment and/or for costs, there comes a point when the delay is so great that the application should be refused.

61 Gaudron J explained the relationship between these two kinds of "waiver" as follows (at 482; the order is reversed):

> "If, in the course of litigation, a person fails to plead a matter, take an available objection or pursue a particular point of law, the matter proceeds on the basis that the point which might have been taken is not in issue. Were it otherwise the conduct of litigation would be unmanageable. Of course, leave may be granted for the point to be raised notwithstanding the failure to take the point at the appropriate time. Generally, leave is granted if the point can be raised without injustice to the other party. That question may depend upon whether disadvantage to the other party can be avoided by adjournment or an appropriate costs order. But other issues may be taken into account. …

> "When a party to litigation deliberately chooses not to take a point or fails to take a point when it comes to notice, the courts may adopt a more stringent attitude, treating the point as having been irrevocably abandoned. Usually, the party who has thus failed to take the point is said to have 'waived' it."

62 The latter is the kind of "waiver" defined in the passage extracted by Toohey J from *Halsbury*. I shall refer to it as "waiver in the stronger sense". Gaudron J gave some examples and then she proceeded (at 484):

> "There is a common aspect to the situations above discussed. The relationship of the parties has changed. In cases involving questions relating to jurisdictional defect or irregularity attending the institution of the proceedings the parties have become or are treated as having become parties to a proceeding. In the case of failure to raise a matter of personal disqualification, the parties have entered a new relationship, namely parties to a proceeding which is in the course of adjudication. Again, once a matter has passed into judgment, the relationship of the parties is according to the judgment, subject only to such powers as may be exercised by an appellate court if an appeal is instituted. And, it is significant that a respondent to an appeal who fails to object that the appeal has not been properly instituted may be precluded from later raising that issue. See *Park Gate Iron Co; Ward v Raw* (1872) LR 15 Eq 83. Again, in that situation the parties are or are deemed to be in a new relationship, namely, that of appellant and respondent.
>
> "Perhaps there is a principle of wider application, but it is clear that a party to litigation will be held to a position previously taken (that position having been intentionally taken with knowledge) if, as a result of that earlier position, the relationship of the parties has changed."

63 Counsel for Tridon sought to draw an analogy between the present circumstances and the law of waiver of legal professional privilege, relying on passages from the joint judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell* (1999) 201 CLR 1. I do not find the analogy helpful. The joint judgment (at 13) acknowledges, citing *Verwayen's* case, that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. The context of "waiver" in legal professional privilege is special, as their Honours point out. Legal professional privilege protects the confidentiality of communications between lawyer and client. The waiver of the privilege occurs when the client, who is entitled to the benefit of the confidentiality, relinquishes that entitlement by engaging in conduct inconsistent with the maintenance of the confidentiality. In this context "waiver" is intentional conduct inconsistent with the maintenance of confidentiality, considerations of fairness being used to determine whether such inconsistency exists (at 13). Explained in this way, waiver of legal professional privilege could well be an application of the doctrine of approbation and reprobation. One cannot have the benefit of confidentiality without respecting the obligation to maintain it. The concept seems to me to be quite distinct from, though broadly similar to, the idea of waiver about which Toohey and Gaudron JJ spoke in *Verwayen*.

64 Tridon claims that by virtue of five steps taken by the defendants in the proceeding, they have waived their right to apply under s 7 (2) for orders staying the proceeding. The facts relating to those matters are as follows.

Initial directions and undertakings to the Court

65 Tridon commenced the present proceeding on 29 November 2001, by summons made returnable on 4 December 2001. On the return date, directions were made establishing a timetable for evidence. TAPL and Mr Lennox consented to those directions. However, Mr Lennox foreshadowed a stay application.

66 The purported transfer of Tridon's shares in TAPL to Mr Lennox took place on 19 January 2002. On 23 January 2002 Tridon filed an amended summons joining Mrs Lennox as third defendant and adding claims for relief. The new claims for relief became, eventually, the Share Divestiture Claims.

67 At an interlocutory hearing before Windeyer J on 29 January 2002, TAPL and Mr and Mrs Lennox gave interim undertakings not to deal with the TAPL shares purportedly transferred from Tridon. It is appropriate to infer that the undertakings were given to forestall an application for interlocutory injunctions. Subsequently in April 2002 TAPL gave an undertaking not to deal with its assets otherwise than in the ordinary course of business.

68 Tridon claims that in consenting to directions and then giving these undertakings, TAPL and Mr Lennox both submitted to the jurisdiction of the Court in a manner which accepted the appropriateness of the Court dealing with the claims brought by Tridon. I disagree. In my view the conduct of TAPL and Mr and Mrs Lennox in these matters was consistent with their seeking to refer the dispute to arbitration. One can rationally take the view that it is desirable to consent to timetabling directions to avoid any costs penalty, even though one believes, and intends to persuade the Court at an appropriate time, that the dispute should be arbitrated. Similarly, faced with the threat on application for an injunction, which one might judge likely to succeed, one can rationally give undertakings consistently with an intention to seek a reference to arbitration at an appropriate stage.

69 Delay in an application to refer a dispute to arbitration might, eventually, give rise to discretionary grounds for refusing the application ("waiver" in the weaker sense identified by Dawson J), and conduct by which a party deliberately defers the making of an application for a stay until the curial proceeding has been well-developed might constitute "waiver" in the stronger sense identified by Toohey and Gaudron JJ. But the facts here fall well short of either of these situations.

70 Mr Lennox foreshadowed an application for a stay based on the arbitration clause at the first return date of the summons, 4 December 2001. The proceeding was affected by his decision to purport compulsorily to acquire Tridon's shares in January 2002, and this led to amendments to the summons. But Mr Lennox made his stay application not much later, on 28 March 2002. Additionally there was agitation for the determination of a separate question in February and March 2002, and for arrangements concerning the fate of the New Zealand proceeding in March and April 2002, each of which I shall describe. Whatever else one may say about the issue concerning separate questions and the agitation concerning the New Zealand proceeding, they provided an explanation for the fact that TAPL and TNZL did not file their stay applications until 1 May 2002.

71 In all the circumstances, I do not regard this aspect of the defendants' conduct as giving rise to waiver in any sense.

Objection to jurisdiction in the New Zealand proceeding

72 Tridon commenced the New Zealand proceeding against TNZL, TAPL and Mr Lennox on 19 December 2001. The claims made in that proceeding cover part of the ground covered by the claims made in the present proceeding. There is evidence that TNZL and TAPL contested the jurisdiction of the High Court of New Zealand on the basis that "the matters sought to be put in issue in this proceeding would more appropriately and conveniently be determined" in the present proceeding. Mr Lennox contested the jurisdiction on the same basis, although he also referred to the arbitration clause in the Shareholders' Agreement.

73 Tridon says that by contesting jurisdiction in New Zealand in this fashion, TNZL, TAPL and Mr Lennox expressly chose to have Tridon's claims determined in this Court. I agree that these defendants expressed a preference for this Court over the High Court of New Zealand as a curial venue for determination of their disputes. However, Mr Lennox made it clear enough that arbitration remained for

him an alternative to curial resolution of the disputes; and the conduct of TAPL and TNZL did not amount to the kind of abandonment of rights that would give rise to a waiver in the stronger sense. Their conduct might be contrasted, for example, with the conduct of the Commonwealth in *Verwayen's* case, where the Commonwealth firmly adopted the policy of not contesting liability or pleading the statute of limitations, and adhered to it for a substantial period of time.

Application for Part 31 orders

74 On 28 February 2002, Mr Lennox made application in this Court for the determination as separate questions of various matters arising in the proceeding. It appears that the application was supported by TAPL. It was opposed by Tridon. The application was heard by Gzell J, who made orders for separate determination, and directions for the filing of evidence.

75 Tridon submitted that in making this application, Mr Lennox was affirming, with TAPL's support, the continuation of the proceeding in this Court. This is true, but his conduct did not, in my opinion, amount to a waiver, in the stronger sense, of his right to seek referral to arbitration. It is evident that Mr Lennox was exploring various ways of resolving the whole or parts of the dispute, consistently with his overall objectives. One of his objectives at the hearing of the stay applications, which may also have been an objective at that time, was to achieve a degree of confidentiality with respect to the determination of certain allegations against him. As far as I can see, the Part 31 application was consistent with that objective, because the matters that would be determined under Part 31 did not involve matters which he wished to keep confidential. His conduct in relation to the Part 31 application was consistent with a desire to seek a reference to arbitration of these other matters at a later stage.

Consent to joinder of TNZL and adjournment of New Zealand proceeding

76 The New Zealand proceeding was commenced, as I have said, on 19 December 2001. TNZL, TAPL and Mr Lennox filed objections to the jurisdiction of the High Court of New Zealand on 15 February 2002. Tridon served an amended pleading in the proceeding in this Court, purporting to join TNZL as the fourth defendant, on 27 February 2002. On 28 March 2002 there was a directions hearing before the Registrar of this Court, adjourned by consent to allow TNZL formally to consent to joinder.

77 The parties agreed that the New Zealand proceeding should be adjourned pending resolution of the proceeding in this Court. On 10 April 2002 TAPL's solicitors forwarded to Tridon's solicitors a copy of a board resolution of TAPL, signed by all three directors, by which TAPL undertook as a shareholder of TNZL to consent to TNZL being joined as a party to the Australian proceeding, subject to suspension of the New Zealand proceeding.

78 This agreement was implemented, as far as the New Zealand proceeding was concerned, in a Consent Memorandum filed with the High Court of New Zealand. Consent orders were made for the indefinite adjournment of the New Zealand proceeding on 17 April 2002. However, on 18 April 2002 TAPL's solicitors wrote to Tridon's solicitors, saying there would be no consent to Tridon's application to join TNZL as a defendant in the proceeding before this Court, and asserting that this Court had no jurisdiction over TNZL. On 19 April 2002 the Registrar of this Court made an order for the joinder of TNZL as fourth defendant. TNZL neither consented to nor opposed that order.

79 In my opinion these facts are in the same category as the facts relating to the application for Part 31 orders. They indicate that the defendants were exploring various ways of achieving resolution of the whole or parts of their disputes with Tridon. They do not amount to evidence of an irrevocable step amounting to a waiver in the stronger sense.

Notice to produce

80 On 13 June 2002 I made orders on the application of TAPL, requiring Tridon to produce certain documents to the Court. TAPL's application was strongly resisted by Tridon.

81 Tridon says that in obtaining these orders, TAPL invoked the coercive power of the Court, in aid of the conduct of this proceeding. It asserts that the documents, and information gained from them, may only be used for the purposes of the proceeding in this Court, and that it would be a contempt to use them for other purposes and in particular for the purposes of an arbitration proceeding.

82 In my opinion the obtaining of orders for production has no bearing on the question of waiver beyond showing that TAPL was in June 2002 engaged in an interlocutory application in the curial proceeding and was not confining its attention to the stay application for the purposes of arbitration. It's conduct in seeking orders for production did not give rise to a waiver in the stronger sense.

The defendants' conduct generally

83 For the reasons I have given, none of the factual circumstances relied upon by Tridon, considered in isolation from the others, give rise to a waiver in the stronger sense. Nor, in my opinion, does the whole course of conduct by the defendants amount to a waiver in the stronger sense. It does not amount to evidence of an irrevocable abandonment of the right under the arbitration agreements to seek a stay of the curial proceeding and a reference to arbitration.

84 I should say that in the course of considering this matter, I have read the voluminous correspondence between the solicitors for the parties, and the transcripts which are in evidence of various applications before Gzell J, Handley JA and the Registrar. This material reinforces my conclusion that there was at no stage any irrevocable abandonment of the defendants' rights to refer their disputes with Tridon to arbitration. Indeed Tridon's counsel appeared to acknowledge, in submissions to Handley JA, that the question of arbitration was still a matter under consideration at that time (transcript, 25 March 2002, page 9).

85 As to waiver in the weaker sense identified by Dawson J, Tridon invites me to take into account, in the exercise of my discretion, that

· TAPL, TNZL and Mr Lennox chose to take advantage of the proceeding in this Court when it suited them to do so, both before and after filing their stay applications;

· TNZL expressly consented to its joinder in the present proceeding;

· the defendants' conduct cannot be said to have been carried out in ignorance of the potential for arbitration, since there was already an arbitration proceeding between TAPL and Tridon under the Distribution Agreement, and Mr Lennox foreshadowed a stay application on the first return date for the summons.

86 As to the first two of these matters, my view is that the defendants have taken different approaches from time to time as to the most expeditious method of achieving resolution of their disputes with Tridon, but I do not regard their doing so as amounting to the adoption, over any substantial period of time, of a position inconsistent with referral to arbitration. I accept the evidence of Mr Lennox, in his affidavit made on 13 June 2002, that "since the beginning of the arbitration, my consistent instructions have been to pursue all avenues for the amicable and commercial resolution of all disputes" between Tridon and TAPL.

87 As to the third matter, I infer that Mr Lennox, and therefore TAPL and TNZL, were aware of the potential for referral to arbitration at all relevant times. Mr Lennox gave evidence, in his affidavit made on 13 June 2002, that he was unaware that the Part 31 application could have been considered to put the right to go to arbitration in any jeopardy, and that if he had been aware that there was such a risk, he would have proceeded immediately with the stay application. I agree with Tridon's submission that this evidence is irrelevant to the question of waiver in the stronger sense. The question is whether Mr Lennox was aware of

the availability of arbitration, and being so aware, intentionally engaged in conduct which irrevocably abandoned the pursuit of arbitration. To the extent that waiver in the stronger sense requires an intentional act with knowledge of the availability of the course of action foregone, knowledge and intention were present here so far as Mr Lennox, TAPL and TNZL were concerned. There was no waiver in the stronger sense, however, because there was no irrevocable step of abandonment of the right of referral to arbitration by any of the defendants.

88 Mr Lennox's knowledge of the availability of referral to arbitration is relevant to the exercise of my discretion to refuse the application for a stay, but I do not regard it as a significant consideration. Although he was aware of the potential for referral to arbitration, he thought it appropriate to take a number of short-term steps to explore other prospects of resolution of his disputes with Tridon. In my opinion it was not unreasonable for him to do so, and it would be wrong to require him to abandon his right of referral to arbitration simply because of those steps.

89 To the extent that, by pursuing these other avenues, the defendants have caused Tridon to incur costs that might have been avoided if their applications for a stay and referral to arbitration had been made at the first available opportunity, any unfair prejudice to Tridon can be addressed by an appropriate order as to costs, upon the principles enunciated in such cases as *Cropper v Smith* (1984) 26 Ch D 700, *Ketteman v Hansel Properties Ltd* [1987] AC 189 and *State of Queensland* v *JL Holdings Pty Ltd* (1997) 189 CLR 146. I should say that at this stage, I am far from persuaded that such a costs order is justified, though I shall hear submissions on the point.

90 My conclusion is that the defendants have not, in any sense, waived their right to apply for a stay of the whole or any part of proceeding and for referral of the whole or parts of the dispute to arbitration. I agree with counsel for Tridon that the Court would not permit a party to demand the enforcement of an arbitration clause at the end of the final hearing in court, either because of waiver in the strong sense or the adverse exercise of the Court's discretion. But that is not the present case. The difference is that by committing to a final hearing, the litigant has irrevocably committed to curial rather than arbitrable determination of the dispute. Lesser conduct might also amount to an irrevocable abandonment of the right to arbitration, but wherever the line is drawn, the defendants' conduct here cannot be so categorised.

Tridon's alleged acknowledgement of arbitrability

91 Mr Lennox alleged that Tridon has acknowledged that the shareholders' disputes raised by its originating process fell within the arbitration clause of the Shareholders' Agreement. The acknowledgement is said to have arisen from two sources. First, an affidavit by Mr Zimmerman, president of Tridon, sworn on 8 March 2002 and filed in this proceeding, stated that at no time had Tridon been accorded the right of arbitration provided by clause 19 of the Shareholders' Agreement, and asserted that this constituted another act of oppression.

92 In my opinion this statement does not amount to any election or waiver binding Tridon. It cannot be contended that Mr Zimmerman, on behalf of Tridon, consented to any reference to arbitration. Mr Zimmerman's belief that the disputed share transfer issue should have gone to arbitration under the Shareholders' Agreement is therefore irrelevant to any issue before the Court.

93 Secondly, on 27 June 2001 Tridon's solicitors wrote to the solicitors for TAPL seeking to require Mr Lennox to repay his loan to TAPL and complaining about payments to Mr Lennox, which were said to be contrary to the terms of the Shareholders' Agreement. After an exchange of facsimiles in which these allegations were disputed, Tridon's solicitors stated in a facsimile dated 10 July 2001 that unless they received satisfactory replies, they would take their client's instructions "on referring the matters in dispute … to arbitration under the Shareholders' Agreement (without prejudice to any other remedies available to our client)." The issues in dispute are now set out in the third amended originating process.

94 The letter says no more than that the solicitors would seek instructions on a point. It expressly reserves other remedies that may be available. It cannot possibly be regarded as constituting consent or a binding election or waiver. It has no operative significance.

95 In my opinion, neither Mr Zimmerman's affidavit nor the solicitor's letter constitutes any impediment to Tridon resisting the applications for a stay of proceeding based on the arbitration clause.

The application of the International Arbitration Act

96 Section 7 of the International Arbitration Act applies to the present case. Both the Distribution Agreement and the Shareholders' Agreement are arbitration agreements as defined in sub-article 1 of Article II of the New York Convention. Though there are some issues about the breadth or narrowness of the arbitration clauses in those agreements, each of them is an agreement under which the parties have undertaken to submit to arbitration all or any differences 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. Sub-paragraph 7 (1) (d) causes the section to apply where a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country. Canada is a Contracting State and therefore a Convention country as defined in s 3 (1). Tridon Limited was a party to both the Distribution Agreement and the Shareholders' Agreement, and was domiciled or ordinarily resident in Canada when the agreements were made because it was incorporated and had its principal place of business in Canada.

97 Subsection 7 (2) requires the Court to make orders staying the proceeding before it and referring the parties to arbitration if the conditions in sub-paragraphs (2) (a) and (b) are met.

98 As to sub-paragraph (2) (a), the present proceeding has been instituted by Tridon. Although there are questions about the effect of the amalgamation between Tridon Limited and the Tomkins entity, the defendants have not challenged the proposition that Tridon is a party to the arbitration agreements contained in clauses 18 and 19 respectively, for the purposes of s 7 (2) (a). Tridon's proceeding in this Court has been instituted against the other parties to the Distribution Agreement and the other party to the Shareholders' Agreement, as well as Mrs Lennox. The ingredients of s 7 (2) (a) are therefore satisfied.

99 The only remaining question is whether the ingredients of s 7 (2) (b) are satisfied. Does the present proceeding "involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration"? There are three issues raised by these words, which I shall consider in turn:

· to identify the matter or matters for determination in the present proceeding;

· to establish the proper construction of the arbitration clauses, so as to decide whether the matter or matters for determination in the proceeding are capable of settlement by arbitration *in pursuance of the agreement*; and

· to determine whether any matter that, in pursuance of the relevant arbitration clause, is to be referred to arbitration is *capable of settlement by arbitration*.

100 The second of these steps could be treated as the constructional aspect of the question whether there is a matter "capable of settlement by arbitration": see *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 353 per Deane and Gaudron JJ. United States courts speak of a "two-step analysis" before referral of a dispute to arbitration: see *Cloe Z Shipping Co Inc v Odyssey Re (London) Ltd* 109 Fed Supp, 2nd Series (SD Cal 2002) at 1236ff. Nothing turns on the structure within which the issues are considered, provided that the issues are considered comprehensively.

101 I should note that TAPL, Mr Lennox and TNZL at one stage seemed to submit that the question of proper construction of an arbitration clause (including the question whether there is one arbitration clause or two) is a matter for the arbitrator rather than for the Court (citing *First Options of Chicago v Kaplan* 115 SCt 1920 (1995)). Such an approach would be inconsistent with the Australian case law on construction of arbitration clauses to which I shall refer.

The matter or matters for determination in the present proceeding

102 Tridon submits that the present proceeding involves no more than five "matters" for the purposes of the Act, namely the Document Access Claims, the Share Divestiture Claims, the Directors' Misconduct Claims, the Further Oppression Claims and the Distribution Agreement Termination Claims. Tridon concedes that, within each of those claims, there are issues about the construction of the Shareholders' Agreement and rights and liabilities of the parties to it, but it submits that these issues should not be regarded as "matters" for the purposes of s 7 (2) (b).

103 In *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243, 250, McLelland J observed that the word "matter" in s 7 (2) (b) "denotes any claim for relief of a kind proper for determination in the Court. It does not include every issue which would, or might, arise for decision in the course of the determination of such a claim".

104 Section 7 (2) was also considered in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332. There, one of the questions was whether a creditor's appeal against a liquidator's rejection of the creditor's proof of debt was a "matter" capable of being referred to arbitration. The High Court held that the determination of whether the company in liquidation owed the debt to the creditor was a "matter" cable of settlement by arbitration for the purposes of s 7 (2).

105 Brennan CJ and Dawson J (with whom Toohey J agreed) appear to have taken a narrow view of the meaning of the word "matter", without much discussion (see at 343-4). Deane and Gaudron JJ set out their reasoning more fully. They held that the entire controversy as to the debt owing, including estoppel issues, constituted the matter to be referred to arbitration. They referred to the use of the word "matter" in Ch III of the Constitution, noting that in that context the word "matter" means "the whole matter" and encompasses "all claims made within the scope of the controversy" (at 351, citing *Fencott v Muller* (1983) 152 CLR 570, 603 and *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 475). However, their Honours pointed out that the word appeared in a quite different context in Ch III. They observed that in any context, the word "matter" is a word of wide import, and after drawing the distinction between a matter and a "mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted", they said (at 351):

> "It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible to settlement as a discrete controversy."

106 In *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc*, Merkel J referred (at paragraph 18) to these authorities, regarding *Tanning Research* as "authority for the view that, for the purposes of s 7 (2), the 'matter' to be determined in a proceeding is to be ascertained by reference to the subject matter of the dispute in the proceeding and the substantive, although not necessarily the ultimate, questions for determination in the proceeding". Applying that principle, his Honour held that the "matter" to be determined in the case before him was a claim to entitlement to recover damages by reason of representations, the entitlement being based partly in claims under the Trade Practices Act and partly in claims in negligence.

107 *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1 provides an interesting contrast to the *Recyclers* case. In *Metrocall* the Full Bench of the Industrial Relations Commission in Court Session held that a claim under s 106 of the Industrial Relations Act 1996 (NSW) was a matter that was not capable of settlement by arbitration, notwithstanding the breadth of the arbitration clause under consideration. The Commission characterised the claim under s 106 as a matter separate from the other matters that were in dispute between the parties. The Commission emphasised (at 18-19) that the claim under s 106 concerned the fairness of the agreement in question, rather than the actionability of certain misrepresentations relied upon in the summons for relief or the validity of the alleged termination of the

agreement. Because the statutory question was different from the questions raised in other aspects of the dispute, it was proper to characterise the statutory claim as a separate "matter".

108 Counsel for Tridon referred me to some recent expositions of the meaning of the word "matter" for the purposes of Ch III of the Constitution: *Re Wakim; ex parte McNally* (1999) 198 CLR 511, 584-5 per Gummow and Hayne JJ; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, 627 per Gaudron J. I do not regard these cases as adding to the exposition of the concept of "matter" in the more directly relevant cases, in any way helpful to the resolution of the issues before me.

109 As Tridon points out in its written submissions, characterisation of the "matters" capable of settlement by arbitration is made difficult, in the present case, by the lack of defences to the third amended originating process. The absence of defences does not make it impossible to identify the "matters" the purposes of s 7 (2) (b), but it complicates the task because, as Merkel J remarked in the *Recyclers* case (at paragraph 19), the manner in which a defence is pleaded is of importance to the characterisation. I must make some inferences from the facts before me as to the likely defences that will raise. I am aided in that task by Tridon's outline of its claims, which I have set out in full above, and by the draft points of defence annexed to TAPL's proposed amended points of claim in the arbitration under the Distribution Agreement.

110 Doing the best I can, I had decided that each of the five claims outlined in Tridon's written submissions involves a "matter" arising out of the Shareholders' Agreement (in the case of the Distribution Agreement Termination Claims, the Distribution Agreement) and also one or more matters arising out of claims to statutory and equitable rights. The controversies as to the correct construction of the Shareholders' Agreement concerning each of the first four Claims, and concerning the rights and liabilities of Mr Lennox and Tridon under the relevant parts of the Agreement, are controversies discrete from the statutory and equitable claims, both in the sense that the contract claims might have been asserted independently of the statutory and equitable claims, although arising out of the same facts, and in the sense that the parties to the contract claims are only Mr Lennox and Tridon, not the other defendants.

111 There are two or more discernible subject matters in the disputes between the parties concerning each Claim. For example, if one takes the Document Access Claims, there is a dispute as to the meaning and effect of the Shareholders' Agreement, clauses 5.2 and 8.3, as between Mr Lennox and Tridon, and there is a dispute as between Tridon and TAPL as to the availability of s 247A, and there is a dispute between Tridon on the one hand and TAPL and Mr and Mrs Lennox on the other hand as to whether denial of access to information constitutes oppression capable of being remedied under s 233. In my view, these amount to three "matters" for the purposes of s 7 (2) (b). The statutory provisions do not merely add another basis for recovery of damages between the same parties on the same facts, as in the *Recyclers* case; they make different facts relevant and operate between partially different parties.

The construction of the arbitration clauses

112 Counsel for TAPL, Mr Lennox and TNZL took me to a large number of reported cases, many from the United States, concerning the proper approach to the construction of an arbitration clause. In deference to the careful submissions that were made about those cases, I shall make some brief remarks about the proper approach to the construction of an international arbitration clause, before addressing the particular clauses before me in this case. I do not regard it as necessary to refer to all of the 126 cases that were cited to me by counsel for the defendants, copies of which were provided to me in four large lever-arched folders, though I have done my best to consider all of them.

The proper approach to the construction of an international arbitration clause

113 The International Arbitration Act, and the New York Convention to which it gives force, reflect a multi-jurisdictional governmental and legislative policy supporting arbitration as a form of international

commercial dispute resolution. In recent times North American courts have frequently emphasised the importance of this policy for international commerce. The turning point in the US judicial attitude to the construction of arbitration clauses was in *Scherk v Alberto-Culver Co* 417 US 506 (1974). In *Moses H Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 24 (1983), the Supreme Court of the United States referred to a "liberal federal policy favouring arbitration agreements". In *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985) Blackmun J, delivering the majority opinion of the same Court, added that this policy is "at bottom a policy guaranteeing the enforcement of private contractual arrangements".

114 In North America, some courts have treated the policy identified by the Supreme Court as a mandate for certain approaches to the construction of international arbitration clauses, in three ways: namely, that they should not put obstacles in the way of the effective enforcement of such clauses; and they should construe such clauses "liberally" so as not to trespass into the field reserved for international arbitration; and they should approach construction with a presumption in favour of arbitration. I shall note some of the North American cases on these themes, and make some observations about the Australian approach.

115 First, some courts have taken the view that they should not, by narrow construction, place obstacles in the way of the enforcement of international arbitration agreements. This thinking has led US courts to treat disputed claims to statutory relief as within the scope of general arbitration clauses. In the *Mitsubishi* case it was accordingly held that a cross-claim under the Sherman Act (a federal anti-trust statute), though based on statutory rights, was amenable to arbitration. A distinction has been drawn between the substantive rights afforded by statute, and the means of resolution and disputes concerning those rights. As Blackmun J remarked in *Mitsubishi* (473 US at 613):

> "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration. "

116 I shall consider later whether, as a matter of Australian law, the statutory and equitable claims raised in the present case are "capable of settlement by arbitration" for the purposes of s 7 (2) (b) of the International Arbitration Act of Australia. It seems that in developing their attitude to whether non-contractual claims are capable of settlement by arbitration, and in construing arbitration clauses to determine whether non-contractual claims are covered, Australian courts have in recent times followed the lead given by the American cases, emphasising the importance of the governmental and legislative policy favouring international commercial arbitration.

117 Thus, in *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, Kirby P referred (at 480) to the *Mitsubishi* case and said that there "the presumption in favour of free negotiation of contractual choice of forum provisions was held to be reinforced by a policy in favour of arbitral dispute resolution", a policy which had "special force in the field of international commerce" (see also *Commonwealth of Australia v Rian Financial Services and Developments Pty Ltd* (1992) 36 FCR 101, 110 per Higgins J; and in England, *Grimaldi Compagnia di Navigazione SpA v Sekihyo Line Ltd* [1998] 3 All ER 943, 952 per Mance J). In *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, Mason J referred (at 247) to the proposition, accepted in the United States, that "the parties to an arbitration are free to clothe the arbitrator with such powers as they may deem it proper to confer, provided that they do not violate any rule of law". And in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 Brennan and Dawson JJ said (at 343) that "to exclude from the scope of an international arbitration agreement binding on a company matters between the other party to that agreement and the company's liquidator would give such agreements an uncertain operation and would jeopardise orderly arrangements", and they cited the *Scherk* case.

118 Secondly, some North American courts treated the legislative policy as mandating what they call a "liberal" approach to the construction of arbitration clauses, particularly international arbitration clauses. There is some support for the view that international commercial arbitration is a special field of dispute

resolution into which the ordinary domestic courts of a country should not trespass. The defendants relied on observations by Clearwater J in the Supreme Court of Manitoba in *Proctor v Schellenberg* 2002 MBQB 135 (22 April 2002), in which his Honour said (at paragraph 11):

> "[I]n recent years, international commercial arbitration has been recognised as an important and growing area of the law. Courts in Canada and the United States have, on the basis of freedom of contract, generally accepted and approved of the arbitration contemplated in the [International Commercial Arbitration Act of Manitoba] and there is little room for judicial intervention in the process."

119 I doubt that an Australian court would treat the policy favouring international commercial arbitration as a mandate requiring "liberal" construction of an arbitration clause. "Liberal" construction is not a rigorous notion. In Australia, courts see their task as ascertaining the intention of the authors of a commercial instrument, as expressed in the instrument, taking into account surrounding circumstances and extrinsic materials to the extent permitted by law. The modern approach to the construction of commercial instruments has tended to remove technical impediments to the ascertainment of the intention of the parties, such as the more restrictive aspects of the parol evidence rule: see *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, esp at 605-6 per Mason J, and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, esp at 347-353 per Mason J. As Kirby P remarked in the *IBM Australia* case (at 472), there was a change in the judicial attitude to arbitration clauses (and, one would add, commercial clauses generally) during the 20th century. The more recent cases are (to use the words of Clarke JA in the same case, at 486) "far less restrictive in their interpretation of arbitration clauses".

120 In other words, while Australian courts are not constrained by considerations of public policy to adopt a "liberal" construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction. As Gleeson CJ said in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, at 165:

> "When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."

(See also *Carob Industries Pty Ltd (in liq) v Simto Pty Ltd* (Supreme Court of Western Australia, Full Court, unreported, 22 May 1997).

121 If, however, the parties have chosen narrow language - for example, language that that, on its face, confines the reference to arbitration to the contractual aspects of their dispute - an Australian court will not disregard the language used so as to permit a reference to arbitration of the non-contractual aspects of the dispute as well: see, for example, *Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1984) 1BCL 80 (a case later confined, in *Francis Travel*, to the particular wording of the arbitration clause before the court).

122 Thirdly, some North American courts, relying on the legislative policy in support of international commercial arbitration, have enunciated a presumption as to the construction of arbitration clauses: see, for example, *Mitsubishi* at 3356-7; *United Steelworkers (America) v Warrior & Gulf Navigational Co* 363 US 574 (1960) p 583; *Deloitte Noraudit v Deloitte Haskins & Sells* 9 F 3d 1060 (2nd Cir 1993), p 1065; *Howard Electrical & Mechanical Co v Frank Briscoe Co* 754 F.2d 847 (1985), p 850; *Tennessee Imports Inc v Pier Paulo Filippi and Prix Italia SRL* (1990) 5 Mealey's International Arbitration Report E1, at E7.

123 I am not aware of any Australian case that has in terms endorsed the idea that, in construing an international arbitration clause, the court should apply a presumption in favour of arbitration. The concept of "presumption", typically used for presumptions of fact, seems to me out of place when the issue is to construe an instrument. There is, however, Australian authority that, on one view, could be treated as having a similar effect.

124 In *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 the High Court held by majority (Stephen, Mason and Murphy JJ, Barwick CJ and Wilson J dissenting) that an arbitrator has the power to award interest where interest would have been recoverable had the matter been determined in a court of law. Stephen J said (at 235) that, subject to certain exceptions reflecting the private and evanescent status of arbitrators, a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of appropriate jurisdiction. If that proposition is read literally, it means that an arbitrator's power should be taken to extend to conferring non-contractual rights and remedies such as statutory rights and remedies under the Trade Practices Act or the Corporations Act, because these rights and remedies would have been available in a court of law.

125 Such an approach bundles together two ideas: first, that it is competent for the parties to an arbitration clause to invest in the arbitrator the authority to deal with all of the causes of action and to exercise all the powers (including statutory powers) that a court would have in the same circumstances; and secondly, that as a matter of construction, a generally worded arbitration clause, or even a voluntary submission to arbitration, should be taken to exhibit an intention to achieve this result. The first idea is supported by other authorities. I shall consider it when I come to matters "capable of settlement by arbitration" for the purposes of s 7 (2) (b) of the International Arbitration Act. The second idea is akin to a broad presumption of construction, in favour of arbitrability of non-contractual claims.

126 It seems to me that Mason J, with whom Murphy J agreed, adopted a narrower proposition (at 246 and 247). The narrower proposition is that, where differences between parties are submitted to arbitration without any express qualification, and the arbitrator is thereby given power to make a money award, the submission to arbitration impliedly gives the arbitrator such powers incidental to the making of a money order as would be possessed by a court in similar circumstances, including the power to award interest.

127 If the issue were uncomplicated by other authority, I would hold that the narrow interpretation of the *Atkinson-Leighton* case is the correct one. Stephen J's broader observations should be treated as dicta to the effect it is competent for the parties to an arbitration agreement to empower the arbitrator to deal with non-contractual (including statutory) rights and remedies, not as support for the proposition that the court should apply a "presumption" in favour of arbitrability to any generally expressed arbitration clause. I say so for five reasons.

128 First, the broader proposition was advanced by only one member of the High Court, Stephen J. Secondly, the question before the High Court related only to the arbitrator's power to include in his award an order incidental to the principal money relief that was the subject of the dispute. The Court did not have to consider whether an arbitrator empowered to resolve a contractual dispute can also be given the power to resolve non-contractual aspects of the dispute, and if so, whether that power arises by implication from a general submission to arbitration or must be expressly conferred. Thirdly, the cases relied upon by Stephen J were cases about contractual disputes, and the principal issue was whether the progenitor case, *Edwards v Great Western Railway Co* (1851) 11 CB 588 [138 ER 603]; (1852) 12 CB 419 [138 ER 969] could be regarded as authority for the proposition that an arbitrator has implied power to award interest, or only for a proposition about the power of a referee who acts in substitution for a jury. Fourthly, later Australian cases, with one possible exception, treat the question whether an arbitrator has the power to resolve non-contractual causes of action as dependent upon the precise words used in the submission to arbitration, rather than upon any general principle or "presumption". Close analysis of the language of the particular arbitration clause before the court would be unnecessary if Stephen J's general principle were to be applied. Fifthly, the narrow interpretation was preferred by Emmett J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1, at 20. His Honour drew a sharp distinction between the right to

interest on damages, which is not an independent cause of action but merely a mechanism to ensure that a claimant is not prejudiced by the delay between the cause of action arising and the judgment, and a cause of action completely independent from contract, such as a statutory cause of action. In his view, the justification for implying into a submission to arbitration the power to award interest is no justification for implying a power to deal with a completely independent cause of action.

129 The case which may be an exception to the general approach taken in later cases, and a case binding on me, is the *IBM Australia* case. In that case all three judges of the Court of Appeal of New South Wales paid close attention to the language of the particular arbitration clause before the court. They emphasised the breadth of the language ("arising out of all related to this Agreement or the breach thereof") and distinguished other cases where the language of the arbitration clause was narrower.

130 However, their Honours went on to apply the *Atkinson-Leighton* case. Kirby P (at 479) and Clarke JA (at 485) applied the observations of Stephen J to which I have referred, as well as the observations of Mason J. Handley JA (at 487-8) referred only to the judgment of Mason J, but treated it as authority for a proposition not confined to the power to award interest.

131 Kirby P said (at 480) that the *Atkinson-Leighton* case "contemplates that the very purpose of a reference to arbitration will frequently be to confer on the arbitrator the powers which would be enjoyed, even by statute only, by the court of law of competent jurisdiction that would otherwise hear the case". He added (at 481):

> "Properly analysed, the holding of that case is not confined solely to an authority to award interest. It concerns the entitlement of parties to confer upon an arbitrator by agreement, express or implied, authority to resolve their dispute in the same way as a court of law of competent jurisdiction would do utilising its powers. The holding stems from the proposition that, in determining the arbitrator's authority, the powers conferred upon such a court by statute may be taken to be agreed within the submission to the arbitrator. This may be so even where the language of the submission is expressed in perfectly general terms."

132 Taken in isolation, these passages could be seen as a broad endorsement of both of the ideas underlying the reasoning of Stephen J. In my view, however, it would be a mistake to do so. A substantial part of the judgment of Kirby P was devoted to close analysis of the wording of the arbitration clause. That would have been unnecessary if his Honour had seen the *Atkinson-Leighton* case as authority for a principle or "presumption" in favour of arbitrability. Consideration of the judgment as a whole leads me to the view that Kirby P invoked the *Atkinson-Leighton* case to support the idea that it was competent for the parties to empower the arbitrator deal with statutory rights and remedies, rather than the idea that a general arbitration clause would be presumed as a matter of construction to empower the arbitrator to do so.

133 Clarke JA (at 485) quoted from and applied the observations by Stephen J as to the principle to be extracted from the authorities. However, it seems to me even clearer from his judgment than the judgment of Kirby P that his Honour treated Stephen J's remarks as going to the question of arbitral power rather than the question of construction. He saw Stephen J's remarks as authority for the view that it is competent for the parties to an arbitration clause to empower the arbitrator to deal with statutory rights and remedies. He upheld that principle, but said there were exceptions to it, and in particular, an arbitrator cannot be empowered to decide that the contract containing the submission to arbitration is void ab initio, "for that would be tantamount to deciding he had no jurisdiction at all" (at 486). Handley JA (at 487) agreed with this limitation. The question whether the parties in the instant case had empowered the arbitrator to deal with statutory rights and remedies depended upon a close analysis of the wording they had adopted. For this reason Clarke JA concluded his judgment by observing (at 486) that "the essential question is simply whether the phrase 'related to' is to be interpreted widely or narrowly".

134 In the *Francis Travel* case (39 NSWLR 160, 166), Gleeson CJ said that the following matters were decided in *IBM Australia*: "first, that it is possible and lawful for parties to agree to refer to arbitration a dispute under the Trade Practices Act 1974 (Cth), secondly, an arbitrator to whom such a dispute has been

referred may, in general, exercise the discretionary powers which the Act confers upon the Supreme Court or the Federal Court, and, thirdly, that there is no reason to read down an otherwise comprehensive arbitration agreement in order to avoid a conclusion that this is what the parties have agreed to do …".

135 This treats the decision in *IBM Australia* as depending on the breadth of the language used in the arbitration clause. There is no presumption against arbitrability, nor any presumption in its favour.

136 My conclusion, therefore, is that the principles employed by an Australian court to construe an international commercial arbitration clause, or any other commercial instrument, do not include any "presumption" in favour of arbitrability, such as would incline the court to treat every general arbitration clause as empowering the arbitrator to deal with non-contractual (including statutory) rights and remedies. The question whether the arbitrator has the power to deal with non-contractual matters is to be resolved by careful construction of the wording of the arbitration clause.

The construction of the arbitration clause in this case

137 The submissions of the parties have raised, broadly speaking, two issues of construction with respect to the arbitration clauses in the two agreements. The first issue is whether to construe clause 19 of the Shareholders' Agreement and clause 18 of the Distribution Agreement separately from one another, or to treat the two agreements as so interwoven, being aspects of the single commercial transaction, that the two clauses should be seen as a composite arbitration agreement. The second issue, vitally dependent on the answer to the first question, is to identify the limits to the agreement to arbitrate.

One arbitration agreement or two?

138 TAPL, Mr Lennox and TNZL strenuously contended that the two arbitration clauses should be construed together. They drew attention to the fact that the two agreements were executed on the same day, as part of the single transaction in which Mr Lennox bought into TAPL, obtaining control of its day-to-day management and ensuring the future of the company by securing long-term distribution arrangements with its former parent company. They noted the integration of the agreements produced by clause 1.5 of the Shareholders' Agreement.

139 In my opinion this submission should be rejected. I acknowledge, for the purpose of determining the present applications, that the Distribution Agreement and the Shareholders' Agreement were part of the single commercial transaction of the kind outlined above. The context or surrounding circumstances in which each agreement was made, namely that the agreements were made on the same day as part of the same commercial transaction, is relevant to be taken into account in construing each agreement, having regard to the principles of construction laid down by Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* at 605-6 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* at 347-353. But the context and surrounding circumstances do not authorise the Court to engage in the fundamental re-drafting that would be involved in constituting the two agreements as a single agreement reflecting a single transaction.

140 The parties involved in the commercial arrangements have chosen to give legal effect to them by entering into two agreements, and there is no warrant for the Court to disregard or qualify that basic position. The decision to make two agreements led to a decision that the parties to the two agreements would not be the same. One of the agreements is between Tridon on the one hand and TAPL and TNZL on the other. Mr Lennox is not a party to it. The other agreement is between Tridon and Mr Lennox. TAPL and TNZL are not parties to it. It would be taking purposive commercial construction far beyond its legitimate boundaries for the Court, by principles of construction, to treat the separate parties to separate agreements as if they were all parties to one agreement, even if individual clauses were re-engineered to make clear which particular entities were bound by them.

141 If the submission by TAPL, Mr Lennox and TNZL were accepted, it would be far from clear just what would happen to the arbitration clause. Would the Court somehow meld the two clauses into a single clause binding all parties, and if so, would the composite clause have the broad scope of the present clause 18 of the Distribution Agreement, or the narrower scope of the present clause 19 of the Shareholders' Agreement? Or would it be narrower as regards Mr Lennox and broader as regards TAPL and TNZL? Would the subject matter of the clause extend to the subject matter of both agreements, as regards all four parties, or would the arbitration clause affecting Mr Lennox be confined to the subject matter of the Shareholders' Agreement while the clause that affected TAPL and TNZL would be confined to the subject matter of the Distribution Agreement?

142 In my view one only has to articulate these questions to perceive that the submission is fatally ambiguous. The correct approach to the construction of the clauses is to read them in their respective separate contexts of the agreements in which they appear. Nothing about circumstances surrounding the two agreements, that they were made on the same day to reflect a single commercial transaction, stands in the way of the conclusion that the four parties intended to separate, into two agreements, the structure and content of their arrangements and the parties to particular promises. Nothing about the context in which the two separate arbitration clauses appear stands in the way of giving them their natural effect, as two separate clauses differing from one another in scope and binding different parties.

The limits to the agreement to arbitrate

143 Any limitation on the scope of the contentions agreed to be arbitrated is to be found in the contractual wording used in the two agreements. Clauses 18 and 19 respectively identify the following aspects of the agreements to arbitrate:

- the contentions which are to be arbitrable
- the timeframe within which arbitrable contentions may arise
- the parties to the contentions
- the subject matter to which the contentions must be relevantly connected
- the degree of connection which must exist between the contentions and that subject matter, for the contentions to be arbitrable.

I shall consider these matters in turn. I am conscious of the risk that by splitting up the clauses into their components, I might distort the natural meaning of each clause when read as a whole. It is convenient, nevertheless, to identify the issues by this analytical technique.

The contentions which are to be arbitrable

144 Clause 19 of the Shareholders' Agreement relates to "all disputes or differences between the parties". Some guidance as to the meaning of the words "disputes or differences" was provided by Evans J in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyds LR 63. His Lordship suggested (at 70) that the words "disputes or differences" in such clauses means disputed claims or contentions, together with any wider meaning which may be derived from the use of "differences" as well as "disputes".

145 Clause 18 of the Distribution Agreement relates to "any dispute, difference or question which may arise at any time hereafter between the Company and the Distributor". If anything, the addition of the word "question" expands the scope of the clause, making it clear that the matters to be referred to arbitration include questions about which the parties are unsure, even though they have not reached the point of disagreeing with one another. In the present case the word "question" is not significant, because all of the issues between the parties that are the subject of the present applications are matters of contention, which are therefore either "disputes" or "differences".

146 Tridon submitted that, in the absence of any defences, I could not conclude that there was any dispute or difference between the parties at this stage. I reject that submission. In my opinion, while the disputes and differences between the parties may lack precise definition because of the absence of defences, the evidence is more than ample to demonstrate the broad lines of disputes and differences for the purposes of the arbitration clauses.

The timeframe within which arbitrable contentions may arise

147 Clause 18 of the Distribution Agreement extends to disputes, differences or questions "which may arise at any time hereafter". It does not seem to me that these words add to or detract from the scope of the clause, compared with clause 19 of the Shareholders' Agreement. In the latter case it is implied that arbitration is required where a dispute or difference arises at any time after the making of the agreement.

The parties to the contentions

148 Clause 18 of the Distribution Agreement refers to disputes etc. "between the Company and the Distributor". The word "Distributor" refers to TAPL and TNZL. Therefore the parties to the arbitrable contentions are Tridon on the one hand, and TAPL and TNZL on the other. Clause 18 does not purport to bind Mr or Mrs Lennox personally, and it does not have that effect.

149 Clause 19 of the Shareholders' Agreement refers to disputes or differences "between the parties hereto". The parties are Tridon and Mr Lennox. Clause 19 does not purport to bind TAPL or TNZL or Mrs Lennox, and it does not have that effect.

The subject matter to which the contentions must be relevantly connected

150 In the Shareholders' Agreement the subject matter of the arbitrable disputes is stated to be "the construction or effect of this Agreement or the rights and liabilities hereunder". In the Distribution Agreement the subject matter is stated to be "the true construction of this Agreement or the rights and liabilities of the parties hereto".

151 It does not seem to me that the word "effect" in the Shareholders' Agreement adds anything to the clause, for the process of construing an agreement involves ascertaining the effect of the agreement on the parties to it. The more difficult question is whether there is a difference in substance between "the rights and liabilities of the parties hereto" in the Distribution Agreement and "the rights and liabilities hereunder" in the Shareholders' Agreement.

152 It is faintly arguable that the reference to "the rights and liabilities of the parties" in the Distribution Agreement extends to all of their rights and liabilities inter se, however arising in whatever context. On this argument, if TAPL had established a new business in Mexico for the manufacture of aircraft, and had appointed Tridon to be a selling agent for those aircraft in Russia, clause 18 of the Distribution Agreement would require any disputes arising out of the business relationship for selling aircraft to be arbitrated, because any such disputes would relate to rights and liabilities of two of the entities that happen to be the parties to the Distribution Agreement.

153 I find such a construction to be implausible. In my view the word "hereto" not only identifies the parties, but limits the subject matter of arbitrable disputes to those appropriately connected with the distribution arrangements for Tridon's products in Australasia and the Pacific Islands. The arbitrable matters must be appropriately connected to the rights and liabilities of the parties to the Distribution Agreement, in their business capacities as envisaged by the Agreement (compare the *Tanning Research*

case, 169 CLR 332, 344 per Brennan and Dawson JJ). Such a construction does not limit the arbitration clause to contractual rights and liabilities conferred or imposed on the parties by the terms of the Distribution Agreement. This is because of the breadth of the linking words, "with respect to", when read together with the words "the rights and liabilities of the parties hereto". Had the word "hereunder" being used instead of the word "hereto", a narrower construction would be required. This is best seen by examining the significance of such linking words. That is the issue to which I now turn.

The degree of connection between the contentions and the subject matter

154 In the *Overseas Union Insurance* case, Evans J observed (at 67) that a distinction should be drawn between clauses that refer to arbitration only those disputes which may arise regarding rights and obligations which are created by the contract itself, and other clauses which show an intention to refer some wide class or classes of disputes.

155 The basic distinction propounded by Evans J is reflected in Australian cases. The second category is not a single category, but instead there is an almost infinite variety of possible outcomes, from clauses which refer to arbitration almost any kind of dispute between the parties, to clauses going not much further than contractual disputes. The position under Australian law depends upon the precise meaning of the language used. The Australian approach is not without disadvantage. There is a risk that important commercial outcomes might be made to depend on over-subtle semantic distinctions, a risk to be avoided by a common sense and practical approach to the task of construction.

156 A question that has frequently arisen for decision is whether the wording of the arbitration clause before the court is wide enough to permit the arbitrator to deal with a claim to rectify the agreement which contains the arbitration clause. The case law in England exhibits a movement from the narrow approach reflected in *Printing Machinery Co Ltd v Linotype and Machinery Ltd* [1912] 1 Ch 566 and *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68, to the more inclusive approach taken in *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 and *Ethiopian Oil Seeds & Pulses Export Corporation v Rio del Mar Foods* [1990] 1 Lloyd's R 86, under the influence of the persuasive reasoning in *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (AD). That movement has been matched in Australasia, where a widely expressed arbitration clause will now be taken to include rectification claims: *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508; *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246; *Drennan v Pickett* [1983] 1 Qd R 445; *State Electricity Commission of Victoria v Alcoa of Australia Ltd* (Marks J, Supreme Court of Victoria, 24 November 1986, unreported); compare the *Mir Brothers* case, which seems to have depended upon the narrowness of the language used in the arbitration clause.

157 Other questions have included whether the wording of the arbitration clause extends to claims based upon mistake (*Ashville Investments*, *Hi-Fert*), misrepresentation during the course of the agreement (*Francis Travel*), a collateral contract (*Mir Brothers*, *Hi-Fert*), negligence (*Hi-Fert*, *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 49), and statutory claims for relief for contravention of Part V of the Trade Practices Act 1974 (Cth) antecedent to the making of the contract (*Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) 7 ATPR 40-636, *IBM Australia*, *Hi-Fert*, *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 [under analogous legislation], *Paper Products*, *QH Tours Ltd v Ship Design & Management (Aust) Pty Ltd* (1991) 105 ALR 371) or during performance or in the course of termination of the contract (*Francis Travel*).

158 These cases demonstrate the importance of analysing the particular words used in the arbitration clause. In the *Mir Brothers* case the words "arising out of the contract or concerning the performance or non-performance by either party of his obligations under the contract" were construed narrowly. The words "under the contract" suggested that the drafters contemplated only disputes closely connected with the contract. Similarly the words "arising under this Agreement" were narrowly construed by French J in the *Paper Products* case. Where, however, the words "arising thereunder" were combined with "or in connection therewith", a much wider construction was warranted, according to Foster J in the *QH Tours*

case. Similarly, the words "arising out of or related to this Agreement or any breach thereof" were widely construed by the Court of Appeal of New South Wales in the *IBM Australia* case. In this respect the *IBM Australia* case should be compared with the *Allergan* case. There Beaumont J found that similar words did not extend to certain Trade Practices claims, because the agreement between the parties was merely part of the background to the alleged contraventions of the Trade Practices Act.

159 The Australian cases closest to the dividing line are the *Francis Travel* case and the *Hi-Fert* case. In the former, the words "arising out of this Agreement" were given a wide construction, permitting arbitration of a dispute about purported termination of an agency agreement, involving claims based on misrepresentation, estoppel and misleading conduct in contravention of the Trade Practices Act. In the *Hi-Fert* case, the words "arising from" were given a relatively wide construction, so as to permit arbitration of Trade Practices claims arising out of conduct during the course of the agreement, although the words were found to be not wide enough to permit arbitration of claims arising out of conduct antecedent to the agreement. It seems that antecedent conduct can be described as conduct "arising out of" the agreement but not as conduct "arising from" the agreement.

160 I have dealt with these cases in deference to the careful arguments based on them. In the last analysis, however, they are of no more than analogical assistance. Each arbitration clause must be construed in its own terms.

161 In clause 18 of the Distribution Agreement, arbitration is required where the dispute, difference or question is "with respect to" construction or rights and liabilities. In my opinion that language brings clause 18 into Evans J's second category. The matters to be referred to arbitration under clause 18 are not limited to the construction of the Distribution Agreement and the rights and liabilities of the parties under it. The arbitrable matters extend as well to matters relevantly connected with the construction of the Agreement and the rights and liabilities of the parties under the Agreement. Those matters may include, for example, matters going to the rectification of the agreement or any issue of waiver, or modification by collateral contract.

162 The linking words, "with respect to", were treated as very wide words in the *Overseas Union* case, and in my view they are not materially different from the words "related to", which were treated as very wide words in the *IBM Australia* case. They require a connection between the contention sought to be arbitrated and the rights and liabilities of the parties to the Distribution Agreement under the Agreement itself and arising out of the business relationship which the Agreement establishes. For example, a contested claim by the Company or the Distributor (or vice versa) to relief for contravention of s 52 of the Trade Practices Act with respect to conduct engaged in during performance of the obligations created by the Distribution Agreement would give rise to a dispute, difference or question with respect to the rights and liabilities of the parties to the Distribution Agreement and would therefore be arbitrable under clause 18, subject to one proviso. The proviso is that the particular relief sought under the Act must not make the matter one that is incapable of settlement by arbitration.

163 In my opinion, clause 18 of the Distribution Agreement does not extend to rights and liabilities arising out of the relationship between TAPL and Tridon as company and shareholder. The Distribution Agreement does not purport to deal in any way with Tridon's proprietary interest in TAPL as a shareholder, or with any issue of governance concerning TAPL. The subject of the Distribution Agreement is the business relationship between supplier and distributor. The scope of clause 18 is limited to contentions with respect to the construction of the Agreement and the rights and liabilities arising out of that business relationship.

164 In clause 19 of the Shareholders' Agreement, the linking words are "touching and concerning". Considered in isolation, those words would probably have much the same meaning as the words "in respect of" in clause 18 of the Distribution Agreement. It is significant, however, that the words in clause 19 are used in conjunction with "rights and liabilities hereunder". Taken together, these words suggest that the scope of the clause was intended to be limited to questions arising out of the effect of the Agreement itself,

rather than questions about the overall relationship between the parties as co-shareholders in TAPL, including their statutory and equitable, as well as their contractual, rights and duties as co-shareholders.

165 Such a limited construction would be in accordance with the nature of the Agreement. Of its nature, a shareholders' agreement is supplementary to the rights and liabilities of the shareholders conferred by company law. It does not purport to exclude or replace the shareholders' company law rights. Indeed, the statutory rights of shareholders cannot, for the most part, be taken away by an agreement. Instead, a shareholders' agreement imposes consensual limitations on the way in which certain rights, such as voting rights and the right to transfer shares, may be exercised.

166 The limited construction is also supported by reflecting on the identity of the parties to the Agreement. The only parties to the Shareholders' Agreement are Mr Lennox and Tridon. TAPL itself is not a party. The statutory and equitable rights of shareholders are, to a significant degree, rights with respect to the company rather than other shareholders. If two shareholders make an agreement with respect to the exercise of their rights, and agree to arbitrate, it would be rational for them to restrict the arbitration agreement to matters concerning their contractual relationship, and not to extend it to their overall shareholding rights and liabilities which involve the company as well.

Conclusions as to the scope of the arbitration clauses

167 It seems to me that Tridon's Distribution Agreement Termination Claims fall within the wording of clause 18 of the Distribution Agreement, to the extent that they involve the parties to the Distribution Agreement. Just as those words are wide enough to encompass disputes about an implied term or a collateral contract relating to the same transaction, they are wide enough to encompass disputes as to whether the Distribution Agreement has been validly terminated.

168 The other four categories of claims made in the third amended originating process could not, in my view, be said to arise in respect of the construction of the Distribution Agreement or the rights and liabilities of the parties to it. Therefore they are not within clause 18 of the Distribution Agreement. The question is whether they fall within clause 19 of the Shareholders' Agreement.

169 The Document Access Claims touch and concern the construction of the Shareholders' Agreement and the rights and liabilities of the parties under it. Clause 5.2 of the Shareholders' Agreement obliges Mr Lennox and Tridon to furnish each other with all necessary information in respect of matters and transactions involving or concerning the business activities or affairs of the Company. Clause 8.3 provides that the duly authorised representatives of Mr Lennox and Tridon are entitled at all reasonable times to have access to examine and inspect the books and records of the Company.

170 The Document Access Claims also assert that the defendants have acted towards Tridon in a fashion that entitles it to relief under the statutory oppression provisions of the Corporations Act, and that Tridon is entitled to orders under s 247A of the Corporations Act. On the construction of clause 19 of the Shareholders' Agreement that I favour, these claims do not touch and concern the construction of that agreement or the rights and liabilities of the parties *under the agreement*. They touch and concern the rights and liabilities of Mr Lennox and Tridon as shareholders in TAPL, but the rights in question are statutory rights arising out of their status as shareholders rather than under the Agreement. Therefore only part of the Document Access Claims fall within clause 19, namely that part of the claims relying on contractual rights and obligations under the Shareholders' Agreement.

171 The Share Divestiture Claims touch and concern the construction of the Shareholders' Agreement and the rights and liabilities of the parties under it. Clause 16.2 authorises the non-defaulting party, if the prerequisites for the application of the clause are satisfied, to follow a procedure under which that party is constituted the attorney of the defaulting party for the purpose of executing share transfers. The Share Divestiture Claims also raise statutory issues and an equitable issue.

172 There are essentially three statutory issues. The first is whether the authority under which Mr Lennox purported to act was constituted by a power of attorney registrable under s 163 of the Conveyancing Act 1919 (NSW), but not registered, and whether the lack of registration vitiated the authority. The second is whether the instrument of transfer by which Mr Lennox purported to transfer Tridon's shares was a proper instrument of transfer for the purposes of s 1071B (2) of the Corporations Act, and the regulations made under that provision. The third is whether any proper ground exists for rectification of the register of members of TAPL under s 175 of the Corporations Act. These are not questions concerning the rights and liabilities of the parties under the Shareholders' Agreement, Mr Lennox and Tridon. They are therefore not within clause 19.

173 The equitable matter raised by the Share Divestiture Claims is whether the directors of TAPL resolved upon the transfer of Tridon's shares for an improper purpose. In my opinion this question does not touch and concern the rights and liabilities of Mr Lennox and Tridon under the Shareholders' Agreement, since it is essentially a question about the discharge by TAPL's directors of their equitable duties to TAPL, even though a breach of the equitable duties may be enforceable derivatively by Tridon as a shareholder or former shareholder in TAPL. Clauses 5.1 and 5.2 oblige Mr Lennox and Tridon to engage themselves diligently in the business of the Company and observe the utmost good faith towards each other, but they are obligations between joint venture shareholders rather than obligations of directors to their company.

174 Therefore, in my opinion the Share Divestiture Claims fall within clause 19 to the extent that they are based on the construction of the Shareholders' Agreement and the rights and liabilities of Mr Lennox and Tridon under the Agreement. Otherwise, the Share Divestiture Claims are outside clause 19.

175 The Directors' Misconduct Claims allege that Mr and Mrs Lennox caused TAPL and TNZL to enter into transactions not in the best interests of those companies, but designed instead to further their own interests and the interests of their family and associates. In part, these claims rest on the Shareholders' Agreement. Clause 5.3 prohibits Mr Lennox and Tridon from making any profit out of dealing with or on behalf of the Company except by way of distributions from the Company pursuant to the agreement. In part, however, the claims rest on allegations of statutory oppression under the Corporations Act, giving rise to an entitlement to substantive relief under s 233 (1) (j), and also an entitlement to orders under s 233 (1) (f) requiring TAPL and TNZL to take proceedings against Mr Lennox and others for breach of directors' duties. The reasoning I have adopted implies that clause 19 applies to the extent that Tridon asserts its rights under the Shareholders' Agreement, but not to the extent that the source of the asserted rights is the Corporations Act.

176 The Further Oppression Claims concern allegations that TNZL, and consequently TAPL, have failed to pay dividends, and also that Mr Lennox has caused TAPL to act oppressively in the conduct of legal proceedings. In addition to seeking specific orders under s 233 (1), Tridon seeks an order that TAPL be wound up or that it be entitled compulsorily to acquire Mr Lennox's shares in TAPL. It is not clear to me that any part of these claims raises contractual issues under the Shareholders' Agreement. Clause 11, which is headed "dividend policy", authorises the retention of certain profits and arguably implies that except to the extent that retention is authorised, there is a contractual duty upon Mr Lennox and Tridon to cause TAPL to distribute its profits by way of dividends. To the extent that the Further Oppression Claims rely on the rights and liabilities created by clause 7 (and perhaps also clause 5.2, which imposes a duty of good faith on Mr Lennox and Tridon), clause 19 applies. But to the extent that the claims are based only on the statutory grounds for relief under the oppression provisions of the Corporations Act, clause 19 does not apply.

177 My conclusion is that some of the matters involved in the proceeding fall within the arbitration clauses in this case, but others do not. I have been urged to resist such a construction of the clauses, on the ground that the Court should not attribute to the parties an intention to have different parts of their dispute resolved before different tribunals: *Francis Travel*, at 165 per Gleeson CJ; *Capital Trust Investment Ltd v Radio Design AB* [2002] EWCA Civ 135, paragraph 52 (English Court of Appeal). That does not seem to me to be a compelling argument in the case of a Shareholders' Agreement, where the contractual

arrangements are superimposed on company law rights. In any case, where the language is clear, and clearly leads to bifurcated dispute resolution processes, there is no warrant to depart from it.

Matters "capable of settlement by arbitration"

178 Tridon contends that, except for the matter or matters constituted by the Distribution Agreement Termination Claims, the "matters" for determination in the present proceeding are all incapable of settlement by arbitration, for the purposes of s 7 (2) (b), since they include substantial components relating to statutory rights, including rights under the Corporations Act. The conclusion I have reached on the construction of the arbitration clauses makes it unnecessary for me to resolve this contention. However, I shall make some observations on the matter, in view of the extensive submissions that I have received.

179 The question for determination is not whether an arbitrator can be empowered to exercise directly those powers conferred on a "Court" by the Corporations Act, a Commonwealth enactment. Chapter III of the Constitution would stand in the way of investing an arbitrator with the judicial power of the Commonwealth: see, for example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at 36-7. The arbitration does not fall foul of Ch III because the arbitral function is founded in contractual arrangements. Emmett J explained the point in the *Hi-Fert* case (at 14):

> "However, in determining a dispute between the parties to an arbitration agreement, an arbitrator does not exercise the judicial power of the Commonwealth, or of a State for that matter. An arbitrator exercises powers conferred by the agreement between the parties to the arbitration agreement. A distinction exists between the powers exercised by an arbitrator to whom the parties have agreed to refer a dispute and powers exercised by a court. Thus, an arbitrator does not have power to make a determination which is directly enforceable in the manner in which an order by a court is enforceable. Where a court makes a determination and a judgment is entered or an order is made, that judgment or order will be enforced by the court.
>
> "An award by an arbitrator, however, gives rise only to contractual rights and obligations which are enforceable by or against the parties who have agreed to abide by that award. An award is binding on the parties only by force of the agreement since they have agreed that their rights and obligations are to be as stated in the arbitrator's award. If one of the parties fails to comply with or give effect to the award, it is necessary for proceedings to be brought in an appropriate court to enforce the award."

180 The question for determination is whether it is competent for parties to an arbitration agreement to agree with one another, in this fashion, to empower the arbitrator to exercise the powers of a Court under the Corporations Act. The purpose of such an agreement could not and would not be to have the arbitrator's award operate as an order of a Court. The arbitrator's determination would be an exercise of consensual power equivalent in scope to the power of a Court under the Corporations Act, having binding effect as between the parties by force of their agreement.

181 There is now firm authority in Australia supporting the proposition that if the arbitration clause is drafted in appropriately wide language, it is legally effective to refer to arbitration statutory claims such as claims under the Trade Practices Act. In the *Francis Travel* case, Gleeson CJ said it had been decided by the Court of Appeal of New South Wales in the *IBM Australia* case (at 166):

> "first, that it is possible and lawful for parties to agree to refer to arbitration a dispute under the Trade Practices Act 1974 (Cth), secondly, that an arbitrator to whom such a dispute has been referred may, in general, exercise the discretionary powers which the Act confers upon the Supreme Court or the Federal Court …".

182 In the *Allergan Pharmaceuticals* case Beaumont J held that an alleged contravention of Part V of the Trade Practices Act and an alleged contravention of the Patents Act 1952 (Cth) were not controversies

or claims "arising out of or relating to" the agreement in question, for the purposes of the relevant arbitration clause. His Honour took the view ((1985) 7 ATPR 40-636 at 47,173) that causes of action alleging contravention of the Trade Practices Act arise exclusively from the statutory provisions themselves, whereas causes of action under the general law, whether in contract or otherwise, arise independently of those provisions. He held that, in the absence of any substantive nexus or connection between the contract sued upon and the alleged contraventions of Part V of the Trade Practices Act, those statutory causes of action could not be referable to arbitration pursuant to the agreement. In his Honour's view, it was not enough to point to the contract as part of the background to the alleged contravention of the statute, because the statutory causes of action are independent of contract. He described the statutory causes of action as "consumer protection provisions which in no way depend upon any private agreement for their source".

183 Beaumont J's reasoning might have been taken as authority for a substantial limitation on the extent to which statutory claims are capable of settlement by arbitration. However, later cases have tended to confine the *Allergan* decision to its facts. In *Attorney-General v Mobil Oil NZ Ltd* Heron J of the New Zealand High Court distinguished *Allergan* ([1989] 2 NZLR 649, at 663) on the ground that in the case before him, it could not be said that the question arising under the New Zealand fair trading legislation existed independently of the contract, or that the contract was just "part of the background". That decision was cited with approval by Kirby P in the *IBM Australia* case (at 476-7). In *Francis Travel* (at 166-7), Gleeson CJ treated the *Allergan* case as depending on the particular construction of the arbitration clause in question, observing that in the case before him the agreement was not merely in the background of the dispute, but the dispute was about the agreement, and its performance, and whether it was properly and lawfully brought to an end. In the *Hi-Fert* case Emmett J referred to *Allergan* (at 18), treating the decision as turning on the construction of the words "arising out of or relating to", rather than the words "arising from" that were before him in that case.

184 My conclusion is that there is nothing about legislation such as the Trade Practices Act that would prevent the parties to an arbitration clause from referring disputed claims to relief under such legislation to an arbitrator for determination. It appears, however, that there are two kinds of limitations upon the competency of the parties to an arbitration clause to refer statutory claims to arbitration.

185 The first limitation emerges from *Heyman v Darwins Ltd* [1942] AC 356. The case has been regarded as deciding that arbitrators can never have jurisdiction to decide whether the contract containing the arbitration clause is a valid contract. That proposition led Clarke and Handley JJA to the view, in the *IBM Australia* case, that the parties to an arbitration clause could not give the arbitrator the power to declare the contract to be void ab initio under s 87 of the Trade Practices Act. A contrary view was taken by Foster J in the *QH Tours* case.

186 The rationale for this limitation appears to be, in the words of Clarke JA (22 NSWLR at 486), that for an arbitrator to make a declaration that the contract containing the arbitration clause is void ab initio would be tantamount to the arbitrator deciding that he or she had no jurisdiction at all (see also *State of New South Wales v Coya (Constructions) Pty Ltd* (1994) 10 BCL 152, 156 per Cole J). Foster J in *QH Tours* carefully analysed the speeches in *Heyman v Darwins*, suggesting that the observations of their Lordships on the point were obiter dicta falling well short of expressions of any firm rule (105 ALR at 383). He preferred to treat the case as authority for a presumption against conferral on the arbitrator of the power to deal with the initial validity of the contract, on the basis that the parties could confer such a power, if they wished, by appropriate language. He suggested, referring to Lord Wright's speech, that the arbitration clause in a commercial contract is of an essentially different nature from the other clauses, and could be severed from the contract, so as to preserve its validity even if the remainder of the contract were invalid.

187 On the present state of authority, it appears to me that there is a limitation preventing the parties from giving their arbitrator the power to determine the initial validity of the contract containing the arbitration clause, for the "logical" reason given by Clarke JA. However, the limitation should be confined to circumstances where that rationale applies. It does not prevent an arbitrator deciding whether the contract containing the arbitration clause has been validly terminated, or whether the contract may be rectified (having regard to the line of cases cited earlier).

188 In the present case one aspect of the dispute relates to the effect of the amalgamation of Tridon Limited under Ontario law. One issue is whether the amalgamation had the effect that Tridon did not succeed to the rights of Tridon Limited under the Distribution Agreement and the Shareholders' Agreement. It was submitted that this question could not be determined by an arbitrator because it affects whether Tridon is a party to the arbitration agreement. It seems to me that the logical difficulty underlying the inability of an arbitrator to determine the initial validity of the contract does not extend to the problem posed in this case. A determination of that issue by the arbitrator would decide which entities were bound by his or her award, rather than whether the arbitration agreements validly conferred jurisdiction to make the award. Allowing the arbitrator to determine the issue would not create any practical problem. If the arbitrator determined that Tridon was now a party to the agreements, it would be bound by the arbitrator's award. If the arbitrator determined that Tridon had not become a party to the agreements, then Tridon would not strictly be bound by the award, but in any case the award would not purport to bind it. This conclusion is consistent with *Gregory v Interstate/Johnson Lane Corporation* 188 F3d 501 (4th Cir, 31 August 1999).

189 The second kind of limitation was described by MJ Mustill & SC Boyd, *Law and Practice of Commercial Arbitration in England* (second edition, 1989), p 149. After stating the general principle that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration, and noting that the general principle was subject to some reservations, the authors proceeded to explain the reservations, including the following:

> "Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85 (3) of the Treaty of Rome." [footnotes omitted]

190 In the *Metrocall* case, the Industrial Relations Commission in Court Session applied these observations to hold that a disputed claim to relief under s 106 of the Industrial Relations Act 1996 (NSW) is not capable of settlement by arbitration. The Commission drew attention to the specialist nature of the jurisdiction and powers of the Commission in Court Session (52 NSWLR at 25), and the nature of the considerations required to be taken into account. They emphasised that those considerations include matters relating to the industrial relations system and the public interest.

191 In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170, the parties to a joint venture agreement agreed to arbitrate any dispute, difference or question touching, inter alia, the dissolution or winding up of the "association" which was their joint venture entity. Warren J declined an application for an order staying a winding up proceeding, under the Victorian commercial arbitration legislation, on the ground that the arbitration clause was null and void because it had the effect of "obviating the statutory regime for the winding up of a company" (at paragraph [18]). Her Honour's decision was partly based on public policy considerations surrounding the process of winding up a company pursuant to court order. An additional ground seems to have been that a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause.

192 In my opinion, the latter ground is a strongly persuasive one, in keeping with the general observations by Mustill & Boyd. I accept, as well, that public policy considerations operate against referring to arbitration a determination to wind up a company on the grounds upon which a court may order that a company be wound up. However, I would not regard these public policy considerations as preventing parties to a dispute from referring questions to arbitration merely because those questions arise under the Corporations Act. I see nothing special about the Corporations Act that would distinguish it, as a whole, from other legislation such as the Trade Practices Act. This seems to be the position reached by United

States courts: see *Dean Witter Reynolds Inc v Byrd* 470 US 213 (1985); *Shearson Lehman Hutton Inc v Wagoner* 944 F 2d 114 (2nd Cir 1991); also *Pick v Discover Financial Services Inc* 2001 No.Civ.A 00-935-SLR (D) Del Sept 28, 2001.

193 The statutory powers of a Court under the Corporations Act are, generally speaking, comparable to the powers exercised by a court under the general law (the power to make a winding up order being an exception to this proposition). They are generally not special powers to be exercised having regard to specialist public interest criteria.

194 Specifically, the public policy considerations held by Warren J to be applicable to a disputed claim to wind up a company do not seem to me to prevent the parties from referring to arbitration a claim for some merely inter partes relief under the oppression provisions of the Corporations Act, or for access to corporate information under s 247A. However, the "in rem" nature of an order for rectification of the share register of a company may prevent reference of that power to an arbitrator.

Should a condition be imposed on the stay of proceeding?

195 The most important feature of the present case is that, as a matter of construction of the arbitration agreement, only part of Tridon's claims are within the scope of the arbitration clauses in the Shareholders' Agreement and the Distribution Agreement. Important ingredients of Tridon's case arise under statute (in particular, the Corporations Act) and equitable principles, and the arbitration agreements do not extend to these components of the dispute. In these circumstances, the Court has no jurisdiction under the Act to require Tridon to submit to arbitration in respect of those parts of its claims. On the other hand, the Court is required by s 7 (2) to order a stay of the proceeding before this Court so far as it relates to matters falling within the arbitration clauses.

196 Tridon's preferred position is that there be no stay of the proceeding in this Court, and that the proceeding be brought to trial as expeditiously as possible without any intervening arbitration. The conclusions I have reached exclude this outcome. Tridon made two alternative submissions, to be considered in the event that the Court concludes (as I have) that the stay of the proceeding must be granted to some degree. The first alternative would defer arbitration until after the conclusion of the Court proceeding, and the second alternative would defer the entire dispute to the proposed arbitrator, not as an arbitrator but as a referee under Part 72 of the Supreme Court Rules. I shall consider the first alternative, and then the reverse of it, which would cause the Court proceeding to be deferred until after arbitration. Then I shall consider the Part 72 proposal.

Should the Court impose a condition deferring arbitration until after its determination of the remainder of the proceeding?

197 The first alternative, and the one preferred by Tridon, is that the stay should be granted on terms that would ensure that the Court proceeding would go ahead and be determined before any matters are determined by arbitration. Section 7 (2) of the International Arbitration Act empowers the Court to make an order staying a proceeding on conditions.

198 In the *Hi-Fert* case the Court decided that disputed contractual claims were subject to s 7 (2) and the applicant for a stay, and referral to arbitration, was entitled to that relief in respect of so much of the proceeding as involved determination of those claims. However, disputed non-contractual claims (including claims under Part V of the Trade Practices Act) did not fall within the arbitration agreement on its proper construction, and would not be capable of settlement by arbitration, and therefore the applicant was not entitled to a stay and referral to arbitration in respect of those claims. Emmett J noted (at 29) the unfortunate result that the parties would be litigating similar issues in different tribunals, but saw that outcome as a result of the applicant’s insistence on invoking its rights under s 7. He said that the parties who instituted the Court proceeding were entitled to prosecute it and if they succeeded, there may be no

need to pursue the contractual claims by arbitration. He therefore considered it appropriate to impose a condition on the stay of the contractual claims that the reference to arbitration in respect of them should not proceed until after the final determination of the proceeding in the Federal Court.

199 The Court has jurisdiction to make orders for the conduct of proceedings under its inherent jurisdiction and s 23 of the Supreme Court Act 1970 (NSW), as well as specific provisions of the Supreme Court Rules. I could therefore couple orders for a stay and referral to arbitration under s 7 (2) with respect to that part of the proceeding that is subject to arbitration, subject to the condition that the remaining part of the proceeding be heard before the arbitration, with orders as to the proper conduct of the remainder of the proceeding, designed to bring the hearing on an early date.

200 Although I have ample jurisdiction to do so, discretionary considerations relating to the circumstances of the present case have persuaded me that I should not make such orders. In the first place, it would be highly artificial for the Court to be in the position of determining statutory claims without being able to determine questions of construction of the agreements and the rights and liabilities of the parties under the agreements. Inevitably the Court would form and express views on these matters, but those views would not be binding on the arbitrator in the subsequent proceeding before him. Secondly, while it is possible that the determination of the Court proceeding would eliminate the need for arbitration, that outcome seems to me to be unlikely. Specifically, if the Share Divestiture Claims were to succeed in Court, the probable relief would be an order for rectification of the share register. The parties would still have incentive to arbitrate the contractual consequences of the purported but invalid transfer, to determine whether damages were recoverable for breach of contract. If the Share Divestiture Claims were to fail in Court, it seems to me very likely that Tridon would wish to establish before the arbitrator that the share transfers were nevertheless in breach of contract, whatever views about that subject may have been expressed by the Court. Likewise, if the Directors' Misconduct Claims were to succeed in Court, in the sense that the Court were to find that the matters complained of constituted oppression, the Court might order that TAPL be wound up. Tridon might nevertheless take the view that it was entitled to recover damages from Mr Lennox for breach of the Shareholders' Agreement, a matter to be determined by arbitration. Conversely, if the Directors' Misconduct Claims were to fail in Court, it would be likely that Tridon would wish to ensure that the arbitration of those matters took place, to recover damages from Mr Lennox.

201 In summary, in this case, in contrast with the *Hi-Fert* case, one can have no confidence that the outcome of the Court proceeding would eliminate the need for arbitration. Rather, one must expect that if Tridon's preferred alternative were to be implemented, there would be a lengthy court hearing followed by a lengthy arbitration. This drawn-out process would, in all probability, expose the parties to very substantial additional costs, delay and inconvenience, contrary to the Court's general obligation to administer proceedings before it so as to achieve the just, quick and cheap resolution of the dispute between the parties, under Part 1 rule 3 of the Supreme Court Rules.

202 Further, in making an order for the partial stay of the proceeding before me to permit arbitration to occur, I shall be enforcing the agreements between the respective parties to the Shareholders' Agreement and the Distribution Agreement. It is open to the parties to such commercial agreements to agree that part of a dispute between them will be referred to arbitration while other parts of the dispute will not. That, in effect, is what the parties have agreed, having regard to the limitations in clause 19 of the Shareholders' Agreement. It would be contrary to the spirit of the substantial body of case law, which respects the agreement of the parties concerning arbitration, for the Court to make orders substantially postponing the arbitration proceeding.

Should the Court defer its determination of the remainder of the proceeding until after arbitration?

203 On the other hand, it seems to me undesirable to defer the determination of the non-arbitrable part of this proceeding until arbitration of the arbitrable part has taken place, unless that outcome is unavoidable. This would create the same sort of drawn-out process as would occur if the curial part of the proceeding were resolved before the arbitrable part, contrary to the spirit of Part 1 rule 3. Further, the matters between

the parties that are not subject to any arbitral process are important matters. They are commercial matters demanding to be resolved, and to be resolved expeditiously. It is also relevant at this point to take into account, regardless of the alleged waiver, that the defendants have made their applications for a stay of the present proceeding somewhat belatedly, given that a reference to arbitration was foreshadowed on behalf of Mr Lennox at the first hearing on 4 December 2001.

204 I am therefore not inclined to do anything that would produce a sequencing of the curial and arbitrable parts of the dispute. That means that unless some other order is made, it will be open to the parties to prosecute both arms of the dispute concurrently. This is likely to lead to real difficulties, including strains on the legal resources of the parties, and a degree of duplication of the processes of information-gathering, evidence and factual determination. There is a real risk that once a stay of part of the proceeding is ordered, cost and delay will expand exponentially even if I do not impose a sequencing of the curial and arbitrable parts of the dispute.

The proposal to make an order under Part 72

205 Tridon made another alternative submission, less preferred by it than the first alternative. Tridon said in its written submission:

> "Alternatively, if the Court considers that matters the subject of these proceedings must be arbitrated and the arbitration of those matters should proceed now, the Court proceedings should be the subject of a reference to Mr Clarke QC under Part 72 of the Rules so that he can determine all the claims in one concurrent hearing."

206 This proposal reflects the approach taken by Cole J in *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd* (1992) 28 NSWLR 321. In that case the proceeding arose out of alleged breaches of contract, negligence, breaches of the Trade Practices Act 1974 (Cth) and of the Fair Trading Act 1987 (NSW), relating to the construction of a hangar and associated buildings. The construction contracts contained arbitration clauses. However, some of the defendants to the proceeding were not parties to those contracts, although they were closely associated with the contracting parties. Cole J referred to arbitration those parts of the dispute that were between the parties to the arbitration agreements, pursuant to s 7 of the International Arbitration Act. As to the remainder of the dispute between those parties, and the dispute involving parties to the litigation who were not parties to the arbitration agreements, his Honour made orders under Part 72 referring those disputes to the arbitrator as a referee.

207 Amongst the considerations identified by his Honour as affecting his decision to make orders under Part 72, were the following:

(a) whether the intrusion of additional parties into an arbitral process may result in a lessening of privacy, especially as to findings on credit, bearing in mind that proceedings before a referee are likely to be private in a practical sense;

(b) the degree of proximity between the issues and parties to the arbitration and the litigation;

(c) any unfairness to a party flowing from a concurrent hearing;

(d) savings of cost and time to the parties;

(e) avoidance of duplicated hearings;

(f) the prospect of inconsistent findings of fact and law;

(g) the prospect of confusion where the same person sits as arbitrator and referee, creating a risk that his award under the arbitration may deal with a dispute not contemplated by the arbitration agreement, potentially invalidating the award;

(h) the comparative lack of finality under Part 72 when compared with arbitration, since the report of the referee must be considered by the Court (giving rise to the possible incongruity of an award standing yet a similar finding under reference being reversed);

(i) the difficulty that parties to the litigation may be required to be present throughout the arbitration/reference proceeding even if they were involved only to a limited degree;

(j) the calibre and reputation of the proposed adjudicator.

208 There is an important difference between the present case and the facts before Cole J. In that case the parties to the litigation could not reach agreement that the whole of the dispute be determined by the selected person as arbitrator, or as referee. The Court has the power to make an order under Part 72 even against the wishes of one of the parties: *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd* (1987) 8 NSWLR 123; generally, see M S Jacobs, *Commercial Arbitration Law and Practice* (Lawbook Co, looseleaf) p 765-6. However, the Court's discretion is qualified by s 7 of the International Arbitration Act. Since s 7 obliges the Court to make an order for a stay and referral to arbitration once the conditions for its application have been satisfied (as they were in that case), his Honour could not make an order requiring the parties seeking arbitration to accept something else instead, namely a reference under Part 72. It was therefore necessary for his Honour to proceed on the basis that the adjudication would in part be an arbitration and in part a report by a referee.

209 In the present case my decision is influenced by what I take to be the consent of all parties other than Mrs Lennox to a reference out, under Part 72, of the entire dispute (except for the matters presently before Mr Clarke QC for arbitration under the Distribution Agreement), not merely the non-arbitrable part. I exclude Mrs Lennox because, at the relevant stage in the proceeding, she was not represented in court, having been excused from attendance. Since she is not a party to either of the arbitration agreements, she is amenable to an order under Part 72 without her consent.

210 Tridon's position arises partly out of the passage from its written submissions which I have extracted. It has sought determination of its principal claim, that none of the subject matter of the present proceeding should be referred to arbitration. Tridon proposed as its preferred alternative, should the Court not be prepared to accede to its principal claim, that a stay be granted of the arbitrable part of the dispute, on terms that would require the curial part of the dispute to be resolved first. The Part 72 alternative was put forward as a "fallback" position in the event that its principal claim and its preferred alternative were to be rejected.

211 I have rejected Tridon's principal claim and its preferred alternative. That being so, the written submission places the proposal for an order under Part 72 "on the table", as an order to which Tridon would consent. That position was confirmed and clarified in Tridon's oral submissions.

212 During the hearing, I raised with the parties the possibility that they might avoid the delay and cost of a full hearing of the stay applications, leading to a considered judgment after time for reflection, by agreeing forthwith to orders under Part 72. Counsel for Tridon agreed to obtain instructions on the proposal but said that it was not a preferred alternative because it could involve "a procedural nightmare". When pressed as to the nature of the procedural difficulties, counsel said that if there were any challenge to the findings of the selected adjudicator, the Court would be faced with the invidious position of having to work out whether the challenge was to a part of the finding going to an arbitral award, in respect of which there would be limited and special rights to seek curial review, or to a part of the finding going to a report of a referee, which would be subject to adoption by the Court.

213 Counsel conceded, however, that the difficulties were not insuperable, and he suggested that if the Court were to adopt the Part 72 route, the correct orders would be to decline the applications for a stay (or invite the defendants to withdraw them), and then to make a reference of (in effect) the entire dispute to the

selected adjudicator under Part 72. While not avoiding all procedural and other difficulties, that approach would eliminate the particular "procedural nightmare" which counsel identified in oral submissions.

214 Two difficulties concerning that suggestion appeared to fall away during the course of further submissions. One difficulty was that the Court would not be able to decline the applications for a stay if the conditions for the application of s 7 of the International Arbitration Act were satisfied. That problem fell away because counsel for TAPL, Mr Lennox and TNZL embraced the Part 72 proposal with enthusiasm, referring to the *Aerospatiale* case, which they had already cited in their written submissions in reply. Counsel for those three defendants said (Transcript for 2 August 2002, page 35.15):

> "That is not to say that we don't want to get on with the matter and have it determined once and for all and if it will help to do that, we say send the whole thing to a referee and it is unlikely that serious allegations would be reported and we would formally consent to that without admitting that we are not entitled or your Honour should not hold in our favour. We say that in a spirit of reasonableness and in order to save time and costs."

215 These remarks imply that the applications for a stay of the proceeding would either be withdrawn or dismissed by consent, on the basis that the dispute would then be referred out to the person previously proposed as arbitrator, for report under Part 72. It seems to me that, the applications having been fully heard, the appropriate course is to dismiss them by consent rather than to grant leave to the applicants to withdraw, as the latter course might distort considerations with respect to costs.

216 The second problem arose from Tridon's submission that a private adjudicator cannot, whether as arbitrator or referee, make orders under the Corporations Act, for example under the oppression provisions. That difficulty evaporated when counsel for Tridon conceded that, while the Court cannot refer to a referee the power to make a determination under the Corporations Act, the Court could refer relevant factual issues to the referee and the referee could recommend, in light of his findings, that particular orders under the Corporations Act would be appropriate for the Court to make.

217 Tridon did not take up the offer by TAPL, Mr Lennox and TNZL that orders be made under Part 72 forthwith, without any determination by me of the stay applications. But its position remained that it supported the Part 72 proposal as a second alternative if its preferred positions were not accepted.

218 In light of these matters, I turn to the ten factors that Cole J considered relevant in the *Aerospatiale* case.

(a) Privacy

219 One of the reasons advanced on behalf of Mr Lennox for preferring arbitration to curial proceedings was that there were allegations against him amounting to allegations of fraudulent conduct, and his strong preference was to have those matters dealt with in private. However, in final submissions his counsel consented to and supported orders under Part 72 having particular regard to considerations of privacy.

220 None of the other defendants gave any indication that privacy was of particular concern, except obviously to the extent that they would wish to keep confidential any matters of a commercially sensitive nature. Problems of that kind are commonly encountered and addressed in curial hearings, and it was not suggested that any such problem would be insuperable here. In those circumstances, privacy is not an issue in this case.

(b) The issues and parties

221 At a factual level, the issues to be addressed by an arbitrator, if the arbitrable part of the dispute were sent to arbitration, would very largely overlap with the issues to be addressed by the Court in the remaining part of the proceeding. Of the five categories of claims identified by Tridon in its written submissions, three involve the assertion of rights and obligations arising contractually under the Shareholders' Agreement, as well as statutory and in some cases equitable rights (that is, the Document Access Claims, the Share Divestiture Claims, and the Directors' Misconduct Claims). The Further Oppression Claims do not appear to rely on breach of any particular provision of the Shareholders' Agreement, but they make assertions of oppressive conduct in the context of the rights and obligations arising under that Agreement. Only the Distribution Agreement Termination Claims appear to be purely contractual, and in that respect distinguishable from the other claims.

222 In the circumstances, the adjudicator of the contractual aspects of the claims and the adjudicator of the Corporations Act and equitable aspects of the claims would be required to make factual determinations on many common matters. This suggests strongly that it would be desirable for the same adjudicator to make all factual determinations.

223 As to the parties, separating the dispute into an arbitrable portion and a curial portion would be highly unsatisfactory unless one could merge the two arbitration clauses to treat them as, in effect, a single arbitration clause binding Tridon and three of the defendants. I have already given reasons for my view that the arbitration clauses cannot be combined in this fashion. Even if they could be, Mrs Lennox would not be involved in the arbitrable portion of the dispute resolution, unless there were some agreement to bring her into the arbitration. If, however, I proceed under Part 72, I shall do so with the consent of Tridon, TAPL, Mr Lennox and TNZL, and I shall be in a position to make orders binding Mrs Lennox, subject to whatever protective provisions may be appropriate to take into account her limited interest.

(c) Unfairness (and prejudice generally)

224 I can see no unfairness or prejudice to any of the parties to the proceeding in my making orders designed to have the whole dispute (except the part already referred to arbitration under the Distribution Agreement) considered and reported on at the same time. I shall explain my view with respect to considerations of costs and time, and attendance at the referee's hearings by Mrs Lennox, under other headings below. I have not been able to detect any residual unfairness to any party in the procedure I have in mind.

225 It is true that the arbitration clauses in the two agreements represent arrangements entered into on a commercial basis, and those arrangements bind only some of the parties. In some situations it would be unfair to impose a single procedure on all the parties when the agreement of the parties, represented by the arbitration clauses, does not have that effect. But in the present case, when the two agreements were entered into on the same day, and there was substantive agreement on all points between the real commercial parties (namely, the Canadian company and Mr Lennox), there is no unfairness in putting the disputes which involve the Canadian interests, Mr Lennox, his co-director and wife Mrs Lennox, and their creatures TAPL and TNZL, into a single procedure. Additionally, Tridon, TAPL, Mr Lennox and TNZL have all consented to the Part 72 proposal. It is unlikely that they would do so if there were unfairness or prejudice to their interests.

(d) Cost and time

226 The importance of considerations with respect to costs and time, in a commercial context, is obvious. It has recently been emphasised in *Ahmed Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's R 522, and 524-5 per Waller LJ.

227 Given the conclusions I have reached, the comparison I must make is between sending part of the dispute to arbitration while retaining the remainder of it in the present proceeding, or sending the whole of

the dispute (other than the Part already before the arbitrator) to a referee under Part 72. I have no firm evidence as to the comparative costs of arbitration and curial proceedings, or the time likely to be consumed by each kind of procedure. The arbitration will involve some costs not incurred in Court, but it seems probable, having regard to his responses on earlier occasions, that the arbitrator would be available more quickly than the Court to hear and determine the whole case. That means a saving in time for the parties.

228 More importantly, the choice here is not between arbitration and the Court, but between bifurcated proceedings by arbitration and in the Court, and a single proceeding before a referee. It seems to me probable, as a matter of common experience, that a single proceeding is likely to be less costly than bifurcated proceedings before an arbitrator and in the Court.

(e) Duplicated hearings

229 Orders under Part 72 would permit the whole of the dispute between the parties to be considered in a single proceeding, in the first instance by the referee, and then by the Court on consideration of his report. The unattractiveness of the alternative was put graphically by Merkel J in the *Recyclers* case, where he referred (at paragraph 66) to "the spectre of two separate proceedings - one curial, one arbitral - proceeding in different places with the risk of inconsistent findings on largely overlapping facts".

230 Of course, the single proceeding to which I refer will exclude the matters already before Mr Clarke QC, unless the parties choose to submit those matters to the same referee procedure, and obtain an appropriate order from the Court to do so. That is an imperfect outcome, but at least the same person will be considering all relevant matters. Moreover, it seems to me that the issues currently before the arbitrator are significantly narrower commercial issues than the ones raised in the present proceeding, so the undesirability of bifurcated proceedings is less acute than it would be if the contractual aspects of the present proceeding were hived off for arbitration in the manner that would, in my judgment, be required by s 7 of the International Arbitration Act were the Part 72 procedure not available to me.

(f) Inconsistent findings

231 There would be a real prospect of inconsistent findings being made by the arbitrator and by the Court if overlapping facts were to be determined by the arbitrator for the purposes of the contractual aspects of the dispute reflected in the present proceeding, and by the Court in dealing with the non-contractual aspects. The problem would not be the mere inconsistency of findings, but the lack of any mechanism to resolve the differences. Orders under Part 72 will remove that problem, because the Court's power to review a referee's findings is governed by the rules of Court and the applicable case law.

232 Unless the matters presently before Mr Clarke QC are brought within the Part 72 orders, there will still be a risk that he will make determinations of fact as arbitrator on the matters before him, and make equivalent determinations in his report as referee, which the Court may decide not to accept. But that risk is very much lower than the risk of inconsistency between an arbitrator and the Court, if the arbitrator and the Court are respectively dealing with the contractual and non-contractual aspects of the same dispute.

(g) Confusion of arbitrator's and referee's roles

233 One of the problems identified by Cole J in the *Aerospatiale* case was that the person appointed as arbitrator and referee might make a single set of findings, which might be difficult to allocate to the arbitral and referee roles. His answer was that the selected referee was a person of such competence and experience that he could adequately separate the issues within the arbitration from the issues within the reference. The same answer could be made in the present case. There is no need to make it, since the agreed proposal is that the applications for a stay of proceeding will be dismissed by consent and the whole dispute will be referred to Mr Clarke QC as referee and not as arbitrator. The matters already before Mr Clarke QC as

arbitrator under the Distribution Agreement are relatively discrete and should not involve the kind of problems raised by Cole J.

(h) Finality/appeals

234 For those who wish to achieve a speedy resolution of commercial disputes, a disadvantage of the procedure under Part 72, when compared with arbitration, is that the referee must report to the Court, and there is then a Court hearing for the adoption of the referee's report, which may well be a contested hearing. The Court has a wide discretion in relation to the adoption or rejection of a report pursuant to Part 72 rule 13 (1) (a) to (d), although the exercise of the discretion is normally confined to "questions of law and the application of legal standards to the facts": *Alcatel Australia Ltd v Scarcella* [2001] NSWCA 401, paragraph 71, per Stein JA. Additionally, there is the prospect of appeal from the Court's decision. In comparison, the determination of the arbitrator is final subject to very limited rights of review.

235 In the present case it would not be possible, for the reasons I have given, to remove the Court entirely from the dispute resolution process. Only the Court could make certain kinds of orders under the Corporations Act, if they are needed, even if the dispute were otherwise dealt with by arbitration. Once the Court becomes involved, the prospect of appeal from its orders necessarily arises. Therefore there is already a qualification on the degree of finality that can be delivered by arbitration in such cases as this.

236 More importantly for present purposes, the Part 72 procedure has been advocated by Tridon, given my rejection of its preferred alternatives, and it has been vigorously supported by TAPL, Mr Lennox and TNZL. That suggests that finality of the resolution of the dispute, and the avoidance of any prospect of appeal, are not overriding considerations in this case.

(i) Attendance

237 The Part 72 procedure will entail, in all probability, a single hearing involving all of the parties to the proceeding. That will not be onerous on Tridon or Mr Lennox, each of whom is vitally interested in every aspect of the dispute. Nor will it be unduly onerous on TAPL and TNZL, even if it is decided that they should be separately represented, because they too are vitally involved in most of the aspects of the dispute.

238 I am not sure whether Mrs Lennox should be treated differently. If she takes the view that she ought not to be required to attend the whole of the hearing before the referee, I see no reason why she could not make appropriate arrangements with the referee to be excluded from the part in the hearing process that does not affect her interests. I do not regard adoption of the Part 72 procedure as necessarily imposing on her the obligation to attend or be represented in parts of the overall dispute resolution process that do not directly involve her.

(j) Qualities of the adjudicator

239 The Hon John Clarke QC is a distinguished former judge of this Court, with extensive experience in company law as well as commercial arbitration. It is appropriate to take his qualifications and experience into account in deciding whether to make orders under Part 72. If a less qualified referee had been proposed, I may have taken a different approach.

Conclusion as to Part 72

240 Given the views I have formed on the application of s 7 of the International Arbitration Act, which will require bifurcated arbitral and curial proceedings for the resolution of the dispute between the parties, I find the proposal to make orders under Part 72 to be an appealing one.

241 In summary, the particular advantage of an order under Part 72 is that by using that provision, I can appoint the person selected by the parties as arbitrator under the Distribution Agreement as a referee to determine all of Tridon's claims in "one concurrent hearing" (to use Tridon's words). The saving in time and cost produced by that procedure will, I hope, be very substantial. Of course, one cannot be sure. It is for the Court to make orders when the referee reports, and there could well be a further contest at that point, and the prospect of appeal. To that extent, the process under Part 72 is less "final" than a determination by an arbitrator. But in the awkward circumstances of this case, where arbitration will lead to bifurcation, the reduction in finality seems to be a reasonable price to pay for efficiency and speed of primary outcome.

242 I hope the parties will consider whether the advantages of the Part 72 procedure can be maximised by their agreeing to withdraw the existing reference to arbitration under the Distribution Agreement, so that the matters currently before Mr Clarke QC can become part of the reference to him under Part 72. If they do not, it still seems to me that the advantages of dealing with the dispute reflected in the present proceeding by orders under Part 72 will outweigh the disadvantages. I am therefore prepared to make orders under Part 72 which exclude the matters currently before Mr Clarke QC for arbitration.

Application of the Commercial Arbitration Act

243 The Court has the power under s 53 of the Commercial Arbitration Act 1984 (NSW) to order that a proceeding be stayed until an arbitration takes place, where the requisite conditions are satisfied. Unlike s 7 (2) of the International Arbitration Act, s 53 gives the court a discretion to order a stay and does not purport to require that the discretion be exercised when the requisite preconditions have been met.

244 In the present case each of clause 18 of the Distribution Agreement and clause 19 of the Shareholders' Agreement is an "arbitration agreement" as defined in s 4 (1), because it is an agreement in writing to refer present or future disputes to arbitration. A party to each of those arbitration agreements, namely Tridon, has commenced the present proceeding against other parties to the respective arbitration agreements in respect of matters agreed to be referred to arbitration by the Agreements, namely the contractual parts of the dispute. The formal conditions for the application of s 53 are therefore satisfied.

245 The defendants have invoked s 53 as an alternative basis for the Court to make an order staying the present proceeding. I have decided that under s 7 (2) of the International Arbitration Act I am required to stay the contractual part of the dispute. The application of the International Arbitration Act does not exclude the concurrent application of State commercial arbitration legislation: *Abigroup Contractors Pty Ltd v Transfield Pty Ltd and Obayashi Corporation* [1998] VSC 103 (16 October 1998), paragraph 19 per Gillard J. Section 53 would be available as a basis for staying the remainder of dispute, pending the arbitrator's determination of the arbitral part, if I were satisfied of the matters set out in s 53 (1) (a) and (b), subject to any leave that may be necessary under s 53 (2). However, I have decided, for reasons given above, that it would be undesirable to stay the non-contractual part of the proceeding pending determination by the arbitrator of the contractual part of the dispute. It is therefore unnecessary to give s 53 further consideration.

Conclusion

246 My conclusion, therefore, is that I should make orders referring to the Hon John Clarke QC, as referee under Part 72 of the Supreme Court Rules, all of Tridon's claims made in the third amended originating process, except to the extent (if at all) that those claims are the subject of the present reference to arbitration under the Distribution Agreement.

247 I shall direct Tridon to prepare draft short minutes of orders to give effect to these reasons for judgment, including short minutes of orders under Part 72. The costs of the applications dealt with by these reasons for judgment, and some other outstanding issues with respect to costs, will also need to be considered. Following a suggestion by counsel for Tridon, I shall give directions for short written submissions to be exchanged by the parties and provided to my associate, with respect to all outstanding questions of costs, and for the case to return to me for brief supplementary oral submissions on costs, and for the making of orders. The draft short minutes of orders should cover these matters.

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