FEDERAL COURT OF AUSTRALIA

WDR Delaware Corporation v Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd [2016] FCA 1164

File number:	NSD 1437 of 2016
Judge:	**FOSTER J**
Date of judgment:	27 September 2016
Catchwords:	**ARBITRATION** – International arbitration – whether some or all of the matters raised by the plaintiffs in the present proceeding should be stayed pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth) and Art 8(1) of the *Model Law on International Commercial Arbitration* because they are, under the relevant arbitration agreement, capable of settlement by arbitration
Legislation:	*Corporations Act 2001* (Cth), ss 232, 233, 461(1)(k) and Pts 2F.1, 5.4, 5.4A and 5.4B *Federal Court of Australia Act 1976* (Cth), s 23 and s 31A(2) *International Arbitration Act 1974* (Cth), ss 2D, 7(1), 7(2), 16(1) and 39(2) and Sch 2 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) *UNCITRAL Model Law on International Commercial Arbitration,* Art 5 and Art 8(1) *Federal Court Rules 2011* (Cth), rr 1.34, 26.01(1) and 28.43
Cases cited:	*A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 *Brazis v Rosati* (2014) 102 ACSR 626 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243 *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 *In re Peveril Gold Mines Ltd* [1898] 1 Ch 122 *Metrocall Inc v Electromix Tracking Systems Pty Ltd*

	(2000) 52 NSWLR 1 *Re 700 Form Holdings Pty Ltd* [2014] VSC 385 *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 *Re Quiksilver Glorious Sun JV Ltd* (2014) 4 HKLRD 759 *Rinehart v Welker* [2012] NSWCA 95 *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 *Tomolugen Holdings Ltd v Silica Investments Ltd* [2015] SFGA 57
Date of hearing:	15 September 2016
Date of last submissions:	16 September 2016
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Division:	General Division
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Counsel for the First Defendant:	The First Defendant submitted save as to costs
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Counsel for CitiGroup Global Markets Australia Pty Limited:	Mr I Ahmed

ORDERS

NSD 1437 of 2016

IN THE MATTER OF HYDROX HOLDINGS PTY LTD (ACN 138 990 593)

BETWEEN:	**WDR DELAWARE CORPORATION** First Plaintiff
	LOWE'S COMPANIES, INC. Second Plaintiff
AND:	**HYDROX HOLDINGS PTY LTD** First Defendant
	WOOLWORTHS LTD Second Defendant

JUDGE: **FOSTER J**

DATE OF ORDER: **27 SEPTEMBER 2016**

THE COURT ORDERS THAT:

1. Until further or other order of the Court, pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth) (**IAA**) and Art 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration* which has the force of law in Australia (as to which, see s 16(1) of the IAA), pending the determination by arbitration of all matters involved in this proceeding save for the ultimate question of whether a winding up order against the first defendant should be made, the whole of this proceeding be stayed.
2. The plaintiffs pay the second defendant's costs of and incidental to the Interlocutory Process filed by the second defendant on 31 August 2016.
3. The final hearing of the plaintiffs' claims made in this proceeding provisionally fixed to commence on 6 October 2016 be vacated.
4. All parties have liberty to apply on seven (7) days' notice or on such shorter notice as a Judge might allow.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FOSTER J:

1 The first plaintiff, WDR Delaware Corporation (**WDR**), is a corporation incorporated under the laws of Delaware, in the United States of America. The second plaintiff, Lowe's Companies, Inc. (**Lowes**), is a corporation incorporated under the laws of North Carolina, in the United States of America. WDR is a wholly owned subsidiary of Lowes.

2 The second defendant, Woolworths Ltd (**Woolworths**), is a public company originally incorporated in New South Wales, Australia, which is listed on the Australian Securities Exchange (**ASX**).

3 In 2009, Lowes and Woolworths formed a joint venture for the purpose of establishing and operating a chain of home improvement and hardware stores in Australia and New Zealand known as *"Masters"*.

4 The joint venture was to operate through a corporation specifically incorporated for that purpose. Lowes, through WDR, was to hold one-third of the issued capital of that corporation and Woolworths was to hold the remaining two-thirds of that capital.

5 Hydrox Holdings Pty Ltd (**Hydrox**), which is the first defendant in this proceeding, was registered as an Australian company on 20 August 2009. As at the date of Hydrox's registration and at all times thereafter, WDR has held one-third of the shares in Hydrox and Woolworths has held the remaining two-thirds. Hydrox was the corporate vehicle through which the Masters joint venture was to be and was, in fact, conducted.

6 The parties entered into a number of transactions at the time when the Masters business was established. Several formal documents were signed. One of those documents was a Joint Venture Agreement (**JVA**), the first version of which was executed on 25 August 2009. The JVA has been amended several times. The current consolidated version of the JVA is the Fourth Amendment Agreement dated 11 August 2014. The parties to the JVA are WDR, Lowes, Woolworths and Hydrox. The joint venture established thereby was between Lowes and Woolworths.

7 The Masters business was not a success. In fact, it has always operated at a loss.

8 As a result, disputes have arisen between Lowes and WDR, on the one hand, and Woolworths, on the other hand, in relation to the joint venture, the Masters business and certain other businesses conducted under the Hydrox umbrella. One such business is the Home Timber and Hardware (**HTH**) business.

9 These disputes began in earnest in late 2015 and have continued unabated ever since.

THE CURRENT PROCEEDING

10 On 29 August 2016, Lowes and WDR approached the Court on an *ex parte* basis and sought the early return of an Originating Process filed on that day as well as an abridgement of the time for the service of that process and the affidavits filed in support thereof viz the affidavit of Robert Spencer ("Trey") O'Neale III affirmed on 28 August 2016 (**Mr O'Neale's first affidavit**) and the affidavit of Crispian Paul Lynch sworn on 29 August 2016. That relief was granted and the proceeding was brought back before the Court on 31 August 2016.

11 In their Originating Process, the plaintiffs claim:

(a) A declaration that the affairs of Hydrox have been conducted in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against WDR; and

(b) An order pursuant to s 233(1)(a) of the *Corporations Act 2001* (Cth) (**Corps Act**) or alternatively, pursuant to s 461(1)(k) of the Corps Act, that Hydrox be wound up; and

(c) Consequential relief.

12 The words *"... oppressive to, unfairly prejudicial to, or unfairly discriminatory against* [WDR]*"* as they appear in Prayer 1 of the claims for relief made by the plaintiffs in their Originating Process are words which appear in s 232(e) of the Corps Act. Section 232 specifies the grounds upon which the orders set out in s 233(1) may be made. Both s 232 and s 233 are found in Pt 2F.1—"Oppressive Conduct of Affairs" in the Corps Act. If any of the grounds specified in s 232 are made out, one of the orders which the Court may make under s 233(1) of the Corps Act is an order winding up the company whose affairs are being conducted oppressively.

13 Section 233(1) empowers the Court to make one or more of ten types of orders of which a winding up order is only one.

14 In the present case, the only relief sought by the plaintiffs is the declaration in Prayer 1 of their Originating Process and an order winding up Hydrox. No other substantive relief is

sought. The Prayer 1 declaration is claimed as a step along the path to the making of a winding up order against Hydrox. It is not a remedy or claim for relief which is sought independently of the plaintiffs' claim that Hydrox should be wound up compulsorily by the Court.

15 In broad terms, the plaintiffs' case is that the affairs of Hydrox have been conducted oppressively as specified in Prayer 1 of their Originating Process, in the *"Concise Statement of Facts, Matters and Circumstances"* dated 14 September 2016 and filed on 16 September 2016 (**Concise Statement**) and in Mr O'Neale's first affidavit and that, for that reason, the Court should make an order winding up Hydrox. In the alternative, they seek the same order based upon the just and equitable ground (as to which, see s 461(1)(k) of the Corps Act). The facts, matters and circumstances which they claim entitle them to that order are found in the same three documents. The plaintiffs do not allege that Hydrox is insolvent and do not claim that Hydrox should be wound up in insolvency. No third party has attended at Court on any of the occasions when the proceeding has been before the Court. It is fair to say that, notwithstanding the nature of the relief claimed by the plaintiffs, the present dispute is an *inter partes* dispute involving the only two shareholders in Hydrox and only the parties to the JVA.

16 The allegations relied upon by the plaintiffs are concentrated on the conduct of Woolworths and its nominee directors on the Hydrox Board in the period from 9 August 2016 to 29 August 2016.

17 On 31 August 2016, Woolworths filed an Interlocutory Process in which it sought the following relief:

> **Stay**
>
> 1. An order that the proceeding be stayed pursuant to:
>
> (a) s 7(2) of the *International Arbitration Act 1974* (Cth) (**the Act**);
>
> (b) art 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, as given effect by s 16(1) of the Act;
>
> (c) s 23 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**); and/or
>
> (d) the implied powers of the Court.
>
> **Summary judgment as against second plaintiff**
>
> 2. An order, pursuant to s 31A(2) of the Federal Court Act and/or r 26.01(1)(a) and (c) of the *Federal Court Rules 2011* (Cth) (**Federal Court Rules**), that

judgment be given against the Second Plaintiff on the basis that:

(a) the Second Plaintiff has no reasonable prospect of successfully prosecuting the proceeding; and

(b) no reasonable cause of action is disclosed.

Other orders

3. An order, pursuant to r 1.34 of the Federal Court Rules, that compliance with r 28.43 of the Federal Court Rules be dispensed with.

4. Costs.

5. Liberty to apply on three days' notice.

6. Such further or other order as the Court considers appropriate.

18 On 31 August 2016, I:

(a) Dismissed Woolworths' Summary Dismissal claim against Lowes (Prayer 2 in Woolworths' Interlocutory Process);

(b) Made an order in the terms of Order 3 in that Interlocutory Process; and

(c) Fixed its claim for relief in Prayer 1 of that process for hearing before me on 15 September 2016.

19 At the same time, I made case management orders designed to ensure that the claims made by the plaintiffs in their Originating Process would be ready for final hearing as soon as possible after 15 September 2016. I also provisionally fixed those claims for final hearing on 6 and 7 October 2016. These last orders were made in order to cater for the possibility that I did not stay the whole or a substantial part of this proceeding as sought by Woolworths and in order to accommodate the parties' reasonable desires to have their disputes resolved expeditiously. I also had in mind the public interest in having proceedings for the winding up of a corporation dealt with in a timely fashion.

20 In support of its stay application, Woolworths contended that:

(a) By the JVA, the parties agreed that disputes of the character of those which comprise the subject matter of the plaintiffs' claims made in this proceeding must be determined by arbitration if not otherwise resolved in accordance with cl 30.1 and cl 30.2 of the JVA (as to which, see cl 30.3 of the JVA);

(b) All of the disputes raised by the plaintiffs in this proceeding are *"... capable of settlement by arbitration ..."* within the meaning of that phrase in s 7(2)(b) of the

International Arbitration Act 1974 (Cth) (**IAA**) and also within Art 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration* (**Model Law**), which is Sch 2 to the IAA; and

(c) For those reasons, the Court ***must*** grant a stay of the whole of this proceeding. This requirement is mandatory.

21 Section 7 of the IAA is directed to the enforcement of foreign arbitration agreements. In the present case, s 7(2) of the IAA is engaged because both WDR and Lowes, being parties to the JVA and thus parties to the arbitration agreement contained in the JVA, were, at the time that the JVA was entered into, domiciled or ordinarily resident in the USA which was, and is, a Convention country (see s 7(1)(d)).

22 Subsection (2) of s 7 provides that:

> (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.

23 As Woolworths has sought a stay, the Court must stay the whole or part of the proceeding if it involves the determination of one or more matters that are capable of being determined by arbitration under the relevant arbitration agreement. The question of whether a matter is capable of such determination depends upon the answer to the following questions: First, whether the matter falls within the scope of the relevant arbitral agreement as a matter of construction of that agreement. Second, if the arbitral agreement covers the matter, whether the matter is arbitrable.

24 Here, it is common ground that all of the disputes raised by the plaintiffs in this proceeding are within the scope of the relevant arbitration agreement.

25 The substantive question for present purposes, therefore, is whether some or all of those claims are arbitrable and, if so, whether the whole or only part of the proceeding should be

stayed. If part only should be stayed, then consideration will need to be given to the terms of the stay and any conditions which ought to be imposed on the grant of the stay.

26 Neither the plaintiffs nor Woolworths submitted that an arbitrator appointed under the JVA could make an order winding up Hydrox. The plaintiffs argued that no part of the proceeding was arbitrable. Woolworths submitted that all of the plaintiffs' claims other than that part of those claims that comprised the claim for relief in Prayer 2 of its Originating Process were arbitrable.

27 In its Interlocutory Process, Woolworths placed primary reliance upon s 7(2) of the IAA. It also relied upon Art 8(1) of the Model Law, read with Art 5, as picked up and applied as Commonwealth law by s 16(1) of the IAA. Article 8(1) provides:

> A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

28 Woolworths correctly submitted that the power given to the Court by Art 8 is separate and independent from the power given by s 7(2) of the IAA.

29 Woolworths also relied upon s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and the implied powers of the Court to stay proceedings either in whole or in part in the exercise of the Court's discretion.

30 Woolworths relied upon s 7(2) of the IAA and Art 8 of the Model Law as mandating a stay in respect of those matters which are arbitrable. It relied upon the discretionary bases to which I have referred in respect of those matters which are not arbitrable (if any).

31 At the hearing of Woolworths' stay application, the plaintiffs read and relied upon Mr O'Neale's first affidavit and tendered all of the documents exhibited to that affidavit. They also tendered all of the documents contained in the Supplementary Court Bundle. The documents in the Supplementary Court Bundle together became Exhibit 1. The plaintiffs also tendered a small number of additional documents extracted from a further eight folders, which, together with Exhibit 1, were described as the *"Agreed Court Bundle"*. Those nine folders were marked as a bundle as *"MFI-1"*. The additional documents tendered by the plaintiffs from MFI-1 became Exhibit 2.

32 The plaintiffs also explained their case by relying upon the Concise Statement. This was a document which I had directed should be filed by the plaintiffs in order to inform both Woolworths and the Court of the detail of the plaintiffs' case.

33 In support of its stay application, Woolworths read and relied upon the affidavit of Alexander Basil Morris sworn on 31 August 2016 and tendered the documents exhibited to that affidavit. Woolworths also tendered a Defence and Counterclaim dated 12 September 2016 filed by Woolworths in a related arbitration. This pleading became Exhibit A.

34 For present purposes, it is neither necessary nor desirable that I make any findings as to the facts addressed in Mr O'Neale's first affidavit, in Mr Morris' affidavit, in Exhibit 1, in Exhibit 2 or in Exhibit A. The evidence in Mr O'Neale's first affidavit and in the documents exhibited to that affidavit as well as the documents contained in Exhibits 1 and 2 assist me to identify and characterise the subject matter of the present proceeding—at least from the plaintiffs' perspective. The evidence in Mr Morris' affidavit and in Exhibit A enables me to appreciate Woolworths' perspective in respect of the plaintiffs' adumbration of the parties' dispute and also provides some insight into the nature and extent of the evidentiary material that will be in dispute at the final hearing, should it be necessary for such a hearing to take place in the near future, as provisionally planned.

35 By these Reasons for Judgment, I determine Woolworths' stay application.

THE ARBITRATION AGREEMENT

36 The relevant arbitration agreement is cl 30.3 of the JVA which is in the following terms:

> **30.3 Arbitration**
>
> (a) This Clause 30.3 does not apply to any Deadlock Matter or any Dispute referred to in any of Clauses 22.2(b)(iii), 23.2(a)(iii), 36.1(d) or 36.2.
>
> (b) If a Dispute is not settled within 28 days (or any other period agreed to in writing between the relevant parties) after the appointment of a mediator under Clause 30.2, the Dispute will be submitted to arbitration in accordance with, and subject to, the rules of arbitration of the Australian Centre for International Commercial Arbitration (**ACICA**) which are operating at the time the matter is referred to.
>
> (c) The arbitrator will be an independent person appointed by ACICA. The arbitrator may not be the same person as the mediator appointed under Clause 30.2.
>
> (d) Subject to Clause 30.3(b), the arbitration will be conducted and held in accordance with the laws of New South Wales, Australia.

> (e) Any arbitration meetings and proceedings under this clause must be held in Sydney.
>
> (Emphasis in original).

37 Clause 30.3 is in a clause (cl 30: Dispute Resolution) which provides for two other forms of alternative dispute resolution (**ADR**) in addition to arbitration. In cl 30, arbitration is specified as the ADR method of last resort.

38 For the purposes of cl 30, *disputes* are defined in cl 1.1 as:

> **Disputes** means any and all claims, disputes, questions or controversies arising out of or in connection with this Agreement, any other Transaction Agreement or any other agreement entered into pursuant to the foregoing, including as to the validity or subject matter, the breach or termination of such agreements, the approval of the Business Plan, or in connection with any matter contemplated by any of the foregoing, raised by a party to the relevant agreement to the other parties to that agreement or by a Block Representative to the other Block Representative.

39 *Transaction Agreement* is defined in cl 1.1 of the JVA as comprising the suite of agreements signed by the parties at the time the joint venture was established.

40 *Business Plan* is defined in cl 1.1 of the JVA in the following terms:

> **Business Plan** means the Start-Up Business Plan or any subsequent business plan adopted by the Board in accordance with the terms of this Agreement.

41 The *Start-Up Business Plan* is defined in cl 1.1 of the JVA as the initial five-year business plan providing for the capitalisation, financial activities and operational activities of the Hydrox group.

42 *Block Representative* means:

> (a) WDR, in relation to [Lowe's] Block; and
>
> (b) [Woolworths], in relation to the [Woolworths] Block.

43 Under cl 1.2(a), words importing the singular include the plural and *vice versa*. Thus, a *dispute* when referred to in cl 30 is defined by the above definition read in the singular.

44 Under cl 30.1, if a dispute arises between the parties to the JVA, the Lowes nominees and the Woolworths nominees are obliged to seek in good faith to resolve the dispute amicably.

45 In the event that the parties' efforts under cl 30.1 do not resolve the relevant dispute or disputes, then the parties are obliged to endeavour to settle that dispute or those disputes by mediation in accordance with cl 30.2.

46 Clause 30.3 is engaged if the relevant dispute or disputes are not settled within 28 days (or any other period agreed to in writing between the relevant parties) after the appointment of a mediator under cl 30.2. Only then are those disputes ripe to be submitted to arbitration.

47 As can readily be seen, the definition of *disputes* (and thus, *dispute*) is wide (*"… claims, disputes, questions or controversies …"*) although it is limited by the words *"... arising out of or in connection with ..."* the JVA, any other Transaction Agreement or any other agreement entered into pursuant to the JVA or any Transaction Agreement.

48 No party submitted that the dispute or any of the disputes (if more than one) between the plaintiffs and Woolworths raised by the plaintiffs in this proceeding fell within the exceptions to arbitration specified in cl 30.3(a) (viz *Deadlock Matters* and disputes referred to in any of cll 22.2(b)(iii), 23.2(a)(iii), 36.1(d) or 36.2 of the JVA).

49 For present purposes, it is not necessary to enter upon a detailed consideration of the scope of the definition of *dispute* for the purposes of cl 30 of the JVA. It was common ground at the hearing before me that, if the subject matter of the plaintiffs' case was wholly or partly arbitrable, then those matters which were arbitrable were within the scope of cl 30.3 properly construed and thus caught by the relevant agreement to arbitrate. Also, it was not suggested that the current disputes were not ripe for arbitration because the parties had not sought to resolve the disputes amicably (cl 30.1) or had not mediated those disputes as required by cl 30.2.

50 Clause 29 of the JVA provides:

> **29. Governing Law**
>
> (a) The validity, performance, construction and effect of this Agreement will be governed by and construed in accordance with the Laws of New South Wales, Australia, and the obligations, rights and remedies of the Parties must be determined in accordance with such Laws, without regard to the conflict of law provisions of any country.
>
> (b) Any resolution of any Disputes arising from or in connection with this Agreement, including any breach of this Agreement, will also be governed by the laws of New South Wales, Australia.

51 Two of the disputes raised by the plaintiffs during the first half of 2016 have been referred to arbitration in accordance with cl 30 of the JVA and a single arbitrator (Mr AM Gleeson QC) has accepted appointment in relation to both arbitrations.

52 Statements of Claim have been filed by WDR and Lowes in each arbitration and a Statement of Defence has been filed by Woolworths in respect of the first of the two arbitrations. In addition, Woolworths has filed a Counter-Claim in the first arbitration against WDR and Lowes in which the validity of Woolworths' termination of the JVA is expressly raised for determination before the arbitrator. This is the Statement of Defence and Counter-Claim that became Exhibit A at the hearing of the stay application before me.

53 In its submissions before me, Woolworths emphasised that the further dispute (if that is what it truly is) which arose between the plaintiffs and Woolworths in the period after 9 August 2016 regarding the manner in which the affairs of Hydrox have been conducted has not been the subject of the cascading ADR obligations to which the parties undertook to adhere in cl 30 of the JVA. In particular, Woolworths submitted that the plaintiffs had not undertaken good faith negotiations pursuant to cl 30.1 or engaged in a mediation in respect of the subject matter of this latest dispute. As I understood this submission, it was not intended to support the proposition that this latest dispute should not yet be referred to arbitration. Rather, I gather that the submission was made in order to explain why it was that this latest dispute had not yet been referred to arbitration.

THE PLAINTIFFS' CASE

54 In Prayer 1 of their Originating Process, the plaintiffs set out the grounds upon which they rely for the declaration which they seek and for the winding up order which they seek. These grounds may be summarised as follows:

(a) At the behest of Woolworths and its nominees on the Board of Directors of Hydrox, Hydrox failed to provide certain information that was requested by the Lowes nominee directors on the Hydrox Board on 9 August 2016;

(b) The Woolworths nominee directors on the Hydrox Board purported to require the Lowes nominee directors on that Board to vote on resolutions put to that Board on 12 August 2016 without the Lowes nominees having the information previously requested by them;

(c) In respect of each of the Hydrox Board meetings held on 12, 23 and 24 August 2016, Woolworths caused the Lowes nominees on that Board to be swamped with a large amount of information and voluminous documents immediately before those meetings in circumstances where the Lowes nominees had insufficient information and insufficient time properly to consider that information and the resolutions put at those meetings;

(d) At the Hydrox Board meetings held on 12 August 2016 and on 24 August 2016, the Woolworths nominee directors purported to exercise by majority vote and without the approval of any Lowes nominee director, powers of the Hydrox Board which require the approval of at least one Lowes nominee director;

(e) During an adjournment of the Hydrox Board meeting held on 24 August 2016, Woolworths wrongfully and in bad faith purported to terminate the JVA for the improper purpose of allowing the Woolworths nominees on the Hydrox Board to pass, by majority vote and without the consent or approval of any Lowes nominee on that Board, a resolution concerning the winding up of the Masters business that Woolworths wished to have passed prior to the announcement of the Woolworths FY16 Preliminary Final Report the following morning (25 August 2016);

(f) Woolworths caused the resolution described at (e) above to be put to the meeting of the Hydrox Board against the advice of the lawyers retained to advise Hydrox and over the objections of the Lowes nominees on that Board; and

(g) Woolworths has thereafter taken control of the affairs and management of Hydrox to the exclusion of WDR, Lowes and their nominees on the Hydrox Board.

55 The plaintiffs provided greater detail of the case which they seek to make in the Concise Statement and in the affidavits filed in support of the allegations made in the Concise Statement. For present purposes, I need only refer to the Concise Statement. I do so for the sole purpose of explaining the plaintiffs' case taken at its highest. I make no findings as to whether the allegations made in the Concise Statement can or will be proved in due course.

56 At pars 7 to 13 of the Concise Statement, the plaintiffs refer to various provisions of the JVA and of the Constitution of Hydrox. In those paragraphs, they said:

> 7 By 2016, the Business [referring to the defined *"Business"*], in fact, mainly comprised (a) the Home Timber and Hardware or "HTH" business and (b) the Masters home improvement business.

8 Pursuant to clause 5.10 of the JVA, subject to certain deadlock provisions, the following matters require the Unanimous Approval of the Hydrox Board:

(a) modifying or amending the Company Objectives (clause 5.10(a)(i));

(b) except as expressly permitted by the Transaction Agreements, authorising, approving or entering into a related party transaction or otherwise amending or modifying the terms of a related party transaction (clause 5.10(a)(v));

(c) the adoption of a plan for a complete or partial liquidation or dissolution of any member of the Hydrox group or otherwise approving or effecting a voluntary winding-up of any member of the Hydrox group or the cessation, in whole or in part, of the Business (clause 5.10(a)(vii));

(d) transferring, selling or otherwise disposing of any property or assets of the Hydrox group, except for a sale and leaseback of real property or a transfer, sale or disposal for under $50 million (clause 5.10(a)(xiii)).

9 In that regard, "Unanimous Approval" means the approval of all directors in attendance at the relevant board meeting or who signed the relevant written resolution and must include at least one director appointed by WDR: clause 1.1.

10 The requirement of Unanimous Approval under clause 5.10 of the JVA is incorporated into Hydrox's constitution: article 3.

11 The JVA contained provisions to the effect that:

(a) all Disputes between the parties (including disputes about whether a party had breached the JVA) were required to be dealt with pursuant to clause 30 of the JVA;

(b) if there was a material breach of the JVA, then, subject to certain conditions, provided the Dispute had been resolved in accordance with clause 30, the innocent party would be entitled to exercise a put option (if WDR was the innocent party) or call option (if Woolworths was the innocent party) (clause 22.2(b) and clause 23.2(b));

(c) the JVA would automatically terminate upon completion of the sale pursuant to the put or call option (clause 26.2(b) and (c));

(d) the JVA could only be terminated in accordance with its provisions (clause 26.1).

12 Clause 13 of the JVA (CB Tab C9) contained provisions that, *"unless otherwise provided in [the JVA]",* were to apply to the selection of an independent expert and dealings with an independent expert under any "Transaction Agreement" (which was a term defined in clause 1.1 to refer to 7 related agreements, including the JVA). Clause 13 set out detailed times and steps with respect to the time for appointment, submissions to the expert and the like, where clause 13 applied.

13 Clause 21 of the JVA contained restrictions on the rights of WDR and Woolworths to transfer their shares in Hydrox, which, amongst other things,

prevented Woolworths from granting a call option over its shares in Hydrox to a third party. Clause 21 of the JVA was incorporated into Hydrox's constitution: article 3

The Put and Call Option Disputes

57 Clause 22 of the JVA conferred a put option on WDR, which entitled WDR, in certain circumstances, to require Woolworths to purchase its shares in Hydrox. Clause 23 conferred a call option on Woolworths, which entitled Woolworths, in certain circumstances, to require WDR to sell its shares in Hydrox to Woolworths.

58 Where either the put option or the call option was exercised, the purchase price was required to be determined in accordance with the contractual mechanism set out in Annexure B to the JVA. That mechanism required expert valuations from both of the venturers in the event that agreement as to the appropriate purchase price could not be reached.

59 On Saturday, 16 January 2016, WDR gave notice pursuant to cl 22.2(c) of the JVA requiring the purchase price of its shares in Hydrox to be determined in accordance with Annexure B to the JVA. At the time when that notice was given, both the Masters and the HTH businesses were being carried on by Hydrox as a going concern and were trading as they had done for a number of years.

60 It is the plaintiffs' case in the present proceeding that its cl 22.2(c) notice took effect from the start of business on 18 January 2016.

61 On 17 January 2016, a Board meeting of Woolworths was held.

62 On Monday, 18 January 2016, at 9.31 am, Woolworths made an announcement to the ASX in which Woolworths said that:

(a) Woolworths intended to exercise its call option under cl 23 of the JVA;

(b) Following the exercise of that call option, Woolworths intended to pursue an orderly sale or wind up of Hydrox's business; and

(c) Hydrox's business would continue to trade in the meantime.

63 Between 18 January 2016 and 25 January 2016, the plaintiffs and Woolworths conducted negotiations in an endeavour to agree a purchase price for WDR's shares in Hydrox pursuant to Annexure B to the JVA. Those negotiations did not produce an agreement.

64 On 16 February 2016, Woolworths purported to exercise its call option.

65 On 25 February 2016, each of WDR and Woolworths served or purported to serve an Independent Expert Valuation as required by Annexure B.

66 WDR's Independent Expert Valuation valued Hydrox on the assumption that it was to continue to operate as a going concern and valued WDR's shares in Hydrox at $654 million.

67 Woolworths' Independent Expert Valuation:

(a) Did not value Hydrox on the assumption that it was to continue to operate as a going concern;

(b) Valued Hydrox on the assumption that there was to be an orderly wind up of the Masters business; and

(c) As a result, valued WDR's shares in Hydrox at $ nil as at 18 January 2016.

68 Since 7 March 2016, the plaintiffs and Woolworths have been in dispute about whether Woolworths' Independent Expert Valuation is a valid Independent Expert Valuation for the purpose of Annexure B to the JVA.

69 In the days following 7 March 2016, the parties were in dispute as to whether the contractual arrangements between them required the appointment of a third expert in order to resolve the differences of opinion as to the value of WDR's shares in Hydrox.

70 On 10 March 2016, WDR, through its solicitors, informed Woolworths that the dispute about the validity of Woolworths' Independent Expert Valuation was a dispute that was required to be resolved pursuant to the dispute resolution provisions set out in cl 30 of the JVA.

71 On 12 March 2016, WDR, through its solicitors, gave notice of a dispute for the purpose of cl 30 of the JVA, namely, whether the Independent Expert Valuation obtained by Woolworths was a valid Independent Expert Valuation within the meaning of Annexure B to the JVA. The position adopted by WDR at this time was that the process for the appointment of a third expert under Annexure B was required to be suspended pending resolution of the dispute as to whether or not the Independent Expert Valuation obtained by Woolworths was in fact a valid valuation for the purposes of Annexure B. The question of whether such a suspension should be put in place was then made the subject of a further notice under cl 30 issued by WDR on 15 March 2016.

72 On 16 March 2016, Woolworths, through its solicitors, gave notice of a dispute pursuant to cl 30 of the JVA, namely, whether WDR had breached, and was continuing to breach, its

obligations under the JVA by failing to do all things reasonably necessary to appoint a third expert for the purposes of Annexure B to the JVA.

73 The parties then engaged in further endeavours to resolve these disputes including through mediation. The mediation took place in June 2016. It was unsuccessful.

74 On 12 July 2016, WDR commenced an arbitration against Woolworths in respect of, amongst other things, the dispute which had arisen as to whether or not the Independent Expert Valuation obtained by Woolworths was a valid Independent Expert Valuation for the purposes of Annexure B to the JVA. Woolworths did not commence any arbitration in respect of the other disputes raised by it to which I have referred above. However, on 12 September 2016, Woolworths lodged a Defence and Counter-Claim in the arbitration commenced by WDR in which it advanced matters in connection with those consequential disputes. That pleading is Exhibit A in the present application. Its contents are, for the moment, suppressed. I have given a brief description of the contents of that pleading at [52] above.

The Sale Process

75 Since February 2016, Woolworths has conducted a sale process aimed at selling the assets of, or the shares in, Hydrox. WDR consented to Woolworths conducting such a sale process provided that Woolworths provided WDR with reasonable information about the conduct of that process.

76 Woolworths retained CitiGroup Global Markets Australia (**Citi**) to provide financial advisory services in relation to the restructuring of Woolworths' joint venture with WDR and Lowes and more recently to assist with its exit from the Home Improvement Business.

77 In about April 2016, Woolworths and Citi prepared information memoranda concerning the sale of the shares in Hydrox or the sale of the businesses of Hydrox. According to the plaintiffs, those information memoranda did not include in the statement of Masters' *"trading"* and *"pipeline"* sites, the Dubbo site, being a Masters site that Woolworths was seeking to acquire for itself. The information memoranda also excluded the Warwick Farm site.

78 From time to time after April 2016, the plaintiffs requested copies of these information memoranda. The plaintiffs allege that, at no point prior to the commencement of the present proceeding, did Woolworths provide those information memoranda to them.

79 Since around 22 March 2016, Woolworths has engaged KordaMentha to assist it with a potential winding up of the Masters businesses and Woolworths' exit from those businesses.

80 The plaintiffs complain that they have been kept in the dark as to the contractual arrangements between Woolworths and KordaMentha and as to the steps being taken by KordaMentha to extract Woolworths from the Masters businesses.

81 Until shortly prior to 12 July 2016, the sale process had been conducted with a view to selling each of the HTH and Masters businesses as a going concern.

82 On or about 12 July 2016, Citi informed the Hydrox Board that it was not going to be possible for the businesses to be sold as a going concern and that they would have to be wound up in as orderly a fashion as possible.

83 In late July and early August 2016, a number of meetings of the Hydrox Board took place at which presentations were made concerning the winding down of the Masters businesses. At the Hydrox Board meetings held on 5 August 2016 and on 9 August 2016, the WDR nominee directors requested certain information to be furnished to them so that they could sensibly decide how they should approach certain decisions which were likely to be put to the Board in the near future.

84 At the Hyrdox Board meeting held on 12 August 2016, Dr Dammery, of Woolworths, who chaired the meeting, said that the Woolworths nominees on that Board wanted to secure the approval of the Hydrox directors to proceed with the pipeline lease exit strategy formulated by Woolworths and to do so later that day. The WDR nominees responded by saying that they had insufficient information properly to consider such a proposal. The proposal was put to the meeting. The four Woolworths nominees voted in favour of the proposal and the three WDR nominees voted against it. As a result, Dr Dammery declared that the resolution had been passed.

85 On or about 13 August 2016, Woolworths documented a plan by which Woolworths might bring about a state of affairs entitling it to terminate the JVA.

86 The WDR nominee directors on the Board of Hydrox continued to complain that they had not been fully informed as to Woolworths' intentions in respect of Hydrox and its businesses.

87 In the Concise Statement, the plaintiffs set out in some detail the Game Plan, Plan A and Plan B, all of which were developed by Woolworths in mid-August 2016 (see, in particular, pars 72 to 103 of the Concise Statement).

88 On 23 August 2016, a further meeting of the Hydrox Board took place. Approximately 12 hours prior to the meeting, the WDR nominees were provided with Board papers for that meeting. The papers comprised over 1200 pages. The papers included notice from Woolworths pursuant to cl 5.4 of the JVA replacing three of the four Woolworths nominees on the Hydrox Board (being all of the Woolworths nominees other than Dr Dammery) with partners of KordaMentha, including Mr Mark Korda.

89 The Board papers for the 23 August 2016 meeting included a recommendation from Citi that:

(a) The HTH business be sold to Metcash for $165 million;

(b) Great American be appointed as agent to liquidate Masters' inventory by 11 December 2016; and

(c) The Masters property portfolio be sold for $830 million to Home Investment Consortium Company Pty Ltd (**Home Investment Consortium**) via an acquisition of the shares in Hydrox—of which $725 million would be consideration provided by Home Investment Consortium and the remaining $105 million would be provided by Woolworths as consideration for certain sites that would be retained by Woolworths.

90 The Board papers provided to the WDR nominees for the 23 August 2016 meeting did not reveal how the figure of $105 million had been calculated.

91 The Citi recommendation was discussed at the 23 August 2016 Board meeting but no resolution for its adoption was put. At the conclusion of that Board meeting, the Board agreed to meet again at 6.30 am (Sydney time) the following day, 24 August 2016.

92 On 23 August 2016, less than 24 hours prior to the 24 August 2016 Hydrox Board meeting, the WDR nominees received the Board papers for that meeting. These papers comprised over 1100 pages. Those Board papers gave notice of proposed resolutions:

(a) To approve the sale of HTH to Metcash;

(b) To approve the proposed inventory agreements with Great American; and

(c) To approve Hydrox doing all things reasonably necessary to facilitate the implementation of a restructure plan contemplated by the Home Investment Consortium Transaction.

93 None of the resolutions to which I have referred at [92] above had been foreshadowed during the course of the Board meeting held on 23 August 2016 although the subject matter of those resolutions had been discussed at that meeting.

94 In their Concise Statement, at pars 88–97, the plaintiffs set out in detail an account of what occurred on 24 August 2016 including events which took place at the Hydrox Board meeting held on that day.

95 At the time the Board papers for the 24 August 2016 Hydrox Board meeting were sent, Woolworths had negotiated a call option over its shares in Hydrox in favour of Home Investment Consortium (a company associated with Mr Di Pilla and Aurrum). The existence of this call option was not known to WDR or Lowes. The call option was on the same terms as the terms negotiated for the Home Investment Consortium transaction referred to at [89(c)] above. The call option did not become exercisable until after the restructure plan contemplated by the Home Investment Consortium transaction had been implemented. That restructure plan included the transfer out of the Hydrox group of sites that Woolworths wished to acquire for itself. It was a term of the call option that each party would do all things reasonably requested by the other to obtain WDR's consent to the Home Investment Consortium transaction.

96 During one of the adjournments of that meeting which took place on that day (the adjournment which occurred between 8.10 am and 10.30 am), Woolworths, by its solicitors, sent a letter purporting to terminate the JVA with immediate effect. The letter also purported to terminate any separate contract whereby Woolworths agreed to buy WDR shares that had arisen upon the exercise by Woolworths of the call option in cl 23 of the JVA.

97 The plaintiffs argue in the present proceeding that Woolworths' purported termination of the JVA on 24 August 2016 was invalid and of no effect. This contention seems to be a critical part of the plaintiffs' case.

98 The plaintiffs also complain that important information has been denied to their nominees on the Hydrox Board being information in relation to Woolworths' intentions in respect of the winding up of the Masters businesses.

99 At pars 104–106 of the Concise Statement, the plaintiffs set out in summary form the grounds upon which they allege that the affairs of Hydrox are being conducted in a manner oppressive to, unfairly prejudicial to and unfairly discriminatory against WDR and upon which they rely in support of their claim that Hydrox be wound up on the just and equitable ground. In those paragraphs, the plaintiffs said:

> 104 The relationship of trust and confidence between the Woolworths nominees and the WDR nominees has broken down and the affairs of Hydrox are being conducted in a manner oppressive to, unfairly prejudicial to and unfairly discriminatory against WDR such that it is just and equitable that Hydrox be wound up, without limiting what is said above, broadly for the following reasons:
>
> (a) The WDR nominees are being provided with Board papers that are so voluminous and that are provided so shortly before Board meetings, that no director could possibly give them proper consideration in time for the Board meeting, as identified in paragraphs 78 and 85 above. Woolworths and the Woolworths' nominees have adopted that course for the purpose of depriving WDR's nominees of the opportunity to properly consider and take advice on matters being put before the Hydrox Board.
>
> (b) The WDR nominees are not being provided with information reasonably requested by them for their participation in the management of Hydrox, as identified in paragraphs 69 – 70 and 75 above.
>
> (c) Woolworths secretly negotiated the Call Option and did not disclose it to the WDR nominees before or during the 24 August 2016 Board meeting.
>
> (d) The tactics employed by Woolworths and the Woolworths' nominees in respect of the 24 August 2016 Board meeting were tactics that any reasonable director would regard as unfair:
>
> (i) Dr Dammery sought to persuade the WDR nominees to approve the Great American resolution by saying that, if the resolution was not approved, Hydrox would be insolvent, when Dr Dammery knew that was not true because of the comfort letter that Woolworths had provided.
>
> (ii) When the WDR nominees did not approve the Great American resolution, Woolworths and the Woolworths' nominees executed a pre-arranged plan to ambush the WDR nominees by terminating the JVA during an adjournment in the Board meeting and then passing the resolution by majority vote, over the objections of the WDR nominees and contrary to the advice of Hydrox's own solicitors.
>
> (iii) In putting the Great American resolution to the meeting and declaring it passed by majority vote, Mr Korda acted without any genuine belief as to whether the JVA had been validly terminated or whether the Board had power to pass the resolution by majority vote, and simply acted to give effect

to the instructions or wishes of Woolworths.

(iv) Woolworths and the Woolworths nominees conducted the 24 August 2016 Board meeting in that manner, not because they considered it to be in the best interests of Hydrox, but because Woolworths wanted (a) to be able to tell the market that it had resolved its problematic investment in Masters and (b) to execute the Call Option, before Woolworths FY16 results were announced on 25 August 2016.

(e) The asserted bases for purportedly terminating the JVA were without substance and, in any event, to the extent that it relied upon the alleged failure to execute the Deed of Release requested by CA ANZ, Woolworths had elected by various acts, including those set out at paragraphs 81, 96(a) and 96(b) above, to affirm the agreement in the hours and minutes prior to the purported termination.

105 The affairs of Hydrox are being conducted in a manner oppressive to, unfairly prejudicial to and unfairly discriminatory against WDR such that it is just and equitable that Hydrox be wound up in that:

(a) Woolworths' purported termination of the JVA was invalid;

(b) the Woolworths' nominees are purporting to exercise, by majority resolution, powers of the Board that, under the JVA and Hydrox's constitution, require Unanimous Approval, as identified at paragraphs 8 – 10, 69.1(e), 71.1(f) and 85 – 88 above.

106 The joint venture that formed the substratum of the relationship between the shareholders and the company is at an end and the assets of the joint venture are being realised. That process of realisation is currently being conducted by Woolworths and advisors retained by Woolworths. The WDR nominees are not being provided with information reasonably requested by them in relation to the conduct of that process (as identified at paragraph 75 above), notwithstanding that Woolworths has a conflict of interest with Hydrox in relation to the disposal of the Masters property portfolio (as identified at paragraph 90 above). Further, in conducting that process, Woolworths has favoured its own interests over those of WDR in entering into the Call Option as identified at paragraph 88 above.

CONSIDERATION AND DECISION

Relevant General Principles of Arbitral Law

100 In its Written Submission, Woolworths made a number of submissions as to the relevant general principles which Woolworths argued needed to be borne in mind when I came to consider the critical question, namely, whether the plaintiffs' claims made in this proceeding (or some of them) are arbitrable.

101 The submissions made by Woolworths in this part of their Written Submission are correct and I accept them. They may be summarised as follows:

(a) The objects of the IAA include:

- To facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes (s 2D(a) of the IAA);
- To facilitate the use of arbitration agreements made in relation to international trade and commerce (s 2D(b));
- To give effect to Australia's obligations under the New York Convention (s 2D(d));
- To give effect to the Model Law (s 2D(e));

(b) When interpreting the IAA or the Model Law, the Court must, in doing so, have regard to:

(i) The objects of the IAA; and

(ii) The fact that:

(A) Arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(B) Awards are intended to provide certainty and finality

(s 39(2) of the IAA);

(c) The general approach which the Court should take to the interpretation of the IAA was stated by Allsop J (as his Honour then was) (with whom Finn and Finnkelstein JJ agreed) in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 (*Comandate)* at 94–95 [192] in the following terms:

> 192 The New York Convention and the Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain. Unreliable or otherwise unsatisfactory decision making, or the fear of such, distorts commerce and makes markets less efficient, raising the cost of commerce. Similar effects can occur if parties can be forced to submit to fora of which they may have no or little knowledge, in circumstances where they have agreed to enter the overall bargain on an entirely different basis of anticipated dispute

> resolution. It may be of no, or little, comfort for such parties to be assured that any particular forum is reliable and otherwise satisfactory (as may be the case). It was not what was agreed. If parties can be forced to submit to fora different to those which they have chosen, a significant unstable variable is introduced into the performance of the international bargain – the uncertainty as to the legal system and the law to govern an international dispute, including doubts about venue and departure from what may be familiar procedures, or at least procedures in which they have sufficient confidence to agree as those to govern the resolution of any dispute.

(d) In this context, there is a *"policy of minimal curial intervention"* in matters governed by arbitration agreements (*Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300 at 306 [14] (*Robotunits*) per Croft J).

(e) One corollary of the policy of minimal curial intervention is that courts are no more entitled to delve into the merits of the case in the context of a stay application than they are in the context of enforcement or setting aside proceedings (*Robotunits* at 306 [14]);

(f) There is a special need to have regard to international case law when construing and applying the IAA, the New York Convention and the Model Law. In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at 383–384 [75], the Full Court said:

> … it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand.

(g) The Court has a number of sources of power to grant the stay sought by Woolworths. These are s 7(2) of the IAA, Art 5 and Art 8(1) of the Model Law, s 23 of the FCA Act and the inherent powers of the Court.

Identifying the Matters the Subject of the Proceeding

102 In order to ascertain whether the Court is obliged to grant a stay pursuant to s 7(2)(b) of the IAA, it is incumbent upon the Court first to decide whether the Court proceeding involves the determination of a matter that, in pursuance of the [arbitration] agreement, is capable of settlement by arbitration.

103 A similar enquiry is required by Art 8 of the Model Law. The language is different but the substance of the enquiry is the same.

104 How then does the Court identify the matter or matters the subject of the Court proceeding in order to then go on to determine whether some or all of those matters are arbitrable?

105 The word *"matter"* in s 7(2)(b) of the IAA is not used in the constitutional sense (*Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (*Tanning*) at 351 per Deane and Gaudron JJ and *Comandate* at 105–106 [235] per Allsop J).

106 Ordinarily, the nature and extent of the *"matters"* involved in a Court proceeding are to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including any defence, are based (*Robotunits* at 311–312 [19]). As Deane and Gaudron JJ said in *Tanning* (at 352), the enquiry is to ascertain the substance of the controversy between the parties in the court proceeding or, as was submitted by Woolworths, the substantive questions in dispute. These may not necessarily be the same as the ultimate questions for determination in the proceeding (*Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 at 426 [18] per Merkel J).

107 The matters to be determined in any given proceeding are distinct from the proceeding itself and multiple matters may exist within the one legal proceeding. As Woolworths submitted, this important aspect is recognised by the terms of s 7(2) itself.

108 In the present case, the Court must look to the Originating Process, the Concise Statement and Mr O'Neale's first affidavit in order to ascertain the matter or matters the subject of the proceeding.

109 In *Tanning*, Deane and Gaudron JJ said (at 351–352):

> Even if some issue in addition to the amount of enforceable indebtedness must be determined before the proof of debt proceedings can be finally decided, that would not oust the operation of s. 7(2) of the Act. By requiring that the proceedings or so much of the proceedings as involves the determination of a matter capable of settlement by arbitration be stayed, s. 7(2) clearly contemplates that the proceedings may encompass issues additional to those constituting "a matter ... capable of settlement by arbitration". See *Flakt Australia Ltd. v. Wilkins & Davies Co. Construction Ltd.* [[1979] 2 N.S.W.L.R. 243]); *Allergan Pharmaceuticals Inc. v. Bausch & Lomb Inc.* [(1985) 7 A.T.P.R. 40-636]. The word "matter" is not defined in the Act. In the quite different context of Ch. III of the Constitution, it has been held that the word "matter" means "the whole matter" and encompasses "all claims made within the scope of the controversy": *Fencott v. Muller* [(1983) 152 C,.L.R. 570, at p. 603]. See also *Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd.* [(1981) 148 C.L.R. 457, at p. 475]. However, in any context, "matter" is a word of

> wide import. In the context of s. 7(2), the expression "matter ... capable of settlement by arbitration" may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression "matter ... capable of settlement by arbitration" indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See *Flakt* [1979] 2 N.S.W.L.R., at p. 250]. 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 of settlement as a discrete controversy. The words "capable of settlement by arbitration" indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power. See Mustill and Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd ed. (1989), pp. 149-150, where it is noted that "English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not" but that the powers of an arbitrator "are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state".
>
> The substance of the controversy between T.R.L. and the liquidator is the amount, if any, enforceable as a debt for goods sold and delivered to Hawaiian under the licence agreement. That controversy is susceptible of settlement as a discrete controversy. And, when stated in those terms, the controversy is readily seen as one arising out of or relating to the licence agreement and thus encompassed within the agreement to arbitrate contained in cl. 10. Moreover, the controversy is as to a matter of a kind which is frequently the subject of arbitration proceedings and which could not be said to require determination only by the exercise of judicial power.

110 A *"matter"* for the purpose of s 7 of the IAA may or may not comprise the whole subject matter of any given proceeding. A *"matter"* is something more than a mere issue or question that falls for decision (*Tanning* at 351 per Deane and Gaudron JJ; and *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243 at 250 per McLelland J).

111 As submitted by the plaintiffs, the Court must first identify the *"matter or matters"* to be determined in the proceeding before asking whether those matters fall within the scope of the arbitration agreement and, if so, whether they are arbitrable.

112 The plaintiffs argued that, in the present case, there is, in substance, only one matter involved in the proceeding for the purpose of s 7 of the IAA, namely, whether Hydrox should be wound up on either of the statutory bases relied upon by the plaintiffs. The plaintiffs contended that difficulties arise if one attempts to parse the proceeding into separate, subsidiary matters. They went on to submit that the Court is being asked to exercise a power, a pre-condition to which is the formation of an opinion of the Court as to the appropriateness of the relief. Under s 233 of the Corps Act, the Court is directed to form such an opinion by the use of the word *"considers"* in the chapeau to s 233(1) and under s 461(1)(k) of the Corps

Act the Court is required in direct terms to form an opinion that the company should be wound up.

113 The plaintiffs submitted that the Court cannot delegate the formation of the relevant opinions to a third party, such as an arbitrator, nor can the Court delegate to a third party the ultimate determination of subsidiary facts or issues for the purpose of the Court forming that opinion. The plaintiffs went on to submit that such an approach would be inconsistent with the language of the Corps Act, which confers the power being exercised, and inconsistent with the nature of that power (which is essentially a power *in rem*).

114 The submissions made on behalf of the plaintiffs to which I have just referred were then linked to the plaintiffs' arguments to the effect that the subject matter of the present proceeding was simply not arbitrable.

115 At [54]–[99] above, I have set out in some detail the claims made by the plaintiffs in the present case.

116 Woolworths submitted that the subject matter of this proceeding was not one matter for the purposes of s 7(2) of the IAA but rather comprised several matters. In its Written Submission, Woolworths characterised those matters in the following terms:

(a) Alleged deficiencies in the provision of information to Lowes nominated directors in connection with Hydrox Board meetings in August 2016;

(b) Alleged wrongful voting by Woolworths nominated directors of Hydrox in breach of the constitution of Hydrox and the JVA at Hydrox Board meetings on 12 and 24 August 2016;

(c) The wrongful termination of the JVA on 24 August 2016; and

(d) Woolworths' conduct in keeping secret its plans for the wind down of the Masters business and, in that context, not permitting the Lowes nominee directors on the Hydrox Board to be able to consider foreshadowed Board resolutions on a proper basis and with sufficient notice.

117 It is apparent from a consideration of the plaintiffs' claims in the present case that, in addition to being advanced as grounds for the winding up of Hydrox, those claims may also conveniently be characterised as breaches of contract (being breaches of the JVA and the constitution of Hydrox), wrongful conduct in a corporate governance sense and wrongful

conduct in purporting to terminate the JVA in bad faith and on grounds which did not justify that termination.

118 The evidence that will be adduced in support of the relief claimed in the present proceeding includes (unsurprisingly) proof of primary facts (that is to say, proof of what was said and done and the circumstances in which that conduct occurred) and other evidence which, when taken with the primary facts, will be relied upon as establishing an appropriate foundation for the drawing of inferences.

119 With the exception of the requirement that the Court consider the evidence as may ultimately be proven at the final hearing and use that evidence to form the necessary opinion as to whether Hydrox should be wound up, all of the facts, matters and circumstances raised by the plaintiffs in the documents from which their claims may be identified involve the determination of questions of fact and law, some of which will inevitably be undisputed and some of which will be disputed.

120 In its Written Submission, Woolworths submitted that its identification of the *"matters"* for determination in this proceeding is reinforced by an understanding of the arbitration agreement itself. It relied upon *Comandate* at 105–106 [234]–[236] in making that submission. Woolworths went on to submit that the very broad definition of *"Disputes"* in the JVA supported its submissions concerning the correct identification of the matters involved in the present proceeding.

121 In light of the arguments to which I have referred, Woolworths ultimately submitted that the present proceeding involved a number of *"matters"* being the *"matters"* identified at [116] above.

122 In my view, there are several matters involved in the present proceeding. The present proceeding is not to be regarded as one single matter (cf *Metrocall Inc v Electromix Tracking Systems Pty Ltd* (2000) 52 NSWLR 1). Although the authorities make clear that not every question or issue constitutes a *"matter"* for the purposes of s 7(2) of the IAA, they also make clear that, in any given proceeding, there may be more than one *"matter"* involved. When proper regard is paid to the grounds relied upon by the plaintiffs in support of Prayer 1 in their Originating Process, I think that there are several *"matters"* involved in the present proceeding. The identification or characterisation of those *"matters"* propounded by Woolworths seems to me to have been arrived at by an appropriate analysis undertaken in

accordance with the relevant principles. These conclusions necessarily involve the rejection of the plaintiffs' primary submission to the effect that there is only one matter involved in this proceeding.

123 I now turn to the question of arbitrability.

Arbitrability

124 In this section of my Reasons, I address the question of whether the *"matters"* which I have identified as being involved in the present proceeding are arbitrable. The issue of arbitrability goes beyond the scope of an arbitration agreement. It involves a consideration of the inherent power of a national legal system to determine what issues are capable of being resolved through arbitration. The issue goes beyond the will or the agreement of the parties. The parties cannot agree to submit to arbitration disputes that are not arbitrable.

125 The question of whether a dispute is arbitrable is to be determined by the application of the nation's domestic law alone (*Comandate* at 97–98 [200]–[201] per Allsop J).

126 As submitted by the plaintiffs, Allsop J in *Comandate* observed that there was a common element to those categories of dispute that engaged the notion of non-arbitrability (at 97–98 [200]). That common element was, according to the plaintiffs, that there was a *"sufficient element of legitimate public interest in the subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate"*.

127 His Honour's observation as summarised in the plaintiffs' submissions to which I have just referred was approved by the NSW Court of Appeal in *Rinehart v Welker* [2012] NSWCA 95 at 166 in the judgment of the Chief Justice (with whom McColl JA and Young AJA agreed).

128 As submitted by the plaintiffs, it is uncontroversial that some disputes cannot be the subject of private arbitration. Examples cited by the plaintiffs were: criminal offences; divorce; custody of children; property settlement; wills; employment grievances; some intellectual property disputes; competition law disputes; and bankruptcy and insolvency.

129 As I have already mentioned, the plaintiffs submitted that the present proceeding should be regarded as one *"matter"* for the purposes of s 7(2) of the IAA. I have already rejected that contention. However, the plaintiffs also submitted that, even if several matters are involved in the present proceeding, none of those matters is arbitrable.

130 The plaintiffs submitted that the public policy of the domestic law or the legitimate public interest of that law against arbitrability of particular disputes may arise in a number of ways. They argued that matters may not be arbitrable because they are uniquely the subject of government authority; because they affect a person's legal status; because they affect interests of third parties in a manner which cannot be considered in an arbitration; or because there is a public interest in seeing matters determined in public (that is to say, in open Court).

131 Although the plaintiffs accepted that some claims for relief under the Corps Act are arbitrable, including claims for purely *inter partes* relief under s 233 (*ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 *(ACD Tridon*) at [192] per Austin J; *Robotunits* at 325–330 [55]–[69]; *Re 700 Form Holdings Pty Ltd* [2014] VSC 385; and *Brazis v Rosati* (2014) 102 ACSR 626), they nonetheless submitted that a claim for a winding up order is not arbitrable at all. In support of this ultimate proposition, the plaintiffs advanced a number of arguments:

(a) An order for winding up affects the legal status of a person. It also has serious consequences for the future of the company in question and those who have been charged with the responsibility of managing it;

(b) An order for winding up affects a number of third parties. Transactions involving the shares in the company being wound up are restricted; dispositions of property are constrained; the company's freedom to act in litigation is constrained; and the company's creditors are affected in a number of different ways;

(c) The creation and dissolution of an artificial legal entity such as a company is a matter uniquely the subject of governmental authority; and

(d) There is a public interest in ensuring that the procedural steps by which a company is placed into liquidation are governed by the Court's processes and determined publicly, not in private by an arbitral tribunal.

132 The plaintiffs went on to submit that the public interest as evidenced by the above matters is reflected in the need for the plaintiff in a winding up action to advertise the filing of its Originating Process and to lodge notice of the filing of that Process with Australian Securities and Investments Commission.

133 Ultimately, the plaintiffs submitted that the legislative structure of Pts 5.4, 5.4A and 5.4B of the Corps Act proceeds upon the basis that the winding up of a company should be subjected

to a public process throughout the proceeding and be actively publicised so that people with an interest in the proceeding can attend, make submissions and even apply to be substituted as the plaintiff in the proceeding.

134 The plaintiffs also submitted that, as a matter of Australian authority, the position is perfectly clear. They relied upon *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 (*A Best Floor Sanding*); *ACD Tridon; Rinehart v Welker*; and *Tanning*.

135 In their submissions, the plaintiffs sought to distinguish several overseas authorities upon the basis that those authorities did not represent the law in Australia and lacked persuasive reasoning in any event. The authorities sought to be distinguished in this fashion were *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 (*Fulham Football Club*), *Tomolugen Holdings Ltd v Silica Investments Ltd* [2015] SFGA 57 (*Tomolugen*), *Re Quiksilver Glorious Sun JV Ltd* (2014) 4 HKLRD 759 (*Quiksilver*) and other authorities relied upon by Woolworths.

136 *Tanning* is authority for the proposition that, in appropriate circumstances, s 7(2) of the IAA will apply to a proceeding to reverse a liquidator's rejection of a proof of debt. Whether, in fact, s 7(2) of the IAA does so apply in any given case depends upon the nature of the grounds relied upon by the liquidator to reject the relevant proof of debt.

137 At 339 in *Tanning*, in their joint judgment, Brennan and Dawson JJ said that the principles that determine the enforceability of the liability to which a proof of debt relates are, in the main, the same as the principles which would be applied in an action brought directly against the company to enforce that liability. Their Honours went on to say that that general rule is qualified. The liquidator may have special grounds peculiar to his position which may entitle him to reject the proof. If the ground or grounds relied upon are no different from those which could have been relied upon by the company, then there is no impediment to an arbitrator determining whether or not those grounds are valid.

138 In *Tanning*, there was no special ground relied upon by the liquidator which was not available to the company itself. The real issue in the proceeding was whether or not the company was indebted to the creditor as the creditor claimed and, if so, in what amount. In that event, Brennan and Dawson JJ said (at 342–343):

> If the creditor and the company are bound by an international arbitration agreement applicable to the claim, there is no reason why the claim should not be determined as between the creditor and the liquidator in the same way as it would have been

> determined had no winding up been commenced. 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 jeopardize orderly arrangements: see *Scherk v. Alberto-Culver Co.* ((1974) 417 U.S. 506, at pp.516–517). But it is otherwise if the liquidator supports his rejection of a proof of debt in reliance on a ground which allows him, and him alone, to go behind the judgment, account stated, covenant or estoppel on which the company's liability is founded. The entitlement of a liquidator to go behind a judgment, account stated, covenant or estoppel is unaffected, either substantially or procedurally, by the existence of an international arbitration agreement binding on the company. To stay proceedings which involve only matters outside the scope of an international arbitration agreement would be to frustrate the provisions for winding up. Thus the application of s. 7(2) to proceedings for the reversal of a liquidator's rejection of a proof of debt must depend on the ground or grounds on which the liquidator seeks to support his rejection of the proof of debt. By attributing such a discriminatory operation to s. 7(2), conflict is avoided between the attainment of the objects of the Act and the procedures appropriate to a winding up.

139 Their Honours went on to hold that, in the circumstances of *Tanning*, the Court's decision on the challenge to the rejection of the proof of debt by the liquidator would inevitably follow the determination of the questions of whether the debt was truly due and, if so, in what amount.

140 All of the Justices in *Tanning* held that the question of whether the debt was due and, if so, in what amount, was arbitrable notwithstanding that it was raised in a context which directly involved the application of the relevant corporations legislation and notwithstanding that the ultimate decision in respect of the creditor's application to reverse the liquidator's rejection necessarily had to be made by the Court.

141 I have already referred to the joint judgment of Deane and Gaudron JJ.

142 At 353, Deane and Gaudron JJ remarked that the operation of s 7(2) of the IAA was not confined to proceedings in which the parties seek the same relief as might have been sought in arbitration proceedings. They held that the section has a wider operation.

143 Justice Toohey agreed with the judgment of Brennan and Dawson JJ.

144 *Tanning* makes clear that the arbitrability of certain matters raised in any given proceeding under the Corps Act (or its predecessors) will usually depend upon the nature of those matters. Blanket propositions in support of the proposition that all claims in a Corps Act proceeding are not arbitrable will not usually find favour with the Court. See also *Rinehart v Welker* at [170]–[171].

145 At [167]–[168] in *ACD Tridon,* Austin J held that one group of claims made in that proceeding fell within the wording of the relevant arbitral agreement but that four other categories of claims made in that case did not fall within the arbitral agreement. At [110]–[111], his Honour had earlier held that each of the five groups of claims identified by Tridon in its Written Submissions involved a *"matter"* for the purposes of s 7(2)(b) of the IAA.

146 At [178]–[204], Austin J then considered whether the claims made were in any event arbitrable. His Honour's views in these paragraphs are, strictly speaking, *obiter dicta*.

147 At [189]–[194], his Honour said:

> 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.
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> 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 Byr*d 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.

148 His Honour then considered whether a Pt 72 SCR reference should be ordered and other matters concerning appropriate relief.

149 It seems to me that his Honour accepted (as he ought to have done) that not all Corps Act matters were not arbitrable. Nonetheless, when considering *A Best Floor Sanding,* his Honour did seem to place considerable weight upon the proposition that a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause. There is no doubt, however, that his Honour also took the view that oppression claims which were truly being litigated on an *inter partes* basis were arbitrable.

150 In *A Best Floor Sanding,* Warren J (as her Honour then was) said the following (at [13]–[18]):

> 13 The application to stay the winding up application on the basis of an arbitration agreement between the joint venture parties raises a fundamental principle of corporations law. To state the very obvious, a company is a corporation in the common law sense formed by registration under Pt 2A.2 of the Corporations Law or under corresponding earlier legislation. In the words of Ford, Austin & Ramsay in Ford's Principles of Corporations Law (at p1061): "a corporation (or body corporate in the common law sense) is a legal device by which legal rights, powers, privileges, immunities, duties,

liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person ... The fictional entity acquires rights and liabilities by the acts of persons behind it." Upon incorporation, the Corporations Law applies to the new entity. Its company directors and management are subject to regulation under the Corporations Law. The Corporations Law contains provisions relating to the company's constitution, general meetings of members, management of the company, the company's dealings with other parties, the company's financing, the handling of its affairs when it is subject to a financial crisis and, most significantly for present purposes, its winding up and dissolution. The Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and death of the company. Such matters cannot and ought not be subject to private contractual arrangement.

14 Chapter 5 of the Corporations Law is concerned with the winding up of companies. A company may be wound up in various circumstances, more often than not, as a result of insolvency. S59P allows an application to be made to the court for a company to be wound up on the basis of insolvency by the company, a creditor, a contributory, a directory, a liquidator or provisional liquidator of the company, ASIC or an agency prescribed under the legislation. A company may be wound up on grounds other than insolvency under s461 of the Corporations Law. The section is concerned with a range of circumstances but those most generally arising are when directors act in the affairs of the company in their own interests rather than in the interests of the members as a whole or in a manner unfair or unjust to other members or where the affairs of the company are conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against another member or in a manner that is contrary to the interests of the members of the company as a whole. In addition, s461(1)(k) contains the broad discretionary ground vested in the court whereby a company may be wound up if the court is of the opinion that it is just and equitable to do so.

15 Throughout Chapter 5 of the Corporations Law there exists a statutory structure setting out the manner in which applications for the winding up of a company are to be made, the persons or parties who are permitted under the Law to make an application for the winding up of a company and, most significantly, the effect of a winding up order on creditors and contributories. A major aspect of the control by the court of the winding up of a company is the fact that the court appoints an official liquidator to be liquidator of the company. In this respect the Corporations Law sets out the powers and duties of a liquidator or a provisional liquidator of the company in the course of the winding up of that company. Indeed, the order of the court for the winding up of the company does not in effect wind up that company. Rather, the effect of the court order is that it directs that the process of liquidating the assets of the company and the winding up of its affairs should begin (see Re Crust 'n' Crumbs Bakers (Wholesale Pty Ltd) (1992) 2 Qd R 76, 78; (1991 5 ACSR 70). Upon a court ordering a winding up and so long as the winding up of the company remains unterminated no further order can be made by a court with respect to that company (see Commonwealth v Emanuel Projects Pty Ltd (1996) 21 ACSR 36; Dewina Trading Sdn Bhd v Ion International Pty Ltd (1996) 141 ALR 317; 22 ACSR 352).

16 It is, of course, contemplated by the Corporations Law that a company can be wound up on a voluntary basis. However, voluntary windings up differ from compulsory windings up in that they are initiated by the members rather than the court. A members' voluntary winding up is possible for solvent

companies only, and the winding up by the liquidator is subject to the control of the members. If the company is insolvent, a voluntary winding up must be a creditors' voluntary winding up. Although it is voluntary in the sense that the members initiate it, the liquidator is subject to control by the creditors.

17 As observed by Ford, Austin & Ramsay in Ford's Principles of Corporations Law (at p27,065):

"If debtors have insufficient property to discharge their liabilities, a procedure to ensure an orderly and rateable distribution of that property among the creditors is needed. In the case of an individual that procedure is a bankruptcy administration. In the case of a company it is a winding up.

Achievement of an orderly and rateable distribution requires:

- collection of all the debtor's property not claimable by secure creditors;

  recovery for addition to the debtor's estate of property previously transferred when the debtor was insolvent;

- a stay of proceedings against the debtor;

- a process by which claims against the debtor can be asserted and quantified;

- a scale of priorities for distribution of the property.

Bankruptcy administration in respect of natural persons has a social function - to give the debtor a discharge from debts and a new start. Winding up a company has no similar aim. At the end of the winding up the company is dissolved."

18 The application by AB Floor to stay the winding up application strikes at the very heart of the corporation structure enshrined in the Corporations Law. The arbitration clause in the joint venture agreement is null and void insofar as it purports to subject the parties to an arbitration with respect to the dissolution or winding up of the company. The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company. Moreso, the arbitration clause, if adhered to, would frustrate the contributory, Skyer Australia in its efforts to seek relief from the court under the winding up provisions of the Law. In essence, the arbitration clause in the joint venture agreement is contrary to the provisions of the Corporations Law and cannot be applied.

151 The views expressed by her Honour must be understood against the terms of the relevant arbitral agreement in the case with which her Honour was dealing. By that agreement, the parties had endeavoured to repose in an arbitrator the capacity to dissolve or wind up the relevant joint venture vehicle. Her Honour took the view that the parties could do no such thing and declared the arbitral agreement to be null and void insofar as it purported to subject the parties to an arbitration with respect to the dissolution or winding up of the relevant corporate entity.

152 The present case differs somewhat from the facts of *A Best Floor Sanding.* Here, it is Woolworths' contention that the determination of the legal and factual disputes adumbrated by the plaintiffs in their Originating Process, the Concise Statement and the affidavits filed in support of their claims for relief, can all be subject to determination by arbitration while leaving to the Court the ultimate decision as to whether or not the matters determined in that manner and any other facts and propositions of law not determined by arbitration are sufficient to persuade the Court to form the necessary opinion which is a precondition to the making of the winding up order sought.

153 *Fulham Football Club* and *Tomolugen* and the other cases relied upon by Woolworths support the proposition that the matters involved in the present proceeding which Woolworths contends should be referred to arbitration are, in fact, arbitrable.

154 In *Fulham Football Club*, the English Court of Appeal distinguished *A Best Floor Sanding*. The leading judgment was given by Patten LJ. Lord Justice Longmire and Rix LJ agreed with the reasons of Patten LJ. At 354 [74], Patten LJ observed that many (but not all) aspects of the corporations law regime in England and Wales for the liquidation by court order of a company are immune from interference by the members of the company whether by contract or otherwise. In particular, his Lordship focussed on the overriding importance of the legislative regime in cases of insolvency.

155 At 355 [76]–[77], his Lordship said of *A Best Floor Sanding*:

> 76 Warren J was, I think, right to regard the arbitration clause she had to consider as unenforceable in so far as it included within the scope of the reference the question whether the company should be wound up. Such an order lies within the exclusive jurisdiction of the court and the discretion as to whether or not to make that order is for the court, not the arbitrator to exercise. But I part company with her if and in so far as she suggests in para 18 of her judgment that there can be no resort to arbitration in respect of the dispute between shareholders or the company which forms the grounds upon which such relief may be sought.
>
> 77 The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA rules would have the power to grant the specific relief sought by Fulham in its section 994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. Nor does the determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction. A dispute between members of a company or between shareholders and the board about

> alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties. The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL rules in relation to the transfer of a Premier League player.

156 His Lordship then reviewed *ACD Tridon* and *In re Peveril Gold Mines Ltd* [1898] 1 Ch 122 and, in respect of the latter, at 357–358 [82]–[84], said the following:

> 82 The decision is therefore limited to the narrow point of whether the articles of a company can effectively restrict or re-model the conditions for the presentation of a petition under what would now be section 122 of the Insolvency Act 1986. It does not suggest that an agreement to resolve a dispute between shareholders which might justify a winding up order on just and equitable grounds would either infringe the statute or be void on grounds of public policy. In fact it suggests the opposite.
>
> 83 It is therefore open to us to decide whether the provisions of section 994 are to be construed as restricting the resolution of unfair prejudice disputes to the exclusive jurisdiction of the court free of any binding authority. I have already set out my own reasons for preferring the view that disputes of this kind which do not involve the making of any winding up order are capable of being arbitrated. Although not necessary for the resolution of this appeal, I also take the view, as Austin J did in the *ACD Tridon* case [2002] NSWSC 896, that the same probably goes for a similar dispute which is used to ground a petition under section 122(1)(g) to wind up the company on just and equitable grounds. In those cases the arbitration agreement would operate as an agreement not to present a winding up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition under section 122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under section 9(4). In much the same way, it would, I think, be open to an arbitrator who considered that the proper solution to a dispute between a shareholder and the company was to give directions for the conduct of the company's affairs to authorise the shareholder to seek such relief from the court under section 994. But such cases are likely to be rare in practice. If the relief sought is of a kind which may affect other members who are not parties to the existing reference, I can see no reason in principle why their views could not be canvassed by the arbitrators before deciding whether to make an award in those terms. Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied.
>
> 84 But, as explained earlier in this judgment, these jurisdictional limitations on

> what an arbitration can achieve are not decisive of the question whether the subject matter of the dispute is arbitrable. They are no more than the practical consequences of choosing that method of dispute resolution: see *Société Commerciale de Réassurance v ERAS (International) Ltd (formerly Eras (UK))* [1992] 1 Lloyd's Rep 570 and *Wealands v CLC Contractors Ltd (Key Scaffolding, Third Party)* [1999] 2 Lloyd's Rep 739.

157 There may be a flaw in his Lordship's reasoning at 357 [83] if, as appears to be the case, part of that reasoning included the proposition that parties to an arbitral agreement might agree amongst themselves not to present a winding up petition unless and until the underlying dispute had been determined by way of arbitration.

158 In *Tomolugen*, the Singapore Court of Appeal followed *Fulham Football Club* and *Quiksilver*. *Quiksilver* is a case directly in point. In that case, despite the fact that it was agreed on all sides that a winding up order could not be made by an arbitrator, the Court nonetheless stayed the legal proceedings. At [21], the Court said:

> The determinative issue … is whether or not the substantive dispute between the parties is arbitrable. By substantive dispute I mean the commercial disagreement, which they wish to have resolved. This is not the same as the relief that one party seeks.

159 Other cases in Canada, New York, the British Virgin Islands and Ireland cited by Woolworths were to the same effect as *Quiksilver*, although some of those cases were decided before *Quiksilver*.

160 The plaintiffs criticised the reasoning in *Fulham Football Club, Tomolugen* and *Quiksilver*. They submitted that the reasoning in those cases reflected different legislative regimes in respect of corporations from that which applies in Australia and, for that and other reasons, the cases failed to pay sufficient regard to the very public nature of a winding up proceeding. They went on to submit that the solution proffered by the English, Singaporean and Hong Kong Courts is unsatisfactory because it deprives the Court of its essential function, leaving it to implement, in a mechanical way, the decision of the arbitrator.

161 In substance, the present case is a dispute between the sole shareholders of Hydrox involving the way in which those shareholders performed their contractual and other obligations *inter partes*. In truth, there is no substantial public interest element in the determination of these parties' disputes. At the present time, it is not suggested that Hydrox is insolvent. Indeed, there is evidence to the effect that Woolworths has provided letters of comfort to the directors of Hydrox in order to allay any concerns that they may have as to the solvency of Hydrox.

No creditor has attended any Court hearings or has sought leave to participate in the proceeding. This is despite the fact that it has been advertised as required under the relevant regulatory regime and despite the fact that the dispute between the plaintiffs and Woolworths has received considerable press coverage.

162 In my judgment, the mere fact that a winding up order is sought does not alter the characterisation of the real controversy between the parties in this proceeding as being an *inter partes* dispute. Of course, it is for the Court, and the Court alone, to decide whether such facts and propositions of law as may ultimately be presented at the hearing of the plaintiffs' winding up application constitute sufficient proof and persuasion entitling the plaintiffs to the declaration and winding up order which they seek.

163 For all of the above reasons, I see no difficulty in all of the matters identified at [116] above being referred to arbitration and for further steps in this proceeding to be stayed until such time as those matters have been determined by arbitration.

164 With the exception of that part of the present proceeding which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence.

The Terms of the Stay

165 Woolworths submitted that, were I minded to grant a stay, it should be a stay of the whole of the present proceeding. It submitted that the matters which are arbitrable are jurisdictional or forensic preconditions to the proper consideration by the Court of the appropriateness of making a winding up order. In addition, it submitted that there are two extant arbitrations already on foot between the same parties concerning central aspects of the JVA (including the validity of Woolworths' purported termination of the JVA).

166 When the question of whether the whole or only part of the proceeding should be stayed was raised with Senior Counsel for the plaintiffs, he accepted, as a practical matter, that his clients would not wish to proceed with the hearing of the winding up application until such time as the arbitrable matters had been determined by arbitration.

167 For these reasons, I propose to grant a stay of the whole of the present proceeding.

168 I see no reason why costs should not follow the event.

169 In light of the fact that I propose to grant a stay, I will vacate next week's hearing of the winding up application.

170 There will be orders accordingly.

I certify that the preceding one hundred and seventy (170) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 27 September 2016