# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Equitable Funds Management Ltd (in liq) & Anor v Heinze & Anor* [2003] QSC 362 |
| PARTIES: | **EQUITABLE FUNDS MANAGEMENT LIMITED ACN 067 565 931 (IN LIQUIDATION) and FRANCIS WRIGHT WILKIE**<br>**(applicants)**<br>**v**<br>**FREDERICK RICHARD HEINZE and KAHL HEINZE**<br>**(respondents)** |
| FILE NO/S: | S6980 of 2003 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| DELIVERED ON: | 30 October 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 October 2003 |
| JUDGES: | Mullins J |
| ORDER: | **Subject to the respondents paying to the applicants on or before 13 November 2003 the sum of $8,510.50 by way of reimbursement of that amount paid by the applicants to the arbitrator, Mr KW Rose, in respect of the respondents' share of the costs of the arbitration, it is ordered that:**<br><br>**1. The final award of the arbitrator dated 31 March 2003 be set aside wholly.**<br><br>**2. The matters the subject of the arbitration be remitted to the arbitrator for reconsideration.**<br><br>**3. The originating application be dismissed.** |
| CATCHWORDS: | ARBITRATION – THE AWARD –POWER TO SET ASIDE– grounds for remitting or setting aside – denial of natural justice – where arbitrator determined that the respondents had no right to be heard in the final hearing without his leave – where final hearing proceeded on an ex parte basis – where defence struck out and award made against respondents – the arbitrator misconducted the arbitration by failing to give the respondents an opportunity to be heard at the final hearing – award set aside<br><br>*Commercial Arbitration Act* 1990 |

*Benedetti v Sasvary* [1967] 2 NSWR 792

COUNSEL: I A Erskine for the applicants
K Barlow for the respondents

SOLICITORS: Bennett & Philp for the applicants
Macrossans Lawyers as town agents for Madgwicks Lawyers for the respondents

[1] **MULLINS J**: By originating application filed on 7 August 2003 Equitable Funds Management Limited (in liquidation) ("Equitable") and Mr Francis Wright Wilkie (to whom I will refer collectively as "the applicants") sought an order that an arbitrator's final award in favour of the applicants against Mr Frederick Richard Heinze and Mr Kahl Heinze ("the respondents") dated 31 March 2003 be made a judgment of this court pursuant to s 33 of the *Commercial Arbitration Act* 1990 ("the Act").

[2] The respondents cross-applied by application filed on 26 September 2003 for leave to appeal the award of the arbitrator pursuant to s 38 of the Act on the ground that the arbitrator made errors of law or, alternatively, an order setting aside the award pursuant to s 42 of the Act on the grounds that the arbitrator misconducted the arbitration.

[3] Logically, the respondents' application needs to be determined before the applicants' application.

**History of arbitration**

[4] Mr Wilkie, Mr Graeme Rodney Mitchell and the applicants entered into a document entitled "Heads of Agreement" on 22 March 1997 in respect of Fishing Information Services Pty Ltd Pty Ltd ("FIL") which carried on business under the name of Fishing Info Line. The current directors of FIL at the time the heads of agreement were entered into were Mr Wilkie, Mr Mitchell and Mr Frederick Heinze. FIL operated as trustee of the FIL Unit Trust ("the trust"). There had been disagreements between Mr Wilkie and Mr Mitchell, on the one hand, and Mr Frederick Heinze, on the other, as to the structure and operation of FIL and its business. The heads of agreement set out the agreement which had been reached under which Mr Frederick Heinze would acquire all the shares and units in FIL and the trust and take over the control of FIL.

[5] The solicitors for the applicants served a notice of dispute under clause 12 of the heads of agreement on the respondents and FIL on 6 November 1998 in respect of a dispute arising out of the heads of agreement as varied by an agreement made in November 1997. FIL subsequently went into receivership and liquidation and the applicants did not continue to seek relief against it.

[6] On 12 December 1998 solicitor Mr Kenneth Rose was appointed as arbitrator.

[7] The applicants' points of claim were delivered on 15 April 1999. The respondents' points of defence which included a cross-claim were delivered on 17 May 1999.

[8] Equitable went into liquidation in August 1999 and the arbitration was put on hold until 14 January 2000. A directions' hearing was held on 14 January 2000. The

applicants' reply and answer to the respondents' points of defence and cross-claim was delivered on 16 October 2000. At the same time the applicants delivered an extensive request for particulars of the respondents' points of defence and cross-claim.

[9] A further directions' hearing was held on 10 November 2000 when a timetable for further steps in the arbitration was set. The solicitors who had been acting for the respondents at that stage gave notice to the arbitrator and the applicants' solicitors on 8 December 2000 that, as they had not been put in funds to meet the direction that the respondents pay the arbitrator the moneys due to him by 8 December 2000, they had ceased to act for the respondents in the matter.

[10] Because the arbitrator had received no communication from either party, he cancelled the conference scheduled for 30 March 2001. On 1 June 2002 the applicants' solicitors requested a review of the matter. Neither party attended the review set for 22 June 2001

[11] The arbitrator informed the parties that there would be a further review and directions' hearing on 13 July 2001. The letter stated:

> "As previously advised, should there be no appearance for the respondent in person or by legal representatives then I will hear submissions from the claimant and make direction as appropriate in relation to the finalisation of this matter by way of an ex parte hearing and subject to formal proof of the claimant's claims."

[12] At the hearing on 13 July 2001, there was no appearance by the respondents and the solicitor for the applicants requested directions to enable the matter to proceed to a summary determination or a default determination. The arbitrator decided to fix a date for hearing of 8 August 2001 on the basis that the applicants could proceed on their affidavits and any written submissions, if the respondents did not appear. By letter dated 16 July 2001 the arbitrator advised Mr Frederick Heinze that he would proceed to hear and determine the applicants' claims against the respondents on 8 August 2001 and stated:

> "Should the Respondents intend to contest the Applicants' claims then you should immediately advise me, and the Applicants' solicitors, accordingly and seek a re-listing of this matter for further directions this month."

[13] The applicants' solicitors prepared written submissions dated 1 August 2001 in support of a request that the arbitrator proceed *ex parte*, because of the respondents' failure to attend the hearing on 13 July 2001 and subsequent failure to respond to correspondence from the arbitrator and the applicants' solicitors. Those submissions were sent by the applicants' solicitors under cover of letter dated 1 August 2001 to the respondents.

[14] At the hearing on 8 August 2001, Mr Frederick Heinze participated by telephone, Mr Heinze stated that he became aware that the hearing was on at about 9.30 pm the previous day and indicated that the respondents wished to have representation, if the arbitration were going to continue. The hearing was stood down until 4.00 pm to enable the respondents to organise for a legal representative to attend.

[15] When the hearing resumed at 4.00 pm, Mr Frederick Heinze was represented by solicitor Mr McMillan from Carne & Herd who requested an adjournment on behalf

of his client. The respondents were ordered to pay the sum of $1,500, which had been ordered previously to be paid to the arbitrator by 8 December 2000, and the hearing was adjourned until 17 August 2001. The arbitrator indicated that Mr Frederick Heinze should swear an affidavit dealing with the matters on which he relied to seek an adjournment and other matters relevant to what orders should be made concerning costs.

[16] By the hearing on 17 August 2001, the sum of $1,500 had been paid to the arbitrator. Any affidavit on which Mr Frederick Heinze sought to rely was ordered to be delivered by 27 August 2001 and the hearing was adjourned to 31 August 2001.

[17] A short affidavit of Mr Heinze was forwarded to the solicitors for the applicant on 27 August 2001. A much longer affidavit of Mr Heinze dealing with his medical history from May 1999 and the death of his son Adam in October 2000 and the effect of these events on his ability to undertake activities was delivered at the solicitors for the applicant on 30 August 2001. Mr Frederick Heinze stated that earlier in 2001 he had been advised by a solicitor from his then solicitors Freehill Hollingdale & Page that the arbitration was not proceeding and he did not become aware that he was required to take steps in respect of the arbitration until he found out on 7 August 2001 about a letter redirected to his son's address which was from the arbitrator.

[18] At the hearing on 31 August 2001, the applicants' solicitors indicated that, as a result of the affidavits from Mr Frederick Heinze, they would not press for the continuation of the *ex parte* hearing. By this hearing, Mr McMillan also had instructions to act on behalf of Mr Kahl Heinze. A timetable for further steps in the arbitration was set at the hearing on 31 August 2001. The directions' hearing was adjourned to 12 August 2001.

[19] Under the timetable, the respondents were required to respond to the applicants' request for particulars by 28 September 2001. The respondents were also required to provide a list of documents by 28 September 2001. Any further affidavits from the respondents were required by 9 October 2001. None of these directions were complied with. Because Mr McMillan was unable to confer with Mr Frederick Heinze, because of the ongoing illness of Mr Heinze, the respondents indicated that they wished to seek an adjournment of the directions' hearing. Further directions were made and a further hearing for review of the matter was set on 30 November 2001.

[20] The respondents served the respondents' list of documents on 30 October 2001. The further and better particulars were provided by the respondents to the applicants on 16 November 2001.

[21] By letter dated 2 November 2001 the applicants' solicitors complained about the failure of the respondents to comply with the timetable. The applicants' solicitors inspected the respondents' documents on 5 November 2001 and made a request for copies of a number of those documents which were then provided by the respondents' solicitors.

[22] The respondents' solicitors by letter dated 9 November 2001 requested copies of various documents from the applicants' list of documents which were provided on 13 November 2001.

[23] A review was conducted before the arbitrator on 3 December 2001. The applicant and the arbitrator were informed that Mr Frederick Heinze was currently preparing a detailed statement of his evidence in chief that would be put in affidavit form. The arbitrator directed that the respondents' affidavits be delivered by 19 December 2001. A review hearing was set for 21 December 2001. The hearing of the arbitration was set for the week commencing 11 February 2002.

[24] An unsworn copy of an affidavit in the name of Mr Frederick Heinze was served by the respondents' solicitors on the applicants' solicitors on 20 December 2001. The parties had also exchanged agreed bundles of documents and prepared a consolidated set of pleadings.

[25] At the review hearing on 21 December 2001 a timetable was set for steps to be undertaken by the parties with a view to completing the preparation for the arbitration to commence on 11 February 2002. A further review hearing was set for 18 January 2002.

[26] On 31 December 2001 the respondents' solicitors informed the applicants' solicitors of the intention to obtain a forensic accountant as an expert witness.

[27] On 15 January 2002 the respondents' solicitors sent a letter to the arbitrator (a copy of which was provided to the applicants' solicitors) which advised that the respondents were not able to meet the timetable set for the hearing of the arbitration on 11 February 2002. The letter identified what appeared to the respondents to be the key issues to be decided as:

> "1. What is the exact amount of the "basic consideration"?
> 2. Whether the "additional consideration" was only to be paid out of revenues from FIL, rather than from the proceeds of the sale of the franchisees."

[28] The identification of these two issues as the key issues represented a considerable reduction in the issues raised by the points of defence and cross claim. The second issue is raised patently as a construction issue from a perusal of the terms of clause 5 of the heads of agreement.

[29] The respondents' solicitors asserted that once these issues had been determined, the matter would become an accounting exercise and that the relevant books of account were held by the liquidator of FIL in Melbourne and that the respondents wished for their forensic accountant to have access to them to work out what moneys were received from the sale of franchisees and what moneys were paid to the applicants.

[30] At the review on 18 January 2002, the parties dealt with an interim award of which notice had been given to them by the arbitrator in respect of the question of outstanding costs. Both parties accepted the terms of the proposed interim award and it was made by the arbitrator on 18 January 2002. The arbitrator determined and directed by way of an interim award:

> "1. The respondent/cross applicants, Fishing Information Services Pty Ltd and Frederick Richard Heinze and Kahl Heinze pay the applicants Equitable Funds Management Limited and Francis Wright Wilkie, costs thrown away, assessed in the amount of $2,000 as a condition of the respondents and/or any of them requesting and being granted the right to have the scheduled ex parte hearing on the 8

August 2001 abandoned and the further right to fully contest and be heard on any future hearing of the applicants' claim and the respondents' cross-claim in this arbitration;

2. Costs of and incidental to the appearances on 17 August 2001, 31 August 2001 and 12 October 2001 be the applicants' costs in the cause."

[31] At this review hearing the respondents' representative made an application for an adjournment of the arbitration on the basis that had been foreshadowed in the preceding correspondence that the respondents wished to obtain the forensic accountant's report, after having access to the relevant records of FIL. That adjournment was opposed by the applicants. It was argued that the issue which the respondents now sought to pursue about whether the additional consideration was only to be paid out of revenues from FIL, rather than proceeds from the sale of franchisees had not been pleaded. (It can be noted, however, that it had always been an issue in the arbitration on the applicants' points of claim that the respondents had to account to the applicants for the additional consideration referred to in clauses 5.1(b) and 5.3 of the heads of agreement which was denied in the points of defence.) The arbitrator chose to set a date by which the respondents had to deliver any proposed amended pleading to raise the issue that had been foreshadowed. A further review was set for 25 January 2002.

[32] On 24 January 2002 the respondents' solicitors served on the applicants' solicitors a copy of the affidavit of Mr Frederick Heinze sworn on 22 January 2002. This was a lengthy affidavit comprising 189 paragraphs which was relevant to the matters in issue and made extensive references to the agreed bundle of documents.

[33] At the directions' hearing on 25 January 2002, it was foreshadowed that the respondents' case would be reduced to two issues of what, if any, of the basic consideration of some $137,000 has been paid or remains payable and what is the amount of the additional consideration, if any which would depend on whether the additional consideration must come out of revenues. The parties therefore proposed that an opportunity be given to the respondents to formalise the reduced scope of their case and that, if that were done, a new set of directions would be agreed upon. The parties also foreshadowed jointly obtaining an accounting report directed at these two issues based on an investigation of the records of FIL. As a result, the affidavit of Mr Frederick Heinze sworn on 22 January 2002 was not delivered to the arbitrator. The arbitrator expressly endorsed this course of not receiving the affidavit on the basis that, if he were provided with the affidavit, costs may be incurred unnecessarily, in view of the parties proposal to obtain an accountant's report.

[34] By letter sent on 31 January 2002 the respondents' solicitors set out the issues to which the respondents were prepared to limit the scope of the arbitration (if agreement could be reached on the appointment of a forensic accountant to undertake an accounting exercise on behalf of the parties) and a proposal for the appointment of such an accountant to conduct an examination of the documents held by the liquidator of FIL with a view to undertaking the accounting exercise which the respondents considered was required, as a result of the limitation of the issues. That letter invited a response from the applicants to confirm that the

accountant could be appointed on behalf of the parties to carryout the exercise proposed.

[35] There was a delay on the applicants' part in responding. The respondents' solicitors did not follow up the applicants for a response, as it appears that Carne & Herd ceased acting for the respondents in about May 2002. It appears that neither party took any steps in the arbitration, until a letter was sent from the applicants' solicitors to the respondents' solicitors dated 3 July 2002. That letter (which was responsive to the letter from the respondents' solicitors dated 31 January 2002) contained a draft referral letter to the accountant to conduct specified investigations on behalf of the parties and requested a response from the respondents' solicitors, as to whether the draft letter was in order, within 7 days. That was an inordinately short time in view of the lack of action by both parties preceding this letter.

[36] The applicants' solicitors sent follow up letters on 16 and 25 July 2002. On 25 July 2002 the applicants' solicitors were notified by Carne & Herd that they no longer acted for the respondents. The applicants' solicitors made a request to the arbitrator on 2 August 2002 that a date be set for further review and the making of directions.

[37] The arbitrator convened a further directions' hearing of the parties on 5 September 2002. Mr Frederick Heinze attended in person at that directions' hearing. Mr Heinze informed the arbitrator that his former solicitors had advised him that the proposed investigation by the accountant was going to cost him $30,000 to $40,000 and he indicated that he did not have the means to proceed with that. Mr Heinze also indicated that his former solicitors were exercising a lien over his file and that he did not have access to the documents which those solicitors held. Mr Heinze indicated that the previous address which he had notified as his address was no longer appropriate and requested that the address of 12 Exell Drive, Dandenong North be treated as his address for service, as that would be an appropriate address for at least 6 months. The directions' hearing was adjourned to 16 September 2002 to give the respondents an opportunity to comply with the interim award made on 18 January 2002 and pay the sum of $2,000 on account of the applicants' costs which was required, in order to enable the respondents to contest the applicants' claim.

[38] Subsequent to this directions' hearing, all post directed by the arbitrator or the applicants' solicitors showed the street address of Mr Frederick Heinze as "Excel" rather than "Exell".

[39] By letter dated 9 September 2002 sent by facsimile to Mr Frederick Heinze, the arbitrator provided Mr Heinze with a transcript of the hearing of 5 September 2002, a copy of the interim award dated 18 January 2002 and documents relating to the arbitrator's accounts. The arbitrator foreshadowed that at the hearing on 16 September 2002, he would be requesting both parties to place further funds in trust as security for costs.

[40] Before the hearing on 16 September 2002, the respondents had paid the sum of $2,000 for costs to the applicants, in accordance with the interim award made on 18 January 2002. Mr Frederick Heinze attended in person for the directions' hearing on 16 September 2002. Mr Heinze advised of two e-mail addresses at which he could be contacted and provided a new facsimile number. He indicated that he intended to approach Carne & Herd to act for him again. The arbitrator therefore

directed that the respondents advise by 4 October 2002, as to whether or not they had been able to arrange legal representation for the future conduct of the arbitration and that a further directions' hearing take place on 11 October 2002. The arbitrator directed that the applicants' evidence-in-chief be delivered by 28 October 2002 and that the respondents deliver the affidavits of their witnesses by 18 November 2002. The arbitrator also directed that any final affidavits on behalf of either party in reply be delivered by 29 November 2002.

[41] The arbitrator and the applicants' solicitors then did not receive any communication from the respondents prior to 11 October 2002. There was no appearance on behalf of the respondents at the directions' hearing on 11 October 2002. The arbitrator directed the applicants' solicitors to write to the respondents and tell them that unless they advised by 17 October 2002 that they intended to continue to contest the case and be represented in it, the applicants would be at liberty to arrange for a further directions' hearing at which directions would be made for procedural steps, so that the arbitration could proceed to hearing on an *ex parte* basis. By letter dated 14 October 2002 which was sent by express post and also by facsimile and e-mail to the facsimile number and e-mail addresses that were given by Mr Heinze at the directions' hearing on 16 September 2002, the applicants's solicitors, as requested by the arbitrator, referred to their understanding that Mr Heinze was making arrangements for payment of moneys outstanding by the respondents to the arbitrator and stated:

> "Mr Rose has directed that:
>
> 1. you Respondents individually or any solicitors that represent you are to advise ourselves on behalf of the Applicants (with a copy to Mr Rose) by no later than 4.00 pm on Thursday 17 October 2002 that you Respondents intend to continue to contest the matter and be represented in it;
>
> 2. if you do not do that then the Applicants will be at liberty to contact Mr Rose (via his assistant) to arrange for a further directions hearing at which directions may be sought by the Applicants to law *(sic)* down steps for the Applicants to further proceed against you Respondents on an ex parte basis."

[42] On 15 October 2002 the applicants' solicitors received an e-mail from Ms Sue Heinze (from Mr Frederick Heinze's e-mail address) acknowledging receipt of the e-mail sent on 14 October 2002 to Mr Frederick Heinze's e-mail address and stating:

> "I wish to advise that my father Fred Heinze has again been in hospital for the past 3+ weeks and has unergone *(sic)* further major surgery. I will see him later today and contact you again after speaking with him about your E-mail."

[43] On 17 October 2002 the applicants' solicitors received an e-mail from Ms Sue Heinze on behalf of Mr Frederick Heinze which advised that he took ill on returning from his last visit to Brisbane and had been unable to attend to matters about the arbitration. It also advised that the arbitration would be vigorously defended and that payment of the arbitrator's fees would be made. It advised that Mr Heinze

expected to be allowed out of hospital the following week and would make contact at that time.

[44] As the applicants' solicitors had not heard anything further from the respondents by 20 November 2002, the applicants' solicitors sent an e-mail to the arbitrator requesting a date for a further review of the arbitration at which the applicants would be seeking directions that the matter proceed to an *ex parte* hearing (subject to the usual appropriate and proper notifications being given to both respondents) and to set procedures for getting the matter heard on that *ex parte* basis. The applicants' solicitors sent a copy of that letter to Mr Frederick Heinze by ordinary post, facsimile and e-mail and a copy of the letter to Mr Kahl Heinze at his address last known to the applicants at Berwick in Victoria. The e-mail sent to Mr Frederick Heinze was at the e-mail address from which a response had been received in October 2002 from Ms Sue Heinze.

[45] The applicants' solicitors did not receive any response from the respondents to the copies of the applicants' solicitors' letter of 20 November 2002. A directions' hearing was set for 29 November 2002, in view of the failure of the respondents to respond to the advice from the applicants' solicitors that they were seeking to obtain such a date. Notice was given to the respondents of the time and date of that directions' hearing by an e-mail sent to Mr Frederick Heinze at the address from which the responses on behalf of Mr Heinze had been despatched in October 2002.

[46] At the hearing on 29 November 2002, the applicants' solicitor indicated that although he had foreshadowed that he was going to seek directions on an *ex parte* basis, on reflection he considered that was not strictly procedurally correct and sought an order that the arbitration be set down for a hearing at which he would be seeking an order that the points of defence of the respondents be struck out and that, subject to any issues of proof, the matter proceed to the granting of an award or decision by the arbitrator.

[47] The arbitrator set the matter down for hearing on 18 December 2002. The arbitrator directed that the applicants deliver any affidavits on which they intended to rely in support of any application they wished to make at that hearing by 9 December 2002. The arbitrator directed that if the respondent sought to be heard at the hearing on 18 December 2002, they pay any outstanding fees or other costs by 9 December 2002. The arbitrator foreshadowed that if the respondents wished to participate in a contested hearing, they would be required to pay within 7 days of the grant of leave to do so one-half of the security for costs of the further hearing. The arbitrator directed that if the respondents intended to appear at the hearing on 18 December 2002, they deliver by 16 December 2002 any affidavits in support of any application which they may intend to make on 18 December 2002.

[48] On 29 November 2002 the applicants' solicitors sent a letter to Mr Frederick Heinze by post and also by facsimile and e-mail and sent a copy of that letter by post to Mr Kahl Heinze at the Berwick address. That letter summarised the directions made by the arbitrator at the hearing on 29 November 2002. That letter also advised that at that directions' hearing, the applicants' solicitors told the arbitrator of their instructions to make an application to have the respondents' points of defence struck out and for leave to be given to the applicants to have the matter determined on the same day in default of a defence. On 2 December 2002 the arbitrator's assistant forwarded by e-mail to the applicants' solicitors a transcript of the directions'

hearing held on 29 November 2002. That e-mail showed that a copy of it had been sent to the e-mail address of Mr Frederick Heinze.

[49] The applicants obtained an affidavit from accountant Mr AR Ashford who was the liquidator of Equitable sworn on 6 December 2002 deposing to the fact that as of that date Equitable had not received payment of "the whole or any part of the balance of the basic consideration or the additional consideration or any interest on any of those monies as deposed to in the affidavit of Francis Wright Wilkie to be filed herein on behalf of the Applicants". The other affidavit relied on by the applicants was of Mr Wilkie sworn on 9 December 2002.

[50] Copies of these affidavits were forwarded by post by the applicants' solicitors to the Berwick address of Mr Kahl Heinze and by express post to Mr Frederick Heinze's address. In addition, the applicants' solicitors sent the letter and enclosures by e-mail and facsimile to the e-mail address and the facsimile number that had been given by Mr Frederick Heinze at the hearing on 16 September 2002. These affidavits were delivered by the applicants' solicitors to the arbitrator on 9 December 2002.

[51] On 17 December 2002 Mr Frederick Heinze sent an e-mail to the arbitrator which was copied to the applicants' solicitors which came from the other e-mail address which he had given on 16 September 2002. That e-mail stated that it was not until 17 December 2002 that Mr Heinze had the opportunity to get direct access to send e-mail. He stated that he had only gained enough strength and composure to address the matter as of that day. He indicated an intention to defend the claims and stated that his continuing ill health and inability to pay Carne & Herd had prevented his active participation in the process. Mr Heinze stated that it was impossible for him to provide the information and respond to the material sent by the applicants' solicitors by the date of 18 December 2002 and requested an extension of time. He also requested confirmation of the exact amount that was owed by the respondents to the arbitrator.

[52] About half an hour prior to the scheduled commencement time of the directions' hearing on 18 December 2002, the applicants' solicitors sent to the e-mail address of Mr Frederick Heinze from which he had sent the e-mail the previous day the written submissions which the applicants proposed to put to the arbitrator at the directions' hearing and the affidavit of Mr Philp that the applicants intended relying on before the arbitrator on 18 December 2002.

[53] The hearing on 18 December 2002 was due to commence at 10am. When it started at 10.11am, Mr Frederick Heinze had neither telephoned the arbitrator nor appeared at the hearing. The solicitor for the applicants had commenced submissions when Mr Heinze telephoned the arbitrator. The hearing then proceeded with Mr Heinze being present on the telephone. Not surprisingly, Mr Heinze indicated that he had not received the written submissions and affidavit sent by e-mail earlier that morning to him by the applicants' solicitors. The arbitrator indicated to Mr Heinze that the applicants' solicitors were seeking to rely on the affidavit of Mr Philp and the written submissions to support a request to the arbitrator to proceed on an *ex parte* basis.

[54] Mr Heinze informed the arbitrator that the respondents needed additional time to provide their affidavits and that his health had not enabled him to be in a position to

get the necessary information to the arbitrator. Mr Heinze stated that he paid the necessary fees to the arbitrator yesterday and requested additional time to respond and defend the matter. The arbitrator informed Mr Heinze that he required objective material by way of appropriate medical evidence and the like as to the reasons for the failure of the respondents to participate adequately in the arbitration since September 2002. Despite what Mr Heinze asserted about having made payment of the fees outstanding to the arbitrator, the arbitrator subsequently ascertained that payment of the sum claimed of $2,762.53 had not been made.

[55] Mr Heinze remained on the telephone whilst the solicitor for the applicants made submissions as to why the defence of the respondent should be struck out and awards made in the applicants' favour. Mr Heinze then made submissions which the arbitrator characterised as seeking the right to be heard in response to the applicants' request that the arbitrator proceed *ex parte* and that the matter be adjourned to enable a hearing in the future on the merits.

[56] The arbitrator decided to allow the respondents further time to put in evidence to persuade the arbitrator to give leave to the respondents to continue to be heard in the matter. The arbitrator directed that the respondents file and serve any material on which they intended to rely to oppose the request of the applicants that the arbitrator proceed on an *ex parte* basis by 5pm on 24 December 2002. The arbitrator directed that any material which the applicants wished to file in response be served on the respondents on or before 3 January 2003. The arbitrator explained to Mr Heinze that the timetable was to accommodate the fact that the solicitor for the applicants would be on leave after 3 January 2003 and he wished to have put in the applicants' response before going on leave. The arbitrator then stated:

> "That will enable me to consider the mater after the 13th January when I return to the office and if need be, I will convene a further directions hearing in the matter and I may even do that today yet to consider the matter then."

[57] In the evening of 18 December 2002 the arbitrator sent the transcript of the directions' hearing held that day by e-mail to Mr Frederick Heinze. At 3.34pm on 24 December 2002 Mr Frederick Heinze e-mailed to the arbitrator and the applicants' solicitors unsworn affidavits in the names respectively of Mr Kahl Heinze and himself. Mr Frederick Heinze's unsworn affidavit was in general terms, comprised 10 short paragraphs and reiterated many of the assertions that had been made by Mr Heinze at the directions' hearing on 18 December 2002. Mr Heinze also forwarded by e-mail a letter which had been provided to him by his doctor by e-mail who he stated was on holidays interstate and relevantly stated:

> "This patient has been suffering from a chronic illness with periods of exacerbation. Since September he developed another exacerbation of his medical condition preventing him from performing his regular duties at full capacity."

This medical certificate was in similar terms to that which Dr Szatsznajder had provided to Mr Frederick Heinze on 11 October 2001 which had been forwarded at that time by the respondents' then solicitors to the applicants' solicitors.

[58] The unsworn affidavit in the name of Mr Kahl Heinze was similarly short and in general terms. It showed his address at Narre Warren.

[59] The covering e-mail from Mr Heinze explained that the affidavits had not been sworn, because Mr Heinze had been unable to locate a relevant witness. Although Mr Heinze stated that the affidavits would be sworn as soon as possible and forwarded to the arbitrator with a signed copy of the doctor's letter, that was not done.

[60] The applicants' solicitors prepared reply submissions dated 3 January 2003 which they forwarded by post to each of the respondents and by facsimile and e-mail to Mr Frederick Heinze. The applicants were urging the arbitrator to grant their application and proceed *ex parte* against the respondents.

[61] By letter dated 7 February 2003 to the parties (which letter shows on its face was also sent by e-mail to each of the parties) the arbitrator forwarded his determination on the *ex parte* hearing request which was dated 7 February 2003 ("the February determination") and an account for outstanding fees. The arbitrator concluded the February determination in the following terms:

> "In the circumstances, I do not consider that the respondents have complied with my directions made on 29 November 2002 and on 18 December 2002 and they have not otherwise persuaded me by credible evidence as to why they should be granted a further indulgence to participate in and defend the arbitration. I accordingly consider it proper to accede to the applicants' request to now proceed ex parte to determine the matter in accordance with the written submissions put forward by them on their clients' behalf on 18 December 2002 and reiterated and supplemented in their submissions on 3 January 2003 and any final submissions they may now make.
>
> This I will proceed to do by way of formal award, which, subject to payment of all outstanding fees (including this determination and the writing of the award) I will then publish."

[62] In the letter dated 7 February 2003 directed to the parties, the arbitrator stated:

> "Subject to any further written or oral submissions from the Applicants' concerning costs (as foreshadowed at the end of their written submissions presented on 18 December 2002) and subject to clarification by the Applicants of the specific relief sought concerning the 'further consideration' as claimed in their affidavit material as compared to the relief sought on this aspect in the Point of Claim of 15 April 1999, I expect to be able to determine the matter on an ex parte basis this month.
>
> In that regard, I also invite submissions from the Applicants concerning the disposal of the cross claim."

[63] The applicants' solicitors sent a letter dated 11 February 2003 to the arbitrator requesting him to expand on what he wanted the applicants to address regarding the "further consideration" claim. The applicants' solicitors sent a copy of that letter by post to the respondents. The arbitrator responded to the applicants' solicitors by letter dated 11 February 2003 which was posted to both parties and also sent by e-mail. The applicants' solicitors responded to the arbitrator's letter of 11 February 2003 by letter dated 21 March 2003. The applicants' solicitors on the same day sent a copy of that letter to each of the respondents by post and also to Mr Frederick

Heinze by facsimile and by e-mail. By an e-mail sent on 25 March 2003 the arbitrator requested the applicants' solicitors to provide an affidavit of service on the respondents in respect of the affidavits and submissions relied on by the applicants on 18 December 2002. That affidavit was provided by the applicants' solicitors to the arbitrator on 25 March 2003 and a copy was sent to Mr Karl Heinze by post and to Mr Frederick Heinze by facsimile.

[64] The applicants' solicitors received an e-mail from the arbitrator on 9 April 2003 advising that he would publish his final award as at 31 March 2003 upon payment of the outstanding fees of $961.95 owed by the applicants and $8,510.50 owed by the respondents. The applicants negotiated with the arbitrator about release of the final award, pending payment by the respondents of their share of the fees. Those fees were ultimately paid by the applicants on 27 June 2003 and the final award was collected by the applicants' solicitors from the arbitrator on that date. The applicants' solicitors forwarded a copy of the final award by post on 30 June 2003 to the addresses which they had been using for each of the respondents.

[65] In the final award, the arbitrator struck out the respondents' points of defence and cross claim and ordered that the final hearing proceed on an *ex parte* basis as and though the respondents had not defended it. The arbitrator awarded to the applicant against the respondents the sum of $137,638.19 as the balance of the basic consideration owing, interest on that sum to 31 March 2003 of $74,709.02, the sum of $600,000 as the additional consideration owing, interest on that sum of $600,000 to 31 March 2003 of $233,753.06, costs and interest on the total debt of $1,046,100.27 at 9% per annum until paid.

[66] After Mr Kahl Heinze had been served with the originating application, the respondents engaged Madgwicks to act on their behalf.

**Legislation**

[67] Part 3 of the Act governs conduct of arbitration proceedings. Section 14 of the Act provides:

> "**14.** Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit."

[68] Section 18(3) of the Act provides:

> "**(3)** If a party to an arbitration agreement-
>
> (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or by the arbitrator or umpire to do so; or
>
> (b) fails within the time specified by the arbitrator or umpire or, if no time is so specified, within a reasonable time to comply with a requirement of the arbitrator or umpire;
>
> the arbitrator or umpire may continue with the arbitration proceedings in default of appearance or any other act by the party if in similar proceedings before the Supreme Court the Supreme Court could in the event of such a default continue with the proceedings."

[69] Section 42 of the Act provides:

"**42.(1)** Where-

(a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
(b) the arbitration or award has been improperly procured;

the court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.

**(2)** Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the court may set aside that part of the award if it can do so without materially affecting the remaining part of the award.

**(3)** Where an application is made under this section to set aside an award, the court may order that any money made payable by the award shall be paid into court or otherwise secured pending the determination of the application."

[70] The term "misconduct" is defined in s 14 of the Act as including "corruption, fraud, partiality, bias and a breach of the rules of natural justice".

**Respondents' material**

[71] In support of their application in this proceeding, the respondents relied on the affidavits of each of them and the affidavit of Dr Szatsznajder.

[72] Mr Karl Heinze's affidavit shows his address as being the Narre Warren address. He states that he did not become aware of the arbitrator's award, until he saw it attached to the originating application that was served on him on 10 August 2003. He states that he had not been personally served nor mailed any documentation in relation to the arbitration process, save for some correspondence in or around May 2003 which he had forwarded to his father who was handling all matters to do with the arbitration on his behalf.

[73] Mr Frederick Heinze's affidavit shows his address at Exell Drive. He states that he was not served with the originating application, but learned of it from his son. He states that he did not receive a copy of the letter and further submissions prepared by the applicants' solicitors and sent in January 2003. Paragraph 4 of his affidavit states:

"I was not notified that any further steps had been taken since I sent the unsworn affidavit and the doctor's letter to the arbitrator. In particular, I was never told those documents were not sufficient for the arbitrator, nor that I would not be granted further time in which to put material before the arbitrator on the substantive issues in the arbitration, nor that a hearing would take place in my absence. I was not surprised that I heard nothing further from the arbitrator between sending those documents to him and receiving the applicant's application. There had previously been periods during the arbitration when there was no contact for a long time."

Mr Frederick Heinze's affidavit then deals with the substantive matters which were in issue in the arbitration in a relatively detailed way.

[74] Neither of the respondents were required for cross-examination at the hearing on 13 October 2003. In view of the number of pieces of correspondence that were despatched by either the arbitrator or the applicants' solicitors to each of the respondents after 24 December 2002, it is difficult to understand why the only correspondence that was received was that which Mr Kahl Heinze could recall receiving in about May 2003.

[75] There is some substance in Mr Frederick Heinze's explanation of lack of surprise if there were no communication received by the respondents from the arbitrator or the applicants' solicitors between 24 December 2002 and the service of the application on Mr Kahl Heinze on 10 August 2003, when there had, in fact, been lengthy periods during the arbitration when no step was taken by the applicants and one such period had occurred as recently as between the despatch of the respondents' solicitors letter on 31 January 2002 and the reply from the applicants' solicitors on 3 July 2002.

[76] Dr Szatsznajder in his affidavit expands on the medical problems which had affected Mr Heinze from 1999. Apart from being treated for malignant bowel tumour in 1999, Mr Heinze suffered a severe emotional and mental distress which was exacerbated by the suicide of his son, Adam in October 2000. During 2000 and 2001, Dr Szatsznajder stated that Mr Heinze experienced periodic improvements in his depressive illness followed by periods of deteriorations. Dr Szatsznajder states that during 2002 Mr Heinze still experienced periods of depression, most notably in February and April 2002 and suffered symptoms which were likely to be a manifestation of the depression and stress related symptoms in September and October 2002. Mr Heinze presented in December 2002 with recurring symptoms of stress. Mr Heinze was still complaining of regular headaches in January 2003 and gradually began his recovery from early 2003 onwards. Dr Szatsznajder states that Mr Heinze's general coping mechanism has now improved, allowing him to return to normal functioning.

**Respondents' arguments for setting aside award**

[77] It is submitted on behalf of the respondents that the arbitrator misconducted the arbitration:

(a) by determining on 18 December 2002 that the respondents had no right to be heard in the final hearing without his leave;

(b) after making the February determination, by proceeding to decide the issues without a final hearing and without giving the respondents an opportunity to cross examine the applicants' witnesses or make submissions about the applicants' claims; and

(c) by striking out the respondents' points of defence and cross claim when the arbitrator was on notice as of 24 December 2002 that the respondents still wished to defend the applicants' claims and that Mr Frederick Heinze had prepared a significant affidavit relating to the merits of the defence in January 2002 which the arbitrator had previously not received as a cost saving measure for the parties at that time.

[78] Despite each of the respondents swearing to non-receipt of documents in connection with the arbitration (other the documents Mr Kahl Heinze recalls receiving in or around May 2003), it is difficult to accept in the light of the other evidence of the various means by which communications were made by the arbitrator and the applicants' solicitors after 24 December 2002, that none of those documents were received by the respondents. The making of findings on this aspect is complicated by the failure of the applicants to require the respondents for cross-examination. Mr Barlow of counsel for the respondents, however, was prepared to make submissions on the basis even if it were found that the respondents had received the February determination, it was not readily apparent from the February determination or the covering letter of 7 February 2003 that there was not going to be a final hearing, particularly when these documents are considered in the light of the arbitrator's statement at the directions' hearing on 18 December 2002 that he may convene another directions' hearing after receiving the material that was directed to be delivered at that hearing. The February determination referred to the arbitrator considering that it was proper to proceed *ex parte* to determine the matter in accordance with the applicants' submissions made on 18 December 2002 and 3 January 2003 "and any final submissions they may now make". The covering letter is equally unclear about whether there will be a final hearing with the arbitrator making the statement that "I expect to be able to determine the matter on an ex parte basis this month". In any case, Mr Barlow submitted that the arbitrator erred by limiting the invitation to make submissions in that letter of 7 February 2003 to the applicants only.

**Decision**

[79] Although the arbitrator is given a wide discretion under s 14 of the Act in determining the procedure of the arbitration, it is a fundamental right of a party to an arbitration to have a right to be present at any hearing and a reasonable opportunity to put forward the party's own case to the arbitrator, both as to argument and to evidence: Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed) at pp 304-312.

[80] An arbitration cannot be frustrated by the failure of a party to attend or cooperate in the process: s 37 of the Act. Section 18(3) of the Act confers specific power on the arbitrator to continue with the arbitration in default of appearance or any other act of the party, when the party has been notified of the hearing and failed to attend or failed within a reasonable time to comply with a requirement of the arbitrator.

[81] The directions that were made on 18 December 2002 were not in exercise of the arbitrator's powers under s 18(3) of the Act. Instead of setting a date in the future at which the arbitrator would proceed to hear the matter (where the arbitrator would have been justified in proceeding with the hearing, if the respondents had not appeared or delivered affidavits if they had been ordered to deliver them), the arbitrator decided to determine whether the respondents could still participate in the arbitration. As at 18 December 2002 the respondents were still parties to the arbitration. That carried with it the right to be heard. The procedure that was devised by the arbitrator in the directions given on 18 December 2002 incorrectly proceeded on the basis that the respondents no longer had a right to be heard unless leave were obtained from the arbitrator.

[82] There is no doubt that there is power of an arbitrator to proceed *ex parte* in the sense of proceeding in the absence of a party who fails to appear at the notified time and date for hearing. This was referred to by O'Brien J in *Benedetti v Sasvary* [1967] 2 NSWR 792, 799:

> "Furthermore, every arbitrator is authorized by the nature of his office to proceed *ex parte* for good cause and the arbitrator is to judge for himself of the discretion of exercising this power although of course, the case for doing so must be strong (*Gladwin v. Chilcote* (1841), 9 Dowl. 550). He has the power to give a peremptory appointment for the hearing of the reference and in the case of default of appearance of either party, to proceed with the reference in his absence (see *Russell, supra*, at pp. 169 and 170 and the cases there cited)."

[83] The applicants rely on the history of the arbitration as supporting the decision of the arbitrator to proceed in the manner which he determined by the directions which he made on 18 December 2002 which resulted in the February determination. The history of the arbitration which I have set out in these reasons would bear out the frustration that both the applicants and the arbitrator must have felt with the respondents at various times throughout the process. The illness of Mr Frederick Heinze who was carrying the conduct of the case on behalf of the respondents (both during the times when there was no legal representation and when there was legal representation) may provide some explanation for some of the delays. In addition not all the delays were due solely to the respondents.

[84] It is also very relevant that the applicants' solicitors were in possession of a copy of the affidavit of Mr Frederick Heinze sworn on 22 January 2002 that went to the substance of the matters in issue in the arbitration in a detailed way and that the arbitrator was aware of the existence of that affidavit. Coupled with the assertions made on behalf of the respondents as late as 24 December 2002 that they wished to vigorously defend the applicants' claims, the arbitrator erred in proceeding to determine the applicants' claims without regard to this material and without setting a date for hearing at which the respondents could seek to rely on that material.

[85] In the sense in which "misconduct" is used in s 42 of the Act, the arbitrator misconducted the arbitration as from 18 December 2002 by failing to give the respondents an opportunity to be heard on the substantive issues of the arbitration.

[86] The court has a discretion whether or not to set aside the award, even if there is a finding that the arbitrator has misconducted the proceedings. Although there is a lot which can be criticised about the respondents' conduct throughout the arbitration and there are patent deficiencies in their explanations for not taking any step after 24 December 2002 in connection with the arbitration, in view of the size of the award against the respondents and that they have provided material during the course of the arbitration directed to the merits of the applicants' claims, the respondents should be given an opportunity to be heard in respect of the issues which are the subject of the arbitration. The award must be set aside.

[87] The applicants sought that if the award were set aside, it be done on conditions. It is appropriate that the respondents reimburse the applicants for the payment of the respondents' share of the arbitrator's fees which were paid by the applicants on 27 June 2003. It is also sought by the applicants that the amount of the award should

be paid into court pending the determination of the arbitration. In view of the fact that the respondents wish to defend the applicants' claims, I do not accept that it is an appropriate condition to require the full amount of what was awarded by the arbitrator to be paid into court in the interim.

[88] As the award will be set aside under s 42 of the Act, it is not necessary to consider the alternative relief sought by the respondents under s 38 of the Act.

**Orders**

[89] It follows that the orders which should be made are:
Subject to the respondents paying to the applicants on or before 13 November 2003 the sum of $8,510.50 by way of reimbursement of that amount paid by the applicants to the arbitrator, Mr KW Rose, in respect of the respondents' share of the costs of the arbitration, it is ordered that:

1. The final award of the arbitrator dated 31 March 2003 be set aside wholly.
2. The matters the subject of the arbitration be remitted to the arbitrator for reconsideration.
3. The originating application be dismissed.

[90] I will hear submissions on costs.