

# SUPREME COURT OF QUEENSLAND

CITATION: *AMCI Investments P/L v Rio Doce Australia P/L* [2008] QCA 387

PARTIES: **AMCI INVESTMENTS PTY LTD**  
ACN 112 315 661  
(applicant/appellant)  
**v**  
**RIO DOCE AUSTRALIA PTY LTD**  
ACN 112 797 403  
(respondent)

FILE NO/S: Appeal No 8359 of 2008  
SC No 7915 of 2008

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 4 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2008

JUDGES: McMurdo P, Mackenzie AJA and Cullinane J  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs to be assessed**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – contract for the sale of approximately half the companies in a company group together with certain assets and liabilities – vendor to have access to documents and personnel of the companies sold under the contract after completion for "any actual or threatened legal or administrative proceedings or inquiry by any Governmental Agency" – relevance of other terms of the contract – circumstances under which commercial parties would expect to access documents and personnel of companies sold – whether the words "by any Governmental Agency" qualified "legal or administrative proceeding" as well as "inquiry"

*Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23; [1953] HCA 52, considered  
*Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99; [1973] HCA 36, applied

*Browne v Commissioner of Taxation* (1998) 82 FCR 1, considered  
*Chalmers Leask Underwriting Agencies v Mayne Nickless Ltd* (1983) 155 CLR 279; [1983] HCA 20, considered  
*Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310, applied  
*McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65, applied  
*Norco Co-operative Ltd v Parmalat Australia Ltd & Ors* [2006] QSC 038, applied  
*Parmalat Australia Ltd v Norco Co-operative Ltd* [\[2006\] QCA 118](#), applied  
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52, applied  
*Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17, applied  
*Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530; [2004] HCA 56, applied

COUNSEL: J D McKenna SC, with A M Pomerence, for the applicant/appellant  
R W Gotterson QC, with C A Wilkins, for the respondent

SOLICITORS: Freehills for the applicant/appellant  
Blake Dawson acting as Town Agent for Baker & McKenzie for the respondent

- [1] **McMURDO P:** These are my reasons for dismissing the appeal.

**The background to this appeal**

- [2] Before 2007, the appellant, AMCI Investments Pty Ltd ("AMCI Investments"), was at the head of a corporate group of about 45 companies involved, directly or indirectly, in coal mining ventures in Queensland and New South Wales. On 24 February 2007, AMCI Investments entered into a moderately complex share sale agreement with the respondent, Rio Doce Australia Pty Ltd ("RDA"). In essence, the agreement restructured the group by dividing it into two parts. AMCI Investments retained control of some companies in its group<sup>1</sup> together with particular assets and liabilities. The remainder of its group companies<sup>2</sup> were divested through a sale of AMCI Investments' shares to RDA.<sup>3</sup> Another company, Companhia Vale do Rio Doce, guaranteed RDA's obligations under the agreement. At the centre of this appeal is the construction of cl 11.2 of the agreement.
- [3] On 9 July 2008, RDA and others commenced proceedings against AMCI Investments and another, alleging that the agreement had been induced by misleading or deceptive conduct concerning certain contracts for the supply of coal, and other matters.
- [4] On 12 August 2008, AMCI Investments wrote to RDA seeking access to and the ability to copy documents and records which it had handed over to RDA under

<sup>1</sup> Listed in sch 2 to the agreement.

<sup>2</sup> Listed in sch 1 to the agreement.

<sup>3</sup> Clause 3 of the agreement.

cl 9.5(c) of the agreement. AMCI Investments contended that it was entitled to this under cl 11.2(b) of that agreement. RDA refused to accede to AMCI Investments' request, disputing AMCI Investments' construction of cl 11.2(b).

- [5] On 15 August 2008 AMCI Investments applied to a judge of the Trial Division of this Court for a declaration in terms of what it claimed was the proper construction of cl 11.2. The judge dismissed AMCI Investments' application with costs, preferring the construction of cl 11.2 advanced by RDA. AMCI Investments appeals from that decision.

### **The relevant terms of the agreement**

- [6] The terms of the agreement primarily relied on by the parties in their submissions in this appeal are as follows.
- [7] Under cl 6, AMCI Investments warrants that each of the warranties<sup>4</sup> is materially correct. Clause 6.5(a) provides:

#### **"6.5 Conditions of payment and Claims for breach**

Despite any other provision of this Agreement each of the following applies in respect of this Agreement.

- (a) **(Notice of Claims)** [AMCI Investments] is not liable to make any payment (whether by way of damages or otherwise) for any breach of any Warranty unless a Warranty Claim is made in writing by [RDA] (setting out full details including details of the fact, circumstance or matter giving rise to the breach, the nature of the breach and [RDA's] calculation of the loss suffered) as soon as reasonably practicable after [RDA] becomes aware of the fact, circumstance or matter on which the Warranty Claim is based and, in any event, on or before the date which is two years after the FRC Completion Date.

...

### **6.9 Dealing with Warranty breach after Completion**

If [RDA] becomes aware after Completion of any fact, circumstance or matter which constitutes or could (whether alone or with any other possible fact, circumstance or matter) constitute a breach of any Warranty, including a Third Party Claim, [RDA] must do each of the following:

- (a) as soon as possible, give [AMCI Investments] full details including details (including material documents) of the fact, circumstance or matter giving rise to the breach (or possible breach), the nature of the breach and, to the extent possible, [RDA's] calculation of the loss suffered or likely to be suffered;
- (b) not make, and procure that no member of the [RDA] Group makes, any admission of Liability, agreement or

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<sup>4</sup> Listed in sch 7 to the agreement and, most relevantly, see item 70 set out at [18] of these reasons.

- compromise with any person in relation to any such fact, circumstance or matter without first consulting with and obtaining the approval of [AMCI Investments].
- (c) in respect of a breach (or possible breach) other than a Third Party Claim, take, and procure that each member of the [RDA] Group takes, reasonable steps to mitigate any loss which may give rise to a Liability of [AMCI Investments] under any Warranty;
  - (d) in respect of Third Party Claims, provided that [AMCI Investments] acknowledges its liability to [RDA] for breach of the relevant Warranty should the Third Party Claim be successful:
    - (i) give, and procure that each member of the [RDA] Group gives, to [AMCI Investments] (at [AMCI Investments]' cost and expense and with the right to select its own counsel) joint conduct and control of all action taken by the [RDA] Group to defend that Third Party Claim (unless the Claim is covered by insurance, in which case, the defence may be conducted by the insurer);
    - (ii) at [AMCI Investments]' expense, give and procure that each member of the [RDA] Group gives, all assistance that [AMCI Investments] may reasonably require in relation to any action taken or proposed to be taken by [AMCI Investments] to defend a Third Party Claim, including by giving [AMCI Investments] and its Representatives reasonable access to:
      - (A) the personnel and premises of the [RDA] Group; and
      - (B) relevant chattels, accounts, documents and records within the possession, custody or power of the [RDA] Group, to enable [AMCI Investments] and its Representatives to examine the personnel, premises, chattels, accounts, documents and records and to take copies or photographs of them; and
    - (iii) at [AMCI Investments]' expense, take, and procure that each member of the [RDA] Group takes reasonable steps to mitigate any loss arising in connection with the Third Party Claim, and all action in good faith and with due diligence as [AMCI Investments] may request to avoid, remedy or mitigate any loss arising in connection with the Third Party Claim, including legal proceedings and disputing, defending, appealing or compromising any Third Party Claim and any adjudication of it."

[8] Clause 7 of the agreement deals with AMCI Investments' obligations prior to the completion date and relevantly provides:

#### **"7.4 Access**

Subject to clause 7.5, prior to Completion, [AMCI Investments] must give [RDA] and its Representatives during normal business hours, reasonable access to:

- (a) any premises from which the business of the Company Group is conducted for the purpose of viewing the manner in which the business is conducted, accompanied by a Representative of [AMCI Investments]; and
- (b) all books of account, books, records, contracts, commitments and property of or relating to the Company Group as [RDA] may reasonably request.

#### **7.5 Conditions of Access**

[RDA] may only exercise its right of access under clause 7.4 if:

- (a) [RDA] has provided [AMCI Investments] with reasonable prior notice of the access that [RDA] requires (including the identity of the Representatives who are to exercise that right of access on behalf of [RDA]);
- (b) the access will not, in the reasonable opinion of [AMCI Investments], interfere with the conduct of the business of the Company Group; and
- (c) [RDA] agrees to comply with [AMCI Investments'] reasonable requirements and directions in relation to that access.

Any exercise of the right of access under clause 7.4 by [RDA] or any of its representatives is at the risk of [RDA]."

- [9] Clause 9.5 concerns AMCI Investments' obligations on completion of the agreement. It relevantly provides:

#### **"9.5 Obligations of [AMCI Investments] on Completion**

On or before Completion [AMCI Investments] must:

...

- (c) subject to clause 11.1 deliver to (or at the direction of) [RDA] the minute books, statutory books and registers, books of account, annual statements, corporate key number assigned by ASIC, trading and financial records, copies of Returns and other documents and papers, and any common seal, duplicate seal or official seal, of each Group Member, other than documents containing strategic or planning information relating to the Vendors, members of the AMCI Vendor Group other than the Company Group, and members of the FRC Group, other than the Note Holder;

...

#### **9.6 Obligations of Purchaser on Completion**

On or before Completion [RDA] must:

- (a) pay or put the Company in funds to pay and procure that the Company Group repays all Inter Company Payables;
- (b) deliver to [AMCI Investments] the duly executed counterparts of the instruments of transfer of the AMCI Shares referred to in clause 9.5(f); and
- (c) do, execute and deliver all other acts and documents that this Agreement or any other Transaction Documents require [RDA] to do, execute or deliver at Completion."

[10] The agreement seeks to keep some of AMCI Investments' contracts with third parties which are not strictly retained by it under the agreement within the control of the AMCI Investments group of companies. The agreement refers to these contracts as "Excluded Assets".<sup>5</sup> Under cl 10, these contracts are to be novated in favour of AMCI Investments' nominee, where possible. Where this is not possible, the party to each contract is to hold the contract on trust for AMCI Investments' nominee for 12 months from the "Completion Date", when other provisions of cl 10.2 (which have no present relevance) are to come into effect.

[11] The clause central to this appeal, cl 11, is headed "Access to Records" and is in these terms:

**"11.1 Copies of records**

[AMCI Investments] may take, and keep after Completion, copies of documents and records referred to in clause 9.5(c) relating to Taxes and Duties in connection with and Returns of, [AMCI Investments] and Group Members.

**11.2 Access to records after Completion**

Without limiting any other rights of [AMCI Investments] under any Transaction Document, from Completion [RDA] must allow [AMCI Investments] and their Representatives access to (and, in relation to documents, where reasonably necessary, to take copies of), and, if required by [RDA], in the company of a Representative of [RDA], during normal business hours on reasonable prior notice, [RDA Group] personnel and the documents and records delivered by [AMCI Investments] to [RDA] under clause 9.5(c) for the purpose of [AMCI Investments] and the Note Holder using those documents and records in connection with:

- (a) the review of any Return, or responding or complying with any Tax or Duty Audit;
- (b) any actual or threatened legal or administrative proceedings or inquiry by any Governmental Agency;
- (c) the preparation or audit of any financial information or accounts which [AMCI Investments] are required to prepare pursuant to any applicable law; and
- (d) any insurance claims made by any member of AMCI Vendor Group or the FRC Group in relation to the Company Group in respect of events occurring before Completion."

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<sup>5</sup> Listed in sch 4 to the agreement.

- [12] The term "Governmental Agency" is defined in the agreement as meaning "a government or a governmental, semi-governmental, or judicial entity or authority". It also includes a self-regulatory organisation established under statute or a stock exchange."<sup>6</sup>
- [13] The terms "legal proceedings", "administrative proceedings" and "inquiry" are not defined in the agreement.
- [14] The term "Representatives" is defined<sup>7</sup> as:  
 "in relation to a person, its:  
 (a) Officers, employees and agents;  
 (b) legal, accounting, financial, technical and other professional advisers and consultants, including industry consultants;  
 (c) financiers; and  
 (d) any other person acting on behalf of that person in relation to a transaction contemplated by the Transaction Documents."
- [15] The term "Purchaser Group" is defined<sup>8</sup> as:  
 "[RDA] and its respective Related Bodies Corporate (including the Note Holder after FRC Completion and Group Members after Completion)."
- [16] Clause 12 is headed "Confidentiality". Clause 12.3 provides:  
**"12.3 Exceptions**  
 A party may make any disclosures in relation to this Agreement as it thinks necessary to:  
 (a) its professional advisers, insurers, bankers, financial advisers and financiers, if those persons undertake to keep information disclosed confidential;  
 (b) comply with any applicable law or requirement of any Governmental Agency;  
 (c) any of its employees or employees of any member of the [AMCI Investments] Group, the FRC Vendor Group and the [RDA] Group to whom it is necessary to disclose the information if that employee undertakes to keep the information confidential; and  
 (d) any member of the [AMCI Investments] Group and the FRC Vendor Group."
- [17] Clause 15 relevantly provides:  
**"15. Taxation**  
 ...  
**15.2 Control of Returns**  
 (a) [AMCI Investments] will, at its own cost and expense, have the conduct and control of:

<sup>6</sup> Clause 1.1 of the agreement.

<sup>7</sup> Clause 1.1 of the agreement.

<sup>8</sup> Clause 1.1 of the agreement.

- (i) the preparation and filing of all Returns of [AMCI Investments], both in its own right and as the head company of an [AMCI Investments] Consolidated Group, and Group Members for Tax Periods ending before the Completion Date (*Pre-Completion Returns*), and
- (ii) the preparation and filing of all Returns of [AMCI Investments], both in its own right and as the head company of an [AMCI Investments] Consolidated Group, and Group Members for Tax Periods commencing before but ending after the Completion Date (*Straddle Returns*), to the extent such Straddle Returns relate to any income, profit or gain derived, or any act, matter, transaction or thing occurring, on or before the Completion Date,

and must:

- (iii) provide copies of all Pre-Completion Returns filed after Completion (unless such copies are included in the Disclosure Material) and Straddle Returns to [RDA] for review:
  - (A) at least ten Business Days prior to filing; or
  - (B) if that is not practicable, as soon as practicable prior to filing; and
  - (C) consider in good faith any amendments to those Pre-Completion Returns and Straddle Returns which are proposed by [RDA] prior to the filing of such Returns.

...

### **15.3 Notice of Assessment or Audit**

If any Taxation Authority issues an Assessment to or undertakes an Audit of [AMCI Investments] or any member of the [RDA] Group which relates to any Pre-Completion Return or Straddle Return or to any income, profit or gain derived, or any act, matter, transaction or thing occurring before Completion in relation to [AMCI Investments] or a Group Member, or any other matter or thing in respect of which [AMCI Investments] is or may become liable to make any payment pursuant to clause 14.3 (*Indemnity Matters*), then:

- (a) in the case of an Assessment issued to or an Audit of a member of [RDA] Group, [RDA] must:
  - (i) promptly (and in any event within 30 days) give [AMCI Investments] notice of the Assessment or Audit (together with copies of all documents received from the Taxation Authority and full written details of the Assessment or Audit to the extent it relates to the Indemnity Matters);



- (ii) provide [AMCI Investments] with any further or additional information relating to the Assessment or Audit (to the extent it relates to the Indemnity Matters) promptly as [RDA] becomes aware of it; and
- (b) in the case of an Assessment issued to or an Audit of [AMCI Investments], promptly provide [AMCI Investments] with any information relating to the Assessment or Audit of which [RDA] becomes aware that is in addition to the information to which clause 11.2 refers."

[18] Under sch 7, AMCI Investments' warranties to RDA included:

**"Business Records**

70. All material Business Records:

- (a) have been maintained by each Group Member in accordance with proper accountancy and business practices and all Laws;
- (b) are in the possession or under the custody or control of each Group Member; and
- (c) contain information accurate in all material respects on all matters required to be dealt with in accordance with Australian Law and generally accepted accounting principles."

**The issues**

[19] The learned primary judge correctly identified the short point in issue as whether the phrase, "by any Governmental Agency" in cl 11.2(b),<sup>9</sup> qualifies the whole of the preceding words of sub-clause (b) or only the word "inquiry". His Honour concluded that the phrase qualified the whole of the preceding words in cl 11.2(b).

[20] Mr McKenna SC, who appeared with Mr Pomeranke for AMCI Investments, contends that the primary judge erred in construing the phrase "by any Governmental Agency" as qualifying the expression "legal or administrative proceeding". He submits that cl 11.2(b) should be read in two parts: it allows AMCI Investments access to RDA's personnel, documents and records and to take copies of the documents for the purposes of "any actual or threatened (i) legal or administrative proceedings; or (ii) inquiry by any Governmental Agency".

[21] In support of that construction, Mr McKenna emphasises the following matters. He argues that the immediate text and structure of cl 11.2 supports his construction, pointing out that cl 11.2(a) and cl 11.2(c), like cl 11.2(b), each contain the word "or" and each concern more than one discrete topic. While accepting that the absence of a comma before "or inquiry" in cl 11.2(b) does not assist his contention, Mr McKenna points out that the drafter of the agreement was not discriminating in the use of commas. He gives by way of example the nonsensical use of the comma in line 2 of cl 11.1 and the absence of a comma separating what he contends are plainly distinct concepts in cl 12.3(b).<sup>10</sup> This haphazard use of commas in the agreement, he submits, means that nothing turns on the comma's absence in

<sup>9</sup> Set out at [11] of these reasons.

<sup>10</sup> Set out at [16] of these reasons.

cl 11.2(b): cf *Chalmers Leask Underwriting Agencies v Mayne Nickless Ltd.*<sup>11</sup> He also contends that the definition in the agreement of the expression "Governmental Agency" and the use of "by" rather than "brought by" make clear that the words "Governmental Agency" are intended only to relate to "inquiry" because, when read in conjunction with their definitions, they cannot sensibly relate to "legal or administrative proceedings". He argues that whilst an inquiry could be held *by* a Governmental Agency as defined, "legal or administrative proceedings" are not held "by a government or a governmental, semi-governmental or judicial entity or authority ... [or] a self-regulatory organisation established under statute or a stock exchange".<sup>12</sup>

- [22] Mr McKenna emphasises that sensible limits are placed on the breadth of the phrase "legal or administrative proceedings" by the words in the introductory paragraph of cl 11.2. These require that AMCI Investments' access to RDA's personnel, documents and records be only for the purpose of AMCI Investments' use of them in connection with the matters listed in (a) to (d). AMCI Investments would have no right to have access to personnel, records or documents which did not concern it or companies in its group. The introductory paragraph of cl 11.2(b) also provides other sensible limitations.
- [23] Mr McKenna further contends that the wider context of cl 11.2(b) when read with the whole agreement favours his construction. Under the agreement, the documents to which cl 11.2 relate are historical records created by AMCI Investments' corporate group prior to completion of the agreement. The agreement contemplates that AMCI Investments should have access to this information for a wide range of practical purposes after completion. Clause 11.2(a), for example, gives AMCI Investments access to documents where it conducts its own review of its tax returns; that clause is not limited to access where the review is by the Australian Taxation Office. Clause 11.2(b), he argues, should have a similar result, allowing AMCI Investments access to RDA's personnel and records previously under its control when it is involved in any actual or threatened legal or administrative proceeding at all; its access should not be limited to legal or administrative proceedings brought by a Governmental agency. Mr McKenna also submits that this wider interpretation sits comfortably with the terms of cl 11.2(c) and cl 11.2(d). He contends it would be an odd result if cl 11.2 was construed to deny AMCI Investments access to its own historical documents needed by it to enforce its rights in proceedings or to deal with proceedings brought against it generally.
- [24] It is common ground that the term "Note Holder" in the introductory paragraph of cl 11.2 refers to a company controlled by RDA.<sup>13</sup> Mr McKenna queries why then does cl 11.2 link the purposes of the Note Holder with AMCI Investments instead of the Note Holder's associate, RDA. This, he argues, is an example of the unsatisfactory drafting of the clause and supports his construction of cl 11.2(b).
- [25] Mr McKenna submits that the primary judge was wrong in considering that AMCI Investments' construction of cl 11.2(b) is inconsistent with cl 6.9 of the agreement. Clause 6.9 is limited and specific in giving AMCI Investments access to RDA personnel and records, whilst cl 11.2 is in much more general terms. He points out

<sup>11</sup> (1983) 155 CLR 279; [1983] HCA 20 at 285-286.

<sup>12</sup> The definition of "Governmental Agency" in cl 1.1 of the agreement.

<sup>13</sup> See the definition of "Purchaser Group" in cl 1.1, set out in [15] of these reasons.

that cl 6.9(d)<sup>14</sup> applies only where RDA becomes aware of a possible breach of warranty by AMCI Investments. RDA is obliged under cl 6.9(a) to then provide AMCI Investments with details of the breach, including material documents. Clause 6.9(d) only applies to third party claims where AMCI Investments acknowledges its liability to RDA for the claimed breach of warranty should the third party claim be successful. By contrast, cl 11.2 is a broader and more general clause. It concerns AMCI Investments' right to access to personnel and documents in the much wider circumstances set out in sub-cll 11.2(a) to (d). Only in the event that AMCI Investments did not admit liability for a breach of warranty so that cl 6.9(d) did not apply and RDA threatened or brought legal proceedings would cl 11.2 apply. Clause 11.2 would then allow both AMCI Investments and RDA to proceed in their legal proceedings each armed with the necessary relevant information. Mr McKenna submits that, on his construction, cl 6.9 and cl 11.2 can and do operate harmoniously; his construction should be preferred.

- [26] Clause 11.2, Mr McKenna contends, should be construed in a way consistent with commercial and business commonsense: *Wilkie v Gordian Runoff Ltd*,<sup>15</sup> *Zhu v Treasurer of the State of New South Wales*,<sup>16</sup> *McCann v Switzerland Insurance Australia Ltd*,<sup>17</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*.<sup>18</sup> The commercial purpose of cl 11.2, he argues, is to ensure that AMCI Investments is not prejudiced in meeting its obligations or pursuing or defending its rights by the agreement's requirement that it give up possession of historical information. The personnel and documents to which AMCI Investments would have access on its construction of cl 11.2(b) are not sensitive; they were AMCI Investments' personnel and documents before the agreement came into effect. By contrast, the construction adopted by the primary judge, he submits, severely limits and significantly undermines the purpose of cl 11.2(b) by denying AMCI Investments' lawyers access to information to pursue or defend its rights in proceedings other than those brought by a "Governmental Agency".
- [27] The agreement, which disposed of liabilities through a group of companies actively engaged in mining leases, was complex. It left wide open the potential for disputes over financial liabilities well beyond those relating to tax matters (cl 11.2(a)), legally imposed obligations relating to financial information or accounts (cl 11.2(c)) and the tortious liability encompassed by the insurance claims referred to in cl 11.2(d). AMCI Investments must, under the agreement, continue to meet any financial liabilities it incurred before the completion of the agreement. On the primary judge's construction of cl 11.2(b), it cannot have access to the historical documents and to key personnel so as to ascertain such liabilities. The construction of cl 11.2(b) put forward by AMCI Investments, Mr McKenna claims, resolves the problem of its vulnerability which would flow from the primary judge's construction.
- [28] The commercial purpose of cl 11.2, he argues, favours his construction. It provides an appropriate balance between AMCI Investments' need to have access to its historical records for conducting proceedings and for the other limited purposes

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<sup>14</sup> Set out at [7] of these reasons.

<sup>15</sup> (2005) 221 CLR 522; [2005] HCA 17 at 528-529 [15].

<sup>16</sup> (2004) 218 CLR 530; [2004] HCA 56 at 559 [82].

<sup>17</sup> (2000) 203 CLR 579; [2000] HCA 65 at 589 [22].

<sup>18</sup> (2004) 219 CLR 165; [2004] HCA 52 at 179 [40].

specified in cl 11.2, whilst minimising the disruption and inconvenience to RDA which could be expected to flow from such access.

- [29] For these reasons, Mr McKenna submits that cl 11.2(b) should be construed in this way. It allows AMCI Investments and its representatives access to the RDA group personnel and the documents and records delivered by it to RDA under cl 9.5(c)<sup>19</sup> for the purpose of it using and copying those documents and records in connection with any actual or threatened legal or administrative proceeding, including the recent action brought by RDA against it.

### **Discussion and conclusion**

- [30] Clause 11.2(b) is not in its terms a model of clear drafting. Its meaning is not immediately discernible from its terms. The reasons of the learned primary judge on the one hand, and the detailed submissions of Mr McKenna on the other, starkly demonstrate the persuasive contradictory arguments as to its meaning. I have concluded that the primary judge's construction of cl 11.2(b) should be preferred. This is why.
- [31] Although there are competing arguments, a reading of the terms of cl 11 itself tends to favour the primary judge's construction of cl 11.2(b). The use of the distinct clauses (a) to (d) and the absence of any comma in cl 11.2(b) suggest that the words "by any Governmental Agency" qualify the words "any actual or threatened legal or administrative proceedings or inquiry". This conclusion is not undermined by the apparently haphazard use of the comma in the second line of cl 11.1, almost certainly a simple typographical error. This construction is also consistent with the use of the comma in cl 11.2(a), which there makes clear that the clause refers to two related but separate concepts, the first being the review of any tax return<sup>20</sup> including a review by AMCI Investments, and the second being AMCI Investments' response or compliance with any tax or duty audit. The absence of a comma before "or inquiry" tends to suggest that "by any Governmental Agency" qualifies all the preceding words in cl 11.2(b).
- [32] The use of the word "by" rather than "brought by" in cl 11.2(b) is, perhaps, inelegant but the same can be said about many clauses in the agreement and, no doubt, many other commercial agreements. A touch of inelegance is not entirely surprising given the complexity of the arrangements in the agreement for the disposition of property and rights between the parties and their associated companies. In any case, as Mr Gotterson QC, who appeared with Mr C A Wilkins for RDA, point out in their written and oral submissions, expressions like "proceedings by the Commissioner" are frequently used in the judgments of learned and experienced judges: see, for example, *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation*<sup>21</sup> and *Browne v Commissioner of Taxation*.<sup>22</sup> The use of the word "by" does not assist Mr McKenna's argument.
- [33] As Mr Gotterson submitted, the words "and the Note Holder" in the introductory paragraph to cl 11.2 do not suggest that the clause is so badly drafted as to be

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<sup>19</sup> Set out at [9] of these reasons.

<sup>20</sup> "Return" is defined in cl 1.1 as meaning "in relation to any Tax or Duty, any return, statement, calculation sheet or other document required to be filed with a Taxation Authority".

<sup>21</sup> (1953) 88 CLR 23; [1953] HCA 52 at 36 (Fullagar J).

<sup>22</sup> (1998) 82 FCR 1 at 6 (Lockhart, O'Loughlin and Kiefel JJ).

meaningless and confusing. Whilst the terms of cl 11.2(c) and cl 11.2(d) make clear that those clauses concern only AMCI Investments, cl 11.2(a) and cl 11.2(b) do not specifically refer in their terms to AMCI Investments. Clauses 11.2(a) and (b) are capable of applying to both AMCI Investments and the Note Holder whose role under the agreement means it could well be involved in a tax audit or Governmental Agency legal or administrative proceeding or inquiry. The reference in cl 11.2 to the Note Holder does not assist AMCI Investments' argument as to the construction of cl 11.2(b).

- [34] The words and formatting of cl 11 and in particular cl 11.2(b) tend to favour the construction of cl 11.2(b) adopted by the primary judge, but these matters are not alone especially persuasive in construing cl 11.2(b). In determining the meaning of an ambiguous clause, a court must consider the whole of the agreement and attempt a construction which allows all clauses to operate harmoniously: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*,<sup>23</sup> *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd*,<sup>24</sup> *Norco Co-operative Ltd v Parmalat Australia Ltd & Ors*<sup>25</sup> and *Parmalat Australia Ltd v Norco Co-operative Ltd*.<sup>26</sup> Consideration should be given to the operation of cl 11 and clause 11.2(b) within the terms of the whole agreement. The objective intention of the parties which emerges from the terms of the agreement set out earlier<sup>27</sup> is that RDA had rights of reasonable access to AMCI Investments' documentary records prior to completion of the agreement<sup>28</sup> and the right to possession of those records upon completion of the contract.<sup>29</sup> After completion, AMCI Investments' rights to access to these records were limited by the terms of the agreement: see cl 6.9(d), cl 11.2, cl 15.2 and cl 15.3.
- [35] Under cl 6.9(d)(ii),<sup>30</sup> only where AMCI Investments acknowledges liability to RDA for breach of the relevant warranty in respect of a third party claim does the right of access under that clause become available to AMCI Investments. This does not suggest that the parties in entering into the agreement intended that AMCI Investments have broad-ranging access to RDA's personnel, documents and records in all litigation it may ever have against RDA. As the primary judge recognised, if AMCI Investments' broad construction of cl 11.2(b) were correct, the provisions of cl 6.9(d) allowing AMCI Investments access to RDA personnel and records would appear to be otiose. On AMCI Investments' construction of cl 11.2(b), the rights given to it under cl 6.9 to access RDA's personnel and documents would be subsumed in its rights to access RDA's personnel and documents in "any actual or threatened legal ... proceedings" under cl 11.2(b).
- [36] Unlike cl 6.9, cl 11.2 imposes no temporal limitation on the access it provides to AMCI Investments. It is improbable that the parties would have intended the agreement to provide AMCI Investments and its representatives with access to RDA's personnel and records for any actual or threatened legal proceedings,

<sup>23</sup> (1973) 129 CLR 99; [1973] HCA 36 at 109.

<sup>24</sup> (1990) 20 NSWLR 310 at 313-4 (Kirby P).

<sup>25</sup> [2006] QSC 038 at [11] (Chesterman J).

<sup>26</sup> [2006] QCA 118 at [42]-[43] (Jerrard JA).

<sup>27</sup> See [7] to [18] of these reasons.

<sup>28</sup> Clauses 7.1(j), 7.4, 7.5 of the agreement.

<sup>29</sup> Clause 9.5(c) of the agreement.

<sup>30</sup> Set out at [7] of these reasons.

forever. The absence of any temporal limitation tends to support the narrower interpretation of cl 11.2(b) adopted by the primary judge.

- [37] Nor is the narrow construction of cl 11.2(b) adopted by the primary judge inconsistent with cl 15<sup>31</sup> which gives AMCI Investments' the right to access RDA's employees and officers to complete its pre-completion and straddle tax returns.
- [38] The narrow construction of cl 11.2(b) is not inconsistent with cl 12.3(b).<sup>32</sup> The construction of cl 12.3(b) was not argued in any detail before this Court. Two things can be said about the formatting of cl 12.3(b) which has some similarities to cl 11.2(b). First, as in cl 11.2(b), cl 12.3(b) has no comma before "or". Second, it contains, perhaps equally inelegantly, the words "any Governmental Agency". The words "any Governmental Agency" in cl 12.3(b) may very well qualify all the preceding words in cl 12.3(b), namely "any applicable law or requirement". Again, there are competing contentions. But it is unnecessary to reach a concluded view as to the construction of cl 12.3(b) in the absence of considered argument. What can be said is that cl 12.3(b) provides very little assistance in the construction of cl 11.2(b).
- [39] Overall, a review of cl 11.2(b) in the context of both cl 11 and of the whole agreement tends to support the construction of cl 12.3(b) adopted by the primary judge.
- [40] Where more than one construction of a commercial agreement is open, a court in construing it should have regard to business common sense and the commercial purpose of the agreement.<sup>33</sup>
- [41] When one entity sells a business to another under an agreement requiring the transfer of historical records and documents, the seller would not ordinarily expect, after completion of the sale, to have a right of access to the business' personnel and to the historical records and documents in the absence of clear and unequivocal terms. If the parties intended cl 11.2(b) to apply to all disputes whenever arising between AMCI Investments and RDA, they can be expected to have clearly and unequivocally stated this in the agreement. They did not. This strongly suggests that the parties did not intend that cl 11.2(b) would give AMCI Investments and its representatives, forever, access to the RDA group personnel, documents and records which were under the control of AMCI Investments prior to completion of the agreement, whenever AMCI Investments was considering bringing any legal proceedings. On the other hand, it is entirely consistent with the commercial purpose of the agreement for RDA to provide AMCI Investments with such access for the more limited purposes concerning taxation;<sup>34</sup> a Governmental Agency's legal or administrative proceedings or inquiry;<sup>35</sup> the legally mandated preparation or audit

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<sup>31</sup> Set out at [17] of these reasons.

<sup>32</sup> Set out at [16] of these reasons.

<sup>33</sup> *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at 528-529 [15]; *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530; [2004] HCA 56 at 559 [82]; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 at 589 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at 179 [40].

<sup>34</sup> Clause 11.2(a) of the agreement.

<sup>35</sup> Clause 11.2(b) of the agreement.

of financial information or accounts;<sup>36</sup> and insurance claims made by AMCI Investments in respect of events prior to the completion of the agreement.<sup>37</sup>

- [42] The narrow construction adopted by the primary judge better gives effect to commercial and business common sense. This conclusion does not make AMCI Investments unusually vulnerable or place it at any particular disadvantage in the litigation commenced by RDA. AMCI Investments will have the usual recourse to the provisions of the *Uniform Civil Procedure Rules* 1999 (Qld) relating to disclosure and inspection. Nor is it prevented from approaching its former employees or officers in preparing its case, there being no property in witnesses.
- [43] A reading of cl 11.2(b), both within the context of cl 11 and within the wider framework of the whole agreement, and taking into account commercial and business common sense, favours the narrow construction given to cl 11.2(b) by the primary judge. In my view, despite Mr McKenna's valiant contrary arguments, the better construction of cl 11.2(b) is that "any Governmental Agency" qualify the words "legal or administrative proceedings or inquiry".
- [44] I would dismiss the appeal with costs to be assessed.
- [45] **MACKENZIE AJA:** I agree that the appeal should be dismissed for the reasons given by the President. I agree with the orders proposed.
- [46] **CULLINANE J:** I have read the draft reasons of McMurdo P in this matter. I agree with those reasons and agree with the orders proposed by her.

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<sup>36</sup> Clause 11.2(c) of the agreement.

<sup>37</sup> Clause 11.2(d) of the agreement.