Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd

Court of Appeal
Supreme Court
New South Wales

- Summary available
- Amendment notes

Medium Neutral Citation:
Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd [2018] NSWCA 81

Hearing dates:
14 February 2018

Date of orders:
24 April 2018

Decision date:
24 April 2018

Before:

Bathurst CJ at [1]; Beazley P at [93]; Emmett AJA at [94]

Decision:

(1) Grant the applicants leave to appeal.

(2) Allow the appeal.

(3) Set aside the orders made by the primary judge.

(4) Direct the parties to make submissions within 7 days as to the appropriate orders to give effect to this judgment.

(5) Order the respondents to pay the applicants' costs of the appeal and the costs of the motion for a stay in the Court below.

Catchwords:

CONTRACTS – Express terms – Incorporation of terms – Incorporation by reference – agreement stated that balance of terms would be "WB standard for 'A' list directors and producers" subject to "good faith negotiations" – whether terms were incorporated before good faith negotiations had taken place – whether terms which were "standard" had been proved to exist

COMMERCIAL ARBITRATION – Arbitration agreement – Form of arbitration agreement – Arbitration clause - agreement stated that balance of terms would be "WB standard for 'A' list directors and producers" – whether an arbitration clause was "WB standard for 'A' list directors and producers"

Legislation Cited:
Commercial Arbitration Act 2010 (NSW)
International Arbitration Act 1974 (Cth)

Cases Cited:
Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622
Council of the Upper Hunter County District v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429; [1968] HCA 8
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 91 ALJR 486; [2017] HCA 12
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631
Lief Investments Pty Ltd v Conagra International Fertiliser Co (Court of Appeal (NSW), 16 July 1998, unrep)

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121; [2000] HCA 18
Segelov v Ernst & Young Services Pty Ltd (2015) 89 NSWLR 431; [2015] NSWCA 156
Sinclair Scott & Co Ltd v Naughton (1929) 43 CLR 310; [1929] HCA 34
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52

Category:
Principal judgment

Parties:
Warners Bros Feature Productions Pty Ltd (first applicant)
Warner Bros Entertainment Inc (second applicant)
Kennedy Miller Mitchell Films Pty Ltd (first respondent)
Kennedy Miller Mitchell Services Pty Ltd (second respondent)

Representation:

Counsel:
A Bell SC with S Free and M Baroni (applicants)
C Withers with A Hochroth (respondents)

Solicitors:
Gilbert + Tobin (applicants)
Simpsons Solicitors (respondents)

File Number(s):
2017/361726

Publication restriction:
Nil

Decision under appeal

Court or tribunal:
Supreme Court of New South Wales

Jurisdiction:
Equity

Citation:
[2017] NSWSC 1526

Date of Decision:
09 November 2017

Before:
Hammerschlag J

File Number(s):
2017/268450

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

HEADNOTE

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

In 2009, Kennedy Miller Mitchell Films Pty Ltd (KMMF) and Kennedy Miller Mitchell Services Pty Ltd (KMMS) entered into an agreement with Warner Bros Feature Productions Pty Ltd (WB Productions) to supply the services of Mr George Miller and Mr Doug Mitchell for the production and direction of a film entitled *Mad Max: Fury Road* (the Letter Agreement). The Letter Agreement was amended several times, most recently in 2012.

Under the Letter Agreement as amended, KMMF and KMMS were entitled to a bonus payment and other benefits if the "net cost" of the film was below an agreed figure. A dispute arose as to whether certain costs ought to be included in the calculation of the "net cost" for the purpose of determining whether KMMF and KMMS were entitled to the bonus payment and other benefits under the Letter Agreement.

KMMF and KMMS brought proceedings against WB Productions in the Supreme Court of New South Wales. They claimed that WB Productions breached the Letter Agreement by failing to make the bonus payment and by preventing KMMF and KMMS from seeking a co-financier for the film. Warner Bros Entertainment Inc (WB Entertainment), the parent of WB Productions, was said to have induced the latter breach. They also claimed that WB Productions and WB Entertainment engaged in misleading and deceptive conduct in relation to which costs would be included in the calculation of the "net cost".

WB Productions sought a stay of the proceedings on the ground that the Letter Agreement included a term requiring the dispute to be submitted to arbitration in California. It claimed that the term was incorporated into the Letter Agreement by cl 21, which provided that the "balance of terms" would be "WB standard for 'A' list directors and producers", subject to "good faith negotiations". WB Entertainment sought a stay on the ground that New South Wales was a clearly inappropriate forum since the claim against it was closely related to the claim against WB Productions.

The primary judge dismissed the application for a stay. He held that cl 21 operated to incorporate terms into the Letter Agreement prior to good faith negotiations occurring. However, he found that WB Productions, as distinct from other members of the Warner Bros group, did not have any terms which were "standard" which were incorporated. Further, even if it was relevant that other members of the Warner Bros group had "form

agreements" with terms requiring disputes to be submitted to arbitration in California, he found that WB Productions had not provided sufficient evidence to prove that these terms were "standard".

The principal issues on appeal were:

1 Whether the Letter Agreement incorporated terms which were "WB standard for 'A' list directors and producers" prior to good faith negotiations occurring; and

2 Whether an arbitration clause was incorporated into the Letter Agreement because it was a term which was "WB standard for 'A' list directors and producers".

Incorporation of terms prior to good faith negotiations

(i) Clause 21 of the Letter Agreement incorporated terms which were "WB standard for 'A' list directors and producers" prior to good faith negotiations occurring. This construction of the clause was supported by the text of the clause read in the context of the Letter Agreement as a whole. In particular, several important terms of the Letter Agreement could not operate unless such terms were incorporated immediately: [56]-[61] (Bathurst CJ); [93] (Beazley P); [104] (Emmett AJA).

Incorporation of terms which were "WB standard for 'A' list directors and producers"

(ii) The primary judge erred in holding that terms could only be "WB standard for 'A' list directors and producers" if they were "standard" for WB Productions. The phrase was wide enough to include terms which were "standard" for other companies in the Warner Bros group: [79] (Bathurst CJ); [93] (Beazley P); [104] (Emmett AJA).

(iii) The primary judge erred in holding that terms could only be "WB standard for 'A' list directors and producers" if they were included in a "sufficient preponderance" of agreements to make their use "usual". The phrase referred to terms which were habitually proffered by companies in the Warner Bros group for agreements with "A" list directors and producers: [82] (Bathurst CJ); [93] (Beazley P); [104] (Emmett AJA).

(iv) Clause 21 of the Letter Agreement incorporated an arbitration clause which was contained in "form agreements" held by a division of a subsidiary of WB Entertainment. The evidence established that this clause had been used since the early 2000s and was included in the "form agreements" which were current at the time the Letter Agreement was made: [83] (Bathurst CJ); [93] (Beazley P); [104] (Emmett AJA).

Judgment

1. **BATHURST CJ:** This is an application for leave to appeal from a decision of a judge of the Supreme Court of New South Wales dismissing an application brought by the applicants, Warner Bros Feature Productions Pty Ltd (WB Productions) and Warner Bros Entertainment Inc (WB Entertainment), for a stay of proceedings brought against them in the Commercial List of the Equity Division of the Supreme Court by the respondents, Kennedy Miller Mitchell Films Pty Ltd (KMMF) and Kennedy Miller Mitchell Services Pty Ltd (KMMS).

The proceedings

2. The proceedings brought against WB Productions and WB Entertainment by KMMF and KMMS in the Commercial List involved a dispute arising out of an agreement (the Letter Agreement) between WB Productions, KMMF and KMMS relating to the supply of the services of Mr George Miller and Mr Doug Mitchell for the production and direction of a film entitled *Mad Max: Fury Road* (the Film). Mr Miller and Mr Mitchell were each directors of both KMMF and KMMS.

3. The document containing the terms of the Letter Agreement was expressed to be "as of" 12 February 2009. The Letter Agreement was amended on three occasions. Each amendment was also expressed to be "as of" a certain date. The first amendment was "as of" 20 August 2009. The second amendment was "as of" 4 January 2012. The third amendment was "as of" 6 June 2012.

4. It will be necessary to set out the terms of the Letter Agreement in a little more detail subsequently in this judgment. However, for present purposes, it is sufficient to note that the Letter Agreement, as amended, provided that KMMF and KMMS were "entitled to an additional sum" of $7 million, amongst other benefits, if they produced the Film for a "net cost" of $157 million or less. In calculating the "net cost" of the Film, the Letter Agreement excluded costs arising from "new or changed scenes" or "changes in the approved schedule" requested by WB Productions.

5. In the proceedings brought by KMMF and KMMS, they claim that, contrary to the Letter Agreement, certain costs which should have been excluded were wrongly included in the calculation of the "net costs" of the Film, thereby denying them the bonus of $7 million and other benefits under the Letter Agreement. Therefore, they claim against WB Productions for breaching the Letter Agreement by failing to pay the bonus of $7 million and the other benefits under the Letter Agreement. In the alternative, KMMF and KMMS claim that each of WB Productions and WB Entertainment engaged in misleading and deceptive conduct in failing to inform them that WB Productions and WB Entertainment did not consider the costs in question to be excluded costs under the Letter Agreement.

6. KMMF and KMMS also claim that WB Productions breached a provision in the Letter Agreement which required WB Productions to offer KMMF and KMMS the first opportunity to provide co-financing if WB Productions intended to seek a co-financier for the Film other than two nominated co-financiers. KMMF and KMMS claim that WB Entertainment induced that breach.

7. WB Productions sought a stay of the proceedings, relying on a clause requiring disputes "arising out of" or "related to" the Letter Agreement to be submitted to arbitration in California by a body known as JAMS. The arbitration clause relied upon by WB Productions was said to have been incorporated into the Letter Agreement by cl 21, which provided that the "balance of terms" in the Letter Agreement would be "WB and WB standard for 'A' list directors and producers". WB Productions therefore submitted that it was entitled to a stay of proceedings under s 7(2) of the *International Arbitration Act 1974* (Cth) or s 8 of the *Commercial Arbitration Act 2010* (NSW). Alternatively, WB Productions relied on an arbitration clause to similar effect contained in two agreements; each entitled "Certificate of Employment (Loanout)". One agreement was executed by WB Productions, KMMF and Mr Miller, and the other was executed by WB Productions, KMMF and Mr Mitchell (the COEs).

8. WB Entertainment was not a party to either the Letter Agreement or the COEs. However, it sought a stay of proceedings on the ground that New South Wales was a clearly inappropriate forum since the claim against it was clearly related to the claim against WB Productions, which was subject to an arbitration clause. In the alternative, it submitted that a temporary stay was appropriate pending the outcome of the arbitration between WB Productions and KMMF and KMMS.

9. The primary judge held that cl 21 was effective to incorporate terms which could be described as "WB and WB standard for 'A' List directors and producers" into the Letter Agreement. However, he considered that WB Productions had not established that the arbitration clause which it relied upon was its "standard" or the "standard" of its parent, Warner Bros Studio Enterprises Inc. He also held that the dispute which was the subject of the proceedings was not covered by the arbitration clause in the COEs. Accordingly, he refused the stays sought by WB Productions and WB Entertainment.

10. WB Productions and WB Entertainment have sought leave to appeal from this decision. They contend that the terms incorporated into the Letter Agreement by cl 21 included an arbitration clause, or alternatively, that the dispute was covered by the arbitration clause in the COEs.

11. By a draft notice of contention, KMMF and KMMS contend that cl 21 did not operate of its own force to incorporate any terms into the Letter Agreement, but rather, that it only imposed an obligation to negotiate in good faith with a view to the inclusion of further terms.

12. The application for leave to appeal was heard concurrently with argument on the appeal.

The Letter Agreement

13. The Letter Agreement is contained in a letter from Ms Sandra Smokler, a Californian attorney who was the Deputy General Counsel of a division of Warner Bros Studio Enterprises Inc, addressed to Mr Harold Brown, a Californian attorney of the firm Gang Tyre Ramer & Brown who represented KMMF and KMMS in negotiations leading to the Letter Agreement, and Mr Bryan Lourd and Mr Glen Meredith of the Creative Artists Agency, who also represented KMMF and KMMS. The letter states that it confirms an agreement between WB Productions, defined as "WB", and KMMF and KMMS, individually and collectively defined as "KMM".

14. Clause 2 of the Letter Agreement provides that, upon satisfaction of "WB's review and approval of the chain-of-title with respect to" the Film, and the execution of an assignment of copyright, the Letter Agreement and the COEs, "WB will pay KMM … for all rights in the Existing Material … and for all additional writing services, if any, rendered on" the Film. The "Existing Material" comprised a screenplay and "detailed storyboards with captions" for the Film.

15. The assignment of copyright which was a precondition of the Letter Agreement was an assignment by Mr Miller and Mr Mitchell of copyright in the services provided by them to WB Productions and in the work resulting from the provision of such services. It also contained some warranties and indemnities which are not relevant to these proceedings.

16. Clause 3 of the Letter Agreement provides for the payment of "compensation" to KMMF and KMMS in exchange for the services of Mr Miller and Mr Mitchell in relation to the Film. Three of the integers used in the formula to calculate the amount of the payment are "Defined Gross", "Merchandising revenues" and "Soundtrack revenues". So far as relevant, these terms are defined as follows:

"Defined Gross and all escalations referred to in this Paragraph shall be computed, determined and payable in accordance with and subject to the provisions of WB's standard participation definitions, as modified by WB's 'A' level rider except with a [REDACTED]% video royalty in lieu of [REDACTED]%.

Merchandising revenues (other than videogame revenues) shall be included in Defined Gross in accordance with WB's standard definition, as modified by WB's 'A' level rider …

…

Soundtrack revenues shall be included in Defined Gross in accordance with WB's standard definition, as modified by WB's 'A' level rider."

17. Clause 4 of the Letter Agreement provides for the adjustment of the "compensation" payable if the costs of production of the picture exceed the agreed budget. Certain costs described as "Excluded Costs" are excluded from the calculations. So far as it is relevant, cl 4(b)(ii) is in the following terms:

"(b) The following (the 'Excluded Costs') shall be excluded from the overbudget calculation.

…

(ii) Costs incurred or delays caused as a result of new or changed scenes added, or changes in the approved schedule made, at the written request of an officer of WB having the rank of Vice-President or higher, and costs designated in writing as approved overages by an officer of WB having the rank of Vice-President or higher."

18. Clause 7 of the Letter Agreement deals with producing credit, directing credit and certain other credits. In relation to producing credit and directing credit, this clause makes the following provision:

"(a) Producing Credit: Miller and Mitchell shall be accorded first and second position 'Produced By' credits, respectively, on screen on a separate card (shared only with each other) and, subject to WB's customary exclusions, in paid ads.

…

(c) Directing Credit: Miller shall be accorded a 'Directed By' credit on screen and, subject to WB's customary exclusions, in paid ads."

19. Other credits dealt with in cl 7 refer to "WB's customary exclusions" in similar terms.

20. Clause 12 of the Letter Agreement deals with termination rights, including on the death or disability of Mr Miller or Mr Mitchell, or on breach by KMMF or KMMS. These rights are expressed to be "the same as WB's customary termination rights for 'A' level directors and producers".

21. Clause 21 of the Letter Agreement is in the following terms:

"BALANCE OF TERMS:

The balance of terms will be WB and WB standard for 'A' list directors and producers, subject to good faith negotiations within WB's and WB's customary parameters."

22. The parties to this appeal proceeded on the basis that the repetition of "WB" and "WB's" in this clause was inadvertent, and that the relevant parts of the clause should be read as simply referring to "WB standard" rather than "WB and WB standard", and "WB's customary parameters" rather than "WB's and WB's customary parameters".

23. The COE relating to Mr Miller contained an acknowledgement by KMMF that WB Productions had engaged it to furnish the services of Mr Miller in connection with the Film, and that the "results and proceeds" of the services he rendered and the rights in those results and proceeds should be the property of WB Productions. Provision is made for what is said to be "equitable remuneration" for such rights. Relevantly, for present purposes, the COE contained an arbitration clause in the following terms:

“Any and all controversies, claims or disputes arising out of or related to this agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate (‘Dispute’), except as otherwise set forth below, shall be resolved according to the following procedures which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under $250,000) or the JAMS Comprehensive (for claims over $250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor (‘JAMS’) in effect at the time the request for arbitration is made (the ‘Arbitration Rules’). The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages.

The arbitrator will provide a dated and signed detailed written statement of decision including findings of fact and conclusions of law, which will be part of the arbitration award and admissible in any judicial proceeding to confirm, correct or vacate the award. Unless the parties agree otherwise, the neutral arbitrator and the members of any appeal panel shall be former or retired judges or justices of any California state or federal court with experience in matters involving the entertainment industry. If either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County. The party seeking enforcement of any arbitration award shall be entitled to an award of all costs, fees and expenses, including attorneys’ fees, incurred in enforcing the award, to be paid by the party against whom enforcement is ordered.”

24. The COE relating to Mr Mitchell is in similar terms to the COE relating to Mr Miller and includes the same arbitration clause.

The evidence of standard terms

25. The evidence in support of the proposition that an arbitration clause was a “WB standard term for ‘A’ list directors and producers” for the purpose of cl 21 of the Letter Agreement came from an affidavit of Mr Richard Levin, the Senior Vice-President and General Counsel of Warner Bros Pictures (WB Pictures), which he stated was a division of Warner Bros Studio Enterprises Inc. He stated that he was also an “authorised signatory” for WB Productions, which he described as “an Australian entity formed for the purposes of producing motion pictures in Australia and which is under the control of WB Pictures”. He stated that WB Pictures and WB Productions were both subsidiaries of WB Entertainment.

26. Mr Levin stated that Ms Smokler, who reported directly to him, was "the attorney principally in charge of preparing and negotiating the various talent agreements relating to" the Film. He stated that most talent agreements commenced with a "deal memo" prepared by a business affairs executive which summarised the "major deal points". He said that such memos were "ordinarily directed to my department" and that one of the lawyers who reported to him would prepare a "long form" agreement based on the deal memo, "supplemented by the standard terms in my department's form agreements". However, he stated that, in some cases, including the present case, agreements would end up being documented in a shorter "deal letter". This is a reference to the Letter Agreement.

27. Mr Levin stated that "long form" agreements were prepared by lawyers in his department using "internal form agreements that my office maintains in a form file on a shared drive". He said that his assistant was the only person that "has rights to change any document on the shared drive". He said that the internal form agreements on the shared drive were "reviewed and updated from time to time".

28. Mr Levin exhibited to his affidavit what he described as two of "WB Pictures' internal form agreements for 'A' List directors and producers that were in use during the first half of 2009" (the 2009 Form Agreements). One form agreement related to directors, and the other related to producers. He stated that the 2009 Form Agreements "each contain the same arbitration provision". The arbitration clause was in the following terms:

"Any and all controversies, claims or disputes arising out of or related to this Agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate ('Dispute'), except as otherwise set forth below, [REDACTED], shall be resolved according to the following procedures which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under $250,000) or the JAMS Comprehensive (for claims over $250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor ('JAMS') in effect at the time the request for arbitration is made (the 'Arbitration Rules'). [REDACTED]. The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages.

The arbitrator will provide a detailed written statement of decision, which will be part of the arbitration award and admissible in any judicial proceeding to confirm, correct or vacate the award. Unless the parties agree otherwise, the neutral arbitrator and the members of any appeal panel shall be former or retired judges or justices of any California state or federal court with experience in matters involving the entertainment industry. If

either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County. The party seeking enforcement of any arbitration award shall be entitled to an award of all costs, fees and expenses, including [REDACTED] attorneys' fees, incurred in enforcing the award, to be paid by the party against whom enforcement is ordered."

29. The arbitration clause in the 2009 Form Agreements exhibited to Mr Levin's affidavit set out above is in substantially the same form as the arbitration clause in the COEs.

30. Mr Levin stated that an arbitration clause like the one contained in the 2009 Form Agreements "had been used in WB Pictures' 'A' List producer and director form agreements since the early 2000s". He exhibited to his affidavit some 56 agreements covering the period 2005 to 2009, which he stated contained arbitration clauses "based on, and in most cases identical to, WB Pictures' standard terms that requires [sic] arbitration of all disputes before JAMS, in Los Angeles, and applying California law". Mr Levin acknowledged that some of the agreements were unsigned, but he stated that this was because WB Pictures did not employ a "signed deal policy". Rather, parties exchanged drafts "until all material issues are deemed resolved, with the final exchanged unsigned draft (which sometimes contain [sic] redlines) being treated as the operative version of the agreement".

31. Ms Smokler also gave evidence by affidavit that she had negotiated a number of "A" list director and producer agreements with representatives from the firm Gang Tyre Ramer & Brown and the Creative Artists Agency, both of whom had represented KMMF and KMMS in the present case. She exhibited to her affidavit 13 such agreements, which she stated all contained the same arbitration clause.

32. Neither Mr Levin nor Ms Smokler was required for cross-examination by KMMF or KMMS in the application for a stay before the primary judge.

The primary judgment

33. The primary judge noted that the first question was "whether by the words the parties used in cl 21, they intended immediately to be bound by terms meeting the description WB standard terms for 'A' list directors or producers". He concluded that the parties intended to be so bound. He stated that, while the parties were "obliged to engage in good faith negotiations, if those negotiations do not result in any amendment, the unamended standard terms apply".

34. The primary judge noted that the second question was whether WB Productions had "proved a set of contractual terms fitting the description WB standard terms for 'A' list directors and producers". He referred to the evidence of Mr Levin and stated that "the notion of WB standard terms for 'A' list directors and producers comprises two elements": first, "terms which are standard for WB"; and second, terms which are "standard for contracts with 'A' list directors and producers".

35. The primary judge stated that Mr Levin did not make explicit what he assumed the expression "standard terms" to connote. He stated that Mr Levin did not identify any document which, on its face, could be said to be the "standard terms" which the parties had in contemplation.

36. The primary judge stated that he took the term "standard", in "its ordinary grammatical meaning", to mean "used in a sufficient preponderance of cases, where [WB Productions] contracts with 'A' list directors and producers, to make its use usual". He stated that WB Productions bore the onus of showing that, when it contracted with "A" list directors and producers, "it had done so with sufficient regularity on the terms which it says are standard, so as to make that course usual". He stated that this required a comparison between the number of instances where WB Productions had contracted with "A" list directors and producers on any terms with the number of instances where it contracted with them on the asserted "standard terms". He pointed to the fact that none of the contracts which were exhibited to Mr Levin's affidavit were agreements to which WB Productions was a party, and that there was "no evidence of any regularity of contracting on the standard terms by [WB Productions] itself".

37. The primary judge also rejected the submission that cl 21 should be read as including WB Pictures, which was a party to the agreements exhibited to Mr Levin's affidavit. He stated that the Letter Agreement unambiguously defined "WB" as WB Productions.

38. The primary judge also concluded that, if the reference to "WB" in cl 21 was to be construed as a reference to WB Pictures, the evidence "did not establish standard terms for 'A' list directors and producers" in agreements entered into by that entity. He stated that Mr Levin's evidence did not establish what the "approved negotiating parameters" might have been for the "standard terms" in the agreements exhibited to his affidavit, or what was meant by "'A' list directors and producers".

39. The primary judge also stated that Mr Levin did not reveal, "for any particular period, or at all, the number of agreements entered into by WB Pictures with 'A' list directors and producers in the long form", compared with "the number of agreements said to have been entered into with 'A' list directors and producers on terms not including what he says are the standard terms". He said that Ms Smokler's evidence did not fill this lacuna. He said that an inference should be drawn that such evidence would not have assisted WB Productions' case.

40. Finally, the primary judge rejected the proposition that the arbitration clause in the COEs applied to the dispute. He rejected the proposition that this question was to be decided under Californian law. He acknowledged that courts in Australia have "repeatedly held that words such as 'arising out of', 'arising under', 'in connection with' or 'connected with' and 'related to' have a wide ambit", and that arbitration clauses "should be liberally construed so as to further their ultimate intent". However, he noted that such clauses do not have "unlimited reach".

41. The primary judge stated that the COEs were undoubtedly "related to" the Letter Agreement, but he held that "a dispute which arises out of, or is related to, the Letter Agreement does not arise out of, nor is it related to, the COEs because the Letter Agreement is related to the COEs". He stated that there was "no controversy, claim or dispute about anything done or not done pursuant to or under the COEs", which he stated had a "specific and limited role in the overall transaction".

42. In these circumstances, the primary judge dismissed the application for a stay.

The application for leave to appeal and the appeal

43. The applicants sought leave to appeal against the conclusion of the primary judge that cl 21 of the Letter Agreement did not incorporate an arbitration clause and that the arbitration clause in the COEs did not apply to the dispute. By draft notice of contention, KMMF and KMMS sought to contend that the primary judge was incorrect in concluding that cl 21 operated to incorporate the "WB standard terms for 'A' list directors and producers" before good faith negotiations about those terms had taken place.

44. It was not seriously in contest that leave should be granted. The appeal is undoubtedly arguable and, if the applicants' contentions are correct, WB Productions should not be required to litigate in a forum other than the one chosen by the parties through the Letter Agreement. In these circumstances, it is appropriate to grant leave.

45. It is convenient to deal first with the issue which is the subject of the notice of contention, namely, whether or not cl 21 operated to incorporate "WB standard terms for 'A' list directors and producers" into the Letter Agreement before good faith negotiations about those terms had taken place. If that issue is determined favourably to the applicants, then it will be necessary to determine whether the primary judge erred in holding that it was not established that there was an arbitration clause which was "WB standard for 'A' list directors and producers". If the applicants succeed on this issue, then it would follow that the arbitration clause in the COEs would not apply, if only for the reason that the Letter Agreement itself contains an arbitration clause.

Did cl 21 of the Letter Agreement incorporate terms which were "WB standard for 'A' list directors and producers" before good faith negotiations about those terms had taken place?

a The submissions

46. KMMF and KMMS submitted that the question of whether "WB standard terms for 'A' list directors and producers" were incorporated before good faith negotiations about those terms had taken place turned on the meaning of the phrase "subject to good faith negotiations" in cl 21 in the context of the Letter Agreement.

47. KMMF and KMMS submitted that the phrase "subject to good faith negotiations" was "apt to indicate a condition precedent" that incorporation of "WB standard terms for 'A' list directors and producers" would only take place once good faith negotiations had occurred. They submitted that the Letter Agreement fell into the category of cases where "the parties agree to be bound immediately by a particular set of terms, intending to negotiate further to supplement those terms".

48. KMMF and KMMS submitted that this was supported by the context in which the Letter Agreement was made. They submitted that no further terms were supplied to KMMF and KMMS or their representatives and that there was no set of terms described as "WB standard terms for 'A' list directors and producers", but rather, that the terms had to be gleaned by "close inspection" of "pro forma agreements" maintained by WB Pictures which did not use the language of "standard terms". KMMF and KMMS submitted that it was unlikely that they would have agreed to bind themselves immediately to terms "which were never supplied and which were not readily ascertainable". They submitted that this was particularly the case where the terms were said to include an arbitration clause resulting in the loss of the respondents' ordinary recourse to the courts of New South Wales.

49. KMMF and KMMS also submitted that what they described as "contextual evidence concerning industry practice" was that "it was not unusual to have motion pictures produced pursuant to agreements where not all the terms were the subject of agreement". They referred to the evidence of Mr Harold Brown, the Californian attorney of the firm Gang Tyre Ramer & Brown who represented KMMF and KMMS, who stated that one of the reasons a studio might not use a "long-form agreement" was that the studio was seeking to reach an agreement on the "key terms", but did not want "to get into negotiations about boilerplate clauses which may prove contentious". KMMF and KMMS also noted Mr Levin's statement in his evidence that WB Pictures did not employ a "signed deal policy", and referred to the evidence of Mr Brown that, even when a "long-form agreement" is negotiated, negotiations may end with agreement on some, but not all, terms and production of the film would continue with problems being dealt with "at a practical level".

50. KMMF and KMMS also referred to Ms Smokler's evidence that the "deal letter" for a film entitled *Happy Feet 2*, to which KMMF and KMMS were both parties, served as the template for the Letter Agreement. They noted that the "deal letter" in that case contained a clause similar to cl 21, except that it referred to "VRM and WB standard terms for 'A' list directors and producers", which recognised that the agreement in that case was with both WB Pictures and Village Roadshow Mumble 2 Productions Pty Ltd. KMMF and KMMS submitted that, since the two studios may have had different "standard terms", determining which terms were to be incorporated under cl 21 could only occur through good faith negotiations. They submitted that the position was the same in the present case, since a reasonable person in the position of the parties would have known of this clause in the earlier "deal letter" and would have intended cl 21 in the Letter Agreement to bear the same construction.

51. The applicants submitted that KMMF and KMMS, in focusing on the expression "subject to good faith negotiations" in cl 21, ignored the balance of the text of the clause. They submitted that the primary judge was correct in concluding that the phrase "will be" served to indicate an intention to be immediately bound. They submitted that the effect was that, subject to any good faith negotiations, the parties to the Letter Agreement would be bound by "WB standard terms for 'A' list directors and producers".

52. The applicants submitted that cl 21 did not reflect any expectation that the "initial limited agreement might be later substituted by a formal agreement of a more elaborate kind". Rather, they submitted that the "standard terms" comprised the "balance of terms" to be included in the Letter Agreement.

53. The applicants submitted that it was "beside the point that the respondents did not seek, and were not supplied with, a copy of the terms". They submitted that the question of whether or not they had proved the existence of particular terms answering the description of "WB standard terms for 'A' list directors and producers" was irrelevant to the question of construction. They also submitted that the proper construction of the equivalent provision in the "deal letter" for the film entitled *Happy Feet 2* was irrelevant to the question of construction of cl 21 in the Letter Agreement.

b Consideration

54. The constructional choice to be made in the present case is whether the parties to the Letter Agreement agreed to be bound by the terms of the letter itself, but envisaged that "good faith negotiations" might result in the incorporation of terms which were "WB standard for 'A' list directors and producers" (see *Sinclair Scott& Co Ltd v Naughton* (1929) 43 CLR 310 at 317; [1929] HCA 34; *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622 at 627-628; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634), or whether terms which were "WB standard for 'A' list directors and producers" would be immediately incorporated into the Letter Agreement, although "subject to good faith negotiations" within the confines of "WB's customary parameters".

55. As McHugh JA pointed out in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634, the "decisive issue" is the intention of the parties objectively ascertained. This involves consideration of the text, context and purpose of the contract. The inquiry in a commercial contract is what a "reasonable businessperson" would have understood the terms to mean, which requires "consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract": *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [47]; see also *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 91 ALJR 486; [2017] HCA 12 at [17].

56. In the present case, the words of cl 21 of the Letter Agreement favour the conclusion that terms which were "WB standard for 'A' list directors and producers" were immediately incorporated, while leaving room for subsequent negotiations about their precise effect in the Letter Agreement. Clause 21 states that the "balance of terms" will be "WB standard for 'A' list directors and producers". The fact that the clause subsequently indicates that there is room for negotiation within limited confines does not detract from that clear expression of the parties' intention.

57. Further, the construction suggested by the text of cl 21 is supported by considering the clause in the context of the Letter Agreement as a whole. I have referred to the definitions of "Defined Gross", "Merchandising revenues" and "Soundtrack revenues" in cl 3 at [16] above. Each of these definitions refers to "WB's standard participation definitions" or "WB's standard definitions". Similarly, the definitions of "Producing Credit" and "Directing Credit" in cl 7 refer to "WB's customary exclusions". All of these provisions point to the incorporation of terms which were "standard" without the need for further negotiation. Without the immediate incorporation of such terms, critical provisions of the Letter Agreement would be rendered meaningless.

58. As I have noted at [47] above, KMMF and KMMS submitted that the phrase "subject to good faith negotiations" was apt to indicate a condition precedent to the incorporation of "WB standard terms for 'A' list directors and producers". The difficulty with this submission is that it is contrary to the text of cl 21 of the Letter Agreement and its context. While it may be the case that, as KMMF and KMMS submitted, it was not uncommon in the film industry to have films produced pursuant to incomplete agreements, there is nothing to suggest that this occurred in the present case, particularly having regard to the incorporation of the "standard definitions" and "customary exclusions" to which I have referred at [57] above.

59. Nor is it of any significance, having regard to the circumstances to which I have already referred, that terms which were "WB standard for 'A' list directors and producers" were not supplied to KMMF and KMMS. As was pointed out in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [47], legal instruments are "often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature". Further, there is no reason to assume that those advising KMMF and KMMS, who were experienced in the film industry, did not appreciate the meaning of terms which were "WB standard for 'A' list directors and producers".

60. Finally, any submission that KMMF and KMMS were unlikely to have agreed to arbitrate disputes in California is gainsaid by the fact that this was precisely what was agreed to in the COEs.

61. For these reasons, the primary judge was correct in concluding that cl 21 incorporated terms which were "WB standard for 'A' list directors and producers" into the Letter Agreement without the need for "good faith negotiations".

Was an arbitration clause incorporated by cl 21 of the Letter Agreement?

a The submissions

62. Senior counsel for the applicants submitted that there was "ample proof that standard terms existed, and they were the standard terms of [WB Productions]; that they were also the standard terms of [WB Pictures], which controlled and directed [WB Productions]". Alternatively, he submitted, the phrase "WB standard terms" could be read more broadly than as only referring to the standard terms of WB Productions, so as to encompass the standard terms of both WB Pictures and WB Entertainment as well.

63. Senior counsel for the applicants submitted that, in the context of a group of companies where "the Australian company was directed and controlled by the American company" and where the General Counsel and Vice-President of the American company negotiated the agreement, "the customary definitions in the standard terms for [WB Productions] were the same as those used elsewhere in the group".

64. In that context, the applicants referred to the fact that various provisions of the Letter Agreement made reference to "WB's standard or customary arrangements, rights and terms". They submitted that the "whole notion of 'A' list directors and producers … pointed to the central and controlling role of the Hollywood based group". They submitted that the place of WB Productions within the group was "both explicit in the contract and a significant feature of the contractual context". They submitted that, having regard to the contractual context, the primary judge should have concluded that "the intention was that the standard or customary terms and arrangements of WB Pictures would apply".

65. In relation to whether they had proved that any such "standard terms" existed, the applicants submitted that the phrase "WB standard terms for 'A' list directors and producers" connotes "terms which are 'standard' for use in such contracts, in the sense of being the established norm". They referred to the evidence of Mr Levin, who was said to have "identified the standard terms within the template document as comprising those terms within the template other than the 'deal terms'" for the particular transaction. On that basis, it was submitted that "WB standard terms for 'A' list directors and producers" were shown to be "certain and objectively identifiable".

66. The applicants submitted that the fact that "WB Pictures may have also entered into an unspecified number of contracts during that period that contained different terms" did not weaken that conclusion. They submitted that the construction of the word "standard" should not be based on the number of times the terms were used.

67. The applicants submitted that, once it was shown that "standard terms" were incorporated, the task for a court was to "do its best to identify the terms intended if there is some doubt": *Lief Investments Pty Ltd v Conagra International Fertiliser Co* (Court of Appeal (NSW), 16 July 1998, unrep). Senior counsel for the applicants submitted that the fact that "WB standard terms for 'A' list directors and producers" were not requested by the Californian attorney acting for KMMF and KMMS showed that they were "well known". Further, he agreed that what was required to be identified was not a "standard contract" but a "standard term".

68. In the alternative to the argument that the "standard terms" of WB Productions encompassed the "standard terms" of the Warner Bros group, including those of WB Pictures, the applicants submitted that the expression "WB" in the definition could be said to encompass WB Pictures. They submitted that "the fact that a defined term is used does not avoid the need to construe the relevant words in the context of the contract as a whole", referring to *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431; [2015] NSWCA 156 at [87].

69. The applicants submitted that a consideration of the Letter Agreement as a whole showed that the reference to "WB" in cl 21 of the Letter Agreement was intended to include both WB Productions and WB Pictures. Senior counsel for the applicants also submitted that the reference in cl 4(b)(ii) of the Letter Agreement, which I have extracted at [17] above, to "an officer of WB having the rank of Vice-President or higher", showed that the expression "WB" was not used consistently throughout the Letter Agreement as referring to WB Productions, since Australian proprietary limited companies do not have a position or status of "Vice-President".

70. Counsel for KMMF and KMMS submitted that the primary judge was correct in concluding that "standard" meant "used in a sufficient preponderance of cases, where [WB Productions] contracts with 'A' list directors and producers, to make its use usual". He submitted that "it was not enough to come to court with a series of agreements and identify in those agreements the existence of an arbitration clause" without providing the "universe" of the agreements entered into by the company. He submitted that it was within the power of the applicants to provide the "universe" of such agreements and that it should be inferred that, in those circumstances, their production would not have assisted the applicants on this issue. He also emphasised that the word "standard" had to refer to "agreements that were actually entered into".

71. KMMF and KMMS also stated the primary judge was correct in finding that the expression "WB" in the Letter Agreement unambiguously referred to WB Productions. They submitted that the definition could not be "rewritten" by reference to surrounding circumstances, pointing to authority that the general rule was that where a term is defined in an agreement by the parties, a court "should attempt to construe the contract by reading the words of the definition into the operative text of the contract". Further, they submitted that there was no evidence to support the contention that "references in the Letter Agreement to WB's customary or standard rights or terms are to be read as including customary or standard rights or terms of WB Pictures". They submitted that "there was no evidence that [WB Productions] operated in that manner let alone that [KMMF and KMMS] knew that is how it operated".

72. In that context, counsel for KMMF and KMMS submitted that it was not for his client to bring forward evidence of "WB standard terms", but rather, that someone from WB Productions or WB Pictures needed to say that it was the practice of WB Productions to use the "standard terms" of WB Pictures. He submitted that one could see why an Australian company dealing with Australian talents would have its own "standard terms" and would not necessarily include an arbitration clause referring disputes to California.

73. In dealing with the submission made by the applicants that there was no evidence that WB Productions operated independently of WB Pictures or had developed its own "standard terms", counsel for KMMF and KMMS submitted that this amounted to a reversal of the onus, and stated that it was for WB Productions to prove that there was a valid and binding arbitration clause, which included excluding the possibility that there were separate standard terms of WB Productions. He noted that no agreements to which WB Productions was a party were put into evidence, other than the Letter Agreement.

74. Finally, KMMF and KMMS submitted that the principle that a court has to "do its best" to identify the incorporated terms does not "dispense with the need for the moving party to establish its case to the usual standard".

b Consideration

75. There are two matters which should be noted at the outset. First, the question is not what "WB standard terms" might be generally, but whether a clause submitting disputes to arbitration in California was "WB standard for 'A' list directors and producers" within the meaning of cl 21 of the Letter Agreement.

76. Second, once it is accepted that cl 21 of the Letter Agreement operates to incorporate terms which are "WB standard for 'A' list directors and producers" without further "good faith negotiations", the task for a court is to "do its best to identify the terms intended if there is some doubt": *Lief Investments Pty Ltd v Conagra International Fertiliser Co* (Court of Appeal (NSW), 16 July 1998, unrep) at 22-23 per Sheller JA, with whom Mason P and Beazley JA agreed. The task is, in one sense, analogous to the task of a court in determining a meaning to be given to a plainly ambiguous term in a contract. A court will strive to give meaning to such a term rather than declare the term or the whole contract to be void for uncertainty: *Council of the Upper Hunter County District v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-437; [1968] HCA 8.

77. In the present case, the evidence of Mr Levin was that WB Productions was under the control of WB Pictures, both of which were subsidiaries of WB Entertainment. He stated that his responsibilities included "ultimate oversight over all matters relating to agreements associated with projects considered for production". He did not limit the description of his role to the United States entities in the Warner Bros group or exclude WB Productions from his area of oversight. Indeed, he stated that he was an "authorised signatory" for WB Productions.

78. Further, as Ms Smokler pointed out in her evidence, negotiations in respect of the Film took place between "WB Pictures business affairs executives" and, ultimately, Mr Levin's legal department, on the one hand, and the United States representatives of KMMF and KMMS on the other. There was no suggestion in her evidence that, because WB Productions was an Australian company, there was a different set of terms which were "WB standard for 'A' list directors and producers" under cl 21, different "standard definitions" under cl 3, different "customary exclusions" under cl 7 or different "customary termination rights for 'A' list directors and producers" under cl 12. I have outlined these provisions of the Letter Agreement at [16]-[21] above.

79. In these circumstances, it seems to me that, in referring to terms which were "WB standard for 'A' list directors and producers", the parties were referring to terms which were "standard" for the companies in the Warner Bros group, including WB Pictures and WB Productions.

80. The primary judge focused on whether the definition of the expression "WB" could be read as extending to other entities in the Warner Bros group. He held that it could not. However, the conclusion which I have reached does not require the definition of the expression "WB" to be extended so as to refer to entities in the Warner Bros group other than WB Productions. Rather, it recognises that the terms which were "standard" for WB Productions were the terms which were "standard" generally throughout the Warner Bros group.

81. There remains the question of whether a clause referring disputes to arbitration in California is "standard for 'A' list directors and producers" throughout the Warner Bros group. It is not necessary for that purpose to identify a "standard contract", or for that matter, to identify all terms which were "standard for 'A' list directors and producers" for WB Productions or WB Pictures. Rather, in my opinion, the question in the present context is whether an arbitration clause in the form of the arbitration clause in the 2009 Form Agreements exhibited to the affidavit of Mr Levin, which I have extracted at [28] above, meets the description of a term which is "standard for 'A' list directors and producers".

82. In my opinion, terms which are "WB standard for 'A' list directors and producers" in the present context can be described as terms which are habitually proffered by companies in the Warner Bros group for agreements with "A" list directors and producers. Mr Levin, in his affidavit, identifies what he described as "WB Pictures' internal form agreements for 'A' list directors and producers that were in use during the first half of 2009", which I have referred to as the 2009 Form Agreements. He said that both of the 2009 Form Agreements contained the same clause requiring arbitration of all disputes before JAMS in California. He stated that an arbitration clause in this form had been used since the early 2000s, and exhibited 56 agreements to his affidavit which contained this clause. As I have noted at [29] above, a substantially similar clause was also used in the COEs to which WB Productions was a party.

83. In these circumstances, it seems to me that the clause requiring the arbitration of all disputes before JAMS in California in the 2009 Form Agreements was a term which was "WB standard for 'A' list directors and producers" for the purpose of cl 21 of the Letter Agreement.

84. The primary judge reached a contrary conclusion on the basis that "standard", in "its ordinary grammatical meaning", means "used in a sufficient preponderance of cases … to make its use usual". As I have indicated, I would prefer to describe terms which are "standard" as terms which are habitually proffered.

85. The primary judge noted that Mr Levin did not record the number of agreements entered into by WB Pictures with "A" list directors and producers so as to enable a comparison to be made between agreements containing the arbitration clause and those which did not for the purpose of applying the primary judge's definition of "standard". Even if it was necessary to determine the question of whether the arbitration clause was a term which was "standard" by reference to the number of times it was used in agreements, as distinct from whether it was habitually proffered by WB Pictures, there is no material contrary to the evidence of Mr Levin that the arbitration clause in the 2009 Form Agreements had been used in form agreements since the early 2000s. There is no material capable of supporting the inference that, in a significant number of agreements, a different arbitration clause was used or was absent. Thus, there was nothing in the evidence capable of sustaining an inference which could have been rebutted by Mr Levin, and therefore, there was no need for him to give evidence on this issue: see *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121; [2000] HCA 18 at [51].

86. In these circumstances, in my respectful opinion, the primary judge erred in failing to conclude that an arbitration clause in the form of the arbitration clause in the 2009 Form Agreements was incorporated by cl 21 of the Letter Agreement. In these circumstances, it is unnecessary to determine whether the arbitration clause in the COEs would have covered the present dispute.

The result

87. So far as it is relevant, s 7 of the *International Arbitration Act 1974* (Cth) is in the following terms:

"**7 Enforcement of foreign arbitration agreements**

(1) Where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

…

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter."

88. In the present case, the arbitration clause incorporated into the Letter Agreement from the 2009 Form Agreements requires that an arbitrator "shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute". Therefore, the "procedure in relation to arbitration" in the Letter Agreement is "governed by the law of a Convention country" for the purpose of s 7(1)(a) of the *International Arbitration Act 1974* (Cth), namely, Californian law as the law of the United States. The present dispute involves a matter that "is capable of settlement by arbitration" under the arbitration clause incorporated into the Letter Agreement. It follows that the proceedings between KMMF and KMMS and WB Productions must be stayed under s 7(2) of the *International Arbitration Act 1974* (Cth).

89. WB Entertainment is not a party to the Letter Agreement, so s 7(2) of the *International Arbitration Act 1974* (Cth)does not mandate a stay of the proceedings against it. However, the claim against WB Entertainment that it "induced" a breach of contract by WB Productions is clearly linked to the claim against WB Productions.

90. In these circumstances, in my opinion, the present proceedings should be stayed in their entirety, but KMMF and KMMS should have the right to seek to have the stay lifted so far as it concerns the claim against WB Entertainment on the giving of 7 days' notice. However, the parties should have the opportunity to consider this judgment and, if they wish to do so, make submissions on the precise form of orders.

91. KMMS and KMMF should pay the applicants' costs of the appeal and the costs of the motion for a stay in the Court below.

92. In the circumstances, I would make the following orders:

    1. Grant the applicants leave to appeal.

    2. Allow the appeal.

    3. Set aside the orders made by the primary judge.

    4. Direct the parties to make submissions within 7 days as to the appropriate orders to give effect to this judgment.

5. Order the respondents to pay the applicants' costs of the appeal and the costs of the motion for a stay in the Court below.

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

94. **EMMETT AJA:** The question in this appeal is whether an order should be made under s 7(2) of the *International Arbitration Act 1974* (Cth) (**the Act**) staying proceedings brought in the Commercial Division by Kennedy Miller Mitchell Films Pty Limited (**KMM Films**) and Kennedy Miller Mitchell Services Pty Limited (**KMM Services**). In the proceedings, KMM Films and KMM Services seek damages from Warner Bros Feature Productions Pty Limited (**WB Productions**) and Warner Bros Entertainment Inc (**WB Entertainment**). WB Productions was formed for the purpose of producing motion pictures in Australia and is under the control and direction of WB Entertainment. A judge of the Equity Division (**the primary judge**) concluded that the proceedings should not be stayed. WB Entertainment and WB Productions seek leave to appeal from that decision.

95. Section 7 of the Act applies, relevantly for present purposes, where the procedure, in relation to arbitration under an arbitration agreement to which s 7 applies, is governed by the law of the United States of America. [1] Under s 7(2), where proceedings instituted by a party to such an arbitration agreement against another party to the agreement are pending in a court and the proceedings involve the determination of a matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration, the court is required to stay the proceedings and refer the parties to arbitration in respect of the matter, if a party to the agreement applies for it to make such an order.

96. The claim against WB Productions is for damages for breach of a contract (**the Letter Agreement**) made on 12 February 2009 between WB Productions, on the one part and KMM Films and KMM Services, on the other part. The first question involved in the proceedings is whether the Letter Agreement contains a provision such that it can be properly characterised as an arbitration agreement.

97. The Letter Agreement confirms an agreement between WB Productions, on the one hand, and KMM Films and KMM Services, on the other, with respect to a theatrical motion picture entitled "Fury Road" (**the Picture**), the proposed *anime* related to the Picture and the services of Mr George Miller (**Mr Miller**) and Mr Doug Mitchell (**Mr Mitchell**) in connection therewith. Clause 2 of the Letter Agreement relevantly provides that, upon the signature of "Certificates of Employment" for both Mr Miller and Mr Mitchell in the form attached, WB Productions was to pay KMM Films and KMM Services for all rights in relation to a screen play and detailed story boards and captions settling forth the principal story for the Picture. Other provisions of the Letter Agreement specify the method for calculating remuneration payable by WB Productions to KMM Films and KMM Services. Clause 21 of the Letter Agreement, which is headed "Balance of Terms", relevantly provides as follows:

"The balance of terms will be [WB Productions] and [WB Productions] standard for "A" list directors and producers, subject to good faith negotiations within [WB Productions'] and [WB Productions'] customary parameters."

98. The first question is whether by the words used in cl 21 of the Letter Agreement, the parties intended immediately to be bound by terms meeting the description "[WB Productions] standard terms for "A" list directors and producers". The second question is whether WB Productions has proved a set of contractual terms fitting that description. WB Productions and WB Entertainment relied on the evidence of Mr Richard Levin, an attorney admitted to practice in the Supreme Court in the State of California.

99. Since 2005, Mr Levin has acted as Senior Vice President and General Counsel of Warner Bros Pictures, a division of WB Studio Enterprises Inc (**WB Pictures**). Mr Levin is also an authorised signatory of WB Productions. WB Pictures is the holding company for both WB Productions and WB Entertainment. The responsibilities of Mr Levin include ultimate oversight over all matters relating to agreements associated with projects considered for production as theatrical motion pictures, including agreements with actors, producers, directors etc. (**Talent**). Ten attorneys in Mr Levin's department report directly to him.

100. Mr Levin gave evidence that most agreements with Talent begin with a "deal memo", which is an internal WB Pictures memo prepared by a business affairs executive with WB Pictures and which summarises the major deal points such as the role, compensation and credit of Talent, of an agreement reached with Talent. Deal memos are ordinarily directed to Mr Levin's department and in most situations one of the lawyers who reports to him will prepare a "long form agreement" based on the major deal points covered in the deal memo. Most agreements with Talent end up in a "long form" format. However, some do not and may end up being documented in a shorter "deal letter" format. That can be due to factors such as the need to close the deal quickly, established prior practice with Talent or the fact that the deal has a feature, such a copyright transfer, that requires a signature in order to be legally effective. For example, the Letter Agreement included the acquisition of a screen play from KMM Films and KMM Services, which, under United States law, required that the Letter Agreement be signed at the outset.

101. Deals that are not "papered" in the "long form" format will often incorporate WB Pictures' standard terms used in the "long form" format by reference to those standard terms. Deals that are governed by a "deal letter" fall into that category. The incorporation of WB Pictures' standard terms is typically accomplished by, among other things, including a paragraph headed "Balance of Terms".

102. Agreements in the "long form" format are prepared by the lawyers in Mr Levin's department using internal forms that his office maintains in a form file on a shared computer drive to which other attorneys in his department have access. His assistant is responsible for maintaining the forms on the shared drive under his direction. The assistant is the only person within Mr Levin's department who has rights to change any document on the shared file. The form are reviewed and updated from time to time. The old versions of the forms are maintained in sub-folders on the same shared drive. One of the sub-folders is entitled "old forms 2006-2010". WB Pictures' forms for "A" list directors and producers that were in use during the first half of 2009 included a "2009 Director Form Agreement" and the "2009 Producer Form Agreement". Those "long form" agreements contained a combination of "deal terms", being terms that are specific to the deal to be negotiated with the director or producer as recorded in the deal letter, and "standard terms", which are essentially the same in every deal, subject to approved negotiating parameters.

103. The "deal terms" relate to those provisions that are negotiated by business affairs executives and would typically be addressed in the deal memo. Those provisions include "compensation" and "credit". The fact that such provisions are "deal terms" is reflected in the form of the "long form" agreements by the fact that the paragraphs that address those matters have blanks to be completed. Both the "2009 Director Form Agreement" and the "2009 Producer Form Agreement" contain the same arbitration provision requiring arbitration of all disputes in Los Angeles, applying Californian law (**the relevant clause**). According to Mr Levin, arbitration provisions such as the relevant clause have been used in WB Pictures' "A" list director and producer forms since the early 2000s, including all the time during which Mr Levin has been general counsel of WB Pictures.

104. I have had the advantage of reading in draft form the proposed reasons of the Chief Justice. I agree with his Honour that cl 21 incorporated, in the present context, standard terms that can be described as terms habitually proffered by companies in the WP Entertainment Group for contracts with "A" list directors and producers. I agree with his Honour that the evidence of Mr Levin summarised above concerning the shared drive maintained in his office establishes that WB Pictures has standard terms and that the relevant clause was a standard term for the purposes of cl 21 of the Letter Agreement. Accordingly, whatever other standard terms might be incorporated into the Letter Agreement, the relevant clause was incorporated into it. The primary judge erred in concluding otherwise. I agree with the Chief Justice that leave to appeal should be granted and that the appeal should be allowed. I agree with the orders proposed by the Chief Justice.

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Endnote

1. s 7(1).

Amendments

01 May 2018 - Coversheet par [1] amend Mr George Miller and Mr Doug Mitchell

Decision last updated: 01 May 2018