

Chairman's Message



I greatly enjoyed my visit to Hobart, Tasmania on 5 October 2004 in order to address members of the sub-group on recent decisions concerning the setting aside of Awards under sections 38 and 42 of the Commercial Arbitration Act. It is heartening to see that the sub-group comprises a wide variety of professionals and others. Craig Doherty is keen to gather the Tasmanian sub-group together whenever there is a visit by a member or someone else prepared to present a CPD seminar in Hobart. Would any member willing to become involved in this please let me know.

One of the members was also able to attend the seminar by conference phone from Launceston. There seems no reason why the conference call facility cannot be used to involve our outlying members in our CPD events.

Working Group convenors Reports

The Arbitrators' group convenor Andrew Kincaid reports on their second meeting on 7th April 2004 at 5.30 pm when the topic was *When court proceedings are used to ambush an arbitration*. Toni De Fina led an unusual discussion on situations where an arbitration was beset by legal proceedings. The third and most recent meeting was on the 18th August when the topic was *Is the Arbitration process really a dry run to litigation?* Andrew Kincaid led an interesting discussion on his paper on recent decisions concerning the setting aside of Awards under sections 38 and 42 of the Commercial Arbitration Act.

Andrew Kincaid

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The Mediation practice discussion Group convenor Breda Annesley reports

The first meeting of the Mediation Practice Discussion Group ("MPDG")

held earlier this year identified a broad range of topics and issues for discussion. To maximize the value of the discussion meetings and in an attempt to cover as many of the topics as possible, a steering committee was formed to clarify the MPDG's objectives and to set meeting agendas.

The working group, comprising of Penny Webster, Todd Trevaks, Cheryl Thomas and Breda Annesley described the overriding objective of the MPDG to be an "Information Exchange" for members. In particular, it was agreed that there are two key focus areas of the Group:

(a) Personal skills development for members (technical skills, role play etc); and

(b) Professional and business development (accreditation, IAMA's strategic plan, marketing, mentoring etc). Meetings are bi-monthly, with the topics alternating between the two key areas. To date, a skills development session has been held on "Breaking an Impasse" and the professional and business development session has focused on the topical subject of Mediator Accreditation (reviewing current IAMA accreditation requirements).

Each meeting provides an opportunity for networking and to keep abreast of news within the Institute and the profession, for example, Victorian Chapter and National Council updates (e.g. CPD program, establishment of a Dispute Resolution Centre etc), case studies, forthcoming tenders, conferences, events etc.

All members (not only mediators!) are invited to attend, and to contribute ideas for topics of discussion. Next meeting we will continue the discussion on Mediator Accreditation.

We hope to see you at the next meeting.

You can contact Breda Annesley:
by phone at 9600 4921
or by email at breda@solutionist.com.au.

Working Group convenors Reports continued

Mediation Business Development

Penny Webster Reports

Mediation @ IAMA - Strategic Business Planning

The general discussion at the MPDG's first meeting about the state of the practice of Mediation and members' expectations of IAMA's role as our professional association has focussed attention on a number of matters.

Mediator members expressed concerns about establishing and maintaining the credibility of the profession and expectations about IAMA's role in raising the profile of professional mediation services, with the marketing and lobbying activities by members, which this will doubtless involve. It will be no surprise that these concerns and expectations also touched on accreditation, quality assurance, training and continuing professional development, marketing and lobbying activities.

As Breda's article states, the Mediation Practice Discussion Group (MPDG) is therefore working in two separate

streams, the personal skills development stream and the professional & business development stream.

In light of this the Victorian Chapter has decided to develop a clear and concise business plan that will inform and guide the development of services to mediator members.

The MPDG has already begun working on a review of IAMA's Mediator Accreditation Policy, with the intention of forwarding any recommendations arising to the Chapter. The next MPDG meeting on 20th October will continue this work.

If you would like to participate in a reference group developing the Plan please email your contact details to

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Tasmanian Group Report

Craig Doherty Tasmanian Group Convenor reports

On 8 June 2004 about a third of our total membership attended a CPD session led by Ray Groom. Ray is one of our most active mediators and arbitrators. He led a discussion of practical aspects of running a mediation, including the preparation of a mediation agreement. The discussion also covered some aspects of the *Alternative Dispute Resolution Act* and some possibilities for reform.

The discussion was very practical and was well received by all who attended. On 3 August, in place of our usual CPD function, we received an honoured guest in the person of Gordon Tippett.

Gordon shared with us news of various activities and initiatives being developed by IAMA.

And sparked a lively discussion about various issues affecting not only Tasmania but, we suspect, many IAMA members outside the larger capital cities. We look forward to further developments, especially in the area of a wider sharing of IAMA's considerable CPD resources. Gordon's visit was greatly appreciated by all who attended and we enjoyed a most congenial evening.

Craig Doherty

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Adjudicators group report

The Adjudicators' Group convenor Lawrence Reddaway reports

Security of Payment – Stronger Legislation Coming in Victoria

The room was crowded when the Victorian Chapter's Security of Payment Group met on 30th June to consider the IAMA draft response to the Building Commission's discussion paper concerning options for strengthening the

Security of payment legislation and the discussion continued during the following buffet dinner.

Adjudicators Group convenors Report continued

As a result of the committee's work and the group's discussion, IAMA has made recommendations to the Victorian State Government regarding strengthening the Security of Payment legislation.

IAMA anticipates that the amended legislation, expected in mid 2005, will be far more effective in achieving the original legislative intention of keeping the money flowing down the contractual chain of all construction projects in Victoria. This will bring to Victoria the benefits that all participants in NSW projects, including the smallest sub-contractors etc, have enjoyed since 2002.

In June 2004, Victoria's Building Commission published an Options Discussion Paper which considered numerous possible changes to the *Building and Construction Security of Payment Act 2002*.

In its covering letter to the Building Commissioner, Mr Tony Arne, IAMA identified three main objectives.

- ♣ The utmost desirability for National uniformity for SoP legislation.
- ♣ The need for Reform of Victoria's SoP legislation
- ♣ The Need for Speed.

The best guess is that the amended legislation could come into effect in the middle of 2005. We expect that all those currently accredited as adjudicators in Victoria will have to undergo additional training about the very major changes that are anticipated.

The Victorian SoP group has a lot of work in hand in preparation for the large upturn in adjudications that can be expected when the legislative changes have taken effect.

The full text of IAMA submission is obtainable by email from Elisabeth Siecker. In the meantime, here are some highlights:

- ♣ We support the strengthening of the prohibition of 'pay when paid' provisions.
- ♣ We support the concept that 'once an issue has been adjudicated upon, it cannot be adjudicated upon again'.
- ♣ We support the widening of the Act to include all payments. [Including "final payments"]

- ♣ We support the prohibition on respondents from including additional material in their response to the adjudicator.
- ♣ We agree that there should be a time limit on when claims can be made. We consider 3 months to be a reasonable time limit.
- ♣ We strongly support a move to remove the option to provide security. [i.e. we support a change to a respondent having to pay cash.]
- ♣ We support a change to optional adjudication if no payment schedule is provided.
- ♣ We support the inclusion of home owners and owner builders, subject to a strong system of education . . .
- ♣ We agree that there should be some ability for an adjudicator to withdraw in certain circumstances.
- ♣ We would support a provision whereby the adjudicator has the ability to formally declare the matter to be 'complex' and extend the time to (say) 20 days.
- ♣ We support the principle of allowing adjudicators to deal with retention monies etc.
- ♣ We believe that the only way for an adjudication to happen is for the claimant to select an ANA; there should no private agreements.
- ♣ We suggest that the Minister should consider very carefully the criteria against which ANAs are approved. For example, we recommend that the criteria for appointing an organisation as an ANA should include 'lack of apparent bias towards possible parties to a building dispute'.

As the pre-eminent ANA involved, we would be pleased to work with the Commission in providing education and training to other organisations.

Lawrence Reddaway
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Book review

Statutory Adjudication

A practical guide

By Derek Simmonds

published in 2003 by Blackwell

publishing UK.

270 pp Octavo cost Aus\$116.00

Derek Simmonds is a Civil Engineer who has been practicing as an Arbitrator in UK for the last 29 years, conducting arbitrations relating to building, civil, mechanical and electrical engineering disputes.

With the advent of Statutory Adjudication in UK he was one of the initial team tutoring courses run by the Chartered Institute of Arbitrators for potential Adjudicators and subsequently interviewing them for listing and is still involved in this.

He is a member of the Chartered Institute of Arbitrators Adjudication advisory group and has a wide experience as an adjudicator both in UK and internationally.

The book is written as a practical guide for the parties to adjudication and is a valuable step-by-step guide, not only for adjudicators but also and particularly, for those who are not familiar with the process.

From an Adjudicators point of view it provides:

In part 2 an insight into what are the complaining party's options for consideration at all stages from the referral to the final determination and enforcement of a decision.

In part 3 he examines the position of a respondent faced with adjudication highlighting the various steps from initial response, including considerations of whether to be involved, through the various actions to be taken to protect its interests including how a decision can be challenged.

In part 4 he looks at matters of common interest to both parties and in particular to the adjudicator.

In parts 5 & 6 he deals with the UK Act and its most frequently used provisions and procedures.

Appendices include a list of 139 cases, which are categorized to assist ready reference.

I found it to be a valuable practical guide to a wide range of problems likely to arise such as for example; those arising from financial difficulties of parties including insolvency and the refusal of a party to participate.

In my opinion, due to its extremely practical approach and the similarities between UK and Australian legal systems; the various differences between the UK and Australian Adjudication legislation have a minimal affect on the value of the book as a guide to Australian adjudicators.

Robert Knott

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Case Notes

The liability of the "Third Party Neutral".

Kurc v Eyecare Pty Ltd [2004] VCAT 1139, (16 June 2004)

This case note is written from the perspective of its relevance to Alternative Dispute Resolution practitioners. A case last year, in this context was:

Tapoohi v Lewenberg & Ors (No 2) [2003] VSC 410, decided on 21 October 2003, concerned the potential liability of a Mediator who in the particular circumstances did not have immunity

from suit, in a situation where one of the parties to a settlement reached at mediation, later considered the terms of settlement to be unsatisfactory.

(for details refer www.austlii.edu.au)

Kurc v Eyecare arises in a very different context – a rent determination by a valuer acting as an expert. Whilst a Mediator does not impose decisions on the parties but assists them to come to their own resolution of a dispute, the "Third Party Neutral" in **Kurc** had the role

Case Notes continued

of imposing a decision: by determining the rent.

The decision in **Kurc** would also be of interest to those involved in retail tenancies, and/or considering rent disputes.

Under a Retail Tenancies Lease of commercial premises, there was an option to renew at a rent to be agreed or determined by a valuer acting as expert and not as an arbitrator. Accordingly the statutory powers and protections afforded to arbitrators under the Commercial Arbitration Act did not apply.

The relevant clause in the Lease gave direction to the valuer as to how to perform that task – although of course the valuer was not a party to the Lease. As paraphrased in the VCAT decision, the valuer was obliged to -

“(a) consider any written submissions made by the parties within 21 days of them being informed of his appointment;

(b) determine the rent as an expert;

(c) assume that the premises are available for leasing with a sitting tenant for a term equal to the term of this lease, and with any options for renewal;

(d) take into account the terms and conditions of this Lease and the permitted use;

(e) assume that the Lessee's covenants have been fully performed;

(f) ignore any fixtures and fitting which the Lessee has the right to remove from the premises and improvements voluntarily made by the Lessee;

(g) ignore the goodwill of the Lessee's business and any improvements made to the premises by the Lessee; and

(h) have regard to current market rentals for comparable premises in the locality”.

A valuer was appointed to determine the rent pursuant to the clause, and he published a determination of the rent to be paid, without stating expressly whether the figure included or excluded GST. The landlord (Eyecare) considered

there were errors in the determination and raised these with the valuer, and after considering matters the valuer issued a revised rental determination, setting a higher rent, without reference to the tenant. The landlord was dissatisfied with the revised determination, which did not state that GST was to be added. The tenant was also dissatisfied and asserted that the original rent determination was final and binding and could not be revised.

The tenant filed proceedings in VCAT, seeking a declaration that the first rent determination was final and binding, and that the rent so determined included GST. The tenant also sought a declaration that the revised determination had no effect between the parties.

The landlord filed a defence and counterclaim which in substance pleaded that due to errors the first rent determination was not valid, and that the second rent determination was the exercise by the valuer of his right to correct a manifest error, effectively under a “slip rule”.

By reply, the tenant pleaded that having delivered the original rent determination the valuer became *functus officio*, and that in any event the valuer had no access to a slip rule.

In addition to defending the tenant's claim, the landlord filed a claim against the valuer, seeking indemnity or contribution in respect of loss of rent and the consequent effect on the capital value of the premises should the Tribunal find that the revised rent determination was not valid and binding. The landlord also sought damages from the valuer for negligence, to be calculated as the difference between the rent the valuer should have determined had he not acted negligently and/or in breach of contract in delivering this determination, and the rent the tenant was obliged to pay as a result of the proceeding.

The Tribunal held that the valuer could not make a revised determination. At para 36:

“One may accept that an expert is not required to act judicially and so the doctrine of *functus officio* which applies to those who do, such as judges, Tribunal members and arbitrators can

Case Notes continued

have no direct application to an expert. Even so, unless the expert is to be at liberty, repeatedly to revisit his determination, the finality of the determination operates in a way analogous to the *functus officio* doctrine”.

There was no slip rule applicable to experts imposed by the general law. A slip rule could be created by the contract under which the expert was appointed, but there was no such provision in this case.

Further, even if there was a slip rule in this case, it could not have been accessed here because the valuer's first determination was deliberate even though it was wrong. At paras 41 – 43 the Tribunal said:

“ 41 The ‘expert’ jurisdiction which (the valuer) is exercising to determine the market rent between the parties has no statutory basis, hence no recourse can be had to provisions such as Section 30 of the *Commercial Arbitration Act 1984* nor can any inherent or implied jurisdiction arise from the terms of any statute as the members of the Administrative Appeals Tribunal of the Commonwealth have variously concluded. In my view, in the absence of a specific contractual authorisation to revise or correct his determination, (the valuer) was most likely in the same position as the arbitrator in *Mordue v Palmer*, incapable of correcting even the most obvious error in his determination. Since the power to make expert determinations derives from a contract it is self-evident that if the consent of both parties or perhaps as in *Pontin v Repatriation Commission* at the request of one party and without opposition from the other party a correction could be made. As previously noted however, not only did (the tenant) Mr Kurc give no assent nor indicate a lack of opposition to the proposed revision, he had no knowledge that it was even in contemplation. He has not consented or indicated a lack of opposition since publication of the revised determination. *I will however assume contrary to my own inclination that (the valuer) was possessed of the power of revision, correction or amendment along the lines of the power which Mr Todd concluded the Commonwealth Administrative Appeals Tribunal had independently of Section 43AA of its statute.*

42 On the basis of those powers was (the valuer) entitled to publish his revised determination? Certainly the matters which (the valuer) sought to correct arose from no clerical mistake, nor from any omission, inadvertence or oversight of the representatives of either party, nor is there any suggestion that the rental determination made by (the valuer) did not give effect to his meaning and intention as that meaning and intention was manifested in the narrative portions of his determination. There is no ambiguity in (the valuer's) determination nor was there any misnomer or misdescription; *Per contra* the corrections made by (the valuer) fall within the class of corrections which ... were impermissible. (The valuer's) determination was as he intended it to be. When the further argument was put to him by (the landlord) he changed his mind. His decision was not ambiguous but according to the views expressed in the revised determination, the original determination was wrong in fact or law.

43 The errors, which (the valuer) sought to correct, would not in my view be corrected or amended even under the slip rule (in the Supreme Court and the County Court Rule 36.07). If (the valuer) did make errors they were not accidental but the result of deliberate finding ...”

It followed that the second determination was invalid and of no effect.

The Tribunal then turned its attention to whether the original determination was valid. The landlord alleged that there were 3 errors, which justified the first determination being set aside. I will not go into these in any detail, because they are of more interest to leasing lawyers than ADR practitioners. Suffice to say that commencing at paragraph 52 the Tribunal considered the law on the impeachability of expert determinations.

In paragraphs 54-60 the Tribunal considered the submission that by allowing a discount based on the committed use for the premises the valuer made an impeachable error. The Tribunal held that no error was made, much less an error, which would vitiate the expert determination.

In paragraphs 61-65 the Tribunal considered the question, based on the use of comparative rental evidence, whether the rentals considered were

Case Notes continued

inclusive or exclusive of GST. There was no doubt that the valuer had made a mistake on this issue, and in publishing his revised determination the valuer admitted he had made such a mistake. The issue though was whether the mistake would vitiate the original determination. At paragraph 65 the Tribunal held that the error was one in the process of valuation; that the determination was in accordance with the lease and the relevant legislation, and that error in the process of valuation was not one that would vitiate the rental determination.

In paragraphs 66- 69 the Tribunal considered the third submission, that by excluding an area at the rear of the premises for the purposes of the valuation of rent, the valuer made an error. The area was 29 sq m, consisting of a stair well and a void. The Tribunal held at paragraph 68 that the guidelines gazetted under the Retail Tenancies Reform Act were consistent with the valuer excluding that area, but that even if the Tribunal were wrong, again that would be an error in the process of valuation and not one, which vitiated the determination.

Accordingly the Tribunal held at paragraph 70 that the original determination was binding on the parties.

The rental determination was exclusive of GST. Under the lease the tenant was obliged to pay outgoings and the Tribunal was then called on to consider whether the tenant had to pay GST as an outgoing. This turned on the interpretation of the GST legislation and the lease, and at paragraph 79 the Tribunal held that because GST is a tax upon the supply of the real estate, as distinct from a tax on the landlord or in respect of the land, the tenant was not liable to pay GST as an outgoing.

From paragraph 88 the Tribunal considered the liability of the valuer to the landlord in the circumstances.

At paragraph 89 the Tribunal noted that a valuer was not immune from suit.

At paragraph 92 the Tribunal noted that the mistake the valuer had made was to misinterpret the comparable rental evidence as being of rentals including GST whereas in fact they excluded GST.

On the accepted basis that a mere mistake is not conclusive evidence of negligence the Tribunal considered whether the valuer had been negligent.

The Tribunal analysed the steps taken by the valuer in order to prepare the determination and concluded that "a person using all the care and skill of a registered valuer" would not have misinterpreted the material placed before him in carrying out the determination that he did. This was a "readily quantifiable breach of duty" (paras 96 and 97).

Cases were cited in support of a submission by the valuer that a 10% or possibly 15% variant is allowed and that a valuation within 10%-15% of the correct figure is not tainted by negligence. The Tribunal again analysed the figures, at para 100, and noted that the figure was within a 10% tolerance of the first determination. "The question then becomes whether I should find looking at the rental valuation as a whole that being within a 10% tolerance is indicative of no negligence or breach of duty".

Citing *Adwell Holdings Pty Ltd v Smith* [2003] NSW CA 103, per Meagher J A, the Tribunal concluded that despite the determination being within 10% of the correct figure "analysis of it shows that it was prepared negligently and in breach of duty".

The valuer was held to be liable to the landlord. However, in the decision made on 16 June 2004 the Tribunal did not assess damages, and the assessment of damages will be carried out after consideration of further submissions and possibly further evidence.

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Accredited Specialist - Mediation

Email contact

Due to time constraints and to contain costs, newsletters, special announcements and Professional Development notices are now circulated by email. Do you prefer to receive your notices by mail?

Please advise the Victorian Chapter office staff if you do.

Arbitration, whether a “manifest error of law” test is to be applied.

Southern Region Ltd v. Minister for Police and Emergency Services (2004) VSC 297.

The big criticism of arbitration has always been that sooner or later the case ends up in the courts anyway. And the law, in the form of Section 38 of the Commercial Arbitration Act, seems to give an open invitation to disgruntled parties to try to have another go when the result of the arbitration has gone against them.

Section 38 says, in substance, that a party may appeal to the Supreme Court on any question of law arising out of an award and it has never been beyond the ingenuity of lawyers to conjure up a question of law to get an appeal off the ground.

It is true that leave to appeal cannot be granted unless the issue would 'substantially affect' the rights of a party and either there is a 'manifest error of law or' 'strong evidence' of an error of law that might add certainty to the commercial law if it were rectified. But despite these hurdles, there is ample scope for the losing party to chance his arm and try to overturn the award. Some would also say that disgruntled parties have succeeded too often in this exercise.

It is refreshing, therefore, to find at least one case where an unsuccessful party with not exactly the strongest case has been very firmly rejected in an application for leave to appeal.

The builder of a new courthouse in Ballarat claimed delay costs that would have been fully recoverable under the general conditions of contract. But they were not recoverable under certain other documents that put a cap on them. The builder said that these other documents were not part of the contract, but the arbitrator found that they were.

The Specification had provided that the contract documents were the specific ones, which were set out, and also' any

other document as may be applicable in the circumstances'. It was that expression that gave rise to the first issue in the case.

One of the 'any other' documents was a letter from the builder during the pre-contract negotiations, in which it agreed that a nominated figure of \$ 4000 per day for extensions of time was an 'all-inclusive rate'. Only after making that concession did the builder submit its tender.

The arbitrator found that the parties intended the disputed documents, including this letter, to be part of the contract. Mr Justice Osborne had no difficulty in agreeing. Indeed, it is hard to see how either of them could have reached a different conclusion.

As the Judge pointed out, the arbitrator had applied, as he should have, an objective test to conclude that the phrase 'any other document as may be applicable in the circumstances' had a real and practical meaning and that it was capable of including the disputed documents that put a cap on the claim for delay.

His Honour concluded that it was not possible to find that the arbitrator had committed a manifest error of law. In reality, however, it is a finding that the arbitrator was absolutely right.

His Honour reached the same conclusion on the Plaintiffs second attempt to show a manifest error of law. This time, it was a claim for delays over the provision of pre-cast concrete wall panels. The entitlement depended on which of two different, ambiguous and inconsistent Australian Standards referred to in the Specification was to be applied. The arbitrator decided that neither of them was applicable, because the conflicting standards were just incapable of being resolved. How then could it be determined as to whether the wall panels were satisfactory or not?

The Judge held that the arbitrator was right in applying an objective test of what the parties intended in such a case; they intended that the panels should be to the standard of a sample as the Specification itself provided.

Case Notes continued

What is important for our purposes, however, is not the quality of the panels in the Ballarat Court House, but the notion expressed by Mr Justice Osborne in no uncertain terms that these sorts of disputes must be resolved by working out, by an objective examination of all the facts, just what the parties intended.

Again, it can hardly be surprising when an arbitrator finds that the parties intended to be governed by their obligations under the Specification.

Arbitration, stay of court proceedings, when an arbitration agreement is inoperative. -

Downing v Al Tameer Establishment & Sheikh Khalid Al Ibrahim (2002) EWCA Civ 721 UK Court of Appeal.

This case is a good illustration of the tests applied by the courts when faced with an attempt by a party to a dispute to stop court proceedings being brought against it on the ground that there is an arbitration clause in the contract and that the dispute should therefore go to arbitration.

Judges generally like to see disputes being resolved in the courts rather than by arbitration. On the other hand, if there is an arbitration clause in the contract, they will tend to insist that the parties should honour their contract and go to arbitration.

But Section 9 of the UK Arbitration Act 1996, like the Australian Act, provides that this will not be ordered if, for example, the arbitration agreement is 'inoperative', i.e., if it no longer has any force or effect. In that case, the arbitration agreement will no longer have the upper hand and the court action will be allowed to proceed.

How, then, do the courts decide whether an arbitration clause is inoperative?

Obviously, all cases depend on their own special facts; but this case gives us something of a general guide as to how the problem will be solved.

But it is re-assuring when a Court decides that such a finding is not a manifest error of law and that the result of the arbitration should stand.

The *Southern Region* case is therefore good news for those who look for finality in the arbitration process.

Hon Neil Brown QC
Arbitrator and Mediator
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Mr Downing, the Appellant, was an inventor who had a long running dispute with a Saudi Arabian company which, he claimed, had wretched on a deal to put up some finance to help develop a process of his that was said to be able to separate crude oil from water.

Their relationship went through the gyrations so common to many international transactions, with the Saudi company starting off by ignoring Mr Downing's claim, then rejecting it, denying that there ever was a contract, refusing to take part in arbitration and then finally, when the moment of truth arrived and Mr Downing sued it in the English courts and served a writ on it, by doing a complete *volte face* and claiming that there was an arbitration clause in the contract. The court proceedings, it said, should be stayed and the dispute should go off to arbitration, a method of adjudication that, until then, it had done everything it could to avoid.

The company then made an application to stay the court proceedings on precisely that ground, that the parties had agreed that disputes should go to arbitration. Mr Downing, of course, wanted his court proceedings to continue, so he had to argue that the arbitration agreement did not prevent them from continuing. He had to argue in effect that the arbitration agreement was 'inoperative'.

Case Notes continued

At the outset of this analysis, it is important to understand that an arbitration clause is separate from the main contract and remains on foot and can be used to stay the court proceedings unless and until it is repudiated by the party relying on it. This means that an arbitration clause will remain in force unless one party first of all shows an intention that he will no longer be bound by it, the 'it', being the separate arbitration agreement or clause.

In addition, the other party must accept that repudiation before the contract can be said to have come to an end.

For that reason, the claimant, Mr Downing, had to argue in the present case that the defendant Saudi company had repudiated the arbitration agreement, that the repudiation had been unequivocally accepted by him, the claimant, (who was bringing the court proceedings and who did not want the arbitration clause to stand in his way) and that his acceptance had been communicated to the defendant (who was relying on the arbitration agreement to stop the court proceedings).

The Saudi company had written two letters in which it had denied the existence of *any* contract at all, so the claimant was able to argue plausibly that this amounted to a repudiation by the defendant, not only of the main contract, but of the arbitration agreement as well.

He also argued that the issue and service of his writ to start the court proceedings was an unequivocal acceptance of the repudiation, that the decks had thus been cleared of the arbitration clause and that he was therefore free to continue with his court proceedings.

When Mr Dowling had started to pursue the Saudi company, the company and its lawyers had adopted a combination of ignoring the claim, denying there was a contract at all (so there could hardly be a breach of it) and finally saying that it had no intention of dealing with you further. ,

The Court of Appeal concluded that this conduct amounted to a clear intention by the company not to be bound by the agreement to arbitrate and therefore an intention to repudiate it. The Court of Appeal seems to have been right in reaching this conclusion: if the defendant

was saying anything at all, it was saying that it would not be arbitrating this dispute.

The first test had therefore been satisfied. The next question was whether the claimant had satisfied the second test; in other words, by issuing his writ and serving it on the defendant, had he unequivocally accepted the repudiation?

The Court of Appeal held that he had.

The test to be applied, it said, was to look at the 'state of play' in the war between the parties. If it is clear that the claimant has abandoned the option to go to arbitration and has done so because his defendant refuses to recognise the arbitration agreement, then he has by the issue and service of the writ unequivocally communicated to the defendant that he accepts the repudiation and the contract is therefore at an end.

Put another way, the Court said that the claimant had resorted to court proceedings only because the defendant had refused to co-operate or acknowledge the existence of the arbitration agreement. Moreover, the defendant must have reached the conclusion that this was its own doing and that it had all come about because of its own conduct. Accordingly, not only had there been a repudiation of the arbitration agreement by the Saudi company but Mr Downing's acceptance of that repudiation must have registered with the company.

Accordingly, as the arbitration agreement was at an end, it was 'inoperative'. It therefore could not stand in the way of the Court proceedings or be used to stay them. As a result, the world of arbitration missed out on another case and Mr Downing was free to continue his court proceedings. I wonder how he went. I wonder if he is still glad that he went for court proceedings rather than arbitration.

Hon Neil Brown QC

Arbitrator and Mediator

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Personal notes

Vale Geoff Masel FIAMA

5 September 1928 - 8 August 2004



Geoff Masel, an extraordinarily talented lawyer, who died recently, had a long and distinguished career, which was complemented by an easy, direct manner. He never succumbed to that common failing of many senior lawyers, pomposity. He was available to anyone who sought his advice. His reputation was forged on integrity, professionalism and acuity.

Geoff was born at home in East St Kilda, the second son of Marie and Alec Masel. He graduated in Law at Melbourne University in 1949 and in Arts majoring in Economics, in 1955. Not a conscientious law student, he took advantage of brother Leigh's notes in order to devote more attention to Zionist affairs and editing a monthly magazine. In 1951 he left Melbourne for the new state of Israel. Although he enjoyed kibbutz life, things did not turn out as he planned, so he returned with his first wife Helen. In 1952 he was articled to his father, Alec Masel. In 1955 he entered into partnership with Alec Masel, Moerlin Fox and Leigh Masel at Phillips Fox & Masel. He was soon recognized as being a talented lawyer, particularly skilful in analysis, negotiation and with an extraordinary recall of relevant cases.

He joined the Institute of Arbitrators Australia in 1979 and was elected as a Fellow in 1981. From reluctant debutante to revered elder statesman, Geoff's practice with the Melbourne law firm Phillips Fox eventually spanned 52 years.

A devoted single father after the end of his first marriage, he never compromised the needs of his children, Danny and Debbie, for his career. In 1971 he married Sandra Copland, an associate solicitor at Phillips Fox & Masel and had two more children, Stephen and Joanna.

He acted for many insurers and large companies and advised all levels of Government on a wide range of issues. He was a recognised expert in aviation, building and construction law and a doyen of insurance and professional liability law. He acted for the little guy as well. Asked why he took on difficult and sometimes eccentric clients, he responded, "They also are entitled to have the best lawyers".

He was involved in some major disaster cases, including the West Gate Bridge collapse, the TAA Canadian Pacific aircraft collision in Sydney, and the Ash Wednesday bushfires. Until 1984, he had conducted life through a veil of roll-your-own cigarette smoke. A familiar image of Geoff in those years was of him seated with one foot on his desk, phone or papers in one hand, rolling a cigarette in the other, adroitly dispensing advice in a nonchalant manner. It was only when he took three months leave in Spain and France after acting for the SECV in the Ash Wednesday bushfires case in London that he was finally able to give up smoking.

A great educator, he was committed to the development of younger lawyers and was a tireless editor and author of legal publications, including his own book, *Professional Negligence of Lawyers, Accountants, Bankers and Brokers*, which went into two editions. He undertook post-graduate teaching and presented many conference papers and seminars both in Australia and internationally. He was intellectually robust, always ready to comment on where the High Court got it wrong. He mentored and inspired many young lawyers during his long career. Not only his own clients and colleagues respected and admired him, but also his opponents and competitors.

Geoff was instrumental in creating the national and later international firm of Phillips Fox and major professional associations like the Australian Insurance Law Association, and the Aviation Law Association of Australia and New Zealand. He was also a foundation member of the Building Dispute Practitioners Society. He served as Chair of Victoria Legal Aid for 3 years, demonstrating his commitment to deliver legal services to the community and his keen sense of social justice.

Since retiring as senior partner 15 years ago, has been an active consultant to Phillips Fox applying his skills and reputation in the field of alternative dispute resolution, both as arbitrator and mediator. At the stage when many people begin to retreat from the world, he remained in demand as a lawyer, speaker, mediator, and board member.

He was an adventurous traveller, a bushwalker and a devoted husband, father and grandfather. He spent many happy times at Mount Martha with his family. Here he swam along the foreshore, measuring his fitness in boatshed lengths. He was a true individual with an independent mind, a raconteur, a lover of fine wine, food and music, and a voter of conscience.

He never took himself too seriously and had a keen sense of humour; he was rather fond of a bad pun. He remained utterly without pretension. Melbourne's gentlemen's clubshed no allure for him. He once quipped that the only club he wanted to join was the Qantas Club.

Sandra Masel, Peter Rashleigh.

Congratulations To Jon Kenfield on elevation to Grade one Arbitrator.

To Lawrence Reddaway on being appointed as a co-opted member of the Building Practitioners Board.

Editors Messages

This is the first of a new series of Monthly email newsletters designed to communicate more effectively and enable members to participate more fully in IAMA Vic Chapter activities by regularly exchanging news and views

Its success depends on your response, by providing news and expressing your views. You can contact the Editor at the email address below.

robertknot@smartchat.net.au

CPD Event not listed on the following pages

– Queensland's upcoming Certificate in Adjudication course in accordance with the Building and Construction Industry Payments Act (Qld) 2004
Thurs. 28 October to Sat. 30 October.

Some interesting websites of International organisations involved in Arbitration and ADR

ICC -The International Court of Arbitration of the International Chamber of Commerce

The site of the ICC International Court of Arbitration has been extensively revised and is now at:

http://www.iccwbo.org/index_court.asp

Documents such as model clauses and rules can be found directly in the corresponding sections of the site or they can be downloaded in PDF format (MSWord) for offline consultation, either from there or by clicking on the document concerned in the desired language listed at: <http://www.iccwbo.org/court/english/rules/rules.asp>

Arbitration; <http://www.iccwbo.org/court/english/arbitration/introduction.asp>

1998 Arbitration Rules: <http://www.iccwbo.org/court/english/arbitration/rules.asp>

Conciliation: http://www.iccwbo.org/court/english/conciliation/all_topics.asp

1988 Conciliation Rules: click on "Rules" within the section. DOCDEX -Documentary credit dispute resolution expertise. This service of the International Centre for Expertise is at:

http://www.iccwbo.org/court/english/docdex/a_11_topics.asp

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Disclaimer: the Institute does not necessarily endorse Views expressed by contributors to this newsletter. The Institute, the editor, or the printers accept no responsibility for the accuracy of information contained within the newsletter.

PROFESSIONAL DEVELOPMENT PROGRAMME 2004

- Cost per standard “non dinner” Forum remains at \$38.50 for Members and \$45.00 for non-Members

NOTE 1: For Tasmanian function details contact Craig Doherty on (03) 6220 6220.

NOTE 2: Melbourne venues are advised on event flyers; check enrolment forms circulated by email approximately two to three weeks in advance or contact the Chapter office.

NOTE 3: The programme may vary as a result of unforeseen circumstances - check emails regularly for updates.

All notices are circulated by email; **please notify us of your email address.**

If you prefer to receive notices by mail? Please advise Chapter staff.

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IAMA Victorian Chapter, GPO Box 4134, Melbourne Vic. 3001

DATE	EVENT & TOPIC	HRS	CPD
OCTOBER			
Tues 5	TASMANIA - Is the Arbitration process really a dry run to litigation? Andrew Kincaid, Barrister and Victorian Chapter Chair	1.5	1
Wed 6 – 5-30	Mediation Practice Discussion Group IAMA Mediator Accreditation Policy/National Accreditation Standards	1	1
Mon 11 - noon	Discussing Disputes @ Defence - participatory lunch Officers' Mess at Victoria Barracks “Great Questions of our time... what works best - Arbitration or Mediation? By males or females?”	1.5	1
Wed 20 – 5.30	Mediation Practice Discussion Group IAMA Mediator Accreditation Policy/National Accreditation Standards (continued)	1	1
NOVEMBER			
Mon 8 - 5-30	International Commercial Arbitration – An Australian Perspective Associate Professor Richard Garnett & Dr Gavan Griffith Neil McPhee Room, Owen Dixon Chambers, 205 William Street, Melbourne. Drinks in Essoign Club from 7pm. Jointly sponsored by CIArb Australian Branch, IAMA Victorian Chapter and the Victorian Bar Council. No admission charge. Register with IAMA Victorian Chapter	1.5	2
Wed 10 – 5-30,	Adjudication in 10 Days – the NSW Experience Tim Sullivan, President, IAMA	1.5	2

Mon 15- 5.30	Chapter Committee meeting		1
Tue 16 – 5 - 30	Expert Determination – Process, Procedures & Opportunities Jon Kenfield LLB CA FIAMA (Grade 1 Arbitrator and Mediator) Expert Determination as a real alternative to arbitration for commercial disputes - putting the experts back into the picture!	1.5	2
Wed 17 – 9.00 to 5.00	Advanced Negotiation Skills Jon Kenfield LLB CA FIAMA (Grade 1 Arbitrator and Mediator) Concepts, tools and techniques for use in complex negotiations, facilitations & mediations. Cost: \$450.00 + GST. (Includes 100+ page manual and negotiation preparation templates on CD).	7	8
Sat & Sun 20 & 21	Mediation Role-plays (Qualifying) Facilitated and supervised by advanced mediators. An opportunity for inexperienced mediators to engage in fully supervised and assessed mediation role-plays that can be counted as actual mediation experience! Cost: \$700.00 +GST for 2 days => 3 mediations as mediator.	14	16
Wed 24 - 5.30	Active Listening & Reframing Breda Annesley & Cheryl Thomas Essential micro-skills training for mediation practitioners.	1.5	2
Thur 25 12.30 - 2.00	Arbitration Case Study – “Fireside Chat” with Dr Clyde Croft SC Implications of Age Old Builders’ Case	1.5	2
DECEMBER			
Wed 1 12.30	Mediation Styles & Formats - Fireside Chat A lively discussion of different mediation theories and styles in practice: What works best? Why? When? Where?	1.5	2
Sat 4 – 9.00 to 5.00	Mock Arbitration Facilitated, commentated and acted out by experienced arbitrators and struggling thespians. Demonstration of arbitration process, including: preliminary conference, taking evidence, directions, decision-making and award formulation. Cost: \$450.00 +GST includes course notes.	8	8
Mon 6 - 5.30	Chapter Committee meeting		1
Tue 7 - 5.30	Tasmania TBA		
Wed 8	Dinner for Members and partners – Victoria Barracks Guest Speaker to be announced		
Wed 15 – 5.30	View from a “victim of arbitration” Unmet expectations of a recent “victim” of arbitration, including analysis of appeals to the Supreme Court. Robust, gloves off discussion. Attendees will be sworn to confidentiality.		