**[2022] WASC 413**

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| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS |
| **CITATION** | **:** | BERNARD GEORGE GRIEVE AND CHRISTINE RAE GRIEVE AND DISSOUDRE PTY LTD (ACN: 009 380 410) T/AS BG GRIEVE BUILDER -v- BRIAN ROBERT GOULD [2022] WASC 413 |
| **CORAM** | **:** | KENNETH MARTIN J |
| **HEARD** | **:** | 19 SEPTEMBER 2022 |
| **DELIVERED** | **:** | 5 DECEMBER 2022 |
| **FILE NO/S** | **:** | ARB 5 of 2022 |
| **BETWEEN** | **:** | BERNARD GEORGE GRIEVE AND CHRISTINE RAE GRIEVE AND DISSOUDRE PTY LTD (ACN: 009 380 410) T/AS BG GRIEVE BUILDER<br>Plaintiffs<br><br>AND<br><br>BRIAN ROBERT GOULD<br>Defendant |

*Catchwords:*

Arbitration - Allegation of ostensible bias against arbitrator - Ad hoc engagement as expert in District Court action by defendant's lawyers - Reasonable apprehension of bias test - Real danger of bias test compared - Alleged justifiable doubts over impartiality and independence - No justifiable doubts over arbitrator's impartiality or independence

*Legislation:*

*Commercial Arbitration Act 2012* (WA)
*Construction Contracts Act 2004* (WA)

*Category:* B

**Representation:**

*Counsel:*

Plaintiffs : J Mazza
Defendant : W Vogt

*Solicitors:*

Plaintiffs : John Mazza
Defendant : Vogt Graham Lawyers

**Cases referred to in decision:**

Blueprint Homes (WA) Pty Ltd v Samuel [2016] WASC 287
Charisteas v Charisteas [2021] HCA 29; (2021) 393 ALR 389
Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337
Giustiniano Nominees Pty Ltd v Minister for Works (1995) 16 WAR 87
Hancock v Hancock Prospecting Pty Ltd [2022] NSWCA 152
Hancock v Hancock Prospecting Pty Ltd [2022] NSWSC 724; (2022) 402 ALR 328
Hui v Esposito Holdings Pty Ltd [2017] FCA 648; (2017) 345 ALR 287
Johnson v Johnson [2000] HCA 48; (2000) 201 CLR 488
Livesey v New South Wales Bar Association [1983] HCA 17; (1983) 151 CLR 288
Mueller v Que Capital Pty Ltd [No 2] [2016] WASCA 157
R v Gough [1993] AC 646
Siah v Wong [2021] WASC 19
Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131
Terravital Pty Ltd v O'Rourke [2016] WASC 428
WMC Resources Ltd v Leighton Contractors Pty Ltd [2000] WASCA 388

**KENNETH MARTIN J**:

1 I am dealing with the plaintiffs' application by originating summons filed 22 June 2022, seeking orders pursuant to s 13(4) of the *Commercial Arbitration Act 2012* (WA) (**CAA**) that the arbitrator be removed in the arbitral proceedings (**Application**). The plaintiffs also seek an order that the defendant pay the plaintiffs' costs of the challenge in the arbitral proceedings and in this court.

2 To that end, the plaintiffs rely on and read in support of their Application two affidavits from their solicitor of record, Mr John Mazza, respectively sworn 22 June 2022 (folio 3) and 7 September 2022 (folio 8).

## Background

3 The plaintiffs, as builder, and the defendant, as the builder's client, entered into a building contract dated 26 February 2016 (**Building Contract**). The Building Contract has been a subject of several earlier disputes between the parties - including two adjudications under the *Construction Contracts Act 2004* (WA) and an arbitration under the CAA. It is the arbitral proceedings that are the subject of this Application.

4 Clause 31 of the Building Contract sets out an agreed procedure for referring disputes to arbitration under the CAA. The procedure involves the arbitrator being agreed by the parties, or if they fail to agree 'then the arbitrator will be the current President of the Master Builders Association of Western Australia (**Association**), or the President's nominee'.

5 Since the parties' commenced arbitral proceedings in December 2017, a total of four different arbitrators have been appointed by the Association. The first arbitrator withdrew as arbitrator due to declining health. The second arbitrator and third arbitrator eventually declined nomination upon the parties' objections - the second arbitrator being initially objected to by the defendant and third arbitrator being initially objected to by the plaintiffs. The appointment of the fourth and current arbitrator, Mr Richard Machell, is the subject of the plaintiffs' Application.

6 It is not necessary to go into great detail towards the circumstances surrounding the earlier appointments of the first three arbitrators. To that end, see a fact chronology which is attached as a Schedule to these reasons which sets out, in effect, the events leading to the appointment and then, the subsequent withdrawal of those earlier arbitrators. However,

for the purpose of the present Application, I will briefly outline the relevant facts concerning the most recent appointment of Mr Machell.

7 By letter dated 22 March 2022, the Association advised the parties that Mr Machell had been nominated and had agreed to act as arbitrator.

8 That same day, Mr Machell wrote to the parties by email confirming his appointment and advising them:

> I confirm, to the best of my knowledge, that I have no knowledge or relationship with the parties, and have no conflict of interest in acting as the arbitrator in the dispute.
>
> Where the parties are of a different view, I should be advised immediately, together with supporting reasons.
>
> I now confirm my appointment as the arbitrator in this matter and hereby enter upon the reference, as the arbitrator in the above dispute, assuming it is a domestic arbitration, consistent with the Commercial Arbitration Act 2012.
>
> …

9 On 5 April 2022 a member of the solicitors for the defendant (**Vogt Graham**) emailed the solicitor for the plaintiffs (**Mr Mazza**) advising that the defendant had no objection to the appointment of Mr Machell as the parties' arbitrator.

10 On 21 April 2022, Mr Mazza emailed Mr Machell, copying in Vogt Graham, advising that he was in the process of drafting correspondence to Vogt Graham for the purpose of conferring as to documentation and information to be forwarded to Mr Machell.

11 On 28 April 2022, Mr Mazza says that he had a discussion with a Ms Harriette Benz, a sole practitioner lawyer who was operating out of the same building as Mr Mazza. In that conversation, Ms Benz is said to have advised Mr Mazza, in effect, that she was aware that a Mr Richard Machell had been engaged as an expert for a client of Vogt Graham in a dispute which was the subject of an ongoing matter in the District Court (**District Court Proceeding**).

12 By letter dated and emailed 4 May 2022, Mr Mazza wrote to Vogt Graham about what he had learned from Ms Benz. He raised an issue as to whether there were justifiable doubts over the impartiality or the independence of Mr Machell as the parties' arbitrator. The letter also requested that Vogt Graham disclose information as to whether

Mr Machell was currently and/or had previously been engaged as an expert by Vogt Graham, or by any of Vogt Graham's clients.

13 On 6 May 2022, Mr Mazza again wrote to Vogt Graham by letter following up on a response to his letter of 4 May 2022. In that letter, Mr Mazza foreshadowed that a challenge application would be forward to Mr Machell on or prior to 12 May 2022.

14 On 11 May 2022, Mr Mazza emailed Mr Machell directly, attaching a letter outlining the plaintiffs' written statement of reasons for a challenge to the arbitral tribunal pursuant to s 13(2) of the CAA (**Challenge**).

15 By letter dated and emailed 16 May 2022, Vogt Graham now wrote to Mr Machell in response to Mr Mazza's letter of 11 May 2022 confirming that the defendant opposed the Challenge.

16 On 24 May 2022 (as amended on 25 May 2022), Mr Machell delivered a decision. He dismissed the Challenge, ordering:

> 1) The challenge to the arbitrator's jurisdiction to determine the dispute arising from contended justifiable doubts as to impartiality and independence is dismissed.

17 Relevantly, Mr Machell had then explained in his decision:

> In providing an independent expert opinion as to building matters to others including mutual clients of Vogt Graham Lawyers, I have not advised but have formed and stated an independent expert opinion, a small but relevant difference.
>
> The provision of independent expert opinions to persons unrelated or affiliated with the parties in this dispute and that are also represented by Vogt Graham Lawyers, was not disclosed or stated, because in my view it was not a disclosable fact that was relevant to my appointment as the arbitrator, and could not give rise to justifiable doubts as to my impartiality or independence.
>
> Despite that an unrelated party to this matter instructs its legal representative to provide a brief for an expert opinion to me, where that service forms part of my business outside of arbitration and which is provided through numerous law firms in west Australia (sic), I am not paid by the legal representative, the legal representative to my knowledge does not authorize payment, except where held in trust and on instruction from the client, nor is there any reasonable basis to draw such a conclusion.

18 On 2 June 2022, Mr Mazza foreshadowed in a Claimants' Brief Status Report of the same date that a motion would be filed in the

Supreme Court, challenging Mr Machell's appointment as arbitrator. By email dated 7 June 2022, Mr Machell advised the parties:

> I understand from the Status Report, that an application is to be made to the Supreme Court in respect to my recent decision as to jurisdiction/apprehended bias, however n (sic) the meantime the arbitration should proceed, subject to any agreement by the parties or decision of the Court that it should be stayed.

19 By letter dated and emailed 9 June 2022, Mr Mazza wrote to Vogt Graham requesting that they advise whether the defendant would consent to a stay of the arbitral proceeding pending the outcome of the Application. Vogt Graham advised by email dated 15 June 2022 that their client was prepared to consent to a stay of the arbitration, pending the determination of the Application.

20 Having now set out the significant events upon which the plaintiffs' Application is made, I will seek to expose the relevant provisions of the CAA, as they relate to the challenging of an appointed arbitrator.

## Applicable Law

21 Grounds for challenging an arbitrator and the procedure for challenging an arbitrator are respectively found set out under ss 12 and 13 of the CAA.

22 Section 12 (with its accompanying note) relevantly provides:

> **12. Grounds for challenge (cf. Model Law Art 12)**
>
> (1) When a person is approached in connection with the person's possible appointment as an arbitrator, the person **must disclose any circumstances likely to give rise to justifiable doubts** as to the person's **impartiality or independence**.
>
> (2) An arbitrator, from the time of the arbitrator's appointment and throughout the arbitral proceedings, must without delay disclose any circumstances of the kind referred to in subsection (1) to the parties unless they have already been informed of them by the arbitrator.
>
> (3) An arbitrator **may be challenged** only if circumstances exist that give rise to **justifiable doubts as to the arbitrator's impartiality or independence**, or if the arbitrator does not possess qualifications agreed to by the parties.
>
> (4) A party may challenge an arbitrator appointed by the party, or in whose appointment the party has participated, only for reasons of

which the party becomes aware after the appointment has been made.

(5) For the purposes of subsection (1), **there are justifiable doubts as to the impartiality or independence** of a person approached in connection with a possible appointment as arbitrator **only if there is a real danger of bias** on the part of the person in conducting the arbitration.

(6) For the purposes of subsection (3), **there are justifiable doubts as to the impartiality or independence** of an arbitrator **only if there is a real danger of bias** on the part of the arbitrator in conducting the arbitration.

Note for this section:

This section (other than subsections (5) and (6)) is substantially the same as Art 12 of the Model Law. Subsections (5) and (6) provide that the test for whether there are justifiable doubts as to the impartiality or independence of a person or arbitrator is whether there is a real danger of bias.

(my emphasis added)

23 Section 13 (with its accompanying note) relevantly provides:

**13. Challenge procedure (cf. Model Law Art 13)**

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to subsection (4).

(2) Failing such agreement, a party who intends to challenge an arbitrator must, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 12(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal must decide on the challenge.

(4) If a challenge under any procedure agreed on by the parties or under the procedure of subsections (2) and (3) is not successful, **the challenging party may request**, within 30 days after having received notice of the decision rejecting the challenge, **the Court to decide on the challenge.**

(5) A **decision of the Court** under subsection (4) that is within the limits of the authority of the Court **is final**.

> (6) While a request under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.
>
> Note for this section:
>
> Section 13 (other than subsection (5)) is substantially the same as Art 13 of the Model Law. Subsection (5) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded.
>
> (my emphasis added)

24 The 'Model Law', as referred to in ss 12 and 13 of the CAA, has now been adopted by all Australian States and Territories. It is defined in s 2 as meaning:

> … the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

25 Under the previous domestic commercial arbitration regime (i.e. before the commencement of the CAA), the test to be applied in determining whether or not an arbitrator should be removed had been the well-established common law test of 'reasonable apprehension of bias' - as first articulated in ***Livesey v New South Wales Bar Association*** [1983] HCA 17; (1983) 151 CLR 288 and subsequently approved in ***Ebner v Official Trustee in Bankruptcy*** [2000] HCA 63; (2000) 205 CLR 337 and ***Johnson v Johnson*** [2000] HCA 48; (2000) 201 CLR 488 (see ***Giustiniano Nominees Pty Ltd v Minister for Works*** (1995) 16 WAR 87).

26 However, in a recent New South Wales decision of ***Hancock v Hancock Prospecting Pty Ltd*** [2022] NSWSC 724; (2022) 402 ALR 328, Ball J explained that the relevant test for challenging an arbitrator's independence, or their impartiality under ss 12 and 13 of the CAA, was the 'real danger of bias' test, as is referred to expressly by ss 12(5) and (6) of the CAA being the test adopted by the House of Lords in ***R v Gough*** [1993] AC 646. As his Honour observed at [15]:

> The "real danger of bias" test set out in ss 12(5) - (6) reflects the test adopted by the House of Lords in *R v Gough* [1993] AC 646 (***Gough***). It appears to set a higher threshold for removal than the Australian common law test for apprehend bias set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 (***Ebner***). In that case, a majority of the High Court stated the test in terms of whether the "fair-

> minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide": at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

27 His Honour then noted reasons for an adoption by the CAA specifically of a higher threshold than the common law, explaining at [16]:

> The view that the test set out in the CA Act was intended to adopt a higher threshold than the common law test in Australia is supported by the report of the Standing Committee on Uniform Legislation and Statutes Review on the Commercial Arbitration Bill 2011 (WA): Legislative Council, Parliament of Western Australia, Standing Committee on Uniform Legislation and Statutes Review, *Report 67* (November 2011). It gave the following explanation for the decision to adopt the test in *Gough*:
>
> 7.39 The following information regarding the "*real danger*" of bias test is extracted from various submissions made to the Commonwealth's overhauling of its *International Arbitration Act 1974* in 2010:
>
> 7.39.1 The "*real danger*" test is a significant shift in the law from the current test for bias in Australia (the reasonable observer test) found in *R v Sussex Justices; Ex Parte McCarthy*:
>
> > *whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.*
>
> 7.39.2 Australian courts used this test to determine bias challenges to arbitrators, including challenges brought under the *International Arbitration Act 1974* Cth. However, at the suggestion of a submission made during consideration of *UNCITRAL Model Law* amendments to the *International Arbitration Act 1974* (Cth) in 2009 for the imposition of a higher bias threshold for arbitrators, a "*real danger*" test or the "*Gough test*" as it is called was enacted. This test appears in both NSW's enactment and the Bill.
>
> 7.39.3 Gough was convicted of conspiracy to rob and sentenced to 15 years imprisonment. He appealed, amongst other things, that there was a material irregularity in the conduct of the trial in that one of the jurors was the next door neighbour of his brother. The House of Lords in dismissing the appeal held:

> *the test to be applied in all cases of apparent bias was the same, whether concerning justices, members of inferior tribunals, arbitrators or jurors… namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the members of the tribunal in question that justice required that the decision should not stand.*

7.39.4 The "*real danger*" test makes it harder to challenge an arbitrator in Australia. Brown and Luttrell [The Honourable Neil Brown QC FC and Inst A, Arbitrator & Mediator; and Sam Luttrell, Solicitor, Law Lecturer, Murdoch University, Perth, who made a joint submission in relation to the review of the Commonwealth legislation], who successfully submitted for a change in the test, argued that adopting a stricter test is considered to be a positive step because bias challenges are an increasingly common procedural tactic in high value international arbitrations; limiting the prospect of bias challenge would make Australia more attractive as a seat for international arbitration. (footnotes omitted.)

28 Ball J continued at [17] - [21]:

[17] In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 (***Sino Dragon Trading***) it was submitted that the Model Law had, in fact, preserved the *Ebner* test. That case relevantly involved a challenge to an award under art 34(2)(b)(ii) of the Model Law which required consideration of s 18A of the *International Arbitration Act 1974* (Cth) (the equivalent provision of s 12 of the CA Act). Dismissing the challenge, Beach J rejected the suggestion that the *Ebner* test had been preserved by art 34(2)(b)(ii) of the Model Law (which is enacted in s 34(2)(b)(ii) of the CA Act), which provides that an arbitral award may be set aside if "the award is in conflict with the public policy of this State": at [191].

[18] The conclusion that the legislature intended to adopt the *Gough* test exclusively is also supported by the Explanatory Note, which expressly states that the test in s 12 "is based on the test for bias applied by the House of Lords in *R v Gough* [1993] AC 646": see Explanatory Note, Commercial Arbitration Bill 2011 (WA) at cl 12.

[19] Unlike the *Ebner* test, the test stated by s 12 requires a real danger of actual bias. Moreover, the test is stated as a purely objective one. The question is whether objectively the required condition is met, not whether it is met from the perspective of a reasonable lay person. That conclusion follows from the plain language of the

> section. It is also said to follow as a corollary to the adoption of the *Gough* test, which itself is said to require the question to be answered "from the perspective of the Court as opposed to merely that of a reasonable lay person": *Sino Dragon Trading* at [197].
>
> [20] The test, at least in the present context, must also be understood as a test concerning a person in the position of the arbitrator being challenged. The test is concerned with the objective likelihood of there being a real risk that someone in the position of the arbitrator would not be able to bring an impartial mind to (all of) the questions to be determined. The test should not be understood as requiring an investigation into the particular attitudes or propensities of the arbitrator under challenge.
>
> [21] As explained by Lord Goff (with whom the other members of the House of Lords agreed) in *Gough* at 670, the first task of the Court is "to ascertain the relevant circumstances from the available evidence…". The second task is to ask "having regard to those circumstances, [whether] there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…". One point that follows from this statement of principle is that the question is not whether there is a real danger that facts may emerge during the course of the case that could have the required consequence. Rather, the question is whether on the known facts there is a real danger that the member of the tribunal could be affected in the way indicated.
>
> (My underlining for emphasis in [19] and [20] above)

29 I note that ***Hancock*** was subsequently sought to be appealed - although ultimately, leave to appeal was refused (see ***Hancock v Hancock Prospecting Pty Ltd*** [2022] NSWCA 152). Relevantly, upon that application refusing leave to appeal, Mitchelmore JA explained at [51]:

> Ground 3 was not the subject of oral submissions and can be dealt with shortly. By this proposed ground, the applicants sought to contend that the primary judge erred in construing s 12(3) of the WA CA Act as setting a higher threshold for removal than the test for apprehended bias set out in *Ebner*. However, as both the HPPL Parties and the GHR Parties submitted, the primary judge's dispositive reasons did not turn on a comparison between the "real danger" test for which s 12 of the WA CA Act makes provision and the test in *Ebner*. Nor were his Honour's reasons influenced in any way by such a comparison. Accordingly, even if the applicants were correct as to the existence of "conflicting first instance decisions on whether and how the test departs from the common law position in *Ebner*", this application does not present a vehicle for this Court to consider that issue.

## Parties' Submissions

30 An initial tranche of written submissions was filed and exchanged as between the plaintiffs' and defendant's lawyers in the lead up to the appointment hearing on 19 September 2022. For the purposes of that hearing, I hold the plaintiffs' written outline of submissions filed 14 September 2022 (folio 11) and the defendant's written outline of submissions filed 14 September 2022 (folio 9).

31 Those initial written submissions and counsel's oral submissions had failed to engage at all with Ball J's observations in ***Hancock,*** or with the implications of a 'real danger of bias' test, as is found in ss 12(5) and (6) of the CAA - in the context of a challenge made against Mr Machell's appointment on the grounds of apprehended bias. Instead, the parties had then submitted that the common law test for apprehend bias, as set out in ***Ebner***, was the relevant test to be applied here. As such, I need to first set out the parties' submissions as they relate to the common law apprehended bias test.

### 'Reasonable Apprehension of Bias' and *Ebner*

32 At par 3(b) of their written submissions, the plaintiffs rely on the Court of Appeal's explanation of the 'reasonable apprehension of bias' test found in ***Mueller v Que Capital Pty Ltd [No 2]*** [2016] WASCA 157. Their Honours explained at [30]:

> The test is whether a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: see, eg, *Johnson v Johnson; Ebner v Official Trustee in Bankruptcy; Livesey v The New South Wales Bar Association.* (citations omitted) (original emphasis)

33 In terms of the 'reasonable apprehension of bias' test applying equally to arbitrators, the plaintiffs submit at par 3(c) that the position of an arbitrator is to be assimilated to the position of a judge. They rely on Ipp J's remarks in ***Giustiniano***, where it was said at 93, that:

> …the requirement that justice must be seen to be done, and the need for the arbitrator to keep apart and, indeed, aloof from the parties is critical. The very nature of the litigation process that is on foot demands complete objectivity and neutrality on the part of the tribunal. In my view, there is no difference between a Judge and an arbitrator in this regard.

34 I provided counsel for the plaintiffs, Mr Mazza, with an opportunity during the in person hearing to point me to some case authority which says that the correct test to be applied towards s 12(6), was the 'reasonable

apprehension of bias' test - as opposed to a 'real danger of bias' as is now expressly set out under ss 12(5) and (6) of the CAA. Mr Mazza could not point to any specific authority on this point. Instead, Mr Mazza submitted that if there was a difference between the two tests, it was not a 'significant difference' (see ts 4). But again, he could not refer me to any case authority to support this contention. However, Mr Mazza did clarify for me later during the in person hearing that the plaintiffs are not alleging actual bias against Mr Machell (see ts 25).

35 Essentially, the plaintiffs submit at par 4(a) that Mr Machell should be removed as the arbitrator in the arbitral proceeding - on a basis of apprehended bias, which they say is established in light of an 'ongoing professional relationship' and a 'previous, current and expected future professional relationship' as between Mr Machell and the defendant's lawyers, Vogt Graham - arising out of the District Court Proceedings.

36 The exact nature of any problematic 'professional relationship' that is alleged, remained unacceptably unclear in my view. During the course of the hearing, Mr Mazza did not elaborate on what it was that rendered the relationship 'ongoing'. Rather, Mr Mazza only reiterated that Mr Machell has been engaged by Vogt Graham on behalf of another client of that law practice to provide an expert opinion in the District Court Proceedings.

37 Nonetheless, the plaintiffs contend by par 4(a)(ii), that as a result of that 'relationship', Mr Machell will be involved in unilateral communications with Vogt Graham and will receive a pecuniary benefit from Vogt Graham (by way of payment for his expert services). Accordingly, the plaintiffs say Mr Machell will not 'keep aloof' from Vogt Graham and that he will be exposed to a suspicion of communicating with Vogt Graham behind the back of, or without the previous knowledge or consent of, the plaintiffs (relying on ***Charisteas v Charisteas*** [2021] HCA 29; (2021) 393 ALR 389 [13]).

38 By par 4(a)(ii) of their written submissions, the plaintiffs submit:

> …The fair-minded lay observer might reasonably apprehend that the arbitrator whether consciously or subconsciously may slant his decision in the arbitration to favour the defendant as a client of Vogt Graham as Vogt Graham has and continues to open the door for remunerative work of the Arbitrator as an expert.

39 The plaintiffs further submit at par 4(a)(iii), that there is a magnification of the danger of bias present, due to both Vogt Graham and Mr Machell initially failing to disclose the extent of their 'relationship' -

referring to the initial communication sent by Mr Machell to the parties where he declared that he had no knowledge or relationship with the parties and had requested the parties to disclose any relationships or potential conflicts of interest.

40 In that regard, the plaintiffs refer me to ***WMC Resources Ltd v Leighton Contractors Pty Ltd*** [2000] WASCA 388. That case had concerned an application to remove an arbitrator for non-disclosure of a past association with one of the parties. Owen J concluded at [12], that:

> It seems to me that the question of disclosure is of obvious importance in matters of this nature. It cannot be doubted, I think, that both the necessity for disclosure and the ability of parties to obtain the requisite information lies primarily with those who possess the information rather than those who are seeking it.

41 Consequently, the plaintiffs raised, in effect, two matters which are said to bear upon the impartiality of Mr Machell. First, Mr Machell has been earlier engaged as an expert by Vogt Graham's client in the District Court Proceedings. Second, Mr Machell failed to disclose that first matter upon his appointment as the parties' arbitrator.

42 Turning now to the defendant's submissions, he submits at par 4.8 of his written submissions that the plaintiffs have overlooked a requirement to have regard to the practical reality of the business world in which Mr Machell operates. Specifically, it is said that regard must be had to the limited nature of the building industry in Western Australia and to a limited number of arbitrators who are available to act in this kind of building dispute (relying on Ipp J's observations at 93 in ***Giustiniano***).

43 The defendant submits then at par 3.12 that Mr Machell is a premier building dispute expert, who is frequently engaged by many law practices across Western Australia in order to provide expert evidence in such matters. To that end, the defendant even identifies a number of cases in this Court where Mr Machell has provided expert evidence (see ***Siah v Wong*** [2021] WASC 19; ***Terravital Pty Ltd v O'Rourke*** [2016] WASC 428; ***Blueprint Homes (WA) Pty Ltd v Samuel*** [2016] WASC 287).

44 As regards the plaintiffs' assertion that Mr Machell would 'slant his decision' based on monetary considerations, the defendant says at par 4.9 that this argument is misconceived, as any relevant connection is as between Mr Machell and Vogt Graham's client - not as between Mr Machell and Vogt Graham and thus, any monetary payment made to Mr Machell is paid by that client.

45 The defendant also highlights at par 4.9.4 that Mr Machell came to be appointed the parties' arbitrator, not by Vogt Graham, but directly by the Association - and so, independently of any influence exerted by either one of the arbitrating parties. Vogt Graham would have had no input into that independent nomination by the Association of Mr Machell.

46 The defendant effectively then submits that Mr Machell was correct to not consider his earlier engagement as an expert witness in the District Court Proceedings of any possible relevance to his independence or partiality as an arbitrator between different parties, and, therefore, this could not have any bearing upon his impartiality. As such, the defendant submits at pars 4.20 and 4.24 that the District Court Proceedings were not a matter a 'reasonable person may have expected' that Mr Machell needed to disclose. Consequently, Mr Machell's failure to disclose that matter cannot bear upon his independence.

47 I will now turn to deal with the plaintiffs' and defendant's further written outlines of submissions which addresses Ball J's reasons in ***Hancock***, both filed 27 September 2022 and respectively folios 14 and 15. These further submissions were made after the hearing. At that time, I provided the respective lawyers with the further opportunity to address that decision - given it had been overlooked.

**'Real Danger of Bias' and *Hancock***

48 As regards the relevant test to be applied, the plaintiffs refer me, by par 2(f) of their further written submissions, to the view as expressed by Ball J in ***Hancock***, that the test for a 'real danger of bias' is purely objective. They submit that this view was largely based on the decision of Beach J in ***Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*** [2016] FCA 1131. They then refer, at par 2(g) of those submissions, to ***Hui v Esposito Holdings Pty Ltd*** [2017] FCA 648; (2017) 345 ALR 287 where Beach J at [241] appeared to qualify that the 'real danger of bias' test was purely objective from the perspective of the court, rather than from the perspective of a 'reasonable bystander'. They rely on Beach J's conclusion, as expressed in ***Hui***, that the correct perspective for the English 'real danger' test is that of the 'reasonable bystander' or 'reasonable man' where actual bias is not alleged.

49 As to whether there were justifiable doubts as to Mr Machell's independence or impartiality, the plaintiffs' position remained unchanged, notwithstanding ***Hancock***. Again, they say submit, by par 3(d), that Vogt Graham will be involved in communications 'behind the back' of the plaintiffs. Further, they argue in that same paragraph, in effect, that

Mr Machell's impartiality will possibly be compromised by something said in the course of communications with Vogt Graham, his 'historic and ongoing professional relationship' with Vogt Graham and any income generated as a consequence of that relationship.

50 Moreover, the plaintiffs continue to assert, by par 3(e), that an adverse inference can be drawn from Mr Machell's initial 'lack' or 'failure' to disclose. They submit there is a 'real danger' that facts or knowledge of Mr Machell and Vogt Graham that would reveal bias will continue to not to be divulged.

51 At pars 3.1 and 3.2 of his further written submissions, the defendant now submits in light of ***Hancock***, which he says is highly persuasive, that the proper question is whether those matters as identified by the plaintiffs can give rise to a 'real danger of actual bias' on the part of Mr Machell. Reiterating his earlier submissions at par 3.8, the defendant submits that they do not give rise to a 'real danger of bias'.

52 The defendant also submits at par 3.4 that there is no evidence Vogt Graham and Mr Machell would discuss the arbitral proceedings in the absence of Mr Mazza, and in any event, that conduct would likely be a breach of Vogt Graham's ethical obligations - a matter that should not be lightly found or inferred.

53 In response to the plaintiffs' failure to disclose argument, at par 3.10 the defendant repeats his earlier submissions and says that ss 12(1) and (5) of the CAA do not require disclosure of every matter, rather instead, only those matters which would present a 'real danger of bias'. Further, the defendant submits at par 3.9 that the timeframe provided by Mr Mazza to Vogt Graham to respond to the disclosure matters referred to in Mr Mazza's correspondence of 4 and 6 May 2022, was manifestly inadequate.

54 The issues that present then concern first, what is the relevant test to be applied by s 12(3) of the CAA, and second, upon application of the relevant test, are there by reference to s 12(6), any 'justifiable doubts' as to the independence or impartiality of Mr Machell as the parties' appointed arbitrator?

## Decision

55 Subject to two qualifications mentioned below, I agree with and so would with respect apply here, the observations of Ball J in ***Hancock***

made towards ss 12(3) and (6) of the CAA - notwithstanding they may be strictly categorised as obiter.

56 My two qualifications relate to the underlined sentences in [19] and [20] from the reasons of Ball J seen earlier. The first qualification is that I do not read his Honour's statement that the test by s 12 'requires a real danger of actual bias' - to be saying, lest there be doubt, that there can no longer be a challenge ground upon apparent or ostensible bias. Of course, the express words of ss 12(5) and (6) only refer to a 'real danger of bias'. With respect, the point I discern his Honour makes by his first sentence is that the danger (not actuality) must be towards some problem with the arbitrator that is tangible from an independence or impartiality perspective - such as for instance, a declared prejudgment, or by a close prior relationship that is inconsistent with proper independence.

57 My second qualification is towards the last sentence of [20] and to the 'particular attitudes or propensities of the arbitrator under challenge'. Whilst I agree that ss 12(5) and (6) endorse and adopt the ***Gough*** test, it is always the words of the legislation to which final recourse must be had. Depending on the presenting facts, an underlying particular challenge on the 'real danger of bias' threshold may be met by a reference to showing a subjectively declared attitude or manifested propensity of the nominated arbitrator - such as for instance towards matters showing potential prejudgment(s) upon an issue or issues arising in the arbitration.

58 But save for those, perhaps unnecessary qualifications, I am otherwise in full agreement with Ball J's observations as quoted earlier.

59 Therefore, I prefer to proceed on the basis that the relevant test for determining whether there are 'justifiable doubts' as to Mr Machell's independence or impartiality under ss 12 and 13 of the CAA, is the s 12(6) 'real danger of bias' test - and not the 'reasonable apprehension of bias' test. That is, 'justifiable doubts' will only be established if 'there is a real danger of bias', in conducting the arbitration.

60 In my opinion, the plaintiffs' submission that there is not a 'significant difference' between the two tests, or that they would not produce different results, is not correct, as Ball J explained.

61 It is clear from ***Hancock*** at [15] that the 'real danger of bias' test appears to endorse a higher threshold for challenging of an arbitrator on the basis of their impartiality or independence. That higher threshold for showing apparent bias in Mr Machell is manifestly not established on the present facts.

62 However, even were I to attempt to use the 'reasonable apprehension of bias in the eyes of a fair-minded lay observer of proceedings' test, there are conceptual obstacles that would present towards its application to present circumstances.

63 First, there are usually no fair-minded lay observers in an arbitration, since arbitration is invariably, a wholly private and confidential affair. An arbitration is not conducted in open court - where the general public is at liberty to observe open justice being administered by a publicly appointed and remunerated judicial officer. That is, by strong contrast to the private nature of a chosen arbitral process. Arbitrators, by and large, are appointed from out of the private sector and are privately remunerated for their work by the parties. The 'justifiable doubts' threshold must be different from the standard that it applies to independent judicial officers - who usually operate in open court.

64 Second, many of the case authorities relied on by the plaintiffs' concern circumstances where it is alleged that an apprehension of bias has arisen out of a 'personal relationship' - not out of a 'professional relationship' as is alleged by the plaintiffs in this case. Even were I to accept that there is an ongoing professional relationship subsisting as between Mr Machell and Vogt Graham, which I do not, the plaintiffs appear to conflate the character of a 'personal relationship' to a 'professional relationship' of providing expert advice or opinions for reward.

65 A barrister during a trial communicating with and also meeting with the trial judge in a personal capacity, as was the case in ***Charisteas***, on my assessment, is many miles away from the present situation. Mr Machell works in the private sector. He is a qualified building industry expert. As such, he is on a panel of people who, from time to time, can get appointed to arbitral tribunals concerning the resolution of building disputes. Here, he was independently appointed as an arbitrator by the Association. He does not have a 'personal' or 'professional' relationship with any of the parties (clients) involved in the arbitral dispute. Evidently, there is the clearest distinction as between the facts of ***Charisteas*** to the current situation.

66 The plaintiffs' submission that a better view for the 'real danger of bias' test is that of the 'reasonable bystander' or 'reasonable man', as was articulated by Beach J at [241] in ***Hui,*** does not bear upon the present case. It fails to take account of Beach J's further observations at [241], that 'in any event this difference in perspective may not make much

practical difference given the way Lord Goff expressed the matter at 670.' Lord Goff in ***Gough*** had said:

> …I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

67 Under the s 12(6) 'real danger of bias' test, the only relevant circumstances concerning Mr Machell's appointment as arbitrator are circumstances as they currently exist. As Ball J explains at [36] in ***Hancock***:

> More fundamentally, however, what might occur in the future is not relevant to the question whether there are grounds for challenge now. Whether there are grounds for challenge now must be judged by reference to the circumstances as they currently exists. The current position is that [the Arbitrator] is not privy to any information which may affect his ability to consider impartially the plaintiffs' case. If he becomes aware of information because his memory is refreshed, he is obliged by s 12(2) of the CA Act to disclose that information without delay to the parties. Whether a party will wish to make a challenge to [the Arbitrator] in the light of that disclosure and whether that challenge should be upheld will depend on the circumstances as they are known at the time.

68 Presently, the circumstances as they currently exist are those at the time of his appointment. Mr Machell has provided his expert opinion, but not been notified he is required to give evidence in the District Court Proceedings - which are completely unrelated both issue wise and participant wise, to the present arbitral proceeding. The indirect ad hoc connection by providing an expert opinion to Vogt Graham acting for a wholly unrelated client, cannot be said to constitute a 'relationship'.

69 The plaintiffs have not satisfactorily articulated a relevant connection that arguably bears upon the independence or impartiality of Mr Machell as an arbitrator. They have not proven, on the balance of probabilities, how Mr Machell's engagement as an expert in the District Court Proceedings might cause him to approach and consider the arbitral proceedings other than in accord with its legal or factual merits, whilst 'conducting the arbitration' - referring to the concluding words of s 12(6).

70 In my opinion, an earlier ad hoc engagement by Vogt Graham of Mr Machell in the past, as an expert to provide an expert opinion in unrelated District Court Proceedings, does not, on its own, give rise to

justifiable doubts over impartiality or independence. There was no real danger of bias in him conducting the unrelated arbitration - as a privately appointed arbitrator. Therefore, that was not a relevant matter requiring disclosure by Mr Machell under s 12(1) of the CAA. It was not suggested for instance that Mr Machell had been engaged on a retainer of some kind - to exclusively provide expert evidence to Vogt Graham's clients in building disputes.

71 The defendant is also correct to submit that one must consider the practical realities of business in the private sector. There are only a finite number of specialists in the local building industry qualified and available to be engaged as experts and as arbitrators in proceedings arising out of building disputes. No doubt overlaps must occur from time to time in the private sector.

72 It is also not relevant what professional communications, albeit any communications, could be exchanged between Mr Machell and the defendant's solicitors at some point in the future. That is a factor that is outside the circumstances for evaluation as they currently exist.

73 Nonetheless, I take the opportunity like Ball J did at [36], to point out that s 12(2) of the CAA imposes a continuing obligation on an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

74 Accordingly, I do not conclude that there are any justifiable doubts as to Mr Machell's impartiality or independence in his conducting of the arbitral proceedings.

## Conclusion

75 In the circumstances, the Application must fail.

76 Consequently, I propose to order that:

1. The plaintiffs' application be dismissed.

2. The plaintiffs as the unsuccessful party must pay the defendant's costs of the application, to be taxed if not agreed.

**Schedule**

| Date | Event | Source | Comment |
|---|---|---|---|
| 26 February 2016 | The plaintiffs, a builder, and the defendant, as the builder's client, entered into a building contract (Building Contract). | J G Mazza Affidavit of 22 June 2022 (folio 3) [2].<br>See JGM1 for a copy of the relevant dispute resolution clause in the Building Contract. | |
| 22 December 2017 | The Master Builders Association of WA (Association) in correspondence to Bernard Grieve (the first name plaintiff) mentioned that the president of the Association had nominated a Mr Mark Jones as arbitrator. | J G Mazza Affidavit of 22 June 2022 (folio 3) [35].<br>See JGM14 for a copy of the correspondence from the Association to Mr Grieve dated 22 December 2017. | The plaintiffs and defendant agreed to this nomination: see J G Mazza Affidavit of 22 June 2022 (folio 3) [36]. |
| 9 January 2021 | Mr Jones provided notice by email to the solicitors for the defendant (Vogt Graham) and solicitor for the plaintiff (Mr Mazza) of termination. The notice stated to the effect that he could no longer perform functions as arbitrator due to deteriorating health issues. | J G Mazza Affidavit of 22 June 2022 (folio 3) [37].<br>See JGM15 for a copy of the notice from Mr Jones dated 9 January 2021. | |
| 22 July 2021 | The Association sent a letter to Vogt Graham and Mr Mazza advising that a Mr Hugh Davis had been nominated as arbitrator and agreed to act as such. | J G Mazza Affidavit of 22 June 2022 (folio 3) [39(a)].<br>See JGM16 for a copy of the Association's letter dated 22 July 2021. | The appointment of Mr Davis was challenged by the defendant on the basis of a real danger of bias: see J G Mazza Affidavit of 22 June 2022 (folio 3) [40]. |
| 2 August 2021 | Vogt Graham sent correspondence to Mr Mazza stating the basis of the defendant's challenge to Mr Davis was because Mr Davis had been the adjudicator in a payment claim the plaintiff made | J G Mazza Affidavit of 22 June 2022 (folio 3) [41] - [44], [46].<br>See JGM18 for a copy of the correspondence from Vogt Graham to Mr Mazza dated 2 August 2021. | |

| Date | Event | Source | Comment |
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| | against the defendant (Payment Claim 2/Adjudication 1). Mr Davis had decided in favour of the plaintiffs in Adjudication 1. | | |
| 4 August 2021 | Mr Mazza sent a letter to Vogt Graham advising that the plaintiffs did not oppose to Mr Davis declining the nomination as arbitrator. | J G Mazza Affidavit of 22 June 2022 (folio 3) [47].<br>See JGM19 for a copy of the letter from Mr Mazza to Vogt Graham dated 4 August 2021. | |
| 12 August 2021 | Mr Davis sent an email to Vogt Graham and Mr Mazza stating that he did 'not accept there is a real danger of bias here: the Respondent misinterprets section 12 of the CAA. This notwithstanding, I will decline the nomination to act as arbitrator in this mater'. | J G Mazza Affidavit of 22 June 2022 (folio 3) [48].<br>See JGM20 for a copy of the email from Mr Davis dated 12 August 2021. | |
| 30 August 2021 | The Association sent a letter to Vogt Graham and Mr Mazza advising that a Mr Alan Riley had been nominated as arbitrator and agreed to act as such. | J G Mazza Affidavit of 22 June 2022 (folio 3) [39(b)].<br>See JGM17 for a copy of the Association's letter dated 30 August 2021. | The appointment of Mr Riley was challenged by the plaintiffs on the basis of real danger of bias: see J G Mazza Affidavit of 22 June 2022 (folio 3) [40]. |
| 3 November 2021 | The plaintiffs' filed in the arbitral proceedings a statement of reasons for the challenge of nominee arbitrator (Mr Riley). The plaintiffs' statement of reasons for the challenge concluded 'Mr Riley in this arbitration will be asked to decide the same issues that he decided in the [Payment Claim 7/Adjudication 2]. Accordingly, there are justifiable doubts as to the impartiality for independence of Mr Riley | J G Mazza Affidavit of 22 June 2022 (folio 3) [41] - [43], [45], [49].<br>See JGM21 for a copy of the statement of reasons dated 3 November 2021. | |

| Date | Event | Source | Comment |
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| | in the sense that there is a real danger of bias on his part in conducting the arbitration'. | | |
| 25 November 2021 | Vogt Graham sent a letter to Mr Riley stating that they are 'instructed by the Respondent that he agrees that you should decline the nomination to serve as the replacement arbitrator in the present arbitration…' | J G Mazza Affidavit of 22 June 2022 (folio 3) [50].<br>See JGM22 for a copy of the letter from Vogt Graham to Mr Riley dated 25 November 2021. | |
| 27 November 2021 | Mr Riley emailed Vogt Graham and Mr Mazza stating that 'with Mr Vogt's letter of 25 November 2021 to hand, I shall notify the MBAWA on Monday that I now decline the nomination'. | See JGM23 for a copy of Mr Riley's email dated 27 November 2021. | |
| 22 March 2022 | The Association sent a letter to Vogt Graham and Mr Mazza advising that a Mr Richard Machell had been nominated and agreed to act as arbitrator. | J G Mazza Affidavit of 22 June 2022 (folio 3) [5].<br>See JGM2 for a copy of the Association's letter dated 22 March 2022. | |
| 22 March 2022 | Mr Machell emailed Vogt Graham and Mr Mazza advising that:<br>'I confirm, to the best of my knowledge, that I have no knowledge or relationship with the parties, and have no conflict of interest in acting as the arbitrator in the dispute.<br>Where the parties are of a different view, I should be advised immediately, together with supporting reasons.<br>I now confirm by appointment as the arbitrator in this matter and herby enter upon the reference, as the arbitrator | J G Mazza Affidavit of 22 June 2022 (folio 3) [6].<br>See JGM3 for a copy of the email from Mr Machell dated 22 March 2022. | |

| Date | Event | Source | Comment |
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| | in the above dispute, assuming it is a domestic arbitration, consistent with the Commercial Arbitration Act 2021' | | |
| 5 April 2022 | Vogt Graham emailed Mr Mazza advising that the defendant had 'no objection to the appointment of Richard Machell as arbitrator'. | J G Mazza Affidavit of 22 June 2022 (folio 3) [7].<br>See JGM4 for a copy of the email from Vogt Graham to Mr Mazza dated 5 April 2022. | The plaintiffs also agreed to the appointment of Mr Machell: see J G Mazza Affidavit of 22 June 2022 (folio 3) [8]. |
| 21 April 2022 | Mr Mazza emailed Mr Machell advising that he 'was in the process of drafting correspondence to Vogt Graham for the purpose of conferring as to documentation and information to be forwarded to you' | J G Mazza Affidavit of 22 June 2022 (folio 3) [9].<br>See JGM5 for a copy of the email from Mr Mazza to Mr Machell dated 21 April 2022. | |
| Undated | Conferral commenced. | J G Mazza Affidavit of 22 June 2022 (folio 3) [10]. | |
| 28 April 2022 | Mr Mazza had a discussion at his office with Ms Harriette Benz, solicitor of Benz Legal.<br>During that conversation, Ms Benz advised Mr Mazza to the effect, that a Richard Machell had been engaged as an expert for a client of Vogt Graham in a dispute being the subject of an ongoing District Court of Western Australia matter (District Court Proceeding). | J G Mazza Affidavit of 22 June 2022 (folio 3) [11], [13]. | Benz Legal and Mr Mazza conduct independent legal practices located in the same building. Ms Benz and Mr Mazza are both sole practitioners. From time to time, they speak to each other about legal issues as colleagues which involves, for example, 'bouncing ideas off each other': see J G Mazza Affidavit of 22 June 2022 (folio 3) [12]. |

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| 4 May 2022 | Mr Mazza emailed a letter to Vogt Graham requesting information as to whether Mr Machell had been engaged as an expert for any of Vogt Graham's clients previously and/or currently etc. | J G Mazza Affidavit of 22 June 2022 (folio 3) [19].<br>See JGM6 for a copy of the letter from Mr Mazza to Vogt Graham dated 4 May 2022. | Vogt Graham did not respond to this correspondence: see J G Mazza Affidavit of 22 June 2022 (folio 3) [21]. |
| 6 May 2022 | Mr Mazza emailed Vogt Graham enclosing a letter which mentioned that Vogt Graham had not responded to his correspondence of 4 May 2022 and that a challenge application would be made on or prior to 12 May 2022. | J G Mazza Affidavit of 22 June 2022 (folio 3) [20].<br>See JGM7 for a copy of the letter from Mr Mazza to Vogt Graham dated 6 May 2022. | Vogt Graham did not respond to this correspondence: see J G Mazza Affidavit of 22 June 2022 (folio 3) [21]. |
| 10 May 2022 | At the office of Benz Legal, Ms Benz told Mr Mazza that particulars of damages were filed by Vogt Graham's client in the District Court Proceeding which refer to Mr Machell as an expert and disclosed that Mr Machell had issued an account for professional consultation and an expert report. | J G Mazza Affidavit of 22 June 2022 (folio 3) [15]. | |
| Undated | Mr Mazza received instructions to challenge Mr Machell continuing as arbitrator. | J G Mazza Affidavit of 22 June 2022 (folio 3) [17]. | |
| 11 May 2022 | Mr Mazza emailed Mr Machell enclosing a letter outlining the plaintiff's written statement of reasons for the challenge to the arbitral tribunal pursuant to s 13(2) of the CAA.<br>Mr Mazza mentioned in the statement that Vogt Graham had not responded to his correspondence dated 4 and 6 May 2022. | J G Mazza Affidavit of 22 June 2022 (folio 3) [22].<br>See JGM8 for a copy of the written statement of reasons dated 11 May 2022. | |

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| 16 May 2022 | Vogt Graham sent Mr Machell a letter responding to the challenge set out in Mr Mazza's correspondence to Mr Machell dated 11 May 2022. | J G Mazza Affidavit of 22 June 2022 (folio 3) [23].<br>See JGM9 for a copy of the letter from Vogt Graham to Mr Machell dated 11 May 2022. | |
| 24 May 2022 | Mr Machell made a decision as to the challenge to his appointment as arbitrator and emailed it to Vogt Graham and Mr Mazza. | J G Mazza Affidavit of 22 June 2022 (folio 3) [24]. | |
| 25 May 2022 | Mr Machell amended his decision of 24 May 2022 which corrected a number of clerical mistakes and emailed it to Vogt Graham and Mr Mazza.<br>Mr Machell concluded at [245] that the challenge was unsuccessful. | J G Mazza Affidavit of 22 June 2022 (folio 3) [25].<br>See folio 4 for a copy of the amended decision of 25 May 2022. | |
| 2 June 2022 | Mr Mazza provided Mr Machell by way of Dropbox link a copy of the documents requested in his email of 22 March 2022. Documents included the 'Claimant's Brief Status Report'. The report provided the history and current stage of the arbitration including background information. | J G Mazza Affidavit of 22 June 2022 (folio 3) [31].<br>See JGM10 for a copy of the 'Claimant's Brief Status Report'. | |
| 7 June 2022 | Mr Machell emailed Vogt Graham and Mr Mazza mentioning that he downloaded the documents made available by Mr Mazza via the Dropbox link. He also stated: 'I understand from the Status Report, that an application is to be made to the Supreme Court in respect to my recent decision as to jurisdiction/apprehended bias, however [i]n the | J G Mazza Affidavit of 22 June 2022 (folio 3) [32].<br>See JGM11 for a copy of the email from Mr Machell dated 7 June 2022. | |

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| | meantime the arbitration should proceed, subject to any agreement by the parties or decision of the Court that it should be stayed'. | | |
| 9 June 2022 | Mr Mazza emailed a letter to Vogt Graham stating that his client will seek a stay of the arbitration proceeding pending the outcome of the challenge before the Court and requesting advice as to whether they would consent to the application for a stay. | J G Mazza Affidavit of 22 June 2022 (folio 3) [33].<br>See JGM12 for a copy of the letter from Mr Mazza to Vogt Graham dated 9 June 2022. | |
| 15 June 2022 | Vogt Graham emailed Mr Mazza advising that the defendant consents to a stay of the arbitration pending the determining of the challenged in the Supreme Court. | J G Mazza Affidavit of 22 June 2022 (folio 3) [34].<br>See JGM13 for a copy of the email from Vogt Graham to Mr Mazza dated 15 June 2022. | |
| 16 June 2022 | Mr Mazza emailed Vogt Graham enclosing a minute of consent orders seeking a stay of the arbitration. | J G Mazza Affidavit of 22 June 2022 (folio 3) [34]. | |
| 22 June 2022 | The plaintiffs filed an Originating Summons (Form 21) accompanied by J G Mazza Affidavit of 22 June 2022 stating the materials facts relied on. | Form 21 - Originating Summons (folio 1). | |

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

PP
Research Associate to the Honourable Justice K Martin

5 DECEMBER 2022