IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
ARBITRATION LIST

Not Restricted

S ECI 2022 04569

FACTORY X PTY LTD (ACN 078 151 667) Applicant

v

GORMAN SERVICES PTY LTD (ACN 123 221 349) Respondent

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 March 2023
DATE OF JUDGMENT:	12 May 2023
CASE MAY BE CITED AS:	Factory X Pty Ltd v Gorman Services Pty Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 247

ARBITRATION — Recourse against award — Procedure — Appeals and leave to appeal — Leave to appeal from decision of arbitrator — Question or error of law — *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570; *Thoroughvision Pty Ltd v Sky Channel Pty Limited* [2010] VSC 139; *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708; *ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd* [2017] SASCFC 150; *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASCA 7 — *Commercial Arbitration Act 2011* (Vic) s 34A.

APPEARANCES:	COUNSEL	SOLICITORS
For the Applicant	Mr PW Collinson KC and Mr AJ Weinstock	Thomson Geer
For the Respondent	Mr N De Young KC and Mr AL Ounapuu	King & Collins

HIS HONOUR:

Introduction

1 The applicant (Factory X Pty Ltd) seeks leave to appeal questions of law arising out of an award of Mr Justin Gleeson SC ('Arbitrator') dated 9 September 2022 ('Award') pursuant to s 34A of the *Commercial Arbitration Act 2011* (Vic) ('the Act'). The questions arise from the Arbitrator's determination of what is described as the 'Third Dispute' and the 'Fourth Dispute' between the parties were originally the subject of these proceedings but at the hearing of the matter the 'Fourth Dispute' issues were not pursued.

2 The applicant filed an Originating Application for Leave to Appeal Against Award dated 9 November 2022 which seeks:

(1) leave under s 34A of the Act to appeal on the questions of law arising out of the Award as set out in the Originating Application; and

(2) if such leave is granted, orders that the appeal be allowed and the Award be varied as follows (now as to paragraph 240 only as issues with respect to the 'Fourth Dispute' are no longer pursued):

> 240. I conclude that the submissions of the Company ~~Gorman Services~~ are to be preferred on the Third Dispute. The consideration to be paid for the shares the subject of each of the ~~Second, Third and Fourth~~ Put Options is to be the market value determined separately in respect of those ~~the~~ shares, so that there be four, separate valuations.
>
> 241. I conclude that the submissions of the Company ~~Gorman Services~~ are to be preferred on the Fourth Dispute. The date as at which the market value of the shares the subject of each put Option is to be determined is the date on which the valuation is carried out ~~Gorman Services gave six months written notice to the Company of the exercise of the First Put Option~~.

The applicant also seeks costs and any other relief thought fit by the Court.

3 The Originating Application sets out the questions of law which the applicant says should be determined, together with the grounds upon which it is alleged that leave to appeal should be granted under s 34A of the Act, as follows:

A: Questions of law to be determined

Definition

In the following questions, 'the Deed' means the Class shareholders deed – LG Shares, undated but made about 15 July 2009, between the applicant, the respondent, and the other holders of the 'LG' class shares in the applicant.

Questions

1. Under cl 6.4(a) of the Deed, as varied on 1 February 2022, must the market value of the shares the subject of each of the respondent's four put options be determined separately, in respect of each option, or only once in respect of all options?

2. If so, must it be:

    a. a market valuation of all 10,000 'LG' class shares in the applicant, so that the consideration to be paid for the 625 'LG' class shares the subject of each put option will be 6.25% of that value; or

    b. a market valuation only of the respondent's 2,500 'LG' class shares, so that the consideration to be paid for the 625 'LG' class shares the subject of each put option will be 25% of that value; or

    c. a market valuation only of the 625 'LG' class shares the subject of the first put option, so that the consideration to be paid for the 625 'LG' class shares the subject of each subsequent put option will simply be an amount equal to that value?

3. When the market value of any of the respondent's 'LG' class shares is determined under cl 6.4(a), as at what date must that value be determined? [This question is no longer being pursued].

B: Grounds on which it is alleged leave to appeal should be granted

1. The determination of the questions will affect the rights of the parties by substantially affecting the consideration to be paid for the shares the subject of the respondent's put options.

2. The questions were ones which the arbitral tribunal was asked to determine:

    a. Question 1 was put in the 'Third Dispute' referred for arbitration in the Amended Referral to Arbitration dated 24 June 2022, [3.1.1B].

    b. The answer to question 2 would follow from the determination of question 1, as it did in the reasons for the tribunal's award, dated 9 September 2022, [174], [175], [180], [189]–[191].

    c. Question 3 was put in the 'Fourth Dispute' referred for arbitration in the Amended Referral to Arbitration dated

24 June 2022, [3.1.1C]. [This question is no longer being pursued].

3. On the basis of the findings of fact in the award, the decision of the tribunal on the questions is obviously wrong, for the reasons set out in the submission accompanying this application.

4. Despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the questions, both because the tribunal's decision in obviously wrong, and because the parties have agreed that, in respect of any question of law arising out of an arbitration, the matter may be referred to the Court: Deed, cl 13.6(g).

Submission Accompanying Originating Application

4 The non-contentious parts of this Submission, namely [2.1.1] to [6.3.1], are agreed between the parties, and are as follows:

1 Introduction

1.1.1 This submission, in accordance with rule 9.20(5) of ch II of the Rules, accompanies the applicant's Originating Application for Leave to Appeal Against Award, dated [9 September] 2022, and sets out the matters prescribed in paras (a)–(h) of that rule.

2 Person whose interests might be affected (para (a))

2.1.1 Lisa Jane Gorman is a person whose interests might be affected by the proposed appeal …

3 Nature and context of dispute (para (b))

3.1.1 On 1 July 2009:

(a) the respondent (Gorman Services) and other interests associated with Ms Gorman sold the applicant (the Company) a business of designing, manufacturing, sourcing, and selling women's apparel and accessories (the Gorman Business);[1] and

(b) in consideration of the sale, the Company issued Gorman Services, as Ms Gorman's nominee, with 2,500 or 25% of the 10,000 'LG' class shares,[2] a class of shares created to receive the profits of the Gorman Business.[3] The remaining 7,500 or 75% of the 10,000 'LG' class shares are held by other persons.[4] The percentage shareholding held by Gorman Services, being 25%, is significant in construing the relevant provisions of the Deed.

---

1 See *Business purchase agreement*, cl 2.1, exhibited to affidavit of N Fryde, sworn 24 October 2022 (***Fryde Affidavit***), at p 5 of NSF-1.

2 See *Business purchase agreement*, cl 3.3, exhibited to Fryde Affidavit, at p 5 of NSF-1.

3 Minutes of the Meeting of the Members of Factory X Pty Ltd, held 1 July 2009, [9(c)], exhibited to Fryde Affidavit at p 64 of NSF-1.

4 Those persons are identified in Schedule 1 of the Deed.

3.1.2 In order, *inter alia*, to regulate dealings in the 'LG' class shares, on or about 15 July 2009, the Company entered into a *Class shareholders deed – LG Shares* with Gorman Services and the other holders of those shares (the ***Deed***).[5]

3.1.3 By cl 6.1 of the Deed, the Company granted Gorman Services four put options, each over 625, or one quarter, of its 25% 'LG' class shares holding, being 6.25% of the *total* issued 'LG' class shares. By cl 6.2 of the Deed, each of those options might be exercised on six months' written notice.

3.1.4 On 27 August 2021, Gorman Services purported to give the Company six months' written notice that it would exercise all four of the put options at once, on 28 February 2022.[6] The parties then fell into dispute:

(a) about:

(i) whether the options could be exercised all at once, as contended by Gorman Services; or

(ii) whether they could be exercised only at six-monthly intervals, as contended by the Company

(the ***First Dispute***); and

(b) if only at six-monthly intervals:

(i) whether each interval began six months after notice had been given for the exercise of the previous option, even if the shares the subject of that option had not yet been transferred back to the Company, as contended by Gorman Services; or

(ii) whether the interval began only once the shares had been transferred back to the Company, as contended by the Company

(the ***Second Dispute***).

3.1.5 On 1 February 2022, the parties varied cl 6.4(a) of the Deed, which had prescribed the consideration to be paid for the shares the subject of each option.[7] So varied, the clause provided that the consideration to be paid for the shares the subject of each option was their 'market value', as determined by an expert.

---

5 Exhibited to Fryde Affidavit at p 88 of NSF-1.

6 See pp 112-123 of exhibit NSF-1 to Fryde Affidavit.

7 Arbitral award, 9 September 2022, exhibited to Fryde Affidavit at p 132 of NSF-1 (***Award***), [13].

3.1.6 Further disputes arose:

(a) about:

(i) whether the shares the subject of each option must be valued separately, so that there be four valuations, as contended by the Company; or

(ii) whether there must be only one valuation, as contended by Gorman Services

(the ***Third Dispute***); and

(b) about whether, when the shares the subject of any option were valued:

(i) their value must be determined as at the date of the valuation, as contended by the Company; or

(ii) their value must be determined as at the date when notice was given for the exercise of the option, as contended by Gorman Services

(the ***Fourth Dispute***).

4 Award (para (c))

4.1.1 The four Disputes were referred for arbitration, in an Amended Referral to Arbitration, on 24 June 2022.[8] The arbitration was heard on 31 August 2022. On 9 September 2022, the arbitrator handed down his award.

4.1.2 In his award, the arbitrator determined:

(a) on the First Dispute, that the options could be exercised only at six-monthly intervals, as contended by the Company: [238];

(b) on the Second Dispute, that each interval began only once the shares the subject of the previous option had been transferred back to the Company, as contended by the Company: [239];

(c) on the Third Dispute:

(i) that there must be only one valuation, as contended by Gorman Services: [190], [240]; and

(ii) that the said valuation must be a valuation, not only of the 625 shares the subject of the first option, or of all Gorman Services' 2,500 'LG' class shares, but of all 10,000 of the 'LG' class shares, with the consideration to be paid for the 625 shares the subject of each option being 6.25% of that value: [174], [175], [180], [189]-[191]; and

[8] Fryde Affidavit, exhibit NSF-1, p 124.

(d) on the Fourth Dispute, that this value must be determined as at the date when notice was given for the exercise of the first option, as contended by Gorman Services: [225], [241].

4.1.3 The arbitrator's determination of the First and Second Disputes is not challenged as the Company succeeded on those matters. What is challenged is:

(a) his determination of the Third Dispute, raising questions 1 and 2 in the Originating Application; and

(b) his determination of the Fourth Dispute, raising question 3 in the Originating Application. [This determination is not now challenged].

4.1.4 Accordingly, the Company seeks leave to appeal from those determinations.

5 Relevant facts found by arbitrator (para (d))

5.1.1 The only relevant fact found by the arbitrator, on the basis of which the questions are to be determined by the Court, is that, when they varied cl 6.4(a) of the Deed, the parties varied it 'such that the consideration to be paid for the Gorman Shares pursuant to the exercise of the Put Options would be the market value of those shares, as determined by an expert appointed under clause 6.4(a)': [13]. This had in any case been agreed by the parties.[9]

6 How determination of questions will affect parties' rights (para (e))

6.1 Summary

6.1.1 The determination of the questions will affect the rights of the parties by substantially affecting, as detailed below, the consideration to be paid for the shares the subject of the put options.

6.2 Questions 1 and 2 (Third Dispute)

6.2.1 The determination of question 1 will determine whether the consideration to be paid for the shares the subject of all the options is to be fixed before the shares the subject of the first option are sold, or whether it is to be reassessed, according to their then market value, before the shares the subject of each subsequent option are sold, over a period of at least two years. The determination of that question, and question 2, will also determine whether the consideration to be paid for the shares the subject of each option is to include a minority discount.

6.3 Question 3 (Fourth Dispute)

[This question is not now pursued]

9 *Amended Referral to Arbitration*, 24 June 2022, [2.3.4].

6.3.1 The determination of question 3 will determine:

(a) whether the value of the shares the subject of the first option is to be determined as at 27 August 2021, when notice was given for the exercise of that option, or whether it is to be determined as at the date of the valuation, which has not yet been carried out; and

(b) if the shares the subject of each subsequent option are to be valued separately, whether that value is to be determined as at the date when notice is given for the exercise of the option, or whether it is to be determined as at the date of the valuation, which may be several months later.

5 The contentious parts of this submission, namely, the material contained in ss 7, 8 and 9, are not agreed raising, in substance, why the applicant contends that the decision of the arbitrator is obviously wrong and as to the justice and appropriateness for the Court to determine the questions the subject of the originating application. These matters are the subject of the reasons which follow.

Appealing Arbitral Awards under s 34A of the Act

6 The Act commenced on 17 November 2011 and is part of a national scheme of relevantly identical legislation. The national scheme, of which the Act is a part, is intended to reform and modernise domestic commercial arbitration law in a manner generally consistent with the UNCITRAL Model Law on International Commercial Arbitration ('Model Law').[10] This approach has been adopted by all Australian States and Territories, and in by the Commonwealth in the *International Arbitration Act 1974*.

7 Section 1AC of the Act reflects and gives effect to the overriding principles and aims of the Act. As I noted in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd*,[11] apart from providing a paramount object — a 'guiding star' — for the interpretation of the provisions of the Act, s 1AC also reflects the philosophy and approach of the international instrument which the provisions of the Act reflect and substantially reproduce in the same terms.[12] For the avoidance of any confusion,

10 As adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, with amendments adopted by UNCITRAL in 2006.

11 [2016] VSC 326.

12 See also *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142.

however, it should be noted that s 34A of the Act is not a provision which is reflected in the Model Law as the approach of that international instrument is, among other things, to promote finality and ready enforceability of arbitral awards and to avoid merits appeals and proceedings which are, in substance, in the nature of merits appeals.[13]

8 The objects, approach and application of the Act are provided for in s 1AC:

> **Paramount object of Act**
>
> (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.
>
> (2) This Act aims to achieve its paramount object by —
>
> (a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest); and
>
> (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.
>
> (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.
>
> (4) Subsection (3) does not affect the application of section 35 of the Interpretation of Legislation Act 1984 for the purposes of interpreting this Act.

9 Consistently with these objects, and the approach of the Act as it applies the Model Law, the involvement of the Court with respect to substantive matters, namely, the merits the subject of the arbitral proceedings and the award, is highly constrained. Section 33 empowers the arbitrator to correct and interpret awards made and to make additional awards but does not provide for any recourse to the Court. Section 27J does, on the other hand, permit recourse to the Court to determine any question of law arising in the course of the arbitration on the application of a party to the arbitration agreement but only with the consent of the arbitrator or of all the other

---

13 See, particularly, *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

parties to the arbitration agreement and, additionally, only with leave of the Court. Consequently, under these provisions the involvement of the Court is constrained. Moreover, these provisions do not confer anything in the nature of an appellate jurisdiction, much less a general merits appellate jurisdiction, on the Court.

10 Section 34 contains very clear provisions, provisions which reflect Article 34 of the Model Law, that recourse against an arbitral award may be made only by an application for setting aside in accordance with sub-ss 34(2) and (3), subject only to the possibility of an appeal under s 34A of the Act. Were it not for the exception provided for under the provisions of s 34A, there would be no possibility of any recourse to the Court beyond the grounds for setting aside expressly provided for in s 34. The rationale for including a limited appeal avenue on a question of law is the view that such an option has more value in a domestic as distinct from an international context.[14] Section 34A is, with only minor differences, in the same form as s 69 of the English *Arbitration Act 1996*; particularly the grounds of appeal set out in s 34A(3). "Anxious consideration" was given whether a right of appeal should be included in the 1996 English Act and the decision ultimately made to include such a provision, a decision upon which Harris, Planterose and Tecks observe in their commentary on that legislation:[15]

> In the event, the Act provides for a right of appeal on a point of law arising out of an award. The rationale would seem to be that the parties must not be taken, in the ordinary case, to have agreed that the tribunal would obviously misapply the relevant law.
>
> …
>
> The right of appeal is limited and restricted in a number of ways, thus ensuring that only rarely will the award not constitute the final decision on the substantive issues in the arbitration.

11 Although s 34A does provide an appeal against an arbitral award, it is an appeal within the very specific limits provided for in s 34A. It is certainly not an appeal at large or a hearing *de novo*, as the provisions of s 34A make clear:

---

14 Croft, Stamboulakis and Warren, *International and Australian Commercial Arbitration* (LexisNexis, 2022), [10.18] p 565.

15 *The Arbitration Act 1996* (5th ed, Wiley, Blackwell, London, 2014), [69C] p 359.

Appeals against awards

(1) An appeal lies to the Court on a question of law arising out of an award if—

(a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section; and

(b) the Court grants leave.

(2) An appeal under this section may be brought by any of the parties to an arbitration agreement.

(3) The Court must not grant leave unless it is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more parties; and

(b) that the question is one which the arbitral tribunal was asked to determine; and

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

(4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.

(6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the ***appeal period***).

(7) On the determination of an appeal under this section the Court may by order—

(a) confirm the award; or

(b) vary the award; or

(c) remit the award, together with the Court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration or, where a new arbitrator has been appointed, to that arbitrator for consideration; or

(d) set aside the award in whole or in part.

(8) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(9) Where the award is remitted under subsection (7)(c) the arbitrator must, unless the order otherwise directs, make the award within 3 months after the date of the order.

(10) The Court may make any leave which it grants under subsection (3)(c) subject to the applicant complying with any conditions it considers appropriate.

(11) Where the award of an arbitrator is varied on an appeal under this section, the award as varied has effect (except for the purposes of this section) as if it were the award of the arbitrator.

Note

There is no equivalent to this section in the Model Law.

12 In relation to the corresponding provisions of the *Commercial Arbitration Act 2011* (SA), the South Australian Court of Appeal, in *Inghams Enterprises Pty Ltd v Southern Cross Farm Australia Pty Ltd*, observed as follows:[16]

> 78. It can thus be seen that the CAA [*Commercial Arbitration Act 2011* (SA)] provides for an "opt in" appeal regime, rather than the "opt out" appeal regime that applied under the CAIRAA [*Commercial Arbitration and Industrial Referral Agreements Act 1996* (SA)]. The parties may appeal on a question of law arising out of an arbitral award if the parties agree that an appeal may be made under that section (s 34A(1)(a)) and the Court grants leave (s 34A(1)(b)).
>
> 79. Under s 34A(3) the Court must not grant leave to appeal unless satisfied of the various matters in ss 34A(3)(a)-(d). While the conditions of a grant of leave under ss 34A(3)(c)(i) and (ii) (namely that the arbitrator's decision is "obviously wrong", or involves a question of "general public importance and … is at least open to serious doubt") are similar to those under ss 38(5)(b)(i) and (ii) of the CAIRAA, it is significant that, under the CAA, satisfaction of these matters must be "on the basis of the findings of fact in the award".

[16] [2022] SASCA 7 (Doyle JA (with whom Livesey and Bleby JJA agreed)), [78]-[82].

> 80. Bearing in mind the objects of the CAA, and the shift from an opt out appeal regime to an opt in appeal regime (with confirmation of the final status of the arbitrator's findings of fact upon which the questions of law are to be determined), it is apparent that the CAA reflects a policy of enhancing the status and finality of domestic arbitral awards.
>
> 81. Even under the CAIRAA the parties could agree not to permit any judicial challenge to an arbitrator's award, meaning that the arbitrator's decision on questions of law would be final. Under the CAA, that has become the default position. This reflects the reality that there is nothing uncommercial about parties, even sophisticated commercial parties in the context of complicated and valuable commercial arrangements, choosing to be bound in this way. That choice may simply reflect a preference for the efficient resolution of disputes, and the certainty of finality, over the spectre of delay and cost often associated with any ability to pursue potential errors on questions of law through the courts.
>
> 82. Nor is there any common law impediment to the parties to a commercial arrangement agreeing to treat an arbitrator's decision, even on questions of law, as final [*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [36]-[37] (French CJ and Gageler J), [74], [76]-[79] (Hayne, Crennan, Kiefel and Bell JJ)].

13 It must also be observed that the provisions of s 34A of the Act do not confer an unfettered right of appeal on parties, even if they have agreed to the possibility of an appeal against the arbitral award under the provisions of this section. As is made clear by sub-s 34A(1), before its provisions will operate, in addition to party agreement to an appeal under these provisions, the court must grant leave. Moreover, s 34A(3) mandates that the court 'must not grant leave' unless it is satisfied of the matters set out in s 34A(3)(a) to (d), matters which the parties have sought to address in their submissions with respect to the Award. These provisions are consistent with the clear approach of the legislature in the Act to limit appeals against arbitral awards and, consistently with the paramount object of the Act, to see that commercial disputes are resolved 'in a cost-effective manner, informally and quickly'.[17] The reach of the paramount object is also clear in sub-s 34A(5) requiring an application for leave to appeal without a hearing unless it appears to the court

[17] See *Commercial Arbitration Act 2011*, s 1AC (2)(b).

that a hearing is required. As the English Court of Appeal emphasised in *HMV UK v Propinvest Friar Limited Partnership*, these provisions are intended to limit appeals:[18]

> Lord Donaldson MR has also referred to the need to determine these applications quickly and easily in *The Kelaniya* [1989] Lloyd's Rep 32. He observed that the court will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong. It is relevant to set out a little of the procedural history. The matter came before Morgan J on paper and he gave a direction that the application for permission to appeal pursuant to section 69, together with the appeal itself, if permission was granted, should be heard by a High Court judge on a date to be fixed with a time estimate of three hours. Such a direction may be described as a direction for a rolled up procedure. The judge did not retain it to himself. It is not always possible for a High Court judge to retain a matter if he is approaching a long trial. Nonetheless it would in general be preferable, in a case where the judge felt it necessary to adjourn a matter for a hearing in open court, to retain it to himself. However, the point I wish to make is it must be rare that a court finds it necessary to call for further argument orally and also to direct a rolled up procedure as in this case. The danger of a rolled up process is that the judge does not answer the anterior statutory questions in section 69, namely whether the pre-conditions to the grant of leave to appeal in Section 69 are all satisfied. Those questions are ones which statute requires to be answered before the substantive issue on the appeal is fully argued.

14 The application of the provisions of sub-s 34A(3) with respect to the present appeal are considered, specifically, in the reasons which follow, but at this point it is helpful to consider a critical aspect of the provisions of s 34A, namely, paragraph 34A(3)(c) 'that, on the basis of the findings of fact in the award — (i) the decision of the tribunal on the question is *obviously wrong*' (emphasis added).

15 The South Australian Court of Appeal in *Inghams Enterprises* also considered the authorities on the meaning of 'manifest error' as that expression was used in s 38 of the previous legislation (which, in the case of Victoria, was the *Commercial Arbitration Act 1984*).[19] Referring to the decision of the High Court in *Westport Insurance Corporation v Gordian Runoff Ltd*,[20] Doyle JA said:[21]

> 166. Kiefel J reasoned similarly [in *Westport Insurance* at [163]:
>
> > I agree with French CJ, Gummow, Crennan and Bell JJ that manifest error of law requires that the error appear on the face

18 [2011] EWCA 1708, at [40] (Arden LJ, with whom Longmore and McFarlane LJJ) agreed).
19 *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASCA 7, [152]-[167].
20 (2011) 244 CLR 239.
21 *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASCA 7, [166]-[169].

> of the Award, which includes the reasons for it, and that the error be apparent to the understanding of the reader. Such is the case here. It does not require that the error be of a particular quality or that errors involving complex questions be disqualified.

167. There have been subsequent decisions in relation to s 38(5)(b)(i) that have continued to suggest that manifest error connotes an error which is obvious rather than merely arguable [For example, *Limin James Chen v Kevin McNamara & Son Pty Ltd* [2013] VSC 539, [97] (Croft J)]. However, as Martin CJ observed in *D & Z Constructions Pty Ltd v IHI Corporation* [*D & Z Constructions Pty Ltd v IHI Corporation* [2013] WASC 265, [3]; applied in *Alvaro v Amaral (No 2)* [2013] WASCA 232, [25] (Martin CJ, Pullin and Newnes JJA)], there must be considerable doubt whether the observations to this effect in earlier cases such as *Promenade Investments Pty Ltd v New South Wales* [(1992) 26 NSWLR 203] and *Natoli v Walker* [(1994) 217 ALR 201] survive the decision of the High Court in *Westport Insurance Corporation v Gordian Runoff Ltd*. Indeed, in *Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [[2017] SASC 69, [119] (fn 54)], Blue J described this High Court decision as having disapproved of these earlier articulations of manifest error.

168. While the obviousness or otherwise of the error might nevertheless have remained a relevant consideration under the Court's general discretion to grant or refuse leave to appeal even after satisfaction of one or other of the limbs of s 38(5)(b) [*Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, [47] (French CJ, Gummow, Crennan and Bell JJ); *D & Z Constructions Pty Ltd v IHI Corporation* [2013] WASC 263, [2] (Martin CJ).], the issue is now moot given the repeal of the CAIRAA and its replacement with the CAA. Through the introduction of s 34A of the CAA, the legislature has done away with any difficulty associated with the meaning of manifest error and has quite plainly opted for an approach which, through the two limbs of s 34A(3)(c), reflects the two limbs of *The Nema* guidelines. As such, the Australian authorities to which I have referred that have applied this approach in the context of s 38(5) of the CAIRAA and its equivalents will be of some assistance in applying the criterion of "obviously wrong" under s 34A(3)(c)(i) of the CAA. Conversely, it will no longer be necessary to ensure that the alleged error on the relevant question of law be identifiable "on the face of the award" [*Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [2017] SASC 69, [119]-[120]].

169. It remains then to consider whether the Arbitrator's decisions in respect of the questions sought to be raised on appeal by Inghams were obviously wrong. Based upon the authorities reviewed above, this requires something more than arguable error. It connotes an error that is apparent from a perusal of the arbitrator's reasons for the award, without the need for any prolonged adversarial argument. Put another way, the Court must be able to readily identify error rather than merely allowing for the possibility of error, or for the existence of doubt based upon the complexity of the relevant issue(s).

16 A similar approach was taken by the English Court of Appeal in *HMV UK v Propinvest Friar Limited Partnership* in the application of the equivalent provisions of the English *Arbitration Act 1996*:[22]

> 5. It will be apparent from section 69 that rights of appeal from an arbitration award are severely restricted. It is not enough, therefore, simply to show that there is an arguable error on a point of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer. The required quality of the accepted error is that it must be "obviously wrong". Thus the alleged error must be transparent. It must also, at the least, be clear. The word "obvious" is a word of emphasis which means that the courts must not whittle away the restriction on rights of appeal in subsection (c)(i) by being over generous in their determination of the clarity of the wrong.
>
> 6. The words "obviously wrong" should be seen as reflecting the case law on the predecessor provision in section 1(3)(b) of the *Arbitration Act* 1979. In the well-known case of *The Nema* [1982] AC 742-3, Lord Diplock held:
>
> > "Where...a question of law involved is the construction of a 'one-off' clause, the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave..."
>
> 7. The effect of the *Arbitration Act* 1979 in this regard was thus, in my judgment, carried through into section 69 of the 1996 Act. Lord Diplock referred to adversarial argument and to the court determining the question of leave without the benefit of adversarial argument. In the context, it seems to me that he meant primarily oral argument. Contrary to the passages I have cited, in this case this court has heard oral argument, as did the judge, but it is to be noted that Lord Diplock considered that this should not normally happen. The matter should therefore normally be dealt with on paper. I shall come back to these points at the end of my judgment. The point, however, that I wish to emphasise at this stage is that Lord Diplock was clearly contemplating that the error is one which can be grasped simply by a perusal, that is, a study, of the award itself.

---

22 [2011] EWCA 1708, at [5] to [7] (Arden LJ, with whom Longmore and McFarlane LJJ) agreed).

This is consistent with the approach taken by Akenhead J in *Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited*,[23] where his Lordship emphasised the restricted nature of an appeal under these provisions and, more particularly, that such an appeal is not, in effect, a rehearing which would enable the Court to substitute its own view of the proper outcome of the arbitral proceeding. His Lordship stated the position in this respect very clearly:[24]

> 28. Therefore, I must approach the question of leave to appeal on the basis of considering whether the Arbitrator was obviously wrong in reaching his decision. It is not enough that a part of his or her reasoning is wrong or that conceivably another tribunal might respectably have reached the opposite decision. I consider however that the test of obviousness is not only passed if the Award is obviously wrong to the judge considering leave after half an hour's reading of the papers by the judge considering leave. The reference in *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Norther Pioneer* [2003] 1 Lloyds Rep 212 at Paragraph 23 that the judge should be able to digest the written submissions in 30 minutes does not impose such a restriction. If it takes four hours for the judge to understand the submissions and he or she then forms the view that the Section 69 criteria are established, those criteria are established.
>
> 29. To be "obviously wrong", the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily "obviously" so.

17 The applicant in this matter seeks to establish that the Arbitrator's award with respect to the matters identified is 'obviously wrong' for the purposes of s 34A of the Act. Questions of construction are generally accepted to be questions of law.[25]

---

23 [2008] EWHC 426 (TCC).

24 [2008] EWHC 426 (TCC) at [28]-[29]; though in terms of "obviously" in the context of "obviously wrong", the Australian approach is more nuanced than the time it may take to read the award (see *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASC 7 at [169] (Doyle JA, with whom Livesey and Bleby JJA agreed).

25 See *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASCA 7, [143] referring to *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at [82] (Heydon J); *Western Australian Rugby Union v Australian Rugby Union* [2017] NSWSC 1174 at [1]-[3] and [13].

18 The application of s 38 of the previous legislation, namely, the *Commercial Arbitration Act 1984* (Vic), was considered in the context of construction of documents in *Thoroughvision Pty Ltd v Sky Channel Pty Ltd*,[26] where Croft J said:

> 20. The Sky parties also relied upon the decision of the High Court in *The Melbourne Harbour Trust Commissioners v Hancock*[27] in support of the position that where a question of construction of a document is referred to arbitration, the decision of the arbitrator cannot be set aside merely because the court would have come to a different conclusion on construction.
>
> 21. The *Melbourne Harbor Trust Commissioners* case was referred to relatively recently in *Thiess Pty Ltd v ConnectEast Nominee Company Pty Ltd*[28] where Byrne J said:[29]
>
> > "A further argument was presented based upon the old House of Lords decision in *Kelantan Government v Duff Development Co*[30] which has been applied in this country by the High Court in *Melbourne Harbour Trust Commissioners v Hancock*.[31] Pursuant to this principle, in a case such as the present, the award of an arbitrator upon a question as to the construction of a contract which question is specifically referred for consideration, will not be set aside for error of law on its face only because the court would have come to a different conclusion. The party impugning the award must show that the arbitrator proceeded illegally.[32] The examples of illegality offered in the *Kelantan* case were that the arbitrator made the decision upon inadmissible evidence or upon erroneous principle of construction.[33] It will be apparent that there is no such illegality here. If the *Kelantan* principle applies this is a further reason for rejecting the proposed appeal. It is, however, not necessary that I consider this point further and, in particular, the question as to the continuing application of the principle to arbitration law in Australia given the passage of the uniform Commercial Arbitration Acts."
>
> 22. The approach of the High Court in *The Melbourne Harbour Trust Commissioners* case appears from the joint judgment of Knox CJ and Gavan Duffy J:[34]

---

26 [2010] VSC 139.
27 (1927) 39 CLR 570.
28 [3008] VSC 287.
29 [2008] VSC 287 at [21].
30 [1923] AC 395.
31 (1927) 39 CLR 570.
32 See also *NSW Rutile Mining Co Pty Ltd v Hartford Fire Insurance Co* (1972) 46 ALJR 391 at 392, per Gibbs J.
33 *Kelantan Government v Duff Development Co* [1923] AC 395 at 409, per Viscount Cave LC.
34 (1927) 39 CLR 570 at 580-1; and see *NSW Rutile Mining Company Pty Ltd v Hartford Fire Insurance Company* (1972) 46 ALJR 391 at 392 where Gibbs J (as he then was) referred, with approval, to the

"The principal ground of attack on the validity of the award was that the decision of the arbitrator that the omission in question was not such as could properly be made under the contract was wrong in law. It was argued for the appellants that it appeared from the reasons that the arbitrator in arriving at this conclusion had wrongly construed clause 13 of the contract and had in doing so proceeded on wrong principles of construction. This, it was said, amounted to error in law appearing on the face of the award and afforded sufficient ground for setting it aside. If we assume this to be so, the first question to be considered is whether the decision of the arbitrator that the omission was not such as could properly be made under the contract is subject to review. In *Kelantan Government v Duff Development Co*,[35] it was decided by the House of Lords that where a question of construction is specifically referred, or is the very question referred, to arbitration, the decision of the arbitrator on that point cannot be set aside because the court would have come to a different conclusion unless it appears on the face of the award that the arbitrator has acted illegally, eg, by deciding on evidence which is inadmissible or on principles of construction which the law does not countenance. In that case Viscount Cave LC, with whose reasoning Lord Shaw of Dunfermline agreed, said[36] —

> 'The reference, therefore, was a reference as to construction. If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally — for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose'."

---

remarks of Viscount Cave LC in *Kelantan Government v Duff Development Co Ltd* [1923] AC 395 at 409.

35 [1923] AC 395.

36 [1923] AC 395, at p 409.

The other members of the High Court, Isaacs and Starke JJ, approached the issue in the same way. In so doing, Isaacs J added, with reference to the *Kelantan* case:[37]

> "… I think that Lord Trevethin, in the *Kelantan Case*,[38] collected in a short passage the broad sense of the matter as found in the cases from *Hodgkinson v Fernie*[39] to the *Kelantan Case*. His Lordship said that the arbitrator's decision cannot be questioned, though the law be bad on the face of the award, only 'when the submission is of a specific question of law, and is such that it can fairly be construed to show that the parties intended to give up their rights to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own'."

23. The House of Lords decision in *Kelantan Government v Duff Development Co Ltd*,[40] which was applied by the High Court in *The Melbourne Harbour Trust Commissioners v Hancock*,[41] was, as the Lord Chancellor Viscount Cave noted, fully supported by English authorities, some of which were then of long standing.[42] In my view, this, together with the decisions in *Kelantan* and *The Melbourne Harbour Trust Commissioners*, is significant when consideration is given to the possible effect of the provisions of the Act on the current authority of those decisions.[43] Additionally, the language used in the speeches of their Lordships in *Kelantan* and the reference to the need for the party seeking to challenge the award to show error "on the face of the award" is consistent with the relevant provisions of the Act.[44]

24. As has been discussed, the Act, and the uniform commercial arbitration legislation generally, marked a very significant departure from the earlier "regime" of intensive court supervision and court intervention, particularly through the case stated procedure.[45] In this context, it is, in my opinion, particularly significant that the *Kelantan* and *The Melbourne Harbour Trust Commissioners* cases were decided in the pre-Act environment where the case stated procedure prevailed.[46] In spite of the then prevailing regime of close court supervision and intervention in arbitration,[47] the House of Lords and the High Court

---

37 (1927) 39 CLR 570 at 585.

38 [1923] AC 395 at p 421.

39 (1857) 3 CB (NS) 189.

40 [1923] AC 395.

41 (1927) 39 CLR 570.

42 See [1923] AC 395 at 410.

43 Noting that this question was left open by Byrne J in *Thiess Pty Ltd v ConnectEast Nominee Company Pty Ltd* [2008] VSC 287 at [21]; see above, paragraph 21.

44 [1923] AC 395 at 409 (Viscount Cave LJ, with whom Lords Denfemline and Sumner agreed), at 416 (Lord Parmoor) and at 421 (Lord Trevethin).

45 See above, paragraphs 13 to 17.

46 See above, paragraphs 15 and 16.

47 That is, the case stated procedure which, in Victoria, was then provided for in s 19 of the *Arbitration Act* 1915 (Vic), as follows:

> '19. Any referee arbitrator or umpire may at any stage of the proceedings under a reference and shall if so directed by the Court or a Judge state in the form of a special case for the opinion of the Court any question of law arising in the course of the

> gave pre-eminence to the principle of party autonomy, as now described, in circumstances where parties had referred a question of construction of a document to arbitration. In my opinion, the force of these authorities is strengthened dramatically by the provisions of the Act and the approach of the uniform commercial arbitration legislation.

19 The last sentence in the passage quoted above expresses an opinion on the force of the authorities to which reference was made, with reference to the provisions of s 38 of the former legislation. Having regard to the provisions of s 1AC as to the paramount object of the Act and the provisions of s 34A requiring that before leave to appeal is given, the decision of the arbitral tribunal on the question must be found to be 'obviously wrong',[48] as applied and interpreted by the South Australian Court of Appeal in *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd*,[49] the force of the authorities referred to in *Thoroughvision*, and the decision of *Thoroughvision* itself, are strengthened significantly by the provisions of the current Act.

20 The applicant also sought to rely upon a number of further cases in support of its application. Those cases were not decisions with respect to arbitration matters but, rather, were directed to a grammatical issue where views of possible general application were expressed and, otherwise, on issues in other contexts which were said to be presently relevant, at least by analogy. None of these cases are, in my view, relevant to this application having regard to the nature and scope of the provisions of s 34A of the Act as made clear in the authorities and commentary discussed. Rather, they are, in my view, cases together with their contended significance which go to the arbitrator's task and not that of the Court in the present context. I turn now to the more particular reasons for this view with reference to these further cases.

---

reference.'

48 See s 34A(3)(c)(i).

49 [2022] SASCA 7.

21 The first of these further cases is *Tamas v Victorian Civil and Administrative Tribunal*,[50] the critical part of which the applicant relied upon is the discussion of the natural and correct use of English in the employment of the definite article by Callaway JA.[51] It should, nevertheless, be observed that Callaway JA refers to the 'natural and correct' use of the definite article. It is hardly controversial that the meaning of words may vary with the context in which they are used and that their significance may be affected by the context of the document in which they are used. The myriad of authorities in the construction of documents reflect this position as they apply the legal principles applicable to this process. Thus, the treatment of the definite article as used in the Deed is a matter of construction; a task for which the parties engaged the Arbitrator. Moreover, it is significant that there is no suggestion or argument in this proceeding that the Arbitrator applied incorrect legal principles in construction of the provisions of the Deed. For these reasons, *Tamas* does not support the applicant's position.

22 The same may be said of other cases relied upon by the applicant though they raise issues said to be applicable to the construction of the provisions of the Deed beyond matters of English useage. Thus, *Byrne v AJ Byrne Pty Ltd*,[52] an oppression proceeding, is said to go to the issue of a 'minority discount' in the valuation of shares and *National Australia Bank Limited v Clowes*[53] addresses the position where the literal meaning of contractual words is an absurdity having regard to the objective intention of the parties.[54] Again, this case was an application of accepted legal

---

50 (2003) 9 VR 154 (CA).

51 See (2003) 9 VR 154 at 157 [8]; and also references to the correct employment of the definite article in English in works such as *Fowler's Modern English Useage*, the *Oxford English Dictionary* and the *Macquarie Dictionary*.

52 [2012] NSWSC 667 (Black J).

53 [2013] NSWCA 179 (CA).

54 See [2013] NSWCA 179 at [34] where Leeming JA (with whom McColl and Macfarlan JJA) said:

> In my view, the Bank's submission should be accepted because of the Bank's first point. In my opinion this is a clear case where the literal meaning of the contractual words is an absurdity, *and* it is self-evident what the objective intention is to be taken to have been. Where both those elements are present, as here, ordinary processes of contractual construction displace an absurd literal meaning by a meaningful legal meaning. As this Court observed in *Westpac Banking Corporation v Tanzone Pty Ltd* [2000] NSWCA 25; (2000) 9 BPR 17,521 at [21], the principle is premised upon absurdity, not ambiguity, and is available even where, as here, the language is

principles of construction, as was *Australian Crime Commission v AA Pty Ltd*,[55] to which the applicant also made reference in this context.

Section 34A of the Act and this Application

23 The application for leave to appeal the subject of the Originating Application was the subject of an oral hearing, following the provision of written submissions and other relevant written material. Having regard to the direction to the Court under s 34A(5) of the Act and the position of the parties with respect to an oral hearing and the authorities on s 34A and its English equivalent, I decided that an oral hearing was required. The Award the subject of the application is both detailed and complex. In my view, the resolution of this application in a fair, properly informed, cost-effective and expeditious manner consistently with the paramount object of the Act, as expressed in s 1AC, required such a course. Further, and in my view, again consistent with the paramount objective, I accepted the agreed position of the parties that if leave were to be given the hearing and submissions should be treated as a 'rolled up' application for leave and substantive appeal hearing, within the constraints of s 34A. It follows, consistently with the authorities to which reference has been made, that if leave were not to be granted the Court would not consider matters with respect to any substantive appeal because the threshold for such consideration under s 34A would not be satisfied. In proceeding in this way I am mindful, as the English Court of Appeal emphasised in *HMV UK v Propinvest Friar Limited Partnership*, that these provisions are intended to limit appeals and that the anterior statutory questions must be answered in a rolled up procedure.[56]

24 I turn now to the further submissions of the parties with respect to this application. In doing so, I address the critical matters going to the question which now remain alive in this proceeding. However, having regard to the nature and scope of the provisions of s 34A of the Act and the authorities and commentary to which

---

unambiguous.

55 (2006) 149 FCR 540 (FC).

56 [2011] EWCA 1708, at [40] (Arden LJ, with whom Longmore and McFarlane LJJ) agreed); and see above, [13].

reference has been made, it is not, in my view, appropriate to consider in any detail to the construction issues the applicant now seeks to agitate. Were the Court to do so, this proceeding would become, in effect, a rehearing of the substance of the arbitral proceedings, a process which is clearly not available under s 34A. Moreover, in this instance, this would be to provide a rehearing of matters which were argued before the Arbitrator on the part of the applicant and considered in detail and rejected by the Arbitrator on the basis of comprehensive reasoning as set out in the Award. This is particularly significant in the present circumstances where, as noted previously, there is no suggestion or argument that the Arbitrator applied incorrect legal principles in construction of the provisions of the Deed.

25 The applicant submitted at the hearing of this application that its construction of clause 6.4(a) of the Deed was 'obviously or plainly right', which is the converse of showing the Arbitrator's decision was 'obviously wrong'.[57] The applicant contended that 'the Shares' meant 'the Shares the subject of the Put Option' and the Arbitrator's contrary understanding of 'the Shares' as all the 'LG' class shares was 'obviously wrong'. At this point I should observe that, as submitted by the respondent, this is not the test posed by s 34A of the Act and should be rejected. The converse of 'obviously wrong' in the present context is not 'obviously right', or similarly, 'not obviously wrong'. The applicant's contention in this respect would, among other things, raise onus issues and invite a distortion of the statutory provisions in this respect. As indicated in the authorities with respect to s 34A of the Act and what might be regarded as predecessor provisions where legislation permitted appeal from arbitral awards, the relevant statutory language is critically important, as is the context of the use of statutory or other expressions, similar or otherwise. Consequently, the applicant's reliance on the meaning of the expressions 'plainly wrong' or 'clearly wrong' in the entirely different context of the Australian judicial precedent system as applied by the New South Wales Court of Appeal in *Gett v*

57 Transcript dated 28 March 2023, 2-3.

Tabet[58] does not assist its position in this proceeding.[59]

26 The applicant primarily relied upon the following matters in support of its contentions as to the proper construction of the Deed:

2.1 the use of the definite article in 'the Shares' refers back to the last Shares referred to, being 'the Shares the Subject of the Put Option that has been exercised';

2.2 if 'the Shares' referred to all the 'LG' class shares, this would render the whole valuation process redundant, unless 'the market value of the Shares' were multiplied by 6.25%, which should not be done if 'the Shares' can be given its natural and ordinary meaning of referring back to the Shares last referred to; and

2.3 'the Shares' in cl 6.6(a), describing the sale of the Shares the subject of the Put Option that has been exercised, also refers back to those Shares. If so, so must 'the Shares' in the middle paragraph of cl 6.4(a), which describes the valuation of those Shares for the purpose of that sale.[60]

27 The applicant's approach results in clause 6.4(a) applying 'on four separate occasions to each of the four Put Options exercised, as the [A]rbitrator found, at intervals of six months'.[61] Should the applicant not accept the amount derived from paragraph (i) of clause 6.4(a), an expert may be appointed by the applicant to 'determine the market value of the Shares the subject of that Put Option'.[62] By contrast, the Arbitrator's interpretation would lead to the expert in this scenario determining 'the market value of *all of* the 'LG' class shares in the capital of the Company'.[63]

28 The applicant asserted that ''the market value of the Shares' refers back to the 625 'LG' class shares the subject of that Put Option (i.e. 6.25% or one quarter of Gorman Services' aggregate 25% shareholding)'. The 'amount' in paragraphs (iii) and (iv) of clause 6.4(a) would be based upon an equivalent figure, namely 'a 6.25% 'LG' class

58 (2009) 254 ALR 504, particularly at 565, [294] (Full Court).
59 And see *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASCA 7 at [163] (Doyle JA, with whom Livesey and Bleby JJA agreed).
60 Applicant's Submission on [69M] of Commentary to *Arbitration Act 1996* (UK), 5 April 2023.
61 Applicant's Submission Accompanying Originating Application for Leave to Appeal Against Award, 9 November 2022, 7 [7.1.5].
62 Ibid.
63 Ibid.

shareholding'.[64]

29 The Arbitrator's alternative method would, it was contended, introduce the need 'to substitute '[100% of]' for '[6.25% of]' in paragraph (i)' to avoid 'comparing 6.25% with 100%'.[65] However, the applicant suggested it 'would then pay for a 25% LG class shareholding either (1) 100% of EBITDA for the previous financial year multiplied by five less the Discount Percentage or (2) 100% of the market value determined an Expert', which the Arbitrator found to be an absurdity.[66]

30 The respondent opposed the grant of leave on the basis that the Arbitrator's decision on the questions is not 'obviously wrong' for the purposes of s 34A(3)(c)(i) of the Act.[67]

31 The respondent's preferred construction of clause 6.4(a) of the Deed was a 'like with like' comparison.[68] Accordingly, '[t]he market valuation of the 'LG' class shares as determined by the expert is to be compared with the "*Exercise Price as adjusted by the Discount Percentage*". Both are to be done at the global level, that is looking at the 'LG' class shares as a whole'.[69]

32 In relation to s 34A(3)(c) of the Act, the respondent referred to Lady Justice Arden's dismissal of the appeal in *HMV UK Ltd v Propinvest Friar Limited Partnership*[70] regarding the equivalent provision, s 69, of the *Arbitration Act 1996* (UK) ('UK Act'). Her Ladyship considered an 'obviously wrong' decision to be one which was:

(a) 'unarguable';[71]

(b) 'making a false leap in logic';[72]

---

64 Ibid 8 [7.1.8].
65 Ibid 8 [7.1.9].
66 Ibid.
67 Respondent's Submissions pursuant to Rule 9.20(7), 24 November 2022, 2 [6].
68 Ibid 5 [15(g)].
69 Ibid.
70 [2011] EWCA Civ 1708; and see, above, 16.
71 Respondent's Submissions regarding *HMV UK Ltd v Propinvest Friar LP*, 5 April 2023, 1 [4], citing *HMV v Propinvest Friar LP* [2011] EWCA Civ 1708 [34].
72 Ibid.

(c) 'reaching a result for which there was no reasonable explanation';[73] or

(d) 'a major intellectual aberration'.[74]

33 The respondent emphasised that showing 'an arguable error on a point of law' or that the judge 'might himself or herself have come to a different answer' would be insufficient.[75] The transparency and clarity of the error was also cited as a requirement.[76] The respondent also highlighted Lady Justice Arden's statement in the judgment that 'the word "obvious" is "a word of emphasis which means the courts must not whittle away the restriction on rights of appeal … by being over generous in their determination of the clarity of the wrong"'.[77] Having regard to these matters, the respondent submitted that s 34A(3)(c)(i) of the Act was not satisfied in the present case, as the Arbitrator's conclusion regarding clause 6.4's 'proper construction'[78] could not be described in the terms outlined above.

34 On the basis of the authorities and commentary to which reference has been made, I accept the submission of the respondent that the Arbitrator's decision ought not to be considered obviously wrong only because the Court might have adopted a different construction of clause 6.4(a) or other provisions of the Deed. In so doing, it should not be taken that the Court does or does not have a view on the construction of the provisions of the Deed different from that of the Arbitrator.

35 In addition, as the respondent identifies in its submissions, the Arbitrator rejected the applicant's construction in the Award.[79] Consequently, the applicant is in the position in this appeal in matters of critical relevance on arguments put to and previously considered and rejected by the Arbitrator.

---

73 Ibid 2 [4], citing *HMV v Propinvest Friar LP* [2011] EWCA Civ 1708 [34].

74 Ibid, citing *HMV v Propinvest Friar LP* [2011] EWCA Civ 1708 [8].

75 Ibid 2 [5], citing *HMV v Propinvest Friar LP* [2011] EWCA Civ 1708 [5]; and see *Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited* [2005] EWHC 426 (TCC) at [28]-[29] (Akenhead J); and see, above, [16].

76 Ibid 2 [6], citing *HMV v Propinvest Friar LP* [2011] EWCA Civ 1708 [5].

77 Ibid.

78 Ibid 2 [9].

79 Respondent's Submissions pursuant to Rule 9.20(7), 24 November 2022, 4 [15], citing Arbitral Award, 9 September 2022, exhibited to Fryde Affidavit at p 132 of NSF-1 [160]-[161], [169]-[170], [174]-[175], [234], [177], [180]-[181], [188], [189] ('Award').

36 The South Australian Court of Appeal in *Inghams Enterprises* similarly highlighted that Inghams depended upon submissions which the Arbitrator had already rejected.[80] Although the Court accepted that Inghams' submissions had 'some force' and 'the question of construction was not straightforward', it was not persuaded that the Arbitrator's decision displayed 'any obvious error'.[81]

37 The present context is analogous, because clause 6.4(a) of the Deed, as drafted, lacks clarity and the applicant has made submissions regarding the practical implications of the Arbitrator's construction and why the applicant's position on construction of the Deed may be preferable. However, I do not accept that the possible merits of the applicant's construction of clause 6.4(a) render the Arbitrator's conclusion 'obviously wrong' for the purpose of s 34A of the Act. Rather, I accept the respondent's submission that the Arbitrator favoured the respondent's contention only after considering other possible constructions of those provisions; including those as submitted by the applicant, considering constructions and that this analysis did not lead to obvious error in his decision.[82]

Summary and conclusions

38 For the preceding reasons I refuse leave to appeal the Award under the provisions of s 34A of the Act.

39 The parties are to bring in orders accordingly. I reserve the question of costs and will hear the parties further on this issue should that be necessary.

---

80 *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* [2022] SASCA 7, [171].
81 Ibid.
82 Respondent's Submissions pursuant to Rule 9.20(7), 24 November 2022, 6-7.