BROWN v TAVERN OPERATOR PTY LTD
[2018] NSWSC 1290
Equity Division: Ward CJ in Eq

14–18, 21, 22 May, 22 August 2018

Contracts — Formation — By deed — Form and execution — "Attestation" — Whether valid attestation of purported deed where person present at time of execution later deposes by affidavit to witnessing of execution — Conveyancing Act 1919 (NSW), s 38.

The *Conveyancing Act 1919* (NSW), s 38 relevantly provided:

"**38 Signature and attestation**

(1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.

(1A) For the purposes of subsection (1), but without prejudice to any other method of signing, a deed is sufficiently signed by a person if:

(a) by the direction and in the presence of that person the deed is signed in the name of that person by another person,

(b) the signature is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and

(c) the person attesting the signature certifies in his or her attestation that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be.

…"

A commercial agreement was recorded in an instrument which purported to be executed as a deed. In consequence of a finding that the person who had purported to sign as witness was not present when the deed was executed, it became necessary to decide whether valid attestation occurred where a person present at that time did not sign but later deposed by affidavit to having witnessed the execution.

Held: In order for a document to be attested in compliance with the requirements for the execution of a deed in the *Conveyancing Act 1919* (NSW), s 38(1), the witness present at the time of execution of the document must sign it at that time as witness for the purpose of attesting the execution. Section 38(1A) has no bearing on the meaning of "shall be attested" in s 38(1). ([448]–[496])

Ellison v Vukicevic (1986) 7 NSWLR 104; *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680; [1999] FCA 1156, considered.

Netglory Pty Ltd v Caratti [2013] WASC 364, applied.

Deacon v Auckland District Land Registrar (1910) 30 NZLR 369, not followed.

CASES CITED

The following cases are cited in the judgment:

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Deacon v Auckland District Land Registrar (1910) 30 NZLR 369

Doe on the Demise of Mansfield v Peach (1814) 2 M & S 576; 105 ER 496
Doe on the Demises of John Hotchkiss and Mary his wife v Pearce (1815) 6 Taunt 402; 128 ER 1090
Ellison v Vukicevic (1986) 7 NSWLR 104
HCK China Investments Ltd v Solar Honest Ltd (1999) 165 ALR 680; [1999] FCA 1156
Mostyn v Mostyn (1989) 16 NSWLR 635
Netglory Pty Ltd v Caratti [2013] WASC 364
Shah v Shah [2002] QB 35; [2001] EWCA Civ 527
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52
Wright v Wakeford (1811) 17 Ves Jun 455; 34 ER 176 (Court of Chancery)
Wright v Wakeford (1812) 4 Taunt 213; 128 ER 310 (Court of Common Pleas)

SUMMONS

This was a decision of a single judge of the Supreme Court of New South Wales, in which it was held that an instrument purportedly executed as a deed was not binding and enforceable.

M Bennett, for the plaintiff.

J Morris SC and *AJ O'Brien*, for the defendants.

Judgment reserved

22 August 2018

1 **WARD CJ in Eq.** In this matter, the plaintiff (James Brown) seeks relief in relation to an alleged binding agreement, said to have been entered into by way of deed, with the second and third defendants (Gregory Nixon and Bronwyn Tallis), and the company controlled by them (the first defendant, Tavern Operator Pty Ltd, to which I will refer as Tavern Operator) acting as trustee for the Tallis Trading Trust.

2 For ease of reference, particularly since both James Brown and his father, Ron Brown, feature in the events giving rise to this dispute, I will refer to the respective individuals (other than those who feature in a professional capacity), by their first names; to Greg and Bronwyn jointly as the Nixons; to the Nixons and Tavern Operator, collectively, as the Nixon interests; and to James and Ron, collectively, as the Brown interests (though I note it is not alleged that Ron was a party to the alleged agreement).

Introduction

3 James contends that under the alleged agreement he was to acquire a 50% interest in certain property at Menangle Park (the Menangle property), 50% of the shares in Tavern Operator, 50% of the units in the Tallis Trading Trust, and 50% of the hotel and function business conducted at the Menangle property (known as The Horse and Jockey Inn); and that he presently has an equitable interest therein as a result. The defendants deny the alleged agreement and have cross-claimed for misleading or deceptive conduct and/or unconscionable conduct in relation to the circumstances giving rise to the execution of the document relied upon by James as a deed and James' attempt now to enforce the agreement recorded in that document.

4 The registered proprietor of the Menangle property, at the relevant time, was Bronwyn. Bronwyn acquired the property in October 1995. Tavern Operator

was incorporated in June 2000 and was at the relevant times the operator of the hotel and function business conducted at the property, as trustee of the Tallis Trading Trust.

5 The case for James, in essence, is that as at May 2012 the Nixons: were in a dire financial position; required around $1.125 million to repay creditors, taxes and to acquire poker machine licences; and had made attempts at securing finance for those and general business purposes which had failed. Pausing here, James accepts that the Nixons' immediate requirement for funds as at April/May 2012 was not for the whole $1.125 million, since that included amounts referable to the acquisition in due course of the poker machine licences and poker machines themselves. Nevertheless, there is certainly evidence (to which I will come in due course) that the Nixons were looking for finance at that stage of around $1 million to $1.3 million.

6 James says that the Nixons sought assistance from his father, Ron, who had previously been involved in the hospitality or hotel industry; that a bargain was struck to assist the Nixons under which James was to receive a half share in the property, company and trading trust; and that the Nixons should now be held to their bargain.

7 He says that what was always the subject of the discussions between the relevant parties was that he would take a 50% interest in the Menangle property and the business but that what was to be provided in exchange for that 50% interest changed during the course of the negotiations. It is said that initially there was going to be the immediate payment of amounts totalling around $192,000 to discharge the pressing debts of the Nixons; that there was "discussion" that James would secure services from a mortgage broker or a solicitor or other people to assist the Nixons in their then financial position; and, finally, that further funding would be obtained to help the business grow.

8 Ultimately, however, the consideration that James contends was provided by him (for the agreement by the Nixon interests to transfer a half share of the property and business to him), as explained in oral submissions at the hearing, may be summarised as being simply the provision of short-term finance (repayable to James out of finance later to be procured for the benefit of the business but in relation to which the Nixon interests or some of them were to be the borrower) and the provision of assistance from the Browns' financial adviser (Mr Dominic Lambrinos) (and perhaps also their solicitor, Mr Patrick Moloney) for the benefit of the Nixons in relation to their attempts to obtain finance for the business (and, in the solicitor's case, in relation to the removal of a caveat lodged at one stage on the title to the property). In other words, on James' version of the deal that was finally struck, he had no obligation to make any monetary contribution to the Nixon interests nor to the business in exchange for the acquisition of a half share of the property and business (other than the provision of short-term finance of around $200,000 repayable out of borrowings for which the Nixon interests were to be liable).

9 James contends that the Nixons are commercially sophisticated businesspeople who struck a bargain from a position of weakness and who now "seek to explain away" a binding deed, company records and transfer (all said to have been witnessed by Ron's partner — Lana Beynon), after "benefiting from James and his professional's efforts to fix the immediate situation".

10 James accepts that, had the Nixons not been in dire financial straits, the bargain that was struck may not have been an attractive bargain for them but

he says that, in the Nixons' particular circumstances at the time, it was an attractive bargain (and that in any event it is binding on them).

11 The Nixons do not deny that their business was in financial difficulty in 2011 and 2012 (though, somewhat inconsistently with their affidavit evidence, they do not accept that the position was as dire as the Brown interests portray). They say that this was partly due to the cost of the extensions and variations carried out by a builder exceeding the original quote for building works carried out in that period — but nothing turns on this and there is no basis in the evidence on which I could make a finding to that effect.

12 Nor do the Nixons deny that there was a binding bargain at one stage of their dealings with the Brown interests but they say that this was the agreement comprised in a "Heads of Agreement" document that was signed on 22 May 2012 (and not that on which James now relies — namely, the agreement recorded in a "deed" subsequently signed by them in September that year).

13 The Nixons contend that the "deed" they signed on 21 September 2012 (to which I will refer, solely for descriptive purposes — since its validity as a deed is one of the issues in the proceedings — as the September Deed) was induced by misleading or deceptive conduct (as also, they say, were the other documents signed at the time, including a form for transfer under the *Real Property Act 1900* (NSW) in relation to a half share in the Menangle property and ASIC and other documents relating to a transfer of a share in Tavern Operator to James). Indeed, they go so far as to allege fraud on the part of the Brown interests (see [55] of the Nixons' cross-claim filed on 29 June 2016). The Nixons further maintain that the conduct of James and those allegedly acting as his agents (namely, Ron and Mr Lambrinos) was and is unconscionable within the meaning of s 21(1)(b) of the Australian Consumer Law (*Competition and Consumer Act 2010* (Cth), Sch 2).

14 There are significant areas of factual dispute — most critically as to what happened at the 21 September 2012 meeting when the September Deed was signed. The respective parties' accounts differ widely as to most matters relating to that meeting: including, how it was arranged; who was there; where at the Menangle property it was held; whether (and, if so, how) the documents signed at the meeting were provided to the Nixons in advance; and what was said and done at the time the documents were signed. There is also an issue as to who prepared the documents that were signed on the day (the Nixons contending that it should be inferred that Mr Lambrinos made significant changes to the document that was presented to them for signing as a deed on that day). Given the diametrically opposed accounts of the meeting, the contemporaneous documents take on particular significance (as I will explain in due course) and it is necessary to set out in some detail the chronology of events leading up to the present dispute (which I do below).

Summary

15 In summary, for the reasons that follow, I have concluded that James' claim should be dismissed with costs. It is therefore not necessary to decide whether the relief sought by the Nixons in the cross-claim should be granted; but, had it been necessary, I would have granted that relief in part.

16 I have concluded, applying the necessary standard of proof to the resolution of the various factual disputes (see *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34), that the evidence of the Nixons as to what occurred at the critical 21 September 2012 meeting should be preferred to that of the

Brown witnesses. I am persuaded to the level of actual satisfaction that the meeting with the Nixons on that day was attended by Ron and Mr Lambrinos (as the Nixons contend) not Ron, James and Lana (as the Brown witnesses contend) and that at that meeting the Nixons were presented with documents to sign which they were told were to be used just as "security" and kept "in a drawer" — in effect that the documents would not be relied upon unless there was default in the repayment to Ron of the moneys he had advanced to James for the benefit of the Nixons in order to discharge debts of around $200,000.

17 I find that the September Deed was not validly attested and is not enforceable as a deed; that the agreement recorded in that document is not supported by consideration and not enforceable as an agreement; and that even if one or both of those conclusions were to be incorrect, it would be unconscionable conduct on the part of James now to seek to enforce the said agreement, having regard to the circumstances in which it was executed.

[The court then set out its determination of the factual matters in dispute relating to representations and alleged contractual documentation. These were matters not calling for report.**]**

Legal issues arising out of the above factual findings

Attestation

448 I turn now to consider whether the September Deed is enforceable as a deed. It was common ground that it is not a deed unless the requirements in s 38(1) of the *Conveyancing Act 1919* (NSW) (the NSW Act) were met (I set out s 38(1) below). In particular, this issue arises in the context where I have found that Lana, the purported witness to the Nixons' signatures, was not present at the execution of the September Deed by the Nixons. The submission was made for James that, even if (as I have found) Lana did not witness the signing of the September Deed, the signing of it by the Nixons was nonetheless physically witnessed by Ron, who is not a party to the deed and who has attested in his affidavit evidence to the fact that he witnessed the execution by the Nixons. In this context, it is relevant to note that the Nixons do not deny that they signed the September Deed at the meeting in Ron's presence.

449 In the course of oral closing submissions, the above attestation issue having arisen, I drew the parties' attention to the decision of Edelman J, then sitting in the Supreme Court of Western Australia, in *Netglory Pty Ltd v Caratti* [2013] WASC 364. There, his Honour considered the formalities required of a deed for the purposes of s 9 of the *Property Law Act 1969* (WA) (the WA Act) in circumstances where the signature of a witness was inserted years after the witness claimed to have been present and to have witnessed the signing.

450 As his Honour had concluded (at [84]) that the documents in question had not been witnessed, and therefore were not deeds and could not be enforced as deeds, the subsequent discussion concerning whether (if the document had been witnessed) that witnessing ought to have been contemporaneous with its execution is obiter, but it nonetheless contains a thorough exposition of the authorities and is of considerable value here. His Honour went on to consider the formalities required of a deed under the WA Act as to attestation.

451 Section 9 of the WA Act, which his Honour noted had implemented dramatic reforms to the law of property (at [88]) provided as follows:

> "**9. Formalities of deed**
>
> (1) Every deed, whether or not affecting property —
>
> (a) shall be signed by the party to be bound thereby; and
>
> (b) shall be attested by at least one witness not being a party to the deed but no particular form of words is required for the attestation.
>
> (2) It is not necessary to seal any deed except in the case of a deed executed by a corporation under its common or official seal.
>
> (3) Formal delivery and indenting are not necessary in any case.
>
> (4) Every instrument expressed or purporting to be an indenture or a deed or an agreement under seal […] and which is executed as required by this section has the same effect as a deed duly executed in accordance with the law in force immediately prior to the coming into operation of this Act."

452 Edelman J concluded, having had regard to the legislative intent (revealed by the language of the provision and its history, purpose and context) as well as to judicial decisions on the New South Wales equivalent to the section (s 38(1) of the NSW Act, with which we are here concerned) and other authority, that any failure to comply with the requirements of s 9(1)(b) of the WA Act had the effect that the relevant documents were not deeds (see [125]).

453 His Honour then considered (and rejected) a submission to the effect that the requirement for attestation meant simply that the witness must be present at the signature of the party to be bound but did not require that the witness sign to signify that presence; and hence that no written signature was required of the attesting witness. Having regard to various authorities, his Honour considered that the meaning of attestation as articulated in *Norton on Deeds* (R Morrison and H Goolden (2nd ed, 1928, London, Sweet & Maxwell)), ought be uncontroversial (at [144]), citing the following passage:

> "[144] … Attestation means 'that one or more persons are present at the time of the execution for that purpose' (i.e. for the purpose of attesting the execution) 'and that as evidence thereof they sign the attestation clause, stating such execution' ... The witness must sign as witness and for the purpose of attesting the execution ... and consequently a party to the deed cannot be a witness." (Emphasis omitted)

454 His Honour also noted the statement by Hely J in *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680; [1999] FCA 1156 to the effect that attestation ordinarily requires that a person is present at the time of execution of a document for the purpose of attesting the execution "and as evidence thereof signs the document": at [181]; and gave as another modern example the decision of *Ellison v Vukicevic* (1986) 7 NSWLR 104, where Young J (as his Honour then was) held that a document executed when the purported witness was not present was not a deed.

455 A further issue considered by Edelman J was whether attestation was required at the time of signature. His Honour concluded (at [156]) that, as a matter of principle, the approach of the majority in *Wright v Wakeford* (1812) 4 Taunt 213; 128 ER 310 (Court of Common Pleas, the case having been directed from the Court of Chancery: see (1811) 17 Ves Jun 455; 34 ER 176) should be preferred, namely that the attestation required to constitute a due and effectual exercise by deed of the power there in question (a trust power for the sale of land) "ought to make a part of the same transaction with the signing and sealing … such being the usual and common way of attesting the execution of all instruments requiring attestation" (see [153]). His Honour

noted that s 9 was enacted against, and ought to be interpreted as incorporating this historical understanding of the meaning of attestation (see [160]).

456 Hence the relevant documents in that case did not satisfy the formalities required of a deed.

457 In the present case, the statutory provision is s 38 of the NSW Act, which, relevantly, provides that:

> "**38 Signature and attestation**
>
> (1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.
>
> (1A) For the purposes of subsection (1), but without prejudice to any other method of signing, a deed is sufficiently signed by a person if:
>
> (a) by the direction and in the presence of that person the deed is signed in the name of that person by another person,
>
> (b) the signature is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
>
> (c) the person attesting the signature certifies in his or her attestation that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be.
>
> …
>
> (3) Every instrument expressed to be an indenture or a deed, or to be sealed, which is signed and attested in accordance with this section, shall be deemed to be sealed."

458 Counsel for James sought to draw a distinction between the present case and that considered by Edelman J in *Netglory*, on the basis that the equivalent provision in Western Australia did not include a provision corresponding to s 38(1A); and pointed to the fact that s 38(1A) is without prejudice to any other method of signing (that is, is facultative not mandatory). However, subs (1A) says nothing about the meaning of attestation for the purposes of s 38 of the legislation here applicable. Counsel also drew attention to the decision in *Shah v Shah* [2002] QB 35; [2001] EWCA Civ 527, which I consider below.

Determination on the issue of attestation

459 Prior to the intervention of statute, there was no requirement that a deed be either signed or attested. A deed was "a writing or instrument, written on paper, or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed" (Edward Hilliard (ed), *Sheppard's Touchstone of Common Assurances* (7th ed, 1820, J & WT Clarke) at 50).

460 In *Norton on Deeds* (cited above), at 7, the authors note:

> "Signing is not necessary to make a deed valid as such at common law, nor, contrary to Blackstone's opinion, Com. Bk. II, c. 20 (2nd ed., p. 305), by the Statute of Frauds (29 Car. 2, c. 3). 'But whether the parties to the deed write in the end their names or set to their marks, as it is commonly used, it matters not at all (as I think) for that is not meant where it is said that every deed ought to have writing': Termes de la Ley, s.v. 'Fait'; Preston in Shep. Touch. 56; Shep. Touch. 60; 3 Prest. Abst. 61 …"

and at 24, as to attestation, they write:

> "Attestation of the signature, sealing or delivery of the deed is not necessary to make a deed as such valid: Co. Litt. 6 a, 7 a, 7 b; Bl. Com. Bk. II, c. 20 (8th ed., p. 307); *Goddard's Case* (1583), 2 Rep. 4 b, at p. 5 a; *Garrett v. Lister* (1662), 1

> Lev. 25; but of course in practice it should never be omitted, and in the case of many instruments attestation is required by law."

461 See also G Dworkin, *Odgers' Construction of Deeds and Statutes* (5th ed, 1967, London, Sweet & Maxwell) at 13–14; RA Donnell (ed), *Gibson's Conveyancing* (21st ed, 1980, London, Eastern Press Ltd) at 198; P Butt, *Land Law* (6th ed, 2010, Pyrmont, Lawbook Co), [19-115]. In Victoria there is still no requirement that a deed be witnessed (see N Seddon, *Seddon on Deeds* (2015, Sydney, Federation Press) at 50–51; *Property Law Act 1958* (Vic), s 73).

462 Thus, as Edelman J noted in *Netglory* at [124]:

> "[124] At common law there was no particular requirement for attestation. But attestation could be required by statute or by a power of appointment."

463 Section 38(1) of the NSW Act has altered the common law requirements for the execution of a deed by adding the requirements that the deed be signed and that it be attested by a witness: *Land Law* at [19-117].

464 It is well accepted that noncompliance with the requirements of s 38(1) prevents a document from being a deed (see, for example, *Mostyn v Mostyn* (1989) 16 NSWLR 635 at 639; and *Netglory* at [95]–[121]). The plaintiff did not submit to the contrary. However, the question as to which there is less authority and about which there is some divergence of opinion in the authorities and in academic writing, is the meaning of the requirement that the deed "shall be attested", and in particular whether it requires that the witness affix his or her signature at the same time that the signature so being witnessed is affixed. This is relevant in the present case because, although I accept that Ron witnessed the signing by the Nixons of the September Deed, he did not affix his signature to it (either then or afterwards).

465 As to the meaning of "attestation", attestation means that one or more persons present at the execution, for the purpose of attesting it, signs the attestation clause: see the passage already set out (at [453] above) from *Norton on Deeds*.

466 I have already referred to *Ellison v Vukicevic*, to which Edelman J referred for the proposition that the attesting witness must be *present* at the time of the execution. There, Young J (as his Honour then was) said (at 112):

> "It was put by the plaintiff that the present deed is not a deed because if I accept, as I have, the plaintiff's version of the execution of the deed *Mr Hocking, who purported to witness the plaintiff's signature, was not present at the time of execution.* The formalities of a deed are set out in the *Conveyancing Act*, 1919, s 38, which probably reproduce in most part the pre-existing law, and these requirements include one, that the deed must be attested by a person who is not a party to the deed. Although the word 'attested' is not defined in the statute in *Wickham v Marquis of Bath* (1865) LR 1 Eq 17 at 24 Lord Romilly discussed the question of attestation under the general law and said:
>
> > '… It means, as I understand it, that one or more persons are present at the time of the execution for that purpose, and that as evidence thereof they sign the attestation clause, stating such execution.' "

467 Here, that question does not arise because Ron was present at the signing. The question is whether he was required to affix his signature as witness at the time the deed was signed.

468 In *Netglory*, Edelman J considered a number of 19th century authorities (some concerning attestation of instruments other than deeds), which suggest that the affixing of the witness' signature ought to occur at the same time as the execution witnessed: *Wright v Wakeford* (Court of Common Pleas); *Doe on*

the Demise of Mansfield v Peach (1814) 2 M & S 576; 105 ER 496; and *Doe on the Demises of John Hotchkiss and Mary his wife v Pearce* (1815) 6 Taunt 402; 128 ER 1090.

469 His Honour observed (at [156]) that modern authority as to the timing of the statutory requirement of attestation was very limited, going on to conclude (for the reasons set out at [156]–[169]) that s 9 of the WA Act should be interpreted as requiring contemporaneous attestation. Before considering those authorities, I note that the possibility of a contrary conclusion was adverted to by Professor Butt (*Land Law* at [19-118]), by reference to a New Zealand decision to which it appears Edelman J's attention was not drawn in *Netglory*, namely *Deacon v Auckland District Land Registrar* (1910) 30 NZLR 369. Professor Butt observes at [19-118]:

> "The witness(es) must be present when the deed is executed, *though it appears that a witness can add his or her actual signature at a later time*. [*Deacon v Auckland District Land Registrar* (1910) 30 NZLR 369 at 377; *Kerr v Meates* (1991) ANZ ConvR 110.]" (One footnote omitted, one footnote supplied; emphasis added)

470 In *Deacon*, Edwards J concluded that a witness could add his signature to a deed more than 30 years after its execution. Edwards J acknowledged the authority of *Wright v Wakeford*, but distinguished it, concluding that it should be limited to the execution of powers.

471 In the *Deacon* case, Paora Tuhaere (as one joint tenant), and Paora Tuhaere and Te Keeni Tangaroa (jointly owning the other half of the land as joint tenants of the whole), were owners of a parcel of land at Kaipara. By a deed dated 29 September 1876, the joint tenants conveyed the entirety of their estate and interest in the land to Walter Lee. The deed was valid in all respects but one. The *Native Land Act 1873* (NZ) required that "instrument[s] of disposition [of land] by any Natives" be attested by a "male adult credible witness": s 85. Some years later, an application was brought by the present owner and occupier of the land seeking to oblige the District Land Registrar to bring the land under the provisions of the *Land Transfer Act 1908* (NZ). One of the Registrar's reasons for refusing so to do was the missing attestation in the conveyance to Lee.

472 An affidavit was filed by the solicitor (Mr Armstrong) who prepared the Lee conveyance, in which he attested that he was present with the magistrate who attested the deed, for the purpose of witnessing and attesting the execution of it; and that his failure to attest the signatures was "purely inadvertent".

473 After dealing with another objection raised by the Registrar, not presently relevant, Edwards J said (commencing at 375):

> "The conveyance in present form, although it could not be put forward as passing the legal estate, is good as a contract. … If Paora Tuhaere and Te Keeni Tangaroa, or some person claiming under them, were to bring an action against the applicant [Deacon] to recover possession of the land in question, could they succeed in such an action? Plainly they could not …"

474 As to the question of the solicitor's evidence, his Honour said (at 375):

> "I have considered whether or not Mr. Armstrong can now properly attest the execution of the deed, *and so complete the deed that it can be put forward as passing the legal estate*. There is a dearth of authority upon the matter, but I have come to the conclusion that he can." (Emphasis added)

475 In coming to that conclusion (that the witnessing could be supplemented at a much later date — there 34 years), Edwards J expressly distinguished *Wright v Wakeford*, on which Edelman J relied in *Netglory*. Edwards J concluded that

Wright v Wakeford was "not to be extended" and was, in any event, distinguishable (at 376), saying (at 377) that the reasoning in *Wright v Wakeford* applied "only to the execution of powers". Edwards J explained this as follows:

> "There, if the power is not well executed, no equity is created. The whole execution is simply nugatory; and it certainly does seem strange if, after the death of the party executing the power, while the attempted execution is still nugatory, it can be rendered effectual. *This does not apply* to such a case as the present, in which the estate has passed in equity, and the defect simply affects the dry legal estate." (Emphasis added)

476 His Honour went on to say (at 377):

> "It certainly has not been the usual and common way of executing deeds, that the attestation by the witness should be simultaneous with the signature by the party. … To quote the words of Lord Mansfield in *Wright* v. *Wakeford* … ,
>
> > 'I know no rule or case which requires that the attestation should be immediately written at the time of the execution of the instrument, or within any particular limited time after its execution; and therefore, so long as the witnesses live and remember the transaction, they may, I think, properly write or sign their attestation, and unless there is some element of fraud in the case they must be presumed fairly to do so.' "

477 Edwards J held that the solicitor could attest the deed and that the District Land Registrar ought to be satisfied and bring the land under the Act.

478 As a matter of precedent, neither *Deacon* nor *Netglory* is strictly binding on me. Having considered the reasoning in both decisions, I consider that the latter should be preferred. The matters to which Edelman J refers in relation to the purpose, scope and context of the attestation requirement, are in my view persuasive as a matter of statutory construction.

479 Nor do I consider that *Netglory* should be distinguished on the basis of differences between the WA Act and the NSW Act. In my view there are no material differences between the provisions. The New South Wales provision (s 38(1) of the NSW Act) and the WA Act (s 9(1) of the WA Act) are relevantly the same. In the interests of completeness, however, I note the differences are as follows. The New South Wales provision does not dispense with the requirement that a deed be sealed, providing (in s 38(1)) that a deed is to be "signed as well as sealed". However, by s 38(3), an instrument which is "expressed to be an indenture or a deed, or to be sealed" is, by the operation of that subsection, "deemed to be sealed". Therefore, physical sealing has been replaced, in New South Wales, by the use of a verbal expression in the instrument.

480 By contrast, s 9 of the WA Act has dispensed with sealing entirely, providing, in s 9(2), that:

> "**9. Formalities of deed**
>
> …
>
> (2) It is not necessary to seal any deed except in the case of a deed executed by a corporation under its common or official seal."

481 As counsel for James pointed out in the course of closing submissions, the other difference is that the WA Act does not have an equivalent of s 38(1A) and (1B) of the NSW Act. Those subsections have no equivalent in the WA Act, or indeed in other Australian jurisdictions.

482 Section 38(1A) provides that a deed may be sufficiently signed by a person if, by the direction and in the presence of that person, the deed is signed in the name of that person by another person; if the signature is attested by a person

who is not a party or signatory (except by way of attestation) to the deed; and the person attesting certifies that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be.

483 Section 38(1B) provides that a deed is sufficiently signed by a person if that person affixes his or her mark to the deed; the affixing mark is attested by a person who is not a party or signatory (except by way of attestation) to the deed; and the person attesting certifies that, before the mark was affixed, he or she explained the nature and effect of the deed to the person making the mark, and he or she believed, at the time the mark was affixed, that the person making the mark understood the explanation.

484 The introduction of s 38(1A) and (1B) was described, on the occasion of the introducing of the Conveyancing (Amendment) Bill 1976 (NSW) into the Legislative Assembly, as a measure to "extend the facilities for executing deeds in the case of persons who, by reason of illiteracy or physical incapacity, are unable to sign documents": Legislative Assembly, New South Wales, *Parliamentary Debates* (Hansard), 14 September 1976, 804 at 804.

485 On the occasion of the second reading of the Bill in the Legislative Assembly, the Minister for Lands said in relation to s 38(1A) and (1B) (New South Wales, *Parliamentary Debates* (Hansard), 30 September 1976, 1295 at 1295):

> "These new provisions deal with the execution of deeds either by the disposing party affixing his mark — the attesting witness having explained the effect of the deed to him — or by the disposing party directing some other person to write the party's name. The new provisions give to this course the same effect as if the disposing party had himself executed the deed. In each of the foregoing cases, a safeguard is introduced in that the witness who attests the execution of the deed must amplify his certificate of attestation in the manner directed by the new provisions."

486 In their terms s 38(1A) and (1B) are facultative provisions permitting a person who is unable to sign a document to execute a deed. They provide alternative ways in which a deed might be executed. They were not utilised in this case. They do not appear to me to affect how the phrase "shall be attested" in s 38(1) should be interpreted nor do they provide a basis for distinguishing the reasoning in *Netglory*.

487 In closing submissions it was briefly suggested by counsel for James that, if there was a defect in the attestation of the defendants' signatures, the defendants might nonetheless be estopped from denying the validity of the deed. Reference was made in that regard to *Shah v Shah*, to which Edelman J referred in *Netglory*.

488 In that case, the plaintiff, by arrangement with the third and fourth defendants, who were executives of a Kenyan Bank (Reliance), transferred £1.5 million to a bank account operated by Reliance on 20 August 1998. Reliance was to repay to the plaintiff £1.665 million the following April, but was placed under statutory management before that time. In an attempt to recover the plaintiff's funds, the plaintiff's solicitor, Mr Anup Shah, made an agreement with the third and fourth defendants for the latter to repay personally £1.5 million to the plaintiff.

489 Those negotiations took place in a public hotel. The third and fourth defendant took away the draft deed and later returned the deed, it on its face having been executed by them, with their signatures attested by a Mr Jaydeep

Patel. By that deed, the third and fourth defendants "jointly and severally agreed to pay the sum of £1.5 m": at [8].

490 When the plaintiff later sued on the deed, it emerged that the deed had not in fact been signed in Mr Patel's presence. The trial judge found that it was brought to Mr Patel after the third and fourth defendants had signed it.

491 Both the trial judge and in due course the Court of Appeal of England and Wales held that the plaintiff was entitled to sue on the deed. In the Court of Appeal (Pill LJ) concluded (*Shah v Shah* at [13]) that:

> "[13] … The delivery of the document constituted an unambiguous representation of fact that it was a deed. Mr Anup Shah acted reasonably in relying upon that representation …"

492 *Shah v Shah* does not, in my opinion, assist James here. Unlike the position in *Shah v Shah*, Ron (who for the purpose of this argument is now propounded by James as a witness) did not affix his signature to the document at all. Hence the delivery of the signed (but not formally witnessed) September Deed could not have constituted an unambiguous representation by the Nixons that it was in fact a deed. While on any view of events the Nixons signed the document at the 21 September 2012 meeting, it came into the possession of James (who I have found was not at the meeting) through either Ron or Mr Lambrinos. Any understanding which James may have gleaned, through Ron or Mr Lambrinos, as to the validity of its execution cannot have been as a result of any representation conveyed to him by the Nixons merely by reason of delivery of the document.

493 True it is that by signing the September Deed and providing it to either Ron or Mr Lambrinos, the Nixons may be said to have represented to James, as a reasonable reader of the deed, that they had either read and approved the contents of the deed and were agreeing to its terms (or willing to take the chance of being bound by its contents) as explained in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 (at [45]):

> "[45] It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it."

494 However, there can have been no representation by the Nixons as to the validity of the document *as a deed* in circumstances where I have found that, in the form in which it was provided to James (through either Ron or Mr Lambrinos, neither of whom James accepts was his agent for the purpose of the negotiations in relation to the execution of that document at the 21 September 2012 meeting), it did not bear the signature of any witness. (Nor would the provision of documents that, if completed correctly, would have armed James with the ability to take a transfer of the relevant interest in the property and business convey any such representation.)

495 Having regard to the accepted elements of an estoppel by conduct, I am not persuaded in this case any representation was made by the Nixons, or that the Nixons in any other way induced an assumption on the part of James, in relation to the validity of the September Deed. All facts relating to the validity of execution of the September Deed which were within the Nixons' knowledge were (on the face of the document) also within James' knowledge.

496 Therefore, having considered the authorities referred to by Edelman J in *Netglory*, I would, with respect, concur with his Honour's conclusion that what is required for there to be the necessary attestation is that the witness (here, Ron) present at the time of execution of the relevant document, must sign the document at the time as witness for the purpose of attesting the execution and, hence, I find that Ron not having done so at the time, the document to which I have referred in these reasons as the September Deed was not executed in compliance with the formalities for execution of a deed and is not enforceable as a deed.

[The court went on to decide the deed could not be enforced as an agreement, the claim for misleading or deceptive conduct was not made out and that it would have been unconscionable to seek to enforce the deed. These were matters not calling for report.**]**

Conclusion

561 For the reasons given above, I make the following orders:

(1) Dismiss the plaintiff's amended summons and points of claim with costs.

(2) For the avoidance of doubt, declare that the document purportedly executed by the parties as a deed on 21 September 2012 is not binding and enforceable.

(3) Order the plaintiff to deliver up to the defendants' solicitors within 14 days any originals of the documents signed by the defendants on 21 September 2012 that remain in the plaintiff's possession custody or control.

(4) Declare that, as between the plaintiff and the defendants, the defendants are entitled to the moneys held in a trust account in the name of the defendants' solicitors and representing 50% of the net settlement proceeds from the sale of the property known as 170 Menangle Road, Menangle Park, in the State of New South Wales, and any remaining funds out of the net settlement proceeds from the sale of the defendants' business.

Orders accordingly

Solicitors for the plaintiff: *Marsdens Law Group*.

Solicitors for the defendants: *Gibson Howlin Lawyers* (Cronulla).

JA ELDRIDGE