Leisure Investments P/L v Bilioara P/L [2000] NTSC 94

PARTIES:	LEISURE INVESTMENTS PTY LTD ACN 009 633 532
	v
	BILIOARA PTY LTD ACN 009 649 389
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	14 of 2000 (20003251)
DELIVERED:	27 November 2000
HEARING DATES:	23 – 25, 28 and 29 August 2000
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Plaintiff:	L Silvester
Defendant:	A Young

Solicitors:

Plaintiff:	Hunt and Hunt
Defendant:	Ward Keller

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Leisure Investments P/L v Bilioara P/L [2000] NTSC 94
No. 14 of 2000 (20003251)

BETWEEN:

LEISURE INVESTMENTS PTY LTD
ACN 009 633 532
Appellant

AND:

BILIOARA PTY LTD
ACN 009 649 389
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 27 November 2000)

[1] In addition to the hearing dates allocated for the evidence presented in this matter, counsel for the plaintiff prepared written submissions dated 11 September 2000. Counsel for the defendant prepared written submissions dated 5 September. Written submissions in reply were made by counsel for the plaintiff and the defendant on 25 October 2000 and 27 October 2000 respectively.

[2] The plaintiff (hereinafter referred to as "Leisure") and the defendant (hereinafter referred to as "Bilioara"), entered into a deed of partnership on 29 May 1990. Under this deed of partnership the parties agreed to become

partners in a business of tourist operators under the name and style of Mirambeena Tourist Resort ("Mirambeena").

[3] This action concerns a dispute which has arisen between the parties following the termination of the deed of partnership. In particular, the dispute is as to whether Leisure can exercise an option to purchase the real property and business assets of the partnership pursuant to clause 15(a) of the deed of partnership. Clause 15(a) of the Deed of Partnership provides as follows:

> "If a notice of dissolution is given in accordance with sub-clause (d) of the preceding clause then provided the irreconcilable deadlock shall relate to the matters set out in clause 24.1(a) hereof Leisure Investments shall have the option of purchasing the interest of Relkenet in the partnership and the partnership assets[.] Such option shall be exercisable by a notice in writing given by Leisure Investments to Relkenet in the notice given pursuant to clause 14(d) hereof. In the event of the option contained in this clause being exercised then the value to be placed upon the partnership and the partnership assets shall be determined by a Chartered Accountant appointed for that purpose by agreement between the partners or failing agreement shall be appointed for that purpose by the Chairman for the time being of the Institute of Chartered Accountants in Australia (N.T. Branch) (or in the event that that body has ceased to exist, by the professional body of Chartered Accountants in the Northern Territory that replaces it) and for the purpose of determining the said value such Chartered Accountant shall act as an expert and not as an arbitrator and his decision shall be final and binding upon the partners. The cost and expense of such valuation shall be born by the partners in equal shares. The partners agree that the Chartered Accountant so appointed shall value the partnership and the partnership assets as a going concern using a capitalisation rate determined by him as the then market rate on the net projected income of the partnership business for the then current financial year of the partnership business having regard to;-
>
> (i) actual figures for the previous three years where available together with actual figures for the period from the

commencement of the then current financial year to the date of dissolution and

(ii) existing company budget figures for the remainder of the then current financial year."

[4] By letter dated 24 March 1998, Leisure gave a Notice of Intention to dissolve the partnership, "the first Notice". The letter (DHG46), omitting formal parts, reads as follows:

> "Pursuant to clause 14(a) of our deed of partnership dated the 29th day of May 1990 Leisure Investments Pty Ltd (ACN 009 633 532) hereby gives you notice of its intention to dissolve the partnership existing between us on the 26th day of September 1998."

[5] Clause 14(a) of the Deed of Partnership provides as follows:

> "The partnership shall be dissolved in the expiry of not less than six months notice of dissolution in writing by one of the partners to the other."

[6] The partnership was dissolved on 26 September 1998. Neither party took any steps to wind up the partnership.

[7] Counsel for the plaintiff, Mr Silvester, submits that by s 31 of the Partnership Act 1997 (NT), the partnership continued to operate on the same terms and conditions as before save as is inconsistent with the incidents of a partnership at will.

[8] A Notice of Dissolution of Partnership and Notice of Exercise of Option was given by Leisure under clause 14(d) of the deed of partnership on 1 July 1999 (the second Notice). Clause 14(d) of the Deed of Partnership (DHG3) states as follows:

"In the event of there being an irreconcilable deadlock between the partners or between the members of the Board referred to in clause 23 hereof then either partner may serve on the other partner a notice in writing dissolving the partnership. For the purpose of this Deed there shall be deemed to be an irreconcilable deadlock in the event of the members of the Board referred to in clause 23 hereof being unable to pass a unanimous resolution in respect of any of the matters referred to in clauses 24.1 to 24.9 hereof inclusive at two successive meetings of the members of the Board with not less than twenty eight (28) days interval between each such meeting."

[9] The Notice of Dissolution of Partnership and Notice of Exercise of Option, referred to as the Second Notice, which is addressed to Bilioara Pty Ltd is Exhibit DHG93 and states as follows:

A. "By a Partnership Deed dated 29 May 1990 ("the Deed") Leisure Investments Pty Ltd (ACN 009 633 532) ("Leisure") and Relkenet Pty Ltd (ACN 009 649 389) (now called Bilioara Pty Ltd) ("Bilioara") became partners in a business of tourist resort operators ("the Business") under the name and style of "Mirambeena Tourist Resort" ("the Partnership").

B. Under the Deed, subject to provisions for retirement, expulsion and dissolution, the Partnership was to continue for as long as the partners shall jointly own the Business and the land upon which the Business is carried on.

C. By a notice dated 24 March 1998 ("the First Notice") Leisure gave notice to Bilioara of its intention to dissolve the Partnership as at 26 September 1998.

D. Notwithstanding the First Notice, the partners continued to carry on the Business after 26 September 1998 and the Partnership continued in existence on the same terms and conditions as before.

E. At a meeting on 15 April 1999 and at a subsequent meeting on 27 May 1999 the partners failed to reach agreement on three key items of the proposed 1999 budget giving rise to an irreconcilable deadlock between the partners in respect of matters referred to in clause 24.1 a. of the Deed.

F. Clause 14 d. of the Deed provides that in the event of an irreconcilable deadlock between the partners, either partner may serve on the other a notice in writing dissolving the Partnership.

G. By clause 15 a. of the Deed, if notice of dissolution is given in accordance with clause 14 d., then, provided the irreconcilable deadlock shall relate to the matters set out in clause 24 1 a., Leisure shall have the option of purchasing the interest of Bilioara in the Partnership and the Partnership assets for a price to be determined in accordance with the mechanism set out in that clause.

THEREFORE TAKE NOTICE THAT Leisure hereby gives notice to Bilioara pursuant to clause 14 d. of the Deed that the Partnership is dissolved.

AND Leisure HEREBY GIVES NOTICE OF THE EXERCISE OF THE OPTION conferred on it by clause 15 a. of the Deed to purchase the interest of Bilioara in the Partnership and the Partnership assets."

[10] The partnership was again dissolved. Neither party took any steps to wind up the partnership. Mr Silvester, counsel for the plaintiff, submits the partnership continued under s 31 of the Act as before save as inconsistent with the incidents of a partnership at will.

[11] Notice of Dissolution of Partnership was given by Leisure under clause 14(d) of the deed of partnership on 31 December 1999 ("the third Notice") which is addressed to Bilioara Pty Ltd (Exhibit DHG109) and provides as follows:

"A. By a Joint Venture or Partnership Deed dated 29 May 1990 ("the Deed") Leisure Investments Pty Ltd (ACN 009 633 532) ("Leisure") and Relkenet Pty Ltd (ACN 009 649 389) (now called Bilioara Pty Ltd) ("Bilioara") became partners in a business of tourist resort operators ("the Business") under the name and style of "Mirambeena Tourist Resort" ("the Partnership").

B. Under the Deed, subject to provisions for retirement, expulsion and dissolution, the Partnership was to continue for as long as the partners shall jointly own the Business and the land upon which the Business is carried on.

C. By a notice dated 24 March 1998 ("the First Notice") Leisure gave notice to Bilioara of its intention to dissolve the Partnership as at 26 September 1998.

E. By a notice dated 1st July 1999 ("the Second Notice") Leisure dissolved the partnership.

F. Notwithstanding the Second Notice, the partners continued to carry on the Business after 1 July 1999 and the Partnership continued in existence on the same terms and conditions as before.

G. At partnership directors' meetings held on 10 December 1998, 4 February 1999, 15 April 1999, 29 April 1999, 27 May 1999, 1 July 1999 and 22 December 1999, the partners failed to reach an agreement on an operating and cashflow budget for the period 1 January 1999 to 31 December 1999.

H. The failure to agree the 1999 budget gave rise to an irrevocable deadlock between the partners in respect of matters referred to in clause 24.1(a) of the Deed.

F. Clause 14(d) of the Deed provides that in the event of an irreconcilable deadlock between the partners, either partner may serve on the other a notice in writing dissolving the Partnership;

G. By clause 15(a) of the Deed if notice of dissolution is given in accordance with clause 14(d), then, provided the irreconcilable deadlock shall relate to the matters set out in clause 24.1(a) Leisure shall have the option of purchasing the interest of Bilioara in the Partnership and the Partnership assets for a price to be determined in accordance with the mechanism set out in that clause."

The partnership was dissolved on 31 December 1999.

[12] The exercise of an option to purchase is a right conferred by clause 15(a) of the Partnership Deed upon Leisure in the event that the parties become deadlocked over, inter alia, the operating budget for the partnership business. It is a dispute resolution process. The parties have agreed that in that circumstance, the original owner, Leisure, can buy back the half share it sold to Bilioara in 1990. It is the plaintiff's case that it is not inconsistent

with the incidents of a partnership at will. The plaintiff submits the right to exercise the option under clause 15(a) can not have been extinguished by dissolution of the partnership on 26 September 1998 and 1 July 1999 which by agreement of the parties never took effect.

[13] On 11 February 2000, Leisure commenced action in the Supreme Court to enforce its right to purchase the interest of Bilioara in the partnership and seeking consequential orders. Since the dissolution of the partnership on 31 December 1999 and pursuant to s 42(1) of the Partnership Act, the partners have acted with continuing authority for the purposes of and only for so long as it takes to wind up the partnership.

[14] The background to this matter is as follows:

[15] Leisure and Bilioara are the registered proprietors as tenants in common of Lot 5238 Town of Darwin, Certificate of Title Vol. 342 Folio 169, on which the Mirambeena Tourist Resort is constructed. At present, Mirambeena comprises 225 air-conditioned rooms, two lagoon style saltwater pools with spas, mini golf course, video games room, a fitness room, three conference room facilities and a fully licensed restaurant.

[16] Leisure purchased the land at auction in 1987 and thereafter began development of Mirambeena on the land.

[17] In about January 1989, a representative of the Aboriginal Development Corporation ("ADC") approached Mr Douglas Gamble the managing director

of Leisure expressing an interest in Mirambeena. The ADC was the forerunner of the Aboriginal Torres Strait Islander Commission ("ATSIC"). Between January 1989 and May 1990, Mr Gamble had discussions with representatives of ADC and representatives of Bilioara. The proposed investment by ATSIC was in the belief of Mr Gamble for the following reasons:

(i) First and foremost as a commercial venture.

(ii) to accumulate for 10 years a fund for the future education and training of young Aboriginal people; and through that

(iii) to create long term employment opportunities for Aboriginal people.

[18] It was on this understanding that Leisure entered into the Mirambeena partnership agreement with Bilioara.

[19] In her affidavit sworn 3 August 2000 at paragraph 8 (Exhibit D8), Ms Brennan, who had been director of Bilioara from 17 May 1990 to 12 October 1999, agrees the partnership was intended to be commercial and that the investment was to give Aboriginal and Torres Strait Islanders a chance to take part in main stream enterprises and to provide opportunities for Aboriginal and Torres Strait Islanders training and employment.

[20] On 29 May 1990, Leisure and Bilioara (formerly known as Relkenet Pty Ltd) became joint venture partners in the land and business known as Mirambeena.

[21] Pursuant to the Partnership Agreement the business of the partnership was to be conducted by a Board of Management ("the Board") consisting of four members, two appointed by Leisure and two appointed by Bilioara. Mr Gamble was the Chairman of the Meetings of the Board. Mr Gamble had a casting vote in the event of equality of votes in all matters other than those requiring a unanimous resolution of all the members of the Board by the provisions of clause 24 in the Partnership Agreement.

[22] Clause 24 of the Partnership Agreement provided as follows:

> "24. All matters relating to the management and conduct of the affairs of the partnership shall be decided by a majority of the members of the Board except the following matters which shall require a unanimous resolution of all members of the Board.
>
> 1. (a) The setting of annual budget limits in respect of all revenue, expenditure, borrowing or lending of any sum within the anticipated cash flow of the partnership business and in the ordinary course of such business by the partnership (including expenditure of a capital nature) for the forthcoming year.
>
> (b) The variation by more than 20 per centum (20%) in any agreed budget item.
>
> 2. The giving of any guarantee.
>
> 3. The commitment to new capital expenditure outside the predetermined annual budget limitations.
>
> 4. The sale of the partnership premises being Lot 5238 Town of Darwin.
>
> 5. Any increase of the capital of the partnership.

6. Any decision concerning the varying of or the renewal of the Management Agreement referred to in clause 26 hereof.
7. Any decision concerning any alteration in the status quo of the liquor licence of the business.
8. Any decision concerning any alteration in the status quo of the leasehold interest in Lot 5645 Town of Darwin.
9. Any decision to vary the share of profits and losses of the partnership from the proportions set out in clause 7 hereof."

[23] The Partnership Agreement provided that the Board meet at least 10 times a year in each financial year. The financial year for Mirambeena was 1 January to 31 December.

[24] By further agreement made on 29 May 1990, Leisure entered into a management agreement of Mirambeena for a period of five years. Mr Gamble was appointed the managing director of the Management Committee. On 9 January 1997, the management agreement was assigned from 1 July 1996 with the agreement of Bilioara from Leisure to Redco Investments Pty Limited (Redco). Mr Gamble is the managing director of Redco.

[25] The term of the management agreement and Mr Gamble's appointment as manager was extended for a second term of five years to expire on 31 May 2000.

[26] At a series of meetings prior to the signing of the partnership agreement in May 1990, Mr Gamble was told by Jan Zaraza, the Darwin branch manager of ADC, and by Ms Brennan, an original director of Bilioara, that Bilioara

was to be a trustee of the Bilioara Unit Trust and that ATSIC held 80 per cent of the units in the Unit Trust and the Northern Aboriginal Investment Corporation Pty Ltd ("NAIC") held 20 per cent. Mr Gamble formed the belief from what he had been told that ATSIC held the shares in Bilioara beneficially, ultimately for NAIC and other Aboriginal interests. Mr Gamble was never shown any documentation to support the information he had been given.

[27] In about May 1998 Mr Gamble was informed by Ms Brennan that ATSIC had resolved to divest their shareholding to NAIC. It is Mr Gamble's present understanding from his discussions with Mr Bob Poole of ATSIC that this proposed divestment still has not eventuated.

[28] In his affidavit sworn 31 May 2000, Mr Gamble documents his understanding of the relationship between Bilioara, ATSIC and NAIC and his continuing frustration at being unable to properly ascertain the true beneficial interests of Bilioara.

[29] In an affidavit sworn 3 August 2000 paragraph 22 (Exhibit D8), Ms Brennan, who was a director of Bilioara from 17 May 1990 to 12 October 1999, deposes to the fact that in 1998 ATSIC became owner of all the shares in Bilioara and that she had informed Mr Gamble and the Board that ATSIC had resolved to divest its shareholding to NAIC.

[30] On 7 January 1998, Mr Gamble received a letter (DHG11) advising him that ATSIC proposed to divest its interests in Bilioara. This letter was discussed

at the Mirambeena Joint Venture Management Committee meeting held on 12 February 1998 (DHG12).

[31] In his affidavit, Mr Gamble details the expressions of interest he received from other interested parties in acquiring an interest in Mirambeena and the reactions of Bilioara representatives which Mr Gamble found unrealistic and unacceptable. Mr Gamble detailed an offer to purchase Mirambeena, that Mr Gamble urged the Board to accept the offer to purchase while the market was in a boom condition. However, Bilioara refused to consider the offer (par 35). Bilioara Board members indicated they were not interested in accepting any offer to purchase prior to the divestment of ATSIC's equity to local interests. This attitude on the part of Bilioara remained the same during 1997 and in respect of a number of offers to purchase. From discussions between the parties Mr Gamble was given to understand that the directors of Bilioara believed any sale of its interest before ATSIC divested its interest in Mirambeena to local Aboriginal interests would result in the total proceeds of sale being credited to the Commonwealth Treasurers consolidated funds rather than to local Aboriginal interests such as NAIC. It was Mr Gamble's opinion that the action of Bilioara in blocking such a sale was neither in their interest nor in the interests of their majority shareholder ATSIC.

[32] Mr Gamble deposes in his affidavit, paragraphs 42 to 74, the details of the funding and extensions to Mirambeena which were carried out during 1995 and 1996. In these paragraphs of his affidavit, Mr Gamble details the

tensions between Leisure and Bilioara because on Mr Gamble's evidence Bilioara, or alternately ATSIC, were delaying in making a decision to assist with the funding of the extensions. This delayed the commencement of the extensions and resulted in a cost blow out in excess of $650,000 on the budgeted cost. At the conclusion of the Mirambeena Board Meeting on 27 March 1996 the directors of Bilioara, Ms Brennan and Suttie Ahmat advised Mr Gamble that Bilioara had a possible tax bill in excess of $300,000 and may need to withdraw $300,000 from Mirambeena as they had no other source of funds. Mr Gamble details the effort made to negotiate with the National Australia Bank (NAB) in respect of Bilioara's cash flow problem. This involved Leisure in effectively underwriting the loan. On 25 October 1996, ATSIC deposited $250,000 into the Mirambeena bank account. Bilioara advised that ATSIC had paid their 1990 – 1995 tax bill. Bilioara made no offer to repay the $250,000.

[33] Where Ms Brennan's evidence conflicts with the evidence of Mr Gamble on this aspect, I prefer the evidence of Mr Gamble.

[34] In his affidavit paragraphs 75 onwards, Mr Gamble details the increasing tension between the parties from July 1994 onwards. Essentially these tensions arose from the failure by Bilioara to resolve critical outstanding matters and to participate in ensuring the commercial success of the operations of the partnership. The major items continually carried forward at the Board meetings included, preparation of new joint venture documentation (carried forward without resolution at every Board meeting

from 9 January 1997 to 26 March 1998), revised budgets, working capital requirements, missed sales opportunities for the property and steadily decreasing market values. These resulted in potential liabilities and lost business opportunities involving very substantial amounts of money.

[35] At Board meetings on 2 October 1997 and 30 October 1997, Mr Gamble stated that unless the unresolved matters were satisfactorily decided, Leisure would dissolve the existing arrangements (DHG44 and DHG45).

[36] By Notice of Dissolution dated 24 March 1998, Leisure gave notice to Bilioara of its intention to dissolve the partnership on 26 September 1998 (DHG46) (first Notice). Leisure never followed up this Notice of Intention by taking steps to wind up the partnership.

[37] At the Board meeting on 26 March 1998, Mr Gamble stated the reasons for service of the Notice and the difficulties that had given rise to this action. Apart from some critical comments made by Ms Brennan and Ms Kathy Mills representing Bilioara about the inaction of ATSIC, there was no reaction to the Notice of Dissolution by the Board members of Bilioara.

[38] Mr Gamble formed the opinion that the lack of progress towards divestment created a lot of friction between ATSIC and the local entities aspiring to achieve control of Bilioara.

[39] The original intention of ATSIC at the time of establishment of Bilioara was to divest its 80 per cent interest in Bilioara as soon as possible.

[40] At meetings of ATSIC between 9 and 11 December 1997, ATSIC decided that unless mutually acceptable agreement is reached with respect to an appropriate divestment process by 31 March 1998, ATSIC will proceed to sell up its interests in Bilioara and the Bilioara Unit Trust. This information was conveyed by letter from ATSIC to Mr Gamble dated 7 January 1998 (DHG11).

[41] By letter dated 23 July 1998 from ATSIC to Mr Gamble (DHG49) advising that ATSIC had rescinded its decision made in December 1997 and "agreed to divest the Commission's units in the Bilioara Unit Trust to NAIC on the basis it enter into an agreement whereby 50 per cent of the proceeds from the business are distributed for the benefit of groups identified by the Yilli Rreung Regional Council".

[42] On 27 July 1998, Mr Gamble wrote a letter to the Board of Directors of Bilioara summarising factors over the previous eight years of association with ATSIC (through Bilioara) which Leisure found unacceptable and which had created financial loss to Leisure. The letter itemised matters which would have to be addressed before Leisure would consider any replacement documentation (DHG50).

[43] In his affidavit, Mr Gamble details further discussions he had and letters he received from ATSIC (DHG51 and DHG51A) relating to further changes of decision by ATSIC to sell ATSIC's interest in Bilioara. These changes included granting ATSIC's shares in Bilioara to NAIC.

[44] In February 1999, Mr Gamble indicated when approached by a representative of NAIC that Leisure would purchase Bilioara's interest in the joint venture.

[45] By the end of June 1999 no finalisation had yet occurred in the ATSIC divestment to NAIC or the purchase of the shares by NAIC.

[46] After service of the first Notice in March 1998, Mr Gamble continued as managing director, Redco continued to conduct the business of the partnership.

[47] At subsequent meetings of the Board of Management of Mirambeena, a replacement partnership document was discussed.

[48] There were lengthy meetings on 24 September 1998 and with the Board of Management and their legal advisers on 25 September 1998. Leisure expressed their concern at the apparent political infighting involved in the divestment of ATSIC's shareholding and the detrimental effect on the commercial venture and that the accumulation of funds for the purpose of the further education of local Aboriginal people did not seem to be happening.

[49] I accept the evidence given by Mr Ralph Simpson in his affidavit sworn 21 August 2000 which is Exhibit P7. In particular, Mr Simpson deposes to the fact that he was a director of Leisure from 1987 to December 1996 and in that time regularly attended Board meetings of Mirambeena as a director of

Leisure as one of the two voting directors for Leisure. From December 1996 to July 1999, Mr Simpson continued to attend the partnership Board meetings although he could not vote. I accept the evidence of Mr Simpson that it was only after 26 September 1998 that the Bilioara directors proposed that the partnership should prepare the training program and pay for the training of Aboriginal participants. Under the original agreement between Leisure and Bilioara, it was the responsibility of Bilioara to prepare the training program and to fund the cost of the training of Aboriginal participants. The cost of training of Aboriginal participants in the training scheme had always been borne by Bilioara and never by the partnership. There had never been a budget allocation in the partnership budgets for the training program (par 5). Mr Simpson attested to his belief from what he had been told by the directors and Bilioara that one of Bilioara's aims was to provide a fund for the education of Aboriginal children from the profits it would receive from the partnership. It had been agreed between Leisure and Bilioara that Mirambeena would provide employment training for Aboriginals. Although it had been proposed that the training program was to be arranged for Bilioara by Suttie Ahmat and either funded by the Government Training Subsidy or Bilioara (and ATSIC) no training program was ever prepared.

[50] At the conclusion of those meetings there was no agreement as to the terms of their future relationship but they did agree to continue negotiations.

[51] After 26 September 1998, the management of the business of the partnership was continued by Mr Gamble as managing director. There was no follow up action by either party to effect the dissolution.

[52] There was no resolution of the issues between Leisure and Bilioara.

[53] Toward the end of 1997 for a variety of reasons the local accommodation industry had entered a severe and ongoing economic downturn.

[54] The efficient management and control of the financial affairs of Mirambeena required a revised budget. Mr Gamble tabled a revised budget at the Board meeting on 29 June 1998 (DHG58).

[55] Mr Gamble was unable to obtain the Board's approval to the revised budget. The Bilioara Directors stated that until the proposed ATSIC divestment was completed and the new joint venture terms and conditions were agreed, it would be pointless to revise the budget.

[56] In addition to the difficulties with the budget, Mr Gamble details in his affidavit the problems he had in respect of a valuation of Mirambeena prepared by Mr Ray Buckley for the partnership. This was required to complete the 1998 audit. Mr Gamble had raised a number of concerns with the valuer, Mr Buckley, which needed to be resolved. Mr Buckley had informed him in April 1999 that to answer the questions posed by Mr Gamble, Mr Buckley would need to seek a clearance from ATSIC who had commissioned the valuation.

[57] Mr Gamble subsequently sought an estimated valuation of the partnership assets and business from Mr Terry Kirk. A copy of Mr Kirk's indicative valuation dated 15 June 1999 is DHG67.

[58] A detailed formal valuation prepared by Mr Kirk of the partnership assets and business as at 30 June 1999 is DHG69.

[59] The original preliminary 1999 operating budget was tabled at the Board meeting on 10 December 1998. The directors of Bilioara refused to accept or pass the 1999 operating budget at the meeting on 10 December 1998 and deferred consideration of it until the resolution of their discussions with ATSIC and a new agreement between Leisure and Bilioara. The approval of the budget was not achieved at subsequent Board meetings. At the meeting of the Board on 15 April 1999 a director of Bilioara, Ms Brennan, advised that Bilioara would not agree to three key items in the budget, being, inclusion of payments to an external director, the revised management fees and the exclusion of Aboriginal training costs from the Mirambeena budget. These training costs had previously been a Bilioara commitment. It was agreed that these matters should be discussed separately to the approval of the budget.

[60] Mr Gamble prepared an updated operating budget for the 1999 calendar year which was tabled at the Board meeting on 29 April 1999. Copy of this updated budget is DHG70. The directors of Bilioara advised they had not had sufficient time to consider the updated budget. The minutes of the

Board meeting held on 29 April 1999 (DHG74) under the heading "Budget" states as follows:

> "The Budget tabled at the 15th April meeting, was due to be retabled for adoption at this meeting but Bilioara noted that it had not yet been able to hold its own separate meeting and could not yet therefore comment further on either the matters in dispute nor adoption of the budget as a whole. Bilioara agreed after completion of their own meeting to contact DHG to arrange a further Mirambeena meeting."

[61] In the Mirambeena Joint Venture minutes of management committee meeting held on 27 May 1999, Mr Gamble moved a motion and insisted on a formal vote that "the 1999 budget as tabled at the 15 April 1999 meeting be adopted". The two Bilioara representatives voted against the budget and the minutes (DHG76) note that "as the vote on the Budget did not unanimously approve such budget, it could not be adopted". The Bilioara directors have since that time refused to pass the 1999 budget.

[62] Redco has been forced to manage Mirambeena without an effective budget since June 1998.

[63] Mr Gamble details in his affidavit sworn 31 May 2000 paragraphs 112 – 138 (inclusive) his concerns about the "Buckley" valuation of the partnerships major asset and the impact upon the 1998 audit report, the reasons why the directors of Bilioara refused to accept the audit report at the meeting on 15 April 1999 (DHG72) and notes made to the financial statements under the heading "Re-appraisal":

> "The Directors acknowledge that the Joint Venture operates in an industry which is subject to severe cyclical influences and that for the last twelve months the local industry has been adversely affected by an oversupply of hotel rooms and also by other matters such as the Asian financial crisis. Concerned that this could have impact on the 10 September 1998 valuation, the Managing Director sought the advice of the Valuer on 13 April 1999 and, as a result, the Managing Director decided to re-appraise the value of the property as at 31 December 1998, based on the mid-range of market capitalization rates agreed in discussion with the Valuer, at $14,500,000, which represents a diminution of a further 6% since the 10 September 1998 re-valuation.
>
> Bilioara Pty Ltd disagree with the re-appraisal by the Managing Director."

[64] Bilioara wrote a letter to Mr Gamble dated 18 June 1999 (DHG78) advising the reason they were not prepared to sign the audit statement for 1998 which was essentially their conflicting view as to the value of the property and the valuation that had been prepared. Mr Gamble refers in his affidavit to the concerns expressed by the National Australia Bank who, as part of their loan agreement to Mirambeena, required audited financial reports to be lodged with the bank.

[65] Mr Gamble wrote to Mr Bob Poole at ATSIC 19 June 1999 (DHG79) explaining the reason for the severe drop in the value of the property and the implications of Bilioara refusing to accept such a drop in value and to sign the 1998 financial statements. In a telephone conversation with Mr Poole on 21 June 1999, Mr Poole also did not accept Mr Gamble's assertions as to the drop in value of the property.

[66] Mr Gamble advised Bilioara by letter dated 30 July 1999 (DHG82) that in view of their continued refusal to sign the 1998 financial statements Mr

Gamble had no alternative other than to lodge the financial statements with their bankers signed only by Leisure and the auditors.

[67] Because of the continuing deadlock between Leisure and Bilioara over the 1998 audit report, the three key management issues unresolved at the meeting of 25 September 1998 and the failure of Bilioara to approve the 1999 operating budget, Mr Gamble served Ms Brennan, as secretary/director of Bilioara at the Board meeting on 1 July 1999, with a Notice of Dissolution of Partnership and Notice of Exercise of Option dated 1 July 1999 (DHG93).

[68] In paragraphs 145 – 156 of his affidavit, Mr Gamble details the further discussions that took place on 9 August concerning the possibility of NAIC and Leisure negotiating a future business structure for the ownership and operation of Mirambeena, in the event that NAIC was successful in obtaining the transfer to it of ATSIC's interest in Bilioara.

[69] At a Board meeting on 22 December 1999, Mr Gamble tabled a letter (DHG108) in which he expressed his concerns that Bilioara had not accepted the "Buckley" valuation was wrong and Mr Gamble's reasons for this and the implication of Bilioara not acknowledging a realistic valuation which implication included the bank funding and audit requirements.

[70] Because of the inability of the parties to resolve their disputes, on 31 December 1999 Mr Gamble delivered a Notice of Dissolution of Partnership and a Notice of Exercise of Option dated 31 December 1999, executed by

Leisure, to the registered office of Bilioara. Copy of this Notice is (DHG109).

[71] As at 31 December 1999, the partnership had long term loan commitments with the National Australia Bank of $7.5 million (DHG110).

[72] In paragraphs 162 – 163 of his affidavit sworn 31 May 2000, Mr Gamble has itemised his concern about the decreasing value of Mirambeena over the last two years leading to a possible default by the partnership in its loans to asset ratio as required by the partnership bankers and the steps Mr Gamble has taken to address National Australia Bank's concerns, as the partnership's bank funding is critical to its survival.

[73] In paragraph 164, Mr Gamble details his concerns about the lack of business awareness displayed by the directors of Bilioara and the representatives of ATSIC and that they had no commercial appreciation of bank security ratios or the factors which determine property market values on which banks rely and their failure to understand that there had been a drop in the value of the Mirambeena property which could have very significant consequences.

[74] To assist the worsening financial position, Mr Gamble insisted on minimal cash distribution to the partners to enable a build up of cash reserve funds with the bankers to offset the diminishing property value and concerns in regard to default in the partnership bank funding.

[75] In paragraphs 167 – 170, Mr Gamble details the action he has taken to keep the National Australia Bank informed of developments and his concerns about the continuing inaction of the directors of Bilioara and its detrimental effect on the business.

[76] In paragraph 171, Mr Gamble deposes to the fact that he believes Bilioara increasingly lost focus from the primary original intent of the partnership that it be run on a strictly commercial basis. I accept Mr Gamble's assessment that this action cost Leisure considerable loss in capital and placed its investment at risk. I accept Mr Gamble's assessment that Bilioara's continued refusal to finalise and pass the 1999 budget, its failure to sign the audited 1998 financial statements and the irreconcilable deadlock which has existed between the partners since September 1998, has made the partnership totally unworkable and is placing Leisure's investment at serious risk. I accept the evidence of Mr Gamble. In an affidavit sworn 3 August 2000 paragraph 102 (Exhibit D8), Ms Brennan states that a consideration of the budget was deferred at the Board meetings in December 1998 and February 1999 by agreement of the whole Board because of the negotiation about the new joint venture agreement. Following the cross examination of Ms Brennan I do not accept this evidence. Nor do I accept that any discussions about a new joint venture provided sufficient reason to defer a decision about the budget. Where the evidence of Ms Brennan conflicts with the evidence of Mr Gamble, I prefer the evidence of Mr Gamble.

The Partnership

[77] The first Notice dated 24 March 1998, was sufficient to terminate the partnership on 26 September 1998.

[78] I find that after 26 September 1998, the partnership continued as a partnership at will. This is because of s 31 of the Partnership Act which provides:

> "31. CONTINUANCE OF PARTNERSHIP ON OLD TERMS
>
> (1) Where a partnership entered into for a fixed term is continued after the term expires, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.
>
> (2) A continuance of the business by the partners or those partners as habitually acted as partners during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership."

[79] The submission by Mr Young on behalf of the defendant is that the option clause in 15(a) of the deed of partnership was no longer available to be exercised.

[80] I agree with the submission made by Mr Young that in relation to nomenclature there is no real difference between "dissolution", "termination" or the "ending" of a partnership. Butterworths Australian Legal Dictionary defines "dissolution" as "ending or breakup of a partnership" and goes on to say "A dissolution may be followed by a winding up of the partnership where both the firm and the assets are realised and distributed". Lindley and Banks on "partnership" 17th ed at 10 – 20

refers to a partnership surviving as a partnership at will following a dissolution. This is an indication that it is permissible to refer to the dissolution of a partnership even where what follows is a partnership at will on similar terms.

[81] Under the terms of the partnership agreement the partnership was for a fixed term. Clause (4) of the deed of partnership (DHG3) provides as follows:

> "Subject to the provisions for retirement, expulsion and dissolution hereinafter contained the partnership shall continue for so long as the partners shall jointly own the land and improvements being Lot 5238 Town of Darwin and the business known as Mirambeena Tourist Resort."
>
> See *Moss v Elphick* [1910] KB 846

[82] The defendant's position is that the Notice given by the plaintiff on 31 December 1999 was not valid because the partnership was dissolved as from 26 September 1998 pursuant to the Notice of Dissolution dated 24 March 1998 served by the plaintiff and further there had been no irreconcilable deadlock pursuant to clause 14(d) of the Deed in that:

(a) The Board was not unable to pass a unanimous resolution and no relevant resolution was proposed or voted on, and/or

(b) The points at issue in any irreconcilable deadlock viz increasing the fees payable under the management agreement, the appointment of a further Board member inconsistently with clause 23 of the Deed and a proposed Aboriginal training initiative, did not relate to any matter within clause 24.1(a) of the Deed.

[83] The defendant's further alternative position is that the partnership was terminated on 26 September 1998 and the parties thereafter exercised continuing authority for the purpose of winding up pursuant to s 42 of the Partnership Act.

[84] The defence position is that the crucial point is that, in all cases the option in clause 15(a) of the Partnership Deed was no longer available to be exercised. If the partnership continued after 26 September 1998 as a partnership at will the defendant says that the question which disposes of the matter is whether the option in clause 15(a) is consistent with a partnership at will. If not the defendant says, it is unnecessary to go further because the option cannot have been validly exercised and the orders which ordinarily follow are that the partnership is declared dissolved and orders are made for the sale of the assets and division of the proceeds.

[85] It is permissible to refer to the dissolution of partnership even where what follows is a partnership at will on similar terms (Lindley & Banks on Partnership, 17th Ed 10 – 20).

[86] Counsel for the defence argues that the partnership was terminated on 26 September 1998 by Notice – not by expiration of the term or completion of the transactions for which it was created. The defence submission is that particular caution should be exercised before presuming or implying the existence of all the previous terms where a partnership is determined by special provision before the expiration of the term or before the completion

of a particular transaction. Mr Young refers to Lindley & Banks on Partnership 17th Ed at 24.08 and 24.09 in support of this submission. I accept it is appropriate to exercise such caution.

[87] The defence submission is that there is no presumption that the option clause 15(a) continued and there are two reasons for this:

(i) This partnership is not one which has continued beyond its term or beyond the particular transaction for which it was formed. The defence say it was deliberately terminated because disputes or difficulties had arisen in relation to the partnership which led one partner to terminate the partnership early. There is no basis for inferring an intention that all the terms should continue.

(ii) Section 31 of the Partnership Act says the presumption in relation to fixed term partnership is made if the business is continued "… without any settlement or liquidation of the partnership affairs …". Lindley & Banks 24.08 says the presumption applies if the business is continued "without attempting to wind up its affairs".

[88] It is the defence submission that the parties were attempting to wind up the affairs of the partnership to the extent that they were negotiating on the basis that the old agreement was finished and a new arrangement would need to be put in place.

[89] It is the defence submission that while some terms of the old arrangement e.g. continued management by Redco remained in place this was expressly stated to be until matters were resolved. In those circumstances the defence argument is that there is no basis for inferring or implying the existence of any terms beyond those necessary to keep the business running which does not include clause 14(d) concerning deadlock and clause 15(a) concerning the exercise of an option both of which had no further role to play.

[90] Counsel for the defence raised an alternative argument that if the partnership was not continuing at will under s 31, then consideration must be given to s 42 of the Partnership Act. Section 42 of the Partnership Act provides as follows:

> "42. CONTINUING AUTHORITY OF PARTNERS FOR PURPOSES OF WINDING UP
>
> (1) After the dissolution of a partnership, the authority of a partner to bind the firm and the other rights and obligations of the partners continue notwithstanding the dissolution so far as is necessary to wind up the affairs of the partnership and to complete transactions begun but not finished at the time of the dissolution, but not otherwise.
>
> (2) A firm is in no case bound by the acts of a partner who has become bankrupt but this subsection does not affect the liability of a person who has after the bankruptcy represented himself or herself or knowingly permitted himself or herself to be represented as a partner of the bankrupt."

[91] I am satisfied the partnership was continuing as a partnership at will under s 31 and the partners were not exercising continuing authority to wind up the old partnership pursuant to s 42 of the Partnership Act until after 31 December 1999 and only then for the purposes therein set out.

[92] There is no credible evidence to support a finding that the parties were acting pursuant to s 42 of the Partnership Act prior to 31 December 1999.

[93] The distinctive characteristic of a partnership at will is that it may be terminated at any time by notice. It is the submission of counsel for the defence that an elaborate mechanism, as is created by clause 14(d) and 15(a) of the partnership deed, providing for dissolution if there is a deadlock at a successive management committee meetings and then acquisition by one partner on the basis of a valuation on advantageous terms is inconsistent with a partnership at will (*Featherstonhaugh v Fenwick* (1810) 34 ER 115).

[94] In *Featherstonhaugh v Fenwick* (supra), Sir William Grant MR held that where a partnership for a definite term was dissolved but continued and continued as a partnership for an indefinite period it could be dissolved without the requirement for notice and at the will of either of the partners. The court there held that the rights of the parties were precisely equal at 120 "… to have the whole concern wound up by a sale and division of the produce." No partner therefore can derive a particular advantage by choosing an unreasonable moment for dissolution. The case of *Featherstonhaugh v Fenwick* (supra) is distinguishable from the case before this Court because in *Featherstonhaugh v Fenwick* (supra) there was never any option to purchase in the original agreement.

[95] *Clark v Leach* (1862) 55 ER 6 involved a matter where the partners after the expiration of the term of the partnership continued on the business of the

partnership as before. Sir John Romilly MR held that a provision for giving a period of notice was inconsistent with a partnership at will and also held that a clause from the original partnership agreement that a partner upon default of his co-partner had the power to dissolve, and thereafter the defaulting partner was to be considered as quitting the business for the benefit of the partner giving the notice who was to have the option of taking the property and effects of the partnership at a valuation, did not apply to a partnership continued at will after the expiration of the seven years.

[96] In *Neilson v Mossend Iron Co* (1886) 11 App Cas 298, the term of the partnership expired and the partnership continued at will. The contract of co-partnership provided that if three months before the term of the contract had expired, the partners had not all agreed to continue, a partner wishing to retire might do so and be paid out the balance due to him appearing in the partnership books. The retiring partner claimed that this did not apply to a partnership at will and he sought the sale of the business and the distribution of the proceeds. I quote the following passage from the decision of the Earl of Selborne at 306:

> "….. If, as was suggested in the argument, one partner after the three months had begun to run, or upon the day when they did begin to run, no general agreement having been made, says: 'Now I wish to go out, and I call upon you to elect whether you will continue or not,' it may be that the other partners could say: 'We are not obliged to make an immediate election; we postpone that, and reserve to ourselves the right to make it during the whole time that the contract permits us;' but that could only be at the most during the residue of the partnership, commencing from three months before its termination; and if the partnership were actually first terminated, it appears to me that a man then declaring his wish to retire on these terms could not

without the will and consent of his co-partners be entitled to be paid out on these particular terms.

If that be so, it is quite plain that it is a provision inapplicable to the subsequent partnership at will, because you never can get those three months in any such subsequent partnership, and there is an end of the case."

[97] In the following cases options or similar clauses have been held to be consistent with a partnership at will.

[98] In *Gillett v Thornton* (1875) LR 19 Eq 599, Sir Charles Hall VC at 604 – 606 held that an arbitration clause in the partnership agreement continued beyond the one year of the partnership agreement and was not confined to the one year duration of the partnership.

[99] In *Cox v Willoughby* (1880) 13 ChD 863, Fry J held that a provision in the articles that, on the decease of one of the partners before the expiration of the partnership term, the surviving partner should pay the executors of the deceased partner the sum of £1500 for the deceased's share of the capital and goodwill of the firm. After the expiration of the term provided for in the articles, one partner did and the surviving partner argued that the payment was inconsistent with a partnership at will. Fry J held that such a payment was consistent with the partnership at will suggesting that some such mechanism was appropriate to provide for the repayment of the capital continued to the partnership by the deceased.

[100] In *Daw v Herring* [1892] 1 Ch 284, the partnership deed provided that after the termination of the partnership, the partner who originally owned the firm

was entitled to purchase the firm at valuation. The partnership continued as a partnership at will and was then terminated by Notice. The plaintiff argued that the option to purchase was inconsistent with the partnership at will. The court held that the term was consistent with the partnership at will. The reasoning of the court being that the option clause was to be exercised on the termination of the partnership and the manner of the termination, including by immediate Notice, as in a partnership at will was not inconsistent with that, at 291 Stirling J:

> "… The only peculiarity of clause 27 is that it gives to Mr. Herring the option to purchase the business on certain terms. The reason of that appears to be that he was the original owner of the business. I see no reason why that should be inapplicable to a partnership at will. It was said that it might induce the partner to whom it was given to dissolve at a moment when he would gain an undue advantage, regard being had to the then state of the partnership assets. The answer appears to be found in the words of Lord Watson (11 App. Cas. 309): 'The right must, of course, be exercised in bona fide, and not for the purpose of deriving an undue advantage from the state of the firm's engagements'; but his Lordship adds, 'no question of that kind arises here.' The same remark appears to me to be applicable in this case. I think, therefore, that Mr Herring is entitled to the option which he claims."

[101] Similar considerations apply in the matter before this Court. The plaintiff was the original owner of the business. I see no reason why the option clause is inapplicable to a partnership at will. The plaintiff is exercising the right bona fide and not for the purpose of deriving an undue advancement from the state of the firm's engagement.

[102] Lindley & Banks at 10 – 20 says clauses dealing with the manner of termination of a partnership will usually not survive a dissolution to become terms of a partnership at will.

[103] The case of *Featherstonhaugh v Fenwick* (supra) is distinguishable because in that case there was no term in the partnership agreement allowing one partner to acquire the other partner's share at valuation.

[104] Counsel for the defence argues that this case is practically indistinguishable from the decision in *Clark v Leach* (supra). In that matter a partnership for seven years had expired. Under the terms of the articles of partnership, one partner had power to dissolve the partnership on notice where the other partner was guilty of neglect and to exercise an option to acquire the partnership at valuation. It was held that the option was no longer available because it was inconsistent with the partnership at will created on the expiration of the seven year term. Sir John Romilly MR said (p. 9) line 4:

> "…. Now it is incidental to the character of a partnership at will that either partner may, at any moment, give notice to dissolve, and therefore no special provision is necessary for that purpose. It is therefore obvious that if there had been a provision that six months' notice should be given to dissolve, as soon as it had become a partnership at will, this would have been quite inconsistent with the legal incidents of a partnership at will, and inapplicable to the then existing state of things."

and line 16:

> "… It was not necessary that this article should continue after the seven years, because neither of the partners was then bound to

> continue or compellable to work for the benefit of the other, for he might give notice of dissolution at any moment."

[105] Counsel for the defendant argues that identical logic applies to this case in that neither of the partners was compelled to continue with the partnership once the first notice was given and a provision intended to ensure that budgets be agreed and passed had no role to play.

[106] Mr Young submits that in this case the option to acquire only arises if there has been a deadlock at two successive Board meetings about particular budgeting matters. Mr Young maintains it is the mechanism for encouraging the avoidance of deadlock between partners by allowing either partner to acquire the firm on advantageous terms. On Mr Young's argument this is completely inconsistent with a partnership at will where either partner may terminate the partnership on immediate notice. It is the contention for the defendant that on this reasoning in a partnership at will, this elaborate mechanism can have no purpose. Further, the defence say that a reading of the partnership deed as a whole also indicates that clauses 14(a), (b), (c) and (d) are mutually exclusive mechanisms. From this it follows that the partnership can only be terminated by one of them and once terminated the other provisions for termination are inapplicable.

[107] Counsel for the defence further argues that even if the mechanism for termination in clause 14(d) and the option in 15(a) is consistent with a partnership at will the condition necessary for the application of those clauses has not arisen. The defence argument is that it is clear from the

evidence that after the termination of the partnership by the first Notice the various parties began to negotiate a new structure for the business relationship but the partners were unable to satisfactorily resolve their differences. The defence submission is that Leisure had no entitlement to increase management fees without some new agreement. Nevertheless, these increased fees were inserted in the proposed budget by Mr Gamble and rejected by Bilioara. The defence submission is that similarly, the issue of the external director's fees and costs of the proposed Aboriginal training were aspects of the continuing and unresolved issue of the proposed new partnership or joint venture arrangements. The defence say they could not be made matters relating to "The setting of annual budget limits in respect of all revenue, expenditure, borrowing or lending of any sum within the anticipated cash flow of the partnership business and in the ordinary course of such business by the partnership (including expenditure of a capital nature) for the forthcoming year" by simply including them as a line item in the budget document. They were fundamental aspects of the unresolved issues between the parties argues the defence and accordingly it is implicit that any budget item should be contractually justified.

[108] I do not agree with this submission. On the evidence I find that the parties were continuing the partnership after the first and second Notice of Dissolution whilst they discussed their differences in an effort to reach an acceptable resolution of such differences.

[109] I agree with the submission made by Mr Silvester for the plaintiff that as at midnight on 26 September 1998, neither party regarded the partnership as at an end. Neither party took any steps to subsequently wind up the partnership. Both parties continued to conduct the business affairs as before. Both parties participated in negotiations for a new joint venture to replace the first deed of partnership at some future time. Mr Gamble and Ms Brennan are agreed in their evidence that the areas to be resolved between them were questions of Aboriginal training and employment and remuneration for a third non voting director. The first notice did not take effect because both partners regarded the partnership as continuing until a new agreement was reached.

[110] There was no express new agreement. There was an agreement that Redco would continue to manage the business, this was not an express new agreement. Redco were not given any greater power or authority to manage than had been conferred in the original management agreement.

[111] On all of the evidence the partners continued the business in the same manner and in accordance with the partnership deed.

[112] A partnership at will is a partnership for an undefined time s 30 Partnership Act. See Higgins & Fletcher, The Law of Partnership in Australia and New Zealand, 7th Edition Chapter 7.

[113] The essence of a partnership at will is that subject to certain constraints it may be determined by any partner at any time without prior notice.

[114] Any clause in the partnership agreement curtailing the right of a partner to determine the partnership at any time by notice without having to show cause will be inconsistent with a partnership at will, such that under the continuing partnership, they will have no effect.

[115] The clauses under the original deed of agreement between the parties that are inconsistent with a partnership at will are clause 4, clause 14(a) requiring six months notice, clause 14(b) and 14(c) to the extent that its validity was pre-conditioned by a requirement for the occurrence of a defined event it is inconsistent.

[116] Clause 14(d) is not inconsistent because a right is conferred to dissolve the partnership without notice. Where a Notice of Dissolution is given in circumstances of irreconcilable deadlock then this triggers the right of the plaintiff to exercise the option to purchase the interest of Bilioara in the partnership and partnership assets under clause 15(a) of the partnership agreement.

[117] I agree with the submission of Mr Silvester on behalf of the plaintiff that merely because the third Notice was expressed to be given pursuant to clause 14(d) of the deed does not render it inconsistent with the incidents of a partnership at will.

[118] On the evidence of Mr Gamble and Ms Brennan I am satisfied that after the service of the second Notice of Dissolution on 1 July 1999 the partnership continued as a partnership at will pursuant to s 31(1) of the Partnership Act.

I accept the evidence given by Mr Gamble that for all intentioned purposes Bilioara ignored the second Notice of Dissolution dated 1 July 1999 and the partnership continued with business as usual and discussions continued between the parties. Exhibit P21 is the financial statement for the Bilioara Unit Trust for the year ending 30 June 1999. At the conclusion of the notes to the financial statement is paragraph 20 which is headed "Events Occurring After Reporting Date" and states as follows:

> "On July 1, Leisure Investments advised Bilioara in writing of their intent to dissolve the partnership and exercise their option under the Partnership Deed to purchase Bilioara's half share in the venture. Bilioara have since received independent legal advice stating that given the partnership was legally dissolved on 28 September 1998, Leisure Investments are not able to rely on the now defunct agreements. Prior to this notice by Leisure Investments, the partners had agreed to continue operating the Resort as if the old agreements continued to exist, until the disputed matters could be resolved. As at the date of signing, these matters continue to remain unresolved.
>
> Due to a disagreement between the partners with respect to the valuation of the Resort's land and buildings in Mirambeena's 31 December 1998 accounts, the partners failed to meet the conditions of their bank covenant which requires provision of audited financial statements within six months of year end. As at the date of signing, no action had been taken by the bank in respect of this breach.
>
> A resolution has been passed by the ATSIC's board approving divestment of their interest in the Trust. This divestment has not taken place at the date of signing these accounts.

[119] The partnership at will, created by the continuation of the business after the second Notice, was determined by a third Notice.

[120] There were no meetings of the Board between 1 July 1999 and 22 December 1999. There was no unanimous resolution to approve the 1999 budget.

[121] The right of Leisure to exercise an option is conferred by clause 15(a) of the partnership deed, read with clause 24.1(a). The trigger which enables such option to be exercised is clause 14(d) of the deed of partnership. Both the second and third Notices were stated to have been given pursuant to clause 14(d) of the partnership deed. That Notice was consistent with a partnership at will.

[122] On all the evidence I am satisfied that Bilioara were refusing to pass the 1999 budget in order to secure concessions in a proposed new joint venture and were endeavouring to delay a decision until there had been a divestment by ATSIC of its shares in Bilioara. This refusal to pass the budget rendered the continuing partnership deadlocked and unworkable.

[123] I do not consider that it is inconsistent with a partnership at will for the same dispute mechanisms to continue. Essentially, clause 15(a) read with clause 24.1 provided a dispute resolution mechanism. I accept the submission made on behalf of the plaintiff that the plaintiff does not derive any undue advantage if the Court upholds the plaintiff's right to exercise the option. The defendant did not call any evidence to the contrary and did not seek to cross examine the plaintiff's witnesses on this aspect.

[124] On the evidence given by Ms Brennan in cross examination, I am satisfied that the defendant's refusal to pass the 1999 budget was not for reasons to do with the continuing partnership business but for the purpose of

attempting to force the plaintiff's agreement to certain terms in a new joint venture which were uncommercial and not acceptable to the plaintiff.

[125] I consider that the plaintiff has a right to exercise the option to purchase the defendant's share in the partnership pursuant to clause 15(a) and that the exercise of such option is not inconsistent with a partnership at will.

[126] I consider the law applicable is as expressed by Stirling J in *Daw v Herring* (supra) at 290:

> "Then, returning to the original contract in the present case, we find that the consequences following from the determination of the original partnership are provided for in three clauses, namely, clauses 27, 28, 29. Clause 29 confers a power of expulsion, and it has been expressly decided in the Court of Appeal in *Clark v. Leach* 1 D.J. & S. 409 that such a power is inapplicable to a partnership of will. No question arises upon that clause in the present case, and therefore I may leave it out of consideration. Clauses 27 and 28 seem to me to provide for what is to take place on the natural termination of the original contract. The stipulation as to the continuation of the partnership is this: the partnership shall continue for the term of five years if both partners shall so long live. It may, therefore, be terminated in two events, either when both partners are alive, or when one of them is dead. Clause 27 appears to me to be directed to the former event, clause 28 to the latter. The language of neither is strictly appropriate to the termination of a subsequent partnership at will; but, if I am correct in the view of the law which I have deduced from the decision in the House of Lords and the speech of Lord Watson, what I have to consider is whether the provisions of these clauses are in their essence inapplicable to a partnership at will. I think not. The only peculiarity of clause 27 is that it gives to Mr. Herring the option to purchase the business on certain terms. The reason of that appears to be that he was the original owner of the business. I see no reason why that should be inapplicable to a partnership at will. It was said that it might induce the partner to whom it was given to dissolve at a moment when he would gain an undue advantage, regard being had to the then state of the partnership assets. The answer appears to be found in the words of Lord Watson 11 App. Cas. 309: 'The right must, of course, be exercised in *bona fide*, and not for the purpose of deriving an undue advantage from the

> state of the firm's engagements'; but his Lordship adds, 'no question of that kind arises here.' The same remark appears to me to be applicable in this case. I think, therefore, that Mr. Herring is entitled to the option which he claims."

[127] I am satisfied in the matter before this Court that the plaintiff is exercising the right bona fide and not for the purpose of deriving an undue advantage.

[128] In *Daw v Herring* (supra) Stirling J discussed the House of Lords decision of *Neilson v Mossend Iron Co* (supra). It is also of relevance that Stirling J noted at 291 that the option to purchase was available to only one of the parties and that was because he was the original owner of the business.

[129] In the present application the option was only available to the plaintiff who was the original owner of the business.

[130] On 26 September 1998 when the Notice of Dissolution expired, the business continued as before. I am satisfied the partnership continued as a partnership at will and the option to purchase clause 15(a) was not inconsistent with a partnership at will. The same situation continued after the second Notice of Dissolution expired, there was a deadlock over the budget, the parties were still negotiating, business continued as usual. Again there was a partnership at will and the option to purchase in clause 15(a) was not inconsistent with such partnership at will.

[131] The partnership has been finally terminated by Notice of Dissolution delivered on 31 December 1999. I am satisfied the plaintiff is entitled to

exercise the option in clause 15(a) of the Partnership Agreement and I would make the orders as sought by the plaintiff.

[132] I will hear further from the parties as to the exact terms of the order.

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