FEDERAL COURT OF AUSTRALIA

CPB Contractors Pty Limited v Celsus Pty Limited (formerly known as SA Health Partnership Nominees Pty Ltd) [2017] FCA 1620

File number:	NSD 1312 of 2017
Judge:	**LEE J**
Date of judgment:	12 December 2017
Catchwords:	**ARBITRATION** – application by the first respondent for a mandatory stay pursuant to s 8 of the *Commercial Arbitration Act 2010* (NSW) – whether the arbitration agreement is inoperative – where respondent to the stay application relies upon subsequent contractual arrangements between other parties to demonstrate inoperability – meaning of "*inoperative*" and determination of the proviso question – where the subsequent agreements relied upon do not have the effect of causing the arbitration agreement to cease having effect – mandatory stay pursuant to s 8 of the *Commercial Arbitration Act 2010* (NSW) granted **ARBITRATION** – application by the second and third respondents for a mandatory stay pursuant to s 8 of the *Commercial Arbitration Act 2010* (NSW) – determination of the statutory precondition of whether the second and third respondents brought an application for a stay not later than when submitting their first statement on the substance of the dispute within the meaning of s 8 of the *Commercial Arbitration Act 2010* (NSW) – where second and third respondents did not meet the statutory precondition of seeking a stay not later than when submitting their first statement on the substance of the dispute – application for a mandatory stay dismissed **PRACTICE AND PROCEDURE** – applications for a discretionary stay pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) – where certain non-arbitral matters are ancillary to matters the subject of the mandatory stay granted in favour of the first respondent – where there are closely overlapping facts and where the arbitral matters will be largely determinative of a number of aspects of the claims made by the applicants – where discretionary stay is consistent with the facilitation of the overarching purpose – discretionary stay granted to second, third and fourth respondents

Legislation:	*Federal Court of Australia Act 1976* (Cth), Pt VB, ss 23, 37M(1), 37N(1), 37N(4), 43 *International Arbitration Act 1974* (Cth), s 7 *Judiciary Act 1903* (Cth), s 79 *Federal Court Rules 2011* (Cth), r 35.14 *Commercial Arbitration Act 2010* (NSW), s 8(1), 16 *Commercial Arbitration Act 2011* (SA) *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), art 8(1)
Cases cited:	*ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] SGCA 34; [2008] 4 SLR 460 *Cars & Cars Pte Ltd v Volkswagen AG* [2009] SGHC 233; [2010] 1 SLR 625 *Casaceli v Natuzzi SPA* [2012] FCA 691; (2012) 292 ALR 143 *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 238; [2017] 3 SLR 267 *Eton Properties Ltd* [2010] 4 HKLRD J2 *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 *Gilgandra Marketing Co-Operative Ltd v Australian Commodity & Marketing Pty Ltd* [2010] NSWSC 1209 *Groves v Commissioner of Taxation* [2011] FCA 222; (2011) 82 ATR 813 *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 *Heyman v Darwins, Limited* [1942] AC 356 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 *La Donna Pty Ltd v Wolford AG* [2005] VSC 359; (2005) 194 FLR 26 *Louis Dreyfus Trading Ltd v Bonarich International Group Ltd* [1997] 3 HKC 597

	Lucky-Goldstar International (H.K.) Limited v Ng Moo Kee Engineering Limited [1993] 2 HKLR 73 *Northern Territory of Australia v GPAO* [1999] HCA 8; (1999) 196 CLR 553 *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 *Pedersen v Young* (1964) 110 CLR 162 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* [2000] FCA 547; (2000) 100 FCR 420 *Rinehart v Rinehart (No 3)* [2016] FCA 539; (2016) 337 ALR 174 *UDP Holdings Pty Ltd v Ironshore Corporate Capital Ltd* [2016] VSC 400
	Sutton, D St J, Gill, J, and Gearing, M, *Russell on Arbitration* (23rd ed, Sweet & Maxwell, 2007) van den Berg, AJ, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, 1981) van den Berg, Professor AJ, "The New York Convention of 1958: An Overview" in Gaillard E and Di Petro D (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008)
Date of hearing:	11, 12 December 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
Number of paragraphs:	139
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Counsel for the Second and Third Respondents:	Dr A Bell SC and Mr B Doyle
Solicitor for the Second and Third Respondents:	Lipman Karas
Counsel for the Fourth Respondent:	Mr M Connock QC and Mr J Gurr
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ORDERS

NSD 1312 of 2017

BETWEEN:	**CPB CONTRACTORS PTY LIMITED** First Applicant
	HANSEN YUNCKEN PTY LIMITED Second Applicant
AND:	**CELSUS PTY LIMITED (FORMERLY KNOWN AS SA HEALTH PARTNERSHIP NOMINEES PTY LTD) AS A BODY CORPORATE AND AS TRUSTEE OF THE CELSUS TRUST (FORMERLY KNOWN AS THE SA HEALTH PARTNERSHIP TRUST)** First Respondent
	THE MINISTER FOR HEALTH OF SOUTH AUSTRALIA Second Respondent
	STATE OF SOUTH AUSTRALIA (and another named in the Schedule) Third Respondent

JUDGE: **LEE J**

DATE OF ORDER: **12 DECEMBER 2017**

THE COURT ORDERS THAT:

1. The claims against the first respondent detailed in the originating application and the applicant's amended statement of case dated 12 September 2017 be referred to arbitration and the proceedings in this Court stayed pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW), on the basis that the claims are the subject of a valid and binding arbitration agreement.

2. The claims against the second, third and fourth respondents outlined in the originating application and the applicant's amended statement of case dated 12 September 2017 be stayed on a temporary basis pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) until the conclusion of the arbitrations currently being case managed by the Hon Kevin Lindgren QC (being ACICA Cases 2017-103, 2017-104 and 2017-110) and also ACICA Case 2017-111.

3. The applicants pay the first respondent's costs of the interlocutory application filed on 17 November 2017 and, to the extent required, leave be granted to the first respondent to seek taxation of its costs of its interlocutory application pursuant to Division 40.2 of the *Federal Court Rules 2011* (Cth) (**FCR**).

4. The applicants pay 60 per cent of the costs incurred by the second and third respondents in relation to the interlocutory application filed 13 November 2017 (other than any costs incurred in relation to the relief sought in prayer 3 of the second and third respondents' interlocutory application).

5. The applicants pay the costs of the interlocutory application of the fourth respondent filed on 15 November 2017 (other than any costs incurred in relation to prayer 2 of the fourth respondent's interlocutory application).

6. The costs in relation to prayer 3 of the second and third respondents' interlocutory application and in relation to prayer 2 of the fourth respondent's interlocutory application be reserved.

7. The time for filing any application for leave to appeal from these orders be extended to a date 14 days after the date upon which the revised reasons for judgment are published to the parties and, to the extent necessary, the requirements of FCR 35.14 are dispensed with.

8. Liberty be granted to the applicants and the second to fourth respondents to relist the proceedings by application to the Associate to Lee J upon expiry of the temporary stay referred in in order 2.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the transcript)

LEE J:

A INTRODUCTION

1 The building of the new Royal Adelaide Hospital was an undertaking of such scale and scope that it was described in South Australia's Health Care Plan as being "*the most significant single investment in health care in South Australia's history*".

2 A complex and sometimes bewildering web of contractual documentation often governs large building projects. The project the subject of this proceeding (a so-called "public-private partnership") was no exception. As will become evident, there will be a need to have regard to limited aspects of the Byzantine detail, but in very broad terms, the relevant project documentation provided a regime where the Government of South Australia owed no material obligations directly to the builder of the hospital, but rather contracted with a special purpose entity to provide for the financing, design and construction of the hospital.

3 Viewed from the perspective of outsiders, another common feature of complex building projects is labyrinthine disputation between participants. Again, this project is no outlier. By early 2016, disputes had arisen over delays and defects, and by October 2016, the first of a number of arbitral proceedings were commenced. Those proceedings are being conducted before the Hon Kevin Lindgren QC, and what have been described as the "Defects Arbitration" and the "Defects Compensation Arbitration" are set down for hearing in August 2018. It will be necessary to describe these and later arbitral proceedings in more detail below.

4 It was against this background of existing arbitral dispute as to defects that this proceeding was commenced by the applicants (**Builder**) in August 2017, seeking a range of relief against the first respondent, the special purpose corporation created for the project (**Project Co**), the second and third respondents, being the Minister for Health of South Australia and the State of South Australia (collectively, the **State**) and the fourth respondent, being the independent certifier for the project (**IC**).

5 These reasons set out the basis for the determination of three interlocutory applications filed by each of Project Co, the State and the IC. Those three applications, heard together, initially raised issues which can be placed into two broad categories.

6 *First*, orders are sought that the totality of the claims made by the Builder (as articulated in an amended statement of case filed on 5 September 2017 (**ASOC**)) be stayed pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) or the *Commercial Arbitration Act 2011* (SA) (nothing of any moment turns on any difference between these two cognate Acts and, until making orders, I will refer to the legislation without distinction as the **CA Act**) and/or s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) (**Stay Applications**).

7 *Secondly*, both the State and the IC seek to stay permanently, strike out (or, in the case of the IC, summarily dismiss), as an abuse of process, certain claims of intentional and wrongful conduct made by the Builder in the ASOC at [78], [79] and [83] (in the case of the State) and at [80]-[83] (in the case of the IC) (**Further Applications**). It is now unnecessary to deal with the Further Applications as a pragmatic resolution to this aspect of the dispute emerged during the course of the hearing.

8 At the most recent case management hearing, on 29 September 2017, I indicated to the Builder that, for reasons which included the serious nature of the allegations the subject of the Further Applications, a statement of claim should be filed pleading the impugned claims with specificity. Irrespective of the view that I reach in relation to the Stay Applications, the claims made against the State and the IC are to be pleaded. It would be inimical to the overarching purpose contained in s 37M(1) of the FCAA to proceed to determine the Further Applications given it is inevitable that the claims are to be pleaded. Of course, in a sense, this is a form of re-pleading (although technically this is not the case as the proceeding was commenced by way of a concise statement). In any event, the parties have agreed that the appropriate course is for a statement of claim to be filed in due course and for both the State and the IC to reserve their positions as to whether they seek summary determination or, alternatively, permanent stays. In all the circumstances, it is also appropriate that any costs associated with the Further Applications be reserved.

9 Turning to the Stay Applications, I will divide the balance of these reasons into the following headings:

Section B Background

B.1 The Contracts and Arbitration Agreements

B.2 The History of Disputation on the Arbitration

Section C Evidence

C.1 The Evidence Generally

C.2 Findings as to Factual and Legal Overlap

Section D The Stay Applications

D.1 Relevant Principles

D.1.1 Mandatory Stay

D.1.2 Discretionary Stay

D.2 Observations as to Disposition of the Applications and Agreed Issues

D.3 The Project Co Application

D.3.1 Mandatory Stay – Operability of Arbitration Agreement

D.4 The State Application

D.4.1 Mandatory Stay – A Procedural Issue

D.4.2 The Substantive Issue as to the Existence of an Agreement

D.4.3 The Discretionary Stay

D.5 The IC Application

Section E Conclusion and Costs

B BACKGROUND

B.1 The Contracts and Arbitration Agreements

10 As a consequence of the contractual structure to which brief reference has already been made, there are no direct contractual obligations between the Builder and the State or the Builder and the IC to determine disputes between them by way of arbitration.

11 In May 2011, a series of agreements was executed (**Project Documents**) which put in place the following contractual structure:

(a) the State engaged Project Co to finance, design and build the hospital and to provide certain services in connexion with its operation (**Project Agreement**);

(b) Project Co subcontracted to the Builder the design and construction of the hospital (**Construction Contract**);

(c) Project Co and the State engaged the IC as the independent certifier under the Project Agreement to, inter alia, adjudicate extension of time claims, assess progress and determine completion (**IC Agreement**);

(d) Project Co, the State and a syndicate of financiers (**Financiers**) entered into a number of financing agreements under which funds were advanced to Project Co and the State to fund the project; and

(e) Project Co contracted with Spotless P&F Pty Ltd to provide facilities management services.

12 Additionally, the State directly entered into side deeds, one of which is of relevance to these applications, being an agreement entered into with Project Co and the Builder, so as to provide the State with identified rights under the Construction Contract (**Builder Direct Deed**). As would by now be evident, the overall effect of this regime was that the State contracted with Project Co to provide its "*most significant single investment*", leaving it to Project Co to arrange for the financing, design and construction, and the provision of services during the relevant operating term.

13 Turning to the relevant arbitration agreements themselves (generally considered to be contracts independent of the underlying contract in which they are contained: see *Heyman v Darwins, Limited* [1942] AC 356 at 374 per Macmillan LJ; *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [42] per Martin CJ), reliance is placed upon:

(a) clauses 69-72 of the Project Agreement (**Project Arbitration Agreement**);

(b) clauses 69-72 of the Construction Contract (**Construction Arbitration Agreement**); and

(c) clause 16 of the IC Agreement (**IC Arbitration Agreement**),

(collectively, **Arbitration Agreements**).

14 It is plain from the Arbitration Agreements that they were all broadly drawn such as to evince an intention of the contracting parties to capture all potential disputes arising in relation to the project. In this regard, the Project Arbitration Agreement and Construction Arbitration Agreement both relevantly provide:

69.1 Disputes

> If *any* dispute arises between the parties in respect of *any fact, matter or thing arising out of, or in any way in connection with* the Project, the Works, the Facility…the Site or this Agreement (**Dispute**) then the Dispute will be resolved in accordance with Clauses 69 to 72.
>
> (Bolding in original, emphasis added)

15 Additionally, consistently with this apparent intention to resolve all relevant disputes by way of arbitral proceedings, the arbitrator in each instance was granted broad powers to "*grant all legal, equitable and statutory remedies*".

B.2 The History of Disputation on the Arbitration

16 It is unnecessary for the purposes of the Stay Applications to provide a detailed chronology of the various issues that arose in relation to the project. In very broad summary, and relevantly to this proceeding, the following should be noted:

(a) by April 2016, an issue arose as to alleged significant delays;

(b) as a consequence of the delays, Project Co (together with the Builder) was required to put forward a "*Cure Plan*" directed towards remedying or curing the delay which, if accepted by the State, was required to be implemented;

(c) unsurprisingly in the context of delay, disputes arose in relation to extensions of time and extension of time claims were adjudicated by the IC; this adjudication resulted in a determination that Project Co and the Builder were not entitled to any extension;

(d) a Mediated Agreement was entered into by Project Co and the State (but not the Builder) in January 2017 (**Mediated Agreement**), which sought to establish, with the consent of the Builder, a single arbitration process before Mr Lindgren to deal with all project disputes;

(e) following a mediation, an agreement was reached between the State, Project Co and the Financiers by which those parties resolved to address the consequences of the ongoing delays to the project; this led to the execution of a "**Completion Deed**" and a "Consents and acknowledgements deed" (**Consents and Acknowledgements Deed**) (it will be necessary to return to the Mediated Agreement and these documents later in these reasons);

(f) eventually, Technical Completion was achieved in March 2017 and Commercial Acceptance occurred in June 2017.

17 Additionally, and of particular importance for present purposes, arbitral proceedings arose.

18 In July 2016, Project Co issued a notice of dispute in relation to defects, which was stated as being made pursuant to cl 40.3(b) of the Project Agreement, and which "mirrored" an earlier notice of dispute issued by the Builder pursuant to the Construction Contract (**Defects Dispute**). The Defects Dispute was eventually referred for determination by an Independent Expert, pursuant to the procedures under the Project Documents. A further adjectival dispute arose as to the contractual remit of the Independent Expert to address aspects of the Defects Dispute and as to the Independent Expert's determination. This expert determination had been made in September 2016, a month after proceedings had been commenced by the State in the Supreme Court of South Australia, in which a declaration was sought as to the scope of the Independent Expert's role under the Project Agreement. A hearing was held which led to the delivery of judgment by Blue J (*State of South Australia v Goldstein* [2016] SASC 202) which identified his Honour's reasons for determining that the Independent Expert had power to make determinations in relation to some matters, but did not have power in relation to others. The details are not presently material.

19 In any event, following this, in October 2016:

(a) the State commenced arbitral proceedings against Project Co relying on the Project Arbitration Agreement, disputing various of the Independent Expert's determinations and seeking to have them substituted by a determination of the tribunal; and

(b) Project Co issued mirror arbitral proceedings against the Builder, pursuant to the Construction Arbitration Agreement (obviously enough, in respect of the same subject matter).

20 In late 2016, Mr Lindgren was appointed arbitrator in relation to these arbitrations, and the following year he made directions that both arbitrations be heard in parallel with evidence in one being evidence in the other. These combined arbitral proceedings will be described in these reasons as the **Defects Arbitration**.

21 In early 2017:

(a) the State commenced further arbitral proceedings against Project Co pursuant to the Project Arbitration Agreement, seeking compensation in respect of various alleged defects; and

(b) Project Co issued mirror arbitral proceedings against the Builder, pursuant to the Construction Arbitration Agreement.

22 Again, Mr Lindgren was the arbitrator appointed and, with the consent of all relevant parties, made orders for these arbitrations to be conducted in parallel. I will describe these combined arbitral proceedings as the **Defects Compensation Arbitration**.

23 It will be recalled that the hearing of both the Defects Arbitration and the Defects Compensation Arbitration is listed to commence in August 2018. Again, put very broadly, this hearing will resolve questions as to the existence and extent of various defects and the compensation payable, if any, in relation to such defects.

24 There are yet further arbitral proceedings, and the circumstances in which these arbitral proceedings arose are of interest and potential significance.

25 The relevant chronology commences on 10 November 2016, when Project Co wrote to the State enclosing a copy of a document provided to it by the Builder entitled "*Notice of Claimed Entitlements*" dated 8 November 2016 (**Builder Document**). The letter from Project Co to the State adopted various allegations against the State set out in the Builder Document, for the purposes of the Project Agreement.

26 It is unnecessary to dwell on the detail of the Builder Document other than to note that allegations were made by the Builder in relation to various matters, including: the State's delivery of the State's Enterprise Patient Administration System; the conduct of the IC; the State's alleged interference with the IC's determination of various extension of time claims; and an allegation that the State procured a breach by Project Co of the Construction Contract.

27 The Builder, in the Builder Document, had asserted that (Exhibit B, p 3252):

> The Builder sets out below an outline of the basis on which it claims these entitlements. The value of the Builder's claims is likely to exceed $800m. The Builder intends to issue a Notice of Dispute and to initiate the dispute resolution process under the Construction Contract.

28 Despite this statement of intention, the Builder did not take the steps it had foreshadowed. The evidence does not disclose why, and it is unnecessary for me to speculate. What did occur, however, was that this proceeding was commenced in this Court in August 2017. It suffices to note presently that there are similarities between the allegations made in the concise statement (and the ASOC) filed in this proceeding and the claims earlier identified in the Builder Document. I will come to the extent of that similarity below.

29 Returning to the background narrative, this proceeding was listed for a first case management hearing before me on 18 August 2017. I will make further reference to this first case management hearing later, but its present chronological relevance is that shortly after the hearing occurred, and after having taken no formal step following the delivery of the contentions in the Builder Document (and during the 10 months following its receipt through Project Co), the State issued a notice of dispute for the purposes of the Project Arbitration Agreement in respect of the various allegations made in the Builder Document as adopted by Project Co.

30 The next event was that on 5 October 2017, the State issued arbitral proceedings against Project Co pursuant to the Project Arbitration Agreement, challenging the allegations made in the Builder Document as adopted by Project Co, and seeking declaratory relief in relation to those allegations. Less than a week later, Project Co issued arbitral proceedings against the Builder pursuant to the Construction Arbitration Agreement in respect of the same subject matter, seeking similar, but not identical, forms of declaratory relief.

31 These steps were taken without any indication to the Court at the first case management hearing, held some weeks earlier, that the State and/or Project Co would adopt such a course. Indeed, to the contrary, Mr Collins QC, who appeared on behalf of Project Co, although foreshadowing a possible stay application on the basis of an arbitration agreement, indicated that (Exhibit B, pp 23-4):

> We hope not to have to make that [stay] application...Our position is that we that we hope that all the parties agree that all of the claims arising out of the facts the subject the applicant's (sic) claim can be dealt with in this proceeding.

32 For whatever reason, this hope was not realised. When the matter came before me for the second case management hearing, I was confronted with the development that both Project Co and the State had acted to put in place what I will describe as the **Second Arbitration**. Of course, the Second Arbitration itself comprises two arbitrations: the *first* being between the State and Project Co (commenced on 5 October 2017) and the *second* being between Project Co and the Builder (commenced on 11 October 2017). In relation to the former, Mr Lindgren was appointed as arbitrator and following a procedural hearing on 15 November 2017, the matter was adjourned to a further procedural hearing on 21 December 2017. I was told that no arbitrator has yet been appointed to the latter arbitration.

33 The respective positions in relation to the second of the arbitrations which comprise the Second Arbitration is that the Builder contends that it cannot be forced, as a matter of

contract, to accept Mr Lindgren as arbitrator, nor could it be forced to consent to a regime where the two aspects of the Second Arbitration be heard together, as is the case with the Defects Arbitration and the Defects Compensation Arbitration. The view expressed by the State during the course of oral submissions was that it is plain that efficiency and logic demands that Mr Lindgren be the arbitrator in respect of both arbitrations comprising the Second Arbitration. It was also said that if the Builder did not recognise the common-sense of that position then disagreement is inevitable and the Australian Centre for International Commercial Arbitration (acting to resolve any "deadlock") would likely appoint Mr Lindgren as the arbitrator in relation to the whole of the Second Arbitration (with the consequence that Mr Lindgren would very likely make orders to ensure that all aspects of the Second Arbitration be dealt with together).

34 In this way, it seems to me, whether by agreement or otherwise, it is more likely than not that Mr Lindgren will be seized of the Defects Arbitration, the Defects Compensation Arbitration and both arbitral proceedings constituting the Second Arbitration.

C EVIDENCE

C.1 The Evidence Generally

35 Three business days prior to the hearing of the interlocutory applications, eight lever arch folders described as "*Court Book for Hearing on 11 and 12 December 2017*" were delivered to my chambers. Included in this imposing, multi-volume court book was a series of affidavits often deposing to the same facts, and a range of other, non-essential material including, for example, extracts from the FCAA and the *Federal Court Rules 2011* (Cth) (**FCR**).

36 In order to ensure that the documentary material necessary to determine the Stay Applications was kept in manageable form, although affidavits were read, I did not allow annexures or exhibits to the affidavits to be adduced in evidence unless they were specifically referred to during the course of argument or in written submissions. Commendably, and at short notice, the parties worked cooperatively in identifying those materials that truly needed to be in evidence (ultimately a small subset of the voluminous court book). As a consequence, the documentary evidence comprises Exhibit A, being the Construction Contract, and Exhibit B, being a compendium of the documents which have been specifically referred to, either in writing or orally. No witness was cross-examined, and there is not any significant factual contest between the parties.

C.2 Findings as to Factual and Legal Overlap

37 Prior to the hearing of the Stay Applications (the date for which I had set at the second case management hearing after having been informed of the extra-curial actions of the State and Project Co), orders were made for the exchange of written submissions.

38 In the "*State's submissions on Stay Application*" dated 8 December 2017 (**State's Submissions in Chief**), it was asserted that the various claims made by the Builder in this proceeding overlap closely with those the subject of existing arbitral proceedings or the Arbitration Agreements. Of course, this reference to "existing" arbitral proceedings in the State's Submissions in Chief includes the Second Arbitration, which, as I have explained, was commenced after the commencement of this proceeding.

39 A comprehensive summary of the factual overlap in respect of each of the Builder's claims was provided as an annexure to the State's Submissions in Chief. During the course of the first day of the hearing of the Stay Applications, I requested that the Builder identify whether there was any contest as to the extent of the overlap. Annexure A to these reasons sets out a summary of the factual overlap. The first four columns set out the contentions initially made in the State's Submissions in Chief, and the last column identifies the Builder's comments in relation to those submissions as to the factual overlap. The document speaks for itself, and the broad and substantial factual overlap identified by that document is not the subject of real dispute. Although there are some differences in emphasis, and some qualifications made by the Builder, the fact is that the Stay Applications fall to be determined in circumstances where I find that there is a broad and substantial factual overlap between the allegations made by the Builder in this proceeding and the factual matters that need to be determined in the arbitrations.

D THE STAY APPLICATIONS

D.1 Overarching Principles

40 The appropriate starting point is that the Builder has licitly sought orders from this Court exercising the judicial power of the Commonwealth to quell an extant controversy that is appropriately within federal jurisdiction. Although parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for determination by an ascertained or ascertainable third party by way of contract, the jurisdiction of this Court cannot be ousted by a paction, and the only power of an arbitrator to determine the matters presently in dispute between these parties is founded in contract. The Builder submits that an

important aspect of this principle is that interparty contractual arrangements cannot take away from it seeking to invoke the jurisdiction of the Court, and that any restriction on the overarching principle that the Court is to determine a justiciable controversy through the exercise of judicial power can only be found in statute.

D.1.1 Mandatory Stay

41 The basis upon which Project Co and the State seek to have the overall controversy (or at least large parts of it) dealt with through an arbitral determination rather than by the exercise of judicial power is by reliance on s 8 of the CA Act. Both parties also seek that the Court exercise its discretion to allow a non-statutory stay, but that can be put aside for present purposes.

42 Section 8 of the CA Act provides:

> **8 Arbitration Agreement and Substantive Claim before Court**
>
> (cf Model Law Art 8)
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
>
> (Bolding in original)

43 As is well known, the provisions of the CA Act including s 8 are based on the UNCITRAL **Model Law** on International Commercial Arbitration. The CA Act is intended to operate, insofar as it is possible, in conformity with the Model Law. As can be seen from the terms of s 8, provided certain criteria are met, the court must refer the parties to arbitration. Taken as a whole, s 8 provides for four separate requirements:

(a) there is brought before a court an action;

(b) the action is in a 'matter' which is the subject of an arbitration agreement;

(c) no later than when submitting its first statement on the substance of a dispute, a party to the action requests that the parties be referred to arbitration; and

(d) the arbitration agreement is not null and void, inoperative, or incapable of being performed.

44 It is the last two of these requirements which are in dispute on the Stay Applications at various points of the argument, and I will return to these matters below.

45 Very recently, in *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170, the Full Court (Allsop CJ, Besanko and O'Callaghan JJ) explained the principled approach to determining stay applications (including the appropriate standard of review by a court entertaining such an application) under s 8 of the CA Act.

46 The Full Court's discussion was in the context of a dispute that certain deeds, which contained arbitration agreements, were void or should be set aside because they were procured by impugned conduct. The application for an order that the proceeding be stayed was resisted on the basis that the arbitration agreements were void.

47 The primary judge held that *prima facie* there were arbitration agreements and that some of the disputes fell within their scope. Orders were made facilitating a trial of the 'proviso question' as to whether the arbitration agreements contained within the deeds were "*null and void, inoperative or incapable of being performed*": see *Rinehart v Rinehart (No 3)* [2016] FCA 539; (2016) 337 ALR 174. On appeal, the Full Court stayed the proceeding, observing that the attack on the validity of the arbitration agreements (that is, the proviso question) would be determined by the arbitrator (subject to review by a supervisory court pursuant to s 16 of the CA Act).

48 In reaching her conclusion, the primary judge interpreted the arbitration agreements as providing that some matters to be agitated fell within the scope of apparently valid arbitration agreements, but that the attack on the deeds did not fall within that scope. However, her Honour also found that the arguments as to validity were available on the proviso question. Although, as the argument emerged, there was no dispute as to the existence and scope of the relevant arbitration agreements here, the decision in *Hancock* is also notable by reason of the Full Court's observation at [145] that:

> We think that any rigid taxonomy of approach is unhelpful, as are the labels "*prima facie*" and "*merits*" approach. How a judge deals with an application under s 8 of the *CA Act* will depend significantly upon the issues and the context. Broadly speaking, however, and with some qualification, aspects of the *prima facie* approach have much to commend them as an approach that gives support to the jurisdiction of the arbitrator and his or her competence, as recognised by the common law and by s 16 of the *CA Act*, whilst preserving the role of the Court as the ultimate arbiter on questions of jurisdiction conferred by ss 16(9) and (10), 34(2)(a)(iii) and 36(1)(a)(iii) of the *CA Act*. Broadly, the approach is consonant with the structure of the CA Act and the Model Law.

(Italics in original)

49 Particular note should be taken of the comment by the Full Court that how a judge deals with an application under s 8 of the CA Act will depend significantly upon the issues and the context. One other aspect of *Hancock* that is relevant is that the Full Court held that a court hearing the stay application has discretion as to whether it should hear and determine a proviso question: see [367]. In exercising that discretion in favour of providing for the relevant proviso question in *Hancock* to be determined by the arbitrator, the Full Court considered a number of factors, including the fact that the attack on the arbitration agreements could become entangled with broader validity claims, and that it was unlikely that a judicial hearing on the proviso question would be of short duration.

D.1.2 Discretionary Stay

50 Originally, Project Co had put all of its eggs in the basket of a mandatory stay. At the commencement of the hearing of the Stay Applications, leave was granted for Project Co to amend its interlocutory application to add a further prayer for relief, framed in the alternative, to the effect that the claims against Project Co outlined in the ASOC be stayed "*pursuant to s 23 of the [FCAA] and/or the inherent jurisdiction of the Court*". Almost identical alternative relief had been sought by the State in its interlocutory application.

51 Section 23 of the FCAA "*confers upon the Federal Court a broad power to make orders of such kinds, including interlocutory orders, as it 'thinks appropriate'*": *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 per Deane J (Mason CJ, Wilson and Dawson JJ agreeing). Of course, the Court's power to order a stay of proceedings is an incident of its general power to control its own proceedings and it is plain that an order for a stay as sought, if otherwise appropriate, can be made pursuant to s 23: *Groves v Commissioner of Taxation* [2011] FCA 222; (2011) 82 ATR 813 at 819 [22] per Logan J.

52 In their prayers for relief, both Project Co and the State rely upon what they describe as the "*inherent*" jurisdiction of the Court. I pause to remark that this reliance does not seem to me to be soundly based. It is well established that only superior courts of record with unlimited jurisdiction are said to possess inherent jurisdiction. In Australia, the High Court, the Federal Court and the Family Court, all of which are superior courts of record, possess defined jurisdiction granted by either the *Constitution* or statute. As Wilson and Dawson JJ observed in *Sterling Industries* at 618:

> federal courts differ from the supreme courts of the States which, although of

> statutory origin, are truly designated superior courts because they are invested with general jurisdiction by reference to the jurisdiction of the courts at Westminster.

53 Although federal courts possess similar powers, it is not, in this sense, inherent. In the same judgment, their Honours held that a declaration by the Federal Court as a superior court of record was to be given effect as far as it could be and that the "*vesting of judicial power in the specific matters permitted by the Constitution (see ss. 75, 76, 77) carries with it such* ***implied power*** *as is necessarily inherent in the nature of the judicial power itself*" (at 619, emphasis added). Accordingly, although it is less than accurate to say that the Court has an inherent power to grant the relief sought in the Stay Applications, the Court has ample power under s 23 of the FCAA, and by reason of its implied power to control its own proceedings, to grant the relief sought.

54 The question is not as to power but whether such discretionary relief should be granted in the present circumstances. Again, recently, in *Hancock*, the Full Court provided more authoritative guidance on the applicable principles. It did so by at [334] describing as "*basal and correct*" the observation of Merkel J in *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* [2000] FCA 547; (2000) 100 FCR 420 at 435 [66]. In that matter, Merkel J observed at 434-435 [65]-[66]:

> In the event that a proceeding includes matters that are not capable of being referred to arbitration, but the determination of which is dependent upon the determination of the matters required to be submitted to arbitration, a court may, in the exercise of its discretion, stay the whole proceeding: see *Tanning Research* [*Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332] at 216 per Brennan and Dawson JJ. A court may also exercise a discretion to impose terms that the arbitration of the arbitrable claims not proceed prior to the determination of the non-arbitrable claims where the arbitrable claims are seen to be subsidiary to or significantly less substantial than, but overlapping with, the non-arbitrable claims: see *Hi-Fert* [*Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1; 159 ALR 142 at ALR] 167-168, cf *Dodwell & Co (Aust) Pty Ltd v Moss Security Ltd* (unreported, Federal Court, Wilcox J, No 130 of 1990, 11 April 1990). The discretion may also be exercised to stay the proceeding where the non-arbitrable claims are the ancillary claims.
>
> The broad discretion arises as part of the exercise of a court's general power to control its own proceedings. The basis for the discretion is that the spectre of two separate proceedings - one curial, one arbitral - proceeding in different places with the risk of inconsistent findings on largely overlapping facts, is undesirable: see *Dodwell & Co* per Wilcox J at [5] and [7], *Hi-Fert* at 167-168 and *McConnell Dowell Smith East Asia Pty Ltd v State Electricity Commission (Vic)* (unreported, Supreme Court, Vic, Beach J, No 5035 of 1996, 24 November 1998).

55 Although the discretion is commonly exercised when a court has been required to stay part of a proceeding pursuant to s 8 of the CA Act where there are other non-arbitral claims (see

Casaceli v Natuzzi SPA [2012] FCA 691; (2012) 292 ALR 143 at 158-159 [48]-[49] per Jagot J), the court may also exercise the discretion independently of a mandatory stay being granted: see *UDP Holdings Pty Ltd v Ironshore Corporate Capital Ltd* [2016] VSC 400 (Hargrave J).

56 Indeed, in an important sense, it can be seen that the ability to grant a discretionary stay is not only an incident of the ability of the Court to control its proceedings in a general sense, but also now to control those proceedings in such a way as to fulfil the mandate set out in Part VB of the FCAA. Of course, as was common ground, the Court is required by s 37M(3) of the FCAA to exercise its procedural powers in a way that best promotes the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

D.2 Observations as to Disposition of Applications and Agreed Issues

57 The submissions between the parties raised a number of different issues, some of which were no longer pressed in argument at the hearing of the Stay Applications. In order to obtain some clarity in relation to the matters that the Court is required to determine, I prepared and provided to the parties at the outset of oral submissions an "issues document". Helpfully, the parties conferred in relation to that document and the issues requiring determination on the Stay Applications (leaving aside the issue that I determined in section C.2 above). The agreed issues can be summarised as follows:

> <u>The Project Co Application</u>
>
> (1) As to the proviso question, should the Court exercise its discretion to determine the proviso question or allow the arbitral tribunal to resolve (in the first instance) the Builder's challenge to "operability"?
>
> (2) Whether Project Co is entitled to a stay pursuant to s 8 of the CA Act notwithstanding the contentions of the Builder that the Construction Arbitration Agreement is "inoperative" by reason of the entry by the State and Project Co into the Mediated Agreement and the Completion Deed in breach of the Construction Contract (hence engaging the proviso question in s 8 of the CA Act).
>
> (3) In the event that Project Co is not entitled to a stay pursuant to s 8 of the CA Act, is Project Co entitled to a stay pursuant to s 23 of the [FCAA] and/or the inherent jurisdiction of the Court because the claims in the proceeding overlap or are ancillary to those in existing arbitral proceedings?
>
> <u>The State Application</u>
>
> (4) Has the State complied with the procedural condition for a s 8 stay, which required referral to arbitration to be sought no later than when the State submitted its first statement on the substance of the dispute?
>
> (5) If the procedural condition was satisfied, is a substantive condition of a s 8 stay,

that the claims made by the Builder against the State be the subject of an arbitration agreement, satisfied because:

> (a) the making of the Builder's claims against the State constitute a breach of warranties and undertakings in the Builder Direct Deed and whether or not that is so is to be resolved in accordance with what the State alleges is the "*Builder Direct Deed Arbitration Agreement*" which arbitration agreement exists because of the reference to the Project Agreement in the Builder Direct Deed;
>
> (b) the State is a party claiming "*through and under*" Project Co in respect of the releases relevant to some of the claims provided by the Builder in the Construction Contract?

(6) If Project Co is entitled to either a s 8 stay or a discretionary stay, should the claims made against the State by the Builder be stayed pursuant to s 23 of the FCAA or the Court's general power to control its own proceedings because:

> (a) the claims made by the Builder against the State are ancillary to matters the subject of Project Co's stay; and/or
>
> (b) there is a risk of findings on overlapping facts; and/or
>
> (c) the arbitrator's award will be determinative or largely determinative of the claims made in the proceeding against the State; and/or
>
> (d) the State is willing to undertake to submit to the arbitral proceedings; and/or
>
> (e) it is of potential savings in time and cost; and/or
>
> (f) it would be consistent with the policy aims of the CA Act and the intention manifest from the Project Documents (including cl 6 of the Builder Direct Deed) to require arbitration;
>
> (g) it may result in the claims not proceeding, or the issues in dispute being narrowed;
>
> (h) it will remove the burden of duplication for parties, witnesses, experts and legal advisers;
>
> (i) it is only a temporary stay of a monetary claim, and there is accordingly no real prejudice to the Builder;
>
> (j) it is consistent with the operation of ss 23 and 37M of the FCAA and facilitates the fair and efficient administration of justice; and/or
>
> (k) of the alleged weakness of the claims made by the Builder against the State.

(7) If the State is entitled to a s 8 stay in respect of part but not all of the Builder's claims against it, should the balance of the proceeding be stayed pursuant to s 23 of the FCAA?

<u>The IC Application</u>

(8) If Project Co and/or the State is entitled to either a s 8 stay or a discretionary stay, should the claims made against the IC by the Builder be temporarily stayed until the conclusion of the arbitrations or further order pursuant to s 23 of the FCAA and/or the Court's general power to control its own proceedings because:

(a) the claims made by the Builder against the IC are ancillary to the claims made by the Builder against the State and Project Co; and/or

(b) there is an extensive overlap of facts and issues; and/or

(c) to do so would minimize or reduce the risk of inconsistent findings in parallel proceedings; and/or

(d) there will be savings in time and cost; and/or

(e) it is an efficient use of judicial resources; and/or

(f) it may result in claims not proceeding, or the issues in dispute being narrowed; and/or

(g) it will remove the burden of duplication for parties, witnesses, experts and legal advisers; and/or

(h) it is only a temporary stay of a monetary claim, and there is accordingly no real prejudice to the Builder; and/or

(i) if the arbitral matters are mediated, it may be open for the IC to participate in such a mediation, even though it is not a party to the relevant contracts; and/or

(j) it is consistent with the operation of ss 23 and 37M of the FCAA and facilitates the fair and efficient administration of justice.

D.3 The Project Co Application

D.3.1 Mandatory Stay – Operability of Arbitration Agreement

58 I referred at [43] above to the four requirements that must exist before a mandatory stay is ordered. Following the narrowing of issues during the course of oral argument, the only basis upon which the Builder contends that s 8 of the CA Act does not require a stay in the present circumstances is that the Construction Arbitration Agreement is inoperative.

59 The Builder accepts that it bears the onus of establishing its argument as to inoperability. For reasons I identify at [86] below, it is appropriate that I resolve this proviso question and to do so it is necessary to: *first*, identify what is said by the Builder to amount to inoperability; *secondly*, discuss briefly the authorities as to what is meant by the term 'inoperative'; and *thirdly*, assess the Builder's inoperability contention in the light of that discussion.

The Builder's Argument

60 The Builder accepts that if the only way a party could render an arbitration agreement inoperative was for the whole contract to be terminated by acceptance of a repudiation, then the Builder necessarily fails as, obviously enough, there was no such termination. The argument developed by Mr Walker SC, who appears with Mr Hyde for the Builder, was that the term 'inoperative' is "*neither a term of art in contract law, at common law, nor is it a*

particularly specific provision" and identifying whether inoperability was established called for assessment by reference to a "*case-by-case circumstantial understanding*" or inquiry (T 25, 27). In this case, it was said that the entry into inconsistent arrangements by Project Co was sufficient, being arrangements to resolve outstanding disputes in a streamlined and consolidated fashion which "*do not contemplate the Builder's participation in the consolidated or streamlined dispute process that has now been agreed between Project Co and the State in breach by Project Co of the clear terms of clause 1.8 of the Construction Contract*" (see Builder's Written Submissions dated 5 December 2017 at [136]-[137]). Put more generally, the Construction Arbitration Agreement was inoperative because one could point to (T 25):

> an extant obligation to seek to have a different regime obtain from the one to which [the Builder was] entitled under the construction contract [and this] is enough to show that, for the purposes of something as drastic as the court refraining from exercising its undoubted jurisdiction itself to resolve the dispute by judicial power, the arbitration agreement has become, between these parties, inoperative.

61 This issue was first raised on 17 August 2017 when an assertion was made by the Builder that the Construction Arbitration Agreement was relevantly inoperative "*by reason of the State and [Project Co] entering into alternative agreements in breach of the Construction Contract*" (Exhibit B, p 4894).

Inoperability – the Authorities

62 Of course, as has already been explained, the proviso in s 8 of the CA Act is a proviso adopted from art 8(1) of the Model Law. The widespread adoption of the Model Law has meant that consideration of what might broadly be described as 'proviso issues' has occurred in a number of jurisdictions, including the leading centres for arbitrations in the Asia Pacific area, Singapore and Hong Kong. Indeed, a convenient starting point is the relatively recent and detailed decision of Vinodh Coomaraswamy J of the High Court of Singapore in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 238; [2017] 3 SLR 267.

63 In his extended discussion of inoperability, his Honour referred to the work of Professor Albert Jan van den Berg, entitled "The New York Convention of 1958: An Overview" in Gaillard E and Di Petro D (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008). In the Professor's opinion, inoperative agreements are arbitration agreements "*which have ceased to have effect*", noting that (at 52):

> The word "*inoperative*" can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.

64 Vinodh Coomaraswamy J also accepted the Professor's point that the terms contained in the proviso should be construed narrowly. In this respect, at [162], his Honour noted that:

> An arbitration agreement is inoperative, at the very least, when it ceases to have contractual effect under the general law of contract. That can occur as a result of a number of doctrines of the law of contract such as discharge by breach, by agreement or by reason of waiver, estoppel, election or abandonment.

65 At [163]-[166], his Honour then went on to observe as follows:

> [163] David St John Sutton, Judith Gill, and Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) (cited in *Sembawang* [*Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229] at [39]) accept at §7-046 on page 370 that an arbitration agreement will be inoperative "where [it] has been repudiated or abandoned or contains such an inherent contradiction that it cannot be given effect". Mustill and Boyd [*Commercial Arbitration* (Butterworths, 2nd Edition, 1989] at page 464 notes that the term "inoperative" has "no accepted meaning in English law", but proposes that it "would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future". They include in this category situations where an arbitration agreement ceases to have effect by virtue of a declaration to that effect by a court of competent jurisdiction or by virtue of common law doctrines such as termination by acceptance of repudiatory breach or frustration, or by agreement of the parties.
>
> [164] Prof Born in *International Commercial Arbitration* (at §5.06(d) on pages 842 to 843) defines an "inoperative" arbitration agreement as one which has ceased to have effect:
>
> > It … appears reasonably clear that Article II(3) [of the New York Convention], which permits non-enforcement of "inoperative" agreements, refers to agreements that were at one time valid, but which thereafter ceased to have effect (or ceased to be "operative") In one commentator's words, "the word 'inoperative' refers to an arbitration agreement which has ceased to have effect." That would include cases of waiver, revocation, repudiation, or termination of the arbitration agreement, or failure to comply with jurisdictional time limits prescribed by the arbitration agreement.
> >
> > Thus, an arbitration agreement would be "inoperative" where the parties actively pursued litigation, rather than arbitration, resulting in a waiver of the right to arbitrate under applicable law. An arbitration agreement would also be "inoperative" if the parties mutually agree to litigate their dispute (or submit it to a different form of dispute resolution), or where a party repudiated the agreement.
>
> [165] Similarly, David Joseph QC in *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2010) ("*Jurisdiction and Arbitration Agreements*") observes (at §11.49 on page 353) that an arbitration agreement will be inoperative when it is discharged and comes to an end:
>
> > An arbitration agreement therefore can come to an end by repudiation, frustration, waiver or election but it is necessary to distinguish between repudiation of the substantive contract and repudiation of the arbitration

> agreement.
>
> [166] The following are examples of circumstances in which an arbitration agreement would be inoperative:
>
> (a) Where a party has waived a contractual right to arbitrate or finds itself estopped from relying on that right: *Tjong* [*Tjong Very Sumito v Antig Investments Pte Ltd* [2009] SGCA 41; [2009] 4 SLR(R) 732] at [53]; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 238 ALR 457 at [65]; *Ramasamy Athappan* [*Athappan v Secretariat of Court, International Chamber of Commerce* (A.No 2670/2008, A.No 1236/2008, O.A.No 277/2008 and A.No 2671/2008 in C.S.No 257/2008] cited in the UNCITRAL Guide at [106], [109], and [112].
>
> (b) Where a party has abandoned its right to seek a stay under a particular jurisdiction's equivalent of s 6 of the IAA: *Eisenwerk Hensel Bayreuth Dipl-ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461 at [15]; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [53]; *La Donna Pty Ltd v Wolford AG* [2005] VSC 359 at [21] to [22]; and
>
> (c) Where a party has committed a repudiatory breach of the arbitration agreement and that repudiation has been accepted by the innocent counterparty: *Downing* [*Downing v Al Tameer Establishment* [2002] EWCA Civ 721; [2002] BLR 323] at [34] to [35].

66 As might be expected, given the nature of the Builder's submission, the Builder places some emphasis on the words at [162], where Vinodh Coomaraswamy J noted that "*at the very least*" an arbitration agreement would be inoperative when it ceased to have effect under the general law. Of course, as the examples collected by his Honour make clear, there may be circumstances where an arbitration agreement would be inoperative other than in circumstances where an arbitration agreement is brought to an end (in the sense of ceasing to have contractual effect under the law of contract). Obvious, non-exclusive examples would be where a party has waived a contractual right to arbitrate or where equity, for some reason, prevented reliance on strict legal rights.

67 Given they are not terms of art, there is obviously some potential overlap between the word "*inoperative*" and the phrase "*incapable of being performed*", which are both contained within the proviso in s 8 of the CA Act. This can be seen, for example, by the fact that circumstances where an arbitration agreement may be inoperative include where it contains such an inherent contradiction that it cannot be given effect (see *Russell on Arbitration* at §7-046, p 370, referred to at [65] above). It is difficult to understand why such a circumstance would not also be an example where the agreement could be regarded as being "*incapable of being performed*". Be that as it may, for present purposes, given the way the Builder put its argument (relying exclusively on the concept of inoperability), it is unnecessary to explore the precise interrelationship between these different expressions used in s 8 of the CA Act.

68 For my part, as to what renders an arbitration agreement inoperative, I would adopt not only what was noted by Vinodh Coomaraswamy J in *Dyna-Jet* extracted above, but also what was said by Kaplan J in *Lucky-Goldstar International (H.K.) Limited v Ng Moo Kee Engineering Limited* [1993] 2 HKLR 73, where his Honour, at 76, also quoted from Professor van den Berg's work (*The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, 1981) at 158), as follows:

> The word 'inoperative' can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons. One reason may be the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata*...).
>
> (See also *Eton Properties Ltd* [2010] 4 HKLRD J2 at [127] per Joseph Fok J)

Consideration of the Builder's Inoperability Contention

69 It follows that although I accept the Builder's argument that inoperability can exist in circumstances where there is no termination for breach, whatever inoperability means in particular circumstances, it seems to me that it is a concept which necessarily involves the relevant arbitration agreement *ceasing to have effect* – although how the cessation of effect occurs in individual cases will vary.

70 As I noted above, the Builder's argument is that the actions of Project Co and the State in putting in place or agreeing to put in place a dispute resolution process (as contemplated in the Mediated Agreement and the Completion Deed) was, and is, inconsistent with the Construction Arbitration Agreement. It followed, the argument went, that putting in place the process now agreed between Project Co and the State (or participation in it) amounted to a breach by Project Co of cl 1.8 of the Construction Contract.

71 Given what can be concluded from the authorities as to what is meant by the term 'inoperative', the present issue, restated, becomes whether the Builder can sustain its operability contention that the entry into, or effect of, the Mediated Agreement and the Completion Deed meant that the Construction Arbitration Agreement ceased to have any effect (in the sense that I have explained).

72 In resolving this issue, various provisions of the Construction Contract are relevant, being cll 1.8, 69-72 (to which I have already referred and which constitute the Construction Arbitration

Agreement) and, in particular, 79.16. These clauses (with omission of some presently immaterial wording) are set out below:

> **1.8 Project Agreement**
>
> The Builder acknowledges that it has been provided with a copy of the Project Agreement in the form executed on the Date of this Agreement. Project Co must not:
>
> (a) make or permit any amendment to be made to the Project Agreement; and
>
> (b) amend, replace, supplement or waive any right or claim or material obligation it has under the Project Agreement;
>
> where the effect of any such amendment, agreement, replacement, supplementation or waiver would be to affect the Builder's rights, obligations, capacity or ability to fulfil its obligations under this Agreement without the prior written consent of the Builder. The Builder's consent may only be withheld if it reasonably believes such amendment, agreement, replacement, supplementation or waiver will adversely affect the Builder's rights, obligations or capacity or ability to fulfil its obligations under this Agreement.

…

69 Dispute Resolution

> **69.1 Disputes**
>
> If any dispute arises between the parties in respect of any fact, matter or thing arising out of, or in any way in connection with the Project, the Works, the Facility, the Designated Commercial Area, or the Designated Commercial Area Works the Site or this Agreement (**Dispute**) then the Dispute will be resolved in accordance with Clauses 69 to 72.
>
> **69.2 Notice of Dispute**
>
> If there is a Dispute, then a party may deliver to the other party a Notice of Dispute together with its submissions in relation to the Dispute. The submissions will set out its contentions including any relevant legal basis of claim.
>
> **69.3 Continuation of obligations**
>
> Despite the existence of a Dispute between the parties or the referral of the Dispute for resolution in accordance with the Dispute Resolution Procedures:
>
> > (a) the Builder will continue to execute the Works or perform its other obligations (as the case may be) under this Agreement; and
> >
> > (b) each party will otherwise comply with its obligations under this Agreement.
>
> **69.3A Urgent relief**
>
> Nothing in Clauses 69 to 72 or otherwise in this Agreement prevents a party from seeking urgent injunctive or declaratory relief from a court of competent jurisdiction.

70 Executive Dispute Resolution

(a) Subject to Clause 71(a)(i), if a Notice of Dispute has been delivered under Clause 69.2, the Dispute Panel will meet and attempt in good faith, within 5 Business Days of the delivery of the Notice of Dispute under Clause 69.2, to:

(i) resolve the Dispute; or

(ii) agree that the Dispute be referred to an Independent Expert under Clause 71 or to arbitration under Clause 72.

(b) If the meeting required by paragraph (a):

(i) does not occur; or

(ii) having occurred fails to resolve the Dispute or to agree that the Dispute be referred to an Independent Expert under Clause 71 or to arbitration under Clause 72,

within 10 Business Days of the delivery of the Notice of Dispute, the Dispute shall be referred to arbitration under Clause 72 save where the Dispute is in respect of a claim for payment of an amount which is equal to or less than $1 million (as set out in the Notice of Dispute) in which case, within 10 Business Days of the delivery of the Notice of Dispute, the Dispute shall be referred for resolution by an Independent Expert under Clause 71.

71 Accelerated Dispute Resolution Procedures

(a) (**Agreement**): Subject to paragraph (b) and paragraph (c):

(i) if this Agreement expressly provides that a Dispute shall be referred for determination by an Independent Expert or by the Accelerated Dispute Resolution Procedures, then Clause 70 shall not apply and within 5 Business Days of the delivery of the Notice of Dispute the parties shall agree on an Independent Expert to determine the Dispute; or

(ii) if the Dispute is referred to an Independent Expert under Clause 70, then within 5 Business Days of:

A. agreement to refer the Dispute to an Independent Expert under Clause 70(a)(ii); or

B. the end of the 10 Business Day period referred to in Clause 70(b),

the parties shall agree on an Independent Expert to determine the Dispute, either by appointing:

(iii) a person from the Accelerated Dispute Panel; or

(iv) some other person as agreed by the parties.

(b) (**Accelerated Dispute Panel**): …

(c) (**Failure to agree on Accelerated Panel**): …

(d) (**Panel updates**): …

(e) (**Tripartite agreement**): …

(f) (**Referral**): ...

(g) (**Basis for determination**): …

(h) (**Further information**): …

(i) (**Conference**): …

(j) (**Representation**): …

(k) (**Privacy**): …

(l) (**Site visit**): …

(m) (**Timing**): …

(n) (**Not arbitrator**): The Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.

(o) (**Final and binding**): To the extent permitted by Law, the determination of the Independent Expert will be final and binding on the parties, unless:

(i) the value of the determination is greater than $1 million; and

(ii) a party gives written notice to the other party within 15 Business Days of the determination referring the matter to arbitration under Clause 72.

(p) (**Mistake**): …

(q) (**Costs**): …

(r) (**No liability**): …

(s) (**Builder Change Compensation Principles**): …

72 Arbitration

72.1 Arbitrator

(a) All Disputes referred to arbitration in accordance with Clauses 69 to 71 shall be finally determined in accordance with this Clause 72:

(i) before an arbitrator to be agreed between the parties within 5 Business Days of the Dispute being referred to arbitration; or

(ii) failing agreement within that period, an arbitrator nominated by the Australian Centre for International Commercial Arbitration (**ACICA**).

(b) The arbitrator will have power to grant all legal, equitable and statutory remedies and to open up, review and substitute any determination of an Independent Expert under Clause 71 which has been referred to arbitration.

72.2 Arbitration

(a) (**ACICA Rules**): Arbitration pursuant to this Clause 72 will be conducted in accordance with the rules of ACICA (**ACICA Rules**) current at the time of the reference to arbitration and as otherwise set out in this Clause 72.

(b) (**Seat**): The seat of the arbitration will be Adelaide in South Australia.

(c) (**Not court**): Nothing in this Clause 72 or the ACICA Rules is intended to or shall modify or vary the rights of appeal contained in the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA).

(d) (**Conduct of arbitration**): The parties agree that:

(i) they have entered into an arbitration agreement under this Clause 72 for the purposes of achieving a just, quick and cheap resolution of any Dispute or difference;

(ii) any arbitration conducted pursuant to this Clause 72 will not mimic court proceedings of the seat of the arbitration and the practices of those courts will not regulate the conduct of the proceedings before the arbitrator; and

(iii) in conducting the arbitration, the arbitrator must take into account the matters set out in subparagraphs (i) and (ii).

(e) (**Evidence in writing**): All evidence in chief will be in writing unless otherwise ordered by the arbitrator.

(f) (**Discovery**): Discovery will be governed by the substantive and procedural rules and practices adopted by the Federal Court of Australia at the time of arbitration.

(g) (**Oral hearing**): The oral hearing will be conducted as follows:

(i) the oral hearing will take place in Adelaide, South Australia and all outstanding issues must be addressed at the oral hearing;

(ii) the date and duration of the oral hearing will be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in paragraph (d) when determining the duration of the oral hearing;

(iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;

(iv) the oral hearing will be conducted on a stop clock basis with the effect that the time available to the parties will be split equally between the parties so that each party will have the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties;

(v) not less than 20 Business Days prior to the date fixed for the oral hearing, each party will give written notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross examination; and

(vi) in exceptional circumstances, the arbitrator may amend the date of hearing and extend the time for the oral hearing set under subparagraph (ii).

(h) (**Experts**): Unless otherwise ordered, each party may only rely upon one expert witness in respect of any recognised area of specialisation.

(i) (**Costs**): Any determinations made by the arbitrator under this Clause 72 shall include a determination relating to the costs of the reference and the

award, including the fees and expenses of the arbitrator.

72.3 Proportionate Liability

Notwithstanding anything else, to the extent permissible by Law, the arbitrator appointed pursuant to this Clause 72, or the Independent Expert appointed pursuant to Clause 71 (as the case may be) will have no power to apply or to have regard to the provision of any proportionate liability legislation which might, in the absence of this provision, have applied to any Dispute referred to arbitration or expert determination pursuant to this Agreement.

…

79.16 Pass-through of relief

(a) Subject to the Security of Payment Act, despite any other provision of this Agreement, the parties acknowledge that where the Builder has a claim, right or entitlement under this Agreement and Project Co has an equivalent claim, right or entitlement under the Project Agreement, subject to the following provisions of this clause the Builder's entitlement will be limited to the relief actually granted to Project Co under the Project Agreement provided that:

(i) in applying this clause regard shall only be had to financial and other relief allowed under the Project Agreement which relates to the rights and obligations of the Builder under this Agreement and not the other rights and obligations of Project Co under the Project Agreement;

(ii) where any financial relief provided under the Project Agreement is provided by way of adjustment to the Quarterly Services Payment, including by way of any extension to the Term, payments to or from the Builder will be made when they would otherwise be due under this Agreement.

(b) Under the Project Agreement when certain events or circumstances arise Project Co has certain remedies or certain entitlements. The purpose of this Clause 79.16 is to provide the Builder with equivalent remedies or benefits and to satisfy and limit Project Co's liability for such events by reference to the rights of Project Co under the Project Agreement.

(c) Where Project Co or the Project Co Representative is required to act reasonably under this Agreement or consistently with the act of the State or the State Delegate under the Project Agreement, and the State or the State Delegate is required to act reasonably in the corresponding provision of the Project Agreement, subject to any express provision of this Agreement, if the State or the State Delegate fails to act reasonably under the Project Agreement the Builder will be entitled by notice in writing to Project Co to make a Claim against Project Co for the purposes of this Clause 79.16, notwithstanding that Project Co has acted consistently with the act of the State or the State Delegate under the Project Agreement.

(d) lf the Builder reasonably believes Project Co has a claim against the State under the Project Agreement, including in respect of an act or omission of the State, which impacts in any way on the Builder under this Agreement, the Builder may notify Project Co in writing of the nature and details of the claim and such claim will be a Claim of the Builder to which this Clause 79.16 applies. In making such Claim the Builder must have regard to the

impact such Claim will have on the Project as a whole.

(e) For sake of clarity this Clause 79.16 does not apply to:

(i) breaches of this Agreement by Project Co to the extent not caused, or contributed to, by breaches by the State under the Project Agreement;

(ii) claims by the Builder under a warranty or indemnity under a provision of this Agreement which are not the subject of a claim by Project Co under an equivalent warranty or indemnity or other provision of the Project Agreement;

(iii) Project Co Modifications;

(iv) the extent that any remedy or entitlement under the Project Agreement is reduced as a result of a breach of the Project Agreement by Project Co not caused, or contributed to, by the Builder;

(v) the extent that any remedy or entitlement under the Project Agreement is reduced as a result of any act or omission of Project Co not caused, or contributed to, by the Builder, other than any act or omission which is authorised or permitted under the Project Agreement or a Project Document to which the Builder is a party and is done or omitted to be done in any time authorised or permitted under that Project Document;

(vi) Construction Extension Events; and

(vii) payment of the Contract Price.

(f) In relation to any Claim of the Builder to which this Clause 79.16 applies Project Co will:

(i) give the Builder a copy of the claim and submissions made in the prosecution of the claim under the Project Agreement;

(ii) if requested allow the Builder to attend and participate in any meeting or negotiations under the Project Agreement in respect of the claim and allow the Builder to make submissions at any hearing;

(iii) incorporate the Builder's submissions in Project Co's submissions under the Project Agreement pursuing the Claim unless Project Co reasonably believes the Builder's submissions are unsupportable;

(iv) diligently pursue and keep the Builder informed (including by providing documents) as to the progress of the claim under the Project Agreement; and

(v) not settle or compromise the claim without the prior written consent of the Builder.

(g) In respect of any Claim to which this Clause 79.16 applies the Builder's right of recovery against Project Co does not exceed Project Co's right against the State in respect of the Builder's Claim and does not exceed the compensation or relief payable or allowed from the State in respect of the Builder's Claims, rights and entitlement for those matters, save to the extent

> that Project Co has failed to diligently pursue any relevant relief or entitlement under the Project Agreement.
>
> (h) Any remedy or benefit to which the Builder is entitled under this Clause 79.16 must be paid by Project Co to the Builder within 5 days of the payment or allowance of such entitlement by the State to Project Co.
>
> (i) The parties acknowledge this Clause 79.16 applies to Clause 60.7.
>
> (j) Subject to other provisions of this Agreement, if Project Co receives any relief from an obligation or entitlement from the State under the Project Agreement which is related to an equivalent entitlement or obligation of the Builder under this Agreement, Project Co must grant equivalent relief or entitlement to the Builder under this Agreement to the extent, and in the proportion, that such relief or entitlement is relevant to the related entitlement or obligation of the Builder.
>
> (k) Subject to Project Co reasonably considering that any Claim of the Builder for an extension of time or extension to a Cure Period is reasonable, Project Co will take all proper and reasonable steps to diligently and expeditiously pursue such rights and remedies under the Project Agreement.
>
> Without prejudice to any other rights or remedies of Project Co under this Agreement or the other Builder Documents, if the Builder fails to perform or comply with any of its obligations or agreements contained in this Agreement or the other Builder Documents to which Project Co is a party, Project Co may (but shall be under no obligation to) perform or comply (or procure performance or compliance) with such obligations or agreement and the amount of any costs or expenses incurred in such performance or compliance shall be Monies Owing payable by the Builder to Project Coupon demand.
>
> (Uncorrected, bolding in original)

73 Hence, as can be seen, the bargain contemplated that disputes between the Builder and Project Co were to be determined pursuant to the provisions of cll 69-72 of the Construction Contract (the Construction Arbitration Agreement) and, insofar as disputes between the Builder and Project Co also give rise to a dispute between Project Co and the State under the Project Agreement, then the Builder has additional rights as contained in cl 79.16 of the Construction Contract.

74 I now turn *first* to the Mediated Agreement (which is said by the Builder to have displaced the Construction Arbitration Agreement) and *secondly* to the Completion Deed (which is said by the Builder to have further expanded the inconsistent dispute resolution process contemplated by the Mediated Agreement).

Mediated Agreement

75 The first thing to observe is that the Mediated Agreement did not involve the Builder as a contracting party.

76 Clause 4(a) of the Mediated Agreement sets out a proposal to deal with ongoing disputes concerning the project. It is, in one sense, an aspirational agreement, which addresses the concept of a possible 'all in' arbitration to capture and resolve all outstanding claims and disputes, including disputes involving the Builder, and the resolution of court proceedings and related arbitrations commenced by Project Co. By aspirational, I mean that given the Builder is not a party to the Mediated Agreement, the "*single arbitration process*" in cl 4(a) is necessarily subject to the Builder's agreement. In any event, it is clear by its terms that cl 4(a) does not affect the operation of cll 69-72 of the Construction Contract.

77 Clause 4(b) expressly envisages a situation where the Builder did not agree to the single arbitration process. If this was the case, cl 4(b) provides that:

(a) the parties would take the necessary steps to consolidate or (if not possible) "*streamline*" the then existing Defects Arbitration and Defects Compensation Arbitration;

(b) the State and Project Co would establish a further consolidated arbitration process being one that captured all other outstanding claims and disputes, which was to be defined in a schedule (which was never completed), before Mr Lindgren;

(c) the Project Arbitration Agreement, except as otherwise agreed by the parties, would govern that further consolidated arbitration process; and

(d) the parties would use their best endeavours to consolidate or otherwise, if not possible to consolidate, streamline, new claims which may arise.

78 Clause 4(b) of the Mediated Agreement thereby contemplates the Builder's participation in this process *if* the Builder agreed to become involved. New claims by the Builder, in this circumstance, would be streamlined with a new dispute process, and it was not possible for other disputes to be consolidated with the then extant Defects Arbitration and Defects Compensation Arbitration unless the Builder agreed to do so.

79 As would already be clear, the regime agreed between the State and Project Co could only be fully executed with the Builder's cooperation and, if that cooperation was not available, the proposal was limited to those steps that could be taken using the best endeavours of the contracting parties. It should also be noted that, to the extent that the State and Project Co agreed to establish a single arbitration process for all extant claims between them, no

schedule for the purpose of cl 4(b) was delivered and, accordingly, absent the delivery of such a schedule, there was nothing that could have affected any extant "*pass-through*" claims involving the Builder, such as to impact on its rights under cl 79.16 of the Construction Contract.

80 The agreement between Project Co and the State in the Mediated Agreement did not interfere with the previously agreed Construction Arbitration Agreement as between Project Co and the Builder such as to alter the Builder's legal rights (as might be thought obvious given it was not a party to the Mediated Agreement). If one was to assume, however, that cll 4(a) and/or 4(b) did somehow interfere with the Builder's rights and entitlements under the Construction Arbitration Agreement, the anticipated, or actual, breach of cl 1.8 of the Construction Contract may well have given rise to a claim which could be agitated by the Builder, for example, by seeking to enjoin Project Co from acting inconsistently with the Construction Arbitration Agreement or instituting a claim for damages; but this is beside the point. I cannot see how such a breach by Project Co would have the consequence that the Construction Arbitration Agreement ceased to have effect in any relevant respect (it is notable, in this regard, that the Builder was unable to identify any authority which stood for the proposition that inoperability has been established in circumstances similar to those existing here). It cannot be the subjective intentions or wishes of Project Co that are determinative; rather, there must be an objective assessment of whether the Construction Arbitration Agreement continued to have legal force as between the Builder and Project Co. In short, if it remained legally enforceable (which seems to me to be the case), I do not understand how it ceased to have effect with the consequence that it became inoperative.

Completion Deed

81 The same can be said of the Completion Deed (again, an agreement to which the Builder was not a contracting party). Clause 4 contains a detailed process to implement the proposal described in cl 4 of the Mediated Agreement, albeit with some differences. Clause 4(a) requires the State to give its consent to the consolidation of the Defects Arbitration and the Defects Compensation Arbitration, and cll 4(b) and 4(c) address similar points.

82 Clause 4(d) addresses the establishment of a further consolidated arbitration process to resolve the outstanding disputes between Project Co and the State then extant before Mr Lindgren. This clause expressly states that the disputes will be governed by cl 72 of the Project Agreement, but will be subject to the points agreed in cll 4(d)(3)-4(d)(10) of the

Completion Deed. Clauses 4(d)(8) and 4(d)(9) require the contracting parties, where possible, to consolidate new claims and disputes going forward, with the exception of "*Third Party Disputes*", into the single consolidated arbitration, but acknowledged that this may not be practicable. In accordance with cl 1.1 of the Completion Deed, "*Third Party Disputes*" are defined to include "*pass-through*" claims in the case of claims against the State, within the meaning of cl 79.16 of the Construction Contract. In this way, the process deliberately excludes pass-through claims within the meaning of the Construction Contract, meaning that any claims by Project Co against the State which would be pass-through claims by the Builder are not captured by the process. Third Party Disputes are instead addressed in cl 4(e) which provides that if the relevant third party does not consent to consolidate the dispute into the single consolidated arbitration, the State and Project Co agree to take all necessary steps to keep the parallel dispute processes, both upstream and downstream, streamlined and running in parallel, similarly to cl 4(b) of the Mediated Agreement.

83 Again, cl 4(e) of the Completion Deed is not inconsistent with the continued operation of the Construction Arbitration Agreement. Further textual support for this conclusion is to be found in cl 12.3(d)(3) of the Completion Deed and contextual support is found in cl 2(b) of the contemporaneous Consents and Acknowledgement Deed. Subclause 12.3(d)(3) of the Completion Deed provides as follows:

> **12.3 Inconsistency**
>
> …
>
> (d) For the avoidance of doubt, nothing in this deed:
>
> > (3) affects the State's, Project Co's or the Builder's rights and entitlements under the Project Agreement or the Construction Contract, as applicable.

84 Moreover, subclause 2(b) of the Consents and Acknowledgement Deed provides:

> **2 Consents and acknowledgement**
>
> …
>
> (b) Notwithstanding any provision of the [Completion Deed] (including clause 13.8 of the [Completion Deed]), the parties acknowledge and agree that, to the extent that any consents from third parties pursuant to the Project Documents in respect of the entry into and performance of the [Completion Deed] are required (if at all), the relevant provisions of the [Completion Deed] in respect of which those consents are required will not come into full force and effect unless and until each party has received in form and of substance satisfactory to it evidence that all necessary consents pursuant to the Project Documents in respect of the entry into and performance of the [Completion Deed] have been obtained.

Conclusion as to Inoperability

85 Having determined that the proposal to enter into (or entry into) these subsequent dispute resolution arrangements between Project Co and the State did not have the effect of causing the Construction Arbitration Agreement to cease to have effect, I reject the Builder's contentions as to inoperability of the Construction Arbitration Agreement. This being the only basis upon which the Builder continued in final submissions to resist the stay sought by Project Co under s 8 of the CA Act, it follows that Project Co is entitled to a s 8 stay.

86 In proceeding to determine and then reject the Builder's argument as to operability, I am conscious of what the Full Court said in *Hancock* about whether a judge hearing a stay application should proceed to determine a proviso question or leave that issue to an arbitrator. Unlike *Hancock*, this was not a case where an attack on the arbitration agreement could become entangled with broader validity claims, and argument on the proviso issues was relatively narrow and of short duration. With differing degrees of enthusiasm, each party on the Stay Applications urged upon me the determination of this issue, and I considered it appropriate that I exercise my discretion to proceed to do so.

87 Given that Project Co is entitled to a stay pursuant to s 8 of the CA Act, it is unnecessary to deal with issue 3 (identified at [57(3)] above), which was Project Co's alternative contention that it was entitled to a discretionary stay because the claims in the proceeding overlap or are ancillary to those in existing arbitral proceedings.

D.4 The State Application

88 As I have already indicated, an application for a mandatory stay is made under s 8 of the CA Act by the State, by way of an interlocutory application filed on 13 November 2017. Insofar as the State's stay application is concerned, three of the four requirements for a mandatory stay, which I have identified at [43] above, are in dispute. I need not say anything further as to the issue of operability. It is obvious from what I have already said that this argument is rejected insofar as it is advanced against the State. As can be seen from the issues document, the substance of which has been extracted at [57] above, this leaves both a procedural and substantive issue for me to determine.

89 It is common ground that, in the event that the State fails to surmount the procedural hurdle, it is unnecessary for me to form a concluded view in relation to the issue that has been raised as to whether or not the claims made by the Builder against the State are the subject of an

arbitration agreement. For reasons that will emerge, it is unnecessary to go into the detail, but as the terms of issue 5 (see [57(5)] above) try to make clear, the substantive issue revolves around a contention by the State that the Builder's claims against it constitute a breach of warranties and undertakings in the Builder Direct Deed, and whether such a dispute is to be resolved in accordance with what the State alleges is the "Builder Direct Arbitration Agreement", which arbitration agreement is said to exist (somewhat indirectly) because of the reference to the Project Agreement in the Builder Direct Deed. This is advanced together with a contention that the State is claiming "*through and under*" Project Co in respect of the releases relevant to some of the claims provided by the Builder in the Construction Contract.

D.4.1 Mandatory Stay – A Procedural Issue

90 As can be seen by the terms of s 8 of the CA Act, a stay application under the CA Act must be made not later than when a party makes its first statement on the substance of the dispute. This requirement is consistent with the Model Law and, in this regard, the position is somewhat different than that under s 7 of the *International Arbitration Act 1974* (Cth) (**IA Act**). Under the IA Act, similar but different considerations as to timing often have arisen as it is well established that the right to apply for a stay is a private right and, as such, that it may be waived. A number of cases have considered the issue of whether a waiver occurred by virtue of a party's conduct in litigation: see, for example, *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (Austin J) and *La Donna Pty Ltd v Wolford AG* [2005] VSC 359; (2005) 194 FLR 26 (Whelan J).

91 Under s 8 of the CA Act, however, the issue is not whether a party seeking a stay may have abandoned its right to seek a stay by a failure to reserve its position or by its conduct in contesting or acquiescing to the conduct of proceedings, but rather whether the statutory precondition has been satisfied of bringing an application not later than when submitting the party's first statement on the substance of the dispute. The issue of what content should be given to these statutory words was the subject of examination by Slattery J in *Gilgandra Marketing Co-Operative Ltd v Australian Commodity & Marketing Pty Ltd* [2010] NSWSC 1209, and later by Mitchell J in *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52. In the latter case, Mitchell J observed that (at [92]-[93]):

> The only Australian authority to which I have been referred dealing with the relevant language of Art 8 of the Model Law is the decision of Slattery J *Gilgandra Market Cooperative Ltd v Australian Commodities and Marketing Pty Ltd* ([2010] NSWSC

> 1209). In that case the defendant's opposition to an application for an interim injunction, during which it stated its position on the substantive questions in dispute, was found to constitute the defendant's 'first statement on the substance of the dispute'. The subsequent stay application was held to have been made out of time. In so holding, Slattery J reviewed a number of New Zealand cases dealing with the provision, including *Pathak v Tourism Transport Ltd* ([2002] 3 NZLR 681).
>
> I accept the defendant's submission that there is a common feature of the examples of a 'first statement on the substance of the dispute' found in ***Gilgandra*** and cases referred to therein. The common feature is that the statements contained what the party in question said about how the substantive dispute in the primary proceedings should be determined. That accords with the natural meaning of the language used in s 8 of the Act.
>
> (Bolding in original)

92 The extract above refers to a number of decisions in New Zealand which were examined by Slattery J in *Gilgandra* at [49]-[53]. His Honour considered that those authorities supported the principle that a respondent which opposes interim relief and fails to seek a stay or protest jurisdiction in respect of a substantive dispute at an early time would be prevented from seeking a stay. The consideration in *Gilgandra* should also be supplemented by reference to the approach of other courts dealing with cognate provisions of the Model Law.

93 In *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] SGCA 34; [2008] 4 SLR 460, the Court of Appeal of Singapore summarised the approach in the United Kingdom and then observed (at [55]):

> It now seems to be fairly settled that a "step" is deemed to have been taken if the applicant employs court procedures to enable him to defeat or defend those proceedings *on their merits* and/or the applicant proceeds, from a procedural point of view, beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration.
>
> (Emphasis in original)

94 Similarly, in *Louis Dreyfus Trading Ltd v Bonarich International Group Ltd* [1997] 3 HKC 597 at 606, Waung J held that the reference in the Model Law to a statement submitted to a court is a reference to some form of document which is "*specially submitted by a party to the court which contains what that party says on the substance of the dispute*".

95 Here, of course, it is beyond doubt that the State provided a statement on the substance of the dispute (being its response to the ASOC, filed on 25 September 2017) at a time prior to filing its stay application on 13 November 2017. In contending that the procedural bar had been surmounted, Dr Bell SC, who appears on behalf of the State, made reference to several matters, all of which were of the same nature. They went to a contention that the position of

the State in respect of its s 8 stay application had been reserved. It is unnecessary for me to comment on whether this would have been sufficient, given the express and plain terms of s 8 of the CA Act (which require an application for referral for arbitration to be made not later than the filing of a formal document, such as a response, containing the party's first statement on the substance of the dispute), because, for reasons I will explain, I do not consider that the position of the State was reserved.

96 In any event, the *first* matter relied upon by Dr Bell was a letter dated 16 August 2017, sent by the solicitors for the State, Lipman Karas. In that letter, the State's solicitors were responding to a proposed timetable for the progress of the proceeding in this Court. It was contended by the State's solicitors that it was not an efficient use of the time of the Court or the parties for the respondents to put on a response to the then current concise statement before the Builder:

> properly articulated [its] claims in a formal pleading, and any summary dismissal, strike-out and stay applications have been resolved.

97 This letter was sent in the context of Project Co making it plain that any steps taken in relation to the proceeding the following day were expressly without prejudice to Project Co's right to bring an application for a stay. Against that background, the letter went on to say that:

> We also consider that it is premature to timetable the matter beyond the determination of the foreshadowed summary dismissal, strike-out and stay applications in circumstances where, until those applications are resolved, it is uncertain whether the proceedings will continue in the Federal Court or at all.

98 I infer that the reference to whether the "*proceedings will continue in the Federal Court or at all*" was to the already flagged possibility that Project Co would be making an application for a stay pursuant to s 8 of the CA Act. Certainly, at this time, the State's position had been made plain as a pikestaff: it was asserting that the concise statement was materially deficient and did not provide adequate procedural fairness, particularly in the context of serious allegations being made of intentional wrongdoing. The following day, on 17 August 2017, the solicitor for the State, Mr Foreman, swore an affidavit, which was before the Court at the first case management hearing on 18 August 2017. At [86] of this affidavit (Exhibit B, p 1264), Mr Foreman deposed that:

> As is clear from paragraphs 69 to 83 above [which refer to the then existing Defects Arbitration and Defects Compensation Arbitration], to the extent that the Builder's claims are not amenable to summary dismissal or strike out, they are inextricably linked with matters which are the subject of pending arbitrations, or arbitration

agreements.

99 Previously, at [10] of the same affidavit (Exhibit B, p 1243), Mr Foreman deposed to the fact that the claims made by the Builder in this proceeding were "*inextricably tied to disputes which are the subject of the contractual dispute resolution clauses*". It was further said in evidence that those disputes were already the subject of arbitrations between the State and Project Co, and between Project Co and the Builder.

100 Dr Bell referred to the arbitrations, including the Defects Arbitration and the Defects Compensation Arbitration, at the first case management hearing. He also referred to the evidence of Mr Foreman and his apprehension of overlap between the allegations in the concise statement and the underlying matters which are to be the subject of determination by Mr Lindgren in the arbitrations. This was said to be a factor which made it highly desirable for the Builder's claims to be pleaded with some precision. Dr Bell then went on to say (Exhibit B, p 36):

> But it's quite important for the court – and all the parties – actually, they have a much more precise appreciation about the degree and extent of any overlap than we currently do because that may affect all sorts of matters, including the case management of this proceeding going forward and it might be affected by Mr Lindgren's timetable and when he expects to make determinations and the like.

101 Again, in this context, reference was made to the perceived need for a more orthodox articulation of the claim made in the proceeding at the outset (see Exhibit B, pp 36-7). Dr Bell then returned to the nature of the claims made against the State later in his submissions; he made reference to State's view that "*there's a real issue about a duty of care for the negligent misstatements*". The following was then said (Exhibit B, p 39):

> Now, you see why we're interested in – whether a duty of care would be there. But – so we do anticipate strongly bringing an interlocutory, but we don't want a situation where we're doing it without fully appreciating the case which is sought to be – that wouldn't be efficient for the parties or for the court.

102 Earlier, Mr Hyde, who appeared for the Builder, referred to [86] of Mr Foreman's affidavit (extracted at [98] above), and noted that the claims made by the Builder were linked to various arbitral issues. After making reference to that paragraph, Mr Hyde said (Exhibit B, p 21):

> And it, in effect, should be some sort of stay or prevention of my client running those claims in this jurisdiction. A similar argument has been foreshadowed by [the IC] that they assert that the claims made by my client against the so-called independent certifier are somehow caught by some arbitral relief.

103 Certainly, my clear impression during the course of the first case management hearing was that complaint was being made by the State as to its inability to understand the precise claims made by the Builder against it and that the remedial response to this alleged deficiency should be to require the Builder to plead out either all or part of the claim made against the State. I was acutely aware from what Mr Collins had said of the position of Project Co being expressly reserved (notwithstanding that at that time the position of Project Co was to indicate that it wished, with the consent of all parties, not to bring an application for a stay even though it had by that stage already filed an interlocutory application seeking such a stay). To be frank, I did not turn my mind to the position of the IC one way or the other, but I certainly saw a distinction being made between the position taken by Project Co and the position taken by the State.

104 Irrespective of whether or not there was an asymmetry of understanding between the bench and the bar in relation to this issue, the fact remains that I was not persuaded to make an order that the Builder file a statement of claim. I did, however, put in place case management orders which required further specification of the Builder's claims (which was provided by the ASOC) and ordered for a response to that document to be filed which set out an outline of the substance of the case to be advanced in response to the Builder's claims. As we know from the chronology, the document setting out the State's position was filed on 25 September 2017, prior to its filing of an application for a stay.

105 The *second* matter called in aid by the State is a reservation contained in [1] of its response to the ASOC. That reservation was in the following terms:

> 1. This response is made by [the State] without prejudice to their contention that:
>
> > 1.1 the [ASOC] is inadequate to identify and articulate the elements necessary to make out the causes of action purportedly sought to be relied upon and inadequate to give fair notice of the case to be advanced, especially in relation to a claim of the supposed financial magnitude as the present claim; and
> >
> > 1.2 the underlying claims foreshadowed by the ASOC should be struck out, summarily dismissed or otherwise stayed.

106 My impression when I read that paragraph prior to the second case management hearing was that it related to another matter that had been raised at the first case management hearing, namely that there was an allegation of unlawful means or deliberate infliction of economic harm by the State, which was described as "*extremely serious allegations to make against the Crown*" (Exhibit B, p 41). Indeed, when the interlocutory application was ultimately filed,

the contention that a stay was required was maintained on the basis that an inadequately articulated claim of that type was being made, that this constituted an abuse of process and that, as a consequence, that aspect of the claim "*ought be permanently stayed to put that abuse to an end*" (see State's Submissions in Chief at [193]).

107 Although it may be that the State always intended to file an application for a discretionary stay in the event that a successful s 8 stay application was made by Project Co, I did not understand, prior to the filing of the State's response, that the position of the State was being reserved to seek its own mandatory stay. The first time I understood that a mandatory stay was possibly being sought by the State was when its stay application was filed.

108 In these circumstances, I am not satisfied that the State has requested a referral to arbitration "*not later than when submitting [its] first statement on the substance of the dispute*" within the meaning of s 8 of the CA Act. The fact is that the State did not make an application prior to filing its first response on the substance of the dispute. Moreover, to the extent relevant (see [95] above), in contradistinction to the position taken by Project Co, there was no reservation of the position of the State in relation to a mandatory stay. I note for completeness that no procedural point was raised by the Builder against Project Co, as Project Co had actually filed its interlocutory application on 17 August 2017 and its response to the ASOC on 25 September 2017 (and had previously expressly reserved its position unequivocally – see Exhibit B, pp 23-4).

109 It follows that the procedural condition has not been fulfilled, and on that basis I reject the State's application for a stay pursuant to s 8 of the CA Act.

D.4.2 The Substantive Issue as to the Existence of an Agreement

110 As contemplated by the issues document, given the finding I have made concerning the procedural issue, it is not necessary for me to form a view as to whether or not an arbitration agreement as contended for by the State exists.

D.4.3 The Discretionary Stay

The Arguments

111 There are a number of considerations that the State and the Builder urge upon me in the exercise of my discretion as to whether or not a discretionary stay should be ordered. The State submits that the logical starting point for the Court's consideration is the determination of Project Co's application for a stay pursuant to s 8 of the CA Act and to consider the

consequences that should flow from the success of that application. As can be seen from the way in which the issue is framed, there are a number of matters upon which the State relies. These are set out in the subheadings to issue 6 (see [57(6)] above) and include the following, which received the most emphasis during the course of oral submissions:

(a) the claims made by the Builder against the State are ancillary to matters the subject of Project Co's stay;

(b) the arbitrator's award will be determinative or largely determinative of the claims made in the proceeding against the State;

(c) there would inevitably be potential savings in time or cost should a stay be ordered, removing duplication for parties, experts and legal advisers;

(d) it is only a temporary stay of a monetary claim and accordingly there is no real prejudice to the Builder.

112 I will return to an assessment of these matters below, but I have deliberately left out of this list two matters which I do not think weigh heavily in the discretionary balance, and one matter which I consider must be kept firmly in mind.

113 The *first* matter that I regard as not having great significance, at least insofar as the Defects Arbitration and the Defects Compensation Arbitration are concerned, is that there is a risk of inconsistent findings on overlapping facts. There is no realistic prospect whatever of me making any findings on any facts relating to defects, prior to them being the subject of an arbitrator's award. Indeed, if the Defects Arbitration and the Defects Compensation Arbitration had been the only extant arbitrations, then I would have regarded the determination of applications for a discretionary stay to be a relatively straightforward decision. That is because the usual case management orders made by the Court to progress this proceeding (starting with the filing of a statement of claim) would have taken effect in such a manner as to mean that any arbitrator's award in relation to these arbitrations would not have interfered with the interlocutory progress of this proceeding in any material sense, there thus being no risk of inconsistent findings on overlapping facts. It is the existence of the Second Arbitration and the uncertainty regarding when it will be concluded that creates real complications.

114 The *second* matter which I do not believe is of great significance is the undertaking that the State is willing to undertake to submit to the arbitral proceedings. Although this may be an

important consideration in other cases, if the State is correct, and the Second Arbitration occurs as is proposed, it seems to be accepted, absent the undertaking, that all relevant parties will be bound by the findings made in the Second Arbitration, with the exception of the IC.

115 The one factor not given a special prominence in the written submissions by the parties, which does seem to me to be of some real significance, is the requirement of the Court to have regard to the overarching purpose mandated by s 37M(1) of the FCAA when exercising its power, including its discretionary power, to grant a stay. I have elsewhere written about the case management "*revolution*" that was supposed to be ushered in by the insertion of Part VB of the FCAA, and the imperfect recognition of the significance of that change: see *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 at [1]-[4] and [48]-[50].

116 In exercising the discretion it is also necessary to take account of the matters called in aid by the Builder.

117 The matter that received particular emphasis in the course of oral submissions related to the unusual circumstances in which the Second Arbitration came into being following the first case management hearing. Mr Hyde referred, with some force, to the fact that there was a certain irony about the State seeking the Court intervene to prevent a problem caused by duplication of proceedings when the State had made a decision to create the duplication by asserting, after the first case management hearing, a contractual right which it had previously not asserted. This was compounded, so the argument went, by tardiness, given the fact that the Builder Document had been served some 10 months earlier.

118 Mr Hyde referred to the fact that the Builder could not be forced into falling in with the Second Arbitration in the way in which it had been designed by the State with the subsequent participation of Project Co. In this regard, Mr Hyde argued that his client could not be forced to agree to the two arbitrations which comprise the Second Arbitration being heard together, nor could it be forced to agree to the appointment of Mr Lindgren as the arbitrator. Mr Hyde also pointed to the fact that there was a difference between the relief sought in both the arbitrations, such that they could not be properly characterised as being perfectly mirrored arbitrations. He additionally pointed to the fact that the IC was not a party.

119 The assertion was made by the Builder in written submissions that a risk of multiplicity of proceedings is never a wholly decisive ground for the granting of a stay and that this fact alone cannot automatically mean that a stay must be granted or denied, especially where the

parties have, by contractual agreement, deliberately arranged their dispute resolution procedures in such a fashion that such risks would almost inevitably materialise (see *Cars & Cars Pte Ltd v Volkswagen AG* [2009] SGHC 233; [2010] 1 SLR 625 at [48]-[49] per Andrew Ang J). Allied to this was the fact that the State had deliberately arranged its contractual relationship with the Builder in such a fashion as to not enter into a direct arbitration agreement *inter se*.

120 Further, the Builder pointed to:

(a) the fact that when one comes to a discretionary stay, the relevant starting point is that the jurisdiction of the Court has been properly invoked and that a party is entitled to have its disputes with another quelled by the exercise of judicial power; and

(b) in any event, the absence of cogent evidence to establish that there would be any significant savings of time or cost of any significance in the event that the stay was granted.

Assessment

121 Returning to the matters particularly relied upon by the State (see [111] above), they reflect the matters which the authorities indicate the Court should consider in determining whether or not to stay a proceeding, including:

(a) whether the non-arbitral matters are ancillary to the matters the subject of the mandatory stay (see *Recyclers* at 434-435 [65]-[66] and *Hancock* at [333]-[335]); and

(b) whether the arbitral matters will be determinative of the matters before the Court (*Recyclers* at 434 [65]).

122 In this regard, I accept that: (a) the claims made by the Builder against the State are ancillary to matters the subject of Project Co's stay; (b) the arbitrator's award will be largely determinative of, at least, the factual assertions made in the proceeding against the State; (c) there would, it seems to me clear, likely be savings in time or cost, at least in the short term, should a stay be ordered, removing duplication for experts and legal advisers; and (d), if granted, a temporary stay of a monetary claim is unlikely to visit any significant prejudice upon the Builder.

123 Having said this, I confess that I have considerable sympathy for the proposition that there is a certain irony in the State deciding to commence further arbitral proceedings only after the commencement this proceeding, particularly after the first case management hearing, and then relying on the commencement of those arbitral proceedings (together with the other proceedings commenced by Project Co) to suggest that the duplication should cause the Court to put in place a remedial response. Although Dr Bell made the point in reply that it cannot be the case that some sort of 'first in time' policy mandates whether or not a stay should be granted (because the CA Act and the Model Law expressly recognise the fact that proceedings could already be on foot), for some reason there has been an apparent change of position by the State, and the chronology has caused me some disquiet.

124 However, the fact is that whatever the contractual background and the procedural history, the arbitrations (including the Second Arbitration) exist and I have granted a mandatory stay in favour of Project Co. Given the matters referred to in [122] above and, in particular, the close factual overlap between the issues in this proceeding and the arbitrations (with the consequence that the arbitral matters will be largely determinative of a number of aspects of the claims made by the Builder), I consider that the proper exercise of discretion is to grant a discretionary stay as sought by the State. This is notwithstanding that I accept the force of the general proposition that the starting point of the analysis is that a party, properly invoking the jurisdiction of the Court against another, is generally entitled to have its claims determined by the exercise of judicial power.

125 Such a result also tends to facilitate the overarching purpose as it will, at the very least, have the effect of resolving the issues with promptitude and very substantially narrowing the matters in issue in this proceeding. Although, of course, the Builder is correct to point to the fact that it cannot be forced to agree to an arbitrator proposed by the State or Project Co, nor can it be forced to consent to procedural directions that would facilitate the Second Arbitration occurring in the manner contemplated by the State, this does not seem to me to be a point of much significance. If I thought there was a likelihood of the highly undesirable course of the Second Arbitration proceeding in such a way as to give rise to a risk of conflicting arbitral awards, then, as I pointed out to Mr Hyde, I would certainly consider the possibility of protecting against that outcome (perhaps by making orders, in accordance with s 54A of the FCAA, for inquiry and report by Mr Lindgren on the facts the subject of the arbitration to which he has been appointed). In any event, I am confident that such an

eventuality will not occur, although I understand the context in which the Builder's submission was made.

D.5 The IC Application

126 The matters relied upon by the IC in order to seek a discretionary stay are identified in issue 8 (see [57(8)] above). There was no real attempt to distinguish between the positions of the State, insofar as it related to a discretionary stay, and of the IC. Essentially the same issues arise in relation to the claim made by the Builder against the IC being ancillary to the claims made by the Builder against the State and Project Co, and there is the fact that there is an extensive overlap of issues. Moreover, unlike the State, it cannot be argued that the IC is responsible for any duplication. Accordingly, for the reasons I have already explained in the context of the State's application, I would also order a discretionary stay in favour of the IC.

E CONCLUSION AND COSTS

127 An issue arises as to whether the proposed order in relation to the application made by Project Co should be made under the *Commercial Arbitration Act 2010* (NSW) or the *Commercial Arbitration Act 2011* (SA), 'picked up' and applied as surrogate federal law pursuant to s 79 of the *Judiciary Act 1903* (Cth). The Builder and Project Co had different views. The Builder is correct and the order should be made under the New South Wales legislation, given the relevant order will be made by the Court exercising federal jurisdiction in New South Wales: see *Pedersen v Young* (1964) 110 CLR 162 at 165 per Kitto J; 166 per Taylor J; 167 per Menzies J; *Northern Territory of Australia v GPAO* [1999] HCA 8; (1999) 196 CLR 553 at 588 [80] per Gleeson CJ and Gummow J.

128 Project Co seeks a special costs order in relation to the proceeding brought against it up until the date of the determination of its stay application. It relies principally on the fact that the proceeding was brought in the face of the bargain struck between the parties to agree to arbitrate, and that, as a consequence of the proceeding being commenced it was caused to incur costs that it would otherwise not have been required to incur. Additionally (and I assume that this is suggested to amount to behaviour which could be described as 'unreasonable' within the meaning of that term when used in the context of a special costs order), there is a suggestion that the way in which the case has been articulated in both the concise statement and the ASOC has been deficient and has caused Project Co to be vexed as to the nature of the case brought against it.

129 The position of both the State and the IC is less ambitious. Both seek that costs be paid on the ordinary basis in respect of their interlocutory applications insofar as they sought a stay (that is, other than the costs incurred in relation to the Further Applications, which will be the subject of separate costs orders).

130 It is trite that the Court has broad power to award costs, including making special costs orders under s 43 of the FCAA. It has often been said that the discretion as to costs is unfettered but, since the introduction of Part VB of the FCAA, in exercising the discretion as to costs, s 37N(4) of the FCAA requires the Court, "*in exercising the discretion to award costs in a civil proceeding*" to take account of any failure by the parties to comply with the duty imposed by s 37N(1) to "*conduct the proceeding…in a way that is consistent with the overarching purpose*".

131 I do not consider that I should make an award of costs in favour of Project Co in relation to the proceeding generally, nor do I consider that I should make any order for costs in favour of Project Co otherwise than on a party/party basis. Although it is correct that the position of Project Co on the Stay Applications has been vindicated (in the sense that it is entitled to a mandatory stay), this is a case where, as I previously indicated, the initial position adopted by Project Co was to acquiesce (in the informal sense of indicating that it wished) to have this matter litigated in this Court. This later changed for reasons that are unnecessary to explore. This seems to me to be a pointer that it was not unreasonable for the Builder to consider that there was a very real possibility that a stay would not be sought relying on the Construction Arbitration Agreement.

132 Moreover, relevant to the consideration of the overarching purpose, I do not think that there is any substance in the suggestion that there has been a failure by the Builder to conduct the proceeding in a way that has denied procedural fairness to Project Co. Although I formed the view, immediately prior to the second case management hearing, that it was appropriate that the Builder proceed to file a statement of claim, this did not mean that the course of adopting the expedient of a concise statement was in any way inappropriate. The Court, in seeking to give effect to the policy objectives of Part VB of the FCAA, encourages the use of concise statements. Although, at an appropriate time during the course of the proceeding, it may be that all or parts of the claim should be the subject of a pleading, the fact that at the second case management hearing such an order would have been made (absent the suggestion of a stay) demonstrates no failure on behalf of the Builder. Accordingly, in my view, Project Co

is entitled to an order in its favour for the costs of the interlocutory application (but not for the balance of the proceeding).

133 The orders sought by both the State and the IC can, essentially, be boiled down to the proposition that costs should follow the event.

134 The presently relevant approach is as was explained by Gleeson CJ, Gummow, Hayne and Crennan JJ in *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 at 62-63, that although there is "*no absolute rule*", one of the "*general propositions*" regarding an award of costs is that "*the award is discretionary but generally that discretion is exercised in favour of a successful party*" (see also *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at 88-89 [40]-[41] per Gaudron and Gummow JJ).

135 In relation to the IC, the decision is straightforward as there is no reason why the IC should not have the discretion exercised in its favour, being a successful party.

136 The position in relation to the State is more nuanced. The State failed, for reasons I have explained, in its contention that it was entitled to a mandatory stay pursuant to s 8 of the CA Act, and a significant part of the submissions made by the State was directed to the contention that it was entitled to such a stay. These matters call for a broad-brush exercise of discretion and in all the circumstances I consider that the State should be entitled to 60 per cent of its costs of its interlocutory application.

137 No application has been made for a lump sum costs order or for an order that the costs be paid otherwise than in the usual course, namely at the conclusion of the proceeding. In relation to the costs of the Further Applications, I propose to reserve those costs, consistent with the intention that following the lifting of the temporary stay and the pleading of the Builder's claims, and in the event that either the State or the IC wish to seek summary disposal of those claims and in the event that they succeed on the same arguments that they have already articulated, they will be free to seek their costs and that will be reflected in an appropriate costs order.

138 Given the time of year and the desirability, given the pending directions before the arbitrator, to determine the question of whether or not the stays should be granted with alacrity, these reasons were delivered *ex tempore*. Even so, they are lengthy. In the circumstances, it seemed to me appropriate that I should make an order extending the time for the filing of any application for leave to appeal until 14 days after these revised reasons had been published.

To the extent necessary, I dispensed with the need for there to have been compliance with the requirements of FCR 35.14 prior to the time for leave to appeal being extended. I did so because if any application for leave to appeal is made, it is better that a draft notice of appeal be prepared with the benefit of my reasons, in writing, revised from the transcript.

139 Accordingly, I make the following orders:

(1) The claims against the first respondent detailed in the originating application and the applicant's amended statement of case dated 12 September 2017 be referred to arbitration and the proceedings in this Court stayed pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW), on the basis that the claims are the subject of a valid and binding arbitration agreement.

(2) The claims against the second, third and fourth respondents outlined in the originating application and the applicant's amended statement of case dated 12 September 2017 be stayed on a temporary basis pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) until the conclusion of the arbitrations currently being case managed by the Hon Kevin Lindgren QC (being ACICA Cases 2017-103, 2017-104 and 2017-110) and also ACICA Case 2017-111.

(3) The applicants pay the first respondent's costs of the interlocutory application filed on 17 November 2017 and, to the extent required, leave be granted to the first respondent to seek taxation of its costs of its interlocutory application pursuant to Division 40.2 of the *Federal Court Rules 2011* (Cth) (**FCR**).

(4) The applicants pay 60 per cent of the costs incurred by the second and third respondents in relation to the interlocutory application filed 13 November 2017 (other than any costs incurred in relation to the relief sought in prayer 3 of the second and third respondents' interlocutory application).

(5) The applicants pay the costs of the interlocutory application of the fourth respondent filed on 15 November 2017 (other than any costs incurred in relation to prayer 2 of the fourth respondent's interlocutory application).

(6) The costs in relation to prayer 3 of the second and third respondents' interlocutory application and in relation to prayer 2 of the fourth respondent's interlocutory application be reserved.

(7) The time for filing any application for leave to appeal from these orders be extended to a date 14 days after the date upon which the revised reasons for judgment are

published to the parties and, to the extent necessary, the requirements of FCR 35.14 are dispensed with.

(8) Liberty be granted to the applicants and the second to fourth respondents to relist the proceedings by application to the Associate to Lee J upon expiry of the temporary stay referred in in order 2.

I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 12 January 2018

SCHEDULE OF PARTIES

NSD 1312 of 2017

Respondents

Fourth Respondent: DONALD CANT WATTS CORKE PTY LTD

Annexure A

No.	*Builder's Claim*	*Subject of/factual overlap with existing arbitration proceedings*	*Subject of existing arbitration agreements under Project Documents*	*Builder comments*
1	**Disputed Defects** • State's alleged "unconscionable", "wrongful" and/or "unlawful" conduct in relation to Disputed Defects, see ASOC [32]-[37], [69], [78], [83]; • See Builder's Defects Particulars;[1] • See Builder's Economic Harm Particulars, [1(d)];[2]	• Defects Arbitration (being ACICA Case 2016-99 as between the State and Project Co, and ACICA Case 2017-102 as between Project Co and the Builder) and Defects Compensation Arbitration (being ACICA Case 2017-103		• Agree that, broadly, there is a factual overlap (in ACICA Case 2017-110 and 2017-111 at paragraph 16.13) • Paragraph 16.13 does not refer to the State's conduct as being "unconscionable" or "unlawful".

[1] Third Foreman Affidavit, SBF-41
[2] Third Foreman Affidavit, SBF-44

	• See Builder's Loss and Damage Particulars, [5.4], [7.2], [7.3][3]	as between the State and Project Co, and ACICA Case 2017-104 as between Project Co and the Builder), before Mr Lindgren		
2	**Safety Defects** • State's alleged "wrongful" and/or "unlawful" conduct in notifying existence of safety defects, see ASOC [43], [78], [83]; • See Builder's Economic Harm Particulars, [1(e)]; • See Builder's Loss and Damage Particulars, [7.3]	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren (see [16.13] of State's Notice of Arbitration);[4] • ACICA Case 2017-111, as between Project Co and Builder	• Challenge to IC/Project Co determination of EOT claims re notification of safety defects, per CC cl 42.10/42.22, subject to Construction Arbitration Agreement; • Challenge to Project	• Agree that, broadly, there is a factual overlap (in ACICA Case 2017-110 and 2017-111 at paragraphs 16.13 and 16.14).

[3] Third Foreman Affidavit, SBF-45
[4] Second Foreman Affidavit, SBF-30 p. 132

			Co's entitlement to notify the safety defects under the Construction Contract and/or as to existence of the safety defects[5], subject to Construction Arbitration Agreement	
3	**EPAS (**Enterprise Patient Administration System) • Allegations concerning alleged 'EPAS Representations' and 'EPAS Delays', see ASOC [29]-[31], [38]-[42], [47]-[48], [55]-[58], [61]- [69], [81(b)];	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[7] • ACICA Case 2017-111, as between	• General dispute as to what the State was required to provide to Project Co under the Project Agreement/what Project was required to provide the Builder	• Agree that, broadly, there is a factual overlap in relation to the first point in the column to the left and (refer to section 16.1 to 16.6 of ACICA Case 2017-110 and ACICA

[5] See Builder's Loss and Damage Particulars, [7.3]

	• See Builder's EPAS Particulars;[6] • See Builder's Loss and Damage Particulars, [2], [4], [5]	Project Co and Builder	under the Construction Contract in terms of EPAS, subject of both the Project Arbitration Agreement and the Construction Arbitration Agreement; • Although presently unclear, to the extent that Builder: (i) alleges that Project Co failed to procure the State to complete the State Works in respect of EPAS (per	Case 2017-111). • ACICA Case 2017-110 and ACICA Case 2017-111 only set out six high level bullet points in relation to EPAS, while specific and numerous references have been made to the EPAS claims in the FCA proceedings. - We note that the EPAS Representations in ACICA Case 2017-

[7] Second Foreman Affidavit, SBF-30 p. 131
[6] Third Foreman Affidavit, SBF-40

			CC cl 28); or (ii) challenges the IC's determination (adopted by Project Co) certifying TC [8], subject of Construction Arbitration Agreement	110) and ACICA Case 2017-111 are not the same (and is more limited) as those outlined in the Federal Court Proceedings. The EPAS Representations in the arbitrations are simply that the State misrepresented EPAS (section 16.4), whereas the Federal Court EPAS

[8] See Builder's Loss and Damage Particulars, [6.4]-[6.6]

				Representations include, the State representing that ([47] of ASOC): - A fully functional EPAS was available to be installed at the nRAH; - The State Works (including the EPAS for the nRAH) would be delivered and completed before the proposed amended date of TC, and in any event with sufficient time for the Builder to

				integrate the EPAS for the nRAH with the rest of the ICT Network and perform all the necessary testing before the proposed amended date for TC; and - The availability of EPAS at the nRAH (or alternatively, its unavailability) would not render it impossible for the Builder to achieve TC by 4 April 2016. • Many of the paragraphs of the ASOC

				referenced are not contained in the arbitrations, however, they are broad factual matters which we would expect to see in a pleading later on.
4	**EPAS** • Allegation of reliance upon 'EPAS Representations', see ASOC [56]; • See Builder's EPAS Particulars, [46]-[69]; • See Builder's Loss and Damage Particulars, [2]	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[9] • ACICA Case 2017-111, as between Project Co and Builder	• Builder's breach of warranties and undertakings under the Construction Contract (CC cll 28, 63.3, 65.5), subject to Construction Arbitration Agreement; • Builder's breach of	• Agree, broadly, there is factual overlap. • We note, however, that paragraph [56] of the ASOC notes that, the Builder relied on the EPAS Representations when determining to: - enter into the Interim Settlement

[9] Second Foreman Affidavit, SBF-30 at 131

			warranties and undertakings under BDD cl 4.4 and CC cl 63.3, subject to Builder Direct Arbitration Agreement	Agreement; - in planning the design, construction, commissioning and testing phases of the ICT network of the hospital; and/or - after 17 September 2015, what Claims it was necessary for the Builder to lodge. • However, the arbitrations only reference the entry into the Interim Settlement Agreement and decisions in relation to which Claims to make (bullet points 1 and 3

				above). It does not include reference to the planning the design, construction, commissioning and testing phases of the ICT network of the hospital
5	**EPAS** • Allegation that Builder would have been able to make Claims, but for 'EPAS Representations' ASOC [56(c)]; • See Builder's Loss and Damage Particulars, [2]	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[10] • ACICA Case 2017-111, as between Project Co and Builder	• Challenge to IC/Project Co determination of EOT claims re 'EPAS Delays', per CC cl 42.10/42.22, subject to Construction Arbitration Agreement	• Agree, broadly, there is factual overlap (refer to section 16.5 of ACICA Case 2017-110 and ACICA Case 2017-11). • We note that there appears to be an error in the reference to clause 42.10/42.22 of CC (as there is no such

[10] Second Foreman Affidavit, SBF-30 at 131

				clause)
6	**EPAS** • See Builder's EPAS Particulars, [8], [41]-[45]	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[11] • ACICA Case 2017-111, as between Project Co and Builder	• Challenge to IC/Project Co determination of EOT claims re 'EPAS Delays', per CC cl 42.10/42.22, subject to Construction Arbitration Agreement; • Builder otherwise precluded from making Claims in respect of 'EPAS Delays' by CC cl 42.19, subject to Construction	• Agree, that broadly, there is factual overlap (refer to section 16.5 of ACICA Case 2017-110 and ACICA Case 2017-11), however, there is no express reference to the Builder's contention in the particulars being 'the IC wrongfully rejected the Builder's claim without a proper consideration of the Builder's submissions' ([41]) in the

[11] Second Foreman Affidavit, SBF-30 at 131

			Arbitration Agreement	arbitrations.
7	**Procuring Breach** • Allegation that State induced or procured Project Co to breach the Construction Contract, see ASOC [21]-[28], [70]-[76]; • See Builder's Economic Harm Particulars, [1(a)], [1(b)]; • See Builder's Loss and Damage Particulars, [6]	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[12] • ACICA Case 2017-111, as between Project Co and Builder	• Any allegation that Project Co breached Construction Contract, subject to Construction Arbitration Agreement; • Although presently unclear, to the extent that the Builder: (i) contends that the Financiers' Revised Cure Plan was ineffective or that it was not a valid Cure Plan for the purposes	• Agree, that broadly, there is factual overlap (refer to section 16.17 of ACICA Case 2017-110 and ACICA Case 2017-11). • We note that the Economic Harm Particulars should refer to [1.1(a)] and [1.1(b)] • See comment above at Item 2, bullet point 2

[12] Second Foreman Affidavit, SBF-30 at 132

			of the Project Agreement and/or the Financier Direct Deed; (ii) challenges the certification of TC and/or CA [13], subject of Construction Arbitration Agreement/Project Arbitration Agreement	
8	**Procuring Breach** • Allegation that State "wrongfully" or "unlawfully" caused Project Co to enter into Completion Deed/Consents and	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren; [14]	• Requires Builder to establish that the Project Agreement did not Completion Deed/Consents and Acknowledgement	• Builder's Economic Harm Particulars should refer to [1.1(a)] and [1.1(b)] • See comment above at Item 2, bullet point 2

[13] See Builder's Loss and Damage Particulars, [6.4]-[6.6]
[14] Second Foreman Affidavit, SBF-30 at 132

	Acknowledgement Deed, see ASOC [78], [83]; • See Builder's Economic Harm Particulars, [1(a)], [1(b)] • See Builder's Loss and Damage Particulars, [6], [7] • [7]	• ACICA Case 2017-111, as between Project Co and Builder	Deed and that they were not a legitimate means by which Project Co and the Financiers sought to cure the late-TC Major Default, subject to Construction Arbitration Agreement	
9	**IC Conduct** • Allegations that the IC breached its obligations under the IC Agreement and/or acted unreasonably/ other than in accordance with good industry practice, which	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[17] • ACICA Case 2017-		• Agree that broadly there is a factual overlap (refer to section 16.11 and 16.12 of ACICA 2017-110). • These allegations were also included in the

[173] Second Foreman Affidavit, SBF-30 at 131

	conduct directed or consented to by the State and/or Project Co, see ASOC [40]-[42], [43(b)-(c)], [44]-[45], [49]-[53], [55], [59]-[62], [77], [78(d)], [80]-[81]; • See Builder's [78(d)] IC Conduct Particulars;[15] • See Builder's [80] IC Conduct Particulars;[16] • See Builder's Economic Harm Particulars, [2]; • See Builder's Loss and Damage Particulars, [3], [7.4]-[7.7]	111, as between Project Co and Builder		NOCE (which was referenced in ACICA Case 2017-110 and ACICA Case 2017-111). The allegations in relation to the IC: - breaching its obligations under the IC Agreement; - acting unreasonably/other than in accordance with good industry practice, were set out in section 8 of the NOCE (E.15). • The allegations that the

[171] Third Foreman Affidavit, SBF-42
[172] Third Foreman Affidavit, SBF-43

				conduct was 'directed or consented to by the State and/or Project Co' is set out in sections 8.10, 8.11 and 8.18 of the NOCE.
10	**IC Conduct** • Allegation that Project Co breached cll 5.3/5.4 of Construction Contract by failing to ensure that the IC acted in accordance with the requirements of the IC Agreement/Project Agreement, see ASOC [77] (by reference to matters set out at ASOC [40]- [42], [43(b)-(c)], [44]-[45], [49]-	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[18] • ACICA Case 2017-111, as between Project Co and Builder	• Any allegation that Project Co breached Construction Contract, subject to Construction Arbitration Agreement; • Requires Builder to establish that IC's conduct in breach of the Project Agreement/IC	• Agree that, broadly, there is a factual overlap (see section 16.8 of ACICA Case 2017-111 and ACICA Case 2017-110.). • This allegation is contained within the NOCE at sections 8.1 (generally) and 8.5(f).

[18] Second Foreman Affidavit, SBF-30 at 131

	[53], [55], [59]- [62], [78(d)] and/or [80]-[81])		Agreement, subject to Project Arbitration Agreement and IC Arbitration Agreement	
11	**IC Conduct** • Allegation that State "wrongfully" or "unlawfully" in directing/consenting to IC's conduct and/or interfering in the IC's performance of contractual functions, see ASOC [78(d)], [83]; • See Builder's [78(d)] IC Conduct Particulars; • See Builder's Economic Harm Particulars, [1(c)], [2];	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[19] • ACICA Case 2017-111, as between Project Co and Builder	• Requires Builder to establish that IC and State's conduct in breach of the Project Agreement/IC Agreement, subject to Project Arbitration Agreement and IC Arbitration Agreement	• Agree that, broadly, there is a factual overlap (refer to section 16.9 of ACICA Case 2017-111 and ACICA Case 2017-110). • The general references in the NOCE are at sections 8.10 and 8.11.

[19] Second Foreman Affidavit, SBF-30 at 131

	• See Builder's Loss and Damage Particulars, [7.4]-[7.7]			
12	**IC Conduct** • Allegation that IC failed to administer Builder's EOT Claims and/or permitted State to interfere with discharge of its independent functions, see Builder's [80] IC Conduct Particulars, [6(d)], [7], Schedule 7; • See Builder's Economic Harm Particulars, [1(c)], [2]; • See Builder's Loss and Damage Particulars, [7.4]-[7.7]	• Builders Notice Arbitration as between State and Project Co (ACICA Case 2017-110), before Mr Lindgren;[20] • ACICA Case 2017-111, as between Project Co and Builder	• Any challenge to IC/Project Co determination of Builder's EOT claims, to be made per CC cl 42.10/42.22, subject to Construction Arbitration Agreement	• Agree that, broadly, there is a factual overlap, save that: - ACICA Case 2017-111 and ACICA Case 2017-110 only refers to the IC's determinations rejecting the Builder's EOT claims as being final and binding. There is no reference to the IC failing to

[20] Second Foreman Affidavit, SBF-30 at 131

				administer the EOT claims (see section 16.12); and - the IC's failure to administer the Builder's EOT Claims was not included in the NOCE. • The allegations contained in the NOCE discuss the IC seeking and/or taking directions from the State on matters pertaining to the Independent Certifier Services (see section 8.5(a)). • The general references to the State's interference with the

				IC's independent functions is set out at sections 8.10 and 8.11 of the NOCE.
13	**Cross-Claims** • Any cross-claims, claims for indemnity or contribution as between any of the State, Project Co or the IC in relation to any of Builder's claims, including in relation to State Indemnity Claim, the IC Indemnity Claim and/or the IC Dispute		• Subject to Project Arbitration Agreement and/or IC Arbitration Agreement	• Agree.