Supreme Court

New South Wales

Case Name:	WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)
Medium Neutral Citation:	[2022] NSWSC 505
Hearing Date(s):	31 March 2022 – 1 April 2022
Date of Orders:	29 April 2022
Decision Date:	29 April 2022
Jurisdiction:	Equity - Commercial List
Before:	Rees J
Decision:	Stay proceedings under section 8, Commercial Arbitration Act 2010 (NSW).
Catchwords:	BUILDING AND CONSTRUCTION – plaintiff to build tunnel under Project Deed – defendants to build tunnel for plaintiff under D&C Deed – 'back to back' contracts – disputes concerning same issue under both contracts treated as "Linked Disputes" – claim concerning contamination determined as "Linked Dispute" adversely to plaintiff and defendants – defendants nonetheless seek contamination costs from plaintiff. COMMERCIAL ARBITRATION – application for stay – 'tiered' dispute resolution clause requiring negotiation, expert determination then arbitration – expert determination yet to begin – whether arbitration agreement "inoperative" under section 8(1), Commercial Arbitration Act 2010 (NSW), New York Convention and UNCITRAL Model Law – case law review at [95]-[117] – agreement "operative" notwithstanding expert determination yet to occur – John Holland v Kellogg Brown & Root not followed at [118]-[120] – proceedings stayed.

WORDS AND PHRASES – "inoperative" at [95]-[117] – "urgent" at [138].

Legislation Cited:

Arbitration Act 1975 (UK)
Arbitration Act 1996 (UK)
Commercial Arbitration Act 2010 (NSW) ss 1C, 2A, 8(1), 17J.
International Arbitration Act 1974 (Cth)
UNCITRAL Model Law on International Commercial Arbitration
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Cases Cited:

1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd [2009] VSC 226
AED Oil Ltd v Puffin FPSO Ltd (2010) 27 VR 22; [2010] VSCA 37
Ashgar v The Legal Services Commission [2004] EWHC 1803 (Ch)
Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2016] WASC 52
Bakri Navigation Company Ltd v 'Golden Glory' Glorious Shipping SA (1991) 217 ALR 152
Blair v Curran (1939) 62 CLR 464
Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd (2017) 52 VR 198; [2017] VSC 97
Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825
Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013] WASCA 66
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1992] QB 656; [1992] 2 All ER 609
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334
China Merchants Heavy Industry Co Ltd v JCG Corp [2001] 3 HKC 580
CPB Contractors Pty Ltd v Celsus Pty Ltd (2017) 353 ALR 84; [2017] FCA 1620
CPB Contractors Pty Ltd v DEAL S.R.L. [2021] NSWSC 820
CPB Contractors Pty Ltd v JKC Australian LNG Pty Ltd [2017] WASC 112
CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd [2017] NSWSC 1798

Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd (2019) 101 NSWLR 679; [2019] NSWCA 185
Dyna-Jet Pte Ltd v Wilson Taylor Pacific Pte Ltd [2016] SGHC 238
FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12
Green v Econia Ptv Ltd [2016] SASC 153
Hancock Prospecting v Rinehart (2017) 257 FCR 442; [2017] FCAFC 170
Heggies Bulkhaul v Global Minerals Australia (2003) 59 NSWLR 312; [2003] NSWSC 851
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3) (1998) 86 FCR 374
John Holland Pty Limited v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451
Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky [2013] EWCA Civ 784
Karadag v Samkara Holdings Limited [2022] NSWSC 380
Kaverit Steel and Crane Ltd v Kone Corp (1992) 8 WAC 346; (1992) 87 DLR (4th) 129
Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd (2017) 96 NSWLR 329; [2017] NSWCA 291
Longboat Holdings Groupno3 v Zacole Pty Ltd [2021] VSC 280
Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd [1993] HKCFI 14
Pavlovic v Universal Music Australia Pty Ltd (2015) 90 NSWLR 605; [2015] NSWCA 313
Rinehart v Hancock Prospecting Pty Ltd (2019) 267 CLR 514
Sargent v ASL Developments Ltd (1974) 131 CLR 634
Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd (1996) 133 FLR 417
Siam Steel International Plc v Compass (Australia) Pty Ltd (2014) 293 FLR 260; [2014] WASC 415
Sullivan v Sullivan [2006] NSWCA 312
The Rena K [1979] QB 377
Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd [2020] VSC 476
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

	WCX M4-M5 Link AT Pty Ltd in its personal capacity and its capacity as trustee of the WCX M4-M5 Link Asset Trust v Acciona Infrastructure Projects Australia Pty Ltd [2022] NSWSC 375 Westco Air Conditioning Ltd v Sui Chong Construction & Engineering Co Ltd [1998] HKCFI 946; [1998] 1 HKC 254
Texts Cited:	Albert van den Berg, 'The New York Convention of 1958: An Overview' in Emmanuel Galliard and Domenico Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Cameron May, 2008) 39 Expert Determination Rules of the Resolution Institute (2016 Edition) Howard M Holtzmann and Joseph E Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration (1989, Kluwer) Peter Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions (Wolters Kluwer, 4th ed, 2019) Sir Michael Mustill and Mr SC Boyd in The Law and Practice of Commercial Arbitration in England (1989, Butterworths) UN Doc A/CN.9/264 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations, 2016)
Category:	Principal judgment
Parties:	WCX M4-M5 Link AT Pty Ltd in its personal capacity and in its capacity as trustee of the WCX M4-M5 Link Asset Trust (First Plaintiff) WCX State Works Contractor Pty Ltd (Second Plaintiff) Acciona Infrastructure Projects Australia Pty Ltd (First Defendant) Samsung C&T Corporation a duly organised company under the laws of the Republic of Korea (Second Defendant) Bouygues Construction Australia Pty Ltd (Third Defendant)
Representation:	Counsel: Mr DT Miller SC / Ms N Simpson / Mr S Puttick (First

and Second Plaintiffs)
Mr J Giles SC / Mr D Hughes / Mr S Hartford-Davis (First, Second, Third Defendants)

Solicitors:
King & Wood Mallesons (Plaintiffs)
Norton Rose Fulbright (First, Second, Third Defendants)

File Number(s): 2022/55988

JUDGMENT

1 **HER HONOUR:** The first plaintiff (the *Asset Trustee*) has agreed, under a "Project Deed", to design and construct the WestConnex M4-M5 link tunnels for Transport for NSW. The first to third defendants (together the *Contractor*) have agreed, under a "D&C Deed", to design and construct the tunnels for the plaintiffs (often referred to as the *M4-M5 Link Group*). By and large, the obligations of the Asset Trustee under the Project Deed are "back-to-back" with the obligations of the Contractor under the D&C Deed. Both deeds contain dispute resolution provisions, requiring negotiation then expert determination then arbitration (sometimes referred to as a 'tiered' dispute resolution clause). In addition, disputes between the plaintiffs and the Contractor "concerned with the same or substantially similar issues" as the Project Deed may be treated as a "Linked Dispute", such that determination of a "Linked Dispute" under the Project Deed is binding on the Contractor.

2 In 2020, a dispute arose between the Contractor, the Asset Trustee and Transport for NSW as to who was responsible for implementing a solution (the *Durability Solution*) to protect the WestConnex M4-M5 link tunnels from contamination migrating towards the tunnels from a former rubbish tip now underneath Sydney Park (the *Contamination Claim*). The Contractor also contended that two communications received from the Asset Trustee in July 2020 constituted "Directions" to implement the Durability Solution, while the Asset Trustee disagreed (the parties referred to this as the *Directions Dispute*). These matters were treated as Linked Disputes. In December 2020, an expert determined that the Asset Trustee was responsible for implementing the Durability Solution under the Project Deed. As a Linked Dispute, the

Contractor was bound by the expert determination and thus bound to implement the Durability Solution. There the matter lay for some time.

3 In November 2021, the Contractor sought to progress the Directions Dispute as un-Linked Disputes. If successful in this endeavour, the cost of implementing the Durability Solution – said to be some $200 million – may be borne by the Asset Trustee rather than the Contractor and, more importantly, without recourse to Transport for NSW. The stakes are obviously high. Unsurprisingly, a dispute has arisen as to whether the Directions Dispute is a Linked Dispute (the parties referred to this as the *Jurisdiction Dispute*) and whether the Jurisdiction Dispute should be determined before the Directions Dispute.

4 Before the Court are two applications.

(a) The plaintiffs seek to injunct the Contractor from referring the Directions Dispute to expert determination by the fourth defendant, Resolution Institute, until the Jurisdiction Dispute is finally determined.

(b) The Contractor seeks to stay these proceedings pursuant to section 8 of the *Commercial Arbitration Act 2010* (NSW).

5 The plaintiffs relied on the evidence of solicitor, Hamish Macpherson, and General Manager Finance NSW and WestConnex, Christopher Poynter. The Contractor relied on the evidence of the Project Director for the WestConnex M4-M5 Link Tunnels Project, Andrew Marsonet. There was no cross-examination. A substantial body of documents was also tendered, including correspondence between the contracting parties. This correspondence largely comprised a bewildering array of "Notices" which, by the "subject" field, sub-headings and contents, sought to invoke various contractual provisions.

FACTS

6 It is necessary to delve sufficiently into the facts to consider whether interlocutory relief should be granted (if the proceedings are not stayed), in particular, as to whether there is a serious question to be tried (which the Contractor denies). Obviously, the parties' claims and defences will ultimately be determined on a larger body of evidence in due course.

7 Stage 3A of the WestConnex project is the design and construction of two 7.5 km underground tunnels running from St Peters to Rozelle, linking the

existing M4 and M5 motorways and aptly called the M4-M5 Link Tunnels. The project is due to complete on 31 March 2023. The tunnels are to last 100 years.

8 On 12 June 2018, Roads and Maritime Services (now Transport for NSW), WCX M4-M5 PT Link Pty Ltd (defined as the *Project Trustee*) and the Asset Trustee executed the WestConnex M4-M5 Link Project Deed (the *Project Deed*). Put shortly, the Asset Trustee was thereby obliged to design and construct the M4-M5 Link Tunnels, to be operated and maintained by the Project Trustee: clause 2, recital (B). The Asset Trustee, the second plaintiff WCX State Works Contractor Pty Ltd, the Project Trustee and RMS also appointed an independent certifier under the Project Deed.

9 On 17 August 2018, the plaintiffs and the Contractor executed the WestConnex M4-M5 Link Main Tunnel Works Design and Construction Deed (the *D&C Deed*). According to Mr Macpherson, the terms of the D&C Deed are "back-to-back" with the terms of the Project Deed. As such, the Asset Trustee's obligations under the Project Deed are the same as the obligations of the Contractor under the D&C Deed. Obviously, both deeds are vast; whether this is true in every case is not the subject of this judgment.

10 Clause 39 in both deeds concerns changes in the scope of work and claims for payment associated with such changes. Clause 39.1 of the D&C Deed provides:

> **Notice of Change**
>
> (a) If the Contractor believes that any Direction of the M4-M5 Link Group's Representative, other than the issuing of a Change Order, constitutes or involves a Change it must, if it wishes to make a Claim against the M4-M5 Link Group arising out of, or in any way in connection with, the Direction:
>
> (i) within 3 Business Days after receiving notice of the Direction and before commencing work on the subject matter of the Direction or otherwise complying with the Direction, give notice to the M4-M5 Link Group's Representative that sets out:
>
> (A) that it considers the Direction constitutes or involves a Change;
>
> (B) details of the relevant Direction; and
>
> (C) details of why it considers the Direction constitutes or involves a Change ...

11 Clause 39.2 provides that, if the Contractor wishes to make a Claim in respect of any Direction or other event, fact, matter or thing, the Contractor must give the plaintiffs a notice in accordance with clause 39.3(a) and a claim in accordance with clause 39.3(b).

Dispute resolution procedures

12 Two dispute resolution regimes apply under the D&C Deed depending on whether a dispute is a "Linked Dispute". A Linked Dispute is a Dispute between the plaintiffs and the Contractor arising out of the D&C Deed that is "concerned with the same or substantially similar issues" to those regarding the rights, liabilities and obligations of Transport for NSW and the Asset Trustee under the Project Deed and in respect of which the plaintiffs have notified the Contractor that they wish to be treated as a Linked Dispute: clauses 3.1(c)(ii), 3.3(a)(ii)(A) and 3.3(b), D&C Deed. As the plaintiffs put it, the purpose of the linking provision is to ensure that, whatever the determination in relation to a particular right, entitlement or obligation under the D&C Deed (*vis a vis* the plaintiffs and the Contractor), the same determination is made under the Project Deed (*vis a vis* the Asset Trustee and Transport for NSW) such that, whatever the determination, the Asset Trustee remains whole, being in effect a 'pass through' vehicle.

13 As to Linked Disputes, Clause 3 in the D&C Deed provides:

> 3. **LINKED CLAIMS AND LINKED DISPUTES**
>
> 3.1 **General**
>
> (a) The parties acknowledge that under the Project Documents when certain events or circumstances arise, the M4-M5 Link Group has with respect to RMS, certain remedies, rights, benefits or entitlements. The purpose of this clause 3 is to:
>
> (i) provide the Contractor with comparable remedies, rights, benefits or entitlements for such events or circumstances; and
>
> (ii) satisfy and limit, to the extent permitted by law, the M4-M5 Link Group's liability to the Contractor, and the Contractor's rights against the M4-M5 Link Group, for such events or circumstances by reference to the M4-M5 Link Group's remedies, rights, benefits and entitlements under the Project Documents.
>
> (b) This clause 3 does not apply to:
>
> …

(iv) any right that the Contractor may have under this deed in respect of a Change directed by the M4-M5 Link Group where there is no corresponding change directed by RMS under the Project Deed or the Main Tunnel State Works Deed (as applicable).

(c) The M4-M5 Link Group and the Contractor acknowledge and agree that:

…

(ii) Claims or Disputes between the M4-M5 Link Group and the contractor arising out of or in connection with this deed may be concerned with the same or substantially similar issues to those in respect of the respective rights, liabilities and obligations of RMS and the M4-M5 Link Group arising out of or in connection with the Project Deed or the Main Tunnel State Works Deed (as applicable) which are or may be the subject of a claim, dispute or difference under the Project Deed or the Main Tunnel State Works Deed (as applicable); and

…

(d) If the M4-M5 Link Group:

(i) fails to pursue the rights and remedies as may be claimable in relation to a Linked Claim in accordance with clause 3.2; or

(ii) does not elect to treat a Dispute as a Linked Dispute in accordance with clause 3.3,

then the Contractor will be entitled to such remedies, rights, benefits and entitlements in accordance with this deed as if the matter was not a Linked Claim or a Linked Dispute (as the case may be), and notwithstanding the resolution or determination of the relevant claim or dispute under the Project Deed or the Main Tunnel State Works Deed (as applicable).

…

3.2 **Linked Claims**

(a) If:

(i) the Contractor issues a notice of a Claim on the M4-M5 Link Group, whether under clause 39.2, 39.3 or 39.4 or any other express provision of this deed entitling the Contractor to make such a Claim; and

(ii) the Claim is one where the M4-M5 Link Group is or may be entitled to obtain remedies, rights, benefits or entitlements under the Project Deed or the Main Tunnel State Works Deed (as applicable), based on the same events or circumstances under the Project Deed or the Main Tunnel State Works Deed (as applicable),

(**Linked Claim**), then this clause 3.2 will apply.

14 Clause 3.2 then sets out the procedure to be followed by the plaintiffs on becoming aware of a Linked Claim being, effectively, to act as a liaison

between the Contractor and Transport for NSW in providing the Contractor's claim to Transport for NSW, promptly giving the Contractor copies of any response from Transport for NSW to the Linked Claim and "keep[ing] the Contractor regularly informed as to all steps taken in relation to the progress of the Linked Claim": clause 3.2(b)(iv). Further:

> 3.3 **Linked Disputes**
>
> (a) Notwithstanding any provision in this deed to the contrary, any and all Disputes:
>
> (i) which concern those matters described in clause 3.1(c)(i) or clause 3.1(c)(ii); and
>
> (ii) in respect of which either:
>
> (A) the M4-M5 Link Group issues a notice in accordance with clause 3.3(b)(ii); or
>
> (B) the Contractor issues a notice in accordance 3.2(c),
>
> (a **Linked Dispute**) must be resolved in accordance with this clause 3.3.

15 Clause 3.3(c) then sets out the procedures which apply to a Linked Dispute. Further, clause 3.3(f) provides:

> (f) Subject to clause 3.3(g), the M4-M5 Link Group and the Contractor agree that in respect of a Linked Dispute:
>
> (i) the Contractor will be bound by any settlement of the subject matter of the Linked Dispute;
>
> (ii) any determination by an expert, an arbitrator or a court under the Project Deed or the Main Tunnel State Works Deed (as applicable) will be binding on the Contractor …

16 However, clause 3.3(g) provides:

> (g) The agreement by the Contractor under clause 3.3(f) does not apply:
>
> …
>
> (ii) to the extent that the relevant member of the M4-M5 Link Group:
>
> (A) agrees with RMS to any resolution, compromise, settlement or waiver; or
>
> (B) makes any admissions or concession to RMS,
>
> in respect of the Linked Dispute without first obtaining the prior written consent of the Contractor to such resolution, compromise, waiver, admission or concession (such consent not to be unreasonably withheld or delayed) …

This sub-clause gained prominence as the Contractor now contends that a concession made by the Asset Trustee to the expert in the course of the Linked Dispute concerning the Contamination Claim was made without its prior written consent and thus the expert determination is not binding on the Contractor.

17 For disputes which were not "Linked", Clause 32 in both the D&C Deed and Project Deed provides:

> **DISPUTE RESOLUTION**
>
> Any dispute or difference arising out of, relating to, or in connection with this deed or the conduct of the parties in relation to this deed, or its subject matter (including any question regarding the existence, validity or termination of this deed) (**Dispute**), must be resolved in accordance with the Dispute Resolution Procedure.

18 The Dispute Resolution Procedure for disputes which were not "Linked" is set out in Schedule 3: clause 1.1. Section 1 of Schedule 3 provides that all Disputes "must be resolved in accordance with this Dispute Resolution Procedure". Where a dispute arises, either party may serve a Notice of Dispute: section 2. On service of the Notice of Dispute, representatives of the parties "must meet and undertake good faith negotiations for the purpose of attempting to resolve the Dispute (the **Negotiation**)": section 3. Section 4 then provides:

> **REFERRAL TO EXPERT DETERMINATION**
>
> If the Dispute has not been resolved within 20 Business Days after the date on which the Notice of Dispute was given (or such longer period of time as the Representatives or the parties may have agreed in writing), then, whether or not a meeting under section 3 had occurred, the Dispute must be and is referred to expert determination in accordance with this Schedule 3.

19 Section 5 provides that any dispute referred to expert determination will be determined in accordance with the Resolution Institute Expert Determination Rules: see further at [22 _Ref101857568]. Further, section 5(b) of Schedule 3 provides:

> The expert's determination:
>
> (i) will be final and binding, unless a party serves a notice of dissatisfaction on the other party within 21 days of the expert's determination; and
>
> (ii) must be complied with unless and until it is overturned, reversed, varied or otherwise changed by an arbitral award.

20 Section 6 provides:

> **REFERRAL TO ARBITRATION AFTER EXPERT DETERMINATION**
>
> (a) If a notice of dissatisfaction is served under section 5(b)(i), the Dispute must be referred to arbitration under section 7 …
>
> (b) If a party fails or refuses to comply with the expert's determination, then the other party may, without prejudice to any other rights it may have, refer any such non-compliance as a Dispute, to arbitration under section 7. Sections 2 to 6 will not apply to this type of Dispute.

21 Section 7 of Schedule 3 outlines the procedure for the referral of any Dispute to arbitration. In particular, the parties agree that appeals from any arbitral award on questions of law may be made to this Court pursuant to section 34A of the *Commercial Arbitration Act*. Finally, section 9 of Schedule 3 provides:

> **URGENT RELIEF**
>
> Nothing in this Schedule 3 will prejudice any right a party may have to seek urgent interlocutory relief from a court in respect of a Dispute.

Expert Determination Rules

22 As to the conduct of an expert determination, rule 5.3 of the Expert Determination Rules provides, "The Expert shall adopt procedures suitable to the circumstances of the particular case … so as to provide an expeditious cost-effective and fair means of determining the Dispute. Rule 5.5 provides:

> Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert's jurisdiction) shall be submitted to and determined by the Expert.

Further, "the Expert shall make such directions or rulings in relation to the process as he or she sees fit": rule 9.1.

23 Under the rules, the parties are obliged to do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the Process including to, "where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law": rule 6.2(c). Finally, subject to any written agreement between the parties, "each party shall pay its own costs of and incidental to the Process": rule 13.1.

Contamination Claim

24 The M4-M5 Link Tunnels are based on a "drained tunnel design". In December 2019, Mr Marsonet received a Hydrological Design Report and a Contamination Assessment Report. Using ammonia as a proxy for other solutes to predict the extent and concentration of contaminants likely to migrate

from a former rubbish tip now underneath Sydney Park to the tunnel, the experts calculated that ammonia in concentrations above 250 mg/l will arrive at the tunnels between the year 2024 and 2050. On reaching the tunnels, the contaminants may have an effect on the durability of tunnel components. A substantial part of the tunnels will be impacted, comprising some 1,560 lineal metres.

25 An immediate question arose as to who was responsible for fixing this problem. Clause 11.10 of the D&C Deed concerns contamination and provides: (emphasis added)

> (e) … the Contractor bears the risk of all Contamination:
>
> (i) subject to clause 11.10(ea), on, in, over, under, about or migrating to or from (but in each case within) the Construction Site or any Extra Land which is disturbed by or interfered with in the carrying out of the Contractor's Activities;
>
> …
>
> (ea) *The Contamination* referred to in clauses 11.10(e)(i), 11.10(e)(iii) and 11.10(e)(v) *will be limited to that part of the Contamination* described in those clauses which is *physically encountered by the Contractor* or its Related Parties (and not to the entire mass of such Contamination).

26 On 31 January 2020, the Contractor served a Notice of Claim on the Asset Trustee (the *Contamination Claim*). The Contractor argued that clause 11.10(e) of the D&C Deed did not impose on the Contractor the risk of the Sydney Park contamination migrating from Sydney Park. (According to Mr Marsonet, the levels of contamination predicted to arrive at the Project Works in years to come were not present at the Construction Site when preparing the design, nor expected to be physically encountered by the Contractor before or on the Date of Opening Completion on 31 March 2023.) The Contractor had, however, developed a design solution in order to achieve the design life requirements of 100 years for the tunnel, involving a secondary lining of the arch, a drainage layer and drainage pipe protection (the *Durability Solution*). The Contractor estimated that the Durability Solution for the contamination problem would cost some $64 million.

27 On 5 February 2020, the Asset Trustee provided the Contamination Claim to Transport for NSW under clause 39.3 of the Project Deed, making a claim "for everything contained in the Contractor's Contamination Claim". The Asset

Trustee also advised Transport for NSW that the Contractor's claim was a "Linked Claim". On 23 March 2020, Transport for NSW rejected the Contamination Claim. On 3 April 2020, Transport for NSW enquired how the Asset Trustee and Project Trustee were complying with *their* obligations under the Project Deed, as the Contamination Claim was considered to admit that the design of the tunnels may not achieve the required design life or satisfy the required durability standards. The Contractor's interpretation of clause 11.10 was said to be "misguided". On 3 April 2020, Transport for NSW advised that it would also raise its concerns with the independent certifier.

28 On 9 April 2020, the Asset Trustee provided a copy of Transport for NSW's most recent letter to the Contractor under clause 3.2 of the D&C Deed which, it will be recalled, concerned Linked Claims. The Contractor's feedback was sought on Transport for NSW's letter. On 11 May 2020, the Asset Trustee wrote to the Contractor again, "In light of TfNSW's rejection of this Linked Claim if [the Contractor] does not issue a Notice of Dispute under the D&C Deed then the M4-M5 Link Group will assume [the Contractor] accepts TfNSW's position and will commence implementation of a revised design at the Contractor's cost."

29 On 22 May 2020, the Contractor served a Notice of Dispute under Schedule 3 of the D&C Deed and asked that the Asset Trustee "immediately notif[y] the Contractor if it wishes the Dispute to be treated as a Linked Dispute as required by clause 3.3(b)(ii)(B) of the D&C Deed." The Contractor also issued a Notice of Dispute under clause 3.2(c) of the D&C Deed, advising that the Contractor disputed the response to the Linked Claim and wished to pursue its Claim under the D&C Deed. On 27 May 2020, the Asset Manager gave notice to the Contractor under clause 3.3(b)(ii) of the D&C Deed that it wished to treat the dispute as a Linked Dispute and, as such, the Dispute Resolution Procedure in Schedule 3 no longer applied.

30 On 29 May 2020, the Asset Trustee provided the Contractor with a draft Notice of Dispute to be issued to Transport for NSW, for the Contractor's comment. The notice reflected the Contractor's position as identified in its Notice of Dispute. The Asset Trustee sought confirmation that the notice captured the

ambit and terms of the Linked Dispute. The Contractor approved the Notice of Dispute. The Asset Trustee issued the Notice of Dispute on 9 June 2020 in respect of the Contamination Claim.

31 On 10 June 2020, the Asset Trustee wrote to the Contractor, noting that the Contractor's design for the Project Works was based on the assumption that the Contractor's position as identified in the Notices of Dispute was correct and that the Contractor was not required to account in its design for any potential impacts that Sydney Park contamination may have on the Project Works in the absence of a Change Order issued by the plaintiffs and, in turn, issued by Transport for NSW. As the dispute was a Linked Dispute, determination of the Notice of Dispute issued under the Project Deed was binding on the Contractor, including if the dispute proceeded to expert determination under Schedule 3 of the Project Deed. The Asset Trustee also advised:

> 4. Going forward, the Asset Trustee will continue to review the Contractor's design on the basis that the Contractor's position as contained in the D&C [Notice of Dispute] is correct. It is likely that many designs will be approved on this basis.
>
> 5. However, if the Dispute progresses to expert determination, and it is determined by an expert that the Contractor's position is not correct, the Contractor will be required at its own cost to appropriately account for the Sydney Park Contamination in its design of the Project Works. That will likely involve the Contractor engaging in re-design and re-issuing design packages which had been approved on the basis set out in paragraph 4 above, at the Contractor's cost.
>
> 6. Conversely, if any expert determination determines that the Contractor's position is correct, the Contractor (and the Asset Trustee) will not be required to account for the Sydney Park Contamination in its design of the Project Works, absent any Change Order issued (in the first instance) by TfNSW.

32 Preparations began for the determination of the Linked Dispute. The plaintiffs' solicitor, King & Wood Mallesons, and the Contractor's solicitor, MinterEllison, began work on a protocol for the conduct of the Linked Dispute.

A Direction?

33 On 2 July 2020, Transport for NSW wrote to the independent certifier, providing a copy of the Hydrological Design Report and Contamination Assessment Report, together with a Durability Assessment Report. The tunnel design was said not to comply with the contractual requirements, in particular, to have a minimum design life of 100 years. The independent certifier's response was

sought. On 10 July 2020, the independent certifier wrote to Transport for NSW, copied to the Asset Trustee, asking precisely what it was that Transport for NSW wished it to do. Transport for NSW provided further clarification, requesting the independent certifier's position as to whether it agreed with Transport for NSW – as to whether the tunnel design complied with the contractual requirements – and if not, why not.

34 On 7 July 2020, the Asset Trustee provided a copy of Transport for NSW's letter to the Contractor for information. On 10 July 2020, the Contractor issued a Notice of Change, contending that the Asset Trustee's letter of 7 July 2020 (providing a copy of Transport for NSW's letter) was not consistent with the Asset Trustee's letter of 10 June 2020 (extracted at [31_Ref100736172]). Further:

> 4. … The 7 July Notice requires the Trustees, and therefore the Contractor, to include the durability solution in its Design Documentation submissions whereas 10 June Notice does not.
>
> 5. As the 7 July Notice does not state that the 10 June Notice still applies, or that the M4-M5 Link Group does not support the contents of the letter from TfNSW dated 2 July 2020, then the 7 July Notice is a decision by the M4-M5 Link Group to proceed with the durability solution.
>
> 6. The Contractor considers this decision is a Direction that constitutes or involves a Change in accordance with D&C Deed clause 39.1(a).
>
> 7. The Contractor will act upon this Direction and commence design for the durability solution forthwith.

35 The suggestion that, by providing the Contractor with a copy of Transport for NSW's letter, the Asset Trustee was requiring the Contractor to implement a Change, appears to have been somewhat unexpected. Later that evening, the Asset Trustee responded by denying that the plaintiffs had given any Direction to the Contractor, suggesting that the Notice of Change "smacks of desperation". Further:

> … as the Contractor well knows, the M4-M5 Link Group's stated position is that it will not issue any Change or Direction which relates to the matters raised in the Linked Dispute without an identical and corresponding Change or Direction having already been given by TfNSW to the M4-M5 Link Group under the Project Deed. The reason for that has been explained many times to the Contractor, namely that the M4-M5 Link Group is not liable for any costs related to the matters raised in the Linked Dispute – those costs live wholly with either the Contractor or TfNSW because the M4-M5 Link Group is merely a 'pass through' vehicle …

The Asset Trustee later advised that, in the event that the Contractor issued a Notice of Dispute in respect of the matter, the Asset Trustee would make it a Linked Dispute under the D&C Deed and issue a corresponding Notice of Dispute to Transport for NSW under the Project Deed "as the correspondence at the heart of the Contractor's assertions emanated from TfNSW."

36 On 15 July 2020, the Asset Trustee provided the Contractor with correspondence from Transport for NSW in accordance with clause 3.3(c) of the D&C Deed, for the Contractor's information (Transport for NSW had proposed questions to be referred for expert determination). A copy of Transport for NSW's further letter to the independent certifier of 10 July 2020 was also provided. The Contractor's solicitor replied, "The proposed questions are far too wide if an expedited determination of the interpretation is to be achieved … The Contractor has briefed David Hume and we are preparing a very narrow question on the interpretation issue." (Mr Hume had commenced work on 9 July 2020, briefed by the Contractor's solicitor.)

37 On 20 July 2020, the independent certifier advised Transport for NSW that the Project Works must address the migrating contaminated groundwater emanating from Sydney Park for the Project Works to achieve the specified design life and other requirements. However, it was not clear who was responsible for dealing with the matter; the project documents were considered to be ambiguous, particularly clauses 11.10(e) and 11.10(ea). As such, Transport for NSW needed to clarify the issue, following which the independent certifier would be able to finalise its position. On 21 July 2020, the Asset Trustee provided a copy of the independent certifier's letter to the Contractor for information.

Another Direction?

38 On 17 July 2020, the Contractor corresponded with the Asset Trustee, requesting access to substratum lots on "expedited program dates" for excavation activities, apparently in connection with the Durability Solution. Further:

> The Contractor further notes it is revising its Overall D&C Program to include those activities associated with constructing the Durability Solution (Secondary Lining). These additional activities include rock bolting, the application of a

> smoothing layer, membrane installation and shotcrete install. In this regard, the Contractor's initial assessment indicates that these additional activities have the potential to be on the critical path of the Project.

39 On 20 July 2020, the Asset Trustee advised the Contractor that, in light of the Contractor's revision of its D&C program to include activities associated with constructing the Durability Solution, the plaintiffs withdrew their notice of 10 June 2020 (see [31_Ref100736172]); "going forward the M4-M5 Link Group will review the Contractor's design on the basis that the Contractor's position as contained in [Notice of Dispute of 22 May 2020] is not correct". The plaintiffs sought details as to how the Contractor's design would be amended.

40 On 23 July 2020, the Contractor issued a Notice of Change in respect of the Asset Trustee's correspondence of 20 July 2020, which the Contractor considered was a decision by the plaintiffs to proceed with the Durability Solution. The Contractor considered this to be a Direction that involved a Change under clause 39.1(a) of the D&C Deed. "The Contractor will act upon this Direction and commence design for the Durability Solution forthwith, without admission and without prejudice to the Contractor's position regarding the interpretation of the D&C Deed."

Direction Dispute 1

41 On 23 July 2020, the Contractor also issued a Notice of Dispute to the Asset Trustee under Schedule 3 of the D&C Deed as to whether the Asset Trustee's communiqué of 7 July 2020 (see [34_Ref102033878]) amounted to a Direction that involved a Change. The Contractor contended that this Dispute was not in connection with the Linked Dispute as clause 3.3(c)(i) of the D&C Deed only obliged the plaintiffs to provide the Contractor with documents, information and material received "in connection with the Linked Dispute". The letter from Transport for NSW of 2 July 2020 was said to go beyond the parameters of the Linked Dispute as the letter suggested that the Contractor's tunnel design did not comply with the requirements of the Project Deed and thus the D&C Deed. Absent the plaintiffs' objection to the contents of the letter, the only basis for which the letter was provided to the Contractor "was as a direction to the Contractor with respect to the contents of the TfNSW letter of 2 July 2020." The Contractor also disputed that the plaintiffs were not liable for any costs related to the matter, nor that they were merely a "pass through" vehicle; "there is no

fundamental principle that the M4-M5 Link Group is immune from responsibility for its directions." The Contractor asked the plaintiffs to promptly notify them if they intended to treat this Dispute as a Linked Dispute and, if so, provide the Contractor with an opportunity to comment upon any draft submissions in accordance with clause 3.3(c)(ii) of the D&C Deed.

42 On 28 July 2020, the Asset Trustee notified the Contractor that it wished to treat this Dispute as a Linked Dispute. A draft Notice of Dispute to be issued to Transport for NSW was provided for the Contractor's comment. Later that day, the Asset Trustee issued a Notice of Claim to Transport for NSW (*Direction Dispute 1*).

43 On 14 August 2020, the Contractor issued a claim for extension of time in respect of the Durability Solution and its impact on the overall D&C program, including invoices for some $100 million in respect of the "7 July Directions Claim". The Asset Trustee issued a Notice of Linked Claim in respect of the claim for an extension of time. On 24 August 2020, the Asset Trustee gave notice to Transport for NSW of a Claim in respect of Direction Dispute 1. Based on the amount claimed by the Contractor, the Asset Trustee claimed some $198 million, expressly adopting the Contractor's calculations and explanation of this figure. On 25 August 2020, the Asset Trustee informed the Contractor that it had "passed the Direction Linked Claim in full up to TfNSW". On 16 September 2020, the Contractor issued a Notice of Dispute under Schedule 3 of the D&C Deed, suggesting that the plaintiffs had not, within 15 business days of receipt of the Contractor's claim, taken any action under clause 39.1(c) of the D&C Deed or at all, which was said to be a denial by the plaintiffs that the Contractor was entitled to make the claim, which the Contractor also disputed. The Asset Trustee gave notice to the Contractor that it wished to treat this dispute as a Linked Dispute.

Direction Dispute 2

44 On 28 July 2020, the Asset Trustee responded to the Contractor's suggestion that its notice of 20 July 2020 (see [39_Ref100749115]) amounted to a Direction: (emphasis in original)

> The purpose of the M4-M5 Link Group's 20 July Notice was clearly to ascertain whether the Contractor's design as submitted complies with the requirements of the D&C Deed, and to the extent that it does not, ascertain what steps the Contractor will take ensure that its design does so comply. This correspondence expressly states that it is not a Direction under the D&C Deed, and was issued *after* the Contractor had already advised the M4-M5 Link Group that it had elected to design and construct the Durability Solution.

The Asset Trustee also noted that a pre-condition to an entitlement to pursue a Claim for a Change was that the Contractor had not already commenced work. The Asset Trustee's notice of 20 July 2020 was issued on the basis that the Contractor had advised that it had commenced work on the Durability Solution.

45 On 7 August 2020, the Contractor issued a Notice of Dispute to the Asset Trustee under Schedule 3 of the D&C Deed as to whether the Asset Trustee's notice of 20 July 2020 amounted to a Direction. Further, it was said that the Contractor's notice of 17 July 2020 "does not suggest, let alone, evidence that the Contactor had already commenced work on the Durability Solution." In any event, any commencement of works was said to have been done in accordance with the Direction provided on 7 July 2020. The Contractor maintained that the plaintiffs were not merely a "pass through" vehicle; "the actions of the M4-M5 Link Group can constitute a Direction in the absence of any equivalent upstream Directions."

46 On 13 August 2020, the Asset Trustee issued a Notice of Linked Dispute, advising the Contractor that it wished to treat this Dispute as a Linked Dispute (*Direction Dispute 2*).

47 On 27 August 2020, the Contractor issued a claim to the Asset Trustee in respect of the additional time needed to comply with the Direction said to have been issued on 20 July 2020 (see [39_Ref100749115]). The Asset Trustee notified that the claim was a Linked Claim and would be provided to Transport for NSW. The Asset Trustee notified Transport for NSW of the claim on 3 September 2020. On 29 September 2020, the Contractor issued a Notice of Dispute to the Asset Trustee in respect of Direction Dispute 2. Again, the Contractor contended that the Asset Trustee had not, within 15 business days of receipt of the Contractor's claim on 27 August 2020, taken any action such that the Asset Trustee was deemed to have denied the Contractor's entitlement to make a claim, which denial the Contractor also disputed.

Preparation for expert determination of Linked Disputes

48 On 17 August 2020, the Resolution Institute appointed Michael Rudge SC as expert. A preliminary conference was arranged. The solicitors for the plaintiffs and the Contractor discussed how the Contractor's counsel could be involved in the expert determination. The Contractor's solicitor advised that Mr Hume was willing to appear on behalf of the Contractor at the preliminary conference, but considered that he should not appear on behalf of the Asset Trustee where the Contractor and the Asset Trustee may ultimately have divergent interests. As the Contractor was not a party to the expert determination, "and probably does not have a right to appear", the Contractor's solicitor suggested that Transport for NSW's consent be sought for Mr Hume to appear as a non-party and put the Contractor's position, which the Asset Trustee may decide to adopt. The plaintiffs' solicitor advised that the Asset Trustee was not interested in its counsel already briefed in the matter "becom[ing] embroiled in the Linked Dispute which … is a minefield of potential conflicts."

49 The plaintiffs' solicitor wrote to the expert and Transport for NSW's solicitor, proposing that the Contractor attend the preliminary conference, as the dispute was a Linked Dispute; the Contractor had issued a dispute regarding its obligations under the D&C Deed and the Asset Trustee, in turn, had issued an identical dispute "upstream" under the Project Deed to Transport for NSW, with the latter dispute now the subject of the expert determination. The plaintiffs' solicitor argued, "The Contractor's dispute underpins the present Dispute before the Expert, it concerns identical facts and identical contractual provisions …". Transport for NSW did not agree to the Contractor's counsel attending the preliminary conference.

50 The Contractor's solicitor then suggested to the plaintiffs that the Contractor's counsel, now also Mr Christie SC, appear on behalf of the Asset Trustee in the expert determination but on the instructions of the Contractor. It was ultimately agreed that Mr Christie SC and Mr Hume would appear on behalf of the Asset Trustee at the preliminary conference but, of necessity, be instructed by the plaintiffs' solicitor as the Contractor did not have a right of appearance.

Linked Dispute Protocol

51 On 20 August 2020, the Asset Trustee and the Contractor executed a "Linked Dispute Protocol". Clause 2.1 of the Linked Dispute Protocol provided:

> This protocol applies to the following Disputes:
>
> (a) the "Contamination Claim Dispute" which is a Linked Dispute but which the Contractor has requested should not yet be referred to dispute under the Project Deed, if and when it is referred to dispute under the Project Deed;
>
> (b) the "Interpretation Dispute" which is a Linked Dispute as further identified in this section;
>
> (c) the "Direction Dispute 1" which is a Linked Dispute as further identified in this section' and
>
> (d) the "Direction Dispute 2" which is a pending Linked Dispute as further identified in this section.

The plaintiffs point to this clause as an express agreement by the Contractor that the Directions Disputes are Linked Disputes, whilst the Contractor points to clause 2.7 of the Linked Dispute Protocol, which provides, "This protocol does not derogate from the rights and obligations of the Asset Trustee and the Contractor under the D&C Deed."

52 The Linked Dispute Protocol provided that the Contractor would lead the preparation of material for the Linked Disputes, together with the preparation of all written communications, evidence and submissions: clauses 5.1, 7.1, 11.1. Further, all actions taken in the course of the expert determination regarding the Linked Disputes required mutual agreement of the Asset Trustee and the Contractor, including consenting to orders and directions of Transport for NSW or the expert, the content and delivery of submissions or evidence and retention of expert witnesses: clause 9.2. At any hearings held by the expert, the Asset Trustee and the Contractor would separately instruct their respective counsel concerning the hearing; the Asset Trustee would seek Transport for NSW and the expert's agreement to the Contractor's attendance and, in the event that the Contractor was prevented from attendance, the parties "shall formulate a means for Contractor to have transparency concerning the conduct of the hearing": clause 12.1. The protocol was said to apply to the negotiation and expert determination phases of the Dispute Resolution Procedure under Schedule 3 of the Project Deed, with a further protocol to be agreed if the Linked Disputes were referred to arbitration: clause 2.8. Either party was

entitled to terminate the protocol in its sole discretion and with immediate effect by giving notice: clause 16.1.

53 The Contractor's counsel required the plaintiffs to brief them so that they could properly inform the expert and Transport for NSW that they were briefed and instructed to appear on behalf of the Asset Trustee. On 31 August 2020, the plaintiffs' solicitor confirmed to Mr Christie SC and Mr Hume that they were instructed to appear on behalf of the Asset Trustee at the preliminary conference, with a solicitor from the firm attending with them to instruct on the day. Mr Christie SC provided a fee disclosure to the plaintiffs' solicitor, but also confirmed "I will not charge KWM". (Mr Christie SC and Mr Hume subsequently rendered invoices to *the Contractor's* solicitor.) Mr Christie SC also sought confirmation that Transport for NSW's solicitors were aware that, while he and Mr Hume were briefed by the plaintiffs' solicitor to appear for the Asset Trustee at the preliminary conference, they also acted for the Contractor "though not in that capacity tomorrow". The Contractor's solicitor so confirmed. The preliminary conference took place on 2 September 2020.

54 Instructions were subsequently provided to counsel by both the Contractor's solicitor and the plaintiffs' solicitor, to whom Mr Hume referred as "client number 2". In addition, the Contractor's solicitor continued to communicate separately with counsel, drafting amended pleadings and submissions and preparing for the expert determination. As is apparent from counsels' fee notes and confirmed by other communications over which the Contractor, by its actions in these proceedings, waived privilege (*WCX M4-M5 Link AT Pty Ltd in its personal capacity and its capacity as trustee of the WCX M4-M5 Link Asset Trust v Acciona Infrastructure Projects Australia Pty Ltd* [2022] NSWSC 375), the Contractor and its solicitors and counsel generally finalised documents amongst themselves before sending them to the plaintiffs' solicitor to be provided to Transport for NSW and the expert. Often, but not always, the comments of the plaintiffs' solicitor were also sought.

55 In particular, on 7 October 2020, the Asset Trustee provided an outline of submissions in advance of a directions hearing to take place on 8 October 2020. The submissions were prepared through a series of drafts and

comments circulated between the Contractor, its solicitors and counsel before providing the finished product to the plaintiffs' solicitors for service. The submissions contended that the questions posed for resolution by Transport for NSW destroyed any prospect of a quick determination. Rather, the Asset Trustee proposed that the expert answer a preliminary and separate question:

> Whether, under the Project Deed, in the Predicted Scenario, the Asset Trustee is obliged, at its own cost, to implement a solution that will ensure that the Project Works will meet the Design Life requirements in the Project Deed.

56 In support of this proposal, the submissions contended: (emphasis in original)

> Asset Trustee also accepts that, if the issue it agitates under cl 11.10(e)(i) and (ea) is resolved against it, then it must implement and pay for a solution to deal with the Sydney Park Contamination. That will be because, unless the risk of the Sydney Park Contamination is allocated away from the Asset Trustee by reason of cl 11.10(e)(i) and (ea), then on current predictions Asset Trustee will need to do **something** in order to ensure that the tunnel meets the Design Life Requirements.
>
> Accordingly, Asset Trustee accepts that, if the clause 11.10(e)(i) and (ea) issue is resolved against it, there will be no obligation on TfNSW to issue a Change Order in respect of the Durability Solution (or some other solution). The work already be within scope.

57 It was also submitted that the expert could direct that this question be determined separately and in advance of the questions posed by Transport for NSW; "if [this question] is resolved against the Asset Trustee, then the questions TfNSW wants answered will not arise. The dispute will have been resolved against Asset Trustee. That will be the end of the matter. The question [proposed] can be resolved with confined lay evidence. Asset Trustee can have its evidence ready within a week."

A concession

58 On 8 October 2020, the third preliminary conference took place. The Asset Trustee was represented by Mr Christie SC, Mr Hume and the plaintiffs' solicitor, Lisa Kleinau. It appears that, after some discussion about the separate question posed by the Asset Trustee and concerns raised by Transport for NSW, the parties took a break to separately confer.

59 Mr Macpherson was joined on a telephone conference call with Mr Christie SC, Mr Hume, Ms Kleinau and the Contractor's solicitor in Melbourne. According to Mr Macpherson, Mr Hume explained that counsel for Transport for NSW had

expressed concern that, even if Transport for NSW won the separate question, "that our client will not then construct the extra tunnel lining and that the victory will be pyrrhic". Mr Hume suggested that they offer a concession that "if we lose the Determination then we concede we have to implement a solution at our own cost." Mr Hume did not think this was "giving away anything" as construction of the extra tunnel lining had already begun.

60 The Contractor's solicitor asked Mr Hume to circulate a draft form of words for consideration and final instructions. At 5.57 pm and 5.58 pm, Mr Hume emailed to the Contractor's solicitor and plaintiffs' solicitor a first and second version of the proposed concession, the second version being as follows:

> In the event that the Asset Trustee loses the argument on cl 11.10(e)(i) and (ea), Asset Trustee accepts that it must presently implement a solution at its own cost concerning the Sydney Park Contamination that will ensure that the Project Works will meet the Design Life Requirements in the Project Deed.

61 At 5.59 pm, the plaintiffs' solicitor replied, copied to the Contractor's solicitor, "You have instructions to make that statement to the Expert and to counsel for TfNSW." It will be immediately noted that there was no email from the Contractor's solicitor providing instructions to make the statement. The Contractor now attaches great weight to this fact: as the concession was given "without first obtaining the prior written consent of the Contractor", the Contractor is said not to be bound by the expert determination: clause 3.3(f) of the D&C Deed.

62 Later that evening, the Contractor's solicitor circulated the "Final question as agreed and made by Rudge SC", including the proposed and concession as drafted by Mr Hume, to other members of his firm without demur. Later still, the plaintiffs' solicitor circulated the proposed separate question and concession "which the parties advised the Expert has been agreed" and the directions made by the expert to counsel and the Contractor's solicitors. In addition to the directions, the expert was recorded as having made a notation:

> "Note: the parties agree that the expert is not at this stage required to decide the nature of any solution to address any pollution damage which may occur to the tunnel or whether any such solution is required."

Counsel for Transport for NSW was also noted as having advised the Expert that he understood that the "note" was agreed by Transport for NSW, "but

would confirm". It would appear from Ms Kleinau's email that it remained for the parties to check the note of the proceedings and the directions made, and confirm the final wording.

63 The next morning, the Contractor received a report from its solicitor, noting that "under pressure from the expert TfNSW indicated that it would agree to the following question if Asset Trustee made the concession below …"; the text of which was set out. Further:

> The consensus of counsel, KWM and ourselves that this was a very favourable outcome for Asset Trustee and [the Contractor] as it limited the issue to one of the interpretation, would require little evidence, and could be argued by 13 November in circumstances where [the Contractor] is already building the Durability Solution
>
> KWM instructed counsel to make the concession on behalf of Asset Trustee.
> …
>
> Our counsel, KWM and ourselves all consider this a very good outcome …

64 Later that morning, Transport for NSW's solicitor circulated their record of the separate question, concession and directions to the plaintiffs' solicitor for any comment before providing it to the expert. The plaintiffs' solicitor circulated the note to the Contractor's solicitor and counsel. The Contractor's solicitor advised that, "subject to [counsels'] confirmation, yes okay to provide the document." However, later that afternoon, the Contractor's in-house counsel raised a question with the Contractor's solicitor: (emphasis in original)

> I'm not familiar with the practice of making concession in an ED. What is the effect of the concession – does it operate as a waiver of all other arguments in contract/law that the Asset Trustee isn't required to implement *a solution at its own cost concerning the Sydney Part Contamination that will ensure that the Project Works will meet the Design Life Requirements in Project Deed.*

65 The Contractor's solicitor promptly forwarded this query to Mr Christie SC and Mr Hume. Half an hour later, the Contractor's solicitor responded to the query: (emphasis in original)

> The concession was requested by TfNSW to avoid the need for evidence and a significant delay to determine the factual questions of whether a Durability Solution was necessary (and would be implemented) if Asset Trustee is unsuccessful. KWM gave instructions to counsel to make the concession on behalf of Asset Trustee because the Durability Solution is being implemented.
>
> If [the Contractor] is not accepting of the concession we should quickly advise Asset Trustee and TfNSW.

> The concession would be a basis for a waiver or estoppel concerning any other contentions that Asset Trustee (vis a vis the State) or [the Contractor] (vis a vis Asset Trustee) is not **contractually** bound to design and construct the Durability Solution if we are unsuccessful on the Interpretation Dispute.
>
> … If [the Contractor] is not comfortable with the concession please let me know quickly, as the Question will be back in issue.

No response from the Contractor is in evidence.

66 An hour and a half later, presumably unaware of the exchanges between the Contractor, its solicitors and counsel, Ms Kleinau followed up counsel as to whether they were happy to advise Transport for NSW's solicitors that the note of the directions made at the preliminary conference could be provided to the expert. Both confirmed their agreement (presumably, the Contractor had not advised that it was "not comfortable with the concession"). The note was duly provided to the expert.

67 On 26 October 2020, in advance of a meeting of the Contractor's steering committee on 6 November 2020, an agenda and presentation was circulated by the Contractor's in-house counsel. The presentation included a summary of the matters discussed between Transport for NSW and the Asset Trustee at the preliminary conference, including the different questions posed for determination by the expert and the separate question and accompanying concession that was reached.

68 Counsel were invited to give a presentation at the meeting of the Contractor's steering committee. On 6 November 2020, the Contractor's in-house counsel circulated material to the steering committee in advance of a briefing by Mr Christie SC and Mr Hume. In addition to the presentation, members of the committee were provided with a copy of the pleadings and written submissions served in the expert determination, together with a statement of agreed facts which set out the agreed question and the concessionA slide presentation was also prepared, which included the agreed question and concession.

69 Following the presentation to the steering committee, the chief executive officer of one of the joint venturers sent an email to the members of the committee, the Contractor's solicitor and counsel, expressing concern in respect of the concession:

> "I am not comfortable at all … I'd like to have absolute clarity about what exactly we, the JV, committed to … As I said at the meeting, I was surprised by [the concession] and do not agree with it and in particular [the acceptance that, if the argument on the construction of clause 11.10 was lost, the Asset Trustee would implement a solution *at its own cost*]. Where did that come from and was it the first time we saw this?"

70 The Contractor's in-house counsel requested a note endorsed by Mr Christie SC explaining the effect of the concession. Answers to specific questions were sought, including whether the concession had any binding legal or contractual effect. Further:

> None of the parties involved in those conversations had the necessary authority for the JV partners to vary or amend the contractual rights or obligations in the D&C Deed. Can a comment made by barristers in a preliminary hearing have some compulsory or mandatory effect on the parties?

71 On 9 November 2020, the Contractor's solicitor provided a memorandum in respect of the concession, settled by senior counsel. The memorandum detailed the events at the preliminary conference on 8 October 2020 as follows: (emphasis added)

> Counsel acting for Asset Trustee *and [the Contractor]* sought an adjournment to seek instructions from KWM as to the Question and the Concession and a phone conference between counsel, KWM and MinterEllison was held and KWM instructed counsel to make the formal concession sought, *and we acquiesced in the giving of the concession*.

72 As to the questions posed by the steering committee, the memorandum advised that the concession was the necessary contractual consequence resulting from the question being answered by the Expert in the negative. Further:

> It is thus a necessary corollary of the final determination of the dispute in the negative that Asset Trustee *vis a vis* TfNSW, and [the Contractor] *vis a vis* Asset Trustee, must presently implement a solution at its own cost concerning the Sydney Part Contamination that will ensure that the Project Works will meet the Design Life Requirements.

Expert determination

73 Whatever the rights and wrongs of the concession, the expert determination was now focussed on the "Interpretation Dispute" – the proper construction of clause 11.10(e)(i) and (ea) of the D&C Deed – rather than the Contamination Claim as a whole. Final preparations for the expert determination continued. Mr Christie SC reminded the Contractor's solicitor, "the Court Books need to be in KWM folders not Minters folders." The expert requested a bundle of authorities;

the Contractor's solicitor asked the plaintiffs' solicitor, "As our authorities will need to come from KWM, can we please trouble you to prepare our index and bundle?".

74 The expert determination took place on 13 November 2020. On 16 December 2020, the expert delivered his determination as follows:

> 110 Do clauses 11.10(e)(i) and (ea) qualify the Asset Trustee's obligations to design and construct a tunnel which meets the design life requirements under the Project Deed, such that the Asset Trustee is not obliged to take into account the predicted migration of the Sydney Park Contamination in designing and constructing the tunnel?
>
> 111 I answer that question "No".

As I understand it, the import of this answer is that the works required to design and construct the tunnels to withstand the Sydney Park contamination for the design life of the tunnels are works within the scope of the Project Deed and, thus, within the scope of the D&C Deed.

75 On 18 December 2020, the Contractor requested the Asset Trustee to issue a notice of dissatisfaction to Transport for NSW in respect of the expert determination. On 21 December 2020, the Asset Trustee served a Notice of Dissatisfaction on Transport for NSW. On 19 January 2021, Transport for NSW wrote to the Asset Trustee and the Project Trustee, advising that the expert determination was "a complete answer" to the claims made on 5 February 2020, 22 July 2020, 21 August 2020, 24 August 2020 and 3 September 2020. The Asset Trustee provided the letter to the Contractor.

76 On 4 February 2021, the Contractor issued a Notice of Intention to the Asset Trustee in accordance with clause 3.2(c) of the D&C Deed (which, it will be recalled, related to Linked Disputes), advising that it wished to dispute Transport for NSW's response in its letter of 19 January 2021. On 22 February 2021, the Asset Trustee advised the Contractor that the matter the subject of the notice of 4 February 2021 was now a Linked Dispute and a Notice of Dispute would be issued to Transport for NSW. A draft Notice of Dispute was provided for the Contractor's consideration.

77 On 10 March 2021, the Asset Trustee issued further notices to the Contractor setting out its view of the status of the Contractor's claims and disputes under

the D&C Deed in relation to the Sydney Park contamination. In short, the Asset Trustee considered that each of the Contractor's claims formed part of a Linked Dispute and, in light of the expert determination, had been rejected by Transport for NSW. On 1 April 2021, the Contractor advised the Asset Trustee that its purpose in issuing notices under clause 3.2(c) of the D&C Deed was to ensure that the Contractor was not bound by any response received from Transport for NSW; the Contractor agreed to accept the amount of the plaintiffs' corresponding entitlement in respect of Transport for NSW's liability under the Project Deed.

78 On 19 April 2021, the Asset Trustee confirmed that the parties were in agreement that the Contractor's claims based on "Direction 1" and "Direction 2" were the subject of Linked Disputes. Noting the Contractor's position that these Linked Disputes were stayed, the Asset Trustee enquired whether it wished for the Notice of Dispute to be served on Transport for NSW (a draft of which had been provided for the Contractor's input) but did not object to the Linked Disputes being stayed "if this is the Contractor's chosen course". The Contactor was asked to advise urgently if it held a different view. The Contractor confirmed that it considered that the Linked Disputes were held in abeyance through the Linked Disputes Protocol, pending the final outcome of the clause 11.10(e) Linked Disputes.

79 There the matter rested for seven months. The Asset Trustee sought reimbursement of its solicitors' fees and disbursements and Resolution Institute fees in respect of the expert determination from the Contractor under clause 3.3(f)(vii) of the D&C Deed. The Contractor paid these amounts without complaint.

A change of course

80 On 6 November 2021, the Contractor took a different position, notifying the Asset Trustee that the notices of dispute of 16 September 2020 (in respect of Direction 1) and 29 September 2020 (in respect of Direction 2) were *not* Linked Claims as, pursuant to clause 3.1(b)(iv) of the D&C Deed, the Contractor had a right in respect of the Change directed by the Asset Trustee where there was no corresponding change directed by Transport for NSW under the Project

Deed. The Directions were for the Contractor to implement the Durability Solution, which were not replicated (or provided at all) under the Project Deed. As such, the plaintiffs were said to be liable for the time and costs of implementing the Durability Solution.

81 Perhaps unsurprisingly, the Asset Trustee did not take this news well. On 10 November 2021, the Asset Trustee sought an undertaking that the Contractor would not seek to refer these matters for expert determination as un-Linked Disputes. The Asset Trustee also wrote to Resolution Institute, warning that the Contractor may seek to refer two disputes for expert determination where it was not permitted to do so under the D&C Deed. On 22 November 2021, the Asset Trustee repeated its request for an undertaking. On 26 November 2021, the Contactor maintained its position. The Asset Trustee rejoined on 8 December 2021, noting "The Asset Trustee is a 'pass through' entity in the contractual chain and any entitlement which the Contractor may have will be passed up to, and paid for by, TfNSW. These particular disputes are wholly without merit because in truth there never was never any 'directions' as that term is defined given by anyone …"

82 Without prejudice communications ensued between the plaintiffs and the Contractor between 16 December 2021 and 17 February 2022, when the parties negotiated. Two without prejudice meetings were held, attended by senior executives at the highest level. The focus of the discussions included the issue which is now before the Court. On 18 February 2022, the Contractor gave an undertaking not to commence the expert determination process for seven days.

Jurisdiction Dispute

83 On 25 February 2022, the Asset Trustee issued a Notice of Dispute to the Contractor under Schedule 3 to the D&C Deed, the dispute being whether the notices of dispute issued by the Contractor were Linked Disputes or not. If the dispute was not resolved by negotiation within 20 business days, the dispute would be referred to expert determination. The Asset Trustee also advised that it considered that its Notice of Dispute should be resolved before the notices of dispute issued by the Contractor. An undertaking was sought that the

Contractor would not refer its disputes for expert determination until the dispute the subject of the Asset Trustee's Notice of Dispute was finally determined. In the absence of an undertaking, the plaintiffs intended to approach the Court seeking urgent interlocutory relief. The Contractor declined to provide an undertaking.

84 The Asset Trustee also sought an undertaking from Resolution Institute that, in the event that the Contractor referred its disputes to the Institute, it would take no steps to nominate an expert and would immediately notify the Asset Trustee that the referral had been received. Resolution Institute advised that it considered it inappropriate to provide an undertaking without having heard from both parties.

These proceedings

85 On 25 February 2022, the plaintiffs commenced these proceedings, seeking interlocutory injunctive relief to restrain the Contractor from referring the Directions Dispute and associated claims for extensions of time until the Jurisdiction Dispute has been finally determined by expert determination and arbitration. By the Amended Technology and Construction List Statement, the plaintiffs contend that there is a serious issue to be tried *by the expert* in the Directions Dispute as to whether, in seeking to refer the Directions Dispute to expert determination as un-Linked Disputes, the Contractor is in breach of clause 3.3 of the D&C Deed, obligations of good faith and cooperation and a collateral agreement, being the Linked Dispute Protocol. Further, the plaintiffs contend that there is a serious issue to be tried *by the expert* as to whether the Contractor is bound by the expert determination in respect of the Interpretation Dispute such that the Contractor is precluded from bringing the Directions Dispute as un-Linked Disputes, said to constitute an abuse of the Dispute Resolution Procedure.

86 Further, it is said that there is a serious issue to be tried by the expert in the Directions Dispute as to whether the Contractor is estopped, by its conduct in the expert determination, from now contending that the concession was made without its prior written consent such that the Contractor is not bound by the expert determination. According to Mr Macpherson, the general counsel of

WestConnex assumed, based on the Linked Dispute Protocol, that there was no divergence in approach between the Asset Trustee and the Contractor in respect of the responsibility for the Sydney Park contamination. General counsel relied on this assumption in permitting the expert determination to proceed on the basis of the Linked Dispute Protocol and in giving instructions to agree, on behalf of the Asset Trustee, to making the concession in the expert determination. Had he been aware that there was a divergence in approach, general counsel would have investigated terminating the Linked Disputes Protocol and would have instructed Mr Macpherson not to agree to the concession.

87 The plaintiffs further contended that, unless the Court grants injunctive relief and if it transpires that the Directions Dispute is a Linked Dispute, then the plaintiffs will have been forced to participate in an expert determination process in breach of clause 3.3(b) of the D&C Deed. Further, the plaintiffs will have participated in the process effectively as a defendant as opposed to plaintiffs acting in the interests of the Contractor and against Transport for NSW under the Dispute Resolution Process under the Project Deed. Damages were said to be an inadequate remedy in these circumstances, including because each party is required to bear their own costs of the expert determination.

88 To this, the Contractor responded that each of the matters raised by the plaintiffs should be pleaded as defences in any expert determination of the Directions Dispute. Any arguments the plaintiffs wish to make in respect of the expert's jurisdiction can be made within the expert determination procedure. Further, the plaintiffs' application to the Court goes beyond "urgent interlocutory relief" within the meaning of section 9 of Schedule 3 of the D&C Deed.

89 On 27 February 2022, the Contractor filed a motion seeking a stay under section 8 of the *Commercial Arbitration Act*. On 28 February 2022, the plaintiffs offered to resolve these proceedings on the basis that the parties submit the question of jurisdiction to the expert for determination ahead of any other question or Dispute. If either party was dissatisfied with the expert determination, then the question of jurisdiction would proceed to arbitration.

These proceedings would be discontinued with no order as to costs. The offer was rejected.

APPLICATION FOR A STAY

90 It is convenient to first consider the application for a stay. The Contractor seeks an order that these proceedings be stayed pursuant to the *Commercial Arbitration Act*, section 8(1) of which provides: (emphasis added)

> 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.

A substantially similar provision exists in the *International Arbitration Act 1974* (Cth) section 7(5), as well as the Uniform Commercial Arbitration Acts in each State and Territory.

91 The parties agreed that the disputes are "the subject of an arbitration agreement", being Schedule 3 of the D&C Deed (though the plaintiffs did not necessarily accept that the entirety of Schedule 3 constituted an "arbitration agreement"). However, the plaintiffs contend that the arbitration agreement is "inoperative" as, under the D&C Deed, a party must issue a notice of dissatisfaction on the conclusion of an expert determination before proceeding to arbitration: clause 6(a), Schedule 3. A notice of dissatisfaction is a condition precedent to arbitration: *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 (per Hammerschlag J). As such, there is presently no arbitration agreement in respect of which a stay of the proceedings might be ordered under section 8 of the *Commercial Arbitration Act*. The Contractor disagreed, submitting that the *ejusdem generis* principle suggests that "inoperative" should be read consistently with "null and void" and "incapable of being performed". Further, to construe "inoperative" as in *John Holland* would allow a party to flout the agreed dispute resolution process by commencing and prosecuting litigation without taking the required steps to fulfil the conditions precedent. *John Holland* was said to be inconsistent with authorities which do not appear to have been referred to in argument before Hammerschlag J.

92 As I noted in *CPB Contractors Pty Ltd v DEAL S.R.L.* [2021] NSWSC 820, an arbitrator has jurisdiction to determine whether a dispute falls within the scope

of an arbitration clause *and* whether the arbitration agreement is operative, known as the *kompetenz-kompetenz* principle. This Court *can* determine such questions but, generally speaking, should leave these matters to the arbitrator unless the context in which these questions arise make it preferable for the Court to determine such matters: at [60]. Here, the parties agreed that it was preferable for the Court to determine whether the arbitration agreement was "inoperative" in this case.

93 Section 8(1) imports a presumptive validity of arbitral agreements, requiring the Court to order a stay unless the agreement is null and void, inoperative or incapable of being performed: *The Rena K* [1979] QB 377 at 392-93; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3)* (1998) 86 FCR 374 at 393. As the High Court of Singapore explained in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [7]:

> The precise words used… in particular, that a stay shall be made *'unless'* the court is satisfied that the arbitration agreement is invalid, strongly suggests the *presumptive validity* of an arbitration agreement. Once an arbitration agreement is shown to exist in that the applicant is a party to the arbitration agreement … the agreement is presumed to be valid unless proved to be otherwise.

94 As Croft J observed in *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* (2017) 52 VR 198; [2017] VSC 97, "inoperative" is a high bar to satisfy, where the onus lies on the party resisting a stay of proceedings on this ground: at [34], [38].

Meaning of "inoperative"

95 The phrase "null and void, inoperative or incapable of being performed" is taken from Article II(3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in 1958 (330 UNTS 3) – better known as the New York Convention – and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which is modelled on the Convention (see, for example, UN Doc A/CN.9/264, art 8, para 2). The words have been described as "rather Delphic": *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 355 (per Lord Mustill).

96 As to how these words should be construed, the Act identifies the interpretive approach. First, section 1C of the Act provides that the Act must be interpreted

so that (as far as practicable) the paramount object of the Act is achieved, being to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

97 Second, section 2A(1) provides that, subject to section 1C, in the interpretation of the Act "regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law … to international commercial arbitrations and the observance of good faith." As such, the Court "must have in mind that the phrases are taken from an International Convention, so they should not be interpreted in an 'anglo-centric' way but in a broad, international sense": *Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky* [2013] EWCA Civ 784 at [76] (per Aitkens LJ); see also *Hancock Prospecting v Rinehart* (2017) 257 FCR 442 at 535; [2017] FCAFC 170 at [366] (noting that the words "have their origins in an international instrument affecting different legal systems and different legal traditions"). Aitkens LJ also observed in *Aeroflot-Russian Airlines* at [99]:

> The whole point about the New York Convention… is that no exercise of judgment or discretion can be involved. Either the arbitration agreement is valid, in which case there must be a stay, or the court is satisfied that it is 'null and void' or 'inoperative' or 'incapable of being performed', in which case there is not. There is no halfway house in which a court can decide whether, on the facts, it would be an 'abuse of right' or 'inequitable' to rely on an otherwise valid arbitration agreement.

98 Third, section 2A(3) provides that, in interpreting the Act, reference may be made to documents relating to the Model Law made by the United Nations Commission on International Trade Law and its working groups for the preparation of the Model Law. However, I have found little assistance from the *travaux préparatoires*. As Howard M Holtzmann and Joseph E Neuhaus observed in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989, Kluwer) at 305:

> The legislative history of Article 8 provides no other insights into the intended meanings of the terms "null and void, inoperative or incapable of being performed" … so their precise meaning must be left to future development.

99 Further, as Peter Binder notes in *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Wolters Kluwer, 4th ed, 2019) at 148:

> … There seems to be no definition or further explanation to the exact meaning of these terms… Not one of the adopting states attempted to define this phrase either…

100 Likewise, learned scholar Professor Albert Jan van den Berg observed, "Neither the text of the Convention nor its legislative history gives much guidance as to how these words should be interpreted": Albert van den Berg, 'The New York Convention of 1958: An Overview' in Emmanuel Galliard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards*: *The New York Convention in Practice* (Cameron May, 2008) 39 at 52.

101 It is noteworthy that the *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations, 2016) also observes, in relation to the substantially similar provision in the New York Convention: (emphasis added)

> Courts generally assess the standard of "inoperability" under the broader expression "null and void, inoperative or incapable of being performed" without any further distinction. However, the relevant case law suggests that the word "inoperative" covers situations where the arbitration agreement *has become inapplicable to the parties or their dispute*.

102 As to judicial consideration, generally, "inoperative" has been construed as ceasing to have effect for the future. An early judicial consideration of the words was by Kerans JA in *Kaverit Steel and Crane Ltd v Kone Corp* (1992) 8 WAC 346; (1992) 87 DLR (4th) 129, where his Honour considered "The proviso is an echo of the law about void contracts ('null and void'), unenforceable contracts ('inoperative'), and frustrated contracts ('incapable of being enforced')": at [52]. Consistently with this, in Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd [1993] HKCFI 14, Kaplan J drew on the views expressed by Professor Albert Jan van den Berg (cited above) at [12]-[13]:

> Professor Albert Jan van den Berg … stated at p.158:
>
> > "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 that 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* …)"

> He goes on to give other examples as for instance where the award has been set aside or there is stalemate in the voting of the arbitrators or the award has not been rendered within the prescribed time limit. Further he suggests that a settlement reached before the commencement of arbitration may have the effect of rendering the arbitration agreement inoperative …

103 Likewise in *Bakri Navigation Company Ltd v 'Golden Glory' Glorious Shipping SA* (1991) 217 ALR 152, Gummow J approved of the meaning of "inoperative" as considered by Sir Michael Mustill and Mr SC Boyd in *The Law and Practice of Commercial Arbitration in England* (1989, Butterworths), at 169:

> The expression 'inoperative' has no accepted meaning in English law, but 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. Three situations can be envisaged in which an arbitration agreement might be said to be 'inoperative'. First, where the … Court has ordered that the arbitration agreement shall cease to have effect ….
>
> Second … there may be circumstances in which an arbitration agreement might become 'inoperative' by virtue of the common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties.

104 In *Bakri*, the parties entered into a contract which contained an arbitration clause, but later entered into a deed of undertaking which excised the subject matter of the proceedings from the arbitration clause. Gummow J concluded that the deed of undertaking effected a variation of the arbitration agreement, although "the arbitration agreement is not thereby deprived of all effect in all circumstances that may arise from time to time hereafter. I would regard what was achieved as the rendering of the arbitration agreement inoperative or ineffective in respect of the claims involved in the present proceeding in this court": at 168. The same approach was taken in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd* (1996) 133 FLR 417 and *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 at [61] (per Mitchell J), where the arbitration agreement was "inoperative" as the agreement ceased to operate by reason of a further agreement between the parties.

105 In *China Merchants Heavy Industry Co Ltd v JCG Corp* [2001] 3 HKC 580, the Court of Appeal in Hong Kong considered that it was stretching the language of the Convention unduly to call an agreement conferring a right on a party to refer a dispute to arbitration 'inoperative' merely because the party chooses not to exercise that right: at 585. *China Merchants* was followed in *Dyna-Jet Pte*

Ltd v Wilson Taylor Pacific Pte Ltd [2016] SGHC 238, where Vinodh Coomaraswamy J of the High Court of Singapore considered that an arbitration agreement was inoperative "at the very least" when it ceased to have contractual effect under the law of contract, such as discharge by breach, by agreement or by reason of waiver, estoppel, election or abandonment: at [162]. Further, the word "inoperative" contemplated the parties' contractual obligation to arbitrate their disputes ceasing to have effect or being discharged by events or circumstances arising outside the contract: at [170]. *Dyna-Jet* was followed by Lee J in *CPB Contractors Pty Ltd v Celsus Pty Ltd* (2017) 353 ALR 84; [2017] FCA 1620 at [62]-[68].

Tiered dispute resolution clauses

106 Turning to whether an arbitration agreement is "inoperative" if it requires the exhaustion of other dispute resolution procedures before arbitration, the issue arose for detailed consideration in *Channel Tunnel Group.* There, the contract contained a tiered dispute resolution mechanism requiring expert determination and then arbitration. The judge refused a stay of proceedings as there had not yet been a decision by, or even a reference to, the expert; the time for arbitration had not arrived. The Court of Appeal disagreed, staying the proceedings pursuant to the provisions of the *Arbitration Act 1975* (UK) in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] QB 656; [1992] 2 All ER 609. Staughton LJ (Woolf and Neill LJJ agreeing) observed at 669: (emphasis added)

> Many types of contract provide for some preliminary step to be taken before there is an arbitration. I cannot see that this entitles a party to disregard the arbitration procedure altogether and start an action at law, merely because the preliminary step has not been taken. In many cases the arbitration agreement could be altogether bypassed if that were permitted …

107 The House of Lords upheld the decision of the Court of Appeal but on a different basis, staying the proceedings under the Court's inherent jurisdiction: at 343. As such, observations on the scope of the *Arbitration Act 1975* (UK) were strictly *obiter*, although widely cited. It was common ground before the House of Lords (and thus presumably not argued) that the first stage of the procedure, being reference to the panel of experts, was not itself an arbitration, whilst the second stage was an arbitration: at 347. Lord Mustill (Lord Keith,

Lord Goff, Lord Jauncey and Lord Browne-Wilkinson agreeing) acknowledged that, while there was "substantial force" in the submission that the relevant clause was not an agreement to submit to arbitration but an agreement to submit to a panel of experts, with the arbitrators providing no more than a contingent form of appeal, "I would have been prepared without undue difficulty to hold" that the clause was an arbitration agreement: at 353.

108 A problem arose, however, as the form of the legislation was in different terms to the Convention. Whilst the Convention (and section 8 of the *Commercial Arbitration Act*) required the Court to refer a matter to arbitration, the *Arbitration Act 1975* (UK) required the Court to stay proceedings. Lord Mustill observed at 354:

> What springs to mind at once is that the application of this formula [in the Convention] to [this arbitration clause] requires the court to do the impossible, namely refer the dispute to the arbitrators, whereas it is to the panel of experts that the matter must first be sent if it is to be sent anywhere at all. If the English legislation had followed the Convention, as strictly speaking it should have done, it would have been hard to resist the conclusion that the duty to stay does not apply to a situation where the reference to the arbitrators is to take place, if at all, only after the matter has been referred to someone else.

That is, Lord Mustill considered *obiter* that legislation in terms of section 8(1) (but not before the Court for consideration) may not apply where an application to refer a matter to arbitration is made at a stage where earlier dispute resolution procedures specified in the arbitration agreement have yet to be completed.

109 The views of Lord Mustill were not followed in *Westco Air Conditioning Ltd v Sui Chong Construction & Engineering Co Ltd* [1998] HKCFI 946; [1998] 1 HKC 254, where an arbitration clause provided that disputes should first be referred to an architect and, if either party was unhappy with the architect's decision or the architect failed to make a decision within 90 days, that party may require that the dispute be referred to arbitration. Findlay J considered that the clause was clearly an arbitration clause, notwithstanding that the parties agreed to submit their disputes to the architect in the first instance. As Findlay J observed:

> [9] An agreement that requires that the parties submit their disputes ultimately to arbitration, although it may also require the parties in the first

> instance to follow a procedure – such as, attempting an amicable settlement – is, to my eyes, an arbitration agreement…
>
> [11] … It matters not, it seems to me, that the parties must, firstly, take some other step before this is done. It cannot possibly have been the intention of the parties that, if one of them issues a writ before that step is taken, their joint wish to avoid proceedings at law is frustrated. And it would make a complete nonsense of the arbitration agreement if it were so that one party could issue a writ on the eighty-ninth day, that the court was not bound to grant a stay then, but it must grant it on the ninety-first day because the period has then expired. …
>
> [12] In my view, what the statute means when it says 'refer the parties to arbitration' is not 'refer the dispute to the arbitrators', as Lord Mustill suggests in relation to the Convention, but refer the parties to the process of arbitration that the parties have agreed to undertake, and, if this involves a preliminary step that the parties have agreed to, to complete that step. Accordingly, I find that the arbitration agreement is not "null and void, inoperative or incapable of being performed", and I am bound to refer the parties to the arbitration to which they agreed.

110 The same approach was taken by Lightman J under the *Arbitration Act 1996* (UK) in *Ashgar v The Legal Services Commission* [2004] EWHC 1803 (Ch), albeit without reference to *Channel Tunnel Group.* A tiered dispute resolution clause provided options to dispute a decision by internal review or review by a Contract Review Body, followed by the option of mediation, failing which the dispute was referred to arbitration. The proceedings were stayed notwithstanding that an initial tier in the resolution process had yet to be undertaken. Lightman J simply accepted the assurance of the Legal Services Commission that a decision by the Contract Review Body could be obtained expeditiously: at [17].

111 In *Siam Steel International Plc v Compass (Australia) Pty Ltd* (2014) 293 FLR 260; [2014] WASC 415, the arbitration agreement required the parties to serve a notice of dispute, then confer and explore alternative methods of resolving their dispute before referring the dispute to arbitration. Le Miere J followed *Bakri*, holding that failure to give a notice of dispute did not render the agreement "inoperative" as the arbitration agreement had not ceased to have effect for the future in relation to the parties' claims: at [44]. Further, at [45]:

> An arbitration agreement is not inoperative in relation to particular claims merely because an arbitrator has not been appointed or a step that must be taken before an arbitrator is appointed has not yet been taken in relation to those claims. To construe 'inoperative' to cover such a situation would turn the exception … into a backdoor for a party wanting to escape the arbitration agreement. The effect of s 7 of the *International Arbitration Act* [s8(1),

> *Commercial Arbitration Act*] is that the parties are to be held to their bargain to arbitrate except relevantly where the arbitration agreement has ceased to have effect for the future at least in relation to the claims the subject of the action.

Although neither party had given the other a notice of dispute, it was open to either party to do so and, if the dispute was not otherwise resolved, to refer the dispute to arbitration. As such, the Court must stay the proceedings and refer the parties to arbitration: at [52].

112 This brings us to *John Holland*, where the dispute resolution clause provided for negotiation, expert determination, then arbitration. Proceedings were commenced before negotiation or expert determination had taken place. Hammerschlag J held that the arbitration agreement was "presently inoperative" within the meaning of section 8(1) of the *Commercial Arbitration Act*: at [186]. In terms, the dispute resolution clause set out the "sequential procedure that is to be followed to resolve a Dispute" being, firstly, negotiation then, secondly, expert determination and, thirdly, arbitration. Further, the clause expressly stated, "it is a condition precedent to a party being entitled to refer a Dispute to arbitration … or to commence court proceedings (other than in the case of an application for urgent interlocutory relief) that the procedures referred to … first be complied with." His Honour held that the clause made compliance with the negotiation and expert determination steps a condition precedent to a party being entitled to refer a dispute to arbitration. At [190]-[191]:

> [190] Unless and until that condition is fulfilled, neither party can effectively refer a Dispute to arbitration. When that condition is fulfilled, the arbitration agreement becomes operative.
>
> [191] Were the arbitration agreement to be treated as operative, the consequence would be that the Court would have to refer the parties to arbitration in conflict with the contractual provisions they have agreed, bypassing important provisions, compliance with which may entirely obviate the need for arbitration.

Importantly, whilst Hammerschlag J found that there was no right under section 8(1) to request the Court to refer the matter to arbitration and "its motion, to that extent, must be dismissed *or at least stood over pending fulfillment of the condition precedent*", the defendant was nonetheless entitled to a permanent stay in light of the dispute resolution clause: at [192]-[193]. An order was made staying the action: at [196].

113 A slightly different approach was taken by Hammerschlag J in *Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825, where the contracting parties had used an obsolete standard form contract which provided that the person to nominate an arbitrator was the President of the Australasian Dispute Centre, neither of which existed. As to whether an arbitration agreement was "inoperative", Hammerschlag J followed *Lucky-Goldstar* and observed at [31]:

> I take the term 'inoperative' in s 8(1) to mean having no field of operation or to be without effect. Whether an arbitration agreement is in this state is to be determined in the context of, and having regard to, provisions of the Act which may make it operative.

His Honour observed that the Act was directed to ensuring that an arbitration agreement operated where the procedure for the appointment of an arbitrator failed: at [48], citing section 11 of the *Commercial Arbitration Act.* As such, the parties were referred to arbitration under section 8(1) of the *Commercial Arbitration Act* but the matter was stood over to enable the Court to deal with remaining issues, including the appointment of an arbitrator: at [56]-[57].

114 *John Holland* was approved in *Blanalko* and *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476. In *Blanalko*, a dispute was referred to arbitration and the arbitrator gave an award determining the dispute apart from costs. Blanalko applied to the court to have its costs assessed and Lysaght sought a stay. Croft J held that the arbitrator's failure to determine part of the dispute did not render the arbitration agreement inoperative, "an arbitration agreement will not be inoperative … merely because it is not fully performed": at [37]. Whilst the arbitrator did not determine one of the issues submitted to arbitration and was not pressed to do so by the parties, this was not an obstacle which could not be overcome by parties who were ready and willing to perform the agreement: at [38]. His Honour added at [40]:

> … The Court will only refer a matter to arbitration where a party has the right to commence or continue an arbitration [citing *John Holland*]. No such right would exist here if a final award had been delivered and the jurisdiction of the arbitral tribunal thus terminated in accordance with s 32 of the CAA. …

115 In *Transurban*, Lyons J reviewed the meaning of "inoperative" from *Bakri* to *John Holland*. Lyons J noted that whether an arbitration agreement had become "inoperative" would most frequently arise where the focus was on

whether the agreement ceased to have effect for the future given a subsequent agreement or conduct including waiver, estoppel or abandonment of a right to arbitrate: at [164]-[165]. *John Holland* was in a different category, where the arbitration clause did not become operative until a condition precedent was fulfilled. At [167]:

> I am not able to form a concluded view on the meaning of inoperative for the purpose of the proviso in this application. I consider this is a difficult issue. With respect, I agree with the decision of Hammerschlag J [in *John Holland*] where he concludes that an arbitration agreement may be relevantly inoperative for the purpose of s 8 of the Act where that agreement is subject to a condition precedent. In this regard, I note the word inoperative is a word of broad meaning.

116 Most recently in *Karadag v Samkara Holdings Limited* [2022] NSWSC 380, Ward CJ in Eq stayed proceedings in which the "matter" was subject of a tiered dispute resolution clause, requiring the parties to mediate then arbitrate: at [22]. Although a mediation had commenced but not concluded (despite several extensions of time) before the stay application was determined, her Honour considered it appropriate to refer the dispute to arbitration and stay the balance of the proceedings until the arbitration had been determined "noting the mandatory nature of s 8 of the *Commercial Arbitration Act* and the policy of the Court to honour such clauses": at [147]. Her Honour did not consider whether, by reason that the first tier of the dispute resolution provisions had yet to be completed, the arbitration clause was "inoperative".

117 Generally, "inoperative" has been interpreted across jurisdictions implementing the Convention and the Model Law as meaning that the arbitration agreement has ceased to have effect for the future, either for a specific type of dispute or at large. An arbitration agreement may be "inoperative" as it is unenforceable, has been amended by a further agreement, is the subject of *res judicata*, has been set aside by a Court, has been frustrated or discharged by breach or by reason of waiver, estoppel, election or abandonment or has otherwise been repudiated.

118 *John Holland* falls outside this rubric. It may be observed that Hammerschlag J was not taken to the authorities referred to in this judgment. Whilst *John Holland* was approved in *Blanalko* and *Transurban*, neither case concerned whether proceedings should be referred to arbitration notwithstanding that a

preliminary step under a tiered dispute resolution clause had yet to be completed. (The case may also be distinguished as the arbitration agreement expressly provided, "It is a condition precedent to a party being entitled to refer a Dispute to arbitration … or to commence court proceedings … that the procedures referred to … first be complied with." Schedule 3 of the D&C Deed does not so provide.)

119 Whilst a more experienced commercial judge would be hard to find, I respectfully consider that, to the extent that *John Holland* is authority for the proposition that failure to complete preliminary steps in a tiered dispute resolution clause before arbitration makes the clause "inoperative", it should not be followed. Such a construction would undermine the object of the Act, depart from the interpretation of the term more widely and enable a party to bypass their contractual bargain to submit their disputes to arbitration by commencing proceedings before all preliminary steps have been completed: *Channel Tunnel Group* at 669 (per Staughton LJ). As Findlay J put it in *Westco*, "It cannot possibly have been the intention of the parties that, if one of them issues a writ before that [preliminary] step is taken, their joint wish to avoid proceedings at law is frustrated": at [11]. Or as Le Miere J stated in *Siam Steel,* "To construe 'inoperative' to cover such a situation would turn the exception … into a backdoor for a party wanting to escape the arbitration agreement": at [45].

120 I doubt that Hammerschlag J had such a result in mind. Rather, in both *John Holland* and *Broken Hill City Council v Unique Urban Built*, his Honour made facultative orders to hold the parties to their bargain to arbitrate, notwithstanding a failure to comply with the precise terms of the arbitration agreement, at least by the time that the application for a stay was heard. Hammerschlag J either stayed or stood over the proceedings until the preliminary steps required before arbitration had been completed.

121 As such, the arbitration agreement in the D&C Deed is "operative" notwithstanding that the expert determination phase has yet to be undertaken. As such, the Court "must" refer the parties to arbitration. The fact that preliminary steps must be taken before the Jurisdiction Dispute or Directions

Dispute reaches the arbitration stage matters not. As the Court explained in *Hancock Prospecting Pty Limited v Rinehart*, section 8 "involves the referral to arbitration, by a stay of court proceedings": at [146]. In that case, the Court stayed the proceedings under section 8(1) "pending any arbitral reference between the parties or until further order": at [417], relevantly upheld by the High Court on appeal (*Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [81]. The same result was achieved, albeit by a different route, in *Channel Tunnel Group*. As Staughton LJ observed at 669:

> The defendant in the court proceedings who applies for a stay may not have any claim which he wishes to make against the plaintiff, or any other reason either to start an arbitration or to carry out any preliminary action before there can be one; he may merely wish to resist the plaintiff's claim. I can see no reason why he should not say to the plaintiff: "I dispute your claim. If you wish to pursue it, you must carry out the preliminary step and then proceed to arbitration."

INTERIM MEASURES

122 In matters governed by the Act, no court may intervene except where so provided by the Act: section 5. Section 9 provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure. It remains to consider, therefore, whether any interim measure of protection should be granted before staying these proceedings. Section 17J of the *Commercial Arbitration Act* provides:

> **Court-ordered interim measures**
>
> (1) The Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.
>
> (2) The Court is to exercise the power in accordance with its own procedures taking into account the specific features of a domestic commercial arbitration.

123 Whilst section 17J, by its terms, may suggest that the Court's power to order an interim measure accords with the Court's inherent jurisdiction to grant interlocutory relief, the Court must "tak[e] into account the specific features of a domestic commercial arbitration". As Lyons J observed in *Transurban* at [145]-[146]:

> [145] … the circumstances in which the Court will exercise its power under s 17J are limited. In *Sino Dragon* [*Trading Ltd v Noble Resources International Pty Lte* (2015) 246 FCR 479], Edelman J agreed with the comments of the Western Australian Court of Appeal [in *Cape Lambert Resources Ltd v MCC*

> *Australia Sanjin Mining Pty Ltd* [2013] WASCA 66] that the Court's power to grant interim measures under s 17J of the Act 'should be exercised very sparingly and in circumstances in which such orders were effectively the only means by which the position of a party could be protected until an arbitral tribunal was convened'. This places a significant restraint on the exercise of the Court's power to grant interim measures.
>
> [146] … the decision in *Hancock* [*Prospecting Pty Ltd v DFD] Rhodes* [*Pty Ltd* [2020] WASCA 77] is authority for the proposition that the general and residual powers of the Court are excluded by s 5 of the Act and that the Court has no power except as provided by the Act where a particular matter is governed by the Act. This would appear to include a removal of the Court's inherent or auxiliary equitable jurisdictions.

Followed in *Longboat Holdings Groupno3 v Zacole Pty Ltd* [2021] VSC 280, [122] (M Osborne J).

124 The plaintiffs' submissions did not address how the interlocutory relief sought – an order that the Contractor must not take any action to refer the Directions Dispute to expert determination until the Jurisdiction Dispute is finally determined – fell within the Court's powers under section 17J of the Act. Such orders do not seek to protect the plaintiffs' position until an arbitral tribunal is convened but to, effectively, make directions in relation to the process to be followed by the expert in their determination – as to which dispute to hear first and separately from other disputes. I do not consider the interlocutory relief sought to be an appropriate interim measure under section 17J of the Act.

"URGENT INTERLOCUTORY RELIEF"

125 It will be recalled that section 9 of Schedule 3 to the D&C Deed provides, "Nothing in this Schedule 3 will prejudice any right a party may have to seek *urgent interlocutory relief* from a court in respect of a Dispute". The plaintiffs submitted that, whilst an expert could determine their own jurisdiction, clause 9 of Schedule 3 of the D&C Deed did not preclude the question of jurisdiction being resolved by the Court. Specific terms of the D&C Deed were said to be inconsistent with and override the Expert Determination Rules. Further, no expert had been appointed in the Directions Disputes to whom the question of jurisdiction could be submitted (no doubt, in part, as a consequence of the plaintiffs' insistence that the Contractor refrain from appointing an expert).

126 The plaintiffs submitted that if an expert decided (incorrectly) that they had jurisdiction to determine the Directions Disputes as un-Linked Disputes, or did

not determine that matter in advance of the substance of the Directions Disputes, then the plaintiffs will be obliged to proceed through the entire process before having an opportunity to challenge the threshold issue in an arbitration. The plaintiffs' offer to resolve these proceedings on the basis that the expert first determine jurisdiction to determine the Directions Disputes as un-Linked Disputes and, if either party be dissatisfied with the determination, the balance of the determination be stayed pending arbitration of that threshold matter had been rejected. The plaintiffs therefore had no option but to seek relief from the Court. The Summons contemplated that any final matters be dealt with by an expert, akin to orders which terminate upon the occurrence of an event, such as the appointment of an arbitrator: *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66 at [28]; *Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd* (2017) 96 NSWLR 329; [2017] NSWCA 291 at [99]-[101].

127 As to whether the Court should grant interlocutory injunctive relief, the plaintiffs submitted that the Contractor, having received an unfavourable determination of a Linked Dispute – which the Contractor prosecuted with its legal team in the name of Asset Trustee – now sought to agitate the same matters as "un-Linked Disputes" as between the Asset Trustee and itself only in the guise of the Directions Disputes. The Contractor "wants another go" but at a different party, rather than following the D&C Deed, which gives it a right to take the Contamination Claim to arbitration with Transport for NSW as the contradictor. It was said that the Contractor was in breach of clause 3.3 of the D&C Deed. The Contractor's conduct was said to lack good faith in the face of the Linked Dispute Protocol and the fact that the concession was proposed by the Contractor's counsel. In doing so, it was said that the Contractor sought to relitigate the same issue litigated in 2020, this being an abuse of process. The Court in its inherent jurisdiction ought prevent this occurring. The plaintiffs sought an order timetabling two competing procedures so as to avoid the prejudice it would suffer if the Directions Dispute proceeds on a wrong footing before the wrong tribunal. Otherwise, the Contractor would seek to force the plaintiffs to through the entire process in the Directions Dispute, opposing the

question of jurisdiction being determined separately from the merits of the dispute.

128 The plaintiffs submitted that there were serious issues to be tried as to whether the Directions Disputes were "un-Linked Disputes", whether disputes were brought in breach of the D&C Deed and / or a further collateral contract between the parties in the form of the Linked Dispute Protocol, whether the Contractor was estopped from bringing the Directions Disputes by reason of an issue estoppel or its conduct during the expert determination (*Blair v Curran* (1939) 62 CLR 464 at 531-532), or whether the Contractor was precluded from pursuing the Directions Disputes as un-Linked Disputes by reason of elections made during the expert determination. The plaintiffs submitted that there could be no doubt that the Directions Disputes – which concern the proper construction of clauses 11.10(e) and 11.10(ea) and other warranties in the D&C Deed – are Disputes “concerned with the same or substantially similar issues” to those regarding the rights, liabilities and obligations of Transport for NSW and the Asset Trustee under the Project Deed, as the same provisions appear in the Project Deed.

129 The plaintiffs submitted that the notion that the 7 July 2020 and 23 July 2020 correspondence were "Directions" strained credulity. On 7 July 2020, the plaintiffs simply provided the Contractor with correspondence concerning the already "Linked" contamination dispute. Having notified the Contractor that the contamination claim was a Linked Claim, the plaintiffs were contractually obliged to keep the Contractor regularly informed as to all steps taken in relation to the progress of the Linked Claim: clause 3.2(b)(iv), D&C Deed. Further, the suggestion that the Asset Trustee had given a Direction where Transport for NSW had not given a Direction was said to be contradictory. If Transport for NSW's letter to the Asset Trustee was not a Direction, then how could passing the letter on to the Contractor be a Direction, particularly where the Asset Trustee was contractually obliged to pass it on. As to the second direction, on 20 July 2020 the Asset Trustee simply advised that it would review the Contractor's design on the basis that it would include a Durability Solution, as that is what the Contractor said it was going to do by its notice dated 17 July 2020.

130 Further, the effect of the expert determination – which the Contractor had not sought to overturn and remains binding on it pursuant to clause 3.3 of the D&C Deed – is that works required to design and construct the tunnels to withstand the Sydney Park contamination for the design life of the tunnels were works within the scope of the D&C Deed. Accordingly, to the extent the 7 July 2020 and 23 July 2020 notices were Directions, they could only ever have been Directions to complete the work that is already within the Contractor's scope under the D&C Deed and could never be Directions to implement a Change to that scope.

131 As to the concession, the plaintiffs submitted that, even if the concession was made without the written consent of the Contractor, the concession would not have the effect of rendering the entirety of the agreement in clause 3.3(f) inapplicable to the Contamination Claim. It would only be "inapplicable" to the extent of the concession. The balance of the dispute, including the proper construction of the Project Deed and the D&C Deed, would remain a Linked Dispute and binding on the Contractor. Further, it was said that there *was* written consent, given the email from the Contractor's solicitor sent the next day, together with the fact that Contractor's counsel proposed the concession and could bind his client: *Pavlovic v Universal Music Australia Pty Ltd* (2015) 90 NSWLR 605; [2015] NSWCA 313 at [21] (per Bathurst CJ), at [150]-[154] (per Beazley P), and at [160] (per Meagher JA). Failing this, an estoppel by convention precluded the Contractor from relying on the matter: *Heggies Bulkhaul v Global Minerals Australia* (2003) 59 NSWLR 312; [2003] NSWSC 851 at [147]–[153]. Failing this, in proceeding to continue with the expert determination as a Linked Dispute, the Contractor was said to have made an election between two inconsistent rights, being the right to contend that the Contamination Dispute was no longer a Linked Dispute (and therefore, the expert lacked jurisdiction under rule 5(5) or rule 6(2)(c) of the Expert Determination Rules) and the right to proceed with the expert determination on the basis that the expert had jurisdiction: *Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd* (2019) 101 NSWLR 679; [2019] NSWCA 185 at [86]. By Rule 6(2)(c), any objection to jurisdiction was required to be progressed expeditiously and it was not.

132 The plaintiffs submitted that the balance of convenience favoured the grant of relief as, in the absence of an injunction, the Asset Trustee would be forced to participate in an expert determination as a contradictor to – as opposed to advocate for – the Contractor's claims. Where the plaintiffs had given notices of Linked Dispute in respect of the Directions Disputes, failure to progress the Directions Dispute as Linked Disputes was said to be a breach of clause 3.3 of the D&C Deed as well as the Linked Dispute Protocol. This would put the Asset Trustee in breach of clause 3.3(c) of the D&C Deed if it later transpired that the Directions Disputes were Linked Disputes. That breach could not then be cured by the Asset Trustee. In addition, the Asset Trustee would not be able to recover its costs of the determination where the rules of Resolution Institute required each party to bear their own costs. Damages were said to be an inadequate remedy. The plaintiffs refuted that there was any relevant delay. Rather, the Contractor had not taken any steps in respect of the Contamination Claim since instructing the plaintiffs to issue a notice of dissatisfaction on 18 December 2020. It was not until 6 November 2021 that the Contractor asserted that the Directions Disputes were not Linked Disputes. Further, as a matter of policy, it was submitted that the Court would not order a *status quo* that risked one party being in breach of a contract pending the final determination of the ultimate issue.

133 The Contractor submitted that the relief sought by the plaintiffs was not "urgent" or "interlocutory". Rather than preserving the status quo, the plaintiffs sought by injunction to finally determine the dispute between the parties as to the appropriate method under the D&C Deed for resolving the Jurisdiction Dispute. The injunction would, on a final basis, ensure that the Jurisdiction Dispute was heard prior to referral of the Directions Disputes. Nor were the orders sought protective until the arbitral tribunal was convened. Rather, the plaintiffs sought to invoke the coercive processes of the Court to manipulate the timing or sequencing of dispute resolution procedures under the D&C Deed in a manner which was different to the contractually agreed process and limited what the tribunal may consider.

134 The Contractor submitted that it was not a breach of the D&C Deed for the Contractor to refer to expert determination an alleged dispute which, on final

analysis, was not within the jurisdiction of the expert or to which the plaintiffs have a defence. The parties had clothed the expert with authority to decide his or her own jurisdiction. The Contractor, which contended that the dispute is not a Linked Dispute, is required by clause 32 of the D&C Deed to engage the processes of Schedule 3. If the Contractor is wrong, then those contractual processes will play out in the plaintiffs' favour but the Contractor does not breach the D&C Deed by engaging those processes.

135 The Contractor submitted that there was no serious question to be tried as the alleged bases for an injunction (breach of contract, issue estoppel, estoppel and election) were matters for the expert to determine, if raised by way of defence by the plaintiffs in response to referral by the Contractor. The Contractor submitted that just because Mr Rudge SC had proceeded on the basis that the Directions Disputes were Linked Disputes does not necessarily make it so; if, as a matter of the proper construction of the D&C Deed, the dispute is not a Linked Dispute, an 'upstream' expert determination cannot resolve that it is. The 'upstream' determination only affects the Contractor's rights in respect of that which is a Linked Dispute.

136 It was said that there could be no issue estoppel where Mr Rudge did not find responsibility for the contamination lay with the Asset Trustee at the Project Deed level, and therefore, the Contractor at the D&C Deed level. There was no consideration, discussion or finding as to the Contractor's position. There was no issue "necessarily established as the legal foundation or justification" of a conclusion in the previous determination: *Blair v Curran* at 531 (per Dixon J). Nor was there estoppel precluding the Contractor from treating the Directions Disputes as un-Linked Disputes. There was no detriment: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428–9 (per Brennan J). Nor was it arguable that the representation was conveyed by the conduct. The plaintiffs' case required it to be shown that the engagement of lawyers conveyed that the Contractor was committing to be bound by the outcome: *Sullivan v Sullivan* [2006] NSWCA 312 at [85] (per Hodgson JA, McColl JA agreeing). This contention was said to be unsustainable where the expert determination was made in response to a dispute between Transport for NSW and the Asset Trustee, not the Contractor. The suggestion of estoppel or

election under the Linked Disputes Protocol was said to be destroyed by clause 2.7 of the protocol. An election requires "both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election as between the two inconsistent rights which he possesses": *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 642 (per Stephen J, McTiernan J agreeing). The required words or conduct were absent.

Conclusion

137 A similar clause to section 9 of Schedule 3 to the D&C Deed, albeit without the requirement that the interlocutory relief be "urgent", was described by Davies J in *1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd* [2009] VSC 226, as "not a way out, through the backdoor, to avoid the dispute resolution procedure … [The clause] enables a party to institute proceedings to obtain injunctive relief in the appropriate case. But the initiation of such proceedings is not a means by which one party may avoid the dispute resolution process where the claiming of injunctive relief is used as a mechanism to bring" proceedings in the Court: at [24].

138 Section 9 of Schedule 3 to the D&C Deed requires that the interlocutory relief be "urgent". Whether the relief sought is, in fact, urgent is a matter to be determined objectively: *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22; [2010] VSCA 37 at [27] (per Buchanan JA, Bongiorno JA and Croft AJA). Were it otherwise, the parties' preference that their disputes be decided by expert determination or arbitration "may be set at nought" if the ability to seek interlocutory relief is not limited to cases which are in fact urgent: *AED Oil* at [28]. *AED Oil* was followed in *Green v Econia Ptv Ltd* [2016] SASC 153, where Dart J added, "For a matter to be urgent, it must have the quality of requiring immediate attention": at [23]. In *CPB Contractors Pty Ltd v JKC Australian LNG Pty Ltd* [2017] WASC 112, Le Miere J considered an "urgent" matter to be "pressing; compelling or requiring immediate action or attention": at [37]; followed by Ward CJ in Eq in *CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd* [2017] NSWSC 1798 at [105], [119].

139 As the Contractor submitted, the plaintiffs' application is not 'urgent' as, if the Contractor refers the Directions Dispute to expert determination, then the plaintiffs can raise the Jurisdiction Dispute and the expert is empowered to determine the issue under rule 5 of the Expert Determination Rules. The issue raised by the plaintiffs – that the Directions Dispute is a Linked Dispute – is, if correct, a complete defence. If the plaintiffs wish to contend that the Contractor has breached the D&C Deed, then they should follow the agreed process by raising it before the expert as a reason they should decline to exercise jurisdiction. An expert appointed to determine the Directions Dispute has jurisdiction to make a determination in respect of that defence. This is not a reason that the plaintiffs' relief requires "immediate attention" by a Court.

140 I accept without hesitation that there are serious issues to be tried, as identified by the plaintiffs. I also accept without hesitation that the plaintiffs' case in respect of these issues is strongly arguable. But, according to the Dispute Resolution Procedure, these serious issues are to be determined by an expert then arbitrator, followed by an appeal to this Court under section 34A of the *Commercial Arbitration Act* on a question of law (subject to a grant of leave). The plaintiffs' pleadings accept as much, identifying serious issues "to be tried by the expert". In short, the plaintiffs seek interlocutory relief to ensure that these serious issues are determined by the expert in their preferred sequence. What the Court is being asked to do is to decide a question of procedure or jurisdiction, supplanting the expert's power under rule 5.5 and rule 9.1 of the Expert Determination Rules, contractually conferred by the parties under the D&C Deed. Granting the relief sought will, in effect, permit the plaintiffs to resile from their contractual bargain.

141 As to where the balance of convenience lies, there is no doubt that, if the Court does not grant the interlocutory relief sought, then the Contractor will refer the Directions Dispute to expert determination, the plaintiffs will refer the Jurisdiction Dispute to expert determination, and a hot contest will ensue before the expert as to whether the Jurisdiction Dispute should be heard first or whether all of the disputes should be heard together. Whilst the Contractor will seek to have all disputes determined together, the appropriate procedure including any separate question is a matter for the expert. If the plaintiffs do not

persuade the expert that their suggested course should be adopted, then there is no doubt that the plaintiffs will incur costs in a composite expert determination which they will not be entitled to recover from the Contractor. But the Dispute Resolution Procedure envisages that a party, who is ultimately determined by an expert or arbitrator to have taken a path which was misconceived, is not obliged to pay the other side's costs of the expert determination or arbitration. That is the contractual bargain.

142 The plaintiffs have raised compelling arguments as to why the expert should determine the Jurisdiction Dispute in advance of the Directions Dispute. But it is a matter for an expert to determine whether this is an appropriate way to proceed. The fact that the plaintiffs cannot recoup the costs of defending the Directions Dispute does not make the proceeding "urgent", this being the consequence of the contract to which the plaintiffs bound themselves. It may, however, be a powerful reason why an expert may accede to the plaintiffs' request that the Jurisdiction Dispute be determined first. But given the bargain struck by the parties, I do not consider that the Court should grant interlocutory relief which interferes with, or modifies, the agreed process.

EXPERT DETERMINATION RULES

143 The plaintiffs also called in aid Rule 6.2(c) of the Expert Determination Rules of Resolution Institute. Rule 6 of the Expert Determination Rules provides:

> **RULE 6 General Duty of Parties**
>
> 1. The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the Process.
>
> 2. Without limiting the generality of the foregoing, the parties shall:
>
> a. be represented at any Preliminary Conference or meeting convened by the Expert by a person or persons with authority to agree on procedural matters;
>
> b. comply without delay with any direction or ruling by the Expert as to procedural or evidentiary matters; and
>
> c. where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law.

"The Process" is defined to mean "expert determination of the Dispute in accordance with these Rules"; "The Dispute" means the disputed issues for expert determination in accordance with these Rules.

144 Rule 6 presupposes that the Process, that is, the expert determination, is underway when "necessary steps" are taken to obtain a decision from a Court on a preliminary question of jurisdiction or law. Rule 6.2(c) envisages that, in the course of an expert determination, an issue may arise on which it is "appropriate" that the Court's decision be obtained.

145 Here, there is no Process. Rather, a party seeks to delay the commencement of an expert determination, at least, in respect of a particular Dispute. While rule 6.2(c) appears to encompass both an application to the Court by all parties, or simply one party, to the expert determination, here, no expert determination has begun such that this rule is not enlivened.

ORDERS

146 For these reasons, I make the following orders:

(1) Dismiss Prayers 6, 7 and 7B of the Amended Summons.

(2) Order the plaintiffs to pay the defendants' costs of the plaintiffs' application for interlocutory relief.

(3) Pursuant to section 8(1) of the *Commercial Arbitration Act 2010* (NSW), stay the proceedings pending any arbitral reference between the parties or until further order.

(4) Order the plaintiffs to pay the defendants' costs of the Notice of Motion filed on 26 February 2022.

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