SUPREME COURT OF QUEENSLAND

CITATION:	*Access Group International Ltd v Dreamfield Pty Ltd & Ors; Dreamfield Pty Ltd v Access Group International Ltd* [2017] QSC 276
PARTIES:	**ACCESS GROUP INTERNATIONAL LIMITED ACN 616 478 267** (applicant) **v** **DREAMFIELD PTY LTD ACN 615 065 248** (first respondent) **NINE PLUS SOME PTY LTD ACN 092 348 573 AS TRUSTEE FOR TFZ TRUST** (second respondent) **NINE PLUS SOME PTY LTD ACN 092 348 573 AS TRUSTEE FOR THE NOSIVAD FAMILY TRUST** (third respondent) **NINE PLUS SOME PTY LTD ACN 092 348 573 AS TRUSTEE FOR LARKHILL TRUST** (fourth respondent) **CAD ASSETS PTY LTD ACN 618 645 711** (fifth respondent)
FILE NO/S:	No 10297 of 2017
PARTIES:	**DREAMFIELD PTY LTD ACN 615 065 248** (applicant) **v** **ACCESS GROUP INTERNATIONAL LIMITED ACN 616 478 267** (respondent)
FILE NO/S:	No 10902 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	23 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2017
JUDGE:	Davis J
ORDER:	**1. The application by Access Group International Limited ACN 616 478 267 for declarations as to the construction of the Subscription Agreement is dismissed.** **2. The application by Access Group International Limited ACN 616 478 267 for specific performance of**

clause 6.1 of the Shareholders' Agreement is stayed pending completion of the dispute resolution and expert determination procedure provided for in clause 23 of the Shareholders' Agreement.

3. **The application by Dreamfield Pty Ltd ACN 615 065 248 for judgment is dismissed.**

4. **I will hear the parties as to costs.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where two contracts were executed on the same day – where one contract was for the subscription of shares and another was as between the shareholders – where the two contracts used the same term, being "Annual Program" – where each contract defined that term differently – whether the definition of one contract prevailed or they should understood by reference to their respective definitions

EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – JURISDICTION AND AVAILABILITY – OTHER MATTERS – where the applicant seeks specific performance of a term of the contract – where the contract provides for an dispute resolution mechanism – where that provision for dispute resolution provides that it "must" be complied with – where that dispute resolution process has not been followed – whether specific performance should be ordered in absence of compliance with the dispute resolution process set out in the contract

Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337, cited
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37 (14 October 2015); (2015) 256 CLR 104, followed
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563, followed

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M Trim for the applicant
C Johnstone for the respondent

No 10902 of 2017
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SOLICITORS: **No 10297 of 2017**
McCullough Robertson for the applicant

Russells for the respondent

No 10902 of 2017
Russells for the applicant
McCullough Robertson for the respondent

[1] These applications concern a dispute which has arisen concerning the construction and effect of two contractual documents both entered into on 21 December 2016.

[2] Dreamfield Pty Ltd (Dreamfield) proposed to operate a business of what is described as that "of operating a purpose built precinct to enhance and support education and training, arts and culture, as well as sports programs, including leasing commercial spaces and undertaking related architecture and other shared services".[1]

[3] The two agreements then, which, by their terms concern that business, are:

1. A "Subscription Agreement" entered into between Dreamfield and Access Group International Limited (Access) (the Subscription Agreement).

2. A "Shareholders' Agreement" entered into between Dreamfield, Access and Nine Plus Some Pty Ltd (Nine Plus Some) as trustee for three different trusts (the Shareholders' Agreement).

[4] The broad objects of the two agreements are obvious. By the Subscription Agreement, Access is to pay a total of $5 million and is to receive 30 per cent of the issued shares in Dreamfield. By the Shareholders' Agreement, the shareholders, which are (after Access's acquisition of shares) Access and Nine Plus Some as trustee for three different trusts, agree between themselves as to the management of Dreamfield and Dreamfield's business.

[5] CAD Assets Pty Ltd (CAD), which is the fifth respondent to the application brought by Access, is not a party to either the Subscription Agreement or the Shareholders' Agreement. At one point, CAD accepted a transfer of shares from Nine Plus Some. There was a dispute about that and it was agreed that CAD had no interest in any shares

[1] Shareholders' Agreement cl 1.1, definition of "business": Affidavit of Guy Humble, filed 5 October 2017, 10297/17 CFI 2 ex from page 17.

in Dreamfield.[2] CAD was obviously joined to the application out of an abundance of caution but in fact has no interest in the matter.

[6] There are two applications before me.

[7] The first[3] is brought by Access. It seeks declarations against Dreamfield, Nine Plus Some as trustee for the three trusts and CAD in these terms:

> "1. Declarations that, on a proper construction of the Subscription Agreement … and Shareholders' Agreement …:
>
> (a) the requirement to pay a 'Funding Notice' under clause 4.1 of the Subscription Agreement is dependent upon the existence of a compliant 'Annual Program' and does not exist without such a compliant 'Annual Program';
>
> (b) to be 'compliant', an 'Annual Program' must comply with the definition set out in clause 1.1 of the Shareholders' Agreement and must be both:
>
> (i) a business plan setting out proposed marketing plans, finance arrangements, capital expenditures and activities for carrying on the 'Business' during that 'Financial Year'; and
>
> (ii) a budget setting out an estimate of the income to be received and the expenses to be incurred in carrying out that business plan; and that
>
> (c) the First Respondent presently does not have a compliant 'Annual Program' which has been approved pursuant to clauses 5 and 10.5 of the Shareholders' Agreement;
>
> 2. Declarations that, on a proper construction of the Subscription Agreement and the Shareholders' Agreement:
>
> (a) the 'Funding Notice' dated 31 August 2017 purportedly requiring a 'Progress Payment' is not valid as there was no compliant 'Annual Program' when the 'Funding Notice' was purportedly issued;
>
> (b) there is no obligation upon the Applicant to pay any monies as a consequence of the 'Funding Notice' dated 31 August 2017; and,
>
> (c) the First Respondent cannot validly issue a valid 'Funding Notice', or validly call for a 'Progress Payment', until a compliant 'Annual Program' is produced and approved pursuant to clauses 5 and 10.5 of the Shareholders' Agreement;"

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[2] Affidavit of Gail Kathleen Ker, filed 24 October 2017, 10927/17 CFI 10 at [12(c)] and ex at 5-8.
[3] Which was amended to correct an obvious error.

[8] The significance of this is that Dreamfield has sent funding notices under the terms of the Subscription Agreement. By the funding notices Dreamfield demanded payment. Some of these have been paid. Dreamfield now, by a funding notice dated 31 August 2017, demands payment of $221,553 from Access.[4] A further funding notice claiming $434,525 was sent on 6 October 2017.[5] Access's case is that Dreamfield cannot issue funding notices because, it is submitted, the terms of the Shareholders' Agreement have to be considered when determining the proper construction of the Subscription Agreement and when that is done Dreamfield has no right to send the notices it has sent.

[9] Access also sought an order for specific performance of clauses 4.2 and 6.1 of the Shareholders' Agreement. The application for specific performance of clause 4.2 was abandoned during the hearing. Clause 6.1 obliges Dreamfield to give to its directors certain information. The relief sought is as follows:

> "3. An order for specific performance of clauses 4.2[6] and 6.1 of the Shareholders' Agreement requiring that the First Respondent give to the directors of the First Respondent a specific and detailed report on what has been done to achieve the objectives of the 'Business' in accordance with clauses 4.2 and 6.1 of the Shareholders' Agreement, including a specific report on:
>
> (a) what has been done in the carrying on of the activities of the First Respondent and by whom over the last 12 months;
>
> (b) what specific progress has been made to achieve the objectives set out in clause 2.1 of the Shareholders' Agreement (particularly when regard is had to the definition of "Business");
>
> (c) what each employee and consultant of Dreamfield has actually and specifically done since the inception of the Business;
>
> (d) what specific and measurable steps have been achieved to develop the Business;
>
> (e) what specific and measurable steps are proposed to further develop the Business;
>
> (f) when and how the First Respondent envisages that it will be conducting the Business defined in the Shareholders' Agreement; and
>
> (g) when and how the First Respondent envisages that it will make a profit and distribute dividends in accordance with clause 9.1 of the Shareholders' Agreement."

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[4] Affidavit of Cecil Ephrem Fernandes, filed 6 October 2017, 10297/17 CFI 3 at [22].
[5] Affidavit of John James Lamont, filed 18 October 2017, 10902/17 CFI 2 at [17].
[6] Now abandoned.

[10] An application has also been made by Dreamfield (Dreamfield's application). Dreamfield's application seeks payment by Access of the sums said to be due under the terms of the funding notices dated 31 August 2017 and 6 October 2017.

The proper construction of the Subscription Agreement

[11] By clause 2.1:

> "**2.1 Subscription**
>
> (a) The Subscriber hereby agrees to subscribe for the Subscription Shares for the Subscription Amount.
>
> (b) The Company hereby agrees to issue the Subscription Shares to the Subscriber at Completion, upon receipt of the Subscription Notice and the Completion Payment from the Subscriber."

[12] The "Subscriber" is defined as Access and the "Company" is defined as Dreamfield.

[13] "Completion" means "completion of the issue and allotment of the Subscription Shares to the Subscriber under this document".[7]

[14] The "Completion Payment" which is payable upon subscription pursuant to clause 2.1 is defined as "means $1,000,000".[8]

[15] While the "Completion Payment" is paid upon subscription, pursuant to clause 2.1, that is not the only money payable for the shares. The term "Progress Payments" is defined as "means an aggregate amount of $4,000,000 payable by the Subscriber to the Company in accordance with clause 4.1(b)". The "Completion Payment" and the "Progress Payments" total the "Subscription Amount" defined as $5,000,000.[9] Clause 4, which deals with the "Payment of Subscription Amount" is as follows:

> "**4.1. Payment of Subscription Amount**
>
> Subject to clause 4.2, unless the parties agree otherwise in writing, the Subscriber must pay the Subscription Amount to the Company as follows:
>
> (a) the Completion Payment on the Completion Date;

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7 Subscription Agreement cl 1.1: Affidavit of Cecil Ephrem Fernandes, filed 6 October 2017, 10297/17 CFI 3 ex from page 1.
8 Subscription Agreement cl 1.1.
9 Subscription Agreement cl 1.1.

(b) the Progress Payments within 5 Business Days of the date of a notice from the Company in the form set out in Annexure A to this document (Funding Notice).

4.2 Progress Payments

(a) The Company may issue a Funding Notice that accords with the Annual Program so as to meet working capital costs of the Project (WC Costs). The Company may require payment of the Progress Payments reasonably in advance of the WC Costs becoming due and payable.

(b) The Company must not issue more than one Funding Notice in a month unless necessary to pay WC Costs that have actually been incurred and fall due for payment in that month.

(c) The Company will provide to the Subscriber monthly updates in relation to the actual WC Costs incurred by the Company.

(d) If the WC Costs actually incurred in a month are:

(i) greater than the amount of the Funding Notice for that month, the Funding Notice for the subsequent month will be increased to account for the shortfall; or

(ii) less than the amount of the Funding Notice for that month, the Funding Notice for the subsequent month will be decreased to account for the excess.

4.3 Use of funds

The parties acknowledge and agree that the Subscription Amount will be applied towards:

(a) in respect of the Completion Payment, the satisfaction of existing liabilities, commitments and historical costs of the Project (which may include distributions to the Founders); and

(b) in respect of the Progress Payments, the working capital costs of the Project."

[16] It can be seen in clause 4.2(a) that the "Progress Payments" become payable when Dreamfield issues a "Funding Notice" that accords with the "Annual Program". Further, the funding is to pay the "WC Costs" which are the working capital costs of the project.[10]

[17] Clause 4.3 then provides that the progress payments will be applied towards meeting the working capital costs of the project.

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[10] Subscription Agreement cl 4.2(a).

[18] The Subscription Agreement defines "Annual Program" as "means the program setting out the payment intervals of the Progress Payments, as attached at Annexure B, as amended from time to time with the approval of the board of directors of the company and notified to the Subscriber."[11] Annexure B then sets out a large number of items of expenditure.

[19] The Shareholders' Agreement also uses the term "Annual Program", which, in that agreement:

> "means a program for carrying on the Business during a Financial Year consisting of:
>
> (a) a business plan setting out proposed marketing plans, finance arrangements, capital expenditures and activities for carrying on the Business during that Financial Year; and
>
> (b) a budget setting out an estimate of the income to be received and the expenses to be incurred in carrying out that business plan,
>
> which is to be consistent with the Principles for the Initial Annual Program, as set out in Annexure B."[12]

[20] It can be seen that the definition of "Annual Program" refers to the "Initial Annual Program". That term means "the Annual Program for the period to 30 June 2017 approved and adopted by the Board under clause 5.1".[13] Clause 5.1 of the Shareholders' Agreement provides as follows:

> "**5.1 Initial Annual Program**
>
> Each Shareholder must exercise its rights as a holder of Shares to ensure the Board considers a draft Annual Program for the period to 30 June 2017 (incorporating a forecast for the next three years ending 30 June 2020), prepared by the Managing Director, and approves and adopts an Annual Program for that period within three months after the Effective Date. The Initial Annual program must be consistent with the principles set out in Annexure B."

[21] Therefore, by the terms of the Shareholders' Agreement, the Board approves an Annual Program initially for the period 30 June 2017 to 30 June 2020. That program must be "consistent with the principles set out in Annexure B" to the Shareholders' Agreement. The principles in Annexure B are a series of goals and aspirational statements.

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[11] Subscription Agreement cl 1.1.
[12] Shareholders' Agreement cl 1.1.
[13] Shareholders' Agreement cl 1.1.

[22] Clause 5.2 deals with "Subsequent Annual Programs", i.e. Annual Programs beyond the "Initial Annual Program". Clause 5.2 provides as follows:

> "**5.2 Subsequent Annual Programs**
>
> The Company must, and each Shareholder must exercise its rights as a holder of Shares to, ensure the Board considers and adopts an Annual Program for each Financial Year after expiry of the period covered by the Initial Annual Program, using the following procedures:
>
> (a) at least two months before the start of each Financial Year, the Managing Director must submit to all other Directors a draft Annual Program for that Financial Year;
>
> (b) the Board must consider the draft Annual Program and approve an Annual Program before the start of the relevant Financial Year; and
>
> (c) the Annual Program approved by the Board may, before or during the period to which the Annual Program relates, be changed by the Board."

[23] Clause 5.3 then provides:

> "**5.3 Conduct in accordance with Annual Programs**
>
> (a) During the Financial Year to which an Annual Program relates, the Company must conduct, and each Shareholder must exercise its rights as a holder of Shares to ensure that the Group conducts, the Business and carries out its activities in accordance with that Annual Program (once adopted) until another Annual Program is approved and adopted under clause 5.1.
>
> (b) If at the start of a new Financial Year an Annual Program has not been approved and adopted under clause 5, the Company must conduct, and each Shareholder must exercise its rights as a holder of Shares to ensure that the Group conducts, the Business and carries out its activities in accordance with the Annual Program of the previous Financial Year until the Annual Program for the new Financial Year is approved and adopted under clause 5.1."

[24] So the parties to the Shareholders' Agreement (which includes the two parties to the Subscription Agreement) have created in the Shareholders' Agreement a regime for the creation of "Annual Program(s)" which govern the way the business of Dreamfield is conducted. However, it can be seen that "Annual Program" in the Subscription Agreement performs a completely different function. It is the means through which

Dreamfield recovers the "Progress Payments" which are part of the "Subscription Amount".[14]

[25] Clause 6.1 of the Shareholders' Agreement provides:

> **6.1 Reports to Directors**
>
> The Company must give, and each Shareholder must exercise its rights as a holder of Shares to ensure that the company gives, to the Directors sufficient management and financial information and reports to allow them to manage the Business efficiently and in a fully informed manner, including Quarterly and annual reports and budget updates.

[26] Clause 10.5 of the Shareholders' Agreement provides as follows:

> "**10.5 Decisions requiring Shareholders' Special Majority Resolution**
>
> Each of the matters listed in Schedule 1 must be decided by a Shareholders Special Majority Resolution."

[27] Included in Schedule 1 is an item "n" which is: "**(Annual Programs)** the adoption of an Annual Program (other than the initial Annual Program) and any material variation to any approved Annual Program".

[28] Therefore, the "Annual Program(s)" under the Shareholders' Agreement have to be passed by a "Shareholders Special Majority Resolution". This differs of course from the "Annual Program" defined in the Subscription Agreement because that may be "amended from time to time with the approval of the Board of Directors of the Company".[15]

[29] The term "Shareholders Special Majority Resolution" is defined in the Shareholders' Agreement as:

> "mean[ing] a resolution of the Shareholders which is approved by Shareholders having, in aggregate, at least 75% of all votes capable of being cast at a Shareholders' meeting by persons present and entitled to vote, which must include the affirmative vote of ACS and CD1 for so long as each of them separately is a Shareholder…"[16]

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[14] Subscription Agreement cl 4.1.
[15] Subscription Agreement cl 1.1, definition of "Annual Program".
[16] Shareholders' Agreement cl 1.1.

[30] Given then that Access holds 30 per cent of the shares of Dreamfield, the practical effect is that an Annual Program under the Shareholders' Agreement cannot be generated without the consent of Access. "ACS" refers to Access, so by the express terms of the definition of "Shareholders Special Majority Resolution", no such resolution is possible unless Access approves.

[31] The "Annual Program" under the Subscription Agreement[17] can be altered "with the approval of the Board of Directors of [Dreamfield]".

[32] Access argues that:

(i) in construing the Subscription Agreement I must look to the Shareholders' Agreement;

(ii) the "Annual Program" under the Subscription Agreement must be one and the same as the "Annual Program" under the Shareholders' Agreement;

(iii) there is no "Annual Program" issued under clause 5 of the Shareholders' Agreement; therefore

(iv) no "Progress Payment" can be demanded under a "Funding Notice" under the Subscription Agreement.

[33] Dreamfield submits that the "Annual Program" under the Subscription Agreement is a different thing to the "Annual Program" under the Shareholders' Agreement. It is therefore not necessary, it is submitted by Dreamfield, for there to be a current "Annual Program" under the Shareholders' Agreement before a progress payment can be demanded by issue of a funding notice under the Subscription Agreement.

[34] It was put to me by Access that the only way to make commercial sense of the arrangements between the parties is to read the two agreements so that the "Annual Program" referred to in the Subscription Agreement is one and the same as the "Annual

[17] The Annual Program as in Annexure B.

Program" in the Shareholders' Agreement. While I accept that the commercial impact of a particular proposed construction is relevant in construing a contract,[18] for the reasons which follow I reject the submission.

[35] There was debate before me about the relevant principles to apply given the so-called "ambiguity" created by the fact that the term "Annual Program" is defined differently in the two agreements. Argument ensued as to whether there was an ambiguity such as to enable Access to introduce evidence of the Shareholders' Agreement in order to construe the Subscription Agreement and resolve the ambiguity.[19] If that is the mechanism whereby I have regard to the Shareholders' Agreement for the purpose of construing the Subscription Agreement, then that is very odd indeed. It is Access's argument that it is the Shareholders' Agreement which creates the ambiguity. Therefore what is proposed is that I look at the Shareholders' Agreement to identify the ambiguity which is then resolved by looking at the Shareholders' Agreement.

[36] The answer is much simpler. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[20] the relevant approach was explained as follows:

> "46. The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose."[21] (footnotes omitted)

[37] In my view, it is not a question of identifying an ambiguity before resort can be had to the Shareholders' Agreement when construing the Subscription Agreement. It is obvious that the Shareholders' Agreement and the Subscription Agreement are related and form a scheme whereby Access is to take a stake in Dreamfield and the shareholders are to then conduct themselves in accordance with the Shareholders' Agreement. The Subscription Agreement refers to the Shareholders' Agreement.

[38] In the end, no party before me cavilled with the notion that when construing the Subscription Agreement regard can be had to the Shareholders' Agreement.

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[18] See *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at 657 [35].
[19] See *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.
[20] [2015] HCA 37 (14 October 2015); (2015) 256 CLR 104.
[21] At 116 [46].

[39] It would be, in my view, an extraordinary result if the "Annual Program" in the Subscription Agreement was a term defined in and governed by the Shareholders' Agreement. Both agreements were signed on the same day. Both were obviously drawn by lawyers, and while each use the term "Annual Program", both contain detailed definitions of that term and detailed covenants as to the production and use of the "Annual Program". I can see no reason why the definition of "Annual Program" and the detailed covenants in the Subscription Agreement should be ignored in favour of those in the Shareholders' Agreement when construing the Subscription Agreement.

[40] This is especially so given that when the two agreements are properly understood, it can be seen that the "Annual Program" in the Subscription Agreement fulfils a completely different purpose to the "Annual Program" in the Shareholders' Agreement. The "Annual Program" in the Subscription Agreement concerns the subscription of capital by Access in Dreamfield. On the other hand, the "Annual Program" in the Shareholders' Agreement is a mechanism through which the shareholders deal with each other in the running of Dreamfield going forward. This explains why the "Annual Program" in the Shareholders' Agreement can only be set by a special resolution of 75 per cent of the shareholders. In other words, it cannot be set without the concurrence of Access. On the other hand, the "Annual Program" in the Subscription Agreement can be altered by Dreamfield without the concurrence of Access. That is explained because that deals with Access's contribution of capital which led to the subscription of shares to it.

[41] In my view, on a proper construction of the Subscription Agreement the requirement of Access to pay on a "funding notice" is not dependent upon the existence of an "Annual Program" approved under the provisions of the Shareholders' Agreement.

[42] The declaration sought in paragraph 1(a) of Access' application is unnecessary. The issue is whether the funding notice must be based upon an "Annual Program" issued pursuant to the Shareholders' Agreement. I have found that not to be the case.

[43] I therefore dismiss the application for declarations.

The application for specific performance of clause 6.1 of the Shareholders' Agreement

[44] Access seeks specific performance of clause 6.1 of the Shareholders' Agreement which I have set out earlier. The application seeks performance of that clause to the extent of requiring production of the seven pieces of information identified in the application. This aspect of the dispute was the subject of exchanges of correspondence between the respective solicitors before the applications were filed. Suffice it to say that the solicitors for Access demanded the information. Solicitors for Dreamfield provided some information and there is generally a dispute as to the sufficiency of what has been provided. Affidavits were read before me on behalf of both Access and Dreamfield, where allegations and counter-allegations were made as to the governance of Dreamfield and the conduct of various individuals.[22]

[45] If orders were made in the current terms, I can see that there is likely to be dispute, firstly, as to precisely what information is required to be produced, and secondly, as to the sufficiency of what is then produced. Concepts such as acts "done in the carrying out of the activities of the First Respondent", "specific progress … to achieve the objectives set out in clause 2.1 of the Shareholders' Agreement", "specific and measurable steps … to develop the business" all seem to be more likely to lead to further disputes rather than to solve existing ones.

[46] In the Shareholders' Agreement, there is a dispute resolution provision, being clause 23. It provides as follows:

> "Any dispute or difference arising out of or in connection with this document must be submitted to an expert in accordance with, and subject to, the Expert Determination Rules."

[47] Access submits that its application before me should proceed notwithstanding clause 23. Dreamfield seeks a stay of the application until the dispute resolution procedures have been followed.

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[22] Affidavit of Cecil Ephrem Fernandes, filed 6 October 2017, 10297/17 CFI 3; Affidavit of Craig Anthony Davison, filed 11 October 2017, 10297/17 CFI 4; Affidavit of Gary Douglas Hardgrave, filed 25 October 2017, 10297/17 CFI 11; and others.

[48] In *Zeke Services Pty Ltd v Traffic Technologies Ltd*, [23] Chesterman J (as his Honour then was) recognised the jurisdiction of the court to grant a stay of proceedings where the applicant has not followed the dispute resolution procedures agreed in the contract. His Honour then said:

> "The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in *Channel Tunnel*, by the High Court in *Dobbs and Huddart Parker Ltd v The Ship Mill Hill and Her Cargo* [1950] HCA 43; (1950) 81 CLR 502 (an arbitration case) and by Gillard J in *Badgin*. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate."[24]

[49] Access relied upon the further statement in *Zeke Services*:

> "[24] It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it may be appropriate to refuse a stay. Complicated disputes of fact or of law may be of such a character.
>
> [25] In *Cott UK Ltd v FE Barber Ltd* (1997) 3 All ER 540 the court refused to stay an action on a contract which contained a clause referring disputes to the determination of an expert on the grounds that:
>
> (a) There were no rules identified in the contract or in the expert's professional association governing the mode of his determination.
>
> (b) The expert appointed had no experience in the areas of dispute.
>
> (c) The contract gave no guidance as to the rules or principles pursuant to which the expert was to approach his determination.
>
> (d) The nature of the dispute itself – a claim for damages for breach of contract – was inapt for determination by an expert.
>
> [26] Gillard J in *Badgin* doubted the relevance of some of the matters relied upon by the court in *Cott* and I respectfully share those doubts.

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[23] [2005] 2 Qd R 563.
[24] At [21].

> The second and fourth points do, with respect, appear to be of substance. Gillard J thought that:
>
> '... the fact that there were issues concerning a number of legal questions, whether there was a breach ... of the agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person ... [I]n the end it is a question of what the term of the contract provides and the nature of the dispute.'"[25]

[50] On Access's behalf it was properly conceded this is not a case where there is nothing in the Shareholders' Agreement identifying the rules which govern the expert determination. The term "Expert Determination Rules" is defined in the Shareholders' Agreement as "means the Resolution Institute Expert Determination Rules 2016".[26]

[51] Access though submits that the rules were not put before me and therefore I could not be satisfied that the engagement of the expert is an appropriate and just way for the dispute to be determined. However, Access agreed to the terms of clause 23 of the Shareholders' Agreement and Access agreed to the identification of the "Expert Determination Rules" being as defined in the agreement. The dispute concerning clause 6.1 is clearly a "dispute or difference arising out of or in connection with" the Shareholders' Agreement.[27] It is in my view for Access to demonstrate to me that the expert determination procedure to which it agreed would not lead to a just resolution of the dispute. In my view Access has failed to do so.

[52] It was suggested on Access's behalf that Dreamfield had waived Access's compliance with clause 23 by conduct before the filing of the applications. I reject that submission. It was made clear in correspondence that Dreamfield relied upon clause 23. The only other act of Dreamfield which could possibly be said to constitute a waiver was the filing of its cross application. That though was obviously done in the context of Access filing its application for declarations. True, Dreamfield did not file a formal application for a stay but it advanced that position both in its written outline and in oral argument.

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[25] At [24]–[26].
[26] Shareholders' Agreement cl 1.1.
[27] Shareholders' Agreement cl 23.

[53] I will order a stay of the application for specific performance of clause 6.1 of the Shareholders' Agreement until compliance with the dispute resolution provisions.

Dreamfield's application

[54] Dreamfield applies for an order that Access pay it the sums demanded by the funding notices.

[55] I have already decided that, as a matter of the proper construction of the Subscription Agreement, the funding notices should be issued under the provisions of the Subscription Agreement without regard to the definition of "Annual Program" in the Shareholders' Agreement. However, Access challenges the validity of the funding notice on other grounds.

[56] Access submits that the funding notice does not accord with the Annual Program being Annexure B to the Subscription Agreement. This is, I think, correct.

[57] However, the "Annual Program" may be amended "with the approval of the Board of Directors of [Dreamfield]". That must mean that there needs to be a resolution of the Board of Directors of Dreamfield to amend the Annual Program. Therefore, it is within the power of Dreamfield to either issue a new funding notice consistent with the Annual Program or amend the Annual Program by resolution of the Board and re-issue the funding notice.

[58] There is currently though no evidence before me that the Annual Program has been amended by resolution of the Board of Directors of Dreamfield. I will therefore dismiss the application of Dreamfield.

ORDERS

[59] I make the following orders:

1. The application by Access Group International Limited ACN 616 478 267 for declarations as to the construction of the Subscription Agreement is dismissed.

2. The application by Access Group International Limited ACN 616 478 267 for specific performance of clause 6.1 of the Shareholders' Agreement is stayed pending completion of the dispute resolution and expert determination procedure provided for in clause 23 of the Shareholders' Agreement.

3. The application by Dreamfield Pty Ltd ACN 615 065 248 for judgment is dismissed.

4. I will hear the parties as to costs.