SUPREME COURT OF QUEENSLAND

CITATION:	*Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors* [2019] QSC 173
PARTIES:	**BULKBUILD PTY LTD ACN 136 952 102** (plaintiff) **v** **FORTUNA WELL PTY LTD ACN 169 357 233 AS TRUSTEE OF THE FORTUNA WELL FAMILY TRUST UNDER INSTRUMENT 715956160** (first defendant) **ANTHONY MARK FENDT** (second defendant) **PROJECT & RETAIL MANAGEMENT PTY LTD ACN 010 935 645** (third defendant)
FILE NO/S:	BS No 5640 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	16 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2019
JUDGE:	Bowskill J
ORDER:	**There will be an order that the proceeding against the first defendant is stayed, and the matter is referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act* 2013 (Qld).** **I will give the parties the opportunity to consider these reasons, and make further submissions if they wish to, in relation to the second and third defendants' stay application and the court's power to make directions. I will also hear the parties in relation to costs.**
CATCHWORDS:	ARBITRATION – THE ARBITRATION AGREEMENT AND REFERENCE – ARBITRATION AGREEMENT AS A DEFENCE AND AS A GROUND FOR STAY OF PROCEEDINGS – STAY OF PROCEEDINGS – POWER OF COURT TO STAY – GENERALLY – where the plaintiff contractor claims that the first defendant principal breached the design and construction contract between them by failing

to pay for the work performed – where the contract included a dispute resolution clause that constituted an arbitration agreement under s 7 of the *Commercial Arbitration Act* 2013 (Qld) – where the first defendant applies for an order that the proceeding be stayed until the dispute resolution clause is complied with – where the plaintiff claims that the arbitration agreement is "incapable of being performed" – whether the court must refer the parties to arbitration, and therefore necessarily grant the stay, under s 8 of the *Commercial Arbitration Act* 2013

ARBITRATION – THE ARBITRATION AGREEMENT AND REFERENCE – HOW MATTERS MAY BE REFERRED – GENERALLY – where the second and third defendants were the superintendent at varying times under the contract between the plaintiff and first defendant – where the second and third defendants also apply for a stay of the proceedings against them – whether the second and third defendants are each a "party" to the arbitration agreement under the *Commercial Arbitration Act* – whether the second and third defendants are claiming (or defending) "through or under" the first defendant – alternatively, whether the court has discretionary power to grant the stay, and should exercise this discretion

Commercial Arbitration Act 2013 (Qld) ss 5, 6, 7, 8, 24B

Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825
Casaceli v Natuzzi SpA (2012) 292 ALR 143
CPB Contractors Pty Ltd v Celsus Pty Ltd [2017] FCA 1620; (2017) 353 ALR 84
Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd (2014) 44 VR 64; (2014) 289 FLR 30
John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451
Novawest Contracting Pty Ltd v Brimbank City Council [2015] VSC 679
Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc (2000) 100 FCR 420; (2000) 175 ALR 725
Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13; (2019) 366 ALR 635
Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd [2008] SGHC 229
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332

COUNSEL: P Somers for the plaintiff
M J Drysdale for the first defendant

J R Moore *(sol)* for the second and third defendants

SOLICITORS: Romans & Romans Lawyers for the plaintiff
Clinton Mohr Lawyers for the first defendant
Thynne & Macartney for the second and third defendants

First defendant's stay application

[1] The plaintiff (as contractor) and the first defendant (as principal) entered into a contract for the design and construction of serviced apartments at Windsor. The plaintiff contends the first defendant has breached the contract, by failing to pay for work performed under the contract. By this proceeding, commenced on 28 May 2019, the plaintiff seeks to recover just over $4.3 million damages for that breach, or alternatively to recover that amount on a quantum meruit basis. The second and third defendants were, at varying times, the superintendent under the contract. The plaintiff also claims damages against them for negligence in relation to, inter alia, the issue of payment certificates and the treatment of variations.

[2] The contract included a dispute resolution clause, in the following terms:

> "41 Dispute resolution
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> 41.1 **Notice of dispute**
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> If a difference or dispute (together called a '*dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *dispute* concerning:
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> (a) a Superintendent's direction; or
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> (b) a claim:
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> (i) in tort;
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> (ii) under statute;
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> (iii) for restitution based on unjust enrichment or other quantum meruit; or
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> (iv) for rectification or frustration,
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> or like claim available under the law governing the *Contract,*
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> then either party shall, by hand or by registered post, give the other and the *Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.

Notwithstanding the existence of a *dispute*, the parties shall, subject to clauses 38 and 39 and subclause 41.4, continue to perform the *Contract*.

41.2 Conference

Within 14 days after receiving a notice of *dispute*, the parties shall confer at least once to resolve the *dispute* or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the *dispute* has not been resolved within 28 days of service of the notice of *dispute,* that *dispute* shall be and is hereby referred to arbitration.

41.3 Arbitration

If within a further 14 days the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in *Item* 37(a). The arbitration shall be conducted in accordance with the rules in *Item* 37(b).

The arbitration shall be held at the location stated in *Item* 37(d).

41.4 Summary relief

Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the *Contract* or to seek injunctive relief or urgent declaratory relief."[1]

[3] It is uncontroversial that this clause constitutes an "arbitration agreement" within the meaning of s 7 of the *Commercial Arbitration Act* 2013 (Qld). Section 7 provides, in part:

> "(1) An ***arbitration agreement*** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. …"

[4] Although the contract is said to have been terminated on or about 27 or 28 March 2019,[2] it is also uncontroversial that an arbitration agreement is independent of the

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1 Affidavit of Mr Mohr, filed 12 June 2019, at pp 67-68 of ex CMM-1.
2 Affidavit of Mr Mohr, filed 12 June 2019, at [5] and [6].

underlying contract in which it is contained and therefore that the enforceability of the arbitration agreement survives the termination of the contract it relates to.[3]

[5] The first defendant applies for an order that the proceeding "be stayed until there has been compliance with the dispute resolution procedures contained in clause 41" of the contract.

[6] The first defendant argues that, by operation of s 8 of the *Commercial Arbitration Act*, the court must grant the stay. Alternatively, if s 8 does not apply, the first defendant seeks to invoke the court's inherent jurisdiction to stay the proceeding until the dispute resolution provisions under clause 41 of the contract have been complied with.

[7] For the following reasons, I find that s 8 of the *Commercial Arbitration Act* does apply, such that the court must refer the parties to arbitration. It follows that it is appropriate to stay the proceeding as against the first defendant.

[8] Section 8 of the *Commercial Arbitration Act* provides:

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

[9] This provision differs markedly from the provision which formerly applied, s 53 of the *Commercial Arbitration Act* 1990 (Qld), which conferred a discretion on the court to stay the proceedings if satisfied "there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement" (s 53(1)(a)). The 1990 Act was repealed by the 2013 Act (see s 41).[4]

[10] By the enactment of the *Commercial Arbitration Act* 2013, the Queensland Parliament adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (as adopted in June 1985, and

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[3] See *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 at [42] and [47] per Martin CJ, and the authorities there referred to.

[4] See *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 at [32] per Martin CJ; and *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [74].

amended in July 2006) with some adaptations for application to domestic arbitrations in Queensland.[5] As recorded in the note within part 1A of the 2013 Act, the Act closely follows commercial arbitration legislation enacted in other Australian jurisdictions "to ensure the greatest possible harmonisation across Australian jurisdictions". The paramount object of the Act is "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense" (s 1AC(1)). Section 2A(1) of the Act provides that, 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 provisions of the Model Law …" and s 2A(3) provides that in interpreting the Act, reference may be made to the documents relating to the Model Law.

[11] Relevantly, the explanatory notes to article 8 of the Model Law (on which s 8 of the 2013 Act is based) provide as follows:

> "Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. …"

[12] There is no discretion under s 8(1) of the 2013 Act. If the action brought by the plaintiff is in a matter which is the subject of an arbitration agreement, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, the court must refer the parties to arbitration.[6]

[13] It is not in issue between the parties that this proceeding is an action "in a matter which is the subject of an arbitration agreement". The first defendant's request, under s 8, has been made at an appropriate time, that is, before and certainly "not later than when submitting the party's first statement on the substance of the dispute". Those circumstances being met, the court must refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

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[5] As part of an integrated statutory framework for international and domestic arbitration in each State and Territory in Australia: *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 366 ALR 635 at [13].

[6] See *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [65], [74], [87] and [132] per Hammerschlag J; *Novawest Contracting Pty Ltd v Brimbank City Council* [2015] VSC 679 at [19]-[21] per Vickery J; *CPB Contractors Pty Ltd v Celsus Pty Ltd* [2017] FCA 1620; (2017) 353 ALR 84 at [43] per Lee J; and *Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825 at [18] per Hammerschlag J.

[14] The plaintiff does not contend the agreement is null and void, or inoperative, but argues the arbitration agreement is "incapable of being performed" for the purposes of s 8 because the plaintiff's respective claims against the first defendant, on the one hand, and the second and third defendants, on the other, will require the court to determine a number of similar factual matters, and there is a risk that if the claim against the first defendant is determined at arbitration, and the claim against the second and third defendants is determined by a court, the two different forums may reach different factual conclusions. It is on the basis of that risk of different factual findings that the plaintiff contends the arbitration agreement is "incapable of being performed".

[15] I do not accept that argument. The meaning of "incapable of being performed" in a provision such as s 8 is discussed in *Novawest Contracting Pty Ltd v Brimbank City Council* [2015] VSC 679 at [22]-[30] and in *Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825 at [33]-[58]. In both cases, reference is made to a decision of the High Court of Singapore in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229 in which the following was said in relation to the term "incapable of being performed" (at [42]):

> "[T]his term would relate to the capability or incapability of parties to perform an arbitration agreement. In Mustill & Boyd, *Commercial Arbitration*, it is stated the expression would suggest 'something more than mere difficulty or inconvenience or delay in performing the arbitration' (at p 465). There has to be 'some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement' (*id* at p 465). In Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), some examples of situations where an arbitration agreement has become incapable of being performed are given. It is stated (*id* at pp 32-33):
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> > 'An arbitration agreement could be incapable of being performed, if, for example, there was contradictory language in the main contract indicating the parties intended to litigate. Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated. In addition, if the place of arbitration was no longer available because of political upheaval, this could render the arbitration agreement incapable of being performed. If the arbitration agreement was itself too vague, confusing or contradictory, it could prevent the arbitration from taking place.'"[7]

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[7] In the *Broken Hill City Council* case at [32]-[34] reference is also made to the observations of Kaplan J on the meaning of "incapable of being performed" in the decision of the Hong Kong Court of First Instance in *Lucky-Goldster International (HK) Ltd v NG Moo Kee Engineering Ltd* [1993] HKCFI 14 at [14], which again was in terms that it applies to a case where the arbitration cannot "be effectively set in motion".

[16] Mere inconvenience, such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant, does not render the arbitration agreement "incapable of being performed".

[17] However, for reasons I will address under the next heading, that inconvenience does support the exercise of the discretion to stay the proceeding against the second and third defendants.

[18] Apart from this argument, the plaintiff contended that clause 41, in particular sub-clause 41.4, preserves its right to bring this proceeding in the court and prosecute it, without having it referred to arbitration. At one stage, counsel for the plaintiff articulated this in terms of the parties having "contracted around" s 8. I reject this argument also. Whatever the scope of clause 41.4 might be (that is, whether it extends to a claim to recover money such as in this proceeding, or is limited to enforcing payment certificates), s 8 of the *Commercial Arbitration Act* is clear in its terms. Where the circumstances apply, and the arbitration agreement is not found to be null and void, inoperative or incapable of being performed, the court must refer the parties to arbitration. The plaintiff accepts the circumstances set out in s 8 apply (relevantly, that this proceeding is an action brought in a matter which is the subject of an arbitration agreement, and the first defendant has made its referral request at an appropriate time); and I have rejected its argument that the agreement is incapable of being performed. Accordingly, the referral must be made.

[19] The balance of the plaintiff's submissions concerned discretionary considerations, on the assumption (which I find is incorrect) that the court retains a discretion whether or not to refer the matter to arbitration. It is accordingly unnecessary to address those matters.

[20] Although the Act does not expressly provide for the proceeding to be stayed as a consequence of a referral to arbitration under s 8, such an order necessarily follows.[8]

[21] The appropriate order to make, in relation to the first defendant's application, is therefore that the proceeding against the first defendant is stayed, and the matter is referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act* 2013.

[22] For completeness, I note that counsel for the plaintiff raised an issue about the scope of any arbitration, following a referral (in terms of whether it would be limited to the matters in respect of which notices of dispute have been given, or extend to all matters of dispute between the parties).[9] Counsel for the first defendant confirmed that the first

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[8] See *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [133]; see also *Novawest Contracting Pty Ltd v Brimbank City Council* [2015] VSC 679 at [20], where Vickery J says that under the Victorian equivalent of s 8 [in identical terms] "it is mandatory for the Court to stay proceedings that are commenced in contradiction to an arbitration agreement".

[9] T 1-36.

defendant wanted all issues between the plaintiff and the first defendant to be dealt with in the arbitration,[10] and there appears to be no reason why that could not occur.

Second and third defendants

[23] The second and third defendants supported the application by the first defendant, but did not initially bring their own application for a stay of the proceedings against them. An oral application was made during the hearing; formalised by the filing of an application on 26 June 2019.

[24] In the *Commercial Arbitration Act* 2013 "party" means a party to an arbitration agreement and includes "any person claiming through or under a party to the arbitration agreement" (s 2(1)).

[25] When read with s 8, this definition enables a person claiming through or under a party to an arbitration agreement to be referred to arbitration, even if they themselves are not a party to the agreement.[11]

[26] The second and third defendants are not parties to the arbitration agreement. But they would appear to be persons "claiming through or under a party to the arbitration agreement". As the High Court recently affirmed,[12] the leading authority as to the meaning of "through or under" in this context is the decision in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332. In *Tanning* at 342 Brennan and Dawson JJ said:

> "… a person who claims through or under a party may be either a person seeking to enforce **or a person seeking to resist the enforcement of** an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence."[13]

[27] As the plurality in *Rinehart v Hancock Prospecting* summarised, at [67]:

> "To similar effect, but more explicitly, Deane and Gaudron JJ reasoned that whether a party to proceedings is advancing a defence through or under a

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10 T 1-43.

11 See *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64; (2014) 289 FLR 30 at [11] and [36] per Warren CJ.

12 *Rinehart v Hancock Prospecting* at [61].

13 Emphasis added. See also *Rinehart v Hancock Prospecting* at [66].

> party to an arbitration agreement is necessarily to be answered by reference to **the subject matter in controversy** rather than the formal nature of the proceedings or the precise legal character of the person initiating or defending the proceedings."[14]

[28] And, further, at [68]:

> "… as Deane and Gaudron JJ went on to explain, it is unnecessary that the issues that the defence puts in controversy in the proceedings be limited to the matter capable of settlement by arbitration. The two need not be coextensive. It is sufficient that the defence puts in issue, among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy."[15]

[29] Appreciating that no defences have been filed yet (given the timing requirement of s 8), it was nevertheless common ground that the plaintiff's claims against the first defendant, and the second and third defendants, are closely related, and depend upon findings about the same factual matters. It was common ground that unless the plaintiff succeeds in establishing its claim for payment against the first defendant, it cannot succeed against the second and third defendants. It is essentially the same case against all parties. As the plaintiff says in its written submissions:

> "23. The respective claims will involve the Court determining a number of similar factual matters, including, *inter alia*:
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> (a) whether certain building works were defective or properly carried out;
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> (b) whether proper waterproofing was installed;
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> (c) whether certain works were within the contracted scope of works;
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> (d) whether certain variations were authorised, or validly rejected.
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> 24. It is necessary for those factual matters to be determined in both claims, because they go to:
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> (a) the amount the plaintiff is to be paid for building work under the Contract; and
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> (b) whether the second and third defendants ought to have certified those works, entitling the plaintiff to payment."

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[14] Referring to *Tanning Research* at 353. Emphasis added.
[15] Referring to *Tanning Research* at 351-352.

[30] It follows from the overlap[16] between the plaintiff's claims as against the first defendant, and the second and third defendants, that it is likely an essential element of the defence by the second and third defendants will rely upon the rights vested in the first defendant under the contract, and in that sense the second and third defendants can be said to claim (or defend) "through or under" the first defendant. On this analysis, the second and third defendants are a "party", and the referral under s 8 applies to them also.

[31] Even if the second and third respondents are not within the meaning of "party", such that the mandatory referral under s 8 applies to them also, it is within the discretionary power of this Court to stay the proceedings against the second and third defendants in any event.[17] As it is common ground between the parties that the plaintiff must make out its claim against the first defendant, in order to succeed in its claim against the second and third defendants, it can be said that the claims against the second and third defendants are ancillary to the matters the subject of the claim against the first defendant; and that the decision of an arbitrator in relation to the latter will be determinative of the former. It therefore makes sense, as a matter of discretion, to stay the plaintiff's claim against the second and third defendants, pending completion of the arbitration.[18]

[32] As indicated at the hearing, however, I will give the parties the opportunity to be heard further in relation to this, should they wish to, before making orders.

Directions

[33] At the hearing, I raised with the parties whether the court has power to make directions, at the same time as a referral under s 8.

[34] Section 8 of the *Commercial Arbitration Act* 2013 does not expressly provide for the court to do more than refer the parties to arbitration (cf s 53 of the repealed Act, which expressly provided for the court to "give such directions with respect to the future conduct of the arbitration as [it] thinks fit").

[35] In addition, s 5 of the *Commercial Arbitration Act* 2013 provides that "[i]n matters governed by this Act, no court must intervene except where so provided by this Act". Section 6 confers particular functions on the Supreme Court,[19] but not a general power

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16 Counsel for the plaintiff at T 1-38.4.

17 See r 16(g) of the *Uniform Civil Procedure Rules* 1999 (Qld).

18 See *Tanning Research* at 345 and 351; see also *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420; (2000) 175 ALR 725 at [65]-[66] per Merkel J; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 at [48]-[49] per Jagot J; and *CPB Contractors Pty Ltd v Celsus Pty Ltd* [2017] FCA 1620; (2017) 353 ALR 84 at [54]-[56] and [122] per Lee J.

19 For example, in relation to disputes about the appointment of an arbitrator (ss 11, 13 and 14), or the jurisdiction of the arbitral tribunal (s 16), recognition and enforcement of an interim measure (ss 17H to 17J), enforcement of an order made or direction given by the arbitral tribunal in the course of the arbitral proceeding (s 19(6)), assistance in taking evidence (ss 27 to 27B), orders prohibiting disclosure of

to make directions following a referral to arbitration. The conduct of arbitral proceedings is dealt with in part 5 of the Act. Those provisions make it plain that it is the arbitral tribunal which is to determine the rules of procedure. There is a general obligation imposed on the parties by s 24B(1) to "do all things necessary for the proper and expeditious conduct of the arbitral proceedings", which includes taking without undue delay any necessary steps to obtain a decision (if required) of the court in relation to a function conferred on the court under s 6 (s 24B(2)(b)).

[36] From a consideration of the provisions of the *Commercial Arbitration Act* 2013, it does not seem to me this Court has power to make any directions, further to the referral to arbitration. However, I will give the parties an opportunity to be heard further in relation to this also, at the time of delivering my reasons.

Orders

[37] There will be an order that the proceeding against the first defendant is stayed, and the matter is referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act* 2013.

[38] I will give the parties the opportunity to consider these reasons, and make further submissions if they wish to, in relation to the second and third defendants' stay application and the court's power to make directions. I will also hear the parties in relation to costs.

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confidential information (ss 27H to 27J), orders as to costs of a failed arbitration (s 33D) and applications to set aside an arbitral award (s 34) or an appeal on a question of law (s 34A).