SUPREME COURT OF QUEENSLAND

CITATION: *GPS Power Pty Ltd & Ors v CS Energy Ltd* [2020] QSC 93

PARTIES: **In proceeding SC 13392/17:**

GPS POWER PTY LTD ACN 009 103 422
(First Applicant)

GPS ENERGY PTY LTD ACN 063 207 456
(Second Applicant)

SUNSHINE STATE POWER BV ARBN 062 295 425
(Third Applicant)

SUNSHINE STATE POWER (NO 2) BV
ARBN 063 382 829
(Fourth Applicant)

SOUTHERN CROSS GPS PTY LTD ACN 063 779 028
(Fifth Applicant)

RYOWA II GPS PTY LTD ACN 063 780 058
(Sixth Applicant)

YKK GPS (QUEENSLAND) PTY LTD ACN 062 905 275
(Seventh Applicant)

v

CS ENERGY LTD ACN 078 848 745
(Respondent)

In proceeding SC 761/18:

CS ENERGY LTD ACN 078 848 745
(Applicant)

v

GPS POWER PTY LTD ACN 009 103 422
(First Respondent)

GPS ENERGY PTY LTD ACN 063 207 456
(Second Respondent)

SUNSHINE STATE POWER BV ARBN 062 295 425
(Third Respondent)

SUNSHINE STATE POWER (NO 2) BV
ARBN 063 382 829

(Fourth Respondent)

SOUTHERN CROSS GPS PTY LTD ACN 063 779 028
(Fifth Respondent)

RYOWA II GPS PTY LTD ACN 063 780 058
(Sixth Respondent)

YKK GPS (QUEENSLAND) PTY LTD ACN 062 905 275
(Seventh Respondent)

FILE NO/S:	SC 13392 of 2017 SC 761 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Jackson J

ORDER: **The order of the Court is that:**

On application SC 13392 of 2017:

1. **It is declared that upon the proper construction of the 2009 IPPA, none of the following includes a reference to the Upper Estimates or the Lower Estimates:**

   a) **the reference in each of clauses 23.4B(a)(i), 23.4B(a)(ii) and 23.4B(b)(i) to 'anticipated levels of dispatch as disclosed in the Station Annual Forecast';**

   b) **the reference in each of cl. 23.4B(a)(ii) and cl. 23.4B(b)(ii) to 'the level of dispatch identified in the Station Annual Forecast';**

   c) **the reference in cl. 23.4A(c) to 'so that the Station Annual Forecast can be met';**

   d) **the reference in each of cl. 23.5(a)(i) and cl. 23.5(b)(i) to the phrase 'to meet the Station Annual Forecast'; and**

   e) **the reference in cl. 23.5(c)(i) to 'if GPS was**

dispatched in accordance with the Station Annual Forecast'.

2. **Except for order 1 above, paragraphs 1 to 5, 7, 9, 11 and 13 of the originating application are dismissed.**

3. **There is no order for costs of the preliminary hearing of separate questions on the application.**

On application SC 761 of 2018:

1. **Paragraphs 1, 2, 4, 5, 5A, 9, 10, 11 and 12 of the originating application are dismissed.**

2. **There is no order for costs of the preliminary hearing of separate questions on the application.**

PROCEDURE– STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY– DECLARATIONS– APPROPRIATE FORM OF RELIEF– DISCRETION OF COURT– OTHER CASES – where in SC 761/18 the applicant applied for declaratory relief regarding the proper construction of clauses contained within the Interconnection and Power Pooling Agreement ('IPPA') – where in SC 13392/17 the parties applied for declaratory relief regarding the proper construction of the IPPA with reference to the Upper Estimate and Lower Estimate– where in both proceedings the parties also applied for orders that certain paragraphs of the applications be dismissed.

PROCEDURE– CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS– COSTS– GENERAL RULE: COSTS FOLLOW EVENT– PARTIAL SUCCESS– where the respondents in SC 761/18 and applicants in SC 13392/17 submit that the other party pay 50% of the costs of the preliminary hearing assessed on the standard basis– where the applicant in SC 761/18 and respondent in SC 13392/17 submits that there should be no order as to costs of the preliminary hearing– where it is submitted that each party enjoyed success before the court– whether the court should make an order for costs in relation to a particular part of a proceeding.

Civil Proceedings Act 2011 (Qld), s 10

Property Law Act 1974 (Qld), s 70

Rules of the Supreme Court 1900 (Qld), O 4 r 16, O 64 r 1A, O 54A

Supreme Court of Queensland Act 1991 (Qld), s 10

Uniform Civil Procedure Rules 1999 (Qld), r 10, r 681(1), r 684

Bass v Permanent Trustee Company Ltd (1999) 198 CLR 334

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421

GPS Power Pty Ltd & Ors v CS Energy Ltd [2018] QSC 294

Oakland Property Holdings Pty Ltd v BNY Trust (Aust) Registry (as trustee for Allfinance Funding Trust) No 1 [2012] NSWSC 335

re Dixon [1994] 1 Qd R 7

Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45

Rural Press Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 53

University of New South Wales v Moorhouse (1975) 133 CLR 1

Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 3) [2015] QSC 164

COUNSEL: S Couper QC, J O'Regan and A Psaltis for CS Energy
P Franco QC and H Clift for GPS Power Pty Ltd and others

SOLICITORS: Clayton Utz for CS Energy Ltd

Minter Ellison for GPS Power Pty Ltd & Ors

[1] **Jackson J**: On delivery of the reasons on these cross-applications,[1] it was ordered that the parties provide written submissions as to the form of relief to be granted in accordance with the reasons and costs. Written submissions were provided but the court was asked to defer consideration of the form of relief as the parties may be able to resolve any remaining questions by agreement. Ultimately, the parties were unable to do so and, by email sent on 31 January 2020, requested that the disputes as to the relief and costs be resolved.

Form of relief

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1 *GPS Power Pty Ltd & Ors v CS Energy Ltd* [2018] QSC 294.

[2] To some extent, the orders to be made are agreed.

[3] Accordingly, on application SC 13392 of 2017 ("Participants application"), it is agreed that the application for the relief sought in paragraphs 3, 7, 9, 11 and 13 should be dismissed.

[4] Similarly, on application SC 761 of 2018 brought by CS Energy Ltd ("CS Energy's application"), it is agreed that the application for the relief sought in paragraphs 1, 5, 5A, 9 and 11 of the relief should be dismissed.

[5] As to the balance, it is possible to deal with some subject matters in groups while other questions must be dealt with *seriatim*.

Paragraphs 1, 2, 4 and 5 of the Participants' application

[6] The relief sought by those paragraphs is as follows:

> "1. A declaration that, upon the proper construction of clause 23.4B(a)(i) of the IPPA:
>
> (a) the reference to 'stockpile level forecast' is a reference to a monthly forecast below 300,000 tonnes that is contained in the Revised Monthly Coal Stockpile Forecast; and
>
> (b) unless clause 23.4B(c) of the IPPA applies, the Respondent is obliged to take the steps in clause 23.4B(a)(i)(A) or (B) if the existence of a stockpile level forecast below 300,000 tonnes is attributable to:
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> (i) the actual levels of dispatch in the calendar year to the date of the Revised Monthly Coal Stockpile Forecast (to the extent this data was reasonably available to the Participants when the Revised Monthly Coal Stockpile Forecast was prepared);
>
> plus
>
> (ii) The anticipated levels of dispatch in the then-current Commitment and Dispatch Estimate (for the balance of that calendar month plus the following two calendar months and on the assumption that the anticipated levels of dispatch in the last week of the Commitment and Dispatch Estimate would continue to the end of the month);
>
> exceeding
>
> (iii) the aggregate of the primary dispatch forecasts for the same periods.

2. A declaration that, upon the proper construction of clause 23.4B(b)(i) of the IPPA:

   (a) the reference to 'stockpile level forecast' is a reference to a monthly forecast above 800,000 tonnes that is contained in the Revised Monthly Coal Stockpile Forecast

   (b) unless clause 23.4B(c) of the IPPA applies, the Respondent is obliged to take the steps in clause 23.4B(b)(i)(A) or (B) if the existence of a stockpile level forecast above 800,000 tonnes is attributable to:

      (i) the actual levels of dispatch in the calendar year to the date of the Revised Monthly Coal Stockpile Forecast (to the extent this data was reasonably available to the Participants when the Revised Monthly Coal Stockpile Forecast was prepared);

      plus

      (ii) the anticipated levels of dispatch in the then-current Commitment and Dispatch Estimate (for the balance of that calendar month plus the following two calendar months and on the assumption that the anticipated levels of dispatch in the last week of the Commitment and Dispatch Estimate would continue to the end of the month);

      falling below

      (iii) the aggregate of the primary dispatch forecasts for the same periods.

…

4. A declaration that, upon the proper construction of the IPPA, each of the following is a reference to meeting the primary dispatch forecasts:

   (a) the reference in cl. 23.4A(c) to 'so that the Station Annual Forecast can be met';

   (b) the reference in each of cl. 23.5(a)(i) and cl. 23.5(b)(i) to the phrase 'to meet the Station Annual Forecast'; and

   (c) the reference in cl. 23.5(c)(i) to 'if GPS was dispatched in accordance with the Station Annual Forecast'.

5. A declaration that, upon the proper construction of the IPPA, each of the following is a reference to the primary dispatch forecasts:

(a) the reference in each of clauses 23.4B(a)(i), 23.4B(a)(ii) and 23.4B(b)(i) to 'anticipated levels of dispatch as disclosed in the Station Annual Forecast'; and

(b) the reference in each of cl. 23.4B(a)(ii) and cl. 23.4B(b)(i) to 'the level of dispatch identified in the Station Annual Forecast'." ("Participant's originating application")

[7] The Participants submit, first, that the relief sought in those paragraphs should be granted. Second, in an alternative draft order, they seek:

"THE COURT DECLARES THAT:

1. Upon the proper construction of the 2009 IPPA, each of the following is a reference to the Sent Out Basis forecasts:

   (a) the reference in each of cl. 23.4B(a)(i), cl. 23.4B(a)(ii) and cl. 23.4B(b)(i) to 'anticipated levels of dispatch as disclosed in the Station Annual Forecast'; and

   (b) the reference in each of cl. 23.4B(a)(ii) and cl. 23.4B(b)(ii) to 'the level of dispatch identified in the Station Annual Forecast'.

2. Upon the proper construction of the 2009 IPPA, each of the following is a reference to meeting the Sent Out Basis forecasts:

   (a) the reference in cl. 23.4A(c) to 'so that the Station Annual Forecast can be met';

   (b) the reference in each of cl. 23.5(a)(i) and cl. 23.5(b)(i) to the phrase 'to meet the Station Annual Forecast'; and

   (c) the reference in cl. 23.5(c)(i) to 'if GPS was dispatched in accordance with the Station Annual Forecast'.

AND THE COURT ORDERS THAT:

3. Paragraphs 1 to 3, 7, 9, 11 and 13 of the originating application otherwise be dismissed.

4. The respondent pay 50% of the applicants' costs of and incidental to the hearing on 12 March, 13 March and 10 April 2018, to be agreed or assessed on the standard basis.

5. The proceedings be reviewed on a date to be fixed."

("Participants' first alternative draft order")

[8] Third, in a second alternative draft order, the Participants seek:

"THE COURT DECLARES THAT:

1. Upon the proper construction of the 2009 IPPA, none of the following includes a reference to the Upper Estimates or the Lower Estimates:

   (a) the reference in each of clauses 23.4B(a)(i), 23.4B(a)(ii) and 23.4B(b)(i) to 'anticipated levels of dispatch as disclosed in the Station Annual Forecast';

   (b) the reference in each of cl. 23.4B(a)(ii) and cl. 23.4B(b)(ii) to 'the level of dispatch identified in the Station Annual Forecast';

   (c) the reference in cl. 23.4A(c) to 'so that the Station Annual Forecast can be met';

   (d) the reference in each of cl. 23.5(a)(i) and cl. 23.5(b)(i) to the phrase 'to meet the Station Annual Forecast'; and

   (e) the reference in cl. 23.5(c)(i) to 'if GPS was dispatched in accordance with the Station Annual Forecast'."

("Participants' second alternative draft order")

[9] In my view, in circumstances like the present case, the Court should not be confronted by so many alternatives put forward by one party. It is not appropriate for the Court to be required to discuss the relative pros and cons of so many different permutations and combinations. It is up to an applicant for an order to apply for the order that it seeks. In the circumstances, it is not appropriate to engage in lengthy discussion of the alternatives beyond that necessary to give reasons for the decision.

[10] A declaration of right is made by this court under the current statutory provision for doing so.[2]

[11] Under prior rules of court, express provision was made for a proceeding to be brought to determine any question of construction under a written instrument and for a declaration of the rights of the persons interested, from 1901 by special indorsement of a writ of summons,[3] and from 1965 by originating summons.[4]

[12] Under the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), there is no specific provision for a similar proceeding but an application to determine such a

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2 *Supreme Court of Queensland Act* 1991 (Qld), s 10; *Civil Proceedings Act* 2011 (Qld), s 10.

3 *Rules of the Supreme Court* 1900 (Qld), O 4 r 16.

4 *Rules of the Supreme Court* 1900 (Qld), O 64 r 1A which was modelled on the English Rules contained in *Rules of the Supreme Court*, O 54A. See also the cognate particular provision for a "vendor and purchaser summons" in *Property Law Act* 1974 (Qld), s 70.

question and declaration is permitted by an originating application when a substantial dispute of fact is unlikely.[5]

[13] The breadth of the power to grant a declaration in relation to the rights of parties under a contract is reflected in many cases. The leading case as to the general principles relating to the grant of declaration is still *Forster v Jododex Australia Pty Ltd*.[6] Declarations as to the proper meaning of a provision in a contract are commonplace[7] as are declarations of a right or entitlement that may follow from the determination of the question of construction. As the correlative of a right or entitlement, a declaration of the obligation of a contractual party may also be granted.[8]

[14] But there are limits. First, "it is not permissible to make a declaration of right which amounts to a conclusion of fact from a hypothetical or assumed state of facts and thereby to enunciate or declare a rule of general application as though it were a declaration of applicable law."[9] Second, the omission of determinative facts as the basis of a form of declaration may lead to the form being objectionable,[10] even to the extent that the declaration may become hypothetical and beyond the limit of the proper exercise of judicial power.[11]

[15] In my view, the relief sought in paragraphs 1, 2, 4 and 5 of the originating application is not in an appropriate form. The declarations sought are divorced from any particular factual context, yet the Participants seek a declaration that CS Energy is obliged to take certain steps unless a particular clause applies. That is not a declaration as to the meaning of the contract as such. As to paragraphs 4 and 5, I note that the orders or declarations sought in paragraph 4 are essentially reproduced in more precise terms in paragraphs 1(c), 1(d) and 1(e) of the Participants' second alternative draft order. There is no equivalent of paragraph 5 in the second alternative draft order, presumably because it is not a necessary declaration.

[16] As to the first alternative draft order, paragraphs 1 and 2 both turn on the meaning of the expression of "the Sent Out Basis forecast", which is defined in paragraph 1(d) thereof. That is not a drafting technique to which I incline. More importantly, in adopting that form of draft declaration, the Participants seek a positive form of declaration as to what is referred to by the particular words extracted from the text of the particular parts of the relevant clauses.

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5 *Uniform Civil Procedure Rules* 1999 (Qld), r 10.

6 (1972) 127 CLR 421, 437-438.

7 An example of such a declaration appealed to the High Court of Australia is *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45.

8 As, for example, in *re Dixon* [1994] 1 Qd R 7.

9 *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 24.

10 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, 91 [89].

11 *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334, 355-357 [45]-[48].

[17] The structure and effect of the reasons, however, is a negative one, namely that what is referred to in particular clauses does not include the particular subject matters of the Upper Estimate and the Lower Estimate. The participants submit that is an implied acceptance of the other side of the coin. Hence they seek a declaration in a positive form as to CS Energy's obligations. That submission may be right in either most or perhaps all circumstances. But it is not necessary to declare so in order to quell the controversy between the parties in a way that is appropriate for resolution by a declaration of right divorced from any particular factual context, in the circumstances of this case.

[18] Accordingly, in my view, the preferable form of declaration is that in paragraph 1 of the Participants' alternative second draft order, namely that upon the proper construction of the 2009 IPPA, the relevant expressions in the particular clauses identified do not include a reference to the Upper Estimates or the Lower Estimates.[12]

[19] In substance, to this extent, CS Energy does not oppose the orders that are sought in paragraphs 1(a) and 1(b) of the Participants' second alternative draft order.

[20] However, CS Energy does oppose the orders sought by paragraphs 1(c), 1(d) and 1(e). Those sub-paragraphs correspond to paragraph 4 of the Participants' application. CS Energy submits that the relief sought by paragraph 4 of the Participants' application should be dismissed. However, in addressing the subject matter of paragraph 4, CS Energy did not address the form of the negative declaration sought in paragraph 1(c), 1(d) and 1(e). In my view, it is appropriate to make declarations in that form, having regard to the reasons for judgment.

[21] It follows, in my view, that upon making the declaration in the form sought by the Participants' second alternative draft order in paragraph 1, it is then appropriate to make an order that paragraphs 1, 2, 5, 7, 9, 11 and 13 of the Participants' application otherwise be dismissed. That leaves paragraphs 6, 8 and 10 of the Participants' application unresolved and for future consideration.

Paragraphs 2, 4, 6A, 10 and 12 of CS Energy's application

[22] CS Energy applies for the following orders by its draft order:

> "THE COURT DECLARES THAT:
>
> 1. On the proper construction of the IPPA, "Station Annual Forecast" for the purposes of each of clauses 5A.4(c), 23.4A(b) and 23.4A(c) of the IPPA includes the upper and lower estimates of dispatch of GPS on an annual basis prescribed by clause 5A.3(b)(ii).
>
> 2. On the proper construction of the IPPA, clause 23.4A(b) requires the Participants to prepare the Annual Coal

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12 Compare, for example, *Oakland Property Holdings Pty Ltd v BNY Trust (Aust) Registry (as trustee for Allfinance Funding Trust) No 1* [2012] NSWSC 335, [93] and [105].

> Procurement Plan taking into account that part of the Station Annual Forecast constituted by the upper and lower estimates of dispatch of GPS on an annual basis prescribed by clause 5A.3(b)(ii).
>
> 3. On the proper construction of the IPPA, the upper and lower estimates of dispatch of GPS on an annual basis prescribed by clause 5A.3(b)(ii) are not superseded by the Commitment and Dispatch Estimates."

[23] Paragraphs 2 and 3 of the draft order correspond to paragraphs 2 and 4 of CS Energy's application. In support of paragraphs 1 and 2 of the draft order, CS Energy submits that the Participants conceded at the hearing that "Station Annual Forecast" in cl 23.4A(b) of the 2009 IPPA includes the Upper Estimate and the Lower Estimate and that the Participants are required to take into account the Station Annual Forecast (including the Upper Estimate and the Lower Estimate) when preparing the Annual Coal Procurement Plan. CS Energy also submits that paragraphs 142 and 163 of the reasons are consistent with that.

[24] In my view, in those circumstances, it is not necessary to make that form of declaration. It is not as though the Participants made a tactical concession at the hearing simply to avoid the making of a declaration which concerned a matter of real dispute between the parties. In reality, this question picks up one of the barrage and counter-barrage of legal arguments exchanged between the parties as to the operation of relevant clauses of the IPPA in the lead up to the hearing of the applications. That does not mean it is appropriate to make a declaration about every point which, ultimately, was not the subject of dispute at the hearing of the applications.

[25] CS Energy similarly submits that order 3 of the draft order should be made because at the hearing the Participants conceded that the Upper Estimate and Lower Estimate are not "superseded" by the Commitment and Dispatch Estimates, contrary to their earlier correspondence.

[26] In my view, the same reasoning as to why declarations in terms of paragraphs 1 and 2 of CS Energy's draft order should not be made applies to paragraph 3. Curiously, CS Energy also submits that no order should be made if the court considers there is no dispute, but that would not dispose of the application in this respect. In my view, the appropriate order is that the application should be dismissed as to the relief that was sought in paragraph 4 of CS Energy's originating application. An additional point is that it never emerged, at any time, what a declaration that the Upper and Lower Estimate are not superseded by the Commitment and Dispatch Estimates would mean.

[27] The Participants apply for an order that the relief sought by paragraphs 6A, 10 and 12 of CS Energy's application should be dismissed.

[28] Paragraph 6A of CS Energy's application provides:

"6A. A declaration that on the proper construction of clause 31.1 of the IPPA, a failure to maintain a stockpile of fuel which a prudent and competent person under the circumstances would have maintained precludes an event from satisfying the definition of Force Majeure where the event falls within clause 31.1 (e) even if that event otherwise falls within clauses 31.1 (a) to (d) or the chapeau of clause 31.1"

…"

[29] Paragraph 10 of CS Energy's application provides:

"10. Further and alternatively to paragraph 9, declarations that where:

(a) in a month or months (the **relevant months**), the dispatch of GPS (taking into account the anticipated levels of dispatch as disclosed in the most recent Commitment and Dispatch Estimate) is greater than the relevant monthly estimate, or sum of the relevant monthly estimates, of dispatch of GPS set out in the current Station Annual Forecast; and

(b) the dispatch of GPS in the year to date up to and including the relevant months (taking into account the anticipated levels of dispatch as disclosed in the most recent Commitment and Dispatch Estimate) has not exceeded the sum of the monthly estimates of dispatch of GPS for the year to date up to and including the relevant months set out in the current Station Annual Forecast;

then:

(c) for the purposes of clause 23.4B(a)(i):

(i) the actual level of dispatch at GPS is not in excess of the anticipated levels of dispatch as disclosed in the Station Annual Forecast;

(ii) further and alternatively, if any Revised Monthly Coal Stockpile Forecast is less than 300,000 tonnes, then the level of such forecast is not attributable to the actual level of dispatch at GPS being in excess of the anticipated levels of dispatch as disclosed in the Station Annual Forecast; and

(d) for the purposes of clause 23.4B(c), if any Revised Monthly Coal Stockpile Forecast is less than 300,000

tonnes, then the level of such forecast is not attributable to the levels of dispatch of power at GPS."

[30] Paragraph 12 of CS Energy's application is for the following relief:

> "12. Further and alternatively to paragraph 11, declarations that where, with respect to a month (the **relevant month**), the deliveries of coal arranged by the Participants for the year to date up to and including the relevant month are, of themselves, insufficient to enable GPS to meet the level of dispatch given by the sum of the monthly estimates of dispatch of GPS for the year to date up to and including the relevant month set out in the current Station Annual Forecast;
>
> then:
>
> (a) for the purposes of clause 23.4B(a)(ii):
>
> (i) the deliveries of coal arranged by the Participants are less than the deliveries necessary to ensure that GPS is able to meet the level of dispatch identified in the Station Annual Forecast;
>
> (ii) further and alternatively, if, as at the relevant month, a Revised Monthly Coal Stockpile Forecast is less than 300,000 tonnes, then the level of such forecast is attributable the deliveries of coal arranged by the Participants being less than the deliveries necessary to ensure that GPS is able to meet the level of dispatch identified in the Station Annual Forecast; and
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> (b) for the purposes of clause 23.4B(c), if, as at the relevant month, any Revised Monthly Coal Stockpile Forecast is less than 300,000 tonnes, then the level of such forecast is attributable to the deliveries of coal arranged by the Participants."

[31] As to paragraph 6A, the Participants submit it should be dismissed because it would be more efficient even though there is no res judicata, whereas CS Energy submits that no order should be made because the reasons do not address paragraph 6A. That is true, but the parties did not argue as to the operation of the force majeure clause in the 2009 IPPA at the hearing.

[32] In the result, I conclude that no order should be made on paragraph 6A of CS Energy's application.

[33] As to paragraphs 10 and 12 of CS Energy's application, in the reasons I expressed the view that the example of the operation of clause 23.4B(a)(i) set out in the reasons demonstrated that the parties were not to be taken to have intended that

either the Upper Estimate or the Lower Estimate should be taken into account under clause 23.4B(a)(i). The same reasoning applied, mutatis mutandis, to clause 23.4B(a)(ii) and to clause 23.4B(b)(i) and (ii). I concluded that it followed that the declarations sought by CS Energy as to these clauses should not be granted.

[34] The Participants submit that the relief sought by paragraphs 10 and 12 should be dismissed.

[35] CS Energy submits that for the same reason that CS Energy submits that the positive declaration sought by paragraph 5 of the Participants' application should not be made, no order should be made on paragraphs 10 and 12. However, in my view, the application for the orders sought in paragraphs 10 and 12 should be dismissed.

Costs

[36] The Participants apply for an order that CS Energy should pay 50 percent of the costs of the preliminary hearing of separate questions on each of the applications.

[37] On 20 December 2017, the court ordered the hearing of the separate questions of the relief sought by paragraphs 1 to 5, 7, 9 11 and 13 of the Participants' originating application and CS Energy's proposed originating application for relief sought in paragraphs 4, 5, 8, 9 or 17 to 20 of the Notice of Referral of Disputes dated 14 November 2017.

[38] As matters transpired, by agreement, the parties limited the preliminary hearing to the subject matters dealt with by the reasons, which are not as extensive as the questions raised by all of those identified paragraphs.

[39] Treating the preliminary hearing as being so confined, the Participants submit that they succeeded on the issue that occupied the most time at the hearing and in the reasons, that was also the issue that triggered and comprised the clearest dispute between the parties.

[40] The Participants submit that although the general rule is that the costs of a proceeding follow the event,[13] the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 684 provides that the court may make an order for costs in relation to a particular part of a proceeding and may declare what percentage of costs is attributable to that part. They further submit that, in doing so, the court is entitled to take an impressionistic and pragmatic view as to the real heads of controversy in the litigation, accepting that the party seeking to invoke r 684 is required to identify the particular part of the proceeding in respect of which the court is asked to make an order for costs.[14]

[41] The Participants submit that it is appropriate that they recover a proportion of their costs of the preliminary hearing, given that the court needed to consider the clauses

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13 *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).

14 *Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 3)* [2015] QSC 164, [13].

in the 2009 IPPA that were the subject of the unsuccessful parts of the Participants' application as part of its consideration of the 2009 IPPA as a whole, and that the additional costs raised by the parts of the Participants' application that were not pressed or "outside" the determination in the reasons was relatively minor. As well, the Participants submit that they incurred additional costs in responding to inadmissible expert material.

[42] CS Energy submits that there were two main issues, each constituting a separate event, which occupied the majority of the court's time at the hearing and were the subject of most of the reasons, being the appropriate meaning to be given to the term "Station Annual Forecast" in various places in the 2009 IPPA and whether and to what extent CS Energy's dispatch and the Participants' coal procurement obligations should be subject to obligations of good operating practice and other constraints.

[43] CS Energy submits that the parties essentially shared success in that they each had success on one of the two main issues. That is, the Participants were partly successful as to the meaning to be given to the term "Station Annual Forecast" and CS Energy was successful in respect of the dispatch and coal procurement obligations issues in resisting the making of the declarations sought in the Participants' application on those points. CS Energy submits that, without adopting any precise analysis, the written submissions and hearing were, in substance, divided between those issues equally.

[44] Accordingly, neither of the parties submits that it is appropriate to make an order for costs by treating each of the separate paragraphs of relief in both applications, or the questions raised by them, as separate "issues" constituting separate "events". Both suggest that a broad brush approach is appropriate. I accept that is the best way to proceed.

[45] In my view, it is not appropriate to measure the success of either of the parties as to a particular part of either proceeding by reference to the pages devoted to individual questions in the reasons. The appropriate guide is to be found in the evidence, the written submissions of the parties and the course of the oral hearing.

[46] Also, in my view, consideration of the appropriate order as to costs, on a broad brush basis, is not significantly influenced in this case by whether the Participants were required to respond to inadmissible expert material.

[47] Whilst it may be true that the issue that occupied the most time at the hearing was the issue on which the Participants succeeded, a significant period of time was also spent on the questions on which CS Energy succeeded.

[48] Once that point is reached, in my view, it is not clear why it would be appropriate to order that CS Energy pay 50 percent of the whole of the Participants' costs of the preliminary hearing.

[49] In all the circumstances, a better reflection of success on the preliminary hearing in each of the proceedings is that there should be no order as to costs.

[50] In circumstances like the present, in my view, that is a better outcome than orders that the respective parties pay the costs of the issues on which they succeeded respectively and, in any event, neither of the parties sought such an order.