SUPREME COURT OF QUEENSLAND

CITATION:	*Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290
PARTIES:	**DOWNER EDI MINING PTY LTD** **ABN 49 004 142 223** (respondent/plaintiff) **v** **WAMBO COAL PTY LTD ABN 13 000 668 057** (applicant/defendant)
FILE NO/S:	BS6563 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application to stay proceedings
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2012
JUDGE:	Martin J
ORDER:	**The proceeding in this matter be stayed until there has been compliance with the dispute resolution procedures contained in clause 46 of the Operation Agreement exhibited to the affidavit of Joern Schimmelfeder filed in this proceeding on 22 August 2012 or further order.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SETTLEMENT OF DISPUTES – where the contract stipulates a dispute resolution procedure ("DRP") – where plaintiff brought action without full compliance with DRP – where defendant applies for stay of proceedings until there has been compliance – whether DRP is so vague and uncertain that it is unenforceable – whether procedures in DRP are unlikely to resolve the dispute and therefore futile *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, considered *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, considered

Huddart Parker Ltd v The Ship Mill Hill (1950) 81 CLR 502, considered
Straits Exploration (Australia) Pty Ltd v Murchison United NL (2005) 31 WAR 187, applied
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563, applied

COUNSEL: DJS Jackson QC with J Otto for the applicant/defendant
W Sofronoff SG QC with D Chesterman for the respondent/plaintiff

SOLICITORS: Middletons for the applicant/defendant
Clayton Utz for the respondent/plaintiff

[1] The applicant/defendant ("Wambo") applies for an order staying the proceeding commenced against it by the respondent/plaintiff ("DEM") until there has been compliance with the dispute resolution procedure ("DRP") in clause 46 of a contract between the parties referred to as the "Operation Agreement".

[2] The bases for the application are:

(a) the plaintiff DEM has not satisfied a condition precedent to its right to commence court proceedings in that it has failed to comply with the DRP;

(b) alternatively, in the exercise of the court's inherent jurisdiction, the court should require DEM to comply with the DRP and stay proceedings until that occurs.

[3] The application is opposed by DEM on these bases:

(a) the DRP is so vague and uncertain that it is unenforceable;

(b) there is no point in staying proceedings whether or not the DRP is enforceable as Wambo has, in discussions to date, been intransigent and unmoveable; and

(c) it follows that the procedures in the DRP are unlikely to resolve the dispute and it would be futile and wasteful for compliance to be required.

Background

[4] In March 2008 DEM and Wambo entered into the Operation Agreement. Pursuant to that agreement DEM is to provide, amongst other things, maintenance of plant and equipment services to Wambo. In consideration of that, Wambo is required to pay to DEM an amount calculated in accordance with other terms of the Operation Agreement. That money is to be held in a separate account and only drawn down to pay for the maintenance services. It is provided in the Operation Agreement that if there is any money left in the account at the end of the agreement, it is to be shared equally between DEM and Wambo.

[5] DEM alleges in its statement of claim that Wambo has determined to make no further payments for maintenance and, as such, is in breach of the agreement. Mr Sofronoff QC submitted that the basis for Wambo's refusal to make any more payments was that it was inevitable that there would be a surplus in the fund at the

termination of the contract; Wambo would thus be paying money into a fund of which it would only recover half when the contract comes to an end.

The dispute resolution procedure

[6] So far as is relevant, clause 46 of the Operation Agreement provides:

> "**46.1 Condition precedent to start of proceedings**
> If any dispute between the parties arises from this Contract (whether during the Term of, or after termination of, this Contract) (**Dispute**), the parties agree to resolve it in the manner set out in this clause, and a party may not commence court proceedings concerning the Dispute unless:
> (a) the party starting proceedings has complied with this clause; or
> (b) the party starting proceedings seeks urgent interlocutory relief; or
> (c) another party has first started proceedings other than under this clause; or
> (d) the Dispute has been referred to an Expert under clause 46.4 and the Expert has not made a decision within the 20 Business Day period specified in clause 46.7(a)(vii); or
> (e) there is manifest error in the Expert's decision.
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> **46.2 Notice of Dispute**
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> Where a Dispute has arisen, a party claiming that a Dispute has arisen must notify each other party to the Dispute specifying the nature of the claim (**Dispute Notice**).
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> **46.3 Resolution of Dispute by negotiation**
> (a) During the 5 Business Days after the date the Dispute Notice is given (or a longer period as the parties may agree in writing) each party must:
> (i) prepare, and exchange with the other parties, a brief statement setting out its own position on the Dispute and its reasons for adopting that position; and
> (ii) give to the other parties any information they may reasonably require to consider the issues relevant to the Dispute.
> (b) Subject to clause 46.3(d), within 5 Business Days after the date the statements are due to be exchanged under clause 46.3(a), the PCG[1] will hold a meeting and the parties will attempt to resolve the Dispute. If the Dispute is not resolved by the PCG 5 Business Days after the meeting, the BRG[2] must meet and use its best endeavours to resolve the Dispute.
> (c) Subject to clause 46.3(d), if the BRG is unable to resolve the Dispute within 10 Business Days after the meeting of the

[1] Project Review Group.
[2] Business Review Group.

BRG, the chief executive officers of each party must meet within 10 Business Days and use their best endeavours to resolve the Dispute, each having full authority to do so.

(d) If the parties have already attempted to resolve the matter the subject of the Dispute Notice under clauses 9.3, 23.2, 24.2(c) or 37.6, clause 46.3(b) and (c) will not apply and the chief executive officers of each party must meet within 10 Business Days after the date the statements are due to be exchanged under clause 46.3(a).

(e) In the absence of agreement between the parties as to the time and venue for any meeting, the meeting must take place at the offices of the Law Society of New South Wales at 9.00am on the last Business Day of the time period referred to in clause 46.3(b) (**Meeting Date**).

46.4 Resolution of issues by Expert

If the Dispute is not resolved under clause 46.3:

(a) for a Claim of less than $1 million (in any 1 year) or about fixing a CSF Target, either party may during the next 5 Business Days after the meeting referred to in clause 46.3(c) or 46.3(d) give a notice (**Expert Determination Notice**) to the other parties, requiring the Dispute to be referred to an Expert in the relevant discipline for determination; or

(b) for a Claim of $1 million or more (in any one year) either party may refer the matter to litigation.

Relevant principles

[7] It was not disputed that, in an appropriate case, a court may make an order of the type sought. Clause 46 does not purport to oust the jurisdiction of the court; rather, it makes compliance with its terms a condition precedent to the commencement of legal proceedings.

[8] There is no relevant difference, in principle, between an expert determination clause and a dispute resolution clause. Both are intended to provide a means by which an issue can be determined without resort to litigation. It has been held that the principles underlying the power to stay proceedings in the instance of an expert determination clause are the same as for arbitrations.[3]

[9] There appears to be no basis in principle for treating this type of dispute resolution procedure any differently from an arbitration clause or an expert determination clause. It is a product of the parties' agreement and it has never been the policy of the law to discourage the parties from resolving their differences in this way.[4]

[10] In *Straits Exploration (Australia) Pty Ltd v Murchison United NL & anor*[5] the Western Australian Court of Appeal was concerned with the operation of an expert determination clause but, in doing so, also considered the effect of a dispute resolution procedure. Wheeler JA, in giving the judgment of the court, said:

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3 *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188, [33]-[34].

4 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652.

5 (2005) 31 WAR 187.

"[14] There is increasingly, as a matter of commercial practice, a tendency of parties to provide for the determination of some or all disputes by reference to an expert. There are a number of reasons for that course, including informality and speed; suitability of some types of disputes for determination by persons with particular expertise; privacy; and a desire to resolve disputes in a way which may be seen as reasonably consistent with the maintenance of ongoing commercial relationships. The law has long recognised that those are proper considerations to which the Court should give appropriate weight, and that it is desirable therefore that parties who make such a bargain should be kept to it. **The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court**. A considerable number of cases demonstrating this trend are collected in the reasons for decision of Einstein J in *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [16] - [33]. (See also *Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 at [50] and *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [21].)

[15] The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider. **Prior to the conclusion of the expert determination procedure - that is, prior to the making of a determination - any party to a contract containing such a clause remains free to sue upon the contract, unless the contract itself makes compliance with some form of dispute resolution procedure a condition precedent to the enforcement of rights under the contract. In relation to the latter type of contract, the effect of the clause is not to invalidate an action brought in breach of it, but to provide a defence and to "postpone" but "not annihilate the right of access to the court"** (*Freshwater v Western Australian Assurance Co Ltd* [1933] 1 KB 515 at 523 per Lord Hanworth MR). The latter type of clause is not in issue here, however. **Where a contract contains a dispute resolution clause, and a party who has not first proceeded in accordance with that clause sues on the contract, the court has, however, a jurisdiction to stay the proceeding so as, in a practical sense, to force the party to fall back upon the contractual procedure.** The circumstances in which a stay will be granted are considered in Jacobs, *Commercial Arbitration: Law and Procedure* (2001), at [12.49/5] - [12.49/8]. There are no proceedings on the agreement in the present case, and it is therefore not necessary to consider those principles." (emphasis added)

[11] The jurisdiction to "force the party to fall back upon the contractual procedure" was reviewed by Chesterman J (as he then was) in *Zeke Services Pty Ltd v Traffic Technologies Ltd*.[6] His Honour was concerned with an expert determination clause.

[12] Chesterman J recited that the starting point in these circumstances is that stated by Dixon J in *Huddart Parker Ltd v The Ship Mill Hill*:[7]

> "But the Courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in *Bristol Corporation v John Aird & Co*., consider the circumstances of a case with a strong bias in favour of maintaining the special bargain or as Scrutton LJ said in *Metropolitan Tunnel and Public Works Ltd v London Electric Railway Co*., '**A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it**'." (emphasis added, footnotes omitted)

[13] Chesterman J highlighted the distinction between arbitration and an expert determination:

> "[23] There is a clear distinction between arbitration and expert determination. The former involves a more or less formal adjudication of the respective cases put before the arbitrator. The court exercises a degree of supervision over the conduct of arbitrations and arbitrators, and minimum standards of procedural fairness are required. There are no such safeguards with respect to expert determination."

[14] In this case, there is no provision for arbitration – the parties are to attempt to solve their problems through discussion at increasing levels of responsibility. In the absence of resolution, the matter may be referred to an expert or the parties can litigate.

[15] The burden on the parties to an application to stay proceedings was considered by Chesterman J. He said:

> "[21] … 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.**
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> [22] Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties

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6 [2005] 2 Qd R 563.

7 (1950) 81 CLR 502, 508–509.

> have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. …" (footnotes omitted, emphasis added)

[16] With those principles in mind, I turn to the arguments of the parties.

The applicant's submissions

[17] Wambo's grounds for the stay are set out in [2] above. It argues that:

(a) the parties' agreement is clear and that a failure to comply with the DRP constitutes a complete defence to DEM's claim; and

(b) in the absence of any other compelling consideration the Court would also exercise its inherent jurisdiction to stay the proceedings until the DRP had been exhausted.

The respondent's submissions

[18] The majority of the written and oral submissions were concerned with DEM's case. It was in two broad sections:

(a) the DRP is of sufficient uncertainty that it cannot be relied upon either as a defence or as a catalyst for the court's inherent jurisdiction; and

(b) even if it is sufficiently certain, resort to the DRP is futile as Wambo's position is entrenched.

Uncertainty

[19] The process in the DRP is said to be uncertain in particular respects. The process, in summary is:

(a) a dispute arises;

(b) the party alleging the existence of the dispute must notify the other party of the dispute and specify its nature by means of a "Dispute Notice" (there is no time limit for this);

(c) after a Dispute Notice has been given, the parties have five days in which to prepare and exchange position papers;

(d) five days after the position papers are due to be exchanged, the PCG "will hold a meeting and the parties will **attempt to resolve** the dispute";

(e) if the PCG has not resolved the dispute within five days of its meeting, the BRG must meet and "**use its best endeavours** to resolve the dispute";

(f) if the BRG has not resolved the dispute within ten days of its meeting then the chief executive officers of each party must meet within a further ten days and "**use their best endeavours** to resolve the dispute".

[20] There is a hiatus in the procedure so far as the timing for a meeting of the BRG is concerned. The process requires that, if the PCG has not resolved the problem within a maximum of ten days after the date for exchange of position papers, then the BRG is to meet. There is no specified time within which that meeting is to occur. There is, though, a time limit for the resolution of the problem by the BRG –

ten days – after which the chief executive officers must meet within a further ten day period and attempt to resolve the dispute.

[21] DEM submits that these procedures are uncertain in three respects.

(a) No procedures exist for the contingency where the required representatives are incapable of meeting within the specified time. Thus, DEM argues that there could be a failure where, for example, the PCG could not convene in the specified time, which would lead to a failure of that part of cl 46.3(b) and a consequent inability of the BRG to meet as the catalyst for that meeting had not occurred.

The circumstances which might give rise to such an occurrence would be relevant to its determination but, in the purely hypothetical situation posited by DEM, there are at least two responses.

First, cl 46 can be amended by the parties by written agreement (cl 54.1). An amendment to deal with this matter (say, by the extension of time) would be consistent with each party's express duty in cl 54.6 to "do all things reasonably necessary to give effect to this Contract and the transactions contemplated by it."

This requirement is consistent with the implied obligation considered in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*[8] in which it was held that the implied term required that the parties were obliged to request a nominating party to choose an arbitrator.

Secondly, cl 54.11 provides:

> "A clause or part of a clause of this Contract that is illegal or unenforceable may be severed from this Contract and the remaining clauses or parts of the clause of this Contract continue in force."

If a part of cl 46 is unenforceable for uncertainty or frustration, then the balance *may* be enforceable, depending upon the extent of the uncertainty or the cause of the frustration. In the hypothetical example employed by DEM, no more can be said as there are insufficient facts to form a more detailed response. In any event, DEM has not demonstrated that the absence of a specific mechanism to deal with the possibility of a meeting not being able to be held within a nominated time renders the clause uncertain.

Finally, and subject to what is said below, the lack of any mechanism to deal with the impossibility of holding a meeting within time does not render the procedure uncertain. It only means that the procedures set out in the clause may not be able to be completed if, for some reason consistent with parties' duty, the BRG could not meet.

(b) There is a time limit for the BRG to resolve the dispute, but no time is set for the holding of a meeting of the BRG if the PCG has failed to resolve the dispute. It is submitted that this creates an uncertainty.

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8 (1982) 149 CLR 600.

It appears that the omission to specify a date may have been an oversight given the timetable otherwise established in cl 46.3. In light of the principle set out by Wheeler JA in *Straits Exploration* – "The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court." – the time for the meeting of the BRG should be determined as being within a reasonable time after the PCG fails to resolve the dispute.

As Dixon J said in *Reid v Moreland Timber Co Pty Ltd*:[9] "An implication of a reasonable time when none is expressly limited is, in general, to be made unless there are indications to the contrary …". In this case, given the other times fixed for performance, it would seem most likely that a reasonable time for the BRG to meet would be no more than ten days after the expiration of the time for the PCG to attempt to resolve the dispute.

(c) The requirement that the PCG "attempt to resolve" the dispute lacks a readily ascertainable objective standard or norm by which one may assess whether there has been compliance with cl 46.3(b)

DEM submits that there is real uncertainty as to how one is to measure whether, in the case of the PCG, there has been an "attempt to resolve the dispute". Unlike the requirements of the BRG and the chief executive officers, no adjective is used to define what must be done to attempt to resolve the dispute. In other words, it is argued, there is an absence of a readily ascertainable objective standard or norm by which one may assess whether there has been compliance with the clause.

This is an unusual argument in that there has been controversy in the past about whether a clause requiring parties to negotiate in good faith was uncertain because of the use, for example, of a term such as "good faith"[10]. In this case, the opposite is argued – the absence of such an expression is said to make the requirement uncertain.

The submission cannot be accepted. There are two requirements in this part of cl 46.3. First, there must be a meeting – there is no uncertainty in that requirement. Secondly, the parties must attempt to resolve the dispute. There is no need to qualify the word "attempt" in order to achieve certainty. "It seems to me hardly necessary but by way of emphasis I point out that 'attempt' in the *Shorter Oxford English Dictionary* … means 'to make an effort or endeavour to do or accomplish some action'. This is consistent with meaning by action to achieve a particular result rather than simply to contemplate the possibility or even the likelihood of such a result by such

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9 (1946) 73 CLR 1, 13; see also *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 567.

10 *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

> action."[11] The question of whether an attempt has been made to do something is one which is susceptible of assessment and it is a task which is undertaken on a daily basis both within and without the court system.

Futility

[22] DEM also argues that it would be futile for the meetings required by cl 46.3 to be convened. The basis for that submission is the following:

(a) meetings have been held on at least three occasions and those meetings were attended by persons holding high positions in both parties;

(b) there have been other discussions between the parties about the maintenance fund; and

(c) none of those meetings or discussions has resolved the dispute.

[23] It is DEM's contention that whenever the issue of the maintenance fund is raised "it is met with intransigence on the part of Wambo at a high level of decision making."

[24] The contention by DEM is that, given this history, it is unlikely that the PCG and the BRG will reach the unanimous consensus required for them to determine the dispute.

[25] Objection was taken by Wambo to evidence given of the negotiations held during the three meetings to which reference has already been made. I do not need to decide that issue as the mere fact of their existence and the general topic of discussion were not in contention. Nor was it disputed that no agreement had been reached at those meetings or at any other time.

[26] The more important aspect of this part of the debate is that the evidence, even taken at its highest, shows that none of the meetings which were held nor any of the discussions that took place, were meetings of the PCG, BRG or of the chief executive officers called for that purpose.

[27] DEM invites a finding that the dispute resolution procedure cannot succeed, in the sense that it cannot lead to a resolution of the dispute. Notwithstanding assertions by DEM, Wambo submitted that it remains ready and willing to participate in the process.

[28] In *Zeke Services Pty Ltd*, Chesterman J spoke of the onus borne by an applicant for a stay as being discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. I am not satisfied that that has been done. Perhaps more importantly, is the principle enunciated by Giles J in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*[12] where his Honour said:[13]

> "What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come."

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11 *R v Leavitt* [1985] 1 Qd R 343, 345.

12 (1992) 28 NSWLR 194.

13 At 206.

[29] This is not a case in which the parties have embarked upon the dispute resolution process and have, through satisfactory evidence, demonstrated that it is pointless to continue. The circumstances of this case are that the parties have engaged in some form of informal and unstructured negotiations which were not pursued under cl 46 but of a more general nature. In any event, it is not uncommon to find that parties which are at loggerheads can, through a formal process of negotiation, reach an agreed position.

[30] I conclude that it has not been demonstrated that to proceed in accordance with cl 46.3 would be futile.

Order

[31] The proceeding in this matter be stayed until there has been compliance with the dispute resolution procedures contained in clause 46 of the Operation Agreement exhibited to the affidavit of Joern Schimmelfeder filed in this proceeding on 22 August 2012 or further order.