SUPREME COURT OF QUEENSLAND

CITATION:	*Parsons Brinckerhoff Australia Pty Ltd and Anor v Thiess Pty Ltd and Anor* [2013] QSC 75
PARTIES:	**PARSONS BRINCKERHOFF AUSTRALIA PTY LTD** ABN 80 078 004 798 (first applicant) **ARUP PTY LTD** ABN 18 000 966 165 (second applicant) **v** **THIESS PTY LTD** ABN 87 010 221 486 (first respondent) **JOHN HOLLAND PTY LTD** ABN 11 004 282 268 (second respondent)
FILE NO/S:	BS 11561 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2013
JUDGE:	Boddice J
ORDER:	I shall hear the parties as to the form of orders, and as to costs.
CATCHWORDS:	ARBITRATION – THE ARBITRATORS AND UMPIRE – APPOINTMENT – POWER TO APPOINT ARBITRATOR – where the applicants and respondents entered into a contractual agreement to carry out specified works – where the agreement provided for a procedure for handling disagreements between the parties – where the agreement provided for where the dispute cannot be resolved, either party may by notice to the other party refer the dispute to arbitration or litigation – where the respondents served such notice – where the applicants contend the respondents failed to comply with the procedure for handling disagreements between the parties – where the respondents appointed an arbitrator pursuant to s8(1)(b) of the *Commercial Arbitration Act* 1990 (Qld) – where the applicants contend s8(1)(b) of the

Commercial Arbitration Act 1990 (Qld) does not apply – whether the respondents referral to arbitration was invalid and ineffective

ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – TERMINATION OR STAY OF ARBITRATION PROCEEDINGS – where the applicants and respondents entered into a contractual agreement to carry out specified works – where the agreement provided for a procedure for handling disagreements between the parties – where the agreement provided for where the dispute cannot be resolved, either party may by notice to the other party refer the dispute to arbitration or litigation – where the respondents served such notice – where the respondents appointed an arbitrator pursuant to s8(1)(b) of the *Commercial Arbitration Act* 1990 (Qld) – where the applicants contend that if the referral to arbitration is valid the arbitration should be stayed because of risk of multiplicity of proceedings – where the applicants contend that if the referral to arbitration is valid the arbitration should be stayed because of the likely involvement of third parties – whether the court should use its discretion to stay the arbitration

Commercial Arbitration Act 1990 (Qld), s 6, s 7, s 8, s 10, s 47

Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd [2001] QCA 471
Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors [2012] QSC 185
Tickner v Chapman (1995) 57 FCR 451
Zeke Services Pty Ltd v Traffic Technologies Ltd

COUNSEL: P Freeburn SC and J O'Regan for the applicants
P O'Shea SC, T Bradley and S Hooper for the respondents

SOLICITORS: Schweikert Harris for the applicants
Herbert Smith Freehills for the respondents

[1] The respondents were the appointed contractors for the construction of a section of a large infrastructure project known as the Airport Link Project. The applicants were appointed by the respondents as design engineers for that section.

[2] Pursuant to that appointment, the applicants and the respondents entered into a contractual agreement for the performance of the design and other works. The basis upon which that contractual arrangement was entered into, its terms, and its performance by the parties, have become the subject of dispute between the applicants and the respondents. The present application arises in that context.

[3] The application concerns the respondents' referral to arbitration of a dispute said to arise as a consequence of the performance of design and other services by the applicants. The applicants contend that that referral, and the subsequent appointment of an arbitrator by the respondents, was invalid and ineffective. Alternatively, they contend the reference to arbitration ought to be stayed, having regard to the history of disputation and other relevant circumstances.

Background

[4] The respondents formed a joint venture to tender for the plan, design, construction and commission of a section of the Airport Link Project. The applicants also formed a joint venture to tender for design and other work on that section.

[5] After the respondents were successful in their tender, the applicants and the respondents entered into a contractual agreement, entitled "the Collaborative Consultancy Agreement" (CCA), pursuant to which the parties agreed to establish a collaborative agreement to carry out specified works. Central to the terms of the CCA was a commitment that the parties would act honestly and reasonably in the performance of their respective contractual responsibilities.

The contract

[6] The CCA provided for the agreement between the applicants and the respondents to be governed by a leadership team known as the CLT. It comprised representatives of the applicants and the respondents, and was to provide guidance and leadership to the parties in the performance of the agreed works.

[7] The duties of the CLT were of a broad range. Relevantly, they included the resolution of any differences referred to it, including any collaborative agreement disagreement. That term is defined in the agreement as "any difference of opinion and/or conflict between the participants arising out of or in connection with the collaborative agreement work or this agreement".

[8] Clause 21.1 of the CCA sets out a procedure for handling disagreements between the parties. It provides:

> "(a) We will use our best endeavours to settle any Collaborative Agreement Disagreement in good faith in a manner consistent with the Collaborative Agreement Charter.
>
> (b) If despite our efforts a Collaborative Agreement Disagreement remains unresolved, either of us may give a written notice to the other within 14 days of the initial disagreement requesting that the Collaborative Agreement Disagreement be considered by the CLT.
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> (c) The CLT will consider any Collaborative Agreement Disagreement referred to it and will give due consideration to submissions by both Participants, to any recommendation by the Collaborative Agreement Manager in respect of the Collaborative Agreement Disagreement and to any other relevant information.
>
> (d) The CLT will use its best endeavours to reach a decision on any Collaborative Agreement Disagreement referred to it and advise each party of that decision by written notice within 30 days of being notified of the disagreement. Where the decision of the CLT is unanimous, it will be final and binding on the Participants.
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> (e) Where the CLT is unable to reach a unanimous decision, it will explore and if possible agree on methods of resolving the dispute by other means.
>
> (f) In the event that the dispute cannot be so resolved or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation."

The dispute

[9] On 28 May 2012, the respondents served a notice of collaborative agreement disagreement on the applicants. It included a draft statement of claim in which the respondents alleged multiple breaches of the agreement by the applicants. On 8 June 2012, the respondents requested that the notice be considered by the CLT, pursuant to clause 21.1(b) of the CCA.

[10] By letter dated 18 June 2012, the applicants set out a proposal for the provision of submissions, and the exchange of information. The respondents, by letter dated 19 June 2012, advised they saw no point in following the proposed process. The respondents further advised that whilst they were prepared to participate in a process capable of resolving the dispute, there was little point in pursuing any alternative dispute resolution without the involvement of the applicants' insurers.

[11] The respondents' notice was discussed at a meeting of the CLT on 19 June 2012. The minutes of that meeting record that the applicants' representative requested further explanation of the respondents' claims against the applicants, including as to causation of any loss. The applicants' representative suggested the CLT undertake an examination of one issue. The minutes further record that the respondents wanted the applicants' insurers involved to avoid duplication of the processes as this "would be more efficient and cost effective" for both parties. The respondents also acknowledged that the claim involved similar issues to an earlier *Trade Practices Act* 1974 (Cth) claim by the respondents against the applicants.

[12] By letter dated 27 June 2012, the applicants requested the respondents reconsider their views as expressed in the letter dated 19 June 2012, and reiterated that the parties were obliged by the CCA to use their best endeavours to resolve the disagreement. The respondents replied by letter dated 2 July 2012, noting that the process foreshadowed by the applicants assumed that the parties should "recommence an alternative dispute resolution process that has already been attempted between the parties". The respondents said no explanation had been given as to why this process would achieve any greater success, and asserted the respondents had already taken a number of steps to resolve the dispute. The letter concluded:

> "Consequently, in light of:
>
> - the extensive steps that [the respondents] have already taken (some of which have been outlined above);
> - the lack of any further progress in this respect between the parties, and
> - the inability for [the applicants] to suggest any process other than one that substantially repeats (without any promise of a different result) what has been set out above,
>
> it is clear that there is no more work for clause 21 to do and [the respondents] will now proceed to refer the dispute to litigation or arbitration."

[13] The CLT met again on 10 July 2012. According to the minutes of that meeting, there was no substantive discussion of the respondents' notice, other than a request by the applicants to expand on the minutes of the meeting held on 19 June 2012.

[14] On 12 July 2012, the applicants forwarded a further letter responding to the matters raised by the respondents in their letter of 2 July 2012. The applicants contended the respondents had not used their best endeavours to attempt to resolve the notice,

and that the respondents had failed to articulate their claim or the basis for the applicants' conduct being causative of any alleged losses. The letter concluded:

> "[The applicants] remains willing and able to consider any process that [the respondents] proposes to resolve the notice of collaborative agreement disagreement, although we note that [the respondents] has not proposed any process at all. Nonetheless, [the applicants'] position remains that [the respondents] must articulate a valid claim or claims, which demonstrate that [the applicants] is responsible (and liable) for [the respondents'] alleged losses."

[15] By letter dated 6 August 2012, the respondents elected to refer the disagreement to arbitration. In response, the applicants advised by letter that they should not be taken to consent to that arbitration.

[16] The CLT met again on 14 August 2012. According to the minutes of that meeting, the applicants' representative questioned whether the notice could be a notice as it involved insurers. The respondents' representative indicated he would seek legal advice, and advise the CLT. At a subsequent meeting held on 11 September 2012, it was noted that the respondents' representative was seeking legal advice and would report to the CLT on whether it could consider the notice. That position was noted by the CLT in its subsequent meeting on 9 October 2012.

[17] By letter dated 29 October 2012, the respondents' solicitors wrote to the applicants' solicitors requesting a list of potential arbitrators. In response, the applicants' solicitors, by letter dated 8 November 2012 advised the respondents' solicitors that the CLT had not been given an opportunity to perform its functions under clause 21 and that it would be premature to consider referral to arbitration.

[18] By letter dated 8 November 2012, the respondents' solicitors wrote proposing a panel of three arbitrators, and requested the applicants exercise the power to appoint jointly with the respondents one of those three arbitrators within seven days.

[19] By letter dated 13 November 2012, the applicants' solicitors requested a response from the respondents' solicitors to the substantive issues raised in previous correspondence, and for the CLT to engage in the process in accordance with clause 21 of the CCA.

[20] The CLT met on 23 November 2012. Its minutes record that the respondents' representative advised the dispute had been referred to arbitration and there was nothing for the CLT to do.

[21] By letter dated 26 November 2012, the respondents' solicitors advised the applicants' solicitors that pursuant to section 8(1)(b) of the *Commercial Arbitration Act* 1990 (Qld) ("the Act") the respondents proposed, in default of the applicants exercising the power to appoint an arbitrator, that Ian Callinan AC QC be appointed as arbitrator.

[22] By letter dated 30 November 2012, the applicants sought information as to the daily rate for each of the proposed arbitrators, their availability and their appropriateness having regard to the nature of the dispute.

[23] In response, the respondents advised by letter dated 3 December 2012, that it proposed to notify the arbitrator of his appointment and that the applicant was free to communicate with the arbitrator in respect of fees.

Submissions

[24] The applicants contend the respondents failed to comply with the requirements of clause 21.1 of the CCA, and that as clause 21.1 is mandatory in its terms, the Court ought to stay or adjourn the arbitration proceedings. The applicants further contend that section 8(1)(b) of the Act has no application.

[25] Alternatively, the applicants contend that if there has been a valid referral of a dispute to arbitration under clause 21.1 of the CCA, the proposed arbitration does not provide a suitable forum for resolution of the dispute as there is a risk of a multiplicity of proceedings, and the likely involvement of third parties. In those circumstances, the Court ought to exercise its discretion to stay any arbitration.

[26] The respondents contend the requirements of clause 21.1 of the CCA were complied with in all material respects, and the dispute was properly referred to arbitration. They further contend that as referral to arbitration has been enlivened, in accordance with the agreement, the failure of the applicants to appoint an arbitrator renders the appointment of the present arbitrator valid. Finally, the respondents contend there is no valid basis for the exercise of any discretion to stay the arbitration.

Discussion

[27] It is not in dispute that the respondents referred the disagreement to the CLT by notice issued within the 14 days specified in clause 21.1(b) of the CCA. What is in dispute is whether the respondents thereafter acted in accordance with their contractual obligations to act honestly and reasonably at all times, and in good faith, in an endeavour to resolve the dispute between the parties.

[28] Clause 21 provides a staged process for the consideration of disagreements by the appointed leadership team, the CLT. That procedure requires the CLT to consider any disagreement referred to it, giving due consideration to submissions, any recommendation of the manager and any other relevant information. It also requires the CLT to use its best endeavours to reach a decision on any such disagreement, and advise each party of that decision by written notice within 30 days of being notified of the disagreement. The imposition of such a short time period is consistent with the procedure being intended to be a quick and efficient mechanism for reaching any resolution.

[29] Clause 21 does not mandate that the CLT must make a decision. The CLT is required to use its best endeavours to reach a decision. Clause 21.1(e) provides for a procedure where a decision is not made. It requires the CLT to explore and, if possible, agree on methods of resolving the dispute by other means. If that procedure is not successful, either party may refer the disagreement to arbitration or litigation.

Did the respondents comply with clause 21?

[30] In determining this issue, it is relevant to consider the circumstances in which the disagreement was referred to the CLT. Those circumstances include prior litigation, and an unsuccessful mediation. Those circumstances also include ongoing and unresolved claims by the respondents that the applicants had engaged in misleading and deceptive conduct prior to entering into the CCA.

[31] Viewed against that background, the respondents' reply to the applicants' proposal as to how the CLT should proceed further to consider the disagreement cannot be properly characterised as a failure by the respondents to use their best endeavours to

resolve that dispute. The respondents did not refuse to consider means by which the dispute may be the subject of resolution. Their correspondence involved an assertion that the proposal put forward by the applicants had little merit, having regard to the background of ongoing disputes. The respondents expressly indicated a willingness to consider other proposals.

[32] The respondents' willingness to consider resolution of the disagreement was reiterated at the meeting of the CLT held on 19 June 2012. Their request that the applicants' insurer be involved in any process is recorded as being explained by the respondents' wish to avoid duplication of the processes as that approach would be more efficient and cost effective for the parties. Against the background of prior disputes, including an unsuccessful mediation, such a request cannot properly be characterised as a failure on the part of the respondents to use their best endeavours to resolve the disagreement. That the applicants found the respondents' proposal unacceptable does not render the request unreasonable and contrary to the respondents' obligations under the CCA.

[33] The applicants' response to the respondents' position was to reiterate its earlier proposals, which the respondents had previously indicated were unacceptable. The respondents' response, by letter dated 2 July 2012, noted that those proposals involved recommencing an alternate dispute resolution process that had already been attempted between the parties in circumstances where no explanation had been given as to why this process would achieve any greater success. Whilst that letter concluded with an assertion that there was, in those circumstances, no more work for clause 21 to do, that assertion must be viewed in the context of there being, at that time, an impasse between the parties with the applicants continuing to insist on a procedure which the respondents, for good reason, found unacceptable.

[34] Significantly, whilst the letter dated 2 July 2012 was sent prior to the expiry of the 30 day period specified in clause 21, the respondents did not proceed to refer the disagreement to arbitration until after the expiry of the 30 day period. Further, the respondents' letter dated 2 July 2012 was not the subject of further correspondence by the applicants until after the expiry of that 30 day period.

[35] The CLT met again on 10 July 2012. Whilst the minutes record that there was no substantive discussion of the relevant notice, Mr Vromans, a representative of the applicants, recalls that the notice was raised in that meeting, and that it was noted the applicants were "to respond to a letter" from the respondents on that subject. Whilst no other person attending that meeting recalls that discussion, I accept Mr Vromans' recollection. It is consistent with what occurred thereafter, namely, a letter being sent by the applicants some two days later on 12 July 2012, referring to the respondents' letter of 2 July 2012.

[36] In any event, by the time of the CLT meeting held on 10 July 2012, the 30 day period specified in clause 21.1(d) of the CCA had expired without any decision, unanimous or otherwise, being reached by the CLT. The expiry of that time period meant that clause 21.1(e) became operative. However, the applicants' letter dated 12 July 2012, which expressed a willingness to consider any proposal for resolution of the disagreement, conditioned that willingness on the respondents further articulating their claim demonstrating that the applicants were responsible and liable for the respondents' alleged losses. It is unsurprising that in those circumstances, the respondents invoked clause 21.1(f) and referred the dispute to arbitration.

[37] By the time the respondents referred the disagreement to arbitration, the 30 day period specified in clause 21 had expired, and no other means of resolving the dispute had been agreed to by the parties. The applicants' willingness to consider any process to resolve the disagreement required the respondents to articulate their claims and the basis for the applicants' responsibility for their alleged losses. That requirement was unsatisfactory to the respondents who had already delivered a proposed statement of claim setting out their claims.

[38] The respondents did not have to agree with the applicants' position. Their refusal to do so cannot be properly characterised as a failure to use their best endeavours to resolve the disagreement. By the time the respondents referred the dispute to arbitration, the position had been reached that the disagreement could not be "so resolved" in accordance with the procedure specified in clause 21.1. The respondents were at liberty by clause 21.1(f) to refer the dispute to arbitration or litigation.

[39] The applicants further contended that clause 21.1 was not complied with as the CLT did not "consider" the disagreement, and did not reach any decision. The applicants contended the word "consider" is to be given a meaning akin to that afforded to "consider" in the context of statutory obligations to consider certain matters in the making of executive administrative decisions.[1]

[40] The meaning of the requirement of the CLT to "consider" a notice must have regard to its context, including the structure of clause 21.1, and the content of the contractual agreement in which it appears. That context is very different to the enforcement of statutory obligations. Little assistance is to be gained in its interpretation by reference to authorities dealing with the obligations of statutory bodies or officeholders to "consider" matters.

[41] Clause 21.1 does not require the CLT to positively make a decision on a notice. As such, "consider" cannot mean reach a conclusion on the disagreement. In context, "consider" means give attention to, in an effort to resolve the disagreement.

[42] On the available material, the CLT did give attention to the respondents' notice. It was discussed at its meetings. The competing proposals were noted in its minutes. Having regard to the fact the CLT was made up of representatives of the applicants and the respondents, this process satisfied the requirement that the CLT consider the notice.

[43] The applicants have not established that the respondents failed to use their best endeavours, or that clause 21.1 of the agreement was otherwise not complied with in the circumstances.

Is the applicants' nomination of an arbitrator valid?

[44] Whilst the CCA provides for a party to refer a disagreement to arbitration or litigation, the CCA does not contain any procedure for the appointment of the arbitrator. Notwithstanding the lack of such a provision, the respondents purported to appoint an arbitrator pursuant to section 8(1)(b) of the Act.

[45] The respondents contend that as the CCA contained an agreement to arbitrate, each of the parties had power to take steps towards the appointment of an arbitrator, such that s 8 of that Act is enlivened. This conclusion is said to flow from a consideration of ss 6 and 7 of the Act, and the fact that the respondents, upon

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1 See, for example, *Tickner v Chapman* (1995) 57 FCR 451 at 462, 476-7 and 495-6.

referring the dispute to arbitration, called upon the applicants to nominate a list of potential arbitrators and subsequently to exercise the power to appoint any one of the three nominated persons, which the applicants did not do.

[46] The applicants contend that s 8 has no operation in circumstances where the arbitration agreement did not provide a power to appoint an arbitrator. Section 8 does not create a power of appointment. It only operates where an express power is given to a party to appoint an arbitrator. They submit that in the circumstances s 10 of the Act is enlivened, and the respondents ought properly to bring an application for the appointment of an arbitrator.

[47] Section 8 of the Act provides:

> "**8. Default in the exercise of power to appoint arbitrator**
>
> (1) Where a person who has a power to appoint an arbitrator defaults in the exercise of that power, a party to the relevant arbitration agreement may, by notice in writing-
>
> (a) require the person in default to exercise the power within such period (not being a period less than 7 days after service of the notice) as may be specified in the notice;
>
> and
>
> (b) propose that in default of that person so doing-
>
> (i) a person named in the notice ("a default nominee") should be appointed to the office in respect of which the power is exercisable;
>
> or
>
> (ii) specified arbitrators (being the arbitrators who have prior to the date of the notice been appointed in relation to the arbitration) should be the sole arbitrators in relation to the arbitration.
>
> (2) A notice under subsection (1) (or, where appropriate, a copy of the notice) must be served upon-
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> (a) each party to the arbitration agreement (except the party by whom the notice is given);
>
> and
>
> (b) each other person (not being a party to the arbitration agreement) who is in default in the exercise of a power of appointment in relation to the office in question, and the notice shall be deemed to have been served when service is last effected under this subsection.
>
> (3) Where a person who is in default in the exercise of a power of appointment fails to exercise the power as required by a notice under subsection (1), then-
>
> (a) where the notice named a default nominee-that nominee shall be deemed to have been duly appointed to the office in respect of which the power was exercisable;
>
> or
>
> (b) where the notice proposed that specified arbitrators should be the sole arbitrators in relation to the arbitration-
>
> (i) the power to which the notice relates shall lapse;
>
> (ii) the arbitrators specified in the notice may enter on the arbitration as if they were the sole arbitrators to be appointed in relation to the arbitration;
>
> and

> (iii) the arbitration agreement shall be construed subject to such modifications (if any) as are necessary to enable those arbitrators effectively to enter on and conduct the arbitration.
>
> (4) The Court may, on the application of a party to an arbitration agreement, set aside an appointment or any other consequence of noncompliance with a notice under this section that takes effect by operation of subsection (3), and may itself make an appointment to the office in respect of which the relevant power of appointment was exercisable.
>
> (5) For the purposes of this section, a person defaults in the exercise of a power of appointment if, after an occasion for the exercise of the power has arisen, that person does not exercise the power within the time fixed by the relevant arbitration agreement or, if no time is so fixed, within a reasonable time."

[48] The applicants contended at the hearing that s 8 was only applicable where the power to appoint an arbitrator was given to an officeholder. However, such an interpretation is not consistent with the terms of s 8. Whilst s 8 refers to "the office" these references, when read in context, relate to the office of arbitrator rather than a particular officeholder.

[49] The respondents contend that s 8 has application in this situation, having regard to ss 6 and 7 of the Act. However, those sections only provide presumptions as to the appointment of a single arbitrator, and to conduct the arbitration as if that arbitrator had been jointly appointed by the parties to the agreement. Those provisions provide no power to appoint an arbitrator.

[50] By its terms, s 8 only provides a procedure to appoint an arbitrator where a party who has power to appoint an arbitrator defaults in the exercise of the power. Where, as here, the arbitration agreement is silent in respect of that matter, s 8 has no application as no party has been given a specific power to appoint the arbitrator. In that event, s 10 of the Act provides a mechanism for the appointment by the Court, on application, of the arbitrator.

[51] Even if I be wrong in that interpretation, before there is power to appoint under s 8, a party must be in default in the exercise of the power. A party defaults in the exercise of that power if, after the exercise of the power has arisen, the person does not exercise the power within the time fixed by the relevant arbitration agreement or, if no time is so fixed, within a reasonable time.[2]

[52] The arbitration agreement provided no time period for the exercise of a power of appointment of an arbitrator. Whilst the respondents contend the applicants have had reasonable time to exercise the power, I am not satisfied the time allowed by the respondents was reasonable in all the circumstances. Not only were the parties in disagreement as to the validity of the reference to arbitration, no details were provided as to terms of the proposed appointment, including as to fees to be charged, the arbitrator's availability, and the suitability of the proposed appointee having regard to the technical nature of the dispute.

[53] In its written submissions in reply, the respondents contended the Court should, in that event, appoint Mr Callinan, pursuant to s 10 of the Act. Whilst the time has now come where an arbitrator needs to be appointed forthwith, procedural fairness requires the parties be heard further on whether the Court should make such an appointment, pursuant to s 10 of the Act.

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2 *Commercial Arbitration Act* 1990 (Qld), s 8(5).

Should the reference to arbitration be stayed?

[54] It is accepted by the parties that clause 21.1(f) constitutes an arbitration agreement. It is also accepted that the Court has power to stay an arbitration, both under its inherent jurisdiction and pursuant to s 47 of the Act.

[55] The applicants contend that a stay ought to be ordered as the background of disputation between the applicants and the respondents, including prior litigation,[3] render it highly likely that without a stay there would be the risk of a multiplicity of proceedings involving the repetition of evidence and substantial cost. Further, the allegations of negligent design and other work by the applicants is likely to lead to the joinder of third parties, having regard to the involvement of other entities in those works. There is also a clear indication from the respondents of an intention to pursue a misleading or deceptive conduct claim pursuant to the *Trade Practices Act*.[4] Such a claim could not properly be included in the arbitration.

[56] A risk of a multiplicity of proceedings is a relevant factor in the exercise of any discretion to stay arbitration proceedings.[5] Multiplicity of proceedings is always undesirable. It not only results in significant extra expense and inconvenience, it also gives rise to a real possibility of conflicting findings of facts and decisions on the same evidence or in respect of the same witnesses.[6]

[57] It is also undesirable for proceedings to occur in circumstances where not all parties relevant to the determination of all issues in dispute are able to be heard at the one time. This is a risk in arbitration proceedings as potential third party claims may not be able to be considered by the arbitrator having regard to the terms of the dispute referred to arbitration. This risk is compounded by the likelihood that any arbitration would be unable to consider claims in respect of proportionate liability pursuant to the *Civil Liability Act* 2003 (Qld).

[58] Each of these factors is relevant in the determination of whether it is appropriate to exercise a discretion to stay the present arbitration proceedings. However, a powerful counter-balancing consideration is that the applicants and the respondents entered into an agreement by which they not only agreed to act fairly and honestly with each other in an endeavour to resolve disputes between them but expressly agreed to a power to refer the dispute to arbitration or litigation at the election of a party. The fact that the election was either arbitration or litigation suggests the agreement was not intended to remove completely the possibility of any dispute from first being referred to litigation. However, the parties agreed to an election in relation to referring a dispute to arbitration or litigation.

[59] A Court should be slow to deny a party who, by a written agreement entered into between the parties, was given the right to refer a dispute to arbitration, from exercising that right. As Chesterman J (as His Honour then was) said in *Zeke Services Pty Ltd v Traffic Technologies Ltd*:[7]

> "[21] … 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

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3 *Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors* [2012] QSC 185.
4 1974 (Cth).
5 *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2001] QCA 471, [25].
6 Ibid, [22].
7 [2005] 2 Qd.R 563, [21].

> 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."

[60] Whilst the undesirability of a multiplicity of proceedings was found to have greater weight in *Mulgrave*, that finding occurred in the context of legal proceedings having already been commenced by one party, and the Court having no power to prevent that litigation from proceeding.[8] That is not the case in the present application.

[61] Whilst the respondents have foreshadowed commencement of proceedings in respect of misleading and deceptive conduct, no such proceedings have yet been instituted by the respondents. Further, the respondents have offered an undertaking that they will not pursue, in any *Trade Practices Act*[9] claim, any matter the subject of the dispute which has been referred to arbitration.

[62] Balancing all of the relevant circumstances, the factors identified by the applicants as justifying the granting of a stay of the arbitration proceedings are insufficient to deprive the respondents of their agreed right to refer a dispute to arbitration. Whilst litigation may allow the applicants to include potential third parties, and a consideration of any proportionate liability, arbitration will provide an efficient, cost effective method for resolving promptly the disagreement which has arisen between the parties. Such a consideration is a powerful factor, in the context of an agreement in which the parties agreed to act fairly and honestly, and in good faith, in an endeavour to resolve disputes between them.

[63] I decline, in the exercise of my discretion, to order a stay of the arbitration.

Conclusions

[64] The applicants have failed to establish that the respondents' referral to arbitration was invalid and ineffective. They have also failed to establish that I ought, in the exercise of my discretion, to stay the arbitration proceedings. The applicants have, however, established that the purported appointment of a specified arbitrator by the respondents was not effective.

[65] I shall hear the parties as to the form of orders, and as to costs.

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8 *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2001] QCA 471, [25].

9 1974 (Cth).