# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2011] QSC 306 |
| PARTIES: | **DISCOVERY BEACH PROJECT PTY LTD ACN 100 500 981** (applicant)<br><br>**v**<br><br>**NORTHBUILD CONSTRUCTION PTY LTD ACN 011 063 764** (respondent) |
| FILE NO: | 2540 of 2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 19 October 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 and 5 October 2011 |
| JUDGE: | Applegarth J |

ORDERS:

**1. It is declared that the claims pleaded by the respondent in the Amended Points of Claim dated 13 March 2007 in an arbitration before Mr Warren Fischer (the arbitrator) referred to as "the Final Claim Arbitration" at:**

**(a) paragraph 15.2(f)(viii): Item 8 – Notice of deduction of liquidated damages;**

**(b) paragraph 15.2(f)(x): Items 10 and 11 – Failure to prove extensions of time and prolongation claims; and**

**(c) paragraph 15.2(f)(xi): Item 12 – Legal costs associated with breaches of contract**

**have been determined by the arbitrator by the making of an award described as the Final Claim Interim Award and dated 14 August 2009.**

**2. Paragraphs 3 and 4 of the Amended Originating Application are adjourned to a date to be fixed.**

CATCHWORDS: ARBITRATION – THE AWARD – EFFECT AND PERFORMANCE – CONCLUSIVENESS OF AWARD – where applicant and respondent had referred various disputes to either arbitration or expert determination arbitrations of building dispute – where arbitrator in a "Final Claim Arbitration" provided for an interim award that would decide all disputes not already in other fora – where arbitrator directed that pleadings, lists of disputes in other fora, and lists of remaining claims be delivered for the purpose of hearing the interim award – where respondent included certain breach of contract claims in its pleadings and included these claims in a table of items to be decided by the interim award – where respondent did not adduce any evidence in support of breach of contract claims or address them in submissions – whether breach of contract claims were determined by the interim award

*Commercial Arbitration Act* 1990 (Qld), s 28

*ABB Service Pty Ltd v Pyrmont Light Rail Company Ltd* (2010) 77 NSWLR 321; [2010] NSWSC 831, followed
*Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2010] QCA 363, cited
*Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The "Golden Bear")* [1987] 1 Lloyd's Rep 330, cited
*Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, applied
*Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, cited
*Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2009] QCA 345, cited
*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, [1981] HCA 45, cited
*Re Resort Condominiums International Inc* [1995] 1 Qd R 406, cited
*SL Sethia Liners Ltd v Naviagro Maritime Corporation (The "Kostas Melas")* [1981] 1 Lloyd's Rep 18, discussed
*Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, cited
*W. J. Allan & Co Ltd v El Nasr Export and Import Co* [1971] 1 Lloyd's Rep 401, cited

COUNSEL: B T Porter for the applicant
D A Savage SC, with C A Wilkins for the respondent

SOLICITORS: Clayton Utz for the applicant
Crouch & Lyndon for the respondent

[1] This is another round in a long-running dispute between a builder and a developer. It relates to a contract for the redevelopment of the Surfair site at Marcoola. The

parties have taken longer to litigate their series of disputes than it took to complete the substantial redevelopment of Surfair. The costs of litigating their disputes, including the costs of lawyers, arbitrators and experts, must be enormous.

[2] The principal issue that I am asked to determine in the present proceeding is whether six claims by Northbuild for breach of contract have been determined by an arbitrator by the making of an award described as the "Final Claim Interim Award" which was dated 14 August 2009. The applicant (DBP) seeks a declaration to this effect and, in the alternative, a declaration that the respondent (Northbuild) is estopped from taking any further steps to pursue or assert those claims. Northbuild concedes that three of the six claims were abandoned by it and, in light of that concession, submits that there is no utility in making the declaration sought in respect of those three claims. As to the other three claims, Northbuild contends that they were not determined by the Final Claim Interim Award, and that it is not estopped from pursuing those claims.

[3] DBP relies on the fact that those three claims were pleaded and specified by Northbuild to be among the claims that it was intending to prosecute at the Interim Award hearing, that the arbitration proceeded to a hearing without any direction that the breach of contract claims not form part of it, and that Northbuild (for whatever reason) did not lead evidence in respect of the breach of contract claims during the arbitration hearings or make submissions in support of them. It submits that Northbuild did not at any time seek a direction that any of the breach of contract claims be determined other than by the award that was made in August 2009, and that no such direction was made to qualify a direction that had earlier been made by the arbitrator that all claims other than those in other fora ought to be heard and determined by him in an Interim Award.

[4] Northbuild submits that the arbitration hearing was conducted on the basis that the Interim Award would determine only certain specified claims that were opened by Northbuild at the hearing.

[5] The other issue that I am asked to determine is whether to grant the declaratory and injunctive relief sought by DBP in paragraphs 3 and 4(b) of its amended originating application. In paragraph 3, DBP seeks a declaration that "all claims by Northbuild within the scope of the reference in the Final Claim Arbitration ("the Reference") other than those claims listed in paragraphs 15.2(a) and (b) of the defence of DBP filed in the Final Claim Arbitration dated 6 July 2007 ("the Referred Claims") have been heard and determined". In paragraph 4(b) it seeks an injunction restraining Northbuild from taking any further steps to pursue or assert any other claim within the scope of the Reference other than the Referred Claims. Northbuild submits that the declaration and injunction sought should not be made.

## Background

[6] The background to the series of disputes that the parties have litigated has been told many times by different judges.[1] It does not need to be retold by me in detail in this

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[1] *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] 1 Qd R 244, [2009] QSC 76; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2009] QCA 235; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 238; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 97; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2009] QCA 345; *Northbuild Construction Pty Ltd v Discovery*

judgment. The essential background is that on 23 May 2003 DBP as principal and Northbuild as builder entered into a contract for the redevelopment of the Surfair resort at Marcoola. The parties executed other documents that related to the scope and nature of the work to be undertaken. The contract included a dispute resolution clause.

[7] By August 2004 the parties were in dispute about many matters. Agreement was reached to allow the work to proceed. Further disputes arose.

[8] By June 2006 the work was largely completed. By that time the parties had referred various disputes to either arbitration or expert determination.

**The final notice dispute**

[9] The contract provided, in summary:

(a) for a "final notice and final account" to be provided by Northbuild on reaching "Final Completion";

(b) for DBP to respond with a Final Certificate stating the amount due to or owing by Northbuild; and

(c) for the Final Certificate to be conclusive, subject to it being disputed by Northbuild and subject to any dispute the subject of an incomplete proceeding.

[10] On 8 June 2006, Northbuild issued a Final Notice. The Final Notice asserted that Final Completion had been reached, called for the release of certain security, and asserted an entitlement to a final payment of $10,386,404.48.

[11] The final account set out how the amount of $10,386,404.48 was calculated by reference to specified individual variation orders, variation requests, variation proposal requests, provisional sum amounts, "loss of profit" claims and breach of contract claims.

[12] The final account also provided further particulars of each claim comprised in the provisional sum, loss of profit and breach of contract in supplementary schedules. A single page document relating to breach of contract claims was headed "Final Payment Claim: Breach of Contract Claim", and these totalled $3,000,000.

[13] The breach of contract claims that are the subject of paragraph 1 of the present application appear in this document as items 8 to 14. They relate:

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*Beach Project Pty Ltd* [2011] QSC 174; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2008] Aust Contract Reports 90-284, [2007] QSC 206; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1)* [2005] 2 Qd R 174, [2005] QSC 45; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 2)* [2005] 2 Qd R 180, [2005] QSC 46; *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2005] QSC 322; *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2006] QSC 54; *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2006] QSC 67; *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2010] QCA 363

(a) in the case of item 8 (later pleaded in subparagraph 15.2(f)(viii) of Northbuild's amended points of claim ("APOC")), to legal costs of $50,000 that Northbuild incurred in an expert determination over whether DBP was entitled to deduct liquidated damages. On 17 May 2006, an expert determination found that Northbuild was not liable for liquidated damages as claimed by DBP. In item 8, Northbuild claimed that DBP unreasonably and in bad faith sought to levy liquidated damages, and that Northbuild was entitled by way of damages pursuant to clause 1.3.4 of the contract to the legal costs of $50,000 incurred by it;

(b) in the case of item 9 (subparagraph 15.2(f)(ix) of the APOC), to a claim about an alleged failure to approve certain variation orders;

(c) in the case of items 10 and 11 (which were grouped together and later pleaded in subparagraph 15.2(f)(x) of the APOC), to an alleged failure to approve extensions of time and prolongation claims. In summary, Northbuild subsequently pleaded in respect of items 10 and 11 that an expert determination by a Mr Lee had determined that Northbuild was entitled to extensions of time and to prolongation costs that it had claimed from DBP, and that had DBP properly and reasonably approved those claims in a timely fashion and in accordance with the contract, then Northbuild would not have pursued those matters by the contractual dispute resolution mechanism. Northbuild claimed that DBP breached clause 1.3.4 of the contract and claimed as damages its experts' costs and legal costs in the expert determination before Mr Lee, and other costs incurred by it incidental to the expert determination;

(d) in the case of item 12 (subparagraph 15.2(f)(xi) of the APOC), to a claim for legal costs incurred in seeking resolution of disputes between Northbuild and DBP which were alleged to have been "unnecessarily created by DBP in bad faith and in breach of clause 1.3.4 of the contract." The quantum of the cost to be claimed in respect of legal costs was not subsequently particularised, and Northbuild indicated in its amended points of claim that the quantum would be "particularised prior to trial and after the resolution of the Waves and PC21 and 22 disputes";

(e) in the case of item 13 (subparagraph 15.2(f)(xii) of the APOC), to a claim for "Lost work opportunities caused by breach of contact"; and

(f) in the case of item 14 (subparagraph 15.2(f)(xiii) of the APOC), to a claim for "Lost company goodwill during the DBP's breaches of contract".

[14] Northbuild subsequently abandoned items 9, 13 and 14, although at one stage before the start of this proceeding it indicated that item 9 was still in dispute. Northbuild says that this was a mistake, and an understandable one since there have been hundreds of items in dispute between the parties. In any event, Northbuild's position has been made clear in its contentions in these proceedings to the effect that it abandoned items 9, 13 and 14, and that these abandoned claims cannot be pursued.

[15] Northbuild, however, seeks to pursue items 8, 10, 11 and 12. These items have the common feature of being claims for damages for breach of contract, the damages reflecting the costs incurred by Northbuild in various expert determinations and

arbitrations which Northbuild contended arose because DBP acted in breach of a contractual obligation of good faith contained in clause 1.3.4 of the contract.

[16] The final account necessarily included all claims by Northbuild against DBP, both disputed and undisputed. It therefore included many claims which had already been referred to expert determination or to arbitration. DBP disputed the final notice and final account.

[17] On 29 June 2006, DBP delivered a Notice of Dispute by which it disputed that Final Completion had been reached, that Northbuild was entitled to the return of security as alleged and that Northbuild was entitled to the amount claimed, alleging for its part that Northbuild owed DBP some $8m, not including breach of contract claims.

[18] The dispute over the final notice and final account was referred to arbitration before Mr Fischer under the dispute resolution clause in the contract. It has been described as the "Final Claim Arbitration".

[19] On 19 October 2006, the arbitrator entered on the reference and directed the delivery of pleadings.

[20] Mr Fischer was also the arbitrator of other disputes, including an arbitration described as the Waves Arbitration. Other disputes have been referred to expert determination.

**The direction for an Interim Award in the Final Claim Arbitration**

[21] Clause 11 of the contract obliged Northbuild to make all of its claims in a "final notice and final account"; failing that, Northbuild's "future or subsisting claims" would be "barred absolutely". This included claims that at the time of the final notice were not then capable of determination—for example, because they were not then capable of quantification. After Northbuild's claims had been disputed by DBP and referred to arbitration, a direction was made by the arbitrator for delivery of points of claim. Northbuild's points of claim included numerous claims that had previously been referred to expert determination or arbitration. In fact, the vast majority of its claims had been referred for such determination. This created a problem about whether the claims already referred to other fora, including those referred to expert determination or previously to arbitration, ought to be determined in those fora or by Mr Fischer in the Final Claim Arbitration. That issue was the subject of correspondence between the parties and with Mr Fisher.

[22] The solution developed by Mr Fischer to address this problem was to provide for an Interim Award in the Final Claim Arbitration which would determine in substance all of the claims which were not in other fora.

[23] This solution was the subject of directions in the Final Claim Arbitration on 29 March 2007. The next day the directions were put in writing which stated, among other things:

> "**In respect of Final Completion arbitration:**
>
> **Those disputes not presently in other fora are to be expedited in the Final Completion arbitration such that an interim award might be issued simultaneously with the award in the Wave 1**

> **and Wave 2 arbitration and the award in the PC 21 and PC 22 arbitration. The following directions apply to the disputes to be dealt with in that interim award only.**
>
> The Claimant is to provide the Respondent, with a copy to the Arbitrator, a 'List of Disputes in other Fora' by Monday, 2 April 2007.
>
> The Respondent is to raise any issue regarding the 'List of Disputes in other Fora' by Wednesday, 4 April 2007.
>
> The Respondent is to provide the Claimant, with a copy to the Arbitrator, its request for further and better particulars by Thursday, 5 April 2007.
>
> The Claimant is to provide the Respondent, with a copy to the Arbitrator, its further and better particulars by Monday, 23 April 2007.
>
> The Respondent is to provide the Claimant and the Arbitrator with its Points of Defence and Counterclaim for the Final Completion (interim award) arbitration by Friday, 1 June 1006 [sic].
>
> The Claimant is to provide the Respondent and the Arbitrator with its Points of Reply and Answer to the Counterclaim for the Final Completion (interim award) arbitration by Friday, 15 June 1006 [sic]." (emphasis added)

I shall refer to this direction as the "Interim Award Direction".

[24] At this time, Mr Fischer was also progressing towards hearing two other arbitrations, the "Waves Arbitration" and the "Progress Certificates 21 & 22 Arbitration". The three arbitrations were originally scheduled to be heard together, starting in September 2007. However, that hearing was adjourned and actually commenced on 11 March 2008. There were three tranches of hearings, namely in March, May and October 2008, with oral submissions following in January 2009.

[25] In the period between 30 March 2007 (when the Interim Award Direction was made) and the commencement of the hearing on 11 March 2008, both of the parties and the arbitrator restated and affirmed the Interim Award Direction, both in the pleadings delivered in accordance with the Interim Award Direction and in correspondence from time to time.

[26] Northbuild pleaded a number of claims for breach of contract in subparagraph 15.2(f) of its Amended Points of Claim. Northbuild indicated in its pleadings that it did not intend to pursue the claims identified as items 9, 13 and 14. In the period leading up to the commencement of the arbitration the parties corresponded with a view to determining, for the purpose of the Interim Award hearing, the disputes that were in other fora ("the Referred Claims"). These matters were also addressed in the parties' pleadings. In the end, the parties were essentially in agreement about the Referred Claims. Importantly, there was no suggestion that any of the breach of contract claims had been referred to another forum for determination.

[27] The parties approached the hearing of the Interim Award arbitration on the basis that it was to include Northbuild's breach of contract claims, save for the abandoned contract claims which Northbuild accepted could not be raised by it in another forum. As to the remaining contract claims of Northbuild, Northbuild's solicitors made clear to DBP and the arbitrator that it would be proceeding with its case as pleaded, and pointed to an earlier submission to the arbitrator of 2 October 2007 which was said by it to set out clearly the items "we intend to prosecute in the March 2008 arbitration".

**The hearing of the Interim Award**

[28] The hearing of the Interim Award commenced on 11 March 2008, along with the hearing of the Waves Arbitration. Another arbitration, described as the Progress Certificate 21 and 22 Arbitration, which had been due to commence at the same time, settled. On the first morning of the hearing, the arbitrator re-stated the effect of the Interim Award Direction as follows:

> "…back in March last year when we determined to take this course, the whole intention had been that there would be a single sitting, we would deal with all the other issues that weren't in other fora, so that when all those other matters were resolved I could ostensibly do a final award based on the documents and there wouldn't be any further requirement for hearing of witnesses.
> …
>
> At the time that those directions were given in March last year, the intention was to have a hearing that would deal with all of the outstanding matters before me in the final claim that I could deal with and [T]he [W]aves. The intention then, subsequently, would be that there would be a further award that would roll in all the orders from the experts, et cetera. Whilst potentially there may have needed to be a hearing, it was anticipated it wouldn't be necessary because it was really just putting in all the other awards to determine a final number."

[29] The arbitrator clarified which variation claims were to proceed before him. There was no suggestion that Northbuild did not intend to proceed, as it had previously indicated, with the pleaded claims it had identified, including the active contract claims. Instead, counsel who appeared for Northbuild at the time sought an adjournment of the Final Claim Arbitration on the basis that:

(a) Northbuild had only recently received DBP's statements;

(b) the Waves Arbitration—which was also being heard—was unlikely to finish in the allotted time; and

(c) the Final Claim Arbitration was, in any event, incapable of being determined because it was dependent on the resolution of claims in other fora, which was yet to occur.

[30] The application for an adjournment was not granted. The parties agreed that DBP's counterclaim could not conveniently be heard and determined in the time allocated

for the hearing of the Interim Award. The parties proposed, and the arbitrator agreed, that it would be adjourned. This was the only stated exception to or qualification of the Interim Award Direction.

[31] Later that afternoon, counsel for Northbuild opened Northbuild's case. He specifically referred to two of Northbuild's breach of contract claims (items 5 and 15). The next day the arbitrator asked counsel for Northbuild to provide him with a list of Northbuild's claims. However, such a list was not provided. The arbitration proceeded over many days. Northbuild did not lead any evidence specifically in support of its breach of contract claims in respect of items 8, 10, 11 and 12. It closed its case on 11 June 2008.

[32] On 23 October 2008 the arbitrator again invited counsel for Northbuild to confirm "the relevant paragraphs of the final claim statement for the purposes of the interim award." Counsel for Northbuild did not provide a list. Instead, counsel for DBP prepared a list, which corresponded with the claims counsel for Northbuild had identified when he opened Northbuild's case. At the time counsel for Northbuild said that he had not reviewed the list, but thought it looked right. The list relevantly:

(a) listed all the matters upon which Northbuild led evidence at the hearing; and

(b) did not include the breach of contract claims in respect of items 8, 10, 11 and 12.

[33] The parties made submissions to the arbitrator in relation to the matters on the list and other matters.

**The Interim Award**

[34] The arbitrator made an award described as the Final Claim Interim Award. It is dated 14 August 2009. The arbitration made declarations about the matters that were in the list that had been provided to him and certain additional matters which the parties agreed should be determined in that award, such as the dates for Practical Completion and Final Completion. The Interim Award reasons did not specifically restate the terms of the Interim Award Direction. However, the subject of the Interim Award was indicated in the reasons:

> "This arbitration concerns claims in respect of numerous variation requests ('VR's') related to alleged variations in the work that have not otherwise been resolved or referred to other fora for determination. Those disputes therefore arise for determination as part of the Final Certificate; along with the determination of the last Date of Practical Completion of a number of separable portions created under the Contract, the return of bank guarantees, claims for loss of profit, breach of Contract, interest and damages."

[35] In his Interim Award, the arbitrator determined issues in relation to Practical Completion and Final Completion and a claim for the return of certain bank guarantees. He then proceeded to deal with the claims on the list that had been provided to him at the hearing, along with an additional claim by Northbuild for damages, as pleaded in subparagraph 15.2(f)(v) of Northbuild's Amended Points of

Claim, also known as item 5. As to that additional claim, the arbitrator noted at paragraph 127 of the reasons for his Interim Award:

> "This issue was not one originally due to be considered in the present proceedings. It was not one included in the list handed up by Northbuild, that list was limited to Final Claim pleadings 15.2(d)(xii), 15.2(d)(xxi), 15.2(d)(xxxiii), 15.2(d)(xxxv), 15.2(d)(xl), 15.2(d)(xli), 15.2(e)(iv) and 15.2(f)(xiv). Notwithstanding that, I consider that I am able and indeed expected to deal with it on the basis of the written submissions made by the parties; therefore I intend to do so."

He also addressed and made a declaration in respect of item 15, which was the breach of contract claim pleaded in subparagraph 15.2(f)(xiv) of the APOC.

[36] The arbitrator did not make declarations dismissing the remaining breach of contract claims, being:

(a) the three claims that had been formally abandoned by Northbuild, namely items 9, 13 and item 8, being the claim pleaded in subparagraph 15.2(f)(viii);

(b) Items 10 and 11, being the claim pleaded in subparagraphs 15.2(f)(x); and

(c) Item 12, being the claim pleaded in subparagraph 15.2(f)(xi).

**Subsequent events**

[37] The arbitrator sought submissions as to the form of any further award. Extensive correspondence followed about the matters that remained for determination, including quantum issues. DBP's position was as follows:

> "The waves arbitration and the interim final claim arbitration have resolved a number of issues between the parties…. leaving the balance of the issues referred to in Northbuild's final payment claim in expert determination.
> …
>
> The purpose of this final claim arbitration interim award was to resolve all monetary claims by Northbuild in the arbitrator's jurisdiction, leaving only the alleged EOTs and DBP's counterclaim (which have been held in abeyance by consent) to be determined."

Northbuild did not contest this proposition at the time. However, subsequently, a dispute has arisen between the parties as to the scope of the Interim Award. Northbuild has contended that:

(a) the Interim Award did not resolve all of the Interim Award Claims;

(b) the Interim Award only resolved such of the Interim Award Claims as were dealt with in the Interim Award; and

(c) it is open to Northbuild to pursue any claim raised in the final claim and final account which was not expressly dealt with in the Interim Award.

[38] Northbuild contends that it remains open to it to pursue the contract claims, which I have earlier described as items 8, 10, 11 and 12 of the contract claims document, and which were pleaded in subparagraphs 15.2(f)(viii), (x) and (xi) of its Amended Points of Claim in the Interim Award Arbitration.

**The issues**

[39] The first and most substantial issue in the present application is whether these breach of contract claims were determined by the Interim Award or, alternatively, whether Northbuild is estopped from taking any further steps to pursue or assert them.

[40] The second issue is whether I should make a declaration in respect of the breach of contract claims that Northbuild concedes it has abandoned (items 9, 13 and 14).

[41] The third issue is whether I should grant the declaratory and injunctive relief sought by DBP in paragraphs 3 and 4(b) of the amended originating application. DBP says that it seeks this relief so as to ensure that Northbuild does not now seek to plead *new claims*, not previously pleaded, in the Final Claim Arbitration. It submits that the relief sought by it does not prevent the pursuit or the determination of any of the Referred Claims that remain to be determined. However, leaving aside those Referred Claims, DBP contends that the remaining pleaded claims have either merged in the Interim Award or been abandoned. DBP seeks this relief in order to prevent Northbuild from pursuing any further claim in the Final Claim Arbitration except the claims that it identifies as the Referred Claims.

**The first issue**

[42] The first issue turns on whether the Interim Award Direction governed the Interim Award, or whether it was qualified or amended in respect of the breach of contract claims by what was said or done on the first day of the hearing. In other words, the issue is whether what was said or done on the first day of the hearing effectively varied the Interim Arbitration Direction so that the breach of contract claims would not be determined by the Interim Award.

[43] That issue must be considered against the background of events leading up to the first day of the hearing, and regard must also be had to the subsequent conduct of the Interim Award Hearing.

[44] The Interim Award Direction, and the statements of the parties and the arbitrator leading up to the first day of the hearing, made it clear that Northbuild's claims for breach of contract (save for those Northbuild indicated it had abandoned) would be the subject of the Interim Award. The relevant evidence on this aspect is set out in Annexure A to DBP's submissions and I need not canvass it. The essential point is that the pleadings and correspondence confirmed that Northbuild's breach of contract claims were not in other fora and that the parties had "proceeded on the basis that the final claim (interim award) comprise[d]" the table of matters set out in Northbuild's solicitors' letter of 2 October 2007. The table included categories of matters in dispute, including Northbuild's breach of contract claims.

[45] In short, the Interim Award Direction was confirmed leading up to the first day of the hearing and, in the circumstances, something weighty would need to have been said on the first day of the hearing to displace a direction that included Northbuild's breach of contract claims in the matters to be determined by the Interim Award.

[46] It is not to the point that Northbuild on the first day of the hearing *might* have developed the argument that if DBP's counterclaim was to be heard at a later arbitration, then Northbuild's breach of contract claims (or some of them) also should be exempted from the Interim Award. The fact is that DBP did not advance any such suggestion, and no direction incorporating such an outcome was made.

[47] Given the background to the first day of the hearing, and the arbitrator's confirmation as recorded on the first page of the transcript for that day that he anticipated that the submissions of 2 October 2007 from Northbuild's solicitors framed the matters that were to be heard, it did not fall to DBP to clarify that day, or subsequently, that Northbuild's breach of contract claims were to be determined by the Interim Award.

[48] The transcript of the hearing on 11 March 2008 (Day 1 of the hearing of the Interim Award and the Waves Arbitration) has been the subject of written and oral submissions, and I do not propose to quote lengthy passages of it. As noted, at the outset the arbitrator referred to the fact that he anticipated that the content of the final claim was framed according to the submissions made by Northbuild's solicitors' letter of 2 October 2007. Northbuild's counsel made an application that the Final Claim Arbitration be adjourned, but that the Waves Arbitration proceed. One of the reasons for seeking an adjournment was the late delivery of DBP's statements. The second reason was that if both the Waves Arbitration and the Final Claim Arbitration proceeded, then they were unlikely to finish in the allocated time so that both would be part heard. His third reason was:

> "…we can't solve the final claim arbitration anyhow because there are a number of things which are elsewhere—significant claims, prolongation claims, worth millions of dollars, ostensibly, and there are other claims which will need to be resolved somehow."

[49] This third point alluded to the fact that expert determinations in other fora had yet to be concluded and that the finalisation of the Final Claim Arbitration had to await the Waves Arbitration, the Interim Award and the various determinations in other fora. This point was well-made, but it is important to observe that Northbuild was seeking to adjourn the hearing of the Interim Award as a whole, not merely parts of it such as Northbuild's breach of contract claims, DBP's counterclaim or aspects that were affected by the late delivery of DBP's statements.

[50] The application for the adjournment was argued for some time. Northbuild points to a reference made by its counsel at the time that "it doesn't seem to be challenged by what my learned friend says that at the end of the day we can't solve the final claim anyhow, not at the moment." To which counsel for DBP responded:

> "The reason I didn't challenge that last point is because there is nothing to challenge. What you set down for resolution under the hearing of the final claim is certain factual disputes. That is what we are talking about. You know that, we know that. Yes, there are other

> outstanding issues, but that doesn't affect you hearing it, because you have a discrete set of factual disputes which you must hear and that is what the purpose was."

In the course of hearing submissions in relation to the application for the adjournment, the arbitrator sought clarification of which variation orders were the subject of determination in other fora. That point was clarified after a short adjournment and counsel for Northbuild was able to assure the arbitrator that each of the matters identified on a certain list was elsewhere, so there was "no hole to fall into". During the course of the proceedings on this first morning, the arbitrator re-stated the effect of the Interim Award Direction that I have quoted at [28]. This confirmed that the intention was to have a hearing that would deal with all of the outstanding matters before him in the final claim that he could deal with, and also the Waves Arbitration. The intention was that there would then be a further award that would "roll in all the orders from the experts, et cetera" and that whilst potentially there may have needed to be a hearing, it was anticipated that this would not be necessary because it was "really just putting in all the other awards to determine a final number."

[51] The position was reached prior to lunch on the first day of the hearing that if the matter proceeded without an adjournment of the Interim Award, then there was a risk of not concluding both the Waves Arbitration and the Interim Award Arbitration in the allocated hearing dates. Before the luncheon adjournment counsel for DBP sought an indication that the arbitration was going to proceed with both the Waves Arbitration and the final claim. He did so on the basis of what he understood to be common ground and the further understanding that, if this occurred, there would not be "any items which [the arbitrator] would have to come back and hear". In response, counsel for Northbuild submitted:

> "I'm not sure you won't have to come back and hear anything. I have conceded those things fall between the cracks. There are, for instance, raised in our final claims pleading claims for interest, cost of proceedings, matters such as that. It certainly wouldn't be as extensive, I concede that; I concede that if we proceed now with the final claim, a subsequent hearing wouldn't be anywhere near as extensive as might be the case now, but I'm not conceding that you wouldn't have to come back and hear the parties on those points—in effect, a wash-up sort of argument—because there are aspects of the pleadings which raise that."

[52] Although counsel could not provide any guarantee in this regard, the matter proceeded on the basis that if the hearing proceeded as anticipated, then upon the determination of the Waves Arbitration and the Interim Award the further hearing of the Final Claim Arbitration would not involve the hearing of contentious evidence but would involve what the arbitrator described as putting in all of the awards and expert determinations to determine "a final number" or what counsel for Northbuild described as in effect "a wash-up", including having regard to "claims for interest, cost of proceedings, matters such as that" which might not require a hearing. In its context, the reference to the "cost of proceedings" might be taken to be a reference to the cost of the arbitration or it might have been understood to refer to the quantification of the cost of the proceedings which formed Northbuild's claim for damages in respect of items 8, 10, 11 and 12, the quantum of which had yet to

be determined. The reference to the "cost of proceedings", in its context, was not apt to suggest that Northbuild was proposing, contrary to the Interim Award Direction and the way the matter had proceeded, to exempt its claimed entitlement to damages for breach of contract in respect of items 8, 10, 11 and 12 from the Interim Award.

[53] After the luncheon adjournment on the first day of the hearing, counsel for DBP referred to the concerns earlier expressed by counsel for Northbuild about whether both matters could be heard in their entirety in the three week period that had been allocated, and recorded that counsel for Northbuild had said: "if there are no issues about the counterclaim they have no problem running their aspects of the final claim". Counsel for DBP indicated that "what seemed to be causing this ruckus was how long it would take also to litigate the counterclaim". He suggested the course that "what we hear in this period is [W]aves and Northbuild's claims under the final claim arbitration and that any counterclaim under that final claim be put off to another date." That was said to seem to meet the complaints from counsel for Northbuild about not being able to meet the counterclaim and would, in an effective way, utilise the time available and the witnesses who were going to be called in the Waves Arbitration in any event. Counsel for DBP submitted that that seemed to be the most efficient way of dealing with the matter, and counsel for Northbuild stated his agreement with that proposed course. The arbitrator stated that if both counsel were happy to proceed on that basis, then the matter would proceed on that basis. This decision effectively resolved the application for the adjournment. Importantly for present purposes, the Interim Award Direction was varied only to the extent of DBP's counterclaim being put off to a later date. No mention was made of any part of Northbuild's breach of contract claims being also "put off" or adjourned to a later arbitration.

[54] Counsel for Northbuild then proceeded to open Northbuild's case in respect of the Waves Arbitration, and then opened Northbuild's case in relation to the final claim. As to the latter, he addressed certain specific matters and briefly referred to some aspects of Northbuild's claims for breach of contract. His opening in respect of the Variation Requests Disputes, the loss of profit claim and the breach of contract claim seemed to follow the sequence of the items in the table that Northbuild's solicitors had prepared in early October 2007 and which the arbitrator at the start of the day anticipated would identify the matters to be heard. In opening Northbuild's case in relation to the final claim, specific reference was made to the loss of profit claims and to a breach of contract claim, failure to release security upon completion (Item 5) and to the breach of contract claim for the cost of a spa pool being removed (Item 15). Counsel did not refer specifically to the breach of contract claims in items 8, 10, 11 and 12. One inference from the omission to refer specifically to them is that he was not proposing to call evidence in respect of them. Another inference is that Northbuild was not intending to prosecute those claims. In any event, counsel for Northbuild did not say indirectly, let alone directly, that those breach of contract claims, or any others, were not being opened or prosecuted as part of the Interim Award because he understood that they were to be put off to a further arbitration, along with DBP's counterclaim. Counsel for Northbuild did not suggest that they should be, nor did he seek a direction to that effect.

[55] Viewed from the standpoint of an objective bystander at the hearing on day one, and who was familiar with the documents to which reference was made, including the pleadings and Northbuild's solicitors' letter of 2 October 2007 which tabulated the

matters that were to constitute the disputes that were to be dealt with by the Interim Award, nothing was said or done so as to vary the Interim Award Direction such that Northbuild's breach of contract claims, including items 8, 10, 11 and 12, would not be determined by the Interim Award. A possible exception relates to item 5, to which I will later refer. Having regard to the transcript of the first day of the hearing, and the matters that preceded it, I conclude that the Interim Award Direction continued to govern the Interim Award, save for the determination of DBP's counterclaim, which was excluded from its scope as a result of the exchange that occurred shortly after the luncheon adjournment. The Interim Award Direction was not qualified or amended, in respect of the breach of contract claims, by what was said or done on the first day of the hearing.

[56] On the second day of the hearing, the arbitrator raised a programming issue about the hearing of the counterclaim, and asked whether there was a list of the paragraphs in the final claim points of claim that were relevant to the present proceedings. Counsel for Northbuild said that it could do one over the luncheon break but, as matters transpired, this did not occur. The arbitrator asked counsel for Northbuild whether there was anything further in regard to the final claim that he wished to provide in opening, as far as what he was going to prove and how he was going to prove it, to which counsel for Northbuild replied: "What we are going to prove is what it is in the statements". The matter then proceeded. On day three, counsel for Northbuild made some general observations about the conduct of the final claim proceeding with matters "up to paragraph 15 and then the VRs that I enumerated the other day", and noted that the arbitrator probably could not make final determinations about those until the counterclaim had been dealt with. The point being made is not clear.

[57] Shortly before closing Northbuild's case on day 27, which was 11 June 2008, counsel for Northbuild tendered certain determinations made by Mr Lee. These were potentially relevant to Northbuild's breach of contract claim in respect of items 10 and 11. After Northbuild closed its case, counsel for DBP mentioned that six lever arch folders had been received in response to a subpoena to Northbuild's former solicitors, and counsel for DBP questioned the relevance of those documents to the proceedings. The arbitrator said that he anticipated that they "may have something to do with the ultimate costs award" and counsel for Northbuild confirmed this. Counsel for DBP mentioned that he thought that this was "a bit premature".

[58] The arbitrator then mentioned the fact that he had been in email contact with counsel and solicitors and had requested that counsel for Northbuild provide a list. Counsel for Northbuild apologised for having forgotten the request and stated that he had discussed the matter with counsel for DBP and expected that they could probably reach some agreement and provide a list. The arbitrator mentioned that he only required it by the end of the hearing. The next day, 28 October 2008, counsel for DBP provided the arbitrator with a list of the issues in the Final Claim Arbitration to be decided by the Interim Award. The list corresponded with the claims that counsel for Northbuild had identified when he opened Northbuild's case. In respect of Northbuild's claims for breach of contract, it identified only the item pleaded in paragraph 15.2(f)(xiv) of the amended points of claim, being item 15. The fact that the list did not include the breach of contract claims for items 8, 10, 11 and 12 does not justify the conclusion that the parties had agreed, let alone that the arbitrator had directed, that the Interim Award Direction did not apply to those

items. Unremarkably, counsel for DBP, in preparing the list, identified those claims which he understood Northbuild to be prosecuting and which would be the subject of submissions by the parties and a decision on their merits by the arbitrator.

[59] It is possible that some of the evidence tendered by Northbuild in its case was relevant to its breach of contract claims for items 8, 10, 11 and 12, and I have mentioned Mr Lee's determinations as an example. However, by its conduct of the proceeding, it appears that Northbuild decided not to call evidence that specifically related to items 8, 10, 11 and 12, or to cross-examine DBP's witnesses with a view to establishing its breach of contract claims in this regard by seeking to prove that DBP had breached its obligation of good faith, as alleged in those claims. Apart from deciding not to adduce evidence to support those claims, as matters transpired Northbuild decided not to make submissions about the claims.

[60] In this proceeding I was invited by DBP to conclude that Northbuild decided not to prosecute the claims because it had a weak case. I am not concerned with Northbuild's subjective reasons for not calling evidence to support these breach of contract claims or for not cross-examining DBP's witnesses to support its case of an absence of good faith on DBP's part. I decline to speculate about Northbuild's reasons in this regard. Instead, I am concerned with what was said and done during the arbitration hearing, and also what was *not* said or done, particularly on the first day of the hearing, in relation to the breach of contract claims that are referred to in DBP's application for declaratory relief. For whatever reason, Northbuild did not raise the issue of whether, contrary to earlier directions and the understanding of the parties as communicated in correspondence, these breach of contract claims should not proceed to be heard as part of the Interim Award. That correspondence prior to the hearing noted in respect of the relevant claims for breach of contract that the amount of each claim was to be calculated. However, Northbuild's solicitors and counsel did not suggest that any outstanding issue of quantification precluded those claims from being determined as part of the Interim Award, as Northbuild's solicitors' letter of 2 October 2007 anticipated that they would be. The matter appears to have proceeded on the basis that issues of quantification might be stood over to the final stage of the Final Claim Arbitration as part of what counsel for Northbuild described as "a wash-up" that might not require the parties to come back to a hearing before the arbitrator on those points.

[61] I find that nothing that was said or done on day one of the hearing amounted to a direction that varied or qualified the Interim Award Direction with respect to Northbuild's breach of contract claims. I also find that nothing said or done during the subsequent days of the hearing amounted to such a direction, or would have been reasonably understood to amount to such a direction. The conduct of counsel for DBP in preparing a list that was provided to the arbitrator on 28 October 2008 reflected his understanding of the claims in the Final Claim Arbitration that Northbuild was intending to prosecute. It is unsurprising that he did not include claims that Northbuild did not open, did not call evidence in respect of and, apparently, had decided not to make submissions about, notwithstanding the contents of the Interim Award Direction and its reaffirmation.

[62] The arbitrator reaffirmed the Interim Award Direction on the first day of the hearing and reiterated it in a letter that he wrote to the parties on 16 October 2008. That letter was written in response to a letter dated 16 October 2008, from DBP's newly appointed solicitors, which sought confirmation that the counterclaim in the final

claim proceeding would not be dealt with as part of the forthcoming hearing. The arbitrator emphatically confirmed this in a letter to the parties dated 16 October 2008. The arbitrator's letter of 16 October 2008 confirmed that the Final Claim Arbitration Interim Award would deal with all "those disputes not presently in other fora", and that this had been confirmed at the outset of the hearing on 11 March 2008. The arbitrator noted that, following discussion at the outset of the hearing and agreement between the parties, the hearing proceeded on the basis "that any counterclaim under that final claim be put off to another date". The letter made clear that the only exception made to the Interim Award Direction first made on 29 March 2007 related to the counterclaim.

[63] Northbuild contends that the three contract claims presently in issue, namely items 8, 10 and 11, and 12, were "not ripe for determination" in 2008-2009. That proposition is contestable, and was contested by DBP in its submissions in reply. However, I do not need to reach a conclusion about it. This is because these arguments relate to points that Northbuild *might* have developed on the first day of the hearing, namely that these claims were not "ripe" for decision, not only as to the determination of the quantification of the costs claimed as damages, but as to Northbuild's asserted entitlement to claim damages for breach of cl 1.3.4 of the contract in the respects alleged by it in its pleading. Northbuild might have submitted that if the counterclaim was to be put off, then these breach of contract claims should also be put off and not form part of the Interim Award. But it did not make these points either orally or in writing to the arbitrator. It did not argue that the breach of contract claims were not "ripe" for determination and that, contrary to what had been said in its solicitors' letter of 2 October 2007 to the effect that these and other claims listed in the table would be the subject of the Interim Award, they should be stood over.

[64] In the circumstances that I have outlined, it was not for DBP to clarify or confirm that the breach of contract claim was still to be the subject of the Interim Award. The arbitrator and Northbuild had made it clear that the breach of contract claims, with the possible exception of item 5,[2] would be part of the Interim Arbitration, and Northbuild did not suggest that they were not "ripe". Accordingly, the Interim Award Direction governed the determination of Northbuild's entitlement to claim damages for breach of contract in respect of items 8, 10, 11 and 12 as matters to be part of the Interim Award. In the event that Northbuild prosecuted those claims and succeeded in establishing its entitlement to claim damages in respect of them, then it is possible that the quantification of those claims might fall into the quantification of monies owing in the process that was contemplated as the final phase of the Final Claim Arbitration.

[65] If the breach of contract claims were not "ripe", as Northbuild contends, they remained subject to the Interim Award Direction. Northbuild did not seek or obtain a further direction to exclude them from the Interim Award on the grounds that they were not ripe or on any other ground.

[66] I conclude in respect of the first issue that the Interim Award Direction continued to govern the Interim Award, save for the exception in respect of the counterclaim. It was not qualified or amended in respect of the breach of contract claims that are the

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[2] A topic addressed in paragraph 9 of Northbuild's solicitors' letter of 2 October 2007.

subject of the present application. The hearing of the Interim Award was conducted on the basis that those breach of contract claims were subject to the Interim Award.

**The principles invoked by DBP**

[67] DBP contends that claims that were directed to be pursued in the Interim Award hearing and were not pursued either merged into the Interim Award or were abandoned. The merger or abandonment of claims not pursued followed on the making of the Interim Award.

[68] The *Commercial Arbitration Act* 1990 (Qld) ("the Act") provides that an award includes a final or an interim award. Subject to agreement to the contrary, and subject to the review provisions of the Act, an award is final and binding on the parties.[3] An arbitral award finally resolves the dispute referred to the arbitrator by the parties. This applies both to an interim award and a final award. Subject to review powers under the Act, once a valid award is given, the arbitrator is *functus officio* and cannot deal further with the matters that have been decided.[4] In the case of an interim award, the arbitrator becomes *functus officio* in respect of that part of the reference which was the subject of the interim award.[5] I respectfully adopt the statement of principle of Ward J in *ABB Service Pty Ltd v Pyrmont Light Rail Company Ltd*,[6] in which her Honour reviewed the leading authorities. Subject to the slip rule exception, an arbitrator's power comes to an end when a valid award is made. The arbitrator is then said to be *functus officio*. No power exists to alter the award that has been made. In the case of an interim award, the arbitrator is only *functus officio* in respect of the issues dealt with in that interim award and retains the authority to deal with the remaining matters.

[69] Doctrines of issue estoppel and *res judicata* apply to arbitral awards, including interim awards.[7] The doctrines apply to interim awards with respect to the claims that are subject to the interim award.[8] Doctrines of *res judicata* in their application to interim awards mean that upon the making of the interim award, the pleaded claims within the scope of the interim award merge in it. A pleaded claim or cause of action that is not pursued at the hearing at which it is to be determined will be *res judicata* on the delivery of the judgment. The plea of *res judicata* applies, except in special circumstances, to the points upon which a court is actually required by the parties to make findings and pronounce judgment, and to every point which "properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."[9] A claim which is pleaded and not prosecuted at the hearing that was set for its determination is, save in special circumstances, subject to a plea of *res judicata* in the same way as claims that are prosecuted and decided on their merits.

[70] These principles apply in the context of arbitrations:

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3 The Act, s 28.

4 *ABB Service Pty Ltd v Pyrmont Light Rail Company Ltd* (2010) 77 NSWLR 321 at 336-337, [2010] NSWSC 831 at [62]-[70].

5 Ibid at 337, [70] citing *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 644.

6 (2010) 77 NSWLR 321 at 336-337, [2010] NSWSC 831 at [62]-[70].

7 *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2010] QCA 363 at [39].

8 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 644.

9 *Henderson v Henderson* (1843) 3 Hare 100 at 115, 67 ER 313 at 318-319, followed in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 598-599, [1981] HCA 45 at [22]-[25] per Gibbs CJ, Mason and Aikin JJ.

> "The arbitrator's jurisdiction is limited to issues falling within the scope of the arbitration agreement, and may be further limited by the terms of his appointment for the particular reference with which he is concerned. The doctrine of res judicata, in either its broad or its narrow sense, has no application to issues falling outside the terms of the arbitration agreement... On the other hand, a claim which does fall within the scope of the reference is deemed to be abandoned if it is not repeated in the claimant's pleading, and although the arbitrator has a discretion to allow it to be revived by amendment during the reference, the abandonment becomes irrevocable once the arbitrator has made his award."[10]

[71] The application of these principles depends upon the scope of the award, and in this case the scope of the Interim Award. DBP submits that the scope of the Interim Award is to be determined by reference to the Interim Award Direction of the arbitrator. This direction was stated and restated, and qualified only in respect of DBP's counterclaim. The direction was that the Interim Award was to determine all of the disputed claims raised by the final notice and final account, apart from those that were referred for determination in other fora. For the reasons given by me, I find that the scope of the Interim Award was determined by the arbitrator's directions, namely the Interim Award Direction first made on 29 March 2007 and subsequently confirmed by him, subject only to the variation on day one of the hearing by the exclusion of DBP's counterclaim. Directions made by the arbitrator and the correspondence of the parties prior to and during the course of the Interim Award hearing, along with their pleadings, lead to the conclusion that Northbuild's breach of contract claims in respect of items 8, 10, 11 and 12 were within the scope of the Interim Award.

## The award

[72] Given the issues that were argued in the course of the Interim Award hearing, and the matters that either were formally abandoned or not prosecuted by Northbuild during the hearing in respect of its pleaded claims for breach of contract, it is unsurprising that the arbitrator's reasons in making the Interim Award addressed matters that were contested. In addition to the matters that appeared on the list compiled by counsel, these matters included issues concerning the date of Practical Completion and the date of Final Completion, which were in dispute.

[73] After providing an overview of the contract between the parties, and the fact that the Interim Award was one of a number of arbitrations in respect of it, the arbitrator's reasons provided a background to the arbitration at hand. He identified the findings and declarations that the parties had sought at the end of the hearing. He then proceeded to deal with the terms of the contract before sequentially dealing with the issues that had been contested at the hearing, starting with issues of practical completion and final completion. He dealt with issues of breach of contract, including an item that was not originally due to be considered relating to the failure to release security (item 5). I have earlier quoted paragraph 127 of his reasons in this regard. It is appropriate to add that paragraph 19 of Northbuild's solicitors' letter/submissions of 2 October 2007 stated, among other things, that the breach of

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[10] Sir Michael J. Mustill and Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (London: Butterworths, 1989), 412-13 (footnotes omitted); see also *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The "Golden Bear")* [1987] 1 Lloyd's Rep 330 at 343.

contract claims that were part of the Interim Award were to be determined in the hearing proposed for February/March 2008 and the "only exception is item 5 of the breach of contract claim, which relates to the bank guarantees and should be included for completeness." In opening Northbuild's case on 11 March 2008, counsel for Northbuild had referred to this item and indicated that a November award apparently had said that Northbuild would not ask for the release of the security until there was a final accounting and so "we don't actually ask for that any more, but we say that there was a breach in failing to release it at the time." It appears from paragraph 127 of the arbitrator's reasons that submissions were made by the parties about this claim and, as a result, the arbitrator dealt with that contested item in his reasons as well.

[74] After dismissing Northbuild's claim for damages for breach of contract for failure to release the bank guarantees, and dismissing its claim for further interest on those bank guarantees, the arbitrator gave his reasons in relation to the breach of contract item in relation to the spa pool. It was dismissed. The final paragraph of the arbitrator's reasons indicates that the parties had discussed with the arbitrator that the award was to be in the form of declarations, and the arbitrator indicated that the parties were at liberty "to make further submissions in respect of the form of a further Award." The actual award contained six declarations in respect of the Variation Requests and seven orders or declarations in relation to other issues, including the claims for damages that Northbuild had prosecuted and DBP contested. The final order gave the parties liberty to make submissions as to the form of any further award, including GST, interest and costs.

[75] Paragraph 5 of the arbitrator's reasons does not recite the Interim Award Direction, but generally identifies the disputes with which the Interim Award was concerned. Contrary to Northbuild's submissions to me, I do not regard this paragraph as indicating that the arbitrator did not consider that Northbuild's claims for damages for breach of contract were for determination by his Interim Award, with the consequence that they were not within the scope of the Interim Award. The content of the arbitrator's reasons and the declarations made by him related to claims that were contested.

[76] Mr Justice Robert Goff (as his Lordship then was) in *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The "Kostas Melas")*[11] discussed the utility of interim awards, and stated:

> "An interim award can relate to any issue in the matters in dispute referred to the arbitrators; it may relate to an issue affecting the whole claim (e.g. the issue of liability, reserving the issue of quantum for a final award), or may relate to a part only of the claims or cross-claims submitted to them for decision. It follows that arbitrators, when making an interim award, must specify the issue, or the claim or part of a claim, which is the subject matter of the interim award."

In that case, Goff J was satisfied that the issues decided by the arbitrators were sufficiently identified in the award. He observed that the function of identification

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11 [1981] 1 Lloyd's Rep 18 at 26; followed in *Re Resort Condominiums International Inc* [1995] 1 Qd R 406 at 425.

of issues decided in an interim award "is to ensure that the parties know what has been decided and therefore what remains to be decided".[12]

[77] In this matter Northbuild has raised the issue of whether the arbitrator in making the Interim Award has sufficiently identified the issues being decided by him. I consider that he has. Paragraph 5 specified the disputes that the Interim Award was deciding, albeit in general terms. Paragraph 5 fell to be understood against the background of the Interim Award Direction as confirmed prior to and during the hearing of the Interim Award, and by reference to the breach of contract claims that were specified in the pleadings and also in a table prepared by Northbuild's solicitors in anticipation of the hearing. That table served to identify the items that Northbuild intended to prosecute at the forthcoming Interim Award Arbitration. It was unnecessary for the arbitrator to set out that table, or a similar table, in the Interim Award because the issues to be decided by the Interim Award were sufficiently identified.

[78] The governing principle in this context is that the matters that are decided by an interim award should be sufficiently identified upon the making of the interim award. The rationale for that rule is to ensure that the parties know what has been decided and therefore what remains to be decided. The parties, and a Court that is asked to review an interim award pursuant to s 38(5) of the Act,[13] must know what issues, claims or parts thereof were the subject matter of the interim award. They will know this when the claim or claims are recited in the interim award itself. But this is not the only means by which the parties and others will know the subject matter of the interim award. The subject matter of the interim award may be sufficiently identified in pleadings or some other document that identifies it, including the claims that are to be submitted to arbitration by way of an interim direction. The subject matter may be sufficiently identified by a direction that governs the interim award. Where the terms of the direction are not recited in the interim award itself, or the claims that are the subject matter of the interim award are not tabulated or otherwise specified in the interim award, a Court normally is entitled to look at the directions or at the pleadings to see what issues were submitted to the arbitrator. As was said in *W. J. Allan Co Ltd v El Nasr Export and Import Co*[14], following what had early been said by Sachs J (as he then was) in *Blackford & Sons (Calne) Ltd v Borough of Christchurch*[15], "as regards an interim award the Court is always entitled to look at the relevant documents to see what was submitted to arbitration".

[79] In this case the matters that were submitted to be arbitrated by the interim award were sufficiently identified. The scope of the Interim Award was set by the Interim Award Direction and clarified by the terms of pleadings, in correspondence between the parties and by the arbitrator prior to the commencement of the Interim Award hearing. The three breach of contract claims with which I am presently concerned fell within the scope of the Interim Award.

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12 *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The "Kostas Melas")* [1981] 1 Lloyd's Rep 18 at 27.

13 As to the scope of review and the adequacy of reasons see *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.

14 [1971] 1 Lloyd's Rep 401 at 408.

15 [1962] 1 Lloyd's Rep 349 at 355.

[80] The form of declarations and orders made by the arbitrator were with respect to those claims that were prosecuted and argued. The arbitrator probably should also have made declarations with respect to claims made by Northbuild that were formally abandoned or which, upon the making of his award, would be taken to be abandoned in accordance with the principles that I have identified above. The parties could, and probably should, have asked the arbitrator to include declarations that formally dismissed the breach of contract claims that were within the scope of the Interim Award, but which Northbuild abandoned. It is unnecessary to decide whether the omission to make formal declarations in this regard was a matter that the arbitrator had power to correct on the application of a party pursuant to s 30 of the *Commercial Arbitration Act*. In any event, the arbitrator invited further submissions as to the form of the Interim Award.

[81] I find that the Interim Award determined claims that were the subject of the Interim Award Declaration, as varied by the ruling on the first day of the hearing that the counterclaim no longer be included in the Interim Award. Those claims included the breach of contract claims with which I am concerned. The choice of Northbuild not to make submissions in relation to those three breach of contract claims simply means that Northbuild chose, for reasons best known to it and not the subject of evidence from it in these proceedings, not to prosecute those claims at the Interim Award, despite the Interim Award Direction and subsequent correspondence that identified these claims as being included within the Interim Award. It chose not to prosecute those claims by not opening them, by not calling evidence in respect of them, by not adding them to the list of claims that was helpfully provided by DBP's counsel for the assistance of the arbitrator and by not making them the subject of final submissions. The choice of Northbuild not to prosecute these breach of contract claims cannot alter the fact that they were included in the pleaded claims directed to be within the Interim Award. The consequence is that these claims were determined by the Interim Award, although the arbitrator was not asked to determine them on their merits.

**Subsequent events and Mr Fischer's letter of 26 November 2009**

[82] Shortly after the Interim Award was made, the parties made submissions about various matters and DBP's solicitors made the submissions that I have quoted in paragraph [37] above. In due course, extensive correspondence was received by the arbitrator in October and November 2009 relating to completion of the Final Claim Arbitration and the extent of his jurisdiction, particularly as to whether two claims described as VR89 and EOT24/VR71-Part 2 had been referred to other fora, and whether the latter of these matters had been raised by the final account and final notice, and therefore was within the scope of the reference in any event. By letter dated 26 November 2009, the arbitrator responded to the parties' correspondence relating to the extent of his jurisdiction in the Final Claim Arbitration proceedings. In doing so he addressed the scope of the Final Claim Arbitration and referred to the Interim Award Direction of March 2007, to the effect that the Final Claim Interim Award hearing was in respect of disputes that were not said to be in other fora. His letter continued:

> "Whilst it is true that, at one time, it was intended that the Final Claim interim award hearing would proceed on the basis of dealing with all disputes not in other fora (*as borne out by my directions to the parties of 30 March 2007 and the subsequent correspondence*

> *from Ebsworth & Ebsworth of 2 April 2007 and from Minter Ellison of 5 April 2007*), clearly that intention had not being [sic] conveyed to either party's subsequent lawyers or to Counsel. That much is evident from the transcript on the first day of hearing (T9:8-T14:41). Since it is clear that neither party had prepared on that basis, I am not inclined to hold the parties to that intent.
>
> The effect of the Final Claim awards delivered to date is to conclude those questions dealt with in each of the Awards. The parties have always understood those awards to be interim awards in the sense that further awards were always understood to be required to, at least, incorporate the determinations, awards and judgments delivered in respect of the disputes addressed in other fora (*including other arbitrations before me*). That both parties have changed lawyers, at least once, during the course of the arbitration may have contributed to a fragmentation of that understanding. It has also been understood by the parties that the '2008 hearings' would not be the end of the hearings necessary to determine all of the issues in dispute in the Final Claim arbitration. As well as DBP's counterclaim and the incorporation of the outcome of disputes in other fora, during the course of the '2008 hearings' Northbuild's Counsel did, on a number of occasions, identify disputes which would have to be subsequently heard (eg. T10:7-23)."

Mr Fischer stated that the intention had been that further hearings would occur, and he gave examples of where the intention had been expressed.

[83] Each party has addressed the paragraphs of Mr Fischer's letter that I have quoted, and Northbuild says that Mr Fischer was in effect saying:

> "My interim award decided what it decided, nothing more, nothing less. The rest of the disputes are yet to be decided by me in the future in the Final Claim Arbitration."

This is a fair general description of the effect of Mr Fischer's letter, but it begs the question of what the Interim Award decided and, for the reasons given by me, I conclude that it determined the matters within the scope of the Interim Award and that these included the three breach of contract claims that are in contention before me. The parties also debated whether Mr Fischer's letter of 26 November 2009 is itself an award. It is unnecessary to determine that issue. A letter may constitute an award, and the letter may be an award with respect to procedural aspects of the matters about which the parties remained in dispute as part of the Final Claim Arbitration. However, there were limits on Mr Fischer's power to determine certain matters. In any case, I do not regard the paragraphs of the letter that I have quoted as a ruling that the scope of the Interim Award did not include the three breach of contract claims with which I am concerned.

[84] Some further observations are appropriate about the paragraphs of Mr Fischer's letter that I have quoted. First, insofar as they confirm that at the time of the Interim Award it was intended that there would be further hearings about matters that remained in dispute in the Final Claim Arbitration, and that the Final Claim Arbitration would need to incorporate the outcome of disputes in other fora, it was

correct. However, the transcript reference to counsel having identified disputes which would have to be subsequently heard is incorrect. The transcript reference T10:7-23 related to a "question mark" that the arbitrator had made on the first morning of the hearing in respect of certain items. He indicated that if they were not in other fora they would have to be heard by him. Counsel for Northbuild agreed with that proposition, but investigation of the matter during the course of the morning led to the conclusion that each of the matters identified on the list had been referred elsewhere and counsel for Northbuild was able to assure the arbitrator of this fact at T16:22-23.

[85] Next, the first paragraph of Mr Fischer's letter that I have quoted is inaccurate and somewhat curious. It is inaccurate in his recollection or opinion about the basis upon which the parties prepared for the Interim Award hearing. For reasons that I have canvassed, the parties prepared for the hearing on the basis that the Interim Award would determine identified matters that were not to be determined in other fora, and this direction continued (subject to the exclusion of DBP's counterclaim). It was confirmed by Mr Fischer in his letter to the parties on 16 October 2008. It is not correct that the parties did not prepare for the Interim Award hearing on the basis that the Interim Award Direction, as varied on the first day of the hearing with respect to DBP's counterclaim, and subject to the specific reference made by counsel for Northbuild to item 5 on the first day (being a matter which later became the subject of submissions and a finding). The transcript references in the first paragraph of Mr Fischer's letter (T9:8-T14:41) do not support the contention that the Interim Award Direction was not conveyed to either party's subsequent lawyers or to counsel. That passage of the transcript clarified that matters that the arbitrator was concerned might not have been referred to other fora had in fact been referred. As noted, the arbitrator's concerns were allayed.

[86] The letter of 26 November 2009 may be an award with respect to procedural and other matters in respect of which Mr Fischer had jurisdiction, but it cannot give him jurisdiction over matters in respect of which he lacks jurisdiction, particularly matters that had been determined by the Interim Award, being matters in respect of which he was *functus officio*. To the extent that the first paragraph of his letter of 26 November 2009 that I have quoted purported to vary the Interim Award Direction that governed the Interim Award, Mr Fischer did not have power to alter the scope of matters that had been determined by the Interim Award, or the manner in which they were to be determined. He was *functus officio* with respect to the Interim Award and the making of directions in respect of its intended scope.

[87] Northbuild submits that one should not treat Mr Fischer as having decided disputes by the Interim Award which he had no intention of deciding. A number of observations may be made in relation to this submission. The first is that the quoted paragraph of the letter does not say that Mr Fischer did not intend, in making the Interim Award, that it should not determine the matters that were within its scope as a result of the Interim Award Direction, as varied by the exclusion of DBP's counterclaim and the confirmed inclusion of item 5 of the breach of contract claims. Second, if the Interim Award, as a matter of law, determined certain claims, such as those that Northbuild had formally abandoned, Mr Fischer's intention that the Interim Award should, or should not, determine those claims is irrelevant. Third, there is no evidence that Mr Fischer did not intend that the Interim Award should determine claims that Northbuild abandoned either formally or informally. Fourth, Mr Fischer's recollection after the event about what the scope of the Interim Award

was and what claims it determined cannot be substituted for an assessment, based on a consideration of the relevant evidence that has been advanced in this proceeding and the submissions of the parties, of the scope of the Interim Award, and whether the nominated breach of contract claims fell within its scope, and therefore were determined by it. This is especially so where Mr Fischer's recollection of what transpired before and during the Interim Award, as recorded in his letter of 26 November 2009, is incorrect in certain respects. Finally, it is not a matter for a person who has made an award to decide after the award has been made whether parties should be held to directions that governed the scope of the award. Mr Fischer's letter may suggest that, having thought back to what he recalled about the basis upon which both parties had prepared for the Interim Award hearing (and, incidentally, having an inaccurate recollection of that matter), it was within his power to decide that the parties should not be held to the direction that the Interim Award would deal with all disputes not in other fora. But it was not in Mr Fischer's power, grace or favour to decide in late November 2009 that the parties should not be held to directions that governed the scope of an award that was made in August 2009.

**Conclusion – first issue**

[88] The first issue I am asked to decide in this proceeding is whether identified claims that were subject to the Interim Award Direction, namely breach of contract claims for items 8, 10, 11 and 12, being claims which the parties and the arbitrator included among the matters to be the subject of the Interim Award, were determined by the Interim Award. That issue is determined by the application of principles of *res judicata*. The Interim Award Direction, as varied on day one of the Interim Award hearing and as reaffirmed during the course of the Interim Award hearing, governed Northbuild's claims for breach of contract for items 8, 10, 11 and 12 and provided for them to be the subject of the Interim Award. These items were pleaded and identified in correspondence before the hearing, and were not matters to be decided in other fora. No direction was made for them to be "put off" to another arbitration.

[89] For reasons best known to it, Northbuild chose not to prosecute those items in the course of the Interim Award. Its failure to do so cannot alter the legal consequences of its failure to do so. The consequence of Northbuild's failure to prosecute claims that were within the scope of the Interim Award is that those claims merged on the making of the Interim Award. An alternative view is that they are deemed to have been abandoned, and the abandonment is irrevocable once the arbitrator has made the award. A specific order dismissing them could have been made, but its absence does not alter the legal effect of the Interim Award.

[90] I resolve the dispute between the parties by making the declaratory orders sought in paragraph 1 of the Amended Originating Application in respect of items 8, 10, 11 and 12. The form of declaration will be:

> "It is declared that the claims pleaded by the respondent in the Amended Points of Claim dated 13 March 2007 in an arbitration before Mr Warren Fischer (the arbitrator) referred to as 'the Final Claim Arbitration' at:

(a) paragraph 15.2(f)(viii): Item 8 – Notice of deduction of liquidated damages;

(b) paragraph 15.2(f)(x): Items 10 and 11 – Failure to prove extensions of time and prolongation claims;

(c) paragraph 15.2(f)(xi): Item 12 – Legal costs associated with breaches of contract;

have been determined by the arbitrator by the making of an award described as the Final Claim Interim Award and dated 14 August 2009."

[91] If I had not made a declaration in this form, I would have made the alternative declaration sought by DBP that Northbuild is estopped from taking any further step to pursue or assert those pleaded claims.

**The second issue: items 9, 13 and 14**

[92] Northbuild has conceded that it abandoned these claims and cannot pursue them in the future. There is no dispute about this and the declarations sought by DBP in relation to items 9, 13 and 14 lack utility in the circumstances. This part of the application may have been prompted by submissions that sought to reinstate item 9 in the submissions that were made to the arbitrator after the Interim Award. However, Northbuild's error in doing so was acknowledged in its notice of contention in reply in these proceedings. I decline to make the declarations sought in respect of items 9, 13 and 14. These reasons sufficiently record Northbuild's concession that it cannot pursue these claims in the future.

**The third issue: paragraphs 3 and 4(b) of the Amended Originating Application**

[93] As previously noted, the third issue is whether I should grant the declaratory and injunctive relief sought by DBP in paragraphs 3 and 4(b) of the Amended Originating Application. DBP says that it seeks this relief to ensure that Northbuild does not now seek to plead *new claims*, not previously pleaded, in the Final Claim Arbitration. It submits that the relief sought by it does not prevent the pursuit and determination of any of the Referred Claims that remain to be determined. Leaving aside those Referred Claims, DBP contends that the remaining pleaded claims have either merged in the Interim Award or been abandoned. DBP seeks this relief to prevent Northbuild from pursuing any further claim in the Final Claim Arbitration except the claims that it identifies as the Referred Claims.

[94] The Amending Originating Application defines the Referred Claims as being those claims listed in paragraphs 15.2(a) and (b) of the defence of DBP filed in the Final Claim Arbitration dated 6 July 2007. For the reasons developed by DBP in its supplementary submissions in reply, the declaration sought has some utility. The Referred Claims were the subject of pleadings and correspondence, and for the reasons given in paragraphs 33-35 of DBP's original submissions, the parties reached a consensus to the effect that all of these items had been referred to other fora, save perhaps for one item in dispute described as the Centre Tower Agency Deed Works claim, in respect of which exchanges between the parties appeared to rest on the basis that it also was a Referred Claim.

[95] Northbuild expressed a concern that the form of relief originally sought in paragraph 3 of the Originating Application in this proceeding would preclude it from making claims which cannot be determined in other fora, and cited the example of certain matters that were referred for expert determination in respect of which the relevant expert has not accepted the reference. It was concerned that the order as originally sought by DBP would preclude Mr Fischer from being able to determine those matters as part of the Final Claim Arbitration and thereby preclude the matter from being determined at all. Incidentally, Northbuild has brought its own application in respect of that matter, and that application is returnable in November.

[96] In order to accommodate Northbuild's concern, DBP amended the form of relief sought, and submits that the amended form of relief will ensure that the declaration will not prevent the pursuit of *any* of the Referred Claims.

[97] The declaration sought may not finally resolve all of the disputes between the parties. However, that does not mean that it lacks utility. Northbuild's claims arising under the reference were pleaded in its Amended Points of Claim. DBP accepts that the Referred Claims have not been determined by the Interim Award and that if they have not been determined in other fora, they remain to be determined. DBP submits that the balance of the pleaded claims which are not Referred Claims and which were not pursued have merged or been abandoned. It says that it is concerned to ensure that Northbuild does not now seek to plead *new claims*, not previously pleaded, in the Final Claim Arbitration. DBP is unable to say what these new claims are, because it says that it does "not know what Northbuild might do in the future." It says that the scope of the relief is clear and that the purpose of the declaration is to prevent Northbuild from pursuing any further claim in the Final Claim Arbitration except the Referred Claims. It submits that the declaration sought has utility since it will resolve a specific dispute about the effect of the Interim Award Direction on Northbuild's right to pursue claims other than the Referred Claims.

[98] I accept DBP's submission that the amended form of paragraph 3 does not have the problems associated with the earlier form. The revised form of declaration would have some utility if Northbuild was to assert that there are claims that were not Referred Claims which are within the scope of the reference in the Final Claim Arbitration and which have not been heard and determined. It also will have utility in the event that Northbuild asserts that it is entitled to bring new claims within the scope of the reference in the Final Claim Arbitration. However, it is not apparent to me that Northbuild makes such a contention or that it threatens to bring any such new claims. In the circumstances, I decline to make the declaration sought at this stage. The declaration that I propose to make in respect of the breach of contract claims, and the reasons for making that declaration, adequately identify the principle that precludes Northbuild from seeking to pursue claims within the scope of the reference in the Final Claim Arbitration, other than the Referred Claims, which have been determined. If Northbuild asserts that it is entitled to pursue or assert existing or new claims other than Referred Claims, then the application for declaratory and injunctive relief in paragraphs 3 and 4(b) can be re-listed. In the meantime, I consider that the relief claimed is premature and I will adjourn those parts of the application to a date to be fixed. I emphasise that declaratory relief in this form may have some utility.

[99] There would be greater utility, however, in the parties rapidly resolving between themselves which Referred Claims remain to be determined, by whom they are to be determined and a schedule for their early determination. If there are any "lost sheep" in addition to the claims identified in Northbuild's pending application, then they should be rounded up. I advised the parties on the second day of the hearing (5 October 2011) that I expected them to resolve the application that is returnable in the Applications List in November. Any disputes about whether matters have been referred and, if so, whether the person to whom they were referred is prepared to determine them should be resolved by the parties without further delay and the need for the Court to resolve them. Almost two years ago the President of the Court of Appeal expressed the expectation that:

> "...the parties' lawyers can now assist them to speedily finalise all aspects of this lengthy and costly dispute. Otherwise the matter could become of institutional concern."[16]

[100] Since that time more of the parties' resources have been expended on litigation. So have finite public resources, namely judicial time. I expect the parties to resolve the pending application and round up what I have described as "lost sheep" (being any claims in respect of which they are in dispute over whether they have been referred for expert determination or where the parties are in doubt as to whether the expert to whom they have been determined is prepared to determine them). The parties should have an agreed program for the finalisation of all aspects of their disputes. The parties are expected to bring their disputes to an end without delay and unnecessary expense.

**Orders**

[101] I propose to make the following orders.

1. It is declared that the claims pleaded by the respondent in the Amended Points of Claim dated 13 March 2007 in an arbitration before Mr Warren Fischer (the arbitrator) referred to as "the Final Claim Arbitration" at:

   (a) paragraph 15.2(f)(viii): Item 8 – Notice of deduction of liquidated damages;

   (b) paragraph 15.2(f)(x): Items 10 and 11 – Failure to prove extensions of time and prolongation claims; and

   (c) paragraph 15.2(f)(xi): Item 12 – Legal costs associated with breaches of contract

   have been determined by the arbitrator by the making of an award described as the Final Claim Interim Award and dated 14 August 2009.

2. Paragraphs 3 and 4 of the Amended Originating Application are adjourned to a date to be fixed.

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16 *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2009] QCA 345 at [21].

[102] I will hear the parties in relation to costs. DBP has been successful on the first issue, being the issue that occupied most of the two day hearing before me. My present view is that its lack of success on the second issue, and my decision to adjourn the relief sought in paragraphs 3 and 4, should not disentitle it to the costs of the application, or at least a substantial part of those costs. Again, I expect the parties to resolve the issue of costs, if possible. If, however, it cannot be resolved, then I will resolve it upon the hearing of short oral submissions, following which I expect to give oral reasons for my order as to costs.