[2016] WASC 338

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	:	MINERAL RESOURCES LTD -v- PILBARA MINERALS LTD [2016] WASC 338
CORAM	:	BANKS-SMITH J
HEARD	:	14 OCTOBER 2016
DELIVERED	:	17 OCTOBER 2016
FILE NO/S	:	CIV 2700 of 2016
BETWEEN	:	MINERAL RESOURCES LTD First Plaintiff ACN 611 488 932 PTY LTD Second Plaintiff AND PILBARA MINERALS LTD Defendant

Catchwords:

Contract - Dispute resolution - Where plaintiff sues for breach of contract which contains provision for expert determination - Where defendant seeks stay - Whether expert determination mandatory - Whether proceedings should be stayed - Exercise of discretion to grant stay - Right of first refusal - Where validity of notice disputed - Where issues of construction - Whether issues amenable to expert determination

Legislation:

Nil

Result:

Stay granted

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr M L Bennett & Mr M J M Nas
Second Plaintiff	:	Mr M L Bennett & Mr M J M Nas
Defendant	:	Mr S K Dharmananda SC & Mr M T McKenna

Solicitors:

First Plaintiff	:	Bennett + Co
Second Plaintiff	:	Bennett + Co
Defendant	:	Gilbert + Tobin

Case(s) referred to in judgment(s):

Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188
Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277
Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332
Fimiston Mining NL v Western Reefs Ltd (Unreported, WASC, Library No 950633, 22 November 1995)
Ipoh v TPS Property No 2 Pty Ltd [2004] NSWSC 289
ITC Ltd v Timbercorp Ltd (in liq) [2009] SASC 342
JTA Le Roux Pty Ltd as trustee for the FLR Family Trust v Lawson [2013] WASC 293
Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd [2008] NSWCA 327
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd [2005] QSC 284
Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd [2015] WASC 242
Savcor Pty Ltd v State of New South Wales (2001) 52 NSWLR 587
Shoalhaven City Council v Firedam Civil Engineering Pty Ltd [2011] HCA 38; (2011) 244 244 CLR 305

Simsmetal Ltd v Wanless Metal Industries Pty Ltd (Unreported, NSWSC, 19 March 1997)
Straits Exploration (Australia) Pty Ltd v Murchison United NL [2005] WASCA 241; (2005) 31 WAR 187
The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646
THL Robina Pty Ltd v The Glades Golf Club Pty Ltd [2004] QSC 461
Warren v Lawton [No 3] [2016] WASC 285
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] QSC 135; (2005) 2 Qd R 563

BANKS-SMITH J:

Summary

1 This application is for a stay of proceedings on the basis the parties contractually agreed to resolution of the dispute by expert determination.

2 The defendant (Pilbara Minerals) is a mining and exploration company listed on the Australian Securities Exchange (ASX), specialising in the exploration and development of specialty minerals including lithium. Lithium and its chemical compounds have a wide range of industrial applications but in particular are used in lithium-ion batteries.

3 The second plaintiff (ACN) is entitled to the benefit of a right of first refusal (ROFR) with respect to lithium produced from certain tenements by Pilbara Minerals. ACN is a wholly owned subsidiary of the first plaintiff (Mineral Resources). The role of Mineral Resources is not of any particular relevance to this application.

4 The parties are in dispute as to the validity of a notice issued by Pilbara Minerals to ACN under the ROFR regime. This dispute arises after an earlier dispute about the content of such notices. If the notice is valid, ACN is obliged to make its election to purchase by 31 October 2016.

5 The plaintiffs instituted these proceedings, seeking a declaration that the notice is invalid and seeking specific performance of the ROFR regime. The plaintiffs seek an expedited trial and determination by a first instance judge in a timeframe that allows (the plaintiffs contend) for an appeal from that decision to be determined by the Court of Appeal before 31 October 2016.

6 Pilbara Minerals has implemented a dispute resolution process seeking to have an expert determine the dispute. Pilbara Minerals seeks a stay of the proceedings and says that an expert can determine the dispute by 24 October 2016.

7 For the reasons set out below, I have decided that the proceedings should be stayed.

Relevant events

The Sale Agreement

8 On 30 May 2014, Pilbara Minerals (as buyer) entered into a contract with Global Advanced Metals Wodgina Pty Ltd (Global Advanced) (as seller) known as the Pilgangoora Assets Sale Agreement (Sale Agreement). Under the Sale Agreement, Global Advanced agreed to sell to Pilbara Minerals certain assets, including its interest in identified tenements in the Wodgina region of the Pilbara and associated mining information. Also under the Sale Agreement, Pilbara Minerals granted a ROFR to Global Advanced to purchase lithium and lithium bearing ore that Pilbara Minerals produces from the defined tenements and otherwise proposes to sell to a third party.[1]

9 The ROFR regime is set out in cl 11, which provides as follows:

> **11 Right of first refusal**
>
> 11.1 If the Buyer [Pilbara Minerals] proposes to sell, assign or transfer any Lithium or Tantalum (**Sale Interest**) to a third party, the Seller [Global Advanced] will have a first right of refusal to purchase the Sale Interest in accordance with clauses 11.2, 11.3 and 11.4.
>
> 11.2 If a sale as contemplated by clause 11.1 is proposed (**Proposed Sale**), the Buyer must notify the Seller of the Proposed Sale and provide full details to the Seller of the Proposed Sale terms, including:
>
> 11.2.1 the identity of the proposed third party purchaser of the Sale Interest;
>
> 11.2.2 the price:
>
> (a) expressed in dollars or, where the consideration is non-cash consideration, the cash equivalent expressed in dollars of the non-cash consideration; and
>
> (b) for sale and delivery at the mine gate or, where the Proposed Sale is not for sale and delivery at the mine gate, the equivalent price for sale and delivery at the mine gate,

[1] Affidavit of Guy Simon Greer filed 3 October 2016, Confidential Attachment GSG1. Confidentiality orders to protect commercially sensitive information extend to four attachments to the Greer Affidavit, being GSG1 (Sale Agreement), GSG3 (Offtake Agreement), GSG4 (draft proposed sale notice) and GSG7 (Proposed Sale Notice). Where those attachments are referred to in these reasons it is done without disclosing confidential information or with minor redactions that do not affect the reasons.

for which the Buyer proposes to sell the Sale Interest to the third party purchaser; and

11.2.3 any other terms on which the Buyer proposes to sell the Sale Interest to the third party,

(**Proposed Sale Notice**).

11.3 Following the giving of a Proposed Sale Notice, the Seller will have 45 days (**Exercise Period**) to, by written notice to the Buyer, elect to purchase the Sale Interest from the Buyer on terms no less favourable to the Buyer than those set out in the Proposed Sale Notice (**Exercise Notice**).

11.4 Subject to clause 11.5, if the Exercise Period elapses without an Exercise Notice being given to the Buyer by the Seller, the Buyer may proceed with the Proposed Sale of the Sale Interest to the relevant third party on terms no less favourable to the third party than those that were set out in the Proposed Sale Notice.

11.5 The Buyer must:

11.5.1 complete the sale of the Sale Interest; or

11.5.2 enter into a legally binding agreement for the sale of the Sale Interest with the third party,

within 3 months of the giving of the Proposed Sale Notice failing which the Buyer may not proceed with the disposal of the Sale Interest without again complying with the requirement of this clause 11.

11.6 If a legally binding agreement referred to in clause 11.5.2 is subsequently terminated, the Buyer may not proceed with the disposal of the Sale Interest (or that portion of the Sale Interest not already sold under that agreement) without again complying with the requirements of this clause 11.

11.7 Any dispute arising under this clause 11 will be determined by an Expert under clause 20.

10 As appears from cl 11.1, Sale Interest means (relevantly) any Lithium. Lithium is defined in cl 1.1 of the Sale Agreement to mean:

> [L]ithium and lithium bearing ore mined from the Tenement Area which is capable of being sold or otherwise disposed of for its lithium content.

11 Clause 11.7, with its reference to cl 20, is central to this application. Clause 20 provides as follows:

> **20 Expert determination**
>
> **Referral of certain disputes to an Expert**
>
> 20.1 Where a matter is permitted or required by this document to be determined by an Expert, or if the Parties otherwise agree, either the Seller or the Buyer may by notice in writing to the other Party refer the matter for determination in accordance with this clause 20.
>
> **Nomination of Expert**
>
> 20.2 The Expert to be appointed will be as agreed between the Parties. If the Parties do not reach agreement on the identity of the Expert within 7 Business Days after receipt of the notice referred to in clause 20.1, the Expert will be appointed by the President for the time being of The Australasian Institute of Mining and Metallurgy or the President's nominee on the application of either Party.
>
> **Expert to have appropriate experience**
>
> 20.3 The Expert is required to have reasonable commercial, technical and practical experience in the matter in dispute and to be independent of the Parties. The Expert is required to undertake to keep confidential matters coming to his or her knowledge by reason of his or her appointment and carrying out his or her determination.
>
> **Powers of Expert**
>
> 20.4 The Expert will have the power to:
>
> 20.4.1 inform himself or herself independently as to facts and if necessary technical matters to which the dispute relates;
>
> 20.4.2 receive written submissions, sworn and unsworn written statements, photocopy documents and to act upon the same; and
>
> 20.4.3 take such measures as he or she thinks fit to expedite the completion of the dispute resolution including finding adversely to any Party who fails to comply with a timetable reasonably set by the Expert.
>
> **Expert not an arbitrator**
>
> 20.5 The Expert will act as an expert and not as an arbitrator. The determination of the Expert will be final and binding on the Parties except in the case of manifest error.

Costs of Expert

20.6 Unless otherwise determined by the Expert, all costs of the Expert appointed pursuant to this clause 20 will be paid by the Parties in equal shares.

Procedures

20.7 Where a matter is referred for determination by an Expert under this document:

20.7.1 the Expert will have access to all information relating to the matter in dispute and each of the Buyer and the Seller must provide every reasonable assistance to ensure that the Expert is fully informed of the issue;

20.7.2 each of the Buyer and the Seller may (expeditiously) make written submissions to the Expert with respect to the matter, provided that each must promptly copy all submissions to the other of them;

20.7.3 the Expert may determine the responsibility for payment of his or her costs in determining the dispute;

20.7.4 the Expert will be requested to deliver his determination in writing to both Parties within 28 days of the date of the Expert's acceptance of his or her appointment;

20.7.5 the Expert must consider any submissions made by the Buyer and the Seller but will not be obliged to have regard to any particular information or evidence in reaching his determination and may, in the Expert's discretion, procure and consider such information and evidence and in such form as the Expert sees fit;

20.7.6 each of the Parties must comply promptly with any request of the Expert for information in such form as the Expert requires; and

20.7.7 the Expert may, in the Expert's complete discretion, decide upon the procedure the Expert will adopt in reaching his or her determination and each of the Parties must comply with any requirement of the Expert in connection with such procedures.

20.8 If the Expert does not determine the dispute within 28 days of appointment, either Party may terminate the appointment by written notice and a new Expert will be appointed within 10 Business Days in accordance with the procedure set out in this clause 20.

The third party offer

12 On 4 July 2016, Pilbara Minerals issued an announcement to the ASX announcing that it had signed a major binding offtake agreement with a leading Chinese lithium chemicals company for over 40% of the anticipated annual production of spodumene concentrate (spodumene is a source of lithium). There were various conditions precedent to the offtake agreement, including waiver by Global Advanced of the ROFR. At the same time, Pilbara Minerals announced that a binding Memorandum of Understanding had been signed with the Chinese entity by which the parties would as joint venturers participate in the evaluation and development of a future offshore conversion and production plant. A binding Equity Subscription Agreement had also been executed under which the Chinese company would invest $17.75 million into Pilbara Minerals via a share placement.[2] The identity of the Chinese company was later disclosed as General Lithium Corporation (General Lithium).

The First Proceedings

13 On 5 July 2016, Pilbara Minerals issued a proposed sale notice to Global Advanced under cl 11.2 of the Sale Agreement.

14 On 22 July 2016, pursuant to the terms of a deed of assignment, Global Advanced assigned its rights with respect to the ROFR (insofar as they relate to lithium) to ACN.[3] It follows that the terms of the Sale Agreement are to be read such that 'Buyer' means Pilbara Minerals and 'Seller' means ACN.

15 On 22 July 2016, the plaintiffs commenced proceedings in this court, being CIV 2264 of 2016 (First Proceedings), seeking a declaration that the 5 July 2016 notice was not a valid notice for the purpose of cl 11.2 of the Sale Agreement. The plaintiffs requested an urgent trial, taking into account the 45-day exercise period.

16 The matter was called on for directions. In addition to the parties being in dispute as to the validity of the notice, Pilbara Minerals initially disputed the validity of the assignment as between Global Advanced and ACN. In the end, Pilbara Minerals sensibly took the position that rather than debate the validity of the 5 July 2016 notice, it would issue a fresh notice under cl 11.2 in draft form to ACN in the hope that differences between the parties could be resolved, and also undertook that it would not rely on an argument that the assignment between Global Advanced

[2] Announcement to ASX made 4 July 2016 (exhibit 1).
[3] Affidavit of Guy Simon Greer filed 3 October 2016 [10].

and ACN was invalid (the alleged defects being matters of form that it was said could easily be remedied). Counsel for Pilbara Minerals on that date (Mr McKenna) informed the court that it was taking its stated position without any concession that the notice of 5 July 2016 was invalid or that the assignment to ACN had been effected properly. Further, Mr McKenna said that going forward, if there were to be a dispute about the fresh notice then Pilbara Minerals' intention would be to refer the dispute to an expert in accordance with the dispute resolution process.[4]

The draft notice

17 On 9 September 2016, under cover of a three-page letter, Pilbara Minerals provided the plaintiffs with a copy of a draft proposed sale notice that it proposed to issue under cl 11.2 of the Sale Agreement. Pilbara Minerals suggested a meeting to discuss the draft sale notice and requested a response by 12 September 2016 to that suggestion.[5]

18 No response was provided by the plaintiffs by 12 September 2016, but a telephone conversation ensued on 13 September 2016. The plaintiffs' solicitors requested a further day to respond to the invitation to meet.[6]

19 No response was received by Pilbara Minerals' solicitors by 14 September 2016.[7]

20 At 9.54 am on 15 September 2016, a letter was sent by email by the plaintiffs' solicitors to Pilbara Minerals' solicitors regarding the draft sale notice.[8]

Pilbara Minerals issues Proposed Sale Notice

21 At 10.42 am on 15 September 2016, Pilbara Minerals issued a formal notice (as against a draft) under cl 11.2 direct to ACN (Proposed Sale Notice).[9]

22 Under cl 11.3 of the Sale Agreement, ACN has 45 days from the giving of the Proposed Sale Notice in which to elect to purchase the Sale Interest. The parties agree that the 45-day period expires at midnight on 31 October 2016.

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[4] Directions hearing, CIV 2700 of 2016, 30 August 2016.
[5] Greer Affidavit [15] - [21] GSG4, GSG5.
[6] Greer Affidavit [22] - [23].
[7] Greer Affidavit [24].
[8] Greer Affidavit [30] - [32], GSG8.
[9] Greer Affidavit [26] - [29], GSG6, GSG7.

ACN issues a default notice

23 On 16 September 2016, ACN issued a default notice to Pilbara Minerals pursuant to cl 15 of the Sale Agreement.[10]

24 Clause 15 of the Sale Agreement provides as follows:

> **Default**
>
> 15.1 If either Party fails to observe or perform any material obligation under this document or repudiates the terms of this document, and such default continues for 5 Business Days after receipt of notice in writing from the non-defaulting Party to remedy the default, the non-defaulting Party, without limiting any of its other rights, is entitled (at its option), to:
>
> 15.1.1 affirm the sale of the Pilgangoora Assets and sue the defaulting Party for damages for breach of contract;
>
> 15.1.2 sue the defaulting Party for specific performance of this document; or
>
> 15.1.3 subject to clause 16, terminate this document by notice in writing to the defaulting Party and:
>
> a) sue the defaulting Party for damages for breach of contract; and
>
> b) without further notice to the defaulting Party, exercise any other rights or remedies which the non-defaulting Party may have at law or in equity against the defaulting Party.
>
> **Costs and expenses**
>
> 15.2 The defaulting Party must, on demand, pay the non-defaulting Party (on a full indemnity basis) all of the non-defaulting Party's costs, fees and expenses of, and incidental to, each breach by the defaulting Party of its obligations under this document.

25 The alleged default set out in the default notice was as follows:

> 1. The purported 'Proposed Sale Notice' does not comply with the requirements set out in Clause 11 of the [Sale] Agreement. It is therefore not a valid and binding Sale Notice.
>
> 2. By its conduct in providing to ACN the 'Proposed Sale Notice' in purported satisfaction of its obligations under clause 11.2 of the

[10] Greer Affidavit [33] - [35], GSG9.

> [Sale] Agreement, Pilbara Minerals has failed to observe or perform a material obligation under the [Sale] Agreement.
>
> 3. In the circumstances set out in paragraphs 1 and 2 above (inter alia), Pilbara Minerals is in default of the [Sale] Agreement.

26 Without prejudice discussions took place between the parties between 23 September 2016 and 29 September 2016,[11] but self-evidently without resolution.

Pilbara Minerals issues dispute notice - expert determination

27 On 29 September 2016, Pilbara Minerals issued a dispute notice pursuant to cl 20 of the Sale Agreement, referring the matter to determination by an expert.[12] The dispute notice was sent outside business hours and ACN contends it is to be read as dated 30 September 2016, but I do not consider anything ultimately turns on the difference.

ACN issues these proceedings

28 On 30 September 2016, the plaintiffs issued these proceedings (CIV 2700 of 2016).

29 On 3 October 2016, Pilbara Minerals issued a summons in these proceedings, seeking a permanent stay.

30 At a directions hearing on 4 October 2016, the First Proceedings were dismissed by consent (with issues of costs reserved) and the stay application was listed for hearing on 14 October 2016. Pilbara Minerals invited ACN to participate in the appointment of an expert, without prejudice to its opposition to the stay application, so that an expert could be appointed as soon as possible.

31 There was clearly some cooperation between the parties in that regard and I was informed at the hearing on 14 October 2016 that the parties had agreed to appoint Mr Craig Colvin SC as an expert, that Mr Colvin SC had agreed to make a determination before 24 October 2016, and that the terms of his appointment have been executed.

The Offtake Agreement and terms of the Proposed Sale Notice

32 The proposal to sell the lithium to General Lithium has undergone some amendments since the ASX announcement referred to above and is comprised in an Amended and Restated Spodumene Concentrate Sale

[11] Greer Affidavit [35].
[12] Greer Affidavit [36] - [39].

Agreement (CIF) made between Pilbara Minerals and General Lithium dated 9 September 2016 (Offtake Agreement).[13]

33 The Proposed Sale Notice annexed a full copy of the Offtake Agreement. The Proposed Sale Notice is in the following form, redacted where stated:

Item to be addressed under the Sale Agreement	**Information**
Clause 11.2 *- full details of the Proposed Sale terms*	Exhibit A to this Proposed Sale Notice contains an executed copy of the Offtake Agreement which sets out, in full, all of the terms on which PLS [Pilbara Minerals] proposes to sell the Product to GL [General Lithium].
Clause 11.2.1 *- the identity of the proposed third party purchaser*	General Lithium Corporation (formerly General Lithium (Haimen) Corporation) [registration number and address supplied]
Clause 11.2.2 *- the price (expressed in Australian dollars for sale and delivery of the Product at mine gate)*	The equivalent price payable for the sale and delivery of the Product at mine gate is the price determined using the pricing formula in clause 5.3 of the Offtake Agreement (**CIF Price**), less the Allowable Deductions, which price (as at the date of this Proposed Sale Notice) is **AUD$[redacted]** (exclusive of GST) per dry metric tonne of Product, which is calculated as the CIF Price of **AUD$[redacted]** per dry metric tonne, less the Allowable Deductions totalling **AUD$[redacted]** per dry metric tonne. Given that the CIF Price is expressed in US$, it has been converted into AUD$ by applying the exchange rate data published on the US Federal Reserve website (www.federalreserve.gov) on 30 June 2016 (being the last day in the Calendar Quarter preceding the date of issue of this Proposed Sale Notice), which exchange rate is **0.7432**.

[13] Greer Affidavit, GSG3.

Clause 11.2.3 *- any other terms on which PLS proposes to sell the Product*	Exhibit A to this Proposed Sate Notice contains an executed copy of the Offtake Agreement which sets out, in full, all of the terms on which PLS proposes to sell the Product to GL (which are expressly incorporated into this Proposed Sale Notice). If the Seller elects to exercise its right of first refusal over the Product under clause 11.3 of the Sale Agreement, the Product must be purchased by the Seller on terms no less favourable to PLS than those set out in this Proposed Sale Notice, including (without limitation) in relation to the equity subscription in clause 15 of the Offtake Agreement and the downstream processing study in clause 16 of the Offtake Agreement which are integral and conditional to delivery of Product.

34 As referred to in the Proposed Sale Notice, cl 15 of the Offtake Agreement requires General Lithium to subscribe for equity in Pilbara Minerals and cl 16 obliges General Lithium to participate with Pilbara Minerals in completing a downstream processing feasibility study. There are also various conditions precedent and subsequent set out in the Offtake Agreement.

The nature of the dispute

35 The statement of claim pleads that the Proposed Sale Notice is defective for various reasons. The reasons were developed in ACN's written submissions and collected under four headings.

Failure to specify price

36 ACN contends that the pricing formula within the Offtake Agreement includes inputs which are not currently known and variables which cannot currently be ascertained with any accuracy. It says that because the CIF price must be converted to a mine gate price, further variables are introduced. It says the provision within the Offtake Agreement for potential changes to the pricing formula creates uncertainty in setting a price. Therefore, it says the 'price' of the Sale Interest is not notified in accordance with cl 11.2.

37 ACN says the price must be specifically stated and refers to ***Sanrus Pty Ltd v Monto Coal 2 Pty Ltd***:[14]

> The words 'terms and conditions ... set out in the Offer' and the requirement of 'a specific cash consideration' are also designed to ensure that upon the making of the offer the offeree, being able to gauge its worth precisely, will have the benefit of a 60 day period within which to accept. If the precise content of the rights and obligations which might flow from acceptance of the offer cannot be determined at the time of the offer or for an indefinite period thereafter, the offeree may be deprived of much of the benefit of the 60 day acceptance period. Indeed the precise content of the parties' bargain may not be known until after the expiration of the offer period. There is no justification for construing the Joint Venture Agreement so as to produce this result.

Failure to specify price in Australian dollars

38 ACN says the pricing formula in the Offtake Agreement refers to a US dollar price, when cl 11.2 of the Sale Agreement requires a price to be in Australian dollars (cl 11.2 does not expressly refer to the price being in Australian dollars but cl 1.2.17 provides that a reference to 'dollars' is a reference to the currency of Australia).

Proposed Sale Interest is not defined

39 ACN says the Proposed Sale Notice fails to identify the Sale Interest. The Offtake Agreement requires the supply of lithium in accordance with sch 2 and that schedule sets out amounts for particular years but it is said that start dates for deliveries are 'unknowable' because of variables as to the start date for production.

'Incompatible terms'

40 ACN contends the inclusion of obligations such as the equity contribution and feasibility study are not matters that go to price and are beyond matters capable of being required of ACN.

41 ACN relies on authorities which have held that it is impermissible to undermine a right of pre-emption by adding collateral conditions to a proposed sale.

42 In ***Simsmetal Ltd v Wanless Metal Industries Pty Ltd***,[15] the consideration offered by a third party for the interests said to be the subject of a right of first refusal was $8 million, $5 million to be paid by

[14] ***Sanrus Pty Ltd v Monto Coal 2 Pty Ltd*** [2005] QSC 284 [38] (Muir J) (notice under pre-emption clause invalid).
[15] ***Simsmetal Ltd v Wanless Metal Industries Pty Ltd*** (Unreported, NSWSC, 19 March 1997) (Cohen J).

an assumption of liabilities and $3 million to be paid by bank cheque. Additional consideration comprised an issue of some eleven million shares in the listed parent company of the purchaser to a Mr Wanless. Another condition was that a specified person would be appointed to the board of the purchaser.[16]

43 A first refusal notice was issued to the plaintiff, said to comprise an offer to the plaintiff to purchase the assets on the same terms. The clause in question required the notice to the plaintiff to be by way of an offer to purchase.[17]

44 Cohen J held that the notice did not comply with the terms on which the right of first refusal was granted for the following reasons:[18]

> Thus, the notice to be given under cl 4.1 is the first step in a series which may lead to a sale. The agreement to sell contemplated by cl 4.5 is to be brought about by the offer in cl 4.2 and acceptance in accordance with cl 4.3. Cl 4.1 cannot be read in isolation. Although it only requires a notice to contain the terms and conditions upon which the grantor proposes to sell, that notice is also required by cl 4.2 to be an offer. It therefore has a dual role, and in the second category it must be in terms which permit acceptance in order to create a contract. If the so-called offer contains conditions which the grantee cannot comply with because they are extraneous to any relationship which it might have with the grantor and are personal to another proposed purchaser, then the balance of cl 4 can never be brought into operation.
>
> Thus, in my opinion, the offer made by the grantor to the grantee must be capable of acceptance by the grantee. This in turn means that the notice which constitutes that offer must contain terms and conditions which are capable of that acceptance. When I refer to capability of acceptance I do not of course refer to a price which may be difficult for the grantee to pay or to terms and conditions which might prove harsh or onerous. These matters would relate only to the grantee's capacity to accept the offer. What in my opinion would not amount to an offer, and therefore could not be contained in the notice under cl 4.1, is a condition which can only be fulfilled by a person or company which is not the grantee.

45 ACN also referred to ***Fimiston Mining NL v Western Reefs Ltd***.[19] In that case, Steytler J upheld the validity of a notice issued by Western Reefs to its joint venturer, Fimiston, to match an offer Western Reefs had received for part of its joint venture interests. The offer was for a

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[16] ***Simsmetal Ltd v Wanless Metal Industries Pty Ltd*** (7).
[17] ***Simsmetal Ltd v Wanless Metal Industries Pty Ltd*** (8).
[18] ***Simsmetal Ltd v Wanless Metal Industries Pty Ltd*** (14).
[19] ***Fimiston Mining NL v Western Reefs Ltd*** (Unreported, WASC, Library No 950633, 22 November 1995) (Steytler J).

purchase price of $1 million, but to be made up partly in cash and partly by a transfer of shares in the proposed purchaser, Copperfield. Fimiston accepted the offer by offering to pay $1 million. Western Reefs then denied there was a binding agreement with Fimiston, claiming, relevantly, that as Fimiston could not transfer shares in Copperfield, it could not 'match' the offer.

46 Steytler J considered that as a matter of construction, it was open to Fimiston to 'match' the offer by offering to pay $1 million, and accordingly the offer and acceptance was binding. Steytler J held that the pre-emption meant that a price had to be specified which was, 'not so structured as to make it impractical for anyone other than a specific third party to satisfy it'.[20]

47 The cases indicate that the court has due regard to protection from the erosion of the right conferred by a right of pre-emption and tends to preserve the bargain made by parties, but the construction of the particular right and the pre-emption regime must always be carefully considered.[21]

Other alleged defects

48 Only ACN's main arguments are summarised above. I have also taken into account the many matters pleaded in the statement of claim[22] and referred to in the written submissions,[23] but it is fair to say that those matters relate to similar claims of uncertainty and variables arising out of the terms of the Offtake Agreement. There is also a contention that a clause that may restrict the on-sale of lithium comprises a restraint on alienation.[24]

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[20] ***Fimiston Mining NL v Western Reefs Ltd*** (22). Other useful examples include ***THL Robina Pty Ltd v The Glades Golf Club Pty Ltd*** [2004] QSC 461 [5] (Chesterman J) (party issuing offer to grantee of right of first refusal not entitled to include land as part of consideration to be matched). Also ***ITC Ltd v Timbercorp Ltd (in liq)*** [2009] SASC 342 [130] - [136] (Kourakis J) (inclusion of reference to shares as part of consideration did not deny validity of notice to grantee of pre-emptive right).

[21] See also Pritchard J in ***Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd*** [2015] WASC 242 [35] (notice to holder of pre-emptive right under joint venture agreement invalid due to conditions imposed), referring to ***Simsmetal Ltd v Wanless Metal Industries Pty Ltd*** and ***Fimiston Mining NL v Western Reefs Ltd***.

[22] Statement of claim [17].

[23] ACN's further submissions filed 13 October 2016.

[24] As discussed in ***Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd*** [2008] NSWCA 327 [144] - [146] (Hodgson JA, Ipp JA agreeing) (meaning of price under right of first refusal - narrow view would amount to restraint on alienation as owner could never reasonably sell); and see the comprehensive discussion of the principles in ***Warren v Lawton [No 3]*** [2016] WASC 285 [98] (Le Miere J) (effect of conditions on sale of undivided one-twentieth interest in land made it inalienable and restraint unlawful).

Issues are questions of construction

49 I do not have to decide whether ACN's contentions as to the invalidity of the Proposed Sale Notice are made out for the purpose of this application. Nor has Pilbara Minerals been obliged to plead a defence as yet, and so its position as to ACN's contentions has not been developed before me.

50 However, the nature of those contentions is relevant to the task to be undertaken by an expert, and for that reason I have outlined ACN's position.

51 It is apparent that the questions raised are legal issues including matters of construction of the Sale Agreement and the Proposed Sale Notice (including the Offtake Agreement).

Principles - where parties agree to expert determination

52 Pilbara Minerals invokes the inherent jurisdiction of the court to stay proceedings brought in breach of an agreed dispute resolution method.

53 It is established that such jurisdiction may be invoked where the parties have expressly agreed to refer a dispute to an expert. The nature of the jurisdiction is traced and discussed in ***Badgin Nominees Pty Ltd v Oneida Ltd***.[25]

54 I respectfully adopt the summary of the principles set out by Chesterman J in ***Zeke Services Pty Ltd v Traffic Technologies Ltd***:[26]

> There is an undoubted jurisdiction to stay a legal proceeding where the parties have by contract agreed that their dispute shall be determined by means other than curial adjudication. As Lord Mustill explained in ***Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors*** [1993] AC 334 at 352, there is an 'inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way.' The basis for the power was said to be a 'wider general principle ... that the court makes people abide by their contracts and ... will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.' (Per MacKinnon LJ in ***Racecourse Betting Control Board v Secretary for Air*** [1944] Ch 114 at 126.)
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> The jurisdiction has been recognised in a number of cases, in this country, at first instance: ***Badgin Nominees Pty Ltd v Oneida Ltd Anor*** [1998]

[25] ***Badgin Nominees Pty Ltd v Oneida Ltd*** [1998] VSC 188 [38] - [44] (Gillard J).
[26] ***Zeke Services Pty Ltd v Traffic Technologies Ltd*** [2005] QSC 135; (2005) 2 Qd R 563 [19] - [22] (Chesterman J).

> VSC 118; ***The Heart Research Institute Ltd v Psiron Ltd*** [2002] NSWSC 646; ***Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd*** [2003] NSWSC 1134. I have not included cases concerning a stay of proceedings where the parties had agreed that disputes between them should be referred to arbitration. Those cases are regulated by the various arbitration statutes.
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> The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in ***Channel Tunnel***, by the High Court in ***Dobbs*** and ***Huddart Parker Ltd v The Ship* Mill Hill *and Her Cargo*** (1950) 81 CLR 502 (an arbitration case) and by Gillard J in ***Badgin***. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.
>
> Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. The parties are presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. This presumption, based on legal theory, removes any violence to the agreement which refusing the stay would otherwise have done.

55 In ***Straits Exploration (Australia) Pty Ltd v Murchison United NL***,[27] Wheeler JA said that where a contract provides for determination of disputes by an expert, the law has recognised that it is desirable that 'parties who make such a bargain should be kept to it', a passage cited by the High Court in ***Shoalhaven City Council v Firedam Civil Engineering Pty Ltd***.[28]

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[27] ***Straits Exploration (Australia) Pty Ltd v Murchison United NL*** [2005] WASCA 241; (2005) 31 WAR 187 [14] (Wheeler JA, McLure JA & Murray AJA agreeing). See also ***JTA Le Roux Pty Ltd as trustee for the FLR Family Trust v Lawson*** [2013] WASC 293 [140] (Edelman J).

[28] ***Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*** [2011] HCA 38; (2011) 244 244 CLR 305 [25] (French CJ, Crennan & Kiefel JJ).

56 There are circumstances where it may be appropriate that a stay be refused. In ***Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd***, Hammerschlag J said:[29]

> Examples of when a stay *may* be refused include where:
>
> a. it would result in a multiplicity of proceedings;
>
> b. the dispute is inapt for determination by an expert because it does not involve the application of his special knowledge to his own observations or the area of dispute is outside of the expert's field of expertise; or
>
> c. the agreed procedures are inadequate for determination of the dispute that has arisen.

57 Even where a dispute involves questions of fact and law, an expert may determine it.[30] A referral may encompass questions of law, including questions as to construction of an agreement.[31] As Gillard J acknowledged in ***Badgin***, the position may be different if the intended expert is untrained and inexperienced.[32]

58 The mere fact that there is a degree of complexity is involved does not mean a chosen procedure should be abandoned.[33]

59 The expert determination process is meant to be expeditious and offer finality. It accords with modern case management principles which support the use of alternate dispute resolution.[34]

60 The respective positions of ACN and Pilbara Minerals are to be considered in accordance with these principles.

Pilbara Minerals' submissions

61 Unsurprisingly, Pilbara Minerals relies on the express terms of cl 11, and in particular cl 11.7. Clause 11.7 sits within the ROFR regime and expressly applies to it. Its language has broad application, encompassing

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[29] ***Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd*** [2009] NSWSC 332 [54], citing ***Savcor Pty Ltd v State of New South Wales*** (2001) 52 NSWLR 587; ***Ipoh v TPS Property No 2 Pty Ltd*** [2004] NSWSC 289; ***Badgin Nominees Pty Ltd v Oneida Ltd***; ***Zeke Services Pty Ltd v Traffic Technologies Ltd***.
[30] ***The Heart Research Institute Ltd v Psiron Ltd*** [2002] NSWSC 646 [25], [30] (Einstein J).
[31] ***Badgin Nominees Pty Ltd v Oneida Ltd*** [133].
[32] ***Badgin Nominees Pty Ltd v Oneida Ltd*** [137].
[33] ***Badgin Nominees Pty Ltd v Oneida Ltd*** [120].
[34] ***The Heart Research Institute Ltd v Psiron Ltd*** [16], [24] - [25], [83] - [86].

'any' dispute. The word 'any' is of broad import, as Edelman J observed in ***JTA Le Roux***.[35]

62 Further, the parties specifically distinguished between matters that may go to expert determination and matters that must. They agreed that:

- Certain disputes *may* be determined by an expert pursuant to cl 20 (and this covers a dispute under cl 19.5);[36]
- Certain other disputes *must* be determined by an expert pursuant to cl 20 (and this covers a dispute to be referred under cl 11.7).

63 The expert determination regime under cl 20 facilitates a quick and efficient resolution of a dispute about the ROFR process, and by an expert with appropriate expertise. That is what the parties bargained for, and it is not surprising. A long-running dispute about a ROFR would potentially deny a seller the ability to sell product for a substantial period. The cl 20 regime brings certainty and resolves a dispute in a short period of time.

64 The dispute falls within the ambit of cl 11.7. The Proposed Sale Notice was issued under cl 11. The default notice issued by ACN takes issue with the validity of the Proposed Sale Notice. The dispute notice issued by Pilbara Minerals describes the dispute as being whether the Proposed Sale Notice complies with the requirements of cl 11. The plaintiffs' pleaded case concerns the validity of the Proposed Sale Notice, seeks a declaration that it is not a valid notice, and seeks the issue of a valid notice.

65 The issue central to each of the default notice, the dispute notice and the pleaded case is whether the Proposed Sale Notice complies with the provisions of cl 11. It is clearly a dispute within the ambit of cl 11.

66 The parties are experienced in business and well able to look after themselves.[37] The Sale Agreement was drafted by lawyers. The parties should be kept to the bargain made under the Sale Agreement. As Gillard J said in ***Badgin***, 'They put it in place, it binds them'.[38]

ACN's submissions

67 ACN asserts no stay should be granted.

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[35] ***JTA Le Roux as trustee for the FLR Family Trust v Lawson*** [74].

[36] Clause 19.5 provides that if there is a dispute as to GST, 'the disputing Party may refer the matter for determination by an Expert'.

[37] ***Badgin Nominees Pty Ltd v Oneida Ltd*** [26].

[38] ***Badgin Nominees Pty Ltd v Oneida Ltd*** [134].

68 ACN contends that the court is the proper forum for resolution of the dispute because of the 45-day exercise period. A first instance judge can decide the issue and the Court of Appeal can resolve an appeal within that time frame. Even if an expert determines the matter within the exercise period, if there is manifest error, there is insufficient time for ACN to vindicate its rights before the court.

69 ACN seeks specific performance by way of an order that Pilbara Minerals issue a notice that complies with the terms of cl 11.2, and says an expert cannot grant such relief.

70 ACN contends that the conduct of Pilbara Minerals tells against the exercise of discretion in its favour. It says Pilbara Minerals initially entered into contractual arrangements with General Lithium in July 2016. It failed to respond to its letter of 9.54 am on 15 September 2016 before issuing the Proposed Sale Notice at 10.42 am. Pilbara Minerals delayed in issuing the dispute notice and failed to respond to the default notice.

71 ACN says it has a crystallised right to sue under cl 15. It says such right crystallised five business days after the issue of the default notice and that as Pilbara Minerals did not respond to the default notice, Pilbara Minerals cannot now contend that the dispute resolution process must be followed.

72 ACN also contends in its first submissions[39] that the issue in dispute is not amenable to resolution by an expert and there is no obligation on the part of the expert to determine it within the exercise period. In considering that submission, I take into account that ACN's first submissions may have been prepared before it was confirmed that Mr Colvin SC was the nominated expert and before Mr Colvin SC agreed to determine the matter by 24 October 2016.

73 For completion, I note two further matters. First, in a footnote to its written submissions, ACN referred to ***Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd***,[40] in which Heenan J found that the dispute resolution clause in question comprised an impermissible ouster of the court's jurisdiction.

74 As Wheeler JA noted in ***Straits Exploration v Murchison***, the finding in ***Baulderstone*** that the relevant dispute resolution clause was

[39] ACN's submissions filed 11 October 2016.
[40] ***Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*** (1997) 14 BCL 277.

against public policy as purporting to oust the jurisdiction of the court, has been the subject of some criticism.[41] Further, Wheeler JA said:[42]

> The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court. A considerable number of cases demonstrating this trend are collected in the reasons for decision of Einstein J in ***The Heart Research Institute Ltd v Psiron Ltd*** [2002] NSWSC 646 at [16] - [33]. (See also ***Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Aust) Pty Ltd*** [2005] VSCA 133 at [50] and ***Zeke Services Pty Ltd v Traffic Technologies Ltd*** [2005] QSC 135 at [21].)
>
> The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider.

75 Taking into account the principles and authorities referred to in [53] - [59] above and the terms of cl 11.7 and cl 20 of the Sale Agreement, I do not consider that cl 11.7 comprises an impermissible ouster of the court's jurisdiction.

76 Second, whilst I refer in these reasons to the bargain made between the parties, the 'bargain' set out in cl 11 was originally negotiated as between Pilbara Minerals and Global Advanced, ACN having acquired its relevant interests by assignment from Global Advanced. Neither party suggested this affects the application of principles in this case.

Consideration

77 The various submissions distil to seven questions.

(1) By cl 11.7 have the parties agreed to expert determination?

78 The clause is clear on its face. Clause 11.7, sitting as it does within the ROFR regime, is intended to have the effect that the parties must submit any dispute arising under cl 11 to expert determination in accordance with cl 20. Clause 20 reinforces the position, distinguishing between discretionary and imperative referral. If, as Pilbara Minerals has done, a party issues a notice referring the dispute to expert determination, then the parties have agreed that the dispute is to be resolved in that manner.

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[41] ***Straits Exploration v Murchison*** [22].
[42] ***Straits Exploration v Murchison*** [14] - [15].

(2) Does the dispute fall within the ambit of cl 11?

79 Regardless of how it is painted, the dispute is about the validity of the Proposed Sale Notice and whether it complies with the terms of cl 11.2. In my view, that is a dispute within the ambit of cl 11.

80 ACN submitted that there is a distinction between determining the issues the subject of the default notice and the issues the subject of the dispute notice, but in my view there is no real distinction. The central question is the same: does the Proposed Sale Notice comply with the terms of cl 11.2.

81 Whilst ACN also seeks in the proceedings an order for specific performance, it must be remembered that it first seeks relief by way of a declaration that the Proposed Sale Notice is invalid. Any issue of specific performance does not arise unless and until it is determined to be invalid.

(3) Is the dispute capable of being determined by Mr Colvin SC?

82 It is a matter of public record that Mr Colvin SC was appointed senior counsel in 2001. He has unquestionably the appropriate expertise to determine questions of law.

83 As noted above, the questions in issue involve generally the construction of cl 11 of the Sale Agreement, the Proposed Sale Notice and the Offtake Agreement. Whilst they may involve some complexity, in my view they are questions amenable to determination by someone of Mr Colvin SC's experience who is duly appointed under cl 20.

(4) What is the relevance of securing a decision from the Court of Appeal?

84 I do not consider the existence of a timing imperative weighs against the grant of a stay. The parties agreed that the exercise period is 45 days. That is the bargain they struck. Whilst it is possible that a dispute may be determined by a first instance judge and any appeal may be determined by a Court of Appeal within that time period, it would depend upon matters such as appropriate allocation of court resources and the questions involved in any trial and appeal. If parties intend that an exercise period should accommodate potential appellate court proceedings, a period considerably greater than 45 days ought to be allowed. Providing for a lengthy time period may well undermine the very purpose for which alternate dispute resolution processes are encouraged and recognised by the courts: speedy and efficient resolution of disputes. As senior counsel for Pilbara Minerals submitted, a time period that allows for a trial, appeal

and potentially a special leave application may defeat the whole purpose of an expert determination clause.

85 The dispute is to be finally determined by a contractually agreed process within the exercise period. That is the course the parties anticipated and agreed upon for the resolution of a cl 11 dispute.

(5) What is the relevance of ACN seeking specific performance?

86 As already noted, in addition to seeking a declaration that the Proposed Sale Notice is invalid, ACN seeks an order that, '[Pilbara Minerals] specifically perform cl 11 of the Sale Agreement by providing to Mineral Resources and ACN a proposed sale notice that complies with the requirements of the clause'.

87 The relief sought has to be viewed in context. The court would only consider the claim for specific performance if it first declares the Proposed Sale Notice invalid. It is not for the court to draft or supervise the content of any fresh notice (and ACN did not suggest otherwise). In any event, it does not follow that specific performance would be ordered.

88 To date, Pilbara Minerals has issued two notices under cl 11.2 and the plaintiffs have asserted both are defective. If the Proposed Sale Notice were declared invalid by the court, there is no reason to expect that Pilbara Minerals would not issue a further notice, after having regard to the court's reasons and its obligations under the Offtake Agreement. Its conduct to date is consistent with that of a party seeking to proceed under cl 11.2. Mr McKenna confirmed in court during the various directions hearings in this matter that his instructions were indeed that if the Proposed Sale Notice were determined to be invalid, Pilbara Minerals intended to issue a new one.

89 I note the approach of Pritchard J in ***Santos Offshore v Apache Oil***, where her Honour, having declared invalid a notice issued to a joint venture party under a pre-emption right regime, said:[43]

> Finally, I turn to the question of specific performance. In my view, this is not an appropriate case for an order for specific performance. Nothing in the facts before the Court suggests that the defendants do not intend to comply with their obligation to give a notice which complies with cl 12.3 of the Spar JOA. Once declarations are made that the Notices are invalid, the obligation on the defendants to issue a Notice will be re-enlivened.

[43] ***Santos Offshore Pty Ltd v Apache Oil Australia Pty Ltd*** [117].

90 Consistent with Pritchard J's approach and taking into account Pilbara Minerals' stated intentions, it ought not be assumed that specific performance would be granted in the manner sought by ACN in any event.

91 If Mr Colvin SC determines that the Proposed Sale Notice is invalid, it follows that Pilbara Minerals would consider the terms of his determination before issuing any new notice under cl 11.2 and would also consider its position under the Offtake Agreement. It has expressly confirmed its obligation in such circumstances to issue a new and compliant notice.[44]

92 Accordingly, in either scenario, the likely outcome is Pilbara Minerals considering its position and seeking to issue a new and compliant notice. I do not consider the lack of power in an expert to order specific performance is a distinction that justifies the proceedings continuing. It is not persuasive in the exercise of discretion in this case.

(6) Does ACN have a 'crystallised right to sue' that overrides cl 11.7?

93 Clause 15 conditions the commencement of proceedings. It is, as senior counsel for Pilbara Minerals described it, a gateway provision. It delays a party seeking relief from the court until the party allegedly in default has had an opportunity to remedy it.

94 Clause 15 is a general provision. Nothing in the wording of cl 11.7 suggests its specific terms are to be read subject to the general terms of cl 15. In my view, cl 11.7 operates where a dispute falls within its ambit, regardless of whether a default notice has issued and regardless of whether a party has initiated court proceedings (at least in the absence of any issue of waiver).

95 I do not consider anything turns on the fact that the default notice was issued before the dispute notice. Pilbara Minerals' intention to rely on the expert determination process in the event of dispute had been disclosed well before the default notice issued. A referral to expert determination was foreshadowed in the letter to ACN's solicitors of 9 September 2016.[45] That prospect was also referred to in Court.[46] The dispute notice was issued immediately after the conclusion of without

[44] A matter confirmed in its reply submissions dated 13 October 2016 [18].
[45] Greer Affidavit GSG5, page 170.
[46] Directions hearing, CIV 2700 of 2016, 30 August 2016.

prejudice discussions. Accordingly, I reject ACN's assertion that the dispute notice was issued 'in answer to the default procedure'.[47]

96 ACN submits that its rights under cl 15 must have priority; otherwise a party could issue a dispute notice referring the dispute to expert determination and seeking a stay on the eve of trial. That prospect does not compel acceptance of ACN's contention. The answer to its contention is that where a stay application is brought so late, the party resisting the stay may have a strong argument that the court's discretion should not be exercised in favour of a stay.

(7) Does the conduct of Pilbara Minerals weigh against the exercise of the discretion to stay?

97 I do not consider there has been any conduct on the part of Pilbara Minerals that exhibits delay or any intention to inhibit the resolution of the dispute within the 45-day exercise period.

98 On the contrary, by its withdrawal of the first notice and by the issue of the draft Proposed Sale Notice, Pilbara Minerals has displayed a willingness to cooperate with ACN in an attempt to narrow differences about the content of any notice under cl 11.2.

99 I do not consider anything turns on ACN's complaint that the Proposed Sale Notice was issued shortly after the letter of 15 September 2016 was sent on behalf of ACN. The letter passed directly between the respective solicitors, whilst the Proposed Sale Notice was apparently issued by Pilbara Minerals direct to ACN. There is no evidence of what occurred in the short window of time between those communications. In any event, it appears ACN had not responded to Pilbara Minerals' communications in the requested time frame.

100 Nor do I consider anything turns on the failure of Pilbara Minerals to respond to the default notice. It had no obligation to respond. It was open to it to continue to rely upon the Proposed Sale Notice, cognisant of the dispute as to its validity.

101 I do not accept ACN's characterisation of Pilbara Minerals' conduct in issuing the dispute notice as dilatory. A referral to an expert was always foreshadowed. The notice was issued as soon as without prejudice communications ceased. The parties have secured an expert who has agreed to determine the dispute by 24 October 2016.

[47] ACN's submissions filed 11 October 2016 [17].

102 In all of the circumstances, and having carefully considered the chronology of this dispute, I do not consider there has been conduct on the part of Pilbara Minerals that dissuades me from exercising my discretion to grant a stay.

Conclusion

103 I acknowledge ACN's desire to have its day in court, but in my view, it bargained away that right in favour of the finality of an expert determination. ACN has not met the heavy onus of establishing why a stay should be refused in the circumstances of this case.

104 I consider the dispute is amenable to determination by the appointed expert. There are undoubtedly arguments to be developed by both parties with respect to the validity of the Proposed Sale Notice, and that can proceed within the expert determination process.

105 Accordingly, Pilbara Minerals is entitled to a stay of the proceedings.

106 I will hear the parties as to the orders that should be made.