FEDERAL COURT OF AUSTRALIA

Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd [2017] FCA 1240

File number:	WAD 341 of 2017
Judge:	**MCKERRACHER J**
Date of judgment:	20 October 2017
Catchwords:	**PRACTICE AND PROCEDURE** – application for stay of proceedings – exercise of discretion to grant stay – whether respondent has failed to comply with dispute resolution clause **CONTRACT** – construction of dispute resolution clause – whether dispute resolution clause applicable to the dispute - whether nature of dispute falls within the ambit of the dispute resolution clause – applicable principles – where there is limited content of the procedural aspects of the clause – where dispute involves complex factual and credit issues – where dispute resolution clause does not produce a binding outcome
Legislation:	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) *Federal Court of Australia Act 1976* (Cth) s 51A *Native Title Act 1993* (Cth) ss 29(1), 29(2)(a), 56, 225(b), 225(e), 253 *Onslow Solar Salt Agreement Act* 1992 (Cth) *Aboriginal Heritage Act 1972* (WA) *Mining Act 1978* (WA)
Cases cited:	*Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041 *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 *Huddart Parker Ltd v Ship Mill Hill* (1950) 81 CLR 502 *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016]

WASC 338
Raskin v Mediterranean Olives Estate Ltd [2017] VSC 94
Savcor Pty Ltd v New South Wales (2001) 52 NSWLR 587
Straits Exploration (Australia) Pty Ltd v Murchison United NL (2005) 31 WAR 187
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563

Date of hearing:	14 September 2017
Registry:	Western Australia
Division:	General Division
National Practice Area:	Native Title
Category:	Catchwords
Number of paragraphs:	82
Counsel for the Applicant:	Mr S Penglis
Solicitor for the Applicant:	Bennett + Co
Counsel for the First Respondent:	Mr SK Dharmananda SC with Mr J Southalan
Solicitor for the First Respondent:	Gilbert + Tobin
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

WAD 341 of 2017

BETWEEN:	**BUURABALAYJI THALANYJI ABORIGINAL CORPORATION (RNTBC)** Applicant
AND:	**ONSLOW SALT PTY LTD (ACN 050 159 558)** First Respondent
	STATE OF WESTERN AUSTRALIA Second Respondent
JUDGE:	**MCKERRACHER J**
DATE OF ORDER:	**20 OCTOBER 2017**

THE COURT ORDERS THAT:

1. The application for stay of the proceedings be dismissed.
2. The first respondent pay the costs of the applicant, to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

INTRODUCTION

1 The Buurabalayji Thalanyji Aboriginal Corporation (**BTAC**) has commenced proceedings against **Onslow Salt** Pty Ltd (ACN 050 159 558) and the **State** of Western Australia. Central to the dispute is a **Deed**, described as a Development Deed, executed by Onslow Salt and various native title claimants (who are now represented by BTAC) on 1 March 1996. Onslow Salt complains that BTAC, by commencing proceedings, has failed to comply with the requirements of a dispute resolution clause (**DRC**) within the Deed. It seeks a stay of the proceedings.

2 The complaint that BTAC did not confer or refer the dispute to an expert in the manner and terms designated in the DRC is not disputed. However, the requirement to do so is challenged. It is contended that the nature of the dispute is not one to which the DRC is directed and further that it would be impossible on any realistic assessment for an expert to resolve the issues raised in the dispute.

3 For the reasons that follow, in my view, the DRC is not applicable to the dispute as pleaded in this particular case and, in those circumstances, I would not stay the proceedings.

THE DISPUTE

4 For the purpose of resolution of this application, it is necessary only to consider the statement of claim and the assertions giving rise to the dispute.

5 None of the matters referred to below represent findings of the Court, but are taken purely from the statement of claim.

The statement of claim

6 In a lengthy pleading (90 pages, including attachments) BTAC contends that it is a duly incorporated native title prescribed body corporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Since 18 September 2008, BTAC has been the holder of native title rights and interests on trust in terms of s 56 of the *Native Title Act 1993* (Cth) (**NTA**) on behalf of the Thalanyji people, pursuant to a determination in this Court on that date in favour of the Thalanyji people. The nature and extent of the native title rights and interests and the exclusiveness of native title (s 225(b) and (e) NTA respectively) in relation

to the determination area confers the following non-exclusive rights on the native title holders (including the right to conduct activities necessary to give effect to them):

(a) to enter and remain on the land, camp, erect temporary shelters etc;

(b) to hunt, fish and gather;

(c) to take and use water (not being water captured by holders of pastoral leases);

(d) to engage in ritual and ceremony on, and in relation to, the land and waters in the determination area; and

(e) to care for, maintain and protect from physical harm particular sites and areas.

7 The rights and interests, however, do not confer possession, occupation, use and enjoyment to the exclusion of all others or a right to control the access to, or use of, the land and waters of the determination area or their resources.

8 By the **Onslow Salt Agreement** entered into on 2 November 1992 between Onslow Salt and the State, and ratified by the *Onslow Solar Salt Agreement Act 1992* (Cth), the State agreed to grant a mining lease to Onslow Salt under the ***Mining Act*** *1978* (WA) for evaporites in respect of the land in the **salt mining area** as described under the Onslow Salt Agreement. The Onslow Salt Agreement was designated as being one of the 'Other Interests' in the determination area, specifically, tenement AM 7000273 (the **Mining Lease**), held by Onslow Salt from the date of grant, being 16 April 1996. The State was represented by Mr Colin Barnett, then **Minister** for State Development and Premier. It is said that Onslow Salt, in relation to all events and matters pleaded, was represented by its Chief Executive Officer (**CEO**), Mr Matsuyama, its General Manager of Operations, Mr Rod Baker and Ms Anita Sarich.

9 By cl 7 of that Agreement, Onslow Salt was entitled to submit, for approval by the Minister, additional proposals to allow it to significantly expand, modify or otherwise vary its activities beyond approved activities or for the development of the area specified in that clause as 'the area coloured red'. Any such mining lease was to be substantially in the form of the schedule to the Onslow Salt Agreement. Onslow Salt was to pay rental and could surrender to the State any portion of the salt mining area with the approval of the Minister. It was to pay royalties to the State on all salt produced and transported under the Onslow Salt Agreement. Under circumstances described in the Onslow Salt Agreement, the State could resume any part of the salt mining area.

10 It is pleaded that the power of the Minister to approve any additional proposal under cl 7 of the Onslow Salt Agreement was subject to conditions, implied by law, that such power could only be validly exercised:

(a) to approve a genuine and accurate additional proposal submitted to the Minister;

(b) in a *bona fide* manner and not for any ulterior or improper purpose; and

(c) subject to the terms and conditions of the Mining Lease.

11 On 14 April 1996, the Minister, pursuant to the Onslow Salt Agreement, granted the Mining Lease which covered the salt mining area. The salt mining area is located to the southwest of the town of Onslow, near the coast. There were express conditions of the Mining Lease (by cl 12 and cl 13) that the development of the salt mining project (the **Project**) be carried out in a manner so as to create the minimum practicable disturbance to the existing vegetation and natural landform and that all topsoil being removed ahead of all mining operations from sites (such as pit areas, waste disposal areas, ore stockpile areas, pipeline, haul roads and new access roads) be later respread or immediately respread as rehabilitation progresses.

12 The Thalanyji native title area includes and covers the salt mining area.

13 The Department of State Development (the **DSD**), under the Minister, has administered on behalf of the State the various agreements by relevant officials for the State who participated in a variety of ongoing meetings. The knowledge and information gained in those meetings is said to be attributable to the Minister, as a matter of law.

14 Next, it is pleaded that **Chevron** Australia Pty Ltd (ABN 290 861 97757) has planned for and, since 2011, operated the land based part of its Wheatstone liquefied natural gas project (**Wheatstone Project**) adjacent to and to the west of the salt mining area in the Ashburton North Strategic and Industrial Area (**ANSIA**). Chevron was duly represented in relation to matters as set out in the statement of claim by identified persons.

15 It is contended that the salt mining area has been a part of the waste lands of the Crown in the right of the State within the meaning of s 3 of the *Constitution Act 1890* (Imp) as it continues to apply in Western Australia. The entire management and control of the waste lands, also known as **Crown land**, vests in the legislature of Western Australia as do the proceeds of the sale, letting or disposal of it, including all royalties, mines and minerals.

16 The statement of claim also pleads the Deed itself and a Future Act Agreement. The Deed is described as follows:

> 17. Onslow Salt entered into a [Deed] with the Native Title Claimants for the Thalanyji people on 1 March 1996 (the **[Deed]**).
>
> 18. Since 18 September 2008 BTAC has represented the Native Title Claimants and has succeeded to their rights and entitlements under the [Deed] by virtue of s 56 of the NTA.
>
> 19. Since 18 September 2008 BTAC has been a party to the [Deed] pursuant to s 24EA(1)(b) of the NTA.
>
> 20. An express material term of the [Deed] was to the effect that Onslow Salt agreed to consult such claimants (at all material times since 18 September 2008 represented by the BTAC) concerning the safeguarding and monitoring of the environment associated with the Project Area, that is the salt mining area (clause 11.2).
>
> 21. Schedule 1 to the [Deed] contained a further Deed executed on or about 1 March 1996, being the Future Act Agreement, as defined in clauses 1.1 and 4.1(c) of the [Deed] (the **Future Act Agreement**). In terms of clause 4.1(c) of the [Deed], the Native Title Claimants agreed at the request of Onslow Salt to execute an agreement with Onslow Salt and the State allowing the grant of the Mining Lease and related interests in the form of Schedule 1 to the [Deed], being the Future Act Agreement.
>
> 22. The parties to the Future Act Agreement were the State of Western Australia and the Minister for Mines (as the Government Party), the Native Title Party (the Thalanyji People) and Onslow Salt.
>
> 23. BTAC has since 18 September 2008 represented the Native Title Party pursuant to s 56 of the NTA and has since then been a party to the Future Act Agreement pursuant to s 24EA(1)(b) of the NTA.
>
> 24. An express material term of the Future Act Agreement was that the Native Title Party agreed to the granting of the mining lease (being application no 7000273), that is the Mining Lease (clause 3).

17 In addition there is a Land Agreement pleaded in these terms:

> 25. On or about 12 January 2010, Onslow Salt and Chevron entered into a written Land Agreement (the **Land Agreement**).
>
> 26. Under the Land Agreement:
>
> > 26.1 Onslow Salt agreed to surrender part of the area covered by the Mining Lease ie part of the salt mine area, to Chevron, to be used by the latter as part of its Wheatstone project. The land to be surrendered was set out in Schedule 2 of the Land Agreement (the surrender area). The plan of its surface is in the shape of a trapezium, and it is 343.24 hectares in size;
> >
> > 26.2 such surrender had to take place when Chevron notified Onslow Salt that it required the whole or a specified portion of the surrender area, as provided in clause 2.1 (the **required area**);

26.3 in terms of clause 2.2, such surrender would take place in one of two ways:

(a) Onslow Salt shall surrender to the State the required area pursuant to clause 10(8) of the Onslow Salt Agreement (pleaded in paragraph 8.7 above), with the State then making such land available to Chevron for use in its Wheatstone project (clauses 2.2(d) and 5.3); or

(b) Onslow Salt shall consent to the State resuming the required area with the State then making such land available to Chevron for use in its Wheatstone project (clauses 2.2(e) and 5.3);

26.4 pursuant to Schedule 3, Chevron shall pay to Onslow Salt:

(a) $250,000 (GST exclusive) on the effective date of the Land Agreement being 12 January 2010;

(b) a further $400,000 (GST exclusive) within 10 business days of the date on which Onslow Salt complied with its obligations under clause 2.2, pleaded in paragraph 26.3 above;

26.5 pursuant to clause 7, Onslow Salt acknowledged receipt of an earlier flood study done for Chevron by URS dated 18 March 2009, and the parties agreed that Chevron shall fund a further Joint Flood Study by URS (the **Joint Flood Study**) to determine the Flooding Impact for the operations of Onslow Salt of Chevron's proposed activities on the surrender area;

26.6 pursuant to clause 7(f), Chevron must take reasonable steps to modify the Project drainage to mitigate Flooding Impact, if such flood study showed that Chevron's activities on the surrender area would have a Flooding Impact on the salt mining area;

26.7 "Flooding Impact" is defined in clause 7(g), to mean the adverse impact on the levee structures of Onslow Salt's evaporation ponds caused by a variation of the height of flood water within the Joint Flood Study Area which is attributable to changes in natural drainage of rainfall or flow of seawater caused by Chevron's activities on the surrender area;

26.8 in terms of paragraph 26.3(a) above, Onslow Salt surrendered the whole of the required area to the State on or about 12 September 2011, to become part of ANSIA and made available by the State to Chevron.

18 There are two further agreements pleaded, described collectively as the '**Ostensible Agreements**'. The statement of claim describes those agreements in these terms:

27. On or about 13 July 2011, Onslow Salt and Chevron executed two related documents respectively named the Onslow Salt - Fill Agreement (the **ostensible Fill Agreement**) and Variation Deed no 1 to the Onslow Salt Land Agreement (the **ostensible varied Land Agreement**).

28. The ostensible Fill Agreement contained the following material express

provisions:

28.1 Onslow Salt appoints Chevron as the sole independent contractor to excavate and remove at Chevron's own costs up to 10 million cubic meters of Fill Material from the salt mining area (to an area outside the area of the Mining Lease) for the purpose of flood water management (Recital B; clauses 2.1 and 2.2; 4.4(a); 5.2(b)). ("Fill Material" is defined to mean fill material including soil, sand, clay, gravel and cap rock (clause 1.1)).

28.2 Chevron had to give Onslow Salt written notice, referred to as the **First Notice**, within 12 months of the Effective Date of the ostensible Fill Agreement that it had the capacity to remove the material and specify from which Fill Sites in the salt mine area and within what time frame it proposed to remove the Fill Material (clause 4.1).

28. 3 As soon as practicable, and no later than 10 business days after receipt of the First Notice, Onslow Salt must give notice to the Minister of its desire to significantly modify its operations for flood management by removal of the Fill Material (clause 4.3).

28.4 Further to paragraph 28.3 Onslow Salt then had to submit an additional proposal (the **Additional Proposal**) to the Minister, as required by clause 7(1) of the Onslow Salt Agreement (clause 4.4(a)).

28.5 Chevron will be responsible at its own costs for preparing the Additional Proposal and to provide to Onslow Salt a draft for final endorsement by it and submission to the Minister (clause 4.4(b)).

28.6 Chevron shall pay any royalties which may be payable to the State under the Mining Act for the removal of the Fill Material and indemnify Onslow Salt against any such possible liability (clause 5.20)).

29. The ostensible varied Land Agreement contained the following material express provisions:

29.1 Changes to the State's planning for the ANSIA necessitated changes to the Land Agreement (Recital C).

29.2 Clause 7(f) of the Land Agreement shall be amended to add a provision that payments made by Chevron to Onslow Salt in accordance with items 3 and 4 of Schedule 3, shall be made in full and final satisfaction of all Claims by Onslow Salt against Chevron in respect of any Flooding Impact.

29.3 A new Schedule 1 to the Land Agreement was added, headed "Payments", which provided for the following payments by Chevron to Onslow Salt:

(a) The amount of $15 million (GST exclusive) payable within 20 Business Days of the date on which Onslow Salt complies with its obligations in accordance with clause 2.2 of the Land Agreement.

(b) A total of $60 million (GST exclusive) payable within the

following time frames after Chevron has made its final investment decision (FID) to proceed with the Wheatstone project:

Payment No	Payment Timing	Amount Due (in millions, GST exclusive)
1	6 months after FID	25.0
2	12 months after FID	7.0
3	18 months after FID	7.0
4	24 months after FID	7.0
5	30 months after FID	7.0
6	36 months after FID	7.0
Total		**60.0**

30. BTAC relies on the facts and circumstances pleaded in paragraphs 31 to 40 below to say that the two ostensible agreements were sham agreements in the respects pleaded in paragraph 41 below.

19 It is pleaded (in substance) that the Ostensible Agreements were 'sham agreements' as their true purpose was to provide Chevron with fill for the Wheatstone Project and there was never any flood risk which required treatment. Those factors are pleaded as follows:

31. Chevron identified its need and desire to obtain fill (up to 10 million cubic meters) for its Wheatstone project from specific locations in the salt mine area (the **fill areas**) before any issue of so-called flood mitigation in the salt mine area was raised and Chevron did so quite independently from any flood mitigation issue. Chevron did so without any reference to so-called flood mitigation in the salt mine area or how the fill removal would interact with the so-called flood mitigation.

Particulars

(1) Memorandum of Understanding between Onslow Salt and Chevron dated 29 March 2010, relating to access to fill material (referred to in the attachment to document 108, dated 15 November 2010).

(2) Document 85, emails from Hegney to Matsuyama dated 21 and 23 September 2010.

(3) Document 89, dated 30 September 2010.

(4) Document 122, Technical Memorandum dated 28 September 2010.

(5) Document 103, dated 29 October 2010.

(6) Document 108, an email dated 15 November 2010, and its attachment: Discussion Draft as basis for Formal Agreement, of the same date, by Chevron to Onslow Salt. The attachment inter alia contained a proposal that Chevron will pay Onslow Salt $12.5

million for the removal of fill from the Mining Lease, and proposed the removal of some 7.6 million cubic meters from Borrow Sites 2, 3 and 4. It also proposed that Chevron be liable for any royalties which may be due under the Mining Act for fill material removed from the land.

(7) Document 115, email chain dated 30 November 2010 to 6 December 2010.

32. Onslow Salt only thereafter proffered "flooding water management" as a purpose for the fill removal. See the email in document 149, dated 16 March 2011.

33. Chevron at all material times planned to excavate (and did excavate) three elevated areas (the fill areas) in the salt mine area - named so-called "islands". As a matter of fact, any such excavation could only have a material flood mitigation effect in the salt mining area if the excavation would cause flood levels to be lowered or the flow of flood waters to be less impeded. However, in terms of the excavation planned and executed by Chevron, the stated minimum height of the soil remaining at the fill areas after excavation, was at 1.5 Australian Height Datum (**AHD**). That was still above the height of the highest predicted astronomical tide for the salt mine area caused by the inflow of sea water, which was 1.36 AHD. In the result, the excavation had no result even at the highest astronomical tide. Moreover, the flood studies obtained by Chevron and Onslow Salt had not identified any material risk from riverine flooding to Onslow Salt's operations in the salt mining area. Excavation to the level of 1.5 AHD referred to above, was not determined with reference to any flood mitigation but was rather determined by Chevron's operational requirements for removal of the fill and the rehabilitation of the affected areas thereafter. Such excavation could not or did not lower flood water levels materially or ease the flow of flood waters. See further at paragraph 48.1 below.

34. There has never been any correlation between Chevron's required volume of fill (up to 10 million cubic meters) and so-called flood mitigation on the salt mine area.

35. In any event, none of the flood studies relating to the salt mine area and commissioned by Chevron and/or Onslow Salt, identified any material risk of flooding in the salt mine area for any works or operations of Onslow Salt, resulting from works done on the adjacent Wheatstone area. At most any such flooding in the salt mine area could cause a small overtopping of the levees (protective embankments) of the evaporation ponds but in fact such levees could readily be built up to deal with such a possibility.

Particulars

On increasing the heights of the levees, see document 112, dated 16 November 2010 and document 157, email to Baker, dated 30 March 2011.

36. In a number of draft Additional Proposals, information on the purported flood mitigation effects were given in a Table 1. These however only showed a minimal reduction in flood levels through the fill removal.

Particulars

(1) Document 213, dated 29 September 2011, attaching a draft Additional Proposal from Chevron: Table 1 on p 11 and further.

(2) Document 218, dated 5 October 2011: attachment, p 15 and further: Table 1.

37. Table 1 then disappeared in the draft Additional Proposal dated 17 November 2011 (document 236) and was not reproduced in the final Additional Proposal submitted to Barnett (the **final Additional Proposal**). (Document 263, dated 18 January 2012, letter to Barnett from Onslow Salt, attached the final Additional Proposal bearing an "issued for use" date of 16 January 2012.)

38. During the drafting process leading to the final Additional Proposal, the DSD queried the rationale of flood reduction and whether the fill removal could be justified on a cost-benefit analysis, and queried for instance how much damage overtopping of the levees could cause to crystallisers. (See document 243 dated 28 November 2011.) This was however never followed up by DSD, or by Chevron and Onslow Salt.

39. A number of the draft Additional Proposals mentioned the need for fill on the part of Chevron and flood mitigation, as dual purposes for the Proposal, but the need for fill was then dropped from the final Additional Proposal document – although the Civil Execution Plan done for Chevron, dated 29 February 2012, that is after Barnett's purported approval of the Additional Proposal, still mentioned both.

40. The consideration eventually contained in the Schedule to the ostensible varied Land Agreement (see paragraph 29.3 above) was in reality consideration for Onslow Salt allowing Chevron to remove the material or fill as appears from the following:

40.1 The original Schedule to the Land Agreement contained payments totalling $650,000 for the part of the Mining Lease to be surrendered by Onslow Salt to Chevron. (See paragraph 26.4 above).

40.2 Thereafter, several draft versions or proposals of the ostensible Fill Agreement contained details of the substantial payments to be made by Chevron to Onslow Salt under *that* Agreement - which BTAC says reflected the reality of the situation.

Particulars

(1) Document 108, 15 November 2010 put the value of fill to Chevron as follows: it would pay Onslow Salt $12.5 million, save costs of $8 million in not having to source the fill elsewhere and pay royalties to the State of $10 Million.

(2) Document 115, email chain between Baker and Matsuyama, 6 December 2010: Baker: "I guess it comes down to how much they (Chevron) are willing to pay (for the fill)."

(3) Document 145, 10 March 2011: payment by Chevron under Fill Agreement now proposed as $1 million for licence to remove fill; varied Land Agreement contains staggered payments totalling $7 4 million from Licence Notice Date, ie when Chevron seeks to exercise the licence under the Fill Agreement.

(4) Document 148, dated 15 March 2011: Hegney to Matsuyama: tax concerns of Onslow Salt can be addressed

by a restructure: simply moving the Payments Schedule from the Variation to the Land Agreement, to the Fill Agreement.

(5) Document 151, email chain of 22 March 2011 and attached draft Agreements. These drafts implemented the proposals in document 148 (above). The Land Agreement was not varied from its original version, pleaded in paragraph 26 above; the Fill Agreement now shows "licence fee" payments by Chevron to Onslow Salt totalling $75 million.

(6) Document 155, dated 28 March 2011: same payment structure as in document 151 (above) but payments of $75 million in draft Fill Agreement, Schedule 2, designated as for "access fee" payable by Chevron.

40.3 The payment sum of $75 million was then shifted and swapped around in the final versions of the two ostensible agreements: a new Schedule to the ostensible varied Land Agreement contained the payments totalling $75 million. These payments were stated, for the first time, to be in full and final satisfaction of all claims by Onslow Salt against Chevron in respect of any Flooding Impact.

40.4 However, in truth and in fact:

(a) there was only a minimal risk of any Flooding Impact on the salt mine area;

(b) the said sum was totally disproportionate to any such risk;

(c) there was never any calculation to seek to correlate that sum to the alleged Flood Impact risk;

(d) whereas the ostensible Fill Agreement mentions flood mitigation in two places, namely as "flood water management" in Recital B and "flood mitigation" in clause 4.3, none of the flood studies identified any material risk of flooding;

Further Particulars

(1) The URS Joint Flood study obtained under the Land Agreement, did not identify any major flooding risks. It only referred to "marginally higher" flood levels. See document 98 dated 21 October 2010.

(2) See further at paragraph 48 below.

(e) the volumes of fill required were set by Chevron, not Onslow Salt. See document 81 dated between 6 and 20 September 2010;

(f) there was never any correlation between the volume of fill required by Chevron and any flood mitigation;

(g) in a number of draft Additional Proposals, information on the purported flood mitigation effects of the fill removal were given in a Table 1. These however all only showed a minimal reduction in flood levels through the fill removal. See document 213 dated 29 September 2011 and the full

reduction table in document 218 dated 5 October 2011. Therein the reduction in flood level by the fill material is estimated to be only some 0.14 m in a 100 year Average Recurring Interval (**ARI**). Expert advice to Onslow Salt was that their levees were designed to prevent overtopping in a 50 year ARI event which was the critical event to consider: document 100, dated 27 October 2010.

Sham elements

41. The relevant sham elements in the ostensible varied Land Agreement and the ostensible Fill Agreement were:

41.1 the exclusive, alternatively a substantial, reason for and purpose of the removal of the Fill Material was to meet the need of Chevron to obtain such fill material for its Wheatstone project and the reason or purpose was not flood mitigation in the salt mine area operated by Onslow Salt, as set out in the ostensible Fill Agreement. The latter featured only as a fictional, alternatively trivial, factor;

41.2 Chevron agreed to make $75 million in payments to get Onslow Salt to agree to the removal of the fill and to compensate Onslow Salt on a commercial basis for the value of such fill for which Chevron had a pressing need on its Wheatstone project and which it would otherwise have to source from other areas further removed than the salt mining area;

41.3 the Wheatstone project and any works or activities by Chevron thereon posed no or a very small risk or increase in risk in respect of flooding of Onslow Salt's works or operations on the salt mine area;

41.4 the payments were not in truth and fact agreed to by Chevron on the basis that Onslow Salt had any realistic claims against Chevron in respect of any Flooding Impact flowing from the activities of Chevron on the surrender land;

41.5 no such claims could even remotely justify a payment of $75 million;

41.6 Onslow Salt did not appoint Chevron merely as its contractor to remove the fill to fit in with any flood mitigation works by Onslow Salt. Chevron drove the whole removal process in its own interests, namely to obtain fill to be used on its Wheatstone project, and was in truth granted a licence to that effect by Onslow Salt;

41.7 contrary to Recital C in the ostensible varied Land Agreement, there were no changes to the State's planning for the ANSIA which justified any changes to the Land Agreement as done in the ostensible varied Land Agreement.

20 It is said that the true agreement, described in the statement of claim as '**the real fill extraction agreement**', was for Chevron to be able to remove 10 million cubic metres of fill material from the salt mining area in return for payment of $75 million to Onslow Salt.

21 It is pleaded that in furtherance of the Ostensible Agreements, Onslow Salt applied on or about 18 January 2012 to the Minister for approval of the additional proposal as defined in

para 28.4 of the statement of claim (see [18] above). It applied by writing two letters of that date, drafted by Chevron (**additional proposal application**). In those letters, Onslow Salt stated that its purpose was to mitigate flooding risks to its salt operations.

22 According to the statement of claim, the additional proposal application did not disclose, as was the fact, that the sole or substantial purpose of the additional proposal was to supply Chevron with fill material. It is pleaded that a report dated January 2012 (**2012 Flood Mitigation Report**), in effect, stated that hydrological modelling indicated that for all modelling scenarios, flood water mitigation works would assist to manage flooding impacts. This statement was said to be misleading or deceptive in that any such risk was minimal only and, in any event, flood mitigation works would have no or only a negligible impact on flood events. The additional proposal application did not disclose the fact that Chevron was planning to pay Onslow Salt $75 million for the fill, but represented, in effect, that Chevron would remove the fill to some undisclosed destination at its own cost without making any payment to Onslow Salt and simply as a contractor for Onslow Salt.

23 It is pleaded that on 13 February 2012, the Minister purportedly approved the additional proposal application under the power granted to him in cl 6(1)(a) of the Onslow Salt Agreement. This **purported approval**, it is said, is contrary to the terms of the Onslow Salt Agreement and beyond the power thereunder granted to the Minister in cl 6(1)(a) to approve additional proposals and is therefore void and of no effect at law for various pleaded grounds. It is also said that it was contrary to the Mining Lease, which only provided for the mining of salt by Onslow Salt in the salt mining area and did not permit the quarrying, mining and monetising of a significant volume of material.

24 The Minister was aware, it is pleaded, that the purported approval was granted for an improper, ulterior purpose, namely, to allow Onslow Salt to sell fill to Chevron and for Chevron to obtain such fill for its own purposes. The Minister's knowledge is said to be imputed through what each of the various senior subordinates knew.

25 Alternatively, it is pleaded that, if the Minister did not have the knowledge so pleaded, the approval was nonetheless void and of no effect at law and it was Onslow Salt which misrepresented the facts in its application to the Minister.

26 It is pleaded that Chevron, sometime after, excavated and removed up to 10 million cubic metres of fill material from the salt mine site and deposited it at its Wheatstone Project and

duly made payments of $70 million or $75 million between 13 February 2012 and 31 March 2012.

27 BTAC pleads that as the real fill extraction agreement was in fact a future act, the only way of lawfully implementing it was by the future act process under the NTA. Further, as it was a future act, the State breached its obligation under s 29(1) and s 29(2)(a) of Pt 2, Div 3, subdiv O NTA owed to BTAC by failing to give it notice of the real fill extraction agreement. Consequently, on a proper construction of the NTA, the State committed the tort of breach of statutory duty with regard to BTAC. The relevant future act proceeded, it is said, without notification to BTAC and in negation of BTAC's procedural rights, as defined under s 253 NTA, to enter into and conclude *bona fide* negotiations with the State and Onslow Salt and to enter into an indigenous land use agreement (**ILUA**) under the NTA with Onslow Salt and/or the State. In consequence, loss and damage was sustained, being loss of a chance on the part of BTAC to negotiate with Onslow Salt to enter into an ILUA to consent to the relevant future act by which it would have received payment at the level of about $12 million.

28 It is also contended that there was intentional interference by Onslow Salt with the native title rights held by BTAC because the Minister's approval was void and Onslow Salt had no other authority or permission to implement or allow the excavation works. Consequently BTAC pleads that Onslow Salt's conduct constituted a tortious interference with the native title rights and economic interests held by BTAC.

29 It is also pleaded that there was a tortious conspiracy between the State and Onslow Salt, relying upon the knowledge of the Minister. It is asserted that the additional proposal application by Onslow Salt to the Minister and his approval constituted a course of concerted conduct involving Onslow Salt and the State and an agreement or understanding between Onslow Salt and the State with the purpose and aim of negating the procedural rights of BTAC under s 253 NTA to conclude *bona fide* negotiations for an ILUA.

30 As an alternative plea, it is also said that if the Minister did not have the knowledge as pleaded in para 52.2 of the statement of claim, Onslow Salt's conduct with respect to the State was misleading or deceptive. It is said to be misleading and deceptive conduct (within the meaning of s 18 of the Australian Consumer Law (**ACL**)) as the additional proposal application:

(1) relied on the Ostensible Agreements which contained sham elements as pleaded in para 41 of the statement of claim;

(2) did not disclose the real fill extraction agreement;

(3) stated that the purpose of the works to be undertaken was flood mitigation whereas that was a non-existent or trivial purpose;

(4) did not disclose, as was the fact, that the sole, or alternatively a substantial, purpose of the additional proposal application was to supply Onslow Salt with fill material;

(5) contained and relied upon a report by which contained misleading and contradictory statements, as pleaded in para 48 of the statement of claim;

(6) did not disclose, as was the fact, that Chevron was paying Onslow Salt some $75 million for the fill; and

(7) by its reliance on the ostensible fill agreement (as defined in the statement of claim), represented in effect that Chevron would remove the fill to some undisclosed destination at its own cost and without making any payment for the fill to Onslow Salt, which was contrary to the true circumstances.

31 If the Minister did not have the knowledge, it is pleaded that Onslow Salt engaged in misleading and deceptive conduct causing the Minister to grant the purported approval and not to give the notice under s 29(1) and s 29(2)(a) NTA to BTAC of the relevant future act causing BTAC the loss and damage pleaded.

32 It is also pleaded that the State owed BTAC a duty of care at common law in dealing with native title rights and interests by reason of the following matters:

(1) the statutory duties of the State under the NTA owed to bodies in the position of BTAC, as pleaded in para 57 and para 58 of the statement of claim;

(2) the superior position of the State when compared with BTAC to obtain information about the real nature and impact of an intended course of action, such as the relevant future act, on the native title rights and interests;

(3) the dependence of bodies like BTAC on information gathering by the State and notification by the State of future acts;

(4) vulnerability on the part of BTAC in that it had no means of knowing the real nature of proposals to do work in the native title area under its control; and

(5) the likelihood and reasonable foreseeability of loss and damage to BTAC through a failure to give due notice, in the circumstances pleaded in paras 59 to 61 of the statement of claim.

33 It is said that in breach of the duty of care the State failed to give BTAC any notice of the real fill extraction agreement as a future act and did so negligently. For the negligence claim, reliance is placed on the particulars (at para 52.2) of the statement of claim:

> 52.2 It was granted for an improper or ulterior purpose (being the sole or a substantial purpose for such granting) namely to allow Onslow Salt to sell fill to Chevron and for Chevron to obtain such fill for its own purposes in light of the following knowledge of the Minister, imputed to him through what each of Simpson, Nash and Klobucar knew, namely the real fill extraction agreement as pleaded in paragraph 42 above.
>
> Particulars
>
> BTAC here relies on the contents of the following documents involving the DSD and the relevant officials, or reflecting knowledge held by them or referring to discussions conducted involving them, and attributable to Barnett as pleaded in paragraph 13.2 above.
>
> (1) Document 57, dated 10 June 2010: Hegney working with DSD.
>
> (2) Document 58, dated 17 June 2010: Hegney on role of DSD and State Solicitor's Office (**SSO**).
>
> (3) Document 61, dated 1 July 2010: options being considered by DSD and SSO.
>
> (4) Document 68: email Hegney dated 29 July 2010. DSD will provide Onslow Salt with letter of advice from SSO, confirming the ability to use the "Additional Proposals" clause in the Onslow State Agreement as an allowable mechanism to gain approval to access fill material.
>
> (5) Document 84, dated 28 September 2010: Letter from Simpson to Matsuyama, setting out options to give Chevron access to fill.
>
> (6) Document 113, dated 4 November 2010: minutes of DSD sponsored meeting between Simpson, Nash, Matsuyama and Sarich.
>
> (7) Sup Doc, dated 17 December 2010: letter from DSD to Matsuyama. State is also seeking to get fill material from Mining Lease area.
>
> (8) Document 119, dated 22 December 2010: acknowledges receipt of document in particular (7) above and provides response by Matsuyama.
>
> (9) Document 127, dated 28 January 2011: minutes of DSD sponsored meeting.
>
> (10) Document 139: final environmental impact statement (**EIS**) of Chevron for Wheatstone project, dated February 2011. This must have come to the knowledge of the relevant officials. It refers to the need for Chevron to get access to fill material in area of Mining

Lease.

(11) Document 152, minutes of DSD sponsored meeting held on 22 March 2011. Discussion of Chevron obtaining surrender land for land fill.

(12) Document 158, email from Klobucar to Matsuyama and Sarich dated 31 March 2011. Discussed the proposal for fill removal.

(13) Document 159, further email from Klobucar to Matsuyama and Sarich dated 31 March 2011. Discussed the proposal for fill removal and what the Minister can approve.

(14) Document 160, dated 6 April 2011. This is from Ian Yull an authorised representative of Chevron (**Yull**), to Matsuyama. It refers to a proposed meeting at the Office of Environmental Protection which was planned to be attended also by representatives of DSD. Yull prepared slides for this purpose. These record inter alia that DSD and Onslow Salt have agreed that the Additional Proposal provisions of the Onslow Solar Salt Agreement can be used to allow Chevron to take fill material from the Onslow Salt mining area. A further slide states that the Additional Proposal would have a dual purpose: removal of fill material for the Wheatstone project and mitigation of flooding risk to Onslow Salt.

(15) Document 161, email dated 7 April 2011, Matsuyama to Yull: the attendance of DSD / Klobucar is essential at any meeting. Unless Klobucar attends, sensible discussion may not be possible.

(16) Sup Doc, dated 13 April 2011: letter from DSD to Matsuyama, dealing with flood protection.

(17) Document 183: letter from DSD to Matsuyama: DSD accepts fill removal "for flood management".

(18) Document 216: email from Sarich to Matsuyama. DSD will comment on draft Additional Proposal.

(19) Document 222: email Simpson to Sarich, dated 21 October 2011: detailed comment on draft Additional Proposal on behalf of DSD.

(20) Document 236: email Chevron to Sarich: Chevron has revised the Additional Proposal to address DSD comments.

(21) Document 271: email Nash to Onslow Salt, dated 22 February 2012 - no royalties payable by Onslow Salt for fill removal "as work is being carried out for its own use (in this case, flood mitigation)".

34 It is also pleaded there was misleading or deceptive conduct by Onslow Salt with respect to BTAC for the following reasons:

79. As pleaded in paragraph 20 above, at all material times an express material term of the [Deed] was to the effect that Onslow Salt agreed to consult the BTAC concerning the safeguarding and monitoring of the environment associated with the Project Area, that is the salt mining area (clause 11.2).

80. BTAC says that in the context of the said clause 11.2 and the relationship

created between it and Onslow Salt by the [Deed] and Future Act Agreement, BTAC at all material times had a reasonable expectation to be fully and properly informed by Onslow Salt of proposed works in the salt mine area such as those contained in the real fill extraction agreement and the additional proposal application, and to be consulted in this regard.

81. However, at all material times Onslow Salt chose not to disclose and did not disclose to BTAC the following, nor did it consult BTAC in this regard:

81.1 the existence of the real fill extraction agreement; or

81.2 the nature and contents of the additional proposal application with its features pleaded in paragraph 72 above;

82. In the premises, Onslow Salt by its said non-disclosures and silence, and failure to consult, engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, in trade or commerce, with regard to the BTAC, within the meaning of s 18 of the ACL.

83. In the result, the BTAC did not alert the State of the relevant future act, as it would have done had Onslow Salt disclosed to it the matters on which it remained silent as pleaded in paragraph 81 and had consulted with it in this regard. This conduct on the part of Onslow Salt caused or contributed to the State failing to give notice of the relevant future act to BTAC, and caused the loss and damage to BTAC pleaded in paragraph 61 above.

35 Finally, it is asserted that there was a breach of the Deed due to the failure by Onslow Salt to consult BTAC in regards to the safeguarding and monitoring of the environment.

36 A variety of relief is sought, including:

(1) a declaration that the purported approval of the Minister is void and of no effect at law;

(2) a declaration that in causing the fill to be removed from the salt mining area, Onslow Salt acted without any valid authorisation or permission;

(3) damages against the State for breach of statutory duty;

(4) damages against the State for negligence and breach of its duty of care;

(5) damages against Onslow Salt for its intentional interference with the native title rights and economic interests held by BTAC;

(6) damages against Onslow Salt and the State for tort of conspiracy;

(7) damages against Onslow Salt for misleading or deceptive conduct;

(8) damages against Onslow Salt for breach of contract; and

(9) interest as a component of such damages or in terms of s 51A of the *Federal Court of Australia Act 1976* (Cth).

THE DEED

37 I will record the Recitals to the Deed as an argument is raised from their content. The Recitals provide:

> A. In the course of negotiations leading to the execution of this Deed the Parties have identified certain principles which they agree are fundamental to their relationship and which they wish to now record in this Deed, together with guidelines which the Parties consider, with goodwill and reasonableness on each of their parts, will enable those principles to be effectively implemented to the long term benefit of the Thalanyji People without prejudicing the best economic and financial interest of Onslow.
>
> B. Onslow is the former holder of exploration licences covering part of the Claim Area and is a party to an Agreement with the State of Western Australia made pursuant to the Onslow Salt Agreement Act 1992 ("the Agreement") for the development of the Salt Project.
>
> C. The Native Title Claimants on behalf of the Thalanyji People, have lodged with the Native Title Tribunal, Native Title Determination WC95/2 under the provisions of the *Native Title Act 1993* (Cth)
>
> D. Onslow intends to apply for mining leases and other related leases and licences over the Project Area which incorporates the Claim Area.
>
> E. The Native Title Claimants and Onslow wish to set out the terms upon which the Salt Project is to proceed in the Claim Area and the terms upon which their respective current and future interests will be exercised.
>
> F. In consideration of the prospective benefits to themselves and the Local Community Salt Project and the terms of this Deed, the Native Title Claimants have consented to grant of appropriate leases and licences over the Claim Area and Project Area a specified.

38 Pursuant to cl 2.4 of the Deed, Onslow Salt did not admit that native title existed over the claim area, but agreed that if it does exist, the Deed would not operate so as to extinguish it.

39 By cl 2.5, in light of the prospective benefits and opportunities afforded by the Project to the native title claimants, the Thalanyji people and the local community and in consideration of the benefits and opportunities contained in the Deed, the native title claimants agreed to the suspension of the operation and enjoyment of native title over the salt mining area (defined in the Deed as the Project Area) whether currently the subject of the claim or not, for the duration of the Project and Onslow Salt Agreement and until Onslow Salt declares in writing to the native title claimants that the salt mining area is no longer required by it for the Project or any related reason.

40 By cl 4.1, the native title claimants agreed to grant any mining lease and any related interests at the request of Onslow Salt, to execute an agreement with Onslow Salt and the State

allowing the grant of the mining leases and related interests in the form of a schedule to the Deed and to the production of the Deed and any agreement thereunder to the National Native Title Tribunal.

41 The native title claimants also agreed to assist Onslow Salt to contest any competing native title claim by third parties and agreed to execute a supplementary deed to be prepared by Onslow Salt to address certain matters of detail.

42 In response, Onslow Salt agreed to pay into a trust account held for the native title claimants the sum of $50,000 on the Project commencement date and on each anniversary, while Onslow Salt holds or operates the mining leases and related interests, a further sum calculated by reference to a formula. The main purpose of the Trust, referred to as a Development Trust, was to assist with the development of economic, educational and cultural programs for the benefit of the Thalanyji people. The trustee was designated and requirements for execution of the Trust Deed were specified.

43 Undertakings were given by Onslow Salt for employment and training of members of the local community, particularly, the Thalanyji people and, in particular, in relation to the Thalanyji recycling business.

44 Onslow Salt also undertook to contribute various community amenities, to assist with the social and economic development of the local community and to support a proposal to upgrade the existing school. Obligations were specified in relation to sites of significance and the effect of the *Aboriginal* ***Heritage Act*** *1972* (WA). There was to be a liaison officer and certain obligations on the part of the Thalanyji people in relation to dialogue generally and specifically concerning heritage and cultural issues. Onslow Salt undertook to use its best endeavours to ensure the Project was conducted so as to comply with the then existent Environmental Proposal and to otherwise conserve and protect the environment associated with the salt mining area by minimising pollution and waste. In particular, by cl 11.2, Onslow Salt undertook to consult with the native title claimants and the local community in regards to Onslow Salt's compliance with the Environmental Proposal and the possible involvement with the Thalanyji people and the local community in safeguarding and monitoring the environment associated with the salt mining area.

45 Certain matters were to be confidential and certain matters were deemed not to be acknowledged, such as the existence of native title. There were various other

acknowledgements and then by cl 15 some general provisions and, most importantly for the purposes of this application, a DRC in cl 15.3.

THE DRC

46 A dispute resolution clause is contained in cl 15.3, but in order to give it context, it is preferable that the entirety of cl 15 be set out, (noting that there is misnumbering after cl 15.3):

> **15 GENERAL**
>
> **15.1 Default**
>
> a. If the Native Title Claimants make default in performing any of their obligations under this Deed then provided there is no other particular remedy specified elsewhere in this Deed for such default Onslow may at its option so long as such default shall be continuing give to the Native Title Claimants notice specifying the default and requiring the Native Title Claimants to remedy such default within thirty (30) days of receiving such notice.
>
> b. If such default is not remedied or if the Native Title Claimants are not diligently proceeding to remedy such default prior to the expiration of the said period of thirty (30) days then Onslow may by further written notice delivered to the Native Title Claimants and any other Parties within the ten (10) day period immediately following the said thirty (30) day period cause the termination of this Deed.
>
> **15.2 Termination**
>
> Subject to clause 15.1 this Deed may only be terminated by mutual Deed of the Parties, provided that Onslow may, if it has no further interest in any Mining Tenement within the Claim Area, terminate this Deed by written notice to the Native Title Claimants posted by registered post to their address appearing at the beginning of this Deed, or as otherwise notified to Onslow by the Native Title Claimants for and on behalf of the Thalanyji People, such termination to take effect upon the date of posting. Following such termination the Parties will have no further obligations under this Deed without prejudice to their obligations accruing under this Deed prior to the date of termination.
>
> **15.3 Dispute Resolution**
>
> a. If there is a dispute question or difference between the Parties with respect to any matter then the Parties shall forthwith confer in an effort to settle the dispute question or difference but if they fail to agree within thirty (30) days after first conferring or if a Party refuses to confer then the dispute question or difference shall be referred by either or both Parties to an independent expert selected by agreement between them or failing agreement by the President for the time being of the Law Society of Western Australia (Inc.).
>
> b. An independent expert shall in carrying out his functions hereunder:
>
> i. act as an expert and not as an arbitrator and the procedures of

the Commercial Arbitration Act 1985 shall have no application to his deliberation;

ii. determine the time and place where the reference shall be heard by him;

iii. at his entire discretion but after consultation with the Parties **decide whether the reference to him shall be made in the form of written or oral representations submitted to him provided that the period for making submissions will not be longer than one (1) month from his decision as to their form**;

iv. **within a reasonable period** from the date of reference **express in writing an opinion** on the matter in dispute and furnish the Parties each with a copy thereof by hand or registered post; and

v. determine at the conclusion of the reference the manner in which his costs are to be borne by the Parties or either of them;

c. No Party shall be entitled to commence or maintain any action or proceedings until the dispute decision or difference has been referred to and considered in accordance with this clause;

d. Performance of this Deed shall continue during any reference pursuant to this clause unless the Parties otherwise agree.

1[5].4 Deed is Paramount

Notwithstanding the provisions of any Authorisation, the provisions of this Deed shall as between the Parties and to the extent permitted by law be paramount as to rights and obligations of the Parties and shall prevail over any inconsistent provision in such Authorisation.

1[5].5 Entire Agreement

This Deed and the Future Act Agreement constitutes and contains the entire and only agreement between the Parties relating to its subject matter and supersedes and cancels all existing agreements, letters of intent, heads of agreement and undertakings including correspondence and communications between the Parties.

1[5].6 Waiver

No waiver by a Party of any of the provisions of this Deed is binding unless made in writing and if it relates only to the specific matter, non-compliance or breach for which it is given and does not apply to any subsequent or other matter, non-compliance or breach.

1[5].7 Further Acts

Each Party agrees to execute such agreements and documents and do such further acts and things as shall be necessary to give effect to this Deed.

1[5].8 Severance

Any provision of this Deed which is unenforceable in any jurisdiction is, (as

to that jurisdiction), ineffective to the extent of the invalidity or unenforceability without affecting the remaining provisions of this Deed, or affecting the validity or enforceability of that provision in any other jurisdiction.

1[5].9 Governing Law

This Deed is subject to the laws of Western Australia and of the Commonwealth of Australia as applicable in Western Australia, and the parties submit to the non-exclusive jurisdiction of the courts of that state.

1[5].10 Costs

Onslow bears the costs associated with the negotiations for and preparation of this Deed.

(emphasis added)

ONSLOW SALT'S ARGUMENTS

47 Onslow Salt seeks a stay of the proceedings on the basis that:

(a) by the DRC, the parties agreed to conferral and to expert determination of any 'dispute, question or difference'. This terminology is so broad, Onslow Salt says, that the dispute clearly falls within the clause;

(b) where parties have, by contract, agreed to follow a particular dispute resolution procedure, they must adhere to that procedure unless the party wishing to abandon it can show good reason for that course: *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 (at [42]). Onslow Salt says that no cogent reason is advanced as to why the dispute resolution procedure should not be followed by BTAC; and

(c) BTAC has not established that it will suffer any prejudice by reason of this proceeding being stayed and the DRC being followed. There is no compelling reason for this dispute immediately to be 'determined' by this Court instead of by an expert as agreed between the parties.

48 Of course, the State was not a party to the Deed, but Onslow Salt notes that the DRC does not preclude third parties from participating in the expert determination process. Onslow Salt submits that the DRC ought not be ignored simply because there are also assertions against the State, particularly in a circumstance where Onslow Salt consents to the State participating in the expert determination process.

49 As to the relevant legal principles, there does not appear to be much between the parties. Onslow Salt submits, and it is so, that the Court has a wide discretionary power to stay legal

proceedings, pending compliance with a DRC. The starting point is a 'strong bias' in favour of contracting parties being held to the terms of their bargain: *Huddart Parker Ltd v Ship Mill Hill* (1950) 81 CLR 502 (at 508-509), more recently confirmed in *Savcor* (at [42]), *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 (at [21]) and *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 (at [6]-[7]). Onslow Salt points out that in *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 (at [26]-[36]), in which a party to a domestic dispute attempted to bring judicial proceedings instead of proceeding with an expert determination, it was held by Gillard J (at [36]) that the Court had jurisdiction to stay the proceedings before it on the simple basis that a 'contract is a contract' and (at [134]) 'they put it in place, it binds them'.

50 There were two obligations, at least, on BTAC if the DRC was binding. The first was to confer in relation to it and the second was to refer the dispute for consideration by an independent expert.

51 It is common ground that where the parties to a commercial contract agree to a particular dispute resolution procedure, they must adhere to that procedure unless the party wishing to abandon it in favour of recourse to the courts can show good cause: *Savcor* (at [42]). The matter was considered in *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016] WASC 338 (at [103]) where Banks-Smith J held that the contracting party had bargained away its right to have its day in court in favour of the finality of an expert determination and that in that particular case, on the relevant facts, the second plaintiff had not met the heavy onus of establishing why a stay should be refused.

52 Her Honour followed *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187 (at [14]-[15]), where Wheeler JA stated:

> 14 There is increasingly, as a matter of commercial practice, a tendency of parties to provide for the determination of some or all disputes by reference to an expert. There are a number of reasons for that course, including informality and speed; suitability of some types of disputes for determination by persons with particular expertise; privacy; and a desire to resolve disputes in a way which may be seen as reasonably consistent with the maintenance of ongoing commercial relationships. The law has long recognised that those are proper considerations to which the court should give appropriate weight, and that it is desirable therefore that parties who make such a bargain should be kept to it. The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court. A considerable number of cases demonstrating this trend are collected in the reasons for decision of

> Einstein J in *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [16]-[33]. (See also *Australia Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 at [50] and *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [21].)
>
> 15 The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider. Prior to the conclusion of the expert determination procedure – that is, prior to the making of a determination – any party to a contract containing such a clause remains free to sue upon the contract, unless the contract itself makes compliance with some form of dispute resolution procedure a condition precedent to the enforcement of rights under the contract. In relation to the latter type of contract, the effect of the clause is not to invalidate an action brought in breach of it, but to provide a defence and to "postpone" but "not annihilate the right of access to the court" (*Freshwater v Western Australian Assurance Co Ltd* [1933] 1 KB 515 at 523 per Lord Hanworth MR). The latter type of clause is not in issue here, however. Where a contract contains a dispute resolution clause, and a party who has not first proceeded in accordance with that clause sues on the contract, the court has, however, a jurisdiction to stay the proceeding so as, in a practical sense, to force the party to fall back upon the contractual procedure. The circumstances in which a stay will be granted are considered in Jacobs, *Commercial Arbitration: Law and Procedure* (2001), at [12.49/5]-[12.49/8]. There are no proceedings on the agreement in the present case, and it is therefore not necessary to consider those principles.

53 Onslow Salt submits the circumstances in which a stay would not be granted would be rare, but such a circumstance may be where it would be unjust to deprive a plaintiff of the right to have its claim determined judicially. Of course, as noted by Hammerschlag J in *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 (at [53]-[54]), each case is to be considered on its own circumstances. In that case, his Honour said:

> 53 The Court has a wide discretionary power to stay legal proceedings where the parties have by contract agreed to have the dispute determined by an expert. Each case is to be considered on its own circumstances. The starting point is, however, that the parties should be held to their bargain. It is for the party opposing the stay of proceedings to show that there is good reason to allow the action to proceed and the onus is a heavy one.
>
> 54 A stay will not be granted if it would be unjust to deprive the plaintiff of the right to have its claim determined judicially, that is where the justice of the case is against staying the proceeding. 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.
>
> See *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587; *Ipoh v TPS Property; Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188; *Zeke Services v*

Traffic Technologies.

54 While the State is not a party to the Deed, Onslow Salt notes that it and the State are parties to the Onslow Salt Agreement. Under the Deed, the contractual relationship between Onslow Salt and BTAC is established as well as the terms on which the Project is to proceed in the claim area and the terms on which the respective current and future interests of Onslow Salt and BTAC will be exercised. Thus, it is that one of the things achieved under the Deed was the suspension of the operation and enjoyment of native title over the salt mining area, without any admission of its existence.

55 Onslow Salt says the fact that there are allegations against and a dispute with the State does not affect BTAC's obligations under the Deed towards Onslow Salt in relation to the DRC.

56 In circumstances where such serious allegations have been raised in the statement of claim, Onslow Salt submits that there should be strict compliance with the Deed's DRC.

57 There can be no doubt, Onslow Salt contends, that the dispute falls within the ambit of the DRC. It applies to disputes, questions or differences between Onslow Salt and BTAC with respect to 'any matter'. The parties are agreed that this, of course, does not mean any matter at large, but any matter arising under or affected by the Deed. Onslow Salt contends that having regard to the purpose and subject matter of the Deed and the breadth of the DRC, BTAC's allegations must fall within the scope of it. Its broad scope demonstrates that the parties did not intend to limit the issues that would be subject to expert determination, Onslow Salt says, relying on *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041 (at 1052).

58 There is no limit under the DRC as to who may be selected as an expert. It simply requires the parties must agree or, failing agreement, refer the matter to the President of the Law Society of Western Australia. This flexibility allows the parties, or the President, to select an expert whose qualifications, expertise and experience would enable him or her to write an opinion on the dispute or difference in question.

59 There is no challenge to the expertise of the persons nominated by Onslow Salt, but there is a challenge as to both the applicability the DRC and whether such a person without all the coercive powers a court has could possibly resolve the complex issues of credit, which would necessitate the giving of evidence and cross-examination. Onslow Salt contends that the case

is unlike *Zeke Services* where the clause identified a particular person, group of individuals or profession clearly inappropriate to determine the issues in dispute.

60 Onslow Salt submits that its entitlement to have the dispute referred to an expert will not delay matters. Onslow Salt says the nature of the clause means that any expert resolution is unlikely to be protracted, referring to cl 15.3b(iii) which provides that the expert will decide:

> … whether the reference to him shall be made in the form of written or oral representations submitted to him provided that the period for making submissions will not be longer than one (1) month from his decision as to their form. …

61 The expert is then to provide a written opinion 'within a reasonable period from the date of reference'.

62 Onslow Salt has suggested that the State participates in the conferral and expert determination, which is not precluded by the DRC and which, it says, would enable the resolution of the entire dispute in an expeditious and cost effective manner. Onslow Salt says on the one hand, BTAC has proposed a tri-partite mediation, but appears to oppose the involvement of the State in any process under the DRC. In any event, Onslow Salt argues that if the outcome of the referral to the expert in accordance with the DRC is that BTAC is still left with a proceeding against the State, this is simply a consequence of BTAC's own conduct and failure to comply with cl 15.3 before commencing proceedings.

63 As noted, the statement of claim commencing this proceeding is lengthy and relates to events which took place over a 25 year period. If the matter goes to trial, it is likely that evidence will be adduced by multiple parties, from many witnesses and that the trial will be lengthy and expensive. There will be a saving of time and costs or, at least, a real chance that there may be, if the dispute can be resolved by conferral, or by expert determination, Onslow Salt argues. Even if the dispute is not resolved, there is a prospect that the issues in dispute may be narrowed after conferral and expert determination.

64 In all those circumstances, Onslow Salt argues that BTAC has fallen well short of the heavy onus of demonstrating that there is good reason why the DRC should not be complied with or that BTAC would suffer any prejudice if the proceedings were temporarily stayed in order that there be compliance with the DRC.

65 From Onslow Salt's point of view, it contracted to resolve disputes privately and would be deprived of that opportunity if the proceedings were not stayed.

BTAC'S CONTENTIONS

66 As noted in the discussion above, BTAC argues that on the proper construction of the Deed, the dispute which is the subject of the proceedings does not fall within the ambit of the DRC. If that construction is incorrect, BTAC argues that in order to do justice between the parties, the stay application should be dismissed on the discretionary grounds identified by Hammerschlag J in *Dirty Dancing Investments*, discussed above, and *Zeke Services*, also discussed above. Particularly in relation to the proper construction of the DRC, BTAC points to *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640, where the plurality noted (at [35]) (footnotes omitted):

> Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

67 Against that background, BTAC relies particularly on Recital C-F discussed above (at [37]) in order to identify the subject matter of the Deed. BTAC says the Deed prescribes the terms on which interests will be exercised. It is the exercise of an interest, not the identification of the interests. It is a facilitative agreement, facilitating how the parties will implement their respective legal interests, but it does not establish the interest. A dispute as to whether interests exist or not, in contrast to how the parties facilitate the interests, is beyond the terms of this agreement and is not something that is in connection with the agreement. I regret that I do not follow this contention which was somewhat left hanging in submissions. Taking this submission in isolation, I would not consider that the relevant heavy onus on BTAC is discharged by reference to this argument. However, as will be seen, I do consider that the actual content of the DRC is decisive in favour of BTAC.

68 On the topic of the DRC, as discussed, the parties are agreed that the reference to 'any matter' must be a matter that arises from or in respect of the Deed. Suitable examples would be disputes about the sum payable into the development trust (cl 5.1), the administration of

the relevant trust (cl 5.4) and the Onslow Salt's obligation to provide the benefits described in cll 5-10 of the Deed.

69 In contrast to such matters clearly referrable to the Deed, the central issues in dispute between BTAC and Onslow Salt on the pleading are:

(a) whether Onslow Salt could authorise the removal of fill material by a third party (Chevron) when this was not a future act recognised by the grant of the M273SA;

(b) whether the real fill extraction agreement as defined in the statement of claim, was a future act within the meaning of s 233(1)(c)(i) NTA, which could only be implemented by the grant of the new mining lease;

(c) whether the real fill extraction agreement affected BTAC's native title rights and interests;

(d) whether the purported approval of the Minister was void and of no effect at law;

(e) whether Onslow Salt entered into and implemented the real fill extraction agreement using the additional proposal procedure for the purpose of avoiding negotiations with BTAC and undermining BTAC's procedural rights under the NTA;

(f) whether the additional application proposal and the purported approval of the Minister was a cause of concerted conduct or an agreement or understanding between Onslow Salt and the State for the purpose of negating BTAC's procedural rights under the NTA;

(g) whether Onslow Salt engaged in misleading conduct causing the Minister to grant the purported approval and not to give BTAC notice under s 29(1) and s 29(2)(a) NTA of the relevant future act;

(h) whether Onslow Salt failed to disclose to BTAC the existence of the real fill extraction agreement and the actual nature of the additional application proposal thereby engaging in misleading or deceptive conduct; and

(i) whether, by cl 11.2 of the Deed, Onslow Salt had an obligation to consult with and notify BTAC of the real fill extraction agreement and the additional proposal application and, if so, whether the failure to do so breached cl 11.2 of the Deed.

70 BTAC contends that none of the issues described above are disputes that arise under, or in some way relate to, the Deed. Rather, the Deed is one of the various agreements pleaded under the subheading 'Other relevant agreements' in the statement of claim. The only cause of action pleaded in relation to the Deed relates to the suggested breach of cl 11.2 and whether that breach constitutes misleading and deceptive conduct. That the pleading is not related to the Deed *per se* is evident by the primary relief sought, namely, the loss of chance by BTAC to negotiate with Onslow Salt to enter into an ILUA and to consent to a relevant future act and receive payments and other benefits from Onslow Salt or third parties. These particulars, together with an analysis of what the DRC actually achieves are critical to the question of whether a stay should be granted.

71 The extent to which the various items of relief claimed could be said to pertain to the Deed are, according to BTAC, very minimal. It follows that the DRC does not apply.

CONSIDERATION

72 There is no doubt that the general principles in relation to stay applications in circumstances such as the present are well settled. Courts will generally hold the parties to the bargain in relation to dispute resolution clauses. Such clauses do not oust the discretion of the Court to hear a matter: see generally *Zeke Services* (at [10]-[15]). Further, there is no suggestion by either party that the DRC purports to oust the jurisdiction of the Court. However, as a general proposition, a stay would not be granted if it would be unjust to deprive an applicant of its right to have its claim judicially determined (*Dirty Dancing Investments* at [54]), but this will all depend very much on the nature of the dispute, the parties to the dispute, the nature of the agreement in which the dispute resolution clause is contained and the conduct of the actual clause.

73 There are examples, particularly, *Dirty Dancing Investments, Zeke Services* and *Raskin v Mediterranean Olives Estate Ltd* [2017] VSC 94 per Hargrave J, in which a stay has been declined in accordance with the interests of justice. In the current matter, in addition to the question of whether declining the stay would be in the interests of justice, there is the further question of whether the DRC applies in the relevant circumstances and, if so, whether it has been breached. While *Zeke Services* can be distinguished on the facts because the expert was not qualified to resolve the dispute, it still provides a helpful examination of the principles. In that decision, Chesterman J noted (at [21]) that the party opposing the stay bears a heavy onus of persuading the Court 'that there is a good ground for the exercise of the discretion to

allow the action to proceed and so preclude the contractual mode of dispute resolution … [t]he court should not lightly conclude that the agreed mechanism is inappropriate'. As to the circumstances that may warrant the onus being discharged, his Honour continued (at [22]–[27]):

> [22] Ordinarily I would think that **that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen**. This consideration includes the procedure, if any, for which the parties 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.
>
> …
>
> [24] It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it may be appropriate to refuse a stay. Complicated disputes of fact or of law may be of such a character.
>
> [25] In *Cott UK Ltd v FE Barber Ltd* (1997) 3 All ER 540 the court refused to stay an action on a contract which contained a clause referring disputes to the determination of an expert on the grounds that:
>
> (a) There were no rules identified in the contract or in the expert's professional association governing the mode of his determination.
>
> (b) The expert appointed had no experience in the areas of dispute.
>
> (c) The contract gave no guidance as to the rules or principles pursuant to which the expert was to approach his determination.
>
> (d) The nature of the dispute itself – a claim for damages for breach of contract – was inapt for determination by an expert.
>
> [26] Gillard J in *Badgin* doubted the relevance of some of the matters relied upon by the court in *Cott* and I respectfully share those doubts. The second and fourth points do, with respect, appear to be of substance. Gillard J thought that:
>
> > '… the fact that there were issues concerning a number of legal questions, whether there was a breach … of the agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person … [I]n the end it is a question of what the term of the contract provides and the nature of the dispute.'
>
> [27] The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar. The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm

> will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed.
>
> …

74 *Zeke Services* was concerned with the fictitious employment of staff and the alleged misrepresentation as to bad debts. As was noted by Chesterman J (at [30]), the alleged misrepresentations of bad debts raised a question of what the company's officers believed about the recoverability of the debts and the reasonableness of any grounds for that belief. His Honour considered that, therefore, there were questions of mixed fact and law to be resolved. Such a determination would involve some argument that was legal in nature and 'is not the paradigm of applying one's special knowledge to one's own observations'. The same considerations were also held to apply to the complaint about fictitious employees. In these circumstances his Honour held that there should not be a stay of proceedings, concluding (at [32]–[37]):

> [32] It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance**. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a conclusion about them, the lack of a methodology for the inquiry is significant**. An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice. The agreement does not contain such a requirement.
>
> …
>
> [35] These three complaints are not readily amenable to expert determination. That paradigm does not accommodate these aspects of the dispute, which require an adjudication between opposing contentions. The answers cannot be found in expert observation, nor informal, one sided, fact finding. …
>
> …
>
> [37] Accordingly, I conclude that some only of the complaints may be appropriately determined by an expert. There should be no stay with respect to those matters. To order a stay of the proceedings to allow the expert to determine some only of the complaints would be unsatisfactory. The same decision-maker should determine all questions in dispute. As the court must determine some, it should determine all.
>
> (emphasis added)

75 As to the matter before me, there is no doubt that the experts nominated by Onslow Salt would have the personal technical ability to resolve any of the disputes which are raised in the statement of claim. But it is equally clear, in my view, that the clause does not contemplate, having regard to the time constraints and very limited content of the procedural aspects of the clause, that there be resolution by an expert of the extremely complex factual

matters raised in the lengthy pleading. More importantly, there is no facility within the clause for compelling witnesses to give evidence and permitting cross-examination. The only flexibility in the clause is for the expert to determine whether the submission itself to the expert will be written or oral. That falls entirely short of a facility for resolving complex factual and credit issues, especially when a third party is brought into the proceeding on claims which, for their most part, are well outside the parameters of matters addressed by the Deed.

76 The inadequacy of the procedures agreed by the parties is not a deficiency in the DRC. Rather, is an indicator that the DRC is limited to simpler, more specific issues arising under the Deed, or in connection with the Deed, in contrast to the wide ranging matters raised in the statement of claim. The inadequacy of the procedures was a specific matter to which Hammerschlag J pointed to in *Dirty Dancing Investments* (at [54]) in drawing upon *Savcor*, *Badgin Nominees* and *Zeke Services*, and is certainly a relevant matter in these circumstances given the content of the challenges in the statement of claim.

77 In *Raskin*, Hargrave J upheld an argument that an expert determination clause was uncertain and therefore unenforceable. However, his Honour went on to consider whether or not the inherent power of the Court to stay the proceeding would have been exercised and concluded that it would not have been. After referring to many of the cases discussed above, his Honour said (at [54]-[57]:

> 54 Of particular relevance to this case is the reference in the decision of Hammerschlag J in *Dance with Mr D Ltd v Dirty Dancing Investments Pty Ltd* to the prospect of a multiplicity of proceedings as a relevant factor in the exercise of the Court's discretion as to whether or not to grant a stay. In this case, even if the expert determination clause permitted a single expert to determine the various disputes (which it does not), the claims in this proceeding against Mr May and, if leave is granted, against the project landowner as a proposed third defendant, would continue. There would be a multiplicity of proceedings and the prospect of conflicting findings of fact and law. Further, the parties would be required to fund and conduct two substantial proceedings, namely, this proceeding and an expert determination process expert accountant.
>
> 55 I do not accept the defendants' submission that the allegations against Mr May, or the proposed allegations against the project landowner, involve the plaintiff endeavouring to 'circumvent' the expert determination clause. The plaintiff is entitled to frame her case as she sees fit without constraint by the clause. The clause does not bind her to agree to claims against non-parties to the contract being determined under the expert determination clause.
>
> 56 The fact that Mr May and the project landowner are prepared to participate in and abide the result of an expert determination process is not to the point. The plaintiff is not bound to agree to that course and would be foolish to do so in

circumstances where there is no guarantee of procedural fairness.

> 57 In all the circumstances, it would in my opinion, be unjust to the plaintiff, indeed all parties, to stay the proceeding so that the expert determination process proposed by the defendants can proceed. The proposed process before a single Independent Expert would not, in the absence of agreement by the plaintiff, accord with the expert determination clause as the dispute involves more than the mere management of the project and legal interpretation issues, but includes accounting and horticultural issues raised by the pleadings. If such a process were undertaken, it would likely lead to further multiplicity of proceedings, based on the ground that the process was not contractually authorised by the expert determination clause.

78 Many of the points raised by his Honour are directly applicable to this present situation. If a part of these proceedings which relates to the Deed is stayed, the result would be that the balance of the proceedings would be continued against both respondents, but with a separate procedure under the DRC being conducted in tandem with respect to those parts of the proceedings relating to the Deed. After this, BTAC, if the matters were not resolved, would be able to proceed in this Court with its claims relating to the Deed. As BTAC submits, even if all of the proceedings against Onslow Salt were stayed, the proceedings would still continue against the State, with the DRC operating in relation to Onslow Salt only. If the matter was not resolved as a result of that process, BTAC would then continue in this Court with its claims against Onslow Salt.

79 Further, as observed by Hargrave J in *Raskin*, a solution to this is not for BTAC to consent to the State taking part in the DRC procedure, even assuming it agreed to do so, which it does not.

80 Significantly in all of this is that the DRC, seen in its context, is meant to provide a quick possible resolution to problems arising under the tasks identified in the Deed or matters which have arisen relating to the Deed.

81 It is fundamentally important to note that the DRC does not produce a determination or any binding outcome at all. It only produces an opinion. I accept that it does so in relative privacy, which is a factor I most certainly take into account in favour of Onslow Salt. Most of the cases (including *Mineral Resources*) on which Onslow Salt relies, however, are clauses from which a determination by, not an opinion of, an expert is the outcome. Nothing in cl 15.3 makes the independent expert's opinion binding on the parties to the Deed, let alone the State. It does not, in fact, provide an alternative method for the binding determination of any dispute between the parties, but simply spells out a private step that needs to be undertaken before the parties may refer a relevant matter to the Court. It is an entirely

commendable process which has been recognised and respected by the Courts on many occasions, except where there are exceptional circumstances. The nature of this case falls into that exceptional category.

CONCLUSION

82 For all those reasons, in my opinion, the stay application should be refused.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 20 October 2017