Court of Appeal
Supreme Court

New South Wales

Case Name:	Campbelltown City Council v WSN Environmental Solutions Pty Ltd
Medium Neutral Citation:	[2015] NSWCA 299
Hearing Date(s):	31 August 2015
Decision Date:	30 September 2015
Before:	Bathurst CJ at [1]; Meagher JA at [11]; Ward JA at [45]
Decision:	1. Appeal allowed. 2. Set aside the declarations and orders made by Sackar J on 6 March 2015. 3. Declare that the respondent has no entitlement to refer for determination by an expert (purportedly pursuant to cl 24.2(2) of the Contract) a dispute as to whether or how it should be compensated for additional costs, in accordance with the provisions in cl 25 of the Processing Contract dated 14 August 2006 in circumstances where: (a) the respondent has asserted the existence of facts or matters referred to in cl 24 of the Processing Contract; (b) the respondent has eschewed reliance upon the circumstances referred to in cl 24.3 of the Processing Contract; (c) following the respondent's assertion of the existence of facts or matters referred to in cl 24.4 of the Processing Contract, the parties have negotiated, but been unable to agree, on the question whether a variation circumstance, based upon the existence of those facts or matters, should apply. 4. Order the respondent's cross claim filed on 20 January 2015 be dismissed.

5. Order the respondent pay the appellants' costs of the summons and cross claim.
6. Order the respondent pay the appellants' costs of the appeal.

Catchwords:	CONTRACT – construction – operation of dispute resolution clauses – provisions of long term contract as to when service provider entitled to variation of fee – where dispute as to whether variation provision applies and, if applies, as to whether and how service provider to be compensated – whether dispute to be referred to expert or subject to general dispute resolution provision – no question of principle
Cases Cited:	Byrne v Australian Airlines Ltd [1995] HCA 24; 185 CLR 410 Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd (1988) 14 NSWLR 438 Rudi's Enterprises Pty Ltd v Jay (1987) 10 NSWLR 568 Wilkie v Gordian Runoff Ltd [2005] HCA 17; 221 CLR 522 York Air Conditioning & Refrigeration (Australasia) Pty Ltd v Commonwealth [1949] HCA 23; 80 CLR 11
Category:	Principal judgment
Parties:	Campbelltown City Council (First Appellant) Camden Council (Second Appellant) Wingecarribee Shire Council (Third Appellant) Wollondilly Shire Council (Fourth Appellant) WSN Environmental Solutions Pty Ltd trading as SITA Australia (Respondent)
Representation:	Counsel: A J L Bannon SC with A J Abadee (Appellants) N C Hutley SC with C O Gleeson (Respondent) Solicitors: Sparke Helmore Lawyers (Appellants) Maddocks Lawyers (Respondent)
File Number(s):	2015/106025
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales

Jurisdiction:	Equity
Citation:	[2015] NSWSC 155
Date of Decision:	6 March 2015
Before:	Sackar J
File Number(s):	2014/371801

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

By a Processing Contract dated 14 August 2006, the respondent, WSN Environmental Solutions Pty Ltd, processed waste on behalf of the appellant Councils.

The Contract is for a term of 15 years and requires each Council to pay a fee calculated by reference to the tonnage of waste delivered to the respondent for processing. Provision is made for the variation of the payable fee in certain circumstances. Clause 24.3 defines two circumstances in which the respondent will be entitled to a variation. Clause 24.2 provides that, in those circumstances, the parties will negotiate as to "whether" and "how" the respondent should be compensated. In the event that the parties cannot agree, those questions may be referred to an expert for determination in accordance with cl 25. Clause 24.4 states that when the respondent incurs "a demonstrable material increase in costs, which are beyond [its] control … and which were reasonably unforeseeable as at the date of the Contract, the Parties agree to negotiate reasonably and in good faith as to whether a variation circumstance should apply".

The mixed waste facility operated by the respondent under the Contract was decommissioned due to concerns as to its "odour footprint". From February 2011, waste was transported to and processed at an alternative facility. The respondent claimed this change constituted a variation circumstance within cl 24.4. The parties negotiated but could not agree as to whether the change in facility met the description in cl 24.4. The respondent sought to refer the dispute as to "whether a variation circumstance should apply" to an expert under cl 25. The Councils sought a declaration that the respondent was not entitled to refer the dispute for determination in that way. The primary judge disagreed with the Councils' construction of the Contract and made orders declaring that the respondent was so entitled.

The issue before the Court was whether the primary judge erred in finding that, on the proper construction of the Contract, the parties' dispute as to "whether a variation circumstance should apply" under cl 24.4 was a dispute to be dealt with via the dispute resolution mechanism in cll 24.2(2) and 25.

The Court held, **allowing the appeal** (per Meagher JA, Bathurst CJ and Ward JA agreeing):

As provided by cl 24.2(4), a variation circumstance will exist "in accordance with the provisions of Clause 24.4", using the term "exist" in the same sense that it is used in cl 24.3, only if the parties have undertaken negotiations under cl 24.4 and reached an agreement that a variation circumstance should "apply" to the notified increase in costs: [8], [32], [34], [45].

The parties cannot be said to have intended that any increase in costs asserted to be within cl 24.4 would constitute an additional "variation circumstance" because it is likely that, as these circumstances were unforeseeable at the time of the Contract, the parties were unable to agree at that time as to who should bear the risk of such an event and so agreed in the event such a circumstance occurred to negotiate on that question reasonably and in good faith: [6], [9], [36], [45].

In the absence of agreement between the parties that a variation circumstance should apply to the increase in costs asserted to be within cl 24.4, there is no

dispute falling within cl 24.2(2) and the respondent is not entitled to refer the present dispute to an expert: [9], [37], [45].

JUDGMENT

1 **BATHURST CJ**: I have had the advantage of reading the judgment of Meagher JA in draft. For convenience, I will use the same abbreviations as those adopted by his Honour in his judgment.

2 Clause 24 of the Processing Contract is clumsily drawn and gives rise to real difficulties of construction.

3 Clause 24.2(1) must, in my opinion, be read in conjunction with cl 24.3. Clause 24.3 lists two circumstances in which WSN is entitled to compensation. If WSN asserts that such a circumstance exists, it can give notice to the Councils under cl 24.2(1), thereby activating the procedures in that clause, cl 24.2(2) and cl 25. I agree with Meagher JA that the word "applies" in cl 24.2(1) means asserted to apply.

4 In that context, a notification under cl 24.2(1) could give rise to two issues. The first is whether a defined "variation circumstance" exists. The second is, if so, how WSN should be compensated. Each of those matters is the subject of the obligation to negotiate in cl 24.2(1) and, in default of successful negotiation, the subject of a reference to an expert under cl 24.2(2) and expert determination under cl 25.

5 In those circumstances, it can be seen that the determination by the expert is limited to two defined issues, first, whether either of the particular circumstances referred to in cl 24.3 exist and second, if so, the quantum and manner of compensation.

6 By contrast, the circumstances in which cl 24.4 can apply are at large; the criteria being that "in connection with the Services, a demonstrable material increase in costs", "beyond the control of the Contractor", has been incurred, which increase was "reasonably unforeseeable" at the date of the Processing Contract. The clause, by its terms, is directed to matters unknown at the date of the contract. It makes it clear that it is for the parties to negotiate, not as to

whether and how the contractor should be compensated, but "whether a variation circumstance should apply".

7 The conclusion of the primary judge seems to be based on the proposition that there is no practical difference between the negotiations required by cl 24.2(1) and those required by cl 24.4. Proceeding from that premise, the primary judge concluded that the parties intended that the failure to successfully negotiate in each case produced the same result, namely, expert determination as to whether and how WSN should be compensated.

8 While there is force in this reasoning, ultimately I have concluded that it is incorrect. The negotiations referred to in cl 24.4 look to whether a variation circumstance should apply. If the parties agree on the matters referred to in that subparagraph, then the particular circumstances in question will become a variation circumstance, to be dealt with in the same manner as the defined variation circumstances set out in cl 24.3. However, cl 24.4 does not require the parties to agree that a variation circumstance exists, but rather to negotiate reasonably and in good faith to that end. Thus, negotiations for the purpose of cl 24.4 could include the following four matters, first, whether a demonstrable material increase in costs has been incurred, second, whether the increase was beyond the control of WSN, third, whether the increase was reasonably unforeseeable, and fourth, assuming the three preceding matters are established, whether a variation circumstance should apply. The latter involves the question of whether, notwithstanding an unforeseen material increases in costs, WSN should be compensated. It is only if all of these four matters are agreed on that a variation circumstance exists.

9 Once this is appreciated, it does not seem to me that it could be said that the parties intended that the inability to reach an agreement on the matters in cl 24.4 should be the subject of expert determination under cl 25. Until they agree, there is not a variation circumstance falling within cl 24.1(1), cl 24.1(2) or cl 25. Further, the potential ambit of any dispute is far wider than that involving a variation circumstance defined in cl 24.3. It does not seem to me, in that context, that the parties necessarily intended for disputes under cl 24.4 to be dealt with by an expert under cl 25.

10 For these reasons and the reasons given by Meagher JA, I agree with the orders his Honour proposes.

11 **MEAGHER JA**: The parties to this appeal are in dispute as to whether the respondent (**WSN**) is entitled to a variation of the fees payable to it by the four appellant Councils for the processing of waste materials. Within that dispute is an issue as to the procedure which applies to its resolution. The primary judge (Sackar J) resolved that narrower question in favour of WSN*: Campbelltown City Council v WSN Environmental Solutions Pty Ltd* [2015] NSWSC 155. The Councils appeal from that decision, which turns on the proper construction of cl 24 of the agreement between the parties.

The relevant provisions of the Processing Contract

12 WSN receives and processes waste on behalf of the Councils pursuant to a Processing Contract dated 14 August 2006. That contract is for a term of 15 years. Clause 5 provides for the payment by each Council of a Processing Fee calculated by reference to the tonnage of waste (mixed solid waste, recyclables, organics and non-putrescible waste) delivered for processing. That fee is subject to a quarterly adjustment to take account of movements in the "Sydney (All Groups) Consumer Price Index". It may also be reviewed annually, but only at the election of the appellants and by reference to lower (and more favourable) rates charged by WSN to other Councils for the processing of equivalent waste material.

13 The Processing Contract makes provision for the variation of the Processing Fee to which WSN is entitled. It does so by describing the circumstances in which WSN is or may be entitled to a variation and a procedure by which that entitlement and the amount of any variation is to be determined. The relevant provisions are cll 24 and 25:

> **24. VARIATIONS**
>
> **24.1 No invalidation**
>
> No variation shall invalidate this Contract.
>
> **24.2 When variations apply**
>
> (1) Within 28 days after the Contractor notifies the Participants that a variation circumstance listed in Clause 24.3 applies, the Contractor and the Participants must meet to negotiate reasonably and in good faith to determine

whether and how the Contractor should be compensated for the additional costs.

(2) If the Parties cannot agree whether and how the Contractor should be compensated for the additional costs either party may refer the dispute to determination by an Expert in accordance with the provisions of Clause 25.

(3) Any variation in respect of a circumstance which is of an ongoing or continuing nature will apply until otherwise agreed.

(4) The Parties agree that a variation circumstance exists in accordance with the provision of Clause 24.4.

24.3 Variation circumstances

A variation circumstance exists for the purposes of Clause 24.2(1) where:

(1) (changes to kerbside collection systems) at any time the Contractor incurs, in connection with the Services, demonstrable additional costs resulting from changes to the Participants kerbside collection systems; or

(2) (change in law) at any time after the date of the Tender the Contractor incurs, in connection with the Services, demonstrable additional costs resulting from changes in legislation, statute or regulation by state or federal governments that could not have been reasonably foreseen at the date of the Tender.

24.4 Unforeseeable events beyond control

At any time the Contractor incurs, in connection with the Services, a demonstrable material increase in costs, which are beyond the control of the Contractor, and which were reasonably unforeseeable as at the date of the Contract, the Parties agree to negotiate reasonably and in good faith as to whether a variation circumstance should apply.

24.5 Variations are CPI adjusted

For the avoidance of doubt any variation agreed or determined shall be adjusted pursuant to Clause 5.10.

25. EXPERT DETERMINATION

25.1 Appointment of expert

Where pursuant to Clause 24 a matter is to be determined by an expert the parties shall mutually agree on the appointment of an expert. In the event that the parties cannot agree on an expert, the provisions of Clause 25.2 shall apply.

25.2 Appointment of expert where parties cannot agree

Where the parties are unable to agree on an expert within 14 days of request by one party to do so, the expert shall be the person nominated by the President of the NSW chapter of the Institute of Mediators and Arbitrators Australia.

25.3 Conduct of expert determination

The expert determination shall be conducted in accordance with the Rules for Expert Determination of the Institute of Mediators and Arbitrators Australia. The expert is not an arbitrator and shall not be liable for any act or omission

done bona fide in the exercise or purported exercise of functions as an expert. The decision of the expert shall be final and binding on the Parties.

14 The Processing Contract also contains a general dispute resolution procedure in cl 19. A Dispute to which that procedure applies is one "between the parties regarding the terms, operation or intent of this Contract". The terms of cl 19 are set out in the primary judge's reasons at [6]. The procedure for which it provides commences with the giving of a written notice of dispute that is followed by a staged consultation process, initially between middle management and then between senior management of the relevant parties. If the dispute is not resolved by that consultation, it must be submitted to mediation, and if not resolved within 20 business days after the commencement of mediation, it must be referred to arbitration before a single arbitrator. The outcome of that arbitration is not binding on the parties if the amount in dispute exceeds $500,000.

The dispute between the parties

15 The Contract provided for the construction and operation by WSN of an Ecolibrium mixed waste facility at the Macarthur Resource Recovery Park. That facility used a processing technology referred to as ArrowBio technology. After the facility commenced operations in June 2009 it became apparent that the ArrowBio technology produced an "odour footprint" that was wider and stronger than anticipated. In response to Government and community concerns, the Ecolibrium facility was eventually decommissioned and converted to a dry mechanical sorting plant. From February 2011, organic waste produced by the Councils was transported by WSN to an alternative facility at Kemps Creek. WSN maintains that these changes in site and technology were "reasonably unforeseeable" at the date of the Contract and have resulted in a "demonstrable material increase" in its processing costs.

16 On 12 September 2013, WSN gave the appellant Councils notice that a "variation circumstance applies under Clause 24.4". The notice contended that in accordance with cl 24 the parties must meet and negotiate "reasonably and in good faith to determine whether and how WSN should be compensated for the additional cost". On 10 October 2013 the Councils responded maintaining that their obligation to negotiate in accordance with cl 24.4 had not been

engaged because the preconditions to that obligation were not satisfied. In subsequent correspondence, differences emerged as to the parties' interpretation and application of the variation and dispute resolution procedures in cll 19, 24 and 25. On 17 December 2014 the Councils gave notice of that dispute under cl 19.1 of the Processing Contract. At that time WSN was asserting it was entitled to refer the dispute about its claim to a variation to an expert to be determined under cl 25. On the following day, the Councils commenced the underlying proceedings seeking a declaration that in the circumstances WSN was not entitled to refer that dispute to an expert.

17 Before the primary judge and on appeal, each party sought to establish the correctness of the procedure they had invoked for the resolution of the dispute. WSN contended that the disputes to be determined in accordance with cl 25 include any disagreement as to "whether a variation circumstance should apply". The Councils maintained that such a dispute is to be resolved under cl 19.

The reasoning of the primary judge

18 The primary judge concluded that the construction of cl 24 proposed by WSN was "clearly to be preferred": [58]. He reasoned: the parties intended to create two distinct dispute resolution regimes, cll 24 and 25 dealing with variation circumstances and cl 19 dealing with all other disputes (at [28]); the application of two regimes to the one dispute would be "extremely cumbersome and commercially inconvenient" (at [52]); cl 24.2(4) provides that unforeseen events leading to a demonstrable material increase in costs - the circumstances described in cl 24.4 - constitute a variation circumstance and accordingly they are subject to cl 24.2, and in particular cl 24.2(2) (at [34], [47]); the explanation for the separate treatment of cl 24.4 variations is a recognition that claims under that clause are likely to require a longer period for resolution than the 28 day period provided in cl 24.2(1) for variations within cl 24.3 (at [39]); disputes as to cl 24.4 variations are, nonetheless, within the application of cl 24.2 because they answer the description in cl 24.2(2) and accordingly are to be determined in accordance with cl 25 (at [39], [57]); and the "threshold question" whether a variation circumstance applies is within cl 24.2(2), being part of a dispute as to whether WSN should be compensated (at [41]-[44]).

The arguments on appeal

19 The Councils contend that the expression *variation circumstance* in cl 24 is used to describe a circumstance which entitles WSN to a variation in the amount of the Processing Fee payable under cl 5.1(1). There are two variation circumstances described in cll 24.3(1) and (2). Clause 24.4 describes a further and different scenario, namely that WSN "incurs, in connection with the Services, a demonstrable material increase in costs, which are beyond the control of the Contractor, and which were reasonably unforeseeable as at the date of the Contract". If the parties agree that a circumstance within that scenario should constitute a variation circumstance *and* the circumstance is established or agreed, WSN is entitled to be compensated for any material increase in costs. The entitlement in respect of that circumstance is said to follow from the application of cl 24.2(4) if the parties have, following a negotiation under cl 24.4, agreed that "a variation circumstance should apply". If the parties cannot thereafter agree whether and how WSN should be compensated for that increase in costs, in accordance with cl 24.2(2), either may refer that dispute to an expert for determination in accordance with cl 25.

20 The Councils make two further submissions as to the relevant operation of cl 24. First, they contend that the parties' obligation under cl 24.4 to negotiate reasonably and in good faith only arises where a circumstance within that scenario in fact exists. If there is a factual dispute as to its existence that dispute falls to be dealt with under cl 19 because cl 24.2(2), which entitles each party to refer a dispute to an expert, only applies to disputes where there is a variation circumstance (either as described in cl 24.3 or agreed in accordance with cl 24.4) that gives rise to an entitlement and the question left to be determined is whether and how the contractor should be compensated. The second is that if the parties cannot agree that "a variation circumstance should apply" to a circumstance said to be within cl 24.4, no variation circumstance exists and any dispute as to whether there was a breach of the obligation to negotiate under cl 24.4 must be dealt with under cl 19.

21 WSN contends that there are three variation circumstances within cl 24. Two are described in cl 24.3 and one is described in cl 24.4. As to the latter, cl 24.2(4) records the parties' agreement that a variation circumstance exists "in

accordance with the provision of Clause 24.4". That will be so if WSN claims that it has incurred an increase in costs within cl 24.4 and the parties have negotiated as to whether a variation circumstance should apply. The language "in accordance with" will be satisfied in relation to that circumstance once the parties have negotiated in accordance with cl 24.4, and irrespective of whether they have agreed as to their being a variation circumstance.

22 If the parties have not agreed, cl 24.2(1) will apply and if after further negotiation the parties still cannot agree "whether and how" WSN should be compensated, cl 24.2(2) will apply and either party may refer the dispute for determination under cl 25. In a case where the parties are unable to agree that a variation circumstance should apply, the dispute as to "whether" WSN should be compensated will include that question, as well as any factual issue concerning the existence of the underlying circumstance. Thus, WSN submits that, as is contemplated by cl 24.5, there are two ways in which variations may arise under cl 24. The first is if they are agreed following a negotiation in accordance with cl 24.4 and/or 24.2(1). The second is if they are "determined" as provided by cl 24.2(2). That determination is to be made in accordance with cl 25.

Discussion

23 In a long term agreement for the provision of services for a fixed fee, a clause entitling the service provider to a variation in the amount of that fee must identify the circumstances in which that entitlement arises. The contract may also specify the manner or procedure by which the amount of the variation is to be determined. Clause 24 does this in relation to the two variation circumstances described in cl 24.3. Each circumstance includes the incurring by WSN of "demonstrable additional costs" that have resulted, by reason of some particular event or occurrence, in an alteration to the position that existed at the time of the contract or at the date of the Tender. In the case of cl 24.3(1), that alteration is to "the Participants kerbside collection systems". In the case of cl 24.3(2), it is "in legislation, statute or regulation by state or federal governments that could not have been reasonably foreseen". In relation to each, cl 24.3 records the parties' agreement that it constitutes a "variation circumstance" for the purpose of cl 24.2(1).

24 Clause 24.2(1) permits WSN, at its election, to notify the appellants "that a variation circumstance listed in Clause 24.3 applies". In this context "applies" must mean is asserted to apply or be engaged. It is not likely that the parties proposed that WSN's notification could foreclose any argument about whether the notified circumstance was established and within cl 24.3. This is confirmed by cl 24.2(2) which requires negotiations directed to determining "whether and how" WSN "should be compensated for the additional costs". The "whether" inquiry directs attention to the factual existence of a variation circumstance within cl 24.3. The expression "should be compensated" does not introduce any further or other consideration into that inquiry. The modal verb "should" is used in the sense of "must" or "ought", consistently with there being an obligation to compensate if a variation circumstance is established. Once that inquiry is answered in the affirmative, the second inquiry is as to "how" WSN is to be compensated.

25 Clause 24.2(1) imposes an obligation to "meet to negotiate reasonably and in good faith" in relation to whether and how WSN's variation claim is to be determined. That obligation must be satisfied within 28 days after notification of this claim. The primary judge construed this provision as requiring that the negotiation be completed – in the sense that it produce either agreement or absence of agreement on the relevant questions – within that 28 day period: [39], [57]. In my view that is not the meaning of the language used. The obligation is to meet to negotiate the outcome of the "whether" and "how" questions. It is not to meet "and" determine whether there is agreement about the answers to those questions within the 28 days. In that respect the language of cl 24.2(1) is to be contrasted with that in cll 19.2, 19.4 and 25.2 which provides for periods within which a relevant dispute must be "resolved" or agreement reached. The primary judge's interpretation does not accord with the words of cl 24.2(1).

26 Clause 24.2(2) provides that if the parties cannot agree on the "whether" and "how" questions, the "dispute" between them may be referred to an expert in accordance with cl 25. As there is no stated time period in which the parties are to reach agreement as to those questions, cl 24.2(2) should be read as applying where the parties have not been able to reach agreement as to those

matters within a reasonable time, that time period to be determined in the circumstances of the particular dispute. The relevant principles are identified and discussed in *York Air Conditioning & Refrigeration (Australasia) Pty Ltd v Commonwealth* [1949] HCA 23; 80 CLR 11 at 62; *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568 at 575-576; and *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438 at 444.

27 Clause 24.5 provides that any variation to the Processing Fee agreed in accordance with cl 24.2(1) or determined in accordance with cll 24.2(2) and 25, shall be subject to the quarterly CPI adjustments provided for in cl 5.10.

28 Thus far the variation provisions considered are fairly orthodox. They describe two circumstances in which an entitlement to a variation will arise and the procedure by which a claim to a variation based upon those circumstances is to be made and determined. It is in this context that the language of cll 24.2(4) and 24.4 falls to be considered.

29 The scenario which cl 24.4 describes, unlike each of the circumstances in cl 24.3, does not identify the event or occurrence resulting in the material increase in costs. Instead it describes in general terms two characteristics which those costs must have, namely that they were "beyond the control" of WSN and "reasonably unforeseeable" at the date of the Processing Contract.

30 A second and obvious matter to note is that the parties did not include the scenario in cl 24.4 as a variation circumstance described in cl 24.3. Instead they agreed that where WSN has incurred an increase in costs within that scenario they will "negotiate reasonably and in good faith as to whether a variation circumstance should apply" to that increase. Unlike cl 24.2(1), cl 24.4 contains no express provision that WSN should notify the Councils that it claims to have incurred an increase in costs within that clause. However a provision to the same effect would be implied into cl 24.4 so as to allow it to work sensibly: *Byrne v Australian Airlines Ltd* [1995] HCA 24; 185 CLR 410 at 441-442.

31 The subject of the obligation to negotiate in cl 24.4 is to be contrasted with that of the obligation in cl 24.2(1). The former is "whether a variation circumstance should apply" to the unforeseeable events notified. The latter, in circumstances

where WSN has already notified that "a variation circumstance in Clause 24.3 applies", is "whether and how [WSN] should be compensated for the additional costs".

32 By cl 24.2(4) the parties have agreed that a variation circumstance exists "in accordance with the provision of Clause 24.4". That provision requires a negotiation, undertaken reasonably and in good faith, directed to whether a variation circumstance should apply to the claimed increase in costs. The outcome of that negotiation will be either agreement or no agreement. The effect of agreement is that the notified circumstance is a variation circumstance. It is only in that event that a variation circumstance will exist "in accordance with the provision of cl 24.4"; in the same way that such circumstances "exist" in accordance with the agreement in cl 24.3.

33 The interpretation of cll 24.2(4) and 24.4 urged by WSN treats the former as applying to any notified increase in costs that has been the subject of a negotiation in accordance with cl 24.4. It follows that the outcome of that negotiation is irrelevant to whether a variation circumstance "exists". Furthermore, it is said that the closing language of cl 24.4 ("whether a variation circumstance should apply") is directed to the "whether" and "how" inquiries arising under cl 24.2(1) and any anterior question as to whether the notified increase in costs is to be treated as a variation circumstance.

34 In my view there are difficulties with this construction. First, cl 24.2(4) is not in terms an agreement that a variation circumstance "exists" where cl 24.4 is invoked. The language "in accordance with the provision of Clause 24.4" directs attention to the outcome of the negotiation process provided for by cl 24.4 and not merely to the fact it has occurred. The outcome of agreement that a variation circumstance should "apply" to a notified increase in costs is that such a circumstance "exists", using that word in the same sense that it is used in cl 24.3. It also means that its application has been invoked in the same way that the application of a circumstance in cl 24.3 is invoked by a notification under cl 24.2(1).

35 It follows also that WSN's construction does not give effect to the closing language of cl 24.4 and its use of the word "apply". Nor does it account for the

use of similar, as well as different, language in cl 24.2(1) to distinguish between the notification of the application of a variation circumstance and the determination of the "whether" and "how" questions in cl 24.3. Thirdly, if the parties had intended by cll 24.2(4) and 24.4 to provide that any increase in costs falling within cl 24.4 should be an additional "variation circumstance", they could have done so by including that scenario within cl 24.3. The reason suggested by the primary judge, and relied on by WSN in this Court, for the parties not having done so – that a negotiation about that circumstance might require a longer period for resolution than the 28 days referred to in cl 24.2(1) - is unfounded because, as I have concluded above at [25], it proceeds upon a wrong construction of cl 24.2(1).

36 Finally, there is a plausible commercial explanation for why the parties did not include that more general scenario, directed to unforeseeable events beyond WSN's control, within cl 24.3 when that course would have been more straightforward. It is almost certainly the case that at the time the parties were negotiating the Processing Contract, they were unable to identify what those events might be because, by definition, at that time the events were "reasonably unforeseeable". In that circumstance and in the context of agreeing the terms of a long term contract for the provision of services at a fixed price, they were not able to agree who should bear the risk of such an event occurring and resulting in a material increase in WSN's costs. The Councils were prepared, however, to agree that if there was such an increase in costs, they would negotiate reasonably and in good faith as to whether it should be treated as a variation circumstance. In the event of agreement, WSN would be entitled to be compensated for it and the processes in cl 24.2 would apply in the same way as they did in relation to circumstances within cl 24.3.

37 In my view the construction substantially urged by the Councils is clearly to be preferred. It follows that, in the absence of agreement between the parties that a variation circumstance should apply to the increase in costs asserted by WSN to be within cl 24.4, a claim to a variation in respect of that circumstance is not one which may be referred under cl 24.2(2) for determination by an expert. Furthermore, if there is a dispute as to whether one or other of the

parties is in breach of its obligation under cl 24.4 to negotiate reasonably and in good faith that dispute does not fall within cl 24.2(2).

38 There is one further matter which must be addressed. WSN notified the Councils that because of the decommissioning of the Ecolibrium facility, it has incurred a material increase in costs that was reasonably unforeseeable and beyond its control. The parties then proceeded to negotiate as required by cl 24.4. The outcome of those negotiations was that they were unable to agree that a variation circumstance should apply to the additional costs. At the same time the Councils disputed the existence of the underlying facts and matters said by WSN to engage cl 24.4 and maintained that their obligation to negotiate did not arise, unless they were established in a way which bound them.

39 It seems that there remains a dispute as to whether the Councils were in breach of any obligation to negotiate. The questions which that dispute raises include first, whether the cl 24.4 obligation to negotiate is only engaged if the relevant facts exist; secondly, if their existence in fact is the precondition to the obligation to negotiate, whether that is established; and finally, whether the Councils negotiated reasonably and in good faith.

40 The first of these questions raises a further interpretation issue, which also is relevant to which of the competing constructions is to be preferred as producing a more coherent and sensible operation of the variation provisions as a whole: *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; 221 CLR 522 at [16]. For that reason, I propose to address it.

41 As the discussion in [30] above shows, notwithstanding the language of cl 24.4, the obligation to negotiate must be triggered by a notification from WSN claiming that it has incurred increased costs and seeking to invoke cl 24.4. In my view, such a notification operates as an assertion as to the application of that provision, in the same way as a notification under cl 24.2(1). The parties are not likely to have intended that the existence of the obligation to negotiate would remain uncertain and dependent upon the existence of the underlying facts. Accepting that the obligation arises upon the assertion of a circumstance within cl 24.4, it was not necessary for those facts to be agreed or established before that negotiation could take place and cl 24.2 provides, in the absence of

agreement, for the "whether" and "how" questions to be addressed and, if not resolved, referred for determination under cl 25.

42 Any remaining dispute as to whether there has been a breach of the cl 24.4 obligation to negotiate is one to which cl 19 applies. That is not surprising because the questions raised by such a dispute are likely to extend beyond those arising on a "whether" and "how" dispute and to require consideration of the broader and separate interests of the parties and how they might be affected by one party or the other having to bear the burden of the additional costs arising from the unforeseen event.

Conclusion

43 The appeal should be allowed and the declarations and orders made by the primary judge set aside. By their notice of appeal the Councils seek declarations in accordance with paras 1 and/or 2 of their Summons and an injunction in accordance with para 4. A declaration in the terms of para 1 should be made except that it should not include para (b) which records the Councils' dispute as to the existence of facts within cl 24.4 and that they have referred that dispute for resolution in accordance with cl 19.1. Those recited facts are not relevant to or necessary for the conclusion that WSN is not entitled to refer its disputed claim to a variation, arising from the circumstances described in [15] above, for determination under cl 25. Finally, WSN's cross claim filed on 20 January 2015 should be dismissed and WSN ordered to pay the appellants' costs of the summons and cross claim and of the appeal. It is not necessary to make any order restraining WSN from acting contrary to the position as declared.

44 The formal orders I propose are:

1. Appeal allowed.

2. Set aside the declarations and orders made by Sackar J on 6 March 2015.

3. Declare that the respondent has no entitlement to refer for determination by an expert (purportedly pursuant to cl 24.2(2) of the Contract) a dispute as to whether or how it should be compensated for additional costs, in accordance

with the provisions in cl 25 of the Processing Contract dated 14 August 2006 in circumstances where:

> (a) the respondent has asserted the existence of facts or matters referred to in cl 24 of the Processing Contract;
>
> (b) the respondent has eschewed reliance upon the circumstances referred to in cl 24.3 of the Processing Contract;
>
> (c) following the respondent's assertion of the existence of facts or matters referred to in cl 24.4 of the Processing Contract, the parties have negotiated, but been unable to agree, on the question whether a variation circumstance, based upon the existence of those facts or matters, should apply.

4. Order the respondent's cross claim filed on 20 January 2015 be dismissed.

5. Order the respondent pay the appellants' costs of the summons and cross claim.

6. Order the respondent pay the appellants' costs of the appeal.

45 **WARD JA**: I agree with Meagher JA, for the reasons his Honour gives, that the appeal should be allowed and with the orders that his Honour has proposed. I also agree with the additional reasons given by Bathurst CJ.

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