

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
BUILDING CASES LIST

No. 7012 of 2006

McCONNELL DOWELL CONSTRUCTORS (AUST) PTY
LTD (ACN 008 444 880)

Plaintiff

v

GAS TRANSMISSION SERVICES WA (OPERATIONS)
PTY LTD (ACN 106 043 332) AND ORS

Defendants

JUDGE: HARGRAVE J
WHERE HELD: Melbourne
DATE OF HEARING: 18 October 2006
DATE OF JUDGMENT: 8 November 2006
CASE MAY BE CITED AS: McConnell Dowell Constructors v Gas Transmission
Services
MEDIUM NEUTRAL CITATION: [2006] VSC 411 First Revision

STAY OF PROCEEDING - dispute resolution clause in agreement requiring expert determination - whether clause applicable to dispute - dispute resolution clause capable of applying to only some issues in the proceeding - exercise of discretion - stay application refused.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Dr C Pannam QC and Mr A Neal	Clayton Utz
For the First Defendant	Mr H Foxcroft SC and Dr M Collins	Mallesons Stephen Jaques
For the Third Defendant	Mr D Collins SC and K Lyons	MolinoCahill Lawyers

HIS HONOUR:

INTRODUCTION

1 Newcrest Mining Ltd operates a gold and copper mine at Telfer in Western Australia. By a "Gas Transport Agreement" dated 13 October 2003 between Newcrest and Gas Transmission Services WA (Operations) Pty Ltd, Gas Transmission agreed to design, construct, own and operate a buried gas pipeline to supply gas to a gas fuelled power station which would supply electrical power to the Telfer Mine.

2 By an "EPC Contract" dated 10 October 2003, Gas Transmission engaged McConnell Dowell Constructors (Aust) Pty Ltd to engineer, procure, construct and commission the gas pipeline. The EPC Contract was, in effect, a subcontract in respect of the design and construct obligations of Gas Transmission under the Gas Transport Agreement - or "GTA" as that contract is called in the EPC Contract.

3 Although the two contracts were apparently negotiated in tandem, the nicknames of Gas Transmission and McConnell Dowell in the two contracts are, confusingly, different:

- (1) Gas Transmission is called "the Supplier" in the Gas Transport Agreement, and "OpCo" in the EPC Contract.
- (2) McConnell Dowell is called McConnell Dowell in the Gas Transport Agreement, and "the Contractor" in the EPC Contract.

As will appear, this is by no means the only source of confusion arising from differences between the two contracts.

4 During the construction of the gas pipeline, the works were substantially affected by two cyclones - "Cyclone Monty" and "Cyclone Fay".

5 In this proceeding, McConnell Dowell raises a number of claims against Gas Transmission. Some of the claims are for extra costs arising out of the two cyclones. There are also claims for extensions of time and other relief. Some incidental claims

are made against Newcrest directly.

6 Apart from the statement of claim, there are no pleadings. The full scope of the issues is yet to be defined.

7 Gas Transmission has applied to stay the whole of this proceeding until the completion of an expert determination procedure provided for under the contracts. In summary, it was submitted on behalf of Gas Transmission that the contracts provided that disputes in relation to claims by McConnell Dowell for extra costs as a result of the two cyclones are required to be the subject of expert determination. It was submitted that these claims for extra costs are inextricably linked to the extension of time claims arising out of the cyclones and that, accordingly, it was appropriate to stay the whole of the proceeding.

8 The stay application is opposed by McConnell Dowell and Newcrest, on a number of grounds. First, it is contended that the expert determination provisions do not apply to any of the disputes in the proceeding. Second, it is contended that if the expert determination provisions of the contracts are applicable to the disputes in the proceeding or any of them, the parties agreed that the expert determination provisions be dispensed with. Third, it is contended that the Court should in any event exercise its discretion to refuse the stay application.

RELEVANT PROVISIONS OF THE EPC CONTRACT

9 Clause 6 of the EPC Contract concerns dispute resolution. Clauses 6.2 to 6.4 stipulate a procedure for good faith negotiations between a nominated representative of each of McConnell Dowell and Gas Transmission. If those negotiations do not resolve the dispute, the dispute must be referred to a "Panel" of representatives. The Panel must meet and attempt in good faith to resolve the dispute.

10 Clause 6.5 of the EPC Contract provides that, except in urgent cases, a party may not commence legal proceedings until the parties have undertaken the processes set out in cl. 6.2 to 6.4 and those processes have failed to resolve the dispute.

11 It is accepted by the parties that the processes set out in cl. 6.2 to 6.4 have been followed in relation to the disputes raised in this proceeding. Accordingly, McConnell Dowell is not, by bringing this proceeding, in breach of cl. 6.5.

12 The stay application is based upon the provisions of cl. 6.9 of the EPC Contract. It is necessary to set out this clause in full:

6.9 Disputes relating to the GTA

(a) If the Contractor wants to dispute an amount, period or other issue determined by OpCo in relation to clauses:

- (i) 7.5(d);
- (ii) 19.10(b);
- (iii) 19.14; or
- (iv) 38(f),

where the Contractor's rights are limited to OpCo's recovery under the GTA then the Contractor must issue a written notice to OpCo's Representative stating that it disputes the issue within 10 Business Days of receiving a notice from OpCo's Representative setting out its determination in relation to the clauses listed above.

(b) If the Contractor does not issue a notice in accordance with clause 6.9(a) then it is barred from making a claim against OpCo in relation to the matter and releases OpCo from all liability in relation to the matter.

(c) If OpCo receives a notice in accordance with clause 6.9(a) OpCo must notify Newcrest of the dispute and provide the Contractor with a copy of the notice.

(d) The Contractor must provide to OpCo details of the Contractor's claim in a timely manner and OpCo must then forward the details to Newcrest in accordance with the requirements of the GTA. OpCo must use its best endeavours to ensure that the Contractor is given the opportunity to be present and participate at any expert hearing, mediation or other meeting between Newcrest and OpCo in relation to the dispute.

(e) OpCo must provide to the Contractor copies of all materials provided to OpCo by Newcrest in relation to disputes under clause 6.9(a) in a timely manner.

(f) OpCo must use its best endeavours to resolve the dispute with Newcrest but must not settle the dispute with Newcrest without the prior written approval of the Contractor.

(g) If the dispute is not resolved to the Contractor's approval, then OpCo must escalate the dispute to an expert determination under the GTA.

(h) If the dispute proceeds to expert determination under the GTA then OpCo must

- (i) use its best endeavours to allow the Contractor to participate in the expert process;
- (ii) not approve the appointment of an expert (if it is to be

- agreed between Newcrest and OpCo) without the written consent of the Contractor which consent cannot be unreasonably withheld by the Contractor; and
- (iii) submit any information provided by the Contractor to the expert during the expert process under the GTA.
 - (i) Insofar as is permitted by law, the parties are bound by the determination of the expert under the GTA in relation to a dispute involving the matters referred to in the clauses listed in clause 6.9(a).
 - (j) If for any reason the expert appointed under the GTA cannot issue a determination in relation to a dispute under clause 6.9(a), OpCo must, if requested in writing by the Contractor, commence proceedings in relation to the dispute unless:
 - (i) The Contractor agrees to withdraw its claim or otherwise agrees to settle the dispute; or
 - (ii) An opinion is obtained from Counsel, agreed by both OpCo and the Contractor, to the effect that the Contractor's claim has no prospects of success.
 - (k) OpCo must proceed with such litigation efficiently and without prejudicing the Contractor's rights (including obtaining the Contractor's approval of pleadings and evidence) unless:
 - (i) The Contractor agrees to withdraw its claim or otherwise agrees to settle the dispute; or
 - (ii) An opinion is obtained from Counsel, agreed by both OpCo and the Contractor, to the effect that the Contractor's claim has no prospects of success.
 - (l) The Contractor must pay all of OpCo's costs in relation to any proceeding undertaken in accordance with clauses 6.8(j) and (k).

13 Clause 19.14 of the EPC Contract provides:

19.14 ADVERSE WEATHER DELAY COSTS

- (a) The Contractor must:
 - (i) Within thirty (30) days of the date of execution of this Contract, provide an Adverse Weather Management Plan to OpCo for approval, such approval not to be unreasonably withheld or delayed; and
 - (ii) Use all diligence, skill, experience and knowledge to mitigate Weather Delay Costs.
- (b) If there is, or the Contractor reasonably expects that there will be, a Qualifying Adverse Weather Delay, then the Contractor must within twenty four (24) hours of the Works being affected by the Qualifying Adverse Weather Delay, provide a written proposal to OpCo outlining:
 - (i) the Weather Delay Scenario applicable to the Qualifying Adverse Weather Delay;
 - (ii) a detailed proposed course of action to mitigate the Weather Delay Costs which must be consistent with the Adverse Weather Management Plan to the maximum extent possible; and

the Contractor's estimate of the Weather Delay Costs incurred or to be incurred by the Contractor in connection with the Qualifying Adverse Weather Delay, having regard to the applicable Weather Delay Scenario (" **Adverse Weather Proposal**").

- (c) The Contractor must comply with the provisions of clause 19.14(b) each time a Qualifying Adverse Weather Delay occurs or if it considers that the Weather Delay Scenario applicable to a Qualifying Weather Delay has or should be changed.
- (d) Within 24 hours of receiving the Contractor's detailed proposal under paragraph (b), OpCo must notify the Contractor in writing whether or to what extent (if any) it approves the Contractor's proposal in connection with the Qualifying Adverse Weather Delay, such approval not to be unreasonably withheld. If OpCo rejects the proposal (or part thereof), then the parties will negotiate in good faith to agree an alternate proposal. If OpCo fails to respond to the Contractor's proposal within twenty four (24) hours of receipt, the proposal will be deemed to be approved by OpCo.
- (e) If OpCo and the Contractor are unable to agree an alternate Adverse Weather Proposal in accordance with paragraph (d), then the parties must comply with the requirements of clause 6.9.
- (f) Subject to clauses 19.14(e), (g), (h) and (i), if the Contractor incurs Weather Delay Costs as a result of a Qualifying Adverse Weather Delay, OpCo will be liable to pay the Contractor for each occurrence as follows:
 - (i) any Weather Delay Costs incurred in the implementation of any proposal which has been approved by OpCo, agreed between the parties in accordance with clause 19.14(d) or determined in accordance with clause 6.9, to the extent actually incurred by the Contractor; or
 - (ii) in the absence of prior approval by OpCo, agreement between the parties pursuant to clause 19.14(d) or as determined in accordance with clause 6.9, amounts under the categories of Weather Delay Costs which are prescribed as being claimable without the pre-approval of OpCo in connection with the relevant Weather Delay Scenario in tables 21.1 and 21.2 of Schedule 21, to a maximum of two (2) Days of delay, to the extent actually incurred by the Contractor.
- (g) Notwithstanding any approval given by OpCo in accordance with clause 19.14(d), OpCo's liability for Weather Delay Costs under clauses 19.14(d) and (f) will (in all cases) be subject to the following conditions:
 - (i) OpCo's liability is limited to the reasonable and direct costs incurred by the Contractor as a result of the Qualifying Adverse Weather Delay, including the reasonable direct costs payable to subcontractors, having regard to the Works affected at the time as described in the Program applying at the time and to the extent that the resources relevant to an activity are actually stood down;
 - (ii) in no event will OpCo be liable for costs relating to head office costs, corporate overheads, profit or loss of profit of the Contractor or its subcontractors;

- (iii) where adverse weather conditions would cause construction productivity to be significantly reduced, the Contractor is entitled to place its workforce on standby, and as necessary to demobilise, but in no event should any claim for Weather Delay Costs relate to reduced efficiency or productivity, or additional work or re-work arising out of the adverse weather conditions or the Qualifying Adverse Weather Delay;
 - (iv) the Contractor must use reasonable diligence, skill, experience and knowledge to mitigate Weather Delay Costs;
 - (v) the Contractor must have submitted a proposal in accordance with clause 19.14(b) in relation to the Weather Delay Costs; and
 - (vi) the amount OpCo receives from Newcrest under the GTA.
 - (h) The Contractor will provide such supporting information as may be reasonably requested by OpCo to verify OpCo's liability for Weather Delay Costs pursuant to clause 19.14(f).
 - (i) The costs payable under clause 19.14(f) must be paid by OpCo within 32 days of the amount being agreed or determined.
 - (j) The parties shall meet at least once each month during the term of the Works to discuss:
 - (i) the effect of Qualifying Adverse Weather Delays on achieving the Program, the Milestones, the Date for Practical Completion and the Date for Acceptance;
 - (ii) any changes that may be necessary to the Adverse Weather Management Plan; and
 - (iii) any claims for Weather Delay Costs accruing at the time and the quantum of any such claims.
- OpCo may require the Contractor to provide full details of any claims for Weather Delay Costs.
- (k) In the event that OpCo believes (acting reasonably) that a Qualifying Adverse Weather Delay may have a significant and immediate impact on achieving the Milestones, the Date for Practical Completion or the Date for Acceptance and such Qualifying Adverse Weather Delay is not currently being dealt with in accordance with the Adverse Weather Management Plan or a proposal approved by OpCo or agreed between the Parties pursuant to clause 19.14(d), OpCo may:
 - (i) by written notice to the Contractor require the Contractor to attend a meeting within 48 hours of receipt of the notice to discuss the Contractor's methodology for dealing with, and mitigating the effects and costs of, the adverse weather conditions and resulting delay; and
 - (ii) within 48 hours of the meeting require the Contractor to submit a revised proposal under clause 19.14(b).
 - (l) If a Qualifying Adverse Weather Delay is not being dealt with in accordance with the Adverse Weather Management Plan, or a proposal approved by OpCo or agreed between the parties pursuant to clause 19.14(d), or the Contractor is not using reasonable diligence, skill, experience and knowledge to prevent or mitigate the effect of the Qualifying Adverse Weather Delay on achieving the Milestones,

the Date for Practical Completion or the Date for Acceptance, then OpCo may upon five (5) Business Days' notice to the Contractor, require the Contractor to take such action to deal with, and mitigate the effects and costs of, the adverse weather conditions as OpCo shall direct (acting reasonably and in compliance with applicable Laws). The Contractor shall comply with any such directions. The Contractor is then entitled to be paid in accordance with the Schedule of Weather Delay Scenarios for the extra costs it incurs in complying with such a direction.

- (m) Both parties will act in good faith in exercising their rights and obligations under this clause 19.14 to determine and resolve issues in a manner that is mutually beneficial to the parties and the Project.

14 Clause 38 of the EPC Contract concerns Force Majeure Events. Clause 38(a) provides that neither Gas Transmission nor McConnell Dowell is responsible:

... for any failure to fulfil any term or condition of this Contract, if and to the extent that the fulfilment has been delayed by an event of Force Majeure and which is beyond the control of, or is not caused or contributed to by the fault or negligence of, the party affected and which the affected party is unable to prevent using its best endeavours.

15 Clause 38(e) provides:

Subject to clause 19.14, the Contractor has no entitlement to and OpCo has no liability for:

- (i) any costs, losses, expenses or damages incurred during any period of Force Majeure; and
- (ii) any delay costs in any way incurred by the Contractor due to an event of Force Majeure.

16 Clause 38(f) appears to assume that cl. 38(a) gives McConnell Dowell an entitlement to an extension of time or to extra costs. It provides:

Notwithstanding anything else in this clause and provided that OpCo complies with the notice requirements under the GTA, the Contractor's entitlement to relief under clause 38(a) is limited to the relief OpCo obtains from Newcrest under the GTA for the same event of Force Majeure.

17 However, neither cl. 38(a) nor any other provision in cl. 38 provides any entitlement to either an extension of time or to extra costs as a result of a force majeure event.

18 Clause 19.7(a)(vi) of the EPC Contract gives McConnell Dowell an entitlement to an extension of time where a delay in the works is caused by a force majeure event. Clause 19.7 is not mentioned in cl. 6.9(a) of the EPC Contract.

19 Clause 19.12(b)(v) provides that delay costs in connection with extensions of time pursuant to cl. 19.7(a)(vi):

... other than costs relating to a Qualifying Adverse Weather Delay which is dealt with under clause 19.14, must be dealt with under clause 38 only.

20 The effect of cll. 38, 19.7(a)(vi) and 19.12(b)(v) is that McConnell Dowell has no entitlement to costs in connection with extensions of time for a force majeure event unless those costs are expressly provided for in cl. 19.14.

RELEVANT PROVISIONS OF THE GAS TRANSPORT AGREEMENT

21 The Gas Transport Agreement provides for more than the design and construction of the gas pipeline - which was to be undertaken by McConnell Dowell by way of subcontract under the EPC Contract. Under the Gas Transport Agreement, Gas Transmission also agreed to operate the gas pipeline, when constructed, and ensure continued delivery of gas.

22 Clause 36.2 of the Gas Transport Agreement provides that gas transmission and Newcrest must make diligent and good faith efforts to resolve any dispute between them before exercising any right to refer a dispute to an expert for determination. The Gas Transport Agreement contains a similar procedure to that provided for in clauses 6.2-6.4 of the EPC Contract.

23 Clause 36.3 of the Gas Transport Agreement provides for the referral of disputes between Gas Transmission and Newcrest to an expert for determination. This regime is different from the regime provided for in cl. 6.9 of the EPC Contract in relation to the referral of disputes between Gas Transmission and McConnell Dowell for expert determination. Clause 36.3 of the Gas Transport Agreement relevantly provides:

36.3 Referral to Expert Determination

- (a) A Party to a Dispute may serve a notice on another Party to the Dispute to have the Dispute determined by an Expert if the Parties have failed to resolve the Dispute under clause 36.2 and the Dispute relates to a Technical Matter or a Financial Matter or a provision of this Agreement prescribes that a Dispute is to be referred to an Expert for determination pursuant to this paragraph (a), unless

otherwise agreed by the Parties.

To avoid doubt, this clause applies to Disputes about:

(i)...

(iii) An Adverse Weather Proposal (clause 5.5(e));

(iv)...

(b) Upon receipt by the other Party, the Dispute will then be referred to determination by an Expert.

24 Clause 5.5 of the Gas Transport Agreement is in virtually identical terms to cl. 19.14 of the EPC Contract. Under cl. 5.5, Gas Transmission is entitled to recover from Newcrest extra costs incurred by it as a result of a “Qualifying Adverse Weather Delay” in respect of which an “Adverse Weather Proposal” has been agreed. Clause 5.5(e), like cl. 19.14(e) of the EPC Contract, relates only to disputes about an Adverse Weather Proposal.

CONDUCT OF THE PARTIES

25 Following the two cyclones, McConnell Dowell provided an “Adverse Weather Proposal” to Gas Transmission as required by cl. 19.14(b). McConnell Dowell alleges that Gas Transmission did not reject this proposal, and it was accordingly deemed to have been approved by Gas Transmission under cl. 19.14(d). McConnell Dowell contends that any such deemed approval involved an acceptance by Gas Transmission that there had been, as between it and McConnell Dowell, a “Qualifying Adverse Weather Delay.” McConnell Dowell contends that, as a result, Gas Transmission would become liable to pay McConnell Dowell for “Weather Delay Costs” in accordance with cll. 19.14(f) and (g).

26 McConnell Dowell alleges in its statement of claim that it has incurred Weather Delay Costs arising out of cyclone Monty in the sum of \$4,422,607.86. It claims those costs from Gas Transmission.

27 McConnell Dowell alleges that it has incurred Weather Delay Costs arising out of Cyclone Fay in the sum of \$11,513,066.67. It claims that amount from Gas Transmission.

QUESTION ONE: DO THE EXPERT DETERMINATION PROVISIONS APPLY?

28 Gas Transmission submits that cl. 6.9(a) of the EPC Contract applies to the disputes raised by McConnell Dowell in this proceeding, insofar as those disputes relate to extra costs claimed by McConnell Dowell as a result of the two cyclones, because:

- (1) these claims relate to cl. 19.14; and
- (2) cl. 19.14 provides that McConnell Dowell's rights to extra costs are limited to the amount which Gas Transmission may recover under the Gas Transport Agreement.

29 Clause 6.9(g) purports to compel Gas Transmission to "escalate" any dispute between it and McConnell Dowell in relation to a matter specified in cl. 6.9(a), which is not resolved under cl. 6.9(a) to (f), "to an expert determination under the GTA." For this clause to operate, Gas Transmission must have a right under the Gas Transport Agreement to refer its dispute with Newcrest about that subject-matter to an expert for determination. In this case, the relevant subject-matter of the dispute is the claims made by McConnell Dowell against Gas Transmission, and by Gas Transmission against Newcrest, for Weather Delay Costs. Accordingly, if Gas Transmission has a right under the Gas Transport Agreement to refer a claim by it for Weather Delay Costs to an expert for determination, then it is obliged to do so in the present circumstances.

30 Under cl. 36.3 of the Gas Transport Agreement, the right of Gas Transmission to refer a dispute to an expert for determination is limited to a dispute which has not been resolved in accordance with cl. 36.2 and which relates to:

- (1) a "Technical Matter". That term is defined in cl. 1.1 in the following terms:

"**Technical Matter** means a matter involving issues relating to the receipt, transportation and delivery of Gas under this Agreement which is capable of determination by reference to engineering or scientific knowledge and practice";

- (2) a "Financial Matter". That term is defined in cl. 1.1 in the following terms:

"**Financial Matter** means a matter involving financial calculations which is capable of determination by audit or reference to financial or accounting

records, knowledge or practice"; or

- (3) a provision of the Gas Transport Agreement which prescribes that a dispute is to be referred to an expert for determination pursuant to cl. 36.3(a).

31 It was submitted on behalf of Gas Transmission that the dispute between it and McConnell Dowell as to the extra costs (if any) payable to McConnell Dowell by reason of the two cyclones is a dispute relating to a Technical Matter or a Financial Matter, as defined in the Gas Transport Agreement. In this regard, it was submitted that a practical and beneficial interpretation should be accorded to the definitions of Technical Matter and Financial Matter in the Gas Transport Agreement. It was submitted that this approach was required so as to ensure that the intention of Gas Transmission and McConnell Dowell that any dispute under cl. 19.14 of the EPC Contract which could not be resolved was escalated to an expert determination under the Gas Transport Agreement, as required by cl. 6.9(g) of the EPC Contract. I do not accept these submissions. Even if a practical and beneficial interpretation is given to the two definitions, they are not applicable in the circumstances of this case, for the following reasons.

32 First, cl. 36.3 of the Gas Transport Agreement is concerned with disputes between Newcrest and Gas Transmission. It is not concerned with disputes between Gas Transmission and McConnell Dowell, even though the genesis of a dispute between Newcrest and Gas Transmission may be found in a dispute between Gas Transmission and McConnell Dowell. In order for either Newcrest or Gas Transmission to have a right to refer a dispute to an expert for determination, that dispute must be between them. Accordingly, it is their intention which is relevant, as ascertained from the words they have used in their contract.

33 Clause 36.3 must be construed objectively. What would a reasonable person in the position of Newcrest and Gas Transmission have understood the words to mean? This question must be answered by reference to the text of the Gas Transport Agreement, the surrounding circumstances known to the parties and the purpose or

object of the transaction.¹ I accept that the surrounding circumstances known to Newcrest and Gas Transmission included the existence of the EPC Contract and, in particular, the obligations of Gas Transmission under it to “escalate” certain disputes between Gas Transmission and McConnell Dowell for expert determination under the Gas Transport Agreement. However, the expert determination regimes under the two contracts are in materially different terms and it cannot be assumed that the intention was to include within cl. 36.3 of the Gas Transport Agreement any dispute falling within cl. 6.9 of the EPC Contract.

34 It was submitted on behalf of Gas Transmission that the contracts were intended to be “back to back” and that it would thwart the intention of the parties if Gas Transmission did not have the right to refer any unresolved dispute between it and McConnell Dowell, to which cl. 6.9 of the EPC Contract applies, to an expert for determination under cl. 36.3 of the Gas Transport Agreement. However, if this was the intention of Gas Transmission and Newcrest, it would have been simple for them to have said so in the Gas Transport Agreement. As appears below, I am of the view that they did not do so. The words they have used are incapable of bearing the meaning contended for by Gas Transmission.

35 Second, it is obvious from the words of cl. 36.3 that the parties intended to limit the disputes which were capable of being referred to an expert for determination. If I give the defined terms the broad and beneficial construction contended for by Gas Transmission, I would be ignoring these limitations.

36 In relation to the definition of “Financial Matter”, it was submitted on behalf of Gas Transmission that a dispute about the costs consequences of the two cyclones will inevitably involve financial calculations and that this is enough to bring the dispute within the definition. I do not accept this submission. A Financial Matter (as defined) is one which must be “capable of determination by audit or reference to financial or accounting records, knowledge or practice.” The dispute about

¹ *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40].

McConnell Dowell's right to Adverse Weather Costs is not capable of determination by these means. It involves questions of fact, law and mixed fact and law.

37 As to the definition of "Technical Matter", it was submitted on behalf of Gas Transmission that the dispute about any entitlement to Adverse Weather Costs involves issues relating to the transportation and delivery of gas under the Gas Transport Agreement, because the two cyclones caused delays to the completion of the gas pipeline. I do not accept this submission. If accepted, it would mean that any dispute relating to a delay in completion of the gas pipeline would be a dispute in relation to a Technical Matter. In my view, the definition is directed at matters arising after completion of the gas pipeline. I accept the submission on behalf of McConnell Dowell that this is evident from the terms of cl. 8.1(b) of the Gas Transport Agreement, which directly concerns the obligations of Gas Transmission in relation to receipt, transport and delivery of gas after the completion of the gas pipeline.

38 The third category of dispute which may be referred to expert determination under the Gas Transport Agreement is not applicable to the facts. Gas Transmission is not seeking a stay in order to enable a dispute about an Adverse Weather Proposal to be escalated for determination by an expert.

39 For the above reasons, I conclude that cl. 6.9(g) of the EPC Contract does not oblige McConnell Dowell to "escalate" its dispute with Gas Transmission concerning its claim for Adverse Weather Costs to an expert determination under the Gas Transport Agreement. This is because Gas Transmission has no right to do so under the Gas Transport Agreement.

QUESTION TWO: IN ANY EVENT, DID THE PARTIES DISPENSE WITH THE EXPERT DETERMINATION PROVISIONS?

40 It is accordingly unnecessary for me to consider the alternative contention raised by McConnell Dowell, to the effect that the parties agreed to dispense with the expert determination provisions in relation to all of their disputes.

41 However, as the matter was fully argued, I will express my view briefly. It was submitted on behalf of McConnell Dowell that the parties agreed to dispense with the expert determination procedures under the EPC Contract and the Gas Transport Agreement. This submission was based upon correspondence between the parties concerning a substantial and protracted mediation undertaken by them in respect of all issues in dispute. It was submitted that a reading of the correspondence evidences an agreement between the parties to vary the contracts to provide that the mediation would replace the expert determination provisions of the contracts. I do not accept this submission.

42 In my view, the correspondence does no more than suspend the operation of the expert determination provisions of the contracts during the period of the mediation. This is clear from the correspondence when read as a whole, in particular the following letters:

- (1) Letter dated 11 October 2004 from McConnell Dowell to Gas Transmission, in which McConnell Dowell stated:

Notwithstanding these negotiations we note that clause 36.3 of the GTA requires referral of a dispute to Expert Determination. We note that during the above referenced meetings you advised that you and Newcrest agreed that Expert Determination did not apply to the subject dispute. We note that the question of whether Expert Determination is appropriate has been the subject of previous correspondence and as yet we haven't received a satisfactory response.

Given that parallel negotiations are planned we do not want to waive our rights to Expert Determination. With this in mind, we respectfully request that you give a notice to Newcrest pursuant to clause 36.3 of the GTA so that no time bar applies.

- (2) Letter dated 11 October 2004 from Newcrest to Gas Transmission, in which Newcrest states:

To allow the negotiation process to work effectively, Newcrest is of the view that all dispute related correspondence between the parties should be suspended... However, this suspension would be on the basis that each party's contractual rights would be preserved under the respective contracts. In other words, at the end of the suspension the position of each party under the GTA and the EPC would not have been altered by the fact that the suspension

occurred.

- (3) Letter dated 13 October 2004 from Gas Transmission to McConnell Dowell in which Gas Transmission stated:

Contrary to your assertion [Gas Transmission] advises that it has not agreed with Newcrest that expert determination does not apply to the disputes and has not agreed to waive any rights that it may have under the GTA.

- 43 I accept that the correspondence evidences an agreement between the parties that completion of the mediation process would be a condition precedent to the commencement of litigation by any party. This condition precedent should be seen as an additional requirement to any rights existing under the contracts, including the expert determination provisions.

QUESTION THREE: SHOULD THE COURT, IN ITS DISCRETION, REFUSE A STAY IN ANY EVENT?

- 44 It is also unnecessary for me to consider in any detail whether I should, if the expert determination provisions are applicable in respect of the dispute concerning Adverse Weather Costs, nevertheless refuse to stay the proceeding on discretionary grounds. However, as the matter was fully argued, I will briefly express my view. In my opinion, even if the expert determination provisions were applicable, it would have been appropriate to refuse the application for a stay in the exercise of my discretion. I am of this opinion for the following reasons.

- 45 First, the claims for Adverse Weather Costs form only part of the claims made by McConnell Dowell in the proceeding. There are other substantial claims. Even at this early stage, a reading of the statement of claim indicates that there is a substantial risk that there will be overlapping factual questions to be resolved in respect of the claims for Adverse Weather Costs and other substantial claims. If a stay is granted, and McConnell Dowell's claims for Adverse Weather Costs are the subject of an expert determination, there is a real risk of inconsistent findings of fact in respect of questions which are common to both the expert determination procedure and the balance of the claims made in this proceeding.

46 Second, a stay of this proceeding whilst the expert determination procedure is implemented will not avoid a trial of the remaining issues in this proceeding. It will simply lead to a multiplicity of proceedings between the parties. This will increase the inconvenience to the parties and their witnesses, and no doubt lead to an increase in overall legal costs.

47 Third, the dispute concerning Adverse Weather Costs raises questions of fact, law and mixed fact and law. Under cl. 36.11 of the Gas Transport Agreement, the expert's determinations in relation to questions of law are not binding upon the parties. Accordingly, there is a real risk that an expert's findings on legal issues will, in any event, be referred to this Court for determination. In my view, it is convenient that all issues be determined at the one time by a Court, where determinations can be made on all issues and the Court's findings on both fact and law will be binding upon the parties subject only to rights of appeal.

48 There are a number of a cases in which factors such as those which I have referred to above have led to the refusal of an application for a stay, in circumstances where the alternative dispute resolution procedure did not apply to the whole of the issues raised in the proceeding which was sought to be stayed. I refer in this regard to the reasons for refusing a stay in *Abigroup Contractors Pty Ltd v Transfield Pty Ltd*,² *Thomas v Star Maid International Pty Ltd and ors*,³ *BTR Engineering (Australia) Limited & Ors v Dana Corporation & Ors*⁴ and *Savcor Pty Ltd v State of New South Wales and anor*.⁵

49 In my view, these matters outweigh any potential prejudice which might possibly flow to Gas Transmission by reason of the operation of cll. 6.9(j), (k) and (l) of the EPC Contract.

CONCLUSION

50 For the above reasons, the application for a stay of the proceeding will be dismissed.

² [1998] VSC 103, [167]-[171].

³ [1999] FCA 911, [10]-[14].

⁴ [2000] VSC 246, [25].

⁵ (2001) 52 NSWLR 587.

