

CITATION: *Wickham Point Development Pty Ltd v Commonwealth of Australia & Ors (No 3)* [2018] NTSC 63

PARTIES: WICKHAM POINT DEVELOPMENT
PTY LTD

v

COMMONWEALTH OF AUSTRALIA

AND

TREPANG SERVICES PTY LTD

AND

SERCO AUSTRALIA PTY LTD

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 25 of 2017 (21715635)

DELIVERED: 6 September 2018

HEARING DATE: 13 August 2018

JUDGMENT OF: Luppino AsJ

CATCHWORDS:

Costs – Costs of interlocutory applications – Usual rule that costs in interlocutory applications are costs of the proceedings – Costs remain in the discretion of the Court – Principles for the exercise of the discretion to award costs in interlocutory applications – Requirement for parties to act reasonably.

Practice and Procedure – Stay of proceedings – Inherent jurisdiction of the Court to stay proceedings – Temporary stay pending hearing in another matter – Principles applicable to the grant of a stay.

Practice and Procedure – Practice Direction 6 of 2009 – Whether the pre-action protocols of Practice Direction 6 of 2009 apply in relation to the subsequent joinder of parties.

Supreme Court Rules rr 1.10, 63.18.

Practice Direction 6 of 2009 – Trial Civil Procedure Reforms.

Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) [2015] NTSC 32.

Johnson v Northern Territory of Australia [2015] NTSC 15.

TTE Pty Ltd v Ken Day Pty Ltd (1990) 2 NTLR 143.

Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin (1997) 186 CLR 622.

United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors [2010] NTSC 31.

NT Pubco Pty Ltd & Anor v DNPW Pty Ltd (Subject to a Deed of Company Arrangement) & Ors [2011] NTSC 51.

Hunter v Chief Constable of West Midland Police [1982] AC 529.

Batistatos v Roads & Traffic Authority of New South Wales (2006) 226 CLR 256.

Rozenblit v Vainer & Anor [2018] HCA 23.

Gao v Zhang (2005) 14 VR 380.

Rochfort v John Fairfax & Sons Ltd [1972] 1 NSWLR 16.

Voth v Manildra Flour Mills Pty Ltd & Anor (1990) 171 CLR 538.

CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345.

Wickham Point Development Pty Ltd v Commonwealth of Australia (No 2) [2018] NTSC 50.

REPRESENTATION:

Counsel:

Plaintiff:	N Christrup
Defendant:	D Robinson SC
First Third Party:	N Christrup
Second Third Party:	Not represented

Solicitors:

Plaintiff:	HWL Ebsworth
Defendant:	Clayton Utz
First Third Party:	HWL Ebsworth
Second Third Party:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	Lup1805
Number of pages:	23

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Wickham Point Development Pty Ltd v
Commonwealth of Australia & Ors (No 3)*
[2018] NTSC 63
No. 25 of 2017 (21715635)

BETWEEN:

**WICKHAM POINT DEVELOPMENT
PTY LTD**
Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA
Defendant

AND:

TREPANG SERVICES PTY LTD
First Third Party

AND

SERCO AUSTRALIA PTY LTD
Second Third Party

CORAM: Luppino AsJ

REASONS

(Delivered 6 September 2018)

- [1] These reasons deal with two applications. Firstly, an application by the Defendant by summons filed 26 June 2018 seeking a stay of the Third Party claim between the Defendant and the First Third Party (“Trepang”).

Secondly, an application by the Plaintiff for costs in respect of an earlier interlocutory application. My reasons published 9 February 2018 relate to that interlocutory application.

- [2] By way of background to the application for costs, as part of the disclosure process pursuant to *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms* (“PD6”) the Defendant had provided the Plaintiff with a number of documents which fell into two categories, namely:-
- (a) Six entries of a diary or workbook which contained redactions;
 - (b) Other entries from the same diary or workbook which also contained redactions and the dates of the entries were not apparent from the unredacted parts.
- [3] The Plaintiff had requested unredacted copies of the documents in the first category but that was refused. In respect of the second category, the Plaintiff had not challenged the redactions but sought the dates in that diary or workbook either side of each of the entries to obtain a temporal reference for each entry. It later transpired that those entries did not contain a date so there had not been any redaction of the date. After the summons was filed but before the matter was argued, the Defendant’s solicitors were able to determine the approximate date of each entry by referring back to the author and having him determine an approximate date for each entry. The Plaintiff accepted that information and therefore it was not necessary to argue that part of the application.

- [4] The Plaintiff now seeks costs on the standard basis in respect of the application for both orders and, in each case, that the application be certified fit for counsel.¹ The Defendant opposes the order for costs but does not oppose the certificate for counsel.
- [5] In my Reasons published 9 February 2018, relevant to the application in respect of the first category of documents, I observed:-
- (a) The redaction of irrelevant parts of discoverable documents may be permitted if it is in the interests of justice to do so;
 - (b) The onus in all respects is on the party seeking the redaction;
 - (c) Confidentiality alone is not sufficient justification for redaction of irrelevant parts;
 - (d) The Defendant's argument that relevance was not established was based on a very strict view of the requirements of pleadings, a view that I did not accept;
 - (e) The Defendant's claim of confidentiality was tenuous.
- [6] In the end the Plaintiff was totally successful in respect of that part of the application and I was of the view that the position taken by the Defendant was not a strong one.

¹ See Rule 63.72(9) which provides that no fee shall be allowed for counsel on an interlocutory application unless the Court otherwise certifies.

[7] Costs in interlocutory applications are regulated by Rule 63.18 of the *Supreme Court Rules* ("SCR"). That provides as follows:-

63.18 Interlocutory application

The costs of an interlocutory or other application in a proceeding, whether made on or without notice, are to be costs in the proceeding unless the Court otherwise orders.

[8] Rule 63.18 was amended with effect from 12 July 2017. All published authorities in respect of the Rule predate that amendment and the effect of those authorities therefore needs to be assessed in light of the amendment. The difference pre and post the recent amendment to Rule 63.18 is relatively brief. Prior to the amendment Rule 63.18 provided that each party bore their own costs absent a contrary order by the Court. Post the amendment the costs of an interlocutory application are costs in the proceeding, again absent a contrary order by the Court. The amendment only changes the default position. The overriding discretion of the Court to award costs in interlocutory applications is maintained. The effect of the amendments is that the costs of interlocutory applications are determined according to the final result in the litigation unless the Court otherwise orders.

[9] I summarised the authorities in respect of Rule 63.18 in *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) (No 2)*.² What I said there, in summary form, was:-

² [2015] NTSC 51.

- (a) A party will not recover costs simply by being successful on an interlocutory application.
- (b) That is because the object of Rule 63.18, at least as it then provided, was to avoid unnecessary applications by encouraging resolution of interlocutory issues by agreement and without recourse to the Court.
- (c) The Full Court in *Johnson v Northern Territory of Australia*³ reaffirmed Martin J in *TTE Pty Ltd v Ken Day Pty Ltd*,⁴ specifically that:

"...there must be something exceptional about the circumstances of the interlocutory application under consideration to lead the Court, in the exercise of its discretion, to make an order as to costs, taxation and payment...

...What is required is an approach which seeks to have a successful party reimbursed the expense of interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably or which are unnecessarily burdensome or which are made at a time, such as here, when that party has been deprived of the value of the work done in preparation of his case for trial....

...No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the application or resistance, as the case may be, are reasonable. However, if such application or resistance is without real merit, as is often the case, the successful party should not have to bear his costs."

- (d) Although the discretion of the Court remains unfettered, the Court is concerned with whether the parties acted reasonably and

³ [2015] NTSC 15.

⁴ (1990) 2 NTLR 143.

consideration of the merits of the application and of the resistance to the application were relevant factors.

[10] In my view, the amendment to Rule 63.18 does not change the object of the Rule, only the default position. The authorities have developed based on the object of the Rule. Absent an amendment which demonstrates a different or altered object, the principles have equal force and application on the amended wording of the Rule.

[11] The Plaintiff seeks the order that the Defendant pay its costs in respect of the application relative to the first category of documents for a number of reasons. I do not accept all of those reasons but I am of the view that it is appropriate for the Defendant to pay the Plaintiff's costs in that respect. Although the Plaintiff was entirely successful on the application, that alone is not sufficient. More relevantly, the Defendant resisted all requests to provide unredacted versions of the relevant documents. The Defendant's position in respect of the relevance of the redacted parts depended on a view of the requirements of pleadings which I did not accept and the claim for confidentiality was tenuous and relied on highly speculative matters which were unrealistic. Overall, I do not therefore consider that the Defendant's resistance to the order for production of the documents in the first category was reasonable.

[12] As to the second category of documents, relevantly, before the issue of the extant interlocutory summons, there had been correspondence passing

between the respective solicitors for the Plaintiff and the Defendant in respect of the issue, albeit in general terms.

[13] By the time it became clear that an interlocutory application was to be required in respect of the first category of documents, and which the Plaintiff was proposing to immediately issue, the issue relevant to the second category of documents had not been resolved. Therefore the Plaintiff decided to seek both orders in the one summons and argued that that was a reasonable and practical way to proceed.

[14] Although I agree that it was inevitable at that stage that the Plaintiff would need to make an application in respect of the first category of documents, in respect of the second category, there is no evidence before me as to why that could not wait until the avenues for resolution had been fully explored. The evidence demonstrates that a resolution of the matter by agreement was still possible at that time. If that subsequently proved unsuccessful, the Plaintiff could then have added the order in respect of the second category of documents by amendment to the summons. The decision to seek both orders in the summons from the outset appears to be little more than a preference or a matter of convenience for the Plaintiff.

[15] The evidence reveals that there were discussions between the solicitors shortly after the service of the summons. The Defendant's solicitor then indicated that he would get instructions. On a subsequent occasion the

Defendant's solicitor indicated likely agreement, although no final commitment was made.

- [16] The issue was not resolved by the time the summons was first mentioned when a timetable for submissions was fixed. Both parties were keen to have the summons heard at the same time as a summons by the Plaintiff seeking leave to amend its Statement of Claim which had by then been listed for argument. A concurrent hearing was granted. As a result of that, an abridged timetable for submissions in respect of the discovery application was fixed to accommodate that concurrent hearing.
- [17] The evidence revealed that the diary or workbook was the property of a contractor of the Defendant and there is no evidence that the Defendant had any control over it. The Defendant's solicitors could not advise the Plaintiff's solicitors of the date of each entry as the unredacted entries did not contain a date. The Defendant's solicitors referred back to that contractor to obtain the information the Plaintiff sought as the information as to the date of the entries could only be determined by that contractor.
- [18] Therefore, in my view, and on the basis that the actual redactions were not challenged, the Defendant did more than it was obliged to. On 24 October 2017, on the eve of the argument, but subsequent to the filing of submissions, the parties resolved the issue. The argument in respect of the amendment to the Statement of Claim and in respect of the first category of

documents in the extant summons commenced on 25 October 2017 and concluded on 15 November 2017.

[19] The Defendant argues that on the authority of *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin*⁵ (“*Qin*”) there should be no order as to costs.⁶ *Qin* dealt with a situation where a matter had been settled but there was still an application for costs. McHugh J said that a Court would not try a hypothetical case simply to determine costs. That has greater application in respect of costs of the substantive proceedings. I think there is still scope for an order for costs to be made in the circumstances of this case. I think that fits squarely with the following passage extracted from the case, namely:-

“In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.”⁷

[20] The Plaintiff argued that the Defendant's delay in providing the dates in respect of those entries justified an order for costs against it. However, even had there been a demonstrated need to apply for an order in respect of the documents at the time the summons was issued, as the Defendant required

⁵ (1997) 186 CLR 622.

⁶ See *United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors* [2010] NTSC 31 and *NT Pubco Pty Ltd & Anor v DNPW Pty Ltd (Subject to a Deed of Company Arrangement) & Ors* [2011] NTSC 51 for the most recent application and consideration of the principle in the Territory.

⁷ (1997) 186 CLR 622 at p 624.

time to obtain the information the Plaintiff sought, and as the provision of that information was otherwise outside the ambit of the Defendant's discovery and disclosure obligations, I am of the view that the Defendant cannot be faulted for the delay. Instead, I think the Plaintiff was too hasty.

[21] For that reason I am of the view that the default position under Rule 63.18 is appropriate in respect of the application for the second category of documents.

[22] As to the stay, the background is a services agreement entered into by the Defendant and Trepang pursuant to which Trepang was to provide various services to the Defendant at the Defendant's detention centre. Clause 5.3 of the services agreement *inter alia* required Trepang to keep and maintain certain records. It also provided that those records were the property of the Defendant and that Trepang was to provide those documents to the Defendant whenever the Defendant required it to do so.

[23] The Defendant had requested Trepang to deliver up those records in accordance with that provision. In the course of correspondence passing between solicitors for the Defendant and Trepang⁸ in respect of that request, Trepang referred to a "usual practice". The Defendant alleged that the existence of such a practice was inconsistent with the obligations of Trepang under the services agreement. The Defendant required the documents to

⁸ The same solicitors represent the Plaintiff and Trepang.

investigate that matter as well as for the purpose of pleading and/or particularising its Third Party claim against Trepang.

[24] As Trepang refused to comply, the Defendant commenced separate proceedings in this Court by Originating Motion⁹ seeking specific performance of the relevant clause of the services agreement (“the Specific Performance Claim”). That Originating Motion was filed on 1 May 2018 and was first mentioned before me on 3 May 2018. On that occasion the Defendant indicated that it was ready to proceed and sought to expedite the matter to hearing. Dates for hearing were available in the following week. Trepang resisted the listing at that time and sought an adjournment to obtain instructions. Although the particular instructions required were not specified, in the expectation that Trepang may wish to file some affidavit material in any case, an adjournment was granted to the 31 May 2018.

[25] On the adjourned date I was then notified that a potential conflict of interest between the Plaintiff and Trepang had been identified and, as the same solicitors acted for both parties, an opportunity to investigate that was sought. An adjournment was granted to 14 June 2018.

[26] On resumption, the potential conflict had apparently been resolved and both the Plaintiff and Trepang were ready to have the matter listed. Directions were given for filing affidavits by Trepang and submissions by both parties. By that time however the Court calendar meant that the matter could not be

⁹ *Commonwealth of Australia v Trepang Services Pty Ltd*, No 37 of 2018.

heard until 27 August 2018, nearly four months after it was first mentioned in Court.

[27] By summons filed in these proceedings on 24 April 2018 the Defendant sought an extension of the time for it to issue its proposed Third Party Notices, including against Trepang. That was based on the need for the same documents as sought in the Specific Performance Claim. I dealt with that application on 26 April 2018 when I essentially refused the application. I was not then aware of precisely what would be required for the Defendant to obtain those documents, nor did I anticipate that it would take more than four months for the matter to be heard by the Court.

[28] The Defendant subsequently filed three Third Party Notices shortly after. Trepang has sought and obtained extensions of the time to file its Defence to the Third Party Notice issued against it pending determination of the current application for a stay.

[29] The Defendant now seeks a stay of the Third Party proceedings against Trepang until determination of the Specific Performance Claim. Both the Plaintiff and Trepang oppose the stay.

[30] There is some controversy between the parties as to the nature and source of the power to grant the stay that the Defendant seeks. Likewise in respect of the principles to be applied in determining if a stay should be granted. I will deal with that first.

[31] The Plaintiff and Trepang argued that there is no express power to generally stay a matter in either the *Supreme Court Act* or the SCR. All parties acknowledge that the SCR provides for power to grant a stay in certain specified circumstances but none are applicable to the current matter.

[32] The Defendant argued that there is inherent jurisdiction to grant a stay and also relied on a power implied to give effect to Rule 1.10 of the SCR. As to the former, the Defendant argued that a general conditional stay is one tool available to the Court for regulating its own proceedings and for the purposes of case management, both being neatly and broadly grouped as being for the purposes of the administration of justice. The Defendant submitted that this Court, being a superior Court of record, has an inherent jurisdiction to secure those objectives and to ensure that the Court's ordinary procedures does not lead to injustice or unnecessary waste of time or resources.

[33] As to the alternative source of power, Rule 1.10 of the SCR provides as follows:-

1.10 Exercise of power

(1) In exercising a power under this Chapter the Court:

- (a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined; and
- (b) may give any direction or impose any term or condition it thinks fit.

- (2) The Court may exercise a power under this Chapter of its own motion or on the application of a party or of a person who has a sufficient interest.

[34] The Plaintiff and Trepang criticised the limited extent of authority relied on by the Defendant in support of its submission. They argued that the authorities the Defendant relied on¹⁰ merely confirmed the existence of an inherent jurisdiction to grant a permanent stay in specified circumstances, broadly described as where there is an abuse of process. However, I am in no doubt that this Court, as a superior Court of record, has the inherent jurisdiction to grant a stay. That has been acknowledged in a number of the cases discussed in argument, the focus of those cases being more as to the principles to be applied when determining whether a stay should be granted rather than the existence of the power.¹¹

[35] More relevantly, the Plaintiff and Trepang argued that it was not appropriate to grant the stay the Defendant sought based on the relevant principles. Those principles, they argued, were firstly that parties are *prima facie* entitled to have their matter determined in the ordinary course of business of the Court.¹² Secondly, that the right of access to the Court should not be lightly denied.¹³ Thirdly, the Court should be cautious about granting a stay.¹⁴ Fourthly, that the power of a Court to grant a stay is designed to

¹⁰ *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 and *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256.

¹¹ *Rozenblit v Vainer & Anor* [2018] HCA 23 (“*Rozenblit*”); *Gao v Zhang* (2005) 14 VR 380; *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 (“*Rochfort*”).

¹² *Rochfort*.

¹³ *Rochfort*, at 19.

¹⁴ *Voth v Manildra Flour Mills Pty Ltd & Anor* (1990) 171 CLR 538 (“*Voth*”).

prevent its own proceedings being used to bring about an injustice.¹⁵ It can be seen that there is some overlap.

[36] I think that further principles relevant to the extant application can also be distilled from those authorities. Firstly, an action should only be stayed when to permit it to proceed would amount to an abuse of jurisdiction or would clearly inflict unnecessary injustice upon the opposing party.¹⁶ The balance of convenience alone is not a sufficient basis for a stay.¹⁷ The caution mandated by the various authorities does not limit the inherent jurisdiction to grant a stay and only demonstrates the gravity of the grant of a stay and consequently the necessity for the existence of proper grounds for the exercise of the power.¹⁸ Importantly, that there is no hard and fast rule as to what constitutes proper grounds for this purpose¹⁹ and that considerations of efficiency and cost, and the consequences of the stay, are relevant to the determination of the justice of the case.²⁰

[37] The Plaintiff and Trepang also argued that the basis relied on by the Defendant is not one of the bases upon which a stay has been ordered in the past. Leaving aside whether that is correct, as with categories of abuse of

¹⁵ *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

¹⁶ *Rozenblit* at para 97; *Gao v Zhang* (2005) 14 VR 380 at 384.

¹⁷ *Voth* at 554, albeit specifically in the case of a stay based on forum considerations and more generally, *Rochfort* at 19.

¹⁸ *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 19; *Rozenblit v Vainer & Anor* [2018] HCA 23 at para 72.

¹⁹ *Rozenblit* at para 72; *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267.

²⁰ *Rozenblit* at paras 72 and 76.

process, the categories are not closed. That a stay has not been ordered in similar circumstances in the past is not determinative.²¹

[38] The Defendant's argument was broadly based on the balance of convenience. One of the principles applicable to the grant of a stay is that the balance of convenience alone is not a sufficient basis for a stay.²² However, in conjunction the Defendant also argued that a limited stay would be beneficial to the efficient case management of the matter in the future in a number of ways. Primarily that benefits would flow from allowing the Defendant to properly investigate and plead a matter that was an issue in the proceeding between the Defendant and Trepang. That in turn that would help to determine the real issues in the proceedings with the positive effect of avoiding wasted costs due to the need for subsequent amendments of pleadings and delays due to other interlocutory processes, such as further discovery. One of the savings was said to be avoiding amendments to the Statement of Claim on the Third Party Notice and the Defence to that Statement of Claim.

[39] The Defendant claimed that neither the Plaintiff nor Trepang have demonstrated that any prejudice will be suffered by either of them if the stay was granted. That was argued to be the case on the basis that the granting of a stay will have little effect on the prosecution of the Third Party claim, or

²¹ *Rozenblit* at para 72; *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267.

²² *Voth* at 554.

the principal proceeding, but that if granted it was likely to avoid wasted costs in additional interlocutory processes.

[40] Lastly, the Defendant relied on its claimed diligence in the prosecution of its attempts to secure the documents. This is presumably an application of the principle in *Rozenblit* that the conduct of the party seeking the stay is a relevant consideration.²³ The evidence relied on in that respect was the correspondence passing between the parties in the lead up to the Defendant filing its Originating Motion in the Specific Performance Claim. That evidence is that the Defendant, through one of its agencies, gave the required notice to request the provision of the relevant documents as far back as 18 August 2016. That was repeated on 26 February 2018 and absent a reply, the Defendant's solicitors wrote to the solicitors acting for both the Plaintiff and Trepang seeking that response. On 21 March 2018 the Defendant's solicitors again wrote to solicitors representing the Plaintiff and Trepang seeking a response. On 13 April 2018 the solicitors for the Plaintiff and Trepang finally refused production of the requested documents. The Defendant also relied on the fact that it sought expedition of the hearing, something frustrated by the two adjournments sought by, and granted to, the Plaintiff and/or Trepang.

[41] The Plaintiff and Trepang dispute all of that. They argued that the Defendant had not been diligent arguing that the Defendant could have commenced the Specific Performance Claim earlier. That however is arbitrary. There is also

²³ *Rozenblit* at para 108.

a certain irony for such a submission made by a party who sought two adjournments of the Specific Performance Claim and, but for those adjournments, that claim may well have been determined by now.

[42] The Plaintiff and Trepang likewise argued that the Defendant could have applied for preliminary discovery, or third party discovery, or production of the documents by subpoena. That implies that less time would have been taken up by those alternative processes, a suggestion which I consider to be dubious. I would place greater emphasis on that if I thought that Trepang would provide the requested documents to the Defendant had those alternative processes been adopted but that was not a commitment which Trepang made. The refusal to provide the documents when requested pursuant to clause 5.3 of the services agreement and the argument of Trepang to support its refusal leads me to conclude that Trepang would have resisted production by those means in any event.

[43] In any case, as the Defendant pointed out, the advantage of the separate proceedings was that they achieved the same result as the suggested alternative procedures but also enabled the Defendant to seek the return of its property, something which it would not have been able to do by the alternative processes.

[44] The Plaintiff and Trepang also argued that the same result could have been achieved earlier by way of the PD6 process. There is evidence that a PD6 process was conducted between the Defendant and the various Third Parties.

That appears to rely on an interpretation of PD6 to the effect that once a proceeding is commenced by Writ, PD6 applies in respect of any subsequent joinder of parties. I am not convinced that PD6 applies to Third Party proceedings. On its wording, PD6 only applies to the actual proceedings commenced by Writ, not to subsequent joinder as it provides for pre-action processes. I read the operative provisions of PD6 as not being applicable to related proceedings commenced by joinder.

[45] Leaving aside whether PD6 applies to Third Party proceedings for the moment, it is clear however that PD6 only provides costs and interest sanctions for non-compliance and in any case the disclosure of documents pursuant to PD6 is a limited form of discovery²⁴ and may not have proven sufficient. Lastly, I am not convinced that the PD6 process would have ensured any greater level of cooperation between the parties. It proved unsuccessful in respect of disclosure between the Plaintiff and the Defendant.

[46] As to prejudice, the Plaintiff and Trepang allege likely prejudice. Although arguable, no actual prejudice was demonstrated by evidence. The likely prejudice claimed is based on the Third Party proceedings lagging behind the principal proceedings if the temporary stay was granted. As part of that the Plaintiff and Trepang also relied on delays to steps such as preparation of Litigation Plans, Trepang's intended Counterclaim and, lastly, the Settlement Conference / Mediation process. They argued that the stay would

²⁴ *Wickham Point Development Pty Ltd v Commonwealth of Australia (No 2)* [2018] NTSC 50.

have the effect of fracturing the proceedings and possibly leading to separate trials. I agree that such a situation should be avoided. However, I do not agree that will be the case in the circumstances of this case given what I think is the likely duration of the stay if granted on the terms sought, and how I expect that will affect the concurrency between the principal proceedings and the Third Party proceedings.

[47] The argument advanced by the Plaintiff and Trepang depended on the stay being a likely delay to these proceedings, with the assumption that otherwise the proceedings would proceed routinely or quickly. Although an admirable aspiration, I think that is an unlikely scenario as the history of the case management of the matter demonstrates. There have already been many directions hearings and interlocutory applications in the matter. In the most part the interlocutory applications have been vigorously prosecuted and defended resulting in delays while affidavits are prepared and filed, for argument to occur and, lastly for decisions to be published. I cannot rule out further delays and particularly I cannot rule out that there will not be any other interlocutory applications. Indeed I expect the converse to be true and I think that one further interlocutory application will delay the principal proceedings longer than the proposed stay sought by the Defendant. Any action which may avoid the need for further interlocutory applications in that context, such as the stay currently sought, therefore may save time and costs overall.

[48] The dispute on the Specific Performance Claim is a discrete one involving the interpretation of the terms of the services agreement. It was heard in one day and the decision has been reserved. The Plaintiff and Trepang argued that it would be some time before a decision is published and the Defendant argued the contrary. Although it is not possible to accurately predict how long it might take to have a final decision, I tend towards the same view as the Defendant.

[49] Currently the principal proceedings await discovery to be completed. That has been ordered to be concluded by early November 2018. I cannot rule out the possibility of an extension of the time to complete discovery. It is possible that there will be a decision on the Specific Performance Claim closer to that time. If so, there will be little delay overall. Moreover, if the Defendant is successful in the Specific Performance Claim, I suspect that compliance should occur quickly given that Trepang has been on notice for some time that the Defendant seeks delivery of the documents and also given that the documents sought, or at least a large part of them, will be discoverable between the Defendant and Trepang. That should then save some of the time that would otherwise be required for that step. In any case, as the Plaintiff and Trepang are represented by the same solicitors, I expect that those solicitors would have already been provided with those documents for preliminary consideration of the discovery process hence, if the Defendant successfully obtains an order, a reduced time for compliance should result.

[50] Taking all relevant matters into account, recognising the principles from the authorities referred to and particularly the need to exercise the power of granting a stay with caution, I think that the stay is likely to be a short one and, allowing for possible further delays due to interlocutory processes, not likely to unduly delay the primary proceedings, if at all. The documents sought are clearly relevant to the Third Party claim and *prima facie* the Defendant has an entitlement to the documents. Moreover the high possibility that there will be a benefit in terms of the overall progress of these proceedings due to the narrowing of the issues, and the likely cost savings from avoiding amendments and consequent delays in that event, leads me to conclude that the stay is appropriate.

[51] The orders that I propose to make are, firstly in respect of the application for a stay, that the Third Party claim between the Defendant and the First Third Party be stayed until final decision in *Commonwealth of Australia v Trepang Services Pty Ltd*, No 37 of 2018. Secondly, in respect of the applications for costs, in respect of the interlocutory application filed 3 October 2017, the Defendant is to pay the Plaintiff's costs in respect of Order 1 in that summons taxed on the standard basis and with a certificate for counsel. Other than also certifying it fit for counsel, I make no order as to costs in respect of Order 2 of that summons.

[52] I will hear the parties as to ancillary orders and costs. My preliminary view, subject to any submissions that the parties may make, is that the costs of these applications should be costs of the proceedings, which is the default

order under Rule 63.18. The matter was also sufficiently complex to warrant a certificate for counsel pursuant to Rule 63.72.