

CITATION: *Northern Territory of Australia v. Dover Investments Pty Ltd and Ors* [2020] NTSC 3

PARTIES: NORTHERN TERRITORY OF AUSTRALIA

v

DOVER INVESTMENTS PTY LTD

AND

AUSTCORP PROPERTY GROUP PTY LIMITED

AND

AUSTCORP INTERNATIONAL PTY LIMITED

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 101 of 2019 (21934064)

DELIVERED: 30 January 2020

HEARING DATES: 12 November 2019

JUDGMENT OF: COULEHAN AJ

CATCHWORDS:

CIVIL PROCEDURE - Alternative dispute resolution - independent expert - Exercise of courts discretion.

Supreme Court Rules O.23.01.

Dance with Mr D Limited v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332.

McVeigh (trustee of the bankrupt estate of Piccolo) v National Australia Bank Ltd [2000] FCA 187.

Royal Society for the Prevention of Cruelty to Animals (Victoria) Inc v Marson Constructions Pty Ltd [2000] 1 VR 274.

Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation [2018] FCAFC 118.

Shoalhaven City Council v Firedam Civil Engineering Pty Ltd [2011] 244 CLR 305.

Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563.

REPRESENTATION:

Counsel:

Plaintiff:	Mr P Bick and Mr H Baddeley
Defendant:	Mr B Walker, Mr A Wyvill and Mr A Edwards

Solicitors:

Plaintiff:	Squire Patton Boggs
Defendant:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	Cou2002
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REASONS FOR DECISION

- [1] This proceeding was commenced by Writ on 11 September 2019. The Plaintiff claims against the First Defendant ("Dover"), a declaration that an agreement, the Development Agreement dated 29 July 2016, was validly terminated by the Plaintiff on 19 April 2019 and, against the Second Defendant ("Austcorp Property") and the Third Defendant ("Austcorp International"), the sum of \$1,273,436 and interest pursuant to a Payment of Works Deed ("Works Deed") dated 30 June 2016.
- [2] A defence to the statement of claim has not been filed. On 17 September 2019 the Defendants applied by summons for an order pursuant to O.23.01 that this proceeding be stayed. The Defendants rely upon dispute resolution clauses in the Development Agreement and the Works Deed, which provide for the appointment of an independent expert in the event of a dispute. The Defendants have given notice of a dispute under both agreements and the stay is sought so that the disputes may be resolved by an independent expert.
- [3] Clause 32 of the Development Agreement provides for dispute resolution as follows:
- "32.1 If a difference or dispute (Dispute) between the parties arises in connection with the subject matter of this Agreement, then either party shall give to the other a written notice of Dispute adequately identifying and providing details of the Dispute."

- [4] It is further provided when written notice of the dispute has been given the dispute must be referred to relevant officers of the parties to the agreement for resolution by negotiation in good faith. If the dispute has not been resolved within 10 business days the dispute must be determined by referral to an independent expert. The independent expert must be a person agreed upon by the parties, or failing agreement, a person or persons duly qualified to decide the dispute and nominated by the President of the Law Society.
- [5] The independent expert must be appointed within 10 business days of the referral for determination by an independent expert. He is required to promptly fix a time and place for receiving submissions or information. He is not bound by the rules of evidence. He is to make a determination only in respect of matters expressly referred for resolution.
- [6] The independent expert must provide a draft determination to the parties within 30 days of his appointment. The parties may make written submissions within 40 business days of appointment. He may take into account the parties submissions to the extent he determines necessary in his absolute discretion and the parties will have no basis for challenging the determination on the basis that he did not take into account, either at all or to a sufficient degree, a party's submissions. He must provide his final determination within 50 business days of his appointment and his decision is final and binding on the parties.
- [7] Clause 6 of the Works Deed provides for dispute resolution as follows:

"6.1 Notice of Dispute

(a) If a dispute arises between the parties as to any matter concerning this Deed (Dispute), the party claiming the Dispute will give immediate notice in writing to the other party providing details of the Dispute."

[8] Within 5 business days of a notice being received by a party, one or both of the parties will nominate an independent expert to determine the dispute. If the parties fail to agree as to an independent expert then the matter may be referred to the President of the Law Society who will nominate one.

[9] The decision of the independent expert is absolute and final and will bind the parties, and the Deed will be deemed to be amended to incorporate the terms of the decision. The parties are to make available to the independent expert all materials requested by him and will furnish him with all other materials which are relevant to the determination.

[10] As to the merits of expert determination, in *Zeke Services Pty Ltd v Traffic Technologies Ltd*¹ Chesterman J suggested that:

"[27] The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and, because the expert applies his

¹*Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd.R.563.

own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar"

This statement was quoted, with apparent approval, in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*².

[11] Chesterman J went on to say in paragraph [27]:

".....The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed."

[12] The Court has a discretion to stay proceedings where the parties have agreed that a dispute between them be otherwise determined. In *Zeke Services*³ Chesterman J commented on the discretion as follows:

"[21] The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in *Channel Tunnel*, by the High Court in *Dobbs and Huddart Parker Ltd v the Ship Mill Hill and Her Cargo* (1950) 81 CLR 502 (an arbitration case) and by Gillard J in *Badgin*. However, a stay will not be granted if it would be unjust to deprive the Plaintiff of the right to have his claim determined

² *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] 244 CLR 305, [25].

³ *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd.R.563.

judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.

[22] Ordinarily, I would think that the onus could be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism that the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. The parties are presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. This presumption, based on legal theory, removes any violence to the agreement which refusing the stay would otherwise have done."

[13] The principles stated by Chesterman J have been cited with approval in a number of cases. In particular, in *Dance with Mr. D Limited v Dirty Dancing Investments Pty Ltd*⁴ Hammerschlag J suggested:

"53 The Court has a wide discretionary power to stay legal proceedings where the parties have by contract agreed to have the dispute determined

⁴ *Dance with Mr. D Limited v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332.

by an expert. Each case is to be considered on its own circumstances. The starting point is, however, that the parties should be held to their bargain. It is the party opposing the stay of proceedings to show that there is good reason to allow the action to proceed and the onus is a heavy one.

54 A stay will not be granted if it would be unjust to deprive the plaintiff of the right to have its claim determined judicially, that is where the justice of the case is against staying the proceeding. Examples of when a stay may be refused include where:

- a. it would result in a multiplicity of proceedings;
- b. the dispute is inapt for determination by an expert because it does not involve the application of his special knowledge to his own observations or the area of dispute is outside of the expert's field of expertise; or
- c. the agreed procedures are inadequate for determination of the dispute that has arisen."

[14] Similar considerations were expressed in *Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation*⁵, at paragraphs 15 – 16 and 19-20. The Court added, at paragraph 17:

"To those matters we would add circumstances where there is a wider public interest in the dispute being dealt with by the courts. Although the

⁵*Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation* [2018] FCAFC 118.

decided cases show that the agreement of the parties to commit to a dispute resolution process is a considerable factor in granting a stay, the agreement of the parties cannot oust the jurisdiction of the courts. Where there are interests beyond those of the parties then that may be a significant factor as to why a stay should be refused. In the present case, the fact that the relief sought included a claim to public law relief in respect of a decision by a Minister is such a factor."

[15] This proceeding arises out of an agreement between the Plaintiff and the First Defendant to develop land in Darwin, the development being known as "Bayview - The Boulevard" ("Bayview"). The terms of the agreement were said to be comprised in a Letter of Offer, the Works Deed and the Development Agreement.

[16] The Letter of Offer, dated 1 July 2016, offered the First Defendant a Crown Lease Term 2514 over proposed lot 8690 for a period of ten years at a stated price. The offer was said to be subject to the entering into of the Development Agreement and the Works Deed, the fulfilment of all requirements under the Works Deed by 31 December 2016, and the fulfilment of further requirements including that Dover obtain a Development Permit from the Development Consent Authority within 6 months, obtain an approved survey plan within 18 months, and obtain any required environmental approvals within 18 months.

[17] The Works Deed related to road works carried out by the Plaintiff on Tiger Brennan Drive adjacent to the land to be developed. Pursuant to the Works Deed, Austcorp Property agreed to pay to the Plaintiff an agreed sum, payable in two instalments, for the road works, and Austcorp International agreed to guarantee payment. These companies may be referred to as the "Austcorp entities".

[18] The parties to the Development Agreement were the Plaintiff and Dover. It was provided that the Plaintiff would grant the proposed lease to Dover for the purposes of the development, subject to certain conditions precedent, including the conditions set out in the Letter of Offer.

[19] It is alleged by the Defendants that in the lead up to the general elections in the Northern Territory in August 2016, Labor Party candidates made statements to the effect that, if Labor was elected, Bayview would not go ahead. Following the election of a Labor Government, Dover was informed that the government would not support Bayview.

[20] By letter dated 13 December 2016 the Plaintiff confirmed that it would not support the Bayview development and Dover was asked to provide a proposal as to how the development may best be terminated.

[21] By letter dated 24 January 2017 Dover informed the Plaintiff that its position gave rise to considerable uncertainty and it no longer had confidence that the Plaintiff would do the things required under the Development Agreement. The Plaintiff was requested to clarify whether it

had determined not to fulfil its obligations under the agreement and was dispensing Dover from satisfying the pre-conditions.

- [22] By letter dated 15 February 2017 the Plaintiff informed Dover that payment under the Works Deed had not been received and that, as a condition precedent to the Development Agreement had not been met, the offer had lapsed. Dover was invited to propose how the Bayview development may best be terminated.
- [23] On 27 February 2017 Dover gave written notice to the Plaintiff to the effect that it had repudiated the Development Agreement by failing to support the development and that Dover accepted the Plaintiff's repudiation and thereby terminated the Development Agreement. Dover also informed the Plaintiff that it intended to institute legal proceedings for damages suffered as a result of anticipatory breach and wrongful repudiation.
- [24] On the same date the Austcorp entities gave written notice to the Plaintiff to the effect that the Development Agreement and the Works Deed were interdependent agreements and a breach under the Development Agreement constituted a breach under the Works Deed. It was alleged that this interdependency entitled them to terminate the Works Deed and be relieved of any obligations thereunder. The Plaintiff was informed that they intended to institute legal proceedings against the plaintiff for damages suffered and other relief, including a declaration that the Second Defendant be relieved of any obligations under the Works Deed.

- [25] By letter dated 10 May 2017 the Plaintiff gave notice to the Defendant's that it did not accept the position adopted by Dover and advised that it would be willing to work to reach a mutually agreeable outcome regarding the Government's intention as it related to the Development.
- [26] Following this letter the parties exchanged correspondence and engaged in without prejudice negotiations.
- [27] By letter to Dover dated 19 April 2018 the Plaintiff gave notice that it terminated the Development Agreement on the grounds that conditions precedent under that agreement had not been satisfied, in that payment had not been made pursuant to the Works Deed, and a development permit and environmental approvals had not been obtained.
- [28] By letter dated 30 May 2018 the Plaintiff demanded payment of the sums owing under the Works Deed by 3 July 2018. The Plaintiff stated that if payment was not made by that time, the Plaintiff reserved the right to take action to recover the debt without further notice.
- [29] By letter dated 23 July 2018 the Defendant's solicitors foreshadowed the appointment of an independent expert in accordance with the Development Agreement and the Works Deed and suggested an informal meeting before formal steps were taken to activate the dispute resolution clauses. The Plaintiff was informed that, by reason of the mandatory dispute resolution requirements in the Development Agreement and the Works Deed, the Plaintiff was not entitled to take action to recover the debt claimed. By

letter dated 21 August 2018, the Plaintiff's solicitor advised that the Plaintiff would respond if the Plaintiff wished to raise anything further.

[30] Following this letter nothing appears to have occurred between the parties until 19 August 2019. The Defendant's say that during this period they were engaged in actively assessing their rights and what action may be taken, as well as investigating the obtaining of funding to assist with their claim.

[31] On 19 August 2019, Dover gave notice of a dispute under clause 32 of the Development Agreement. This recited the background and nature of the dispute, including allegations that the Plaintiff had repudiated the Development Agreement and the Plaintiff's purported termination of the agreement was invalid. The relief sought was a claim for damages by reason of the plaintiff's wrongful repudiation, which were estimated to be approximately \$135 million.

[32] The Issues for expert determination were said to be, whether the Plaintiff had by its conduct evinced an intention not to be bound by the Development Agreement thereby entitling Dover to terminate it, whether Dover terminated the Development Agreement by its notice of termination dated 27 February 2017, and whether the Dover is entitled to claim damages, and, if so, the quantum of such damages.

[33] On 8 October 2019, following the commencement of this proceeding and the bringing of this application, a mediation was held in attempt to resolve the disputes.

[34] By notice dated 22 October 2019, the Second Defendant gave the Plaintiff notice of a dispute between the parties alleged to be matters in connection with the Works Deed. This notice stated that the Works Deed was entered into for the purposes of providing access to a development to be undertaken by the Austcorp entities through their wholly owned subsidiary, Dover. The Works Deed was said to form part of the same transaction as the Development Agreement and was to be read with it, such that the repudiation of the Development Agreement was also a repudiation of the Works Deed. Alternatively, it was said to be an implied term of the Works Deed that the Plaintiff would not deprive the Austcorp entities of its benefit, including wrongfully preventing the development from proceeding. It was alleged that the repudiation of the Development Agreement was a breach of that term and repudiation of the Works Deed.

[35] The relief sought was a determination that the Austcorp entities be relieved of any obligations under the Works Deed. The issues for expert determination were said to be, whether the Plaintiff had repudiated the Works Deed, thereby entitling the Austcorp entities to terminate it, whether the Austcorp entities validly terminated the Works Deed and whether they are relieved from any obligations thereunder, including the obligation to make payment to the Plaintiff in accordance with the Works Deed.

[36] By consent an order has been made restraining the Defendants from progressing the dispute notices pending the determination of this Application.

[37] It was not argued that the dispute resolution clauses are invalid because they deny access to the courts. Under the Development Agreement the parties have submitted to the non-exclusive jurisdiction of the courts of the Northern Territory and under the Works Deed to the jurisdiction of this Court.

[38] As may be seen from the matters alleged in the dispute notices, the defendants allege that the Development Agreement and the Works Deed are part of the same transaction. They say that each document deals with the same subject matter and were entered into contemporaneously. They were interrelated, in that the Letter of Offer cross-references the Works Deed and the Development Agreement, while the Development Agreement cross references the Letter of Offer. The roadworks, the subject of the Works Deed, were to provide access to Bayview.

[39] The Plaintiff says that this contention is untenable. The agreement is recorded in two separate documents involving different parties, the subject matter of the agreements are separate, the dispute resolution provisions are different and the payment for the roadworks was agreed to without any reference to whether or not the development went ahead. It was also argued that the Plaintiff holds leasehold land that may yet benefit from the roadworks. In addition, the Development Agreement and the Works Deed both contain entire agreement clauses.

[40] There is authority for the proposition that when two or more documents record agreements that are part of the same transaction they may be read together⁶. It is arguable that the Development Agreement and the Works Deed form part of the same transaction and that the agreements may be read together with the Letter of Offer. This is an issue of some difficulty, and it is not necessary, or appropriate, that it be resolved in this application. It is sufficient that the Defendants have an arguable case.

[41] There is also an argument as to whether the Works Deed dispute is a one that arises between the parties as to any matter concerning the deed, so as to bring it under clause 6. The deed provides for payment for works already carried out and any dispute was likely to be of a limited nature. There is no reference to the Development Agreement in the Works Deed, but the Letter of Offer provides that the offer was subject to the entering into an agreement for the payment for the road works. It is also provided in clause 2(b) that the works were to provide access to the proposed development area. It is arguable that the clause 6 is wide enough to encompass the dispute as to whether the termination of the Development Agreement entitled the Austcorp entities to terminate the Works Deed.

[42] It will be necessary for the independent expert, or experts, to determine the disputes in accordance with the terms of each agreement. The Development Agreement dispute does not depend on the single agreement issue, but the

⁶ *McVeigh (trustee of the bankrupt estate of Piccolo) v National Australia Bank Ltd* (2000) 278 ALR 429 [29-34] and [77].

Works Deed dispute does. If different independent experts are appointed they will be considering the dispute in accordance with different contractual regimes and there is a possibility that the disputes may be determined with inconsistent results.

[43] The Defendants' solution to this difficulty is to have one independent expert determine both disputes. They have nominated a retired Judge. If the agreement of the Plaintiff is not forthcoming, and it appears that it will not be, then the President of the Law Society will be requested to appoint one expert to determine both. The Defendants suggest that common sense would prevail and the President would appoint one expert to determine both disputes. The Plaintiff submits that it is not appropriate to adopt this course and it would advise the President accordingly. It remains uncertain whether the President would appoint one independent expert to determine both disputes.

[44] The Plaintiff further argues that an independent expert has no authority to determine the Works Deed dispute. It submits that the Notice of Dispute was not given immediately as required by clause 6, and clause 11.1 of the Works Deed makes time of the essence. According to the plaintiff, the dispute arose by at least 27 February 2017 when the obligation to pay under the Works Deed was disputed, or alternatively, 10 May 2017, when the Plaintiff notified the Defendants that it did not accept the argument that it was not obliged to pay the amounts owing. It was not until 22 October 2019 that notice was given, well over two years from the date the dispute arose. By

that time, it is argued, the right to activate the dispute resolution procedure had passed.

[45] In the course of its submissions on this issue the Plaintiff argued that the Defendants had waived the right to the determination of the Works Deed dispute by an independent expert. The termination notice referred to legal proceedings and made no mention of an expert determination and the defendants did not give notice when notice was given under the Development Agreement. The Plaintiff relied upon the opinion expressed by Hammerschlag J in *Dance with Mr. D*⁷ at paragraph 67:

"A party may by deliberate act waive a defence to a claim which it otherwise may have: see *The Commonwealth v Verwayen* at 472-3 per Toohey J and 482 per Gaudron J. It is commonplace to speak of a person 'waiving' a right, for instance, by submitting to the jurisdiction of a court which otherwise has no jurisdiction over him, by not insisting upon arbitration, or by not pressing a particular argument that is available at trial. However, a defence available to a defendant, whether it be on the facts or on the law, is not waiver merely because the defence does not initially plead it. It is commonplace for pleadings to change as an action progresses, whether by way of expansion or contraction: *The Commonwealth v Verwayen* at 472-3 per Toohey J. A right is waived only when the time comes for its exercise and the party for whose sole benefit it has been introduced knowingly abstains from exercising it, a mere

⁷ *Dance with Mr D Limited v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332.

intention not to exercise a right is not immediately effective to divest or sterilise it: *The Commonwealth v Verwayen* at 427 per Brennan J."

[46] The Defendants argue that the time for compliance with the dispute resolution provisions commenced to run when the plaintiff commenced this proceeding. Until this time the exercise of clause 6 did not arise until a party had manifested a dispute appropriate for determination. Prior to that time there was an inchoate disagreement about the interrelationship of the Development Agreement and the Works Deed.

[47] Whether or not the Defendants knowingly abstained from exercising the right to give notice of a dispute under the Works Deed cannot fairly be determined on the evidence available.

[48] The Works Deed Notice of dispute states that the Works Deed was terminated on 27 February 2017, and that as a result the Austcorp entities were relieved from any obligations to make payment under it. The Plaintiff disputed the alleged repudiation of the Works Deed in its letter dated 10 May 2017 and in its letter dated 30 May 2018 demanded payment of the debt.

[49] By this time, at least, it was clear that a dispute had arisen between the parties as to a matter concerning the Works Deed, that is, the Austcorp entities' obligation to pay the monies payable in accordance with its provisions. The Austcorp entities were required, pursuant to the provisions of clause 6, to give immediate notice in writing to the plaintiff providing

details of the dispute. In this context, "immediate notice" may not reasonably be satisfied by the Notice of Dispute given on 22 October 2019 after proceedings for the recovery of the debt had been commenced.

[50] It is argued on behalf of the Defendants that, on a proper construction of clause 6, it could not have been the intention of the parties that a delay that did not constitute abandonment relieved a party from the obligation to submit to expert determination. However, one of the benefits of such a clause is to provide an expeditious and economical means of determining disputes. If it had been the intention of the parties to allow notice to be given after such a significant delay, the requirement for immediate notice would be meaningless. The Austcorp entities have not given immediate notice and the plaintiff is not obliged to participate in an expert determination of the dispute under the Works Deed.

[51] This provides grounds for the refusal of a stay of proceedings in relation to the dispute under the Works Deed because such a stay would be pointless.⁸

[52] The Development Agreement dispute is not constrained by any time limit. If a stay is refused in relation to the Works Deed dispute, the Plaintiff would be at liberty to proceed with its claim insofar as it is based on breaches of the Works Deed. If the Development Agreement dispute proceeded by way of expert determination there would be a multiplicity of proceedings.

⁸ *Society for the Prevention of Cruelty to Animals (Victoria) Inc. v Marson Constructions Pty Ltd* (2000) 1 VR 274 at [13] - [16].

[53] The procedural requirements for the determination of the Development Agreement dispute require the expert to receive submissions and information from the parties. The expert is required fix a time for this, but the time is limited by the need for the independent expert to provide a draft determination within 30 business days.

[54] The Development Agreement notice of dispute raises a number of issues for determination by an independent expert. These include:

Whether the Plaintiff by its conduct evinced an intention not to be bound by the Development Agreement and whether Dover was entitled to terminate the agreement. Presumably, the documentation provided in this application may be relied upon but the parties may wish to rely on additional information. There is no procedure provided to enable the parties to test the information provided. It is conceivable that the expert may allow an opportunity for examination of witnesses, but this may be limited by the time constraints.

Whether Dover was entitled to accept the alleged repudiation. The Plaintiff has indicated that it will pursue the issue as to whether Dover was ready, willing and able to perform its obligations under the Development Agreement. It would be at a disadvantage if it is unable to obtain discovery of the Defendants documents relevant to this issue, and test any evidence that the Plaintiff may wish to provide in support of its case.

Whether Dover was entitled to claim damages, and, if so, the quantum of damages. The damages claimed are substantial. The Plaintiff contends that there will be an issue as to whether the development was possible and viable. The costs of development and the available market and selling prices would also need to be established. These issues would normally require expert evidence, which would probably be contested. The Plaintiff may reasonably expect that it be provided with the evidence in support of such claims with sufficient time to respond, to provide evidence in response, and have an opportunity to test the Defendant's evidence.

[55] The issues are legally and factually complex. A retired judge may be well equipped to determine the issues and it may be assumed that, in the absence of agreement by the parties, the President of the Law Society will nominate an independent expert who has the required qualifications. However, there is a limit to the ability of an independent expert, even if a retired judge, to fairly determine the dispute within the procedures and timelines provided by clause 32.

[56] The Defendants argue that the object of the dispute resolution clauses is to avoid such expensive and time consuming procedures and there is merit in attempting to avoid litigation. Nevertheless, it would be unreasonable to hold the plaintiff to the dispute resolution provisions in a dispute of this magnitude. This is not a dispute that is appropriate to this form of determination.

[57] In the event that the disputes cannot be determined by the same independent expert, there will be a multiplicity of proceedings. This is one of the factors that suggest that a stay may not be appropriate, and it would clearly not be appropriate in this case. This is a proper ground for the refusal of a stay.

[58] There is also a question as to the public interest. This dispute arises out of a decision by the Government not to support the Bayview development, which is alleged to have been motivated by political considerations, and it may be inferred that it has environmental and fiscal implications. The Defendants argue that there is no reason why the Plaintiff can't keep the public informed, but it is not required to do so. This dispute is likely to be of considerable interest to the public, and the public interest would best be served if it was determined in open court.

[59] This dispute is inappropriate for determination by an independent expert because the agreed procedures are inadequate for the determination of the dispute that has arisen. This ground alone would justify the refusal of a stay, notwithstanding the heavy onus.

[60] The justice of the case is against the granting of a stay. The application should be dismissed.