IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2020 02473

TRANSURBAN WGT CO PTY LTD
(ACN 617 420 023) Plaintiff

v

CPB CONTRACTORS PTY LIMITED
(ACN 000 893 667) & others according to the schedule Defendants

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JUDGE:	LYONS J
WHERE HELD:	Melbourne
DATE OF HEARING:	27 and 28 July 2020
DATE OF JUDGMENT:	7 August 2020
CASE MAY BE CITED AS:	Transurban WGT Co Pty Ltd v CPB Contractors Pty Limited
MEDIUM NEUTRAL CITATION:	[2020] VSC 476

ARBITRATION – *Commercial Arbitration Act 2011* (Vic) – Arbitration agreement – Whether downstream arbitration agreement included valid clause to suspend downstream arbitration while related upstream arbitration in progress - Declaration sought that suspension clause valid – Interlocutory injunction sought to suspend downstream arbitration - Power of Court to grant declaration at interlocutory stage – Power of Court to grant interlocutory injunction – Relevance of *Commercial Arbitration Act 2011* (Vic) ss 5, 8, 16, 40 – Powers of Court limited to those under Act and by agreement – Declaration refused – Injunction refused – Downstream arbitral tribunal has power to determine validity and applicability of suspension clause

ARBITRATION – *Commercial Arbitration Act 2011* (Vic) – Arbitration agreement – Whether downstream arbitration agreement included valid clause to suspend downstream arbitration while related upstream arbitration in progress – Whether suspension clause renders downstream arbitration agreement inoperative for the purposes of s 8 – Whether matter going to jurisdiction of downstream arbitral tribunal - Whether issue to be determined by Court or arbitral tribunal for the purpose of s 8 – Referred to arbitral tribunal

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr B Walker SC with Mr J Moore QC Mr T J Breakspear Mr L J Connolly and Ms J Gregory	Herbert Smith Freehills
For the First and Second Defendants	Mr N Young QC with Mr K Naish and Mr R Garnett	Corrs Chambers Westgarth
For the Third Defendant	Mr A P Young QC with Mr P Noonan	Clayton Utz
For the Fourth and Fifth Defendants	No appearance	

TABLE OF CONTENTS

HIS HONOUR:

1. INTRODUCTION

1 The issue for determination is whether it is for the Court or for an arbitral tribunal to make the relief now sought by the plaintiff ('Project Co') against the first and second defendants (the 'Subcontractor').

2 The context in which this issue arises is unusual. As part of the West Gate Tunnel Project:

(1) on 11 December 2017, the State (which is the third defendant) and Project Co entered into a 'head' agreement for Project Co to design, construct, commission, finance and then operate the West Gate Road tunnels and related works (the 'Project Agreement');[1] and

(2) on the same day, Project Co entered into an agreement with the Subcontractor to design and construct the West Gate Road tunnels and related construction works (the 'Subcontract'). The other parties to the Subcontract are the State and the fourth defendant ('NewCo').[2]

3 There is a clear and intended interrelationship between the Project Agreement and the Subcontract. This is because the works to be performed by the Subcontractor are a subset of the works to be performed by Project Co under the Project Agreement. This is reflected in the drafting of the Project Agreement and the Subcontract.

4 Relevantly, the claims regime established by the Subcontract interrelates with the claims regime established by the Project Agreement. Each agreement contains similar clauses for notification of claims including for variations and extensions of time. Each agreement also contains similar clauses for alternative dispute resolution which relevantly provide in cl 43.1(a) that any disputes 'arising in connection with'

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1 The Project Agreement has been amended on 30 October 2018 and 18 February 2019.

2 The Subcontract has been amended on 30 October 2018 and 18 February 2019. The fifth defendant (the 'Trustee') became bound by the Subcontract by a deed of accession dated 15 February 2019.

the relevant agreement ultimately are to be determined by arbitration. [3]

5 Further, the Subcontract provides a specific provision in cl 44A for claims or disputes under the Subcontract in respect of which Project Co may have a related claim against the State under the Project Agreement. Such claims and disputes between the Subcontractor and Project Co are called Linked Claims and Linked Disputes in the Subcontract. For convenience, I will refer to cl 44A as the 'Linked Claim regime'.

6 The Linked Claim regime in summary relevantly provides that:

(1) at the time of making a claim, the Subcontractor is to notify Project Co whether it is a Linked Claim;

(2) Project Co is obliged to pursue Project Co's related claim 'upstream' against the State under the Project Agreement ('an upstream claim') with the assistance of the Subcontractor; and

(3) subject to certain conditions being met, the Subcontractor's entitlement against Project Co under the Subcontract in respect of a Linked Claim corresponds with Project Co's entitlement against the State under the Project Agreement for an upstream claim.

7 Clause 44A also provides what happens if there is a Linked Dispute on foot at the same time as an upstream claim or dispute against the State. Clause 44A.3(a)(ii) relevantly provides that, except where expressly provided under the Subcontract to the extent a dispute is a Linked Dispute, the Linked Dispute:

> will not be progressed [under the terms of the Subcontract] while the [related] dispute under the [Project Agreement] is in progress, and the running of time under, and the parties' obligations to comply with, clauses 43 and 44 of [the Subcontract] will be suspended[.]

8 For convenience, I will refer to cl 44A.3(a)(ii) as the 'suspension clause'.

9 Since December 2018, the Subcontractor has made numerous claims to Project Co. In

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[3] Clause 43.1(a) of each of the Project Agreement and the Subcontract read with cl 43.1(c).

summary, for the most part, these claims are said to arise out of the discovery of the extent of Per and poly-fluoro alkyl substances ('PFAS') including in the vicinity of the area where the two tunnels will be constructed and the inability of the Subcontractor to dispose of PFAS contaminated soil to allow tunnel works to commence.

10 Those claims are significant to the parties. They include claims under the Subcontract for variations or modifications, for extensions of time and/or for additional payments under the Subcontract including on the basis there had been a Force Majeure Event ('FME'). They also include claims:

(1) that the Subcontract was terminated on 28 January 2020 by reason of a Force Majeure Termination Event under the Subcontract ('FMTE');

(2) the Subcontract is void from its inception by reason of common mistake as to the extent of PFAS contamination;

(3) the performance of the Subcontract has been frustrated by reason of the extent of the PFAS contamination; and

(4) the Subcontract should be set aside because of misleading representations as to extent of the PFAS contamination prior to its execution.

11 For convenience, I will refer to these claims as 'the downstream claims'. At the time that many of the downstream claims were made, the Subcontractor notified Project Co that they were Linked Claims, thereby engaging the Linked Claim regime. Where such notification was made, Project Co has made corresponding claims upstream against the State under the Project Agreement ('the upstream claims'). To date, as none of the upstream claims have been accepted by the State, none of the downstream claims have been accepted by Project Co. As a result, the parties remain in dispute in relation to all relevant claims.

12 By notice dated 2 March 2020, the Subcontractor initiated an arbitration with Project Co under the Subcontract in relation to the unresolved downstream claims (the

'downstream arbitration'). In response, by notice dated 2 June 2020, Project Co initiated an arbitration in relation to the unresolved upstream claims with the State under the Project Agreement (the 'upstream arbitration').

13 The Subcontractor has now expressed an intention to proceed with the downstream arbitration while the upstream arbitration is in progress. This is because it now contends among other things that cl 44A is not enforceable as it contravenes ss 13 and 48 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'SOP Act') and that the downstream claims are not Linked Disputes.

14 As a result, in this proceeding, Project Co seeks that the Court declare that the suspension clause is valid and make interlocutory and final injunctions to enforce it. These orders would have the effect of suspending the downstream arbitration while the upstream arbitration is in progress. In light of the arbitration agreement in the Subcontract, Project Co relied upon the Court's auxiliary equitable jurisdiction to make such orders. It also relied upon cl 44.10 of the Subcontract which provides that a party may seek from the Court 'urgent interlocutory relief… where, in that party's reasonable opinion, that action is necessary to protect that party's rights'.

15 This is in circumstances where Project Co submitted that:

(1) the suspension clause is valid, constituting a negative covenant;

(2) as all the downstream disputes are Linked Disputes falling within that clause, Project Co is entitled to an injunction for its enforcement; and

(3) Project Co will suffer prejudice if the downstream arbitration proceeds, namely, the costs of fighting simultaneous arbitrations and the risk of inconsistent findings between those two arbitral tribunals.

16 In response, the Subcontractor has issued an application that this proceeding be referred to the downstream arbitration under s 8 of the *Commercial Arbitration Act 2011* (Vic) (the 'Act' and the 'referral application'). This is on the basis that the relief sought in the proceeding is properly the subject of the downstream arbitration given

that the parties have agreed that all disputes 'arising in connection with' the Subcontract are to be determined by arbitration.

17 I have now heard argument on Project Co's application for interlocutory injunctions and on the power of the Court to grant a declaration in these circumstances. I have also heard the Subcontractor's application.

18 As I noted above, the central issue for determination is whether it is the Court or the downstream arbitral tribunal that should grant the relief sought by Project Co in this proceeding. Based upon the terms of the Subcontract and the powers of the Court in the context of the Act, for the reasons that follow, I have concluded that it is the downstream arbitral tribunal that should grant the relief sought by Project Co.

2. THESE APPLICATIONS

19 Project Co issued this proceeding by originating motion and summons on 5 June 2020.[4] Project Co sought:

(1) a declaration that cl 44A of the Subcontract is valid and enforceable;

(2) an interlocutory and final injunction restraining the Subcontractor from breaching the negative covenant in the suspension clause not to progress disputes satisfying the definition of Linked Disputes while related disputes under the Project Agreement are in progress; and

(3) an interlocutory and final injunction restraining the Subcontractor from taking steps to progress the downstream arbitration until such time as the disputes the subject of Project Co's Notice of Dispute dated 23 March 2020 (which is replicated in the notice of upstream arbitration) are determined under the Project Agreement.

20 On 16 June 2020, the Subcontractor issued the referral application.[5] It relied on s 5 and/or s 8 of the Act and the inherent jurisdiction of the Court.

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4 An amended originating motion and summons were filed on 22 June 2020.

5 An amended summons was filed on 20 July 2020.

21 The applications came on before me for mention on 18 and 19 June 2020. In light of these competing applications, in particular the referral application, on 19 June 2020, I ordered that I would first hear and determine:

(1) Project Co's application for interlocutory injunctions;

(2) the question of whether the Court had power to make a declaration of the kind sought by Project Co; and

(3) the referral application.

22 I adopted this course in an attempt to minimise the costs and expense of the argument as to whether the suspension clause was valid in light of the provisions of the SOP Act in the event I concluded that the court had no power to make a declaration in relation to its validity.

23 The hearing of these applications took place on 27 and 28 July 2020. While the State appeared at the hearing, it made no submissions. The other defendants did not take part in the proceeding. As is evident from these reasons, in the course of hearing the parties also addressed whether the Court had power to make a declaration in the circumstances of this case. Further, in the course of reply submissions at the hearing Project Co informed the Court that in fact it was seeking:

(1) a declaration that only the suspension clause, and not cl 44A, is enforceable; and

(2) an interlocutory injunction in effect to restrain the Subcontractor from taking steps to progress the downstream arbitration until such time as the upstream arbitration is determined.

24 At the hearing, Project Co relied upon the affidavits of David Clements sworn 5 June 2020 (the 'first Clements affidavit') and 24 June 2020 (the 'second Clements affidavit'). The Subcontractor relied upon the affidavit of Andrew Stephenson sworn 5 June 2020 (the 'Stephenson affidavit').

25 I pause to note the affidavit material and submissions were substantial. The first Clements affidavit was 44 pages long and, with exhibits, comprised 4 lever arch folders (with double sided print). The Stephenson affidavit was 31 pages long and, with exhibits, comprised 2.5 lever arch folders (with double sided print). In addition to the contractual documents, the exhibits contained a plethora of correspondence relating to:

(1) the lead up to the execution of the Subcontract on 11 December 2017 including statements made about the extent of contamination and the ability to dispose of it;

(2) the evolving knowledge of contamination issues after 11 December 2017 and the response to those issues by the Subcontractor, the State and the EPA; and

(3) the notification and pursuit of the downstream claims and the upstream claims leading to the downstream arbitration and the upstream arbitration.

26 Further, the written submission of the parties were over 90 pages long.

27 There is a degree of urgency in the determination of these applications. This is because the parties need to know whether the relief sought in this proceeding should be determined by the Court or by the downstream arbitral tribunal in circumstances where the notice of downstream arbitration was issued on 2 March 2020. I have been conscious of this urgency in finalising these reasons for judgment.

3. RELEVANT PROVISIONS OF THE SUBCONTRACT

28 Clauses 43 to 44A of the Subcontract, which provide the agreed dispute resolution procedure, are of central importance to these applications. However, it is necessary to note some relevant terms of the Subcontract.

29 First, the Works were to be undertaken in consideration of the payment of the 'D&C Subcontract Price'. The Works are comprised of distinct work packages to be supplied to, and paid for by, each of Project Co, the State, NewCo and the Trustee.

However, under the Subcontract, the role of the State, NewCo and the Trustee is very limited. Each of them was a party to the Subcontract for the purpose of acquiring services from, and making payments to, the Subcontractor in relation to its respective works package.[6] For all other dealings, each of these parties appointed Project Co to act as its agent in respect of all necessary dealings with the Subcontractor 'in respect of or in connection with' its respective works package.[7]

30 Second, the Subcontract contains clauses for notification of claims. These include the regime for making claims under cl 60; the regime for Modifications in cl 34; and the regime for seeking extensions of time including under cl 23.6 to cl 23.10, a Change Notice for which must comply with the Change Compensation Principles contained in Schedule 4 of the Subcontract.

31 These notification clauses are substantively reflected in the Project Agreement. However, there are differences between the two Agreements. For example, cl 23.14 of the Subcontract places additional payment obligations on the Subcontractor and Project Co for FMEs in certain circumstances that are not reflected in the Project Agreement.

32 Third, the Subcontract contains a number of definitions relevant to the operation of the contractual dispute resolution procedure. They are, relevantly, that:

> **Claim** means any claim, action, demand, suit or proceeding (including by way of contribution or indemnity) made:
>
> (a) in connection with the D&C Project Documents, the Relevant Infrastructure (as defined in the Project Agreement) or the D&C Activities; or
>
> (b) at Law or for specific performance, restitution, payment of money (including damages), an extension of time or any other form of relief.
>
> […]
>
> **Entitlement** means any rights, remedies, benefits, compensation, recovery or other relief.

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6 See generally cll 2.21, 2.24 and 2.26 of the Subcontract respectively.
7 See cll 2.21(n), 2,24(n) and 2.26(n) respectively.

33 Clause 1 also defines 'Upstream Document' as relevantly including the Project Agreement. An 'Upstream Party' is defined as 'a party to an Upstream Document other than Project Co', which relevantly includes the State as a party to the Project Agreement.

4. DISPUTE RESOLUTION PROCEDURE IN THE SUBCONTRACT

34 In summary, cl 43 refers all disputes arising in connection with the Subcontract to negotiation and/or expert determination and ultimately arbitration. Clause 44 provides for when and how the arbitration is to be conducted. Both are expressed to be subject to cl 44A.

4.1 Clause 43

35 Clause 43.1(a) relevantly provides:

> Unless a D&C Project Document provides otherwise, any dispute between Project Co and the [Subcontractor] arising in connection with the D&C Project Documents or the D&C Activities … (**Dispute**) *must* be resolved in accordance with this clause 43 and clause 44.[8]

36 The procedure under these clauses is invoked by serving a notice under cl 43.2(a). Clause 43.1(c) provides that, in the first instance, the Dispute will be referred for resolution by negotiation pursuant to cl 43.2. It also provides that:

(1) if the Dispute remains unresolved in whole or in part after a specified period of time, the parties may agree that the Dispute will be referred to an expert for determination under cl 43.4 to 43.8 or to arbitration under cl 44; and

(2) in the absence of resolution by agreement, or if it is referred to expert determination and either the expert fails to make a determination within a specified period of time or if a notice of dissatisfaction is served in respect of any expert determination in fact made, the Dispute *must* be referred to arbitration pursuant to cl 44.1(a).

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[8] Emphasis added.

37 Clauses 43.4 to 43.8 are not presently relevant. Clause 43.9 provides that '[e]ach party's rights under this clause 43 are subject to clause 44A'.

4.2 Clause 44

38 Clause 44 contains further provisions relating to the instigation of an arbitration and how it is to be conducted. Clause 44.1 provides that either party may refer a dispute to arbitration which either has not been resolved by negotiation under cl 43.2 or, in the case of a dispute referred to expert determination, in which either the expert failed to make a determination within a specified period of time or if a notice of dissatisfaction has been served.

39 Clause 44.2(a) provides that the arbitration will be conducted in accordance with the rules of the Australian Centre for International Commercial Arbitration ('ACICA') and otherwise in accordance with cl 44. Pursuant to cl 44.2(b), the seat of the arbitration will be Melbourne. I note that cl 44.9 provides the law governing the arbitration agreement is the law of Victoria.

40 Clause 44.3 provides that the parties will endeavour to agree upon the arbitrator or arbitrators but, if no such agreement is reached within 14 business days of the Dispute being referred to arbitration in accordance with cl 44.1(b), the arbitrator or arbitrators will be appointed by ACICA.

41 Clause 44.4 provides the general principles for the conduct of the arbitration. Clause 44.4(a) records that the parties agree that, among other things:

> (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;
>
> (ii) any arbitration conducted in accordance with this clause 44 will not necessarily mimic court proceedings of the seat of the arbitration… and the practices of those courts will not regulate the conduct of the proceedings before the arbitrator;[…]

42 Clause 44.4 sets out many of the agreed procedures to be adopted in any arbitration under cl 44. They differ from those that apply to ordinary court proceedings. For example:

(1) Clause 44.4(b) provides that all evidence in chief must be in writing unless otherwise ordered by the arbitrator.

(2) Clause 44.4(c) provides that the rules for evidence and discovery will be the IBA Rules on the Taking of Evidence in International Arbitration current at the date of the arbitration.

43 Further, cl 44.4(d) provides for when oral evidence in chief will be allowed and the nature of oral hearings. It relevantly provides pursuant to cl 44.4(d)(iv) that oral hearings must be conducted on a stop clock basis with the effect that the time available to the parties must be split equally between them unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties.

44 Clause 44.5 provides that, to the extent permitted by law, the arbitrator will have no power to apply or have regard to the provisions of any proportionate liability legislation which might have applied to any dispute referred to arbitration.

45 Clause 44.6 relates to the extension of the ambit of the arbitration. It provides that where a Dispute is referred to arbitration and there is some other Dispute also between the parties to and in accordance with this deed, the arbitrator may upon application make an order directing that the arbitration be extended so as to include the other Dispute.

46 Clause 44.7(a) provides that an award will be final and binding on the parties. This is subject to cl 44.7(b) which provides for an appeal to a court made under the Act on a question of law arising in connection with an arbitral award.

47 Clauses 44.10 and 44.11 are relevant to this application. I will set them out in full:

> **44.10 Interlocutory relief**
>
> This clause 44 does not prevent a party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect that party's rights.

44.11 Linked Disputes

Each party's rights under this clause 44 are subject to clause 44A.

4.3 Clause 44A

48 Clause 44A is contained in the part of the Subcontract headed 'Corresponding Entitlement Provisions'. Clause 44A itself is headed 'Linked Claims and Entitlement'. Clause 44A imposes obligations on both the Subcontractor and Project Co in respect of a Linked Claim and a Linked Dispute.

49 By way of summary and subject to exceptions in cl 44A, the Linked Claim regime relevantly provides:

(1) if the Subcontractor intends to or does make a Claim against Project Co which is a 'Linked Claim', the Subcontractor is to notify Project Co of the Linked Claim, including by identifying the Upstream Document and Upstream Party applicable to the Linked Claim;

(2) Project Co is obliged to diligently pursue the related upstream claim against the State under the Project Agreement (including by employing the alternative dispute resolution procedure in the Project Agreement);

(3) subject to certain conditions being met, the Subcontractor's entitlement against Project Co under the Subcontract in respect of the Linked Claim corresponds with Project Co's entitlement for the related Claim against the State under the Project Agreement; and

(4) that to the extent a dispute between the Subcontractor and Project Co is a 'Linked Dispute', the Linked Dispute will not be progressed while the related dispute between Project Co and the Upstream Party under the Upstream Document is in progress: i.e. the suspension clause.

50 The term 'Linked Claim' is defined in cl 1.1 of the Subcontract as follows:

> **Linked Claim** means a Claim or potential Claim by, or Entitlement or potential Entitlement of the D&C Subcontractor against Project Co where the

Claim, potential Claim, Entitlement or potential Entitlement:

(a) is in respect of similar, equivalent or the same circumstances, actions or omissions as a Claim or potential Claim by, or Entitlement or potential Entitlement of, Project Co against an Upstream Party arising out of or in connection with the Project or an Upstream Document, even if the Claim, potential Claim, Entitlement or potential Entitlement is expressed in different terms or grounds and whether or not Project Co's Claim, potential Claim, Entitlement or potential Entitlement encompasses more or less than a part of the Claim, potential Claim, Entitlement or potential Entitlement of the D&C Subcontractor;

(b) is a Linked Dispute; or

(c) arises out of or in connection with an Upstream Decision,

but subject to clause 44A.9, does not include a claim for payment of the D&C Subcontract Price.

51 The term 'Linked Dispute' is defined in cl 1 of the Subcontract as follows:

Linked Dispute means a dispute:

(a) to which the D&C Subcontractor is a party;

(b) which arises out of this Deed or any other D&C Project Document; and

(c) which is concerned with matters which arise in respect of the respective rights and obligations of Project Co and an Upstream Party under an Upstream Document.

52 I will now address the relevant parts of cl 44A. I note that in the argument before me, each of Project Co and the Subcontractor submitted that cl 44A was for the benefit of the other party. For my part, I have not found such a categorisation relevant or helpful for the purpose of determining this application. As the relevant provisions of cl 44A make plain, that clause imposes both rights and obligations on each of the Subcontractor and Project Co. The provisions were no doubt agreed by sophisticated parties having regard to the commercial interests of each of them.

53 First, cl 44A.1 (headed 'Linked Claims') imposes rights and obligations on the Subcontractor in respect of a Linked Claim, namely:

(1) the obligation to notify Project Co that the Claim made against Project Co is also a 'Linked Claim' including details of the Upstream Document and

Upstream Party applicable to the Linked Claim;[9]

(2) the obligation to submit to Project Co documents which comply with the Subcontract and the Upstream Document to allow Project Co to pursue the related claim under the Project Agreement;[10]

(3) the right to require Project Co to pursue the related claim under the Upstream Document against the Upstream Party;[11]

(4) the obligation to cooperate with, and take all proper and reasonable steps to assist, Project Co's pursuit of the related claim under the Project Agreement;[12] and

(5) the obligation to promptly pay to Project Co any reasonable third-party costs incurred by Project Co in submitting and pursuing the related claim under the Upstream Document to the extent to which the related claim under the Upstream Document is a Linked Claim or is the subject of a Notice of Linked Claim.[13]

54 Second, cl 44A.1(d) imposes rights and obligations on Project Co in respect of a Linked Claim:

(1) to notify promptly the Upstream Party of the Linked Claim;[14]

(2) to diligently and expeditiously pursue such Entitlements as may be claimable in relation to the related claim under the Upstream Document in a manner that does not prejudice the successful pursuit of those Entitlements;[15]

(3) to obtain the Subcontractor's prior written consent to the choice of forum of

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9 Subcontract, cl 44A.1(a)(i).
10 Subcontract, cl 44A.1(a)(iii).
11 Subcontract, cl 44A.1(a)(iv).
12 Subcontract, cl 44A.1(e)(i).
13 Subcontract, cl 44A.1(e)(ii).
14 Subcontract, cl 44A.1(d)(i).
15 Subcontract, cl 44A.1(d)(ii).

dispute resolution under the Upstream Document;[16]

(4) to keep the Subcontractor informed of the progress of the related claim under the Upstream Document;[17]

(5) to regularly consult with the Subcontractor in relation to the manner in which Project Co pursues the related claim under the Upstream Document and implement the steps required by the Subcontractor as to the manner in which the related claim under the Upstream Document should be pursued and costs minimised;[18]

(6) where permitted by the Upstream Party, to allow the Subcontractor to participate in meetings, discussions, negotiations or dispute resolution procedures in relation to the related claim between Project Co and the Upstream Party;[19] and

(7) not to 'settle, waive or compromise... or make any admission' in relation to a related claim under the Upstream Document without the prior written consent of the Subcontractor which consent must not be unreasonably withheld or delayed and, to the extent the related claim is for benefit of the Subcontractor, to take all steps required by the Subcontractor in relation to the proposed settlement, waiver or compromise.[20]

55 Clause 44A.2 imposes serious consequences on Project Co if relevantly it fails to comply with its obligations under cl 44A.1. Those consequences include allowing the Subcontractor to pursue the Claim against Project Co as though it were not a Linked Claim.

56 Clause 44A.3 is headed 'Linked Disputes'. First, cl 44.A.3(a)(i) provides that the parties agree and acknowledge that:

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16 Subcontract, cl 44A.1(d)(iii).
17 Subcontract, cl 44A.1(d)(iv).
18 Subcontract, cl 44A.1(d)(v).
19 Subcontract, cl 44A.1(d)(vi).
20 Subcontract, cl 44A.1(d)(vii).

(i) except where expressly provided otherwise in [the Subcontract], disputes between an Upstream Party and Project Co under the relevant Upstream Document relating to Linked Disputes must be conclusively resolved under and in accordance with the relevant Upstream Document[.]

57 Second, cl 44A.3(a)(ii)A provides that the parties acknowledge and agree that:

(ii) subject to clause 44A.3(a)(i), except where expressly provided otherwise in this Deed, to the extent a Dispute is a Linked Dispute:

A. the Linked Dispute will not be progressed while the dispute under the Upstream Document is in progress, and the running of time under, and the parties' obligations to comply with, clauses 43 and 44 of this Deed will be suspended;

58 Third, cl 44A.3(a)(ii)B and C provide that the parties acknowledge and agree that:

B. subject to clause 44A.3(a)(ii)C and Project Co's compliance with this clause 44A…

1) the D&C Subcontractor and Project Co are bound by the resolution of the dispute under the Upstream Document to the extent of the Linked Dispute; and

2) the D&C Subcontractor will accept and abide by any binding decision or determination under the dispute resolution procedures in the Upstream Document and any findings of fact or expert determination under the Upstream Document to the extent those findings of fact or expert determinations involve the D&C Subcontractor or the performance of the D&C Activities or are otherwise applicable to this Deed, provided that Project Co must use its best endeavours to diligently defend or (as the case may be) pursue and maximise the proceeds of such claim; and

C. Project Co must exercise any right to appeal against the resolution of the relevant dispute under the relevant Upstream Document if the D&C Subcontractor (acting reasonably) requests Project Co in writing to do so.

59 Clause 44A.3(b) imposes similar obligations and rights on Project Co in respect of a Linked Dispute as are imposed in respect of a Linked Claim under cl 44A.1(d). I refer to [54] above.

60 Clauses 44A.4 to 44A.6 provide for the Entitlements of the Subcontractor and the limits of liability of Project Co in respect of a Linked Claim. Clause 44A.4(b) determines the quantum of the Subcontractor's Entitlement. It relevantly provides

that, if Project Co recovers more under the Project Agreement than the Subcontractor claimed under the Linked Claim, the Subcontractor is entitled to the amount it claimed. If the amount recovered is less, the Subcontractor is entitled to an amount stated in writing to be attributable to its claim or an amount otherwise agreed by Project Co and the Subcontractor. If the amount cannot be agreed, the amount will be determined in an arbitration between the Subcontractor and Project Co in accordance with clause 44.

61 Clause 44A.6 provides in substance that Project Co's liability to the Subcontractor in respect of a claim that is a Linked Claim is limited in accordance with cl 44A . Since the definition of a Linked Claim includes a Linked Dispute, the Subcontractor's Linked Entitlement for a Linked Dispute is also limited by the relief that Project Co is entitled to recover for the related dispute under the terms of the Project Agreement.

62 Finally, cl 44A.9 provides that the parties agree that any Claim in connection with a State Works Unpaid Amount will be a Linked Claim.

5. THE ACT AND THE ACICA RULES

63 The Act provides a statutory framework for the resolution, review and enforcement of particular types of arbitration called 'domestic commercial arbitrations'. It was not disputed in this proceeding that the Act applied to the downstream arbitration and the upstream arbitration.

64 Section 1AA(a) of the Act provides that one of the purposes of the Act is to 'improve commercial arbitration processes to facilitate the fair and final resolution of commercial disputes by arbitration without unnecessary delay or expense'. Further, s 1AC of the Act, titled 'Paramount object of Act', relevantly provides:

> (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.
>
> […]
>
> (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object

of this Act is achieved.

65 I note in passing that the note to s 1(1) of the Act records that the *International Arbitration Act 1974* (Cth) ('IAA') covers international commercial arbitrations and the enforcement of foreign arbitral awards. As will become evident in these reasons, both the IAA and the Act are based upon the provisions of the UNCITRAL Model Law on International Commercial Arbitration[21] (the 'Model Law') and the jurisprudence in relation to both statutes is very much influenced by each other and the jurisprudence in relation to the Model Law.

66 The Act deals with the powers of the arbitral tribunal and of the Court in respect of arbitration agreements to which the Act applies. In summary, it expands the powers of the arbitral tribunal and limits the powers of the Court. The primary provision is s 5 which provides:

> **5 Extent of court intervention**
>
> In matters governed by this Act, no court must intervene except where so provided by this Act.

67 This clause is significant. Section 40 of the Act provides that the intention of s 5 of the Act is to alter or vary s 85 of the *Constitution Act 1975* (Vic) ('*Constitution Act*'). That section is the provision of the *Constitution Act* that endows the Supreme Court with unlimited jurisdiction. In summary, the powers of the Court provided for under the Act include those that are set out in ss 8, 10-11, 16(9), 17J, 34 and 36 of the Act.

68 Section 8 provides for the powers of the Court where an action is brought in respect of a matter which is the subject of an arbitration agreement. It provides:

> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void,

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21 As adopted by the United Nations Commission on International Trade Law ('UNCITRAL') on 21 June 1985 and amended on 7 July 2006.

inoperative or incapable of being performed.

(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

69 For convenience, I will refer to the phrase in s 8 'unless it finds that the agreement is null and void, inoperative or incapable of being performed' as the 'proviso'.

70 Relevant to s 8 are the provisions of s 16 of the Act. In summary, s 16 provides for the competence of the arbitral tribunal to rule on its own jurisdiction if raised by a party. Issues of the arbitral tribunal's jurisdiction may be determined either as a preliminary question or in an award on the merits. It relevantly provides that:

16 Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[…]

(4) A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.

(5) A party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator.

(6) A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(7) The arbitral tribunal may, in the case of a plea referred to in subsection (4) or (6), admit a later plea if it considers the delay justified.

(8) The arbitral tribunal may rule on a plea referred to in subsection (4) or (6) either as a preliminary question or in an award on the merits.

(9) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.

(10) A decision of the Court under subsection (9) that is within the limits of the authority of the Court is final.

71 Thus, the Court's powers in relation to jurisdiction are limited as set out in s 16(9).

72 The Act provides that both the arbitral tribunal and the Court has power to grant interim measures in certain circumstances. Section 9 provides that:

> **9 Arbitration agreement and interim measures by court**
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure.

73 The term 'interim measure' is defined in s 17 of the Act. That section grants the arbitral tribunal power to order interim measures. It is contained in Division 1 of Part 4A of the Act, both of which are titled 'Interim Measures'. It relevantly provides that:

> **17 Power of the arbitral tribunal to order interim measures**
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
>
> (2) An ***interim measure*** is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to—
>
> (a) maintain or restore the status quo pending determination of the dispute; or
>
> (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; or
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute.

74 Section 17(3) of the Act provides a non-exhaustive list of interim and interlocutory matters with respect to which the arbitral tribunal may make orders.

75 Section 17A is titled 'Conditions for granting interim measures'. It sets out the conditions that must be met for the arbitral tribunal to grant interim measures under s 17(2)(a), (b) or (c). I note that these conditions are substantively similar to the matters of which the Court must be satisfied to grant interlocutory relief.

76 Section 17H of the Act provides that an interim measure issued by an arbitral tribunal is to be recognised as binding and is enforceable on application to the Court subject to the provisions of s 17I of the Act.

77 Section 17J of the Act is in Division 5 of Part 4A and is titled "Court-ordered interim measures'. It provides that:

> **17J Court-ordered interim measures**
>
> (1) The Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.
>
> (2) The Court is to exercise the power in accordance with its own procedures taking into account the specific features of a domestic commercial arbitration.

78 As noted above, cl 44.2(a) of the Subcontract provides that any arbitration will be conducted in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (the 'ACICA Rules').

79 Article 28 of the ACICA Rules is titled 'Jurisdiction of the Arbitral Tribunal'. It relevantly provides that:

> 28.1 The Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, including objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> 28.2 The Arbitral Tribunal shall have the power to determine the existence or validity of the contract of which an arbitration clause forms a part. For the purposes of this Article 28, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> […]
>
> 28.4 In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in its final award.

80 Article 33 is titled 'Interim Measures of Protection'. It provides that:

33.1 Unless the parties agree otherwise in writing:

(a) a party may request emergency interim measures of protection to be issued by an arbitrator (the Emergency Arbitrator) appointed prior to the constitution of the Arbitral Tribunal in accordance with the provisions set out in Schedule 1; and

(b) the Arbitral Tribunal may, on the request of any party, order interim measures of protection. The Arbitral Tribunal may order such measures in the form of an award, or in any other form (such as an order) provided reasons are given, and on such terms as it deems appropriate. The Arbitral Tribunal shall endeavour to ensure that the measures are enforceable.

[…]

33.8 The power of the Arbitral Tribunal under this Article 33 shall not prejudice a party's right to apply to any competent court or other judicial authority for interim measures. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated, in writing, by the applicant to the Arbitral Tribunal, all other parties and ACICA.

6. THE DISPUTES

6.1 Background to the Claims

81 As set out in section 1, since December 2018, the Subcontractor has made numerous claims to Project Co which are said to arise for the most part out of the PFAS contamination. They also relate to the fact that Project Co and the Subcontractor have not received the benefit of certain provisions of the *Major Transport Projects Facilitation Act 2009* (Vic) ('MTPFA').

82 The issues relating to these claims, and the parties' knowledge in relation to those issues, have evolved over time. This is addressed in some detail in the Stephenson affidavit. The Subcontractor's current position is that it remains impossible to reuse or dispose of the majority of tunnel spoil in compliance with current EPA requirements. The result is that the Subcontractor has not been able to commence tunnelling works for the Project.

83 As a result, the claims are significant to the parties to the Subcontract and the West Gate Tunnel Project. As noted above, these include claims that the Subcontract has come to an end. Consistent with the attitude of the Subcontractor and Project Co

about most issues relating to these claims, there is a dispute between Project Co and the Subcontractor as to how these claims should be categorised. The Subcontractor contended that there were Primary Claims (relating to the termination of the Subcontract) and Additional Claims.

84 Project Co submitted that there were:

(1) the Claims for variations or modifications, for extensions of time and/or additional payments under Subcontract (the 'Contractual Entitlement Claims');

(2) the 'FMTE Claim' under the Subcontract referred to in [10(1)] above; and

(3) the Contract Claims referred to in [10(2)-(4)] above.

85 For the purpose of this proceeding I will adopt the categories as defined by Project Co. I will deal with each in turn.

6.2 Contractual Entitlement Claims

86 The Contractual Entitlement Claims are made up of the FME Claims, the Day 1 Uninsurable Event Claims, the Change in Mandatory Requirements Modifications Claims, the Taskforce Action Modification Claims and the MTPFA Claim.

87 First, there are claims relating to the alleged FMEs by Change Notices dated 31 July 2019 and 26 September 2019 pursuant to cl 23.6(a) of the Subcontract. At the time these claims were lodged, the Subcontractor advised Project Co that these were Linked Claims and required Project Co to pursue them against the State under the Project Agreement. Project Co has done so.

88 Second, there are 'Day 1 Uninsurable Risks' Claims (which relate to 'biological contamination') by a Claim under clause 60.3(b) dated 31 July 2019, a Change Notice dated 17 September 2019 and a further Claim under cl 60.3(b) dated 20 November 2019. At the time these claims were lodged, the Subcontractor advised Project Co that these were Linked Claims and required Project Co to pursue them against the

State under the Project Agreement. Project Co has done so.

89 Third, there are claims relating to 9 Modifications alleged to arise as a result of Changes in Mandatory Requirements issued between 17 December 2018 and 18 March 2019. For 7 of the 9 Modifications, at the time of lodgement, the Subcontractor advised Project Co that these were Linked Claims and required Project Co to pursue them against the State under the Project Agreement. Project Co has done so.

90 Fourth, there are Taskforce Action claims that directions given in meetings constitute Modifications by a Notice dated 7 October 2019 and a Claim under cl 60.3(b) dated 28 January 2020. At the time of lodgement, the Subcontractor advised Project Co that these were Linked Claims and required Project Co to pursue them against the State under the Project Agreement. Project Co has done so.

91 Fifth, there are claims in relation to the MTPFA by a Change Notice dated 20 December 2018 and a Claim dated 20 December 2018 under cl 60.3(b). At the time of lodgement, the Subcontractor advised Project Co that these were Linked Claims and required Project Co to pursue them against the State under the Project Agreement. Project Co has done so.

6.3 FMTE Claim

92 By letter dated 28 January 2020, the Subcontractor claimed that a FMTE had occurred with the result that the Subcontractor terminated the Subcontract in accordance with cl 42.2(a)(ii) thereof and claimed its costs of work on a quantum meruit basis. In response, by letter dated 29 January 2020, Project Co claimed that the termination of the Subcontract was invalid, constituting repudiatory conduct, but elected to affirm the Subcontract.

93 By letter dated 10 March 2020, Project Co advised the State that, if a FMTE had occurred under the Subcontract, a FMTE must have also must have occurred under the Project Agreement. It requested the State to advise whether it considered that

Project Co was entitled to terminate the Project Agreement on this basis. It seems agreed that the FMTE Claim is related to the FME Contractual Entitlement Claim.

6.4 Contract Claims

94 The Contract Claims relate to claims that the Subcontract should be voided, set aside or terminated.

95 By letter dated 13 December 2019, the Subcontractor claimed that, if not for misrepresentations as to the quantity of contaminated soil and the ability of it to be disposed of, the Subcontractor would not have concluded the Subcontract and was entitled to damages.

96 By letter dated 28 January 2020, the Subcontractor also claimed that the Subcontract was void ab initio as a consequence of a common or mutual mistake or has become frustrated from the time of discovery of the PFAS affected material. By letter dated 29 January 2020, Project Co claimed that the termination of the Subcontract was invalid, constituting repudiatory conduct, but elected to affirm the Subcontract.

6.5 Notices of Dispute and Arbitration

97 None of the claims set out above as between the Subcontractor and Project Co has been resolved.

98 On 7 February 2020, the Subcontractor issued a Notice of Dispute under cl 43.1(a) in relation to all the downstream claims set out above. It also included a dispute as to whether cl 44A was invalid by reason of the SOP Act. By letter dated 19 February 2020, Project Co requested more information about the Contract Claims. The Subcontractor did not provide a response to this letter. Rather, on 2 March 2020, the Subcontractor referred the downstream claims to arbitration pursuant to cl 44.1 of the Subcontract (i.e. the downstream arbitration). The downstream arbitration notice also included a claim as to whether cl 44A was invalid by reason of the SOP Act.[22]

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22 Downstream Arbitration Notice, [47].

99 By letter dated 6 March 2020, Project Co repeated its request for further information about the Contract Claims. It expressed the view that these Claims and the FMTE Claim were Linked Claims and Linked Disputes and that the downstream arbitration had thus been commenced prematurely in breach of cl 44A. It requested the withdrawal of the notice of downstream arbitration.

100 By letter dated 18 March 2020, the Subcontractor stated it would not withdraw its notice of downstream arbitration and objected to the enforceability of cl 44A.

101 On 23 March 2020, Project Co issued a Notice of Dispute under cl 44.3 of the Project Agreement to the State in respect of the Contract Entitlement Claims and whether there had been a FMTE under the Subcontract which would entitle Project Co to terminate the Project Agreement. No attempt was made at that time by Project Co to enforce the suspension clause in respect of the downstream arbitration.

102 On 2 June 2020, in the absence of agreement, Project Co issued a Notice of Arbitration to the State under cl 44.1 of the Project Agreement (i.e. the upstream arbitration). I was informed in the course of the hearing that the upstream arbitration is in abeyance because the Subcontractor, Project Co and the State are in discussions, but it has been agreed that the arbitral tribunal would comprise three persons.

103 As set out in section 2, on 5 June 2020, Project Co issued this proceeding.

104 On 11 June 2020, Project Co's solicitors wrote to the Subcontractor's solicitors requesting among other things the Subcontractor provide an undertaking that it will not take any steps to progress the downstream arbitration pending the hearing and determination of this proceeding. No undertaking was provided.

105 The Subcontractor submitted that the FMTE Claim and the Contract Claims are its Primary Claims which are peculiar to the Subcontract and the parties to it. For example:

(1) the claim for misleading conduct involved issues particular to the

Subcontractor; and

(2) the claim that the Subcontract has been voided related only to the parties to the Subcontract.

106 It is for this reason that Project Co's Notice of Dispute and notice of upstream arbitration make no reference to these Primary Claims and do not seek the relief to which the Subcontractor would be entitled to if it succeeds in relation to them. For example, Project Co does not claim:

(1) a Force Majeure Termination Payment or any entitlement to a payment on a quantum meruit basis;

(2) for relief on the basis of mistake or frustration; or

(3) in respect of the misleading conduct in relation to the extent of PFAS contamination or any statements or conduct by the State or others leading up to the execution of the Subcontract.

107 Further, Project Co has not sought relief that the Project Agreement was terminated by the FMTE. Rather, it has sought determination of whether there had been a FMTE under the Subcontract which would entitle Project Co to terminate the Project Agreement.

108 I note that the Subcontractor submitted that its notice of Linked Claims for some of the downstream claims was not decisive of the matter: the question for determination was whether each of the downstream claims had the effect of engaging the suspension clause.

7. THE SUBMISSIONS

109 As noted above, I heard argument on Project Co's application for interlocutory injunctions, the power of the Court to grant a declaration in these circumstances and the Subcontractor's application. While there was a significant overlap between the legal and factual issues in respect of each of these applications, I will deal with the

submissions of the parties on each application separately.

110 Further, as noted in section 2, the written submissions of the parties were over 90 pages. They were supplemented by oral argument. I have attempted to summarise the submissions of the parties as best I can in the following paragraphs.

7.1 The Declaration Issue

111 Project Co submitted that the Court has power to make the declaration sought pursuant to:

(1) its power to make declarations in the course of interlocutory proceedings as part of the Court's equitable auxiliary jurisdiction and by reason of cl 44.10 of the Subcontract;

(2) its inherent jurisdiction to prevent abuses of process; and/or

(3) sections 9, 17(2) and 17J of the Act which provide that the Court may grant interim measures in relation to an arbitration.

112 In oral argument, Project Co relied in particular on [111(1)] and [111(3)]. Project Co submitted that a court has power to make a declaration as part of an application for interlocutory relief in exceptional and urgent circumstances, relying upon *AED Oil Ltd v Puffin FPSO Limited*.[23] In this case, it noted that the clear terms of the parties' bargain in the Subcontract and the resultant uncertainty created by the Subcontractor's conduct gave rise to urgent and exceptional circumstances. As a result, Project Co submitted that the Court had the power to grant this declaration, particularly in light of the carve out in cl 44.10 of the Subcontract.

113 The Subcontractor disputed that the circumstances of this case were either exceptional or objectively urgent. As a result, it submitted neither the Court's power to grant declarations as part of urgent interlocutory relief or cl 44.10 of the Subcontract were engaged.

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23 (2010) 27 VR 22, 27 [24] ('*AED Oil*').

114 In summary, the Subcontractor submitted that:

(1) whether the suspension clause was enforceable was a Dispute 'arising in connection with' the Subcontract under cl 43.1(a) which the parties had agreed to be determined by arbitration;

(2) that question was properly within the jurisdiction of the downstream arbitration and was within the competence of the downstream arbitral tribunal to determine in accordance with s 16 of the Act;

(3) this was in circumstances where Project Co did not contend that the downstream arbitral tribunal did not have the power to make orders relating to the enforceability of the suspension clause; and

(4) as a result, there was no prejudice of the kind alleged to suggest that this case was urgent or exceptional.

115 Further, the Subcontractor noted the limited powers of the Court under the Act, namely ss 5, 8, 9 and 17J of the Act. Relying upon *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd*,[24] it submitted that a court should only make an order under s 17J:

(1) sparingly and in circumstances in which such orders were effectively the only means by which the position of a party could be protected until an arbitral tribunal was convened; and

(2) to assist the arbitral process and not to frustrate or impede it.

116 The Subcontractor submitted that the position of Project Co could be protected by the downstream arbitral tribunal and that a declaration by this Court would have the effect of impeding and not assisting the downstream arbitration.

[24] (2015) 246 FCR 47 (Edelman J) ('*Sino Dragon*').

7.2 Interlocutory Injunction

117 Project Co submitted that the Court has power to grant the interlocutory relief on substantively the same basis, namely:

(1) the Court's auxiliary equitable jurisdiction to enforce negative covenants and by reason of cl 44.10 of the Subcontract;

(2) the Court's inherent jurisdiction to prevent abuses of process; and

(3) ss 9, 17(2) and 17J of Act.

118 In oral argument, Project Co relied in particular on [117(1)] and [117(3)].

119 Project Co submitted that, on its proper construction, the suspension clause is a negative covenant by the Subcontractor not to progress the downstream arbitration while the upstream arbitration is in progress. It submitted that:

(1) a negative covenant constitutes a 'strong foundation' for injunctive relief in cases in which the Court is concerned with private rights;[25] and

(2) although discretionary, an injunction should be granted to enforce a negative covenant unless there are good reasons to the contrary.[26]

120 Project Co also relied upon the Court's power under s 17J of the Act, submitting that an interlocutory injunction was an 'interim measure'.

121 Project Co submitted that the Court should grant the interlocutory injunction sought because:

(1) there is an arguable case that the suspension clause is enforceable and that the downstream arbitration is in breach of that clause because the downstream arbitration relates to Linked Disputes; and

(2) the breach of the suspension clause causes serious prejudice to Project Co,

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25 *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552, 560.

26 *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 209 [76] (Kirby J), 219-20 [102]-[103] (Callinan J).

namely:

(a) it will incur the costs of fighting simultaneous arbitrations before different arbitrators relating to the same subject matter, being the vice the suspension clause seeks to avoid; and

(b) there is a risk of inconsistent findings of fact and law by respective arbitral tribunals in respect of substantial claims.

122 Further, in the course of its reply submissions, Project Co submitted there was a risk that, if the enforcement of the suspension clause was referred to the arbitral tribunal, that tribunal may decline to deal with that issue as a preliminary jurisdictional matter.

123 The Subcontractor disputed that the Court should grant an interlocutory injunction. This was because, just like the application for a declaration, the question of whether an injunction should be granted to enforce the suspension clause was also a matter 'arising in connection with' the Subcontract under cl 43.1(a). It relied upon the submissions set out in [114] above.

124 Further, the Subcontractor submitted:

(1) the suspension clause does not operate as a negative covenant but as a direction to the downstream arbitral tribunal; and

(2) whether the downstream arbitration related to Linked Disputes in respect of which Project Co was pursuing related claims was a matter in dispute and of some complexity, and was more appropriate for the downstream arbitral tribunal.

125 As to the powers of the Court including under s 17J, the Subcontractor relied upon the submissions set out in [115] and [116] above.

126 Further, the Subcontractor submitted that it will suffer prejudice if the interlocutory injunction was granted. This is because the Subcontractor would be prevented from

prosecuting its claims in the downstream arbitration until the determination of the application for a permanent injunction. This is in circumstances where:

(1) whether the Subcontract had been terminated or is void, and there is any entitlement to payment on a quantum meruit basis, is not the subject of the upstream arbitration;

(2) the Subcontractor is continuing to perform the Works under protest with its entitlement to payment only arising by way of a quantum meruit; and

(3) the downstream arbitration was initiated on 2 March 2020: there is no indication as to when the upstream arbitration will be concluded.

127 In any event, it submitted that there was no urgency in light of the powers of the downstream arbitral tribunal to grant the relief now sought by Project Co.

7.3 Referral Application

128 The Subcontractor submitted that the proceeding should be referred for determination in the downstream arbitration pursuant to ss 5 and 8(1) of the Act or the inherent jurisdiction of the Court. In summary, it submitted that:

(1) section 5 limits the Court's powers in an arbitration to those expressly provided in the Act. The Court has no residual powers, relying on *Sino Dragon* and *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd*;[27]

(2) section 8 requires a Court to refer to arbitration a matter in a proceeding which is the subject of the arbitration agreement subject to the proviso which did not apply here;

(3) section 16(1) provides that questions concerning the jurisdiction of the arbitral tribunal are within the competence of the arbitrators and for them to determine in the first instance, relying upon *Lin Tiger Plastering Pty Ltd v*

[27] [2020] WASCA 77, [332] ('*Hancock v Rhodes*').

Platinum Construction (Vic) Pty Ltd;[28] and

(4) section 16(9), which permits a Court to review an arbitral tribunal's determination of its jurisdiction under s 16(1), is the exclusive basis upon which a Court may resolve questions concerning jurisdiction.

129 As a result, relying upon its categorisation in [114] and [124] above, the relief sought in this proceeding was properly the subject of the downstream arbitration to deal with as questions of jurisdiction including the validity and applicability of the suspension clause in respect of the claims in the downstream arbitration.

130 By contrast, Project Co submitted that:

(1) the issues relating to the validity and enforcement of cl 44A do not fall within the meaning of 'jurisdiction' in s 16 which are confined to the validity or existence of the arbitration agreement itself; and

(2) in any event, the effect of the suspension clause is that, while the upstream arbitration is in progress, the arbitration agreement in the Subcontract was suspended and thus relevantly 'inoperative' for the purpose of the proviso in s 8.

131 In reply submissions at the hearing, Project Co submitted for the first time that the suspension clause was a precondition to the operation of the arbitration agreement in cll 43 and 44, relying upon *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd*.[29] In response, the Subcontractor submitted that:

(1) the jurisdiction of the downstream arbitral tribunal was to be determined in accordance with the arbitration agreement in cll 43 to cl 44A of the Subcontract;

(2) if an arbitration agreement has been in operation but suspended, it could not be said that it was 'inoperative' for the purpose of s 8: 'inoperative' in s 8

[28] (2018) 57 VR 576, 578 [2].
[29] [2015] NSWSC 451, [187]-[189] (Hammerschlag J) ('*John Holland*').

means having ceased to have effect;[30] and

(3) in any event, whether the arbitration agreement was 'inoperative' was properly a matter which should be referred to the downstream arbitral tribunal consistent with *Hancock Prospecting Pty Ltd v Rinehart*.[31]

8. THE RELEVANT LAW

8.1 Nature of arbitration and jurisdiction

132 At the outset it is important to recall that arbitration relies on the consent of the parties to submit disputes to arbitration. As French CJ and Gageler J said in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*,[32] 'the existence and scope of the authority to make the arbitral award is founded on the agreement of the parties in an arbitration agreement'.[33] Thus it is the contractual bargain that determines the jurisdiction of the arbitral tribunal.

133 Consistent with keeping parties to their bargains, the Courts have been more willing over time for parties to have the disputes agreed to be referred to arbitration determined at arbitration. In this context, there has arisen an underlying 'commercial purpose' of arbitration agreements that, subject to the terms of their arbitration agreement, the parties to an arbitration agreement intended to have all disputes determined by arbitration including issues of jurisdiction of the arbitral tribunal.[34]

134 This underlying commercial purpose is also reflected in the Act. It provides wide powers for the arbitral tribunal to hear and determine all aspects of the arbitrations including to determine its own jurisdiction pursuant to s 16. By contrast, the Act limits the powers of the Court. It is to this issue that I will now turn.

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30 Relying on *CPB Contractors Pty Ltd v Celsus Pty Ltd* (2017) 353 ALR 84, 98 [63], 100 [69] (Lee J) ('*CPB v Celsus*').

31 (2017) 257 FCR 442, 480 [141] ('*Hancock*').

32 (2013) 251 CLR 533 ('*TCL*').

33 TCL (n 32) 555 [31] (French CJ and Gageler J).

34 See, for example, in *Hancock* (n 31) 492 [177], quoting with approval the comments of Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, [6]-[8].

8.2 Limited role of court under the Act

135 As noted above, s 5 provides that in matters governed by this Act, 'no court must intervene except where so provided by this Act'. Under s 40, the express effect of s 5 is to alter or vary the unlimited power of the Court under the *Constitution Act*.

136 In this case, the Subcontractor submitted that the effect of s 5 is to oust the Court's powers in relation to matters governed by the Act other than where provided by the Act. Based on the authorities to which I was referred, that submission is correct. In *Hancock v Rhodes*, Quinlan CJ, in approving the decision of Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd*,[35] stated:

> **Carter Holt** does not assist the appellants. On the contrary, it confirms my view that the purpose of s 5 is to confirm that where a particular matter, involving the courts, is dealt with in the *Act* ('matters governed by this Act'), the court's powers are to be determined by, and only by, the provisions of the *Act*. As Randerson J expressed it: the intention of s 5 is 'where a particular topic or set of circumstances is governed by the [Act], to exclude any general or residual powers given to the domestic court which are not specified in the [Act]'.[36]

137 Thus the Court's power to intervene in matters that are governed by the Act is very limited.[37] Relevantly, under s 8 the Court has power to consider whether to refer a matter in a proceeding before it to the arbitral tribunal. But even this power under s 8 is limited: the Court has no discretion to refer if the action is brought 'in a matter which is the subject of an arbitration agreement' unless the proviso applies. I will deal with this further below.

138 Under s 16(9) the Court has power to review a preliminary ruling by an arbitral tribunal that it has jurisdiction. But once again, that power is limited. As set out above, s 16 itself grants to the arbitral tribunal the power to determine matters in relation to its own jurisdiction. This is reinforced by art 28 of the ACICA Rules.

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35 [2006] 3 NZLR 794, [46].

36 *Hancock v Rhodes* (n 27) [322] (Quinlan CJ), [465] (Beech and Vaughan JJA agreeing).

37 The Act confers powers on the Court including, for example, ss 11 (appointment of arbitrators), 14(2) (failure or impossibility of the arbitral tribunal to act), 27J (determination of preliminary point of law), 34 (recourse against award), 35 and 36 (recognition and enforcement of award).

8.3 Interim measures

139 Under the Act, both the arbitral tribunal and the Court are given power to grant 'interim measures' of relief as defined in s 17(2). Relevantly, under s 17(1), unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures. As set out above, interim measures are defined to include ordering a party to 'maintain or restore the status quo pending the termination of a dispute' and to 'take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process'.[38]

140 The downstream arbitral tribunal therefore has the power to grant relief of the kind sought in this proceeding. It was not suggested to the contrary by Project Co.

141 Section 17J sets out the Court's powers to award interim measures. As noted above, s 17J(1) provides that the Court has the same power of issuing an interim measure in relation to arbitral proceedings as it has in relation to proceedings in courts. Further, s 17J(2) provides the Court is to exercise the power in accordance with its own procedures taking into account the specific features of a domestic commercial arbitration.

142 The scope of the Court's power to grant interim measures under s 17J of the Act has been considered by the courts. There is authority for the proposition that court-ordered interim measures can only be granted where the purpose is to assist the arbitral process and not to frustrate or impede it.[39] In Australia, the New South Wales Court of Appeal has stated that court ordered interim measures were 'designed to facilitate and protect the arbitration process'.[40]

143 Further, in *Sino Dragon*, Edelman J, when a judge of the Federal Court, referred with approval to the Report of the UNCITRAL on the work of its 39th Session that the purposes of the equivalent of s 17J was to preserve the power of the courts 'to issue

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38 Act s 17(2)(a) and (b).

39 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 365 (Lord Mustill); *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5, [57]; *Smith Elements and Controls Ltd v EPI Group Ltd* [2018] NZHC 336, [31]. See also Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd ed, 2014) 2523, 2543.

40 *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260, 273-4 [63].

interim measures in support of the arbitration'.[41]

144 I am mindful of the respect to be given to these authorities and to Professor Born's text. However, I am conscious that these statements were made in a context where there was only one arbitration on foot. In my view, where there are two related arbitrations on foot, the Court would have the power under s 17J to restrain for a period one arbitral process while a related arbitral process was in progress. For example, I consider the Court would have power if the parties to the former arbitral process have themselves agreed that is to happen if the related arbitration is on foot and there is specific prejudice in the absence of relief from the Court. In this regard, I note that the paramount object of the Act is to facilitate the 'fair' as well as 'final' resolution of disputes by impartial arbitral tribunals without 'unnecessary […] expense'.

145 Further, the circumstances in which the Court will exercise its power under s 17J are limited. In *Sino Dragon*, Edelman J agreed with the comments of the Western Australian Court of Appeal that the Court's power to grant interim measures under s 17J of the Act 'should be exercised very sparingly and in circumstances in which such orders were effectively the only means by which the position of a party could be protected until an arbitral tribunal was convened'.[42] This places a significant restraint on the exercise of the Court's power to grant interim measures.

146 As set out above, the decision in *Hancock v Rhodes* is authority for the proposition that the general and residual powers of the Court are excluded by s 5 of the Act and that the Court has no power except as provided by the Act where a particular matter is governed by the Act. This would appear to include a removal of the Court's inherent or auxiliary equitable jurisdictions.

147 Project Co did not make submissions about the effect of *Hancock v Rhodes*. However, I consider that I am bound by *Hancock v Rhodes* as it is a decision of an intermediate

41 *Sino Dragon* (n 24) 404-5 [104].

42 *Sino Dragon* (n 24) 495 [105], quoting *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666, 694 [96] (Martin CJ, McLure P and Buss JA).

appellate court in circumstances applying sections of a uniform commercial arbitration act in force in each state in Australia. Accordingly, I consider that, under the Act, the Court's power to grant interlocutory relief in matters to which the Act applies derives from s 17J.

148 Further, it was not contended by the parties that the Court had no power to grant urgent interlocutory relief under cl 44.10. Pursuant to s 17J(2), the Court's power to grant interim measures is to be exercised 'taking into account the specific features of a domestic commercial arbitration'. In my view, this would appear to allow the Court to consider the features of the arbitration agreement between the parties, including relevantly cl 44.10 of the Subcontract which allows applications to the Court. This issue was not addressed in argument. However, if my view is correct, the Court's power to grant 'urgent interlocutory relief' under cl 44.10 is nonetheless exercised pursuant to s 17J. This position is consistent with s 9 of the Act, pursuant to which a Court can grant an interim measure under the Act before or during arbitral proceedings, as is envisaged by cl 44.10. In any event, if my view is not correct, similar kinds of factors which need to be addressed for the purposes of cl 44.10 are likely to be relevant in the exercise of the Court's power under s 17J.

8.4 Power to grant declarations in interlocutory applications

149 Courts have typically been reluctant to grant declarations at an interlocutory stage in proceedings because the very nature of declaratory relief is that it is final. However, in *AED Oil*, the Court of Appeal (Buchanan and Bongiorno JJA and Croft AJA) noted in the context of arbitral proceedings that there is scope for a declaration to be made at an interlocutory stage in proceedings before the Court. Their Honours considered that:

> Even if it were accepted that an interlocutory or interim declaration is not available in Australia, this would not, in our opinion, exclude the possibility of a declaration of rights in the course of interlocutory proceedings where the declaration finally determines an aspect of matters in dispute and does not operate only as a declaration for the interim. In our opinion, a declaration of

this type could sensibly be described as 'urgent'.[43]

150 A similar position was adopted in the Federal Court by Lee J in *Dillon v RBS Group (Australia) Pty Ltd*, in which his Honour noted such declarations were a 'special case'.[44]

151 In my view, consistent with these authorities, a final declaration will only be granted at an interlocutory stage where there are exceptional and objectively urgent circumstances. This was accepted by senior counsel for Project Co.[45]

152 This is confirmed by cl 44.10 of the Subcontract which allows a party to approach a court, notwithstanding the arbitration agreement, for 'urgent interlocutory relief' if in that party's reasonable opinion it is necessary to protect that party's rights.

153 There is one further limitation which applies to the grant of injunctions. In the course of oral argument, senior counsel for the Subcontractor referred to a line of authorities for the proposition that a declaration should not be used as a 'staging post' in litigation. That line of authorities stems from the decision of Young J in *McKeown v Cavalier Yachts Pty Ltd*, in which his Honour said:

> The plaintiff's summons asks for a declaration that the yacht is the property of the plaintiff. I do not believe that such a declaration should be made. Declarations should not be made as a staging post in litigation, and in a case where some executive orders have to be made, it is usually best to proceed to consider those executive orders rather than making declarations.[46]

154 Project Co did not address this line of authority in reply. With respect, I generally agree with the comments of Young J. They appear to be based on the efficiency and utility of a making a declaration which is not itself determinative of a matter between the parties. However, consistent with the comments of the Court of Appeal in *AED Oil* (which envisages the 'possibility of a declaration of rights in the course of interlocutory proceedings where the declaration finally determines an aspect of

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43 *AED* Oil (n 23) 27 [24].

44 *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, 156-7 [29].

45 Transcript 60:10-23.

46 *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 312, quoted in *Platypus Leasing Inc v Commissioner of Taxation (No 3)* [2005] NSWSC 388, [81] (Gzell J).

matters in dispute'), I consider that, on such an application for interlocutory relief, it would be appropriate for the Court to consider the efficiency and utility of making such a declaration.

8.5 The referral power under s 8

155 The Subcontractor seeks orders that this proceeding be referred to the downstream arbitral tribunal pursuant to s 8 of the Act. As set out above, s 8 provides that upon request the Court must refer a proceeding which is the subject of an arbitration agreement to arbitration subject to the proviso, namely 'unless it finds that the agreement is null and void, inoperative or incapable of being performed'.

156 Central to whether such a stay must be granted under s 8 in this proceeding is when an arbitration agreement is 'inoperative' for the purpose of the proviso. This in turn involves consideration of which forum should determine whether an arbitration agreement is inoperative. It is to that issue I will first turn.

Who decides whether an arbitration agreement is 'inoperative'?

157 It is clear that the Court and the arbitral tribunal have the power to determine whether an arbitration agreement is 'inoperative'. The Full Court of the Federal Court in *Hancock* noted that s 8 of the Act should be understood in the context 'first, that the Court is not required to decide the matters in the proviso; [and] secondly, that the competence principle is wide enough to permit the arbitral tribunal to decide any question of jurisdiction'.[47]

158 In deciding whether it is the Court or the arbitral tribunal which should determine these matters, the Full Federal Court focused on the nature and extent of the issues relevant to the determination of the application of the proviso. This is in the context where the onus is on the party who asserted the proviso prima facie applied.

159 The Full Federal Court considered that, in most circumstances, the question of who should determine the proviso issue is 'a practical question' based upon the nature of

47 *Hancock* (n 31) 536 [378].

the relevant issue, including its legal and factual complexity. In doing so, the Full Court adopted and endorsed the comments of Colman J in *A v B*.[48]

160 Relevantly, the Full Federal Court considered that:

(1) if the issues relating to the proviso were of short compass, it may be appropriate for the Court to resolve the issue. For example, 'if there is a question of law otherwise affecting the answer to the question of jurisdiction, especially one that is confined, which might be dispositive', then it might be useful for the Court to address the issue.[49]

(2) if the issues relating to the proviso are of some legal and/or factual complexity, then it will be generally more appropriate for the proviso issue to be referred to the arbitral tribunal.[50]

161 I note that in *Hancock*, the Full Federal Court determined to refer the proviso issue to the arbitral tribunal. In doing so, their Honours noted that '[t]he parties to the litigation have displayed an intensity of application to every matter in dispute that makes us consider that the prospect of holding the parties to a short hearing… is unlikely'.[51]

When an arbitration agreement is 'inoperative'?

162 There was much debate before me as to when an arbitration agreement is 'inoperative' as opposed to 'null and void' and 'incapable of being performed'. The Subcontractor submitted it means only when an agreement has ceased to have effect. Project Co submitted it means one whose operation is yet to come into effect or has been suspended. The proviso is in the Model Law and Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[52]

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48 [2007] 1 Lloyd's rep 237, [137], cited in *Hancock* (n 31) 482 [148], 538 [390].
49 *Hancock* (n 31) 481 [145], 538-9[391], [393].
50 *Hancock* (n 31) 481 [145], 538-9 [391], [393].
51 *Hancock* (n 31) 539 [393].
52 330 UNTS 3 (entered into force 10 June 1958) ('New York Convention').

163 In *Bakri Navigation Company Ltd v 'Golden Glory' Glorious Shipping SA*,[53] Gummow J, when a judge of the Federal Court, considered whether an arbitration agreement was rendered inoperative by a subsequent agreement by the parties to refer the matter to the court for determination. His Honour considered the meaning of the term 'inoperative' under s 7 of the IAA. His Honour noted that:[54]

> in my view, the arbitration agreement has, in any event, become "inoperative" within the meaning of s 7(5). In that regard, Sir Michael Mustill and Mr S C Boyd state, in the 2nd edition of their work, *The Law and Practice of Commercial Arbitration in England*, Butterworths, London, 1989, p 464:
>
> > The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be "inoperative". First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise.
> >
> > Second … there may be circumstances in which an arbitration agreement might become "inoperative" by virtue of the common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties.

164 His Honour's comments have been adopted in respect of s 8 of the Act in *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd*.[55] Further authorities relying on Gummow J's definition relate to whether a subsequent agreement or conduct by the parties renders the arbitration agreement inoperative.[56] For example in *CPB v Celsus*, Lee J concluded that an arbitration agreement can become inoperative through waiver, estoppel or abandonment of the right to arbitrate or in like circumstances.[57]

165 Justice Gummow's comments in *Bakri* and the other cases which I have referred to

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53 (1991) 217 ALR 152 ('*Bakri*').

54 *Bakri* (n 53) 169.

55 [2016] WASC 52, [61] ('*Australian Maritime Systems*').

56 See e.g. *Siam Steel International Plc v Compass Group (Australia) Pty Ltd* (2014) 293 FLR 260, 270-2 [43]-[47]; *Australian Maritime Systems* (n 55); *Samsung C&T Corp v Duro Felguera Australia Pty Ltd* [2016] WASC 193, [16]-[19].

57 *CPB v Celsus* (n 30) 98-9 [63]-[65], 100 [67]-[69].

focus on those occasions where the relevant agreement 'ceased to have effect for the future'. It seems clear that that is the context in which disputes most often arise.

166 By contrast, I note the decision in *John Holland*. In that case, the arbitration agreement was subject to an express condition precedent. In an application under s 8 of the New South Wales equivalent of the Act, Hammerschlag J held that until the condition precedent was fulfilled, the arbitration clause did not become operative.[58] As a result, his Honour did not refer the proceeding before him to arbitration under s 8. I note that this reasoning was cited with approval by Croft J in *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd*.[59]

167 I am not able to form a concluded view on the meaning of 'inoperative' for the purpose of the proviso in this application. I consider this is a difficult issue. With respect, I agree with the decision of Hammerschlag J where he concludes that an arbitration agreement may be 'relevantly' inoperative for the purpose of s 8 of the Act where that agreement is subject to a condition precedent. In this regard, I note the word 'inoperative' is a word of broad meaning.

9. ANALYSIS

168 As noted earlier, there is an overlap between the factual and legal issues relating to each of these applications and which are important to their determination. Those issues relate for the most part to matters concerning the validity, enforceability, operation and application of the suspension clause in the context of cll 43-44A of the Subcontract. As a result, it is appropriate that I set out my conclusions about them at this stage. However, I am conscious that these views have been formed in the context of applications for interlocutory relief.

9.1 The relevance of the suspension clause to the downstream arbitration

169 For the reasons set out in section 8.1 above, the jurisdiction of the downstream arbitral tribunal is vested in it by the agreement in the relevant clauses in the

58 *John Holland* (n 29) [189]-[191].
59 (2017) 52 VR 198, 213 [40].

Subcontract. A number of things follow from this.

170 First, I consider that the question in this case of whether the suspension clause is valid and enforceable, and whether it applies to the claims in the downstream arbitration, are Disputes 'arising in connection with' the Subcontract under cl 43.1(a) which the parties had agreed to be determined by arbitration. In this regard, I note that the words 'arising in connection with' the Subcontract are words of broad meaning. They are properly matters for determination by arbitration pursuant to the agreement between the parties to the Subcontract.

171 Further, some of these issues have already been raised in the downstream arbitration. As noted above, the notice of downstream arbitration included an issue in dispute as to whether cl 44A is invalid in light of Project Co's contention that the downstream claims could not be progressed in light of the suspension clause.

172 Second, I have concluded that questions of the validity, enforceability and/or applicability of the suspension clause are questions which go to the jurisdiction of the downstream arbitral tribunal. This is because the suspension clause (however categorised) is part of the agreement between the parties and regulates the circumstances in which the downstream arbitral tribunal has the power to exercise its functions in respect of certain types of claim.

173 Further, in light of the authorities set out in section 8.5, I consider it is arguable that the effect of the suspension clause (if valid and applicable to the claims in the downstream arbitration) is that the agreement referring those claims to the downstream arbitration is relevantly 'inoperative'. I have formed this view on either categorisation of the suspension clause by Project Co: i.e. whether the suspension clause operates as a negative covenant or as a condition precedent to the downstream arbitration.

9.2 Powers of downstream arbitral tribunal and prejudice

174 Project Co did not contend that the downstream arbitral tribunal did not have the

power to make orders relating to the validity, enforceability and/or applicability of the suspension clause of the kind sought in this proceeding. In my view, that is a significant matter in these applications.

175 As a consequence, any issues as to whether the continuation of the downstream arbitration is an abuse of process as alleged by Project Co can be determined by the arbitral tribunal on the basis of the validity, enforceability and/or applicability of the suspension clause. This is particularly so in light of s 17(2)(b) of the Act set out above.

176 Further, if the arbitral tribunal were to consider the validity, enforceability and applicability of the suspension clause as a preliminary matter (whether as a jurisdictional question or otherwise), I consider there would be no prejudice of the kind primarily alleged by Project Co, namely the costs of the two competing arbitrations at once and the risk of inconsistent findings. In accordance with their agreement in relation to the determination of Disputes under the Subcontract, the arbitral tribunal would hear and determine the validity, enforceability and applicability of the suspension clause on the merits. In that event, the decision of the downstream arbitral tribunal will also resolve the prejudice relied upon by the Subcontractor in [126] above.

177 Project Co submitted that there was still prejudice as there remained a risk that the downstream arbitral tribunal would not address these issues as a 'preliminary' jurisdictional matter. As a result, this might have the effect of depriving Project Co of a right of appeal under s 16(9) of the Act. In my view, the risk of this is small in light of the nature of the suspension clause itself, its significance to the parties and its relationship to the jurisdiction of the downstream arbitral tribunal. This is particularly so in light of art 28.4 of the ACICA Rules which the parties have adopted. As set out above, it provides that in general an arbitral tribunal should rule on a plea concerning jurisdiction as a preliminary question. Further, it was accepted by the Subcontractor that jurisdictional issues should be heard as a preliminary

matter in the downstream arbitration.[60]

9.3 The validity, enforceability and applicability of the suspension clause

178 I have concluded that there are number of issues to determine in order to conclude that the suspension clause operates to prevent the progress of the downstream arbitration. Some of these issues are more complex than others. Some involve only legal issues. Others involve factual issues including relating to the nature of the claims being pursued in the downstream arbitration. All of them are required to be considered for the suspension clause to have the effect contended for by Project Co. I will deal with each in turn. However, at the outset, I note that the each of the issues was the subject of dispute between the parties.

179 First, there is the issue as to whether the suspension clause is valid and enforceable. The determination of that question involves, in my view, a consideration of the nature and purpose of s 13 of the SOP Act in its context (in particular, relating to rights to 'progress payments' subject to the excluded amounts in s 10B) and the nature of the suspension clause in the context of cl 44A and the Subcontract more generally. I consider that, in light of the arguments addressing this issue in these applications, there is at least an arguable case that the suspension clause is not unenforceable by reason of the SOP Act. In summary, this is because I consider there is doubt about whether the suspension clause is itself a 'pay when paid provision' under s 13 of the SOP Act.

180 Second, there is the issue of the proper categorisation of the suspension clause. Three alternatives were put forward: two by Project Co and one by the Subcontractor. The determination of this issue is a question of construction of the clause in its context.

181 For my part, I consider that there is an arguable case that, on its proper construction, the suspension clause constitutes a negative covenant. In my view it is at least arguable that in substance it is a promise by each of the parties not to progress a

60 Transcript 157:24.

downstream arbitration between them to the extent it relates to a Linked Dispute while an upstream dispute was in progress. In this regard I note in particular the opening words to the clause, namely 'the parties agree and acknowledge' and the clear objective commercial intent of the parties expressed in that clause. For completeness, I also consider it is at least arguable that the suspension clause may operate as a condition precedent as contended for by Project Co in reply, having regard to cll 43.9 and 44.11 of the Subcontract.

182 Third, there is the issue of what needs to be established for the suspension clause to apply in respect of any claim. Again, this is a question of construction of the clause in its context. The parties also disagreed on this issue.

183 Project Co submitted that it was a matter of reviewing the downstream claims being pursued in the downstream arbitration and the extent to which they were Linked Disputes. Under paragraph (c) of the definition of Linked Disputes that relevantly meant a dispute 'concerned with matters which arise in respect of the respective rights and obligations of Project Co and an Upstream Party under an Upstream Document'. Project Co conceded that its construction would involve a consideration of the upstream claims.

184 By contrast, the Subcontractor submitted that, as a precursor to the operation of the suspension clause, it is necessary to determine whether the claim is a Linked Claim and whether it can be characterised as a Linked Dispute by reason of Project Co raising it under the relevant Upstream Document. This was because cl 44A deals with 'Linked Claims and Entitlement', and the Linked Dispute envisaged by cl 44A.3 requires a comparison of the Subcontractor's downstream claim with Project Co's related upstream claim. This involves consideration of whether each of the downstream claims is a Linked Claim and relevantly whether it satisfies paragraph (a) of the definition of Linked Claim.

185 In my view, in light of the arguments in these applications, the issue of what needs to be established for the suspension clause (on its proper construction) to apply is

not a simple one but requires consideration of the suspension clause in the context of cl 44A as a whole.

186 Further, the Subcontractor submitted that the opening words of the suspension clause meant that, if there had been a breach of the kind set out in cl 44A.2 by Project Co, the suspension clause had no operation. The Subcontractor intends to allege in the downstream arbitration that, by reason of breaches of the kind set out in cl 44A.2 by Project Co, the Subcontractor's Entitlements from Project Co are to be determined as if they were not Linked Claims with the result that the downstream arbitration must proceed. I consider that these are matters of some legal and factual complexity that are entangled with the application of the suspension clause.

187 Fourth, there is also the issue about whether, and the extent to which, each of the downstream claims is a Linked Dispute for the suspension clause (as properly construed) to apply. Once again the parties disagreed on this issue. I have formed the view that it is an issue of some complexity, even if Project Co's construction set out at [183] is correct. There will need to be, at least, an analysis of the downstream claims, the upstream claims and the respective rights and obligations of Project Co. This involves questions of fact and law.

188 I am conscious that, at the time that many of the Contractual Entitlement Claims were lodged, the Subcontractor requested Project Co to pursue them against the State under the Linked Claim regime. It might be thought that this is strong evidence that they are. However, the Subcontractor now seems to resile from its previous position. Further, in my view, there are real issues as to whether the Contract Claims and the FMTE Claim are Linked Disputes. In this regard, I refer to the submissions of the Subcontractor set out in [105] to [107] above.

189 I do not accept that these issues can be determined by a review of the notices of downstream and upstream arbitration alone as submitted by senior counsel for Project Co in reply. I have reviewed those notices. The notice of downstream arbitration raises issues in dispute at a high level. It attached relevantly the

downstream Notice of Dispute and 4 items of correspondence between the Subcontract and Project Co.

190 In my view, the issue of whether and the extent to which each of the downstream claims is a Linked Dispute will require a more comprehensive analysis of, at least, each of the downstream claims, the upstream claims and the respective rights and obligations of Project Co and the State under the Project Agreement. I have formed the view that these issues are of some complexity. In this regard, I note and refer to the substantial volume of material relied on by Project Co and the Subcontractor and the factual issues raised in relation to the downstream and upstream claims as set out in sections 2 and 6 above.

9.4 Powers of the Court

191 As set out in section 8.3 above, I consider that the Court's power to grant urgent interlocutory relief of the kind envisaged by cl 44.10 is exercised pursuant to s 17J of the Act. I will consider Project Co's application on this basis. In any event, as set out in section 8.3, I consider that the same kind of factors which need to be addressed for the purposes of cl 44.10 are likely to be relevant in the exercise of the Court's power under s 17J.

10 DETERMINATION OF APPLICATION

10. 1 Power to grant declaration in the circumstances

192 I have concluded that the Court has no power to grant a declaration in the circumstances of this case. This is based on the principles to grant declarations as part of urgent interlocutory relief set out in section 8.4 above and the terms of cl 44.10 of the Subcontract. This is for three reasons.

193 First, I do not consider that the circumstances of this case are exceptional. This is in circumstances where I have concluded that:

(1) the arbitral tribunal has the power to grant orders relating to the validity, enforceability and/or applicability of the suspension clause as set out in

sections 9.1 and 9.2 above;

(2) in that event, there will be no kind of primary prejudice alleged by Project Co as set out in section 9.2 above;

(3) any risk that the arbitral tribunal will not determine the validity of the suspension clause as an urgent preliminary matter is very low for the reasons set out in section 9.2 above; and

(4) the upstream arbitration is currently in abeyance pending commercial discussions between the parties.

194 Second, I do not consider that the circumstances of this case are objectively urgent. I note that the urgency relied upon by Project Co is a different question as to whether these reasons for judgment are urgent. The urgency in the need for these reasons arises because the parties need to know the outcome of these applications in order to determine whether it is the Court or the arbitral tribunal that should make the orders sought in this proceeding.

195 I have formed the view that the circumstances of this case are not objectively urgent for the same reasons that I relied upon to form the view that the circumstances of this case are not exceptional in [193] above. They can be dealt with as urgently by the arbitral tribunal as by this Court. In my view, if this proceeding had not been instituted, it is likely that the issue of whether the suspension clause was valid would have been the subject of argument before the arbitrators.

196 Third, for the same reasons, I have concluded that a party in the position of Project Co could not reasonably form the opinion that a declaration from the Court is necessary to protect its rights in accordance with cl 44.10. That is because, in light of my conclusions about the power of the downstream arbitral tribunal to hear and determine issues of the validity of the suspension clause and that no real prejudice of the kind alleged by Project Co will result as set out in sections 9.1 and 9.2, I am not satisfied that Court intervention is required.

197 Further, I consider that the declaration is merely a 'staging post' in Project Co obtaining effective relief in respect of the suspension clause. I doubt the utility and efficiency of making such a declaration on an interlocutory application without the determination of the other issues which would lead to the suspension clause having effect for the purpose of the downstream arbitration. However, I acknowledge that this may not be viewed strictly as a matter of the power of the Court to grant such a declaration but when it should be exercised.

198 As to the particular limitations on the powers of the Court to grant interim measures under s 17J, I refer to my comments in [142] to [145] above. I note in particular my comments in [144] on the powers of the Court to restrain the progress of a downstream arbitration while an upstream arbitration is on foot in certain exceptional circumstances. Such an application might involve declarations as to the validity of the relevant clause. However, for the reasons set out in [193], such exceptional circumstances are not present here.

199 Further, for those same reasons, even if I had the power, I am not satisfied that Court intervention is required in the circumstances of this case to protect the position of Project Co as the necessary relief can be sought from the downstream arbitral tribunal.

10.2 Whether to grant the Interlocutory Injunction

200 In my view the Court should not grant the interlocutory injunction sought by Project Co. I have formed this view based on the principles to be applied in granting injunctions and the terms of cl 44.10 of the Subcontract. This is for a number of reasons.

201 First I am not satisfied that I have power to do so consistent with cl 44.10 of the Subcontract. That is to say I do not consider that the interlocutory injunction in the circumstances of this case is 'urgent' interlocutory relief or that a party in the position of Project Co could reasonably form the opinion that an injunction from the Court is necessary to protect its rights in accordance with cl 44.10. I refer to my

comments in [193]-[196] above.

202 Second, even if I had the power, I would decline to grant an interlocutory injunction in the circumstances of this case. This is notwithstanding that I consider it is arguable that the suspension clause is valid and operates as a negative covenant as set out in section 9.3 above. This is because the balance of convenience does not favour the granting of such an injunction. In substance this is for the reasons set out in [193] above. As a result, I am not satisfied that Court intervention is required.

203 As to the particular limitations on the powers of the Court to grant interim measures under s 17J, I am not satisfied that Court intervention is required in the circumstances of this case. I refer to my comments in [198], [199] and [202].

10.3 Determination of the referral application

204 I have also concluded that the proceeding should be referred under s 8 of the Act to be heard and determined in the downstream arbitration. In particular, I will refer the issue of whether the arbitration agreement between the parties is 'inoperative' for the purpose of s 8.

205 In substance this is because:

(1) I consider that the matters raised in this proceeding fall within the scope and the jurisdiction of the arbitration agreement and/or the downstream arbitration as set out in section 9.1; and

(2) it was not in dispute that the downstream arbitral tribunal when appointed has the power to make orders relating to the validity, enforceability and/or applicability of the suspension clause of the kind sought in this proceeding as set out in section 9.2.

206 As to whether the proviso in s 8 applies, I have concluded that, consistent with the principles in *Hancock*, the legal and factual issues raised for the determination of the proviso are not of short compass. To the contrary, for the reasons set out in

section 9.3, they raise issues of some legal and factual complexity. This is in a context where every issue is in dispute and is hard-fought between the parties. In this regard, the attitude of the parties reflects the attitude of the parties in *Hancock* set out in [161] above.

207 Further, I consider that it is appropriate that one tribunal hear and determine all of these issues. While each is to a degree separate, in my view, they are interrelated and argument on one issue might well inform the determination of another. In all these circumstances, I consider that it is more appropriate for the arbitral tribunal to determine the proviso issue.

208 As a result:

(1) Project Co's application for interlocutory injunctions is refused;

(2) the Court has no power to make a declaration of the kind sought by Project Co in the circumstances of this case; and

(3) the referral application is granted and the issue of whether the arbitration agreement in the Subcontract is inoperative is also referred to the downstream tribunal.

209 The parties are requested to consider the orders which should be made in this proceeding as a result of these conclusions, including in relation to costs. In the absence of agreement, I will relist the matter at a time convenient to the parties.
