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

Not Restricted

No. 01707 of 2013

WTE CO-GENERATION — First Named Plaintiff

And

VISY ENERGY PTY LTD — Second Named Plaintiff

v

RCR ENERGY PTY LTD — First Named Defendant

And

RCR TOMLINSON LTD — Second Named Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	24 MAY 2013
DATE OF JUDGMENT:	21 JUNE 2013
CASE MAY BE CITED AS:	WTE CO-GENERATION & ANOR v RCR ENERGY PTY LTD & ANOR
MEDIUM NEUTRAL CITATION:	[2013] VSC 314

BUILDING CONTRACT - Contractual dispute resolution clause a pre-condition to litigation – Whether dispute resolution clause uncertain and unenforceable – Principles as to uncertainty and enforceability of contractual dispute resolution clauses – Dispute resolution clause uncertain and left process for further agreement - Dispute resolution clause unenforceable.

CONTRACT - Contractual dispute resolution clause a pre-condition to litigation – Whether dispute resolution clause uncertain and unenforceable – Principles as to uncertainty and enforceability of contractual dispute resolution clauses – Dispute resolution clause uncertain and left process for further agreement - Dispute resolution clause unenforceable.

PRACTICE AND PROCEDURE – Application for stay of a proceeding – Inherent jurisdiction to order – Contractual dispute resolution clause a pre-condition to litigation – Whether dispute resolution clause uncertain and unenforceable – Principles as to uncertainty and enforceability of contractual dispute resolution clauses – Dispute resolution clause uncertain and left process for further agreement - Dispute resolution clause unenforceable – Stay refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr M Whitten	Arnold Bloch Leibler
For the Defendants	Mr J Gleeson SC with Mr K Naish	Clayton Utz

HIS HONOUR:

1 This is an application by the Defendants that, pursuant to ss 47 and 48 of the *Civil Procedure Act 2010* (Vic) or, alternatively, s 30 of the *Supreme Court Act 1986* (Vic) and the inherent jurisdiction of the Court, the proceeding be stayed until the parties have complied with a contractual dispute resolution clause.

2 The contract in question is the Coolaroo Co-Generation Plant Boiler Contract dated 15 October 2008 (the "Contract").

3 The Contract is for the supply of the co-generation facility (the "Facility"), intended to be fired by paper mill residues. The Contract was entered into by the First Defendant ("RCR Energy") and Visy Paper. The contract price was in excess of $20m.

4 The Firstnamed Plaintiff ("WTE") alleges a breach of contract pursuant to a novation of the Contract. The Second Defendant ("RCR Tomlinson") is sued as a guarantor of RCR Energy's obligations under the Contract. The Second Plaintiff ("Visy Energy") sues for what are alleged to be misleading representations made in the Contract.

5 The bases of the application are:

(a) The parties, by clause 42 of the Contract, agreed that senior executives of the parties would meet to attempt to resolve the dispute in the manner set out in clause 42;

(b) No such meeting has taken place. Accordingly, the Court should give effect to the parties' agreement and stay the proceeding until the Contract is complied with; and

(c) The grant of a stay would be consistent with the principles of the *Civil Procedure Act 2010*, in particular ss 22, 47 and 48.

6 The general rule is that equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary

for the Court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable.[1]

7 The Court may, however, effectively achieve enforcement of a dispute resolution clause by default, by ordering that proceedings commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed.[2]

8 This Court's power to order a stay of proceedings is derived from its inherent jurisdiction to prevent abuse of its process.

The Contract and Background

9 The Facility was constructed, however the Superintendent did not certify practical completion as having been reached.

10 On 11 November 2011, a show cause notice was sent by WTE to RCR Energy. RCR Energy responded, but not to WTE's satisfaction. On 20 December 2011, WTE purported to take out of RCR Energy's hands all of the remaining work under the Contract, pursuant to clause 39.4 of the Contract (the "take out notice").

11 Subsequently, and despite the take out notice, on 14 March 2013, WTE issued a further show cause notice to RCR Energy, requesting RCR Energy to show cause why WTE should not terminate the Contract. RCR Energy responded, but not to WTE's satisfaction. On 5 April 2013, WTE issued a notice purporting to terminate the Contract.

12 Clause 42 of the Contract reads as follows:

> **42.1 Notice of dispute**
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> If a difference or dispute (together called a '*dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *dispute* concerning:
>
> a *Superintendent's direction*; or

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1 See: *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 210; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 (Einstein J) [26].

2 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 (Einstein J) [26].

a claim:

in tort;

under statute;

for restitution based on unjust enrichment or other quantum meruit; or for rectification or frustration, or like claim available under the law governing the *Contract*,

then either party shall, by hand or by registered post, give the other and the *Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.

Notwithstanding the existence of a *dispute*, the parties shall, subject to clauses 39 and 40 and subclause 42.4, continue to perform the *Contract.*

42.2 Conference

Within 7 days after receiving a notice of *dispute*, the parties shall confer at least in the presence of the *Superintendent*. In the event the parties have not resolved the *dispute* then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the *dispute* or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the *dispute* has not been resolved within 28 days of service of the notice of *dispute*, that *dispute* may be referred to litigation.

42.3 Summary relief

Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the *Contract* or to seek injunctive or urgent declaratory relief.

The Issue

13 The Defendants say that there has been no compliance with clause 42.

14 The Plaintiffs in essence say that the clause is uncertain and unenforceable. Alternatively, it is submitted that the parties agreed to dispense with compliance with clause 42.

Legal Principles in Relation to Contractual Dispute Resolution Clauses

15 In Australia a contract may validly include an agreement to negotiate.[3]

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[3] Eg *Coal Cliff Collieries v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 33; *United Group Rail Services Ltd v Rail Corporation of New South Wales* (2009) 74 NSWLR 618; [2009] NSWCA 177; *Con Kallergis Pty Limited v Calshonie Pty Limited* (1997) 14 BCL 201.

16 As the New South Wales Court of Appeal held in *Coal Cliff Collieries v Sijehama Pty Ltd*:[4]

> … [P]rovided there was consideration for the promise, in some circumstance a promise to negotiate in good faith will be enforceable, depending on its precise terms …
>
> In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties …

17 In *United Group Rail Services Ltd v Rail Corporation of New South Wales*,[5] Allsop P extensively reviewed the authorities and followed *Coal Cliff Collieries*, upholding a dispute resolution clause which read, after the identification of the relevant disputes:

> … the dispute or difference is to be referred to a senior executive of each of the Principal and the Contractor who must:
>
> (c) meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference; and
>
> (d) if they cannot resolve the dispute or difference within fourteen days after the giving of the notice … the matter at issue will be referred to the Australia Dispute Centre for mediation.

18 In *United Group Rail Services* one of the critical clauses under consideration was clause 35.11 of the relevant contract. Relevant parts of this clause were in the following form:

> [35.11] Negotiation
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> If:
>
> (a) a notice of appeal is given in accordance with Clause 35.9; or
>
> (b) the dispute or difference for which the notice under Clause 35.1 has been given does not relate to a Direction of the Principal's Representative under one of the Clauses referred to in Attachment 'A',
>
> the dispute or difference is to be referred to a senior representative of each of the Principal and Contractor who must:
>
> (c) **meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference**; and
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> (d) if they cannot resolve the dispute or difference within 14 days after the giving of the notice under Clause 35.1 or 35.9 (whichever is later), the

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4 (1991) 24 NSWLR 1, 26 (Kirby P, with whom Waddell AJA agreed).

5 (2009) 74 NSWLR 618.

> matter at issue will be referred to the Australian Dispute Centre for mediation.
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> …
>
> [Clause 35.1(c) emphasised in bold]

19 A central question in *United Group Rail Services* was whether sub-clause 35.11(c) was uncertain and therefore void and unenforceable.

20 As earlier discussed, Allsop P upheld the sub-clause in issue.

21 However, in the present case, the sub-clause in contention was part of sub-clause 42.2 which was in quite a different form, namely:

> In the event the parties have not resolved the *dispute* then within a further 7 days a senior executive representing each of the parties must **meet to attempt to resolve the *dispute* or to agree on methods of doing so**.
>
> [Emphasis added]

22 The words in sub-clause 42.2 "*… or to agree on methods of doing so*" set it apart from the sub-clause considered in *United Group Rail Services*, which may be distinguished on this ground. The principal issue in *United Group Rail Services* arose from the contractual promises of the parties to "meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference". Allsop P considered the phrase "good faith" in this context,[6] ultimately upholding the clause in issue.

23 The issue here is not whether the attempts to negotiate were genuine or conducted in good faith. In this case no meetings were held and there were no relevant attempts to negotiate.

24 Accordingly, the first and principal question is whether the wording of clause 42.2 of the Contract is sufficiently certain.

25 The Defendants say that the simplicity of sub-clause 42.2 of the Contract enhances rather than detracts from its certainty. Reference was made to the observations of Warren J in *Computershare Ltd v Perpetual Registrars Ltd* where her Honour held:[7]

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[6] 74 NSLWR 639 [70]-[74].
[7] [2000] VSC 33 [15].

> Furthermore, where parties have made a special agreement requiring them to address a path to a potential solution there is every reason for a court to say such parties should be required to endeavour in good faith to achieve it. In these circumstances the court does not need to see a set of rules laid out in advance by which the agreement, if any, between the parties may in fact be achieved.

26 The approach taken by the courts in relation to dispute resolution clauses is consistent with the approach taken by the courts to allegations of contractual uncertainty generally. In *Robertson v Unique Lifestyle Investments Pty Ltd*[8] Habersberger AJA said:[9]

> … the modern approach to the construction of commercial agreements of business people is, generally, to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.

27 Even if a clause is defectively drafted the Court will strive to give it commercial effect. As Dodds-Streeton JA said in *Burbank Trading Pty Ltd v Allmere Pty Ltd*:[10]

> Despite the defective drafting, it was common ground that cl 10, and cl 10.2 in particular, should, in accordance with the principles recognised in *MLW Technology Pty Ltd v May* and like authorities, be construed robustly to give it commercial effect.

28 In considering a dispute resolution clause in a construction contract, Barrett J in *Admiral 1 Pty Ltd v Leighton Contractors Pty Ltd*[11] considered that the clause was sufficiently certain despite the absence of any clear reference to the holding of a meeting between the respective nominated officers. His Honour held that:[12]

> It is nevertheless clear that the parties have agreed that the giving of notices and the expiration of periods in accordance with clause 47 are things that should occur before either proceeds to litigation. I am prepared to consider the clause sufficiently certain to be enforceable, despite the absence of any clear reference to the holding of a meeting between the respective nominated officers.

29 In a similar vein in *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd*[13] Martin J referred with approval to the observations of the Western Australian Court of Appeal

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8 [2007] VSCA 29.
9 *Supra* [38].
10 (2009) 22 VR 633 [82].
11 [2005] NSWSC 1105 [34].
12 *Ibid* [40].
13 [2012] QSC 290 [10].

in *Straits Exploration (Australia) Pty Ltd v Murchison United NL & anor*[14] stating that "the tendency of recent authority is clearly in favour of construing such contracts where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court". Martin J stated that there appears to be no basis in principle for treating a dispute resolution procedure requiring executive meetings any differently from an arbitration clause or an expert determination clause, noting at that:[15]

> … it has never been the policy of the law to discourage the parties from resolving their differences in this way.

30 The Plaintiffs submit that sub-clause 42.2 of the Contract is tainted with fatal uncertainty arising from the reference in the sub-clause to the parties having to agree on methods of resolving the dispute. This is said to be an agreement to agree.

31 The Plaintiffs, in addition to *United Group Rail Services Ltd v Rail Corporation New South Wales*,[16] placed reliance on *Aiton Australia Pty Ltd v Transfield Pty Ltd*.[17]

32 In *Aiton Australia Pty Ltd v Transfield Pty Ltd*[18] Einstein J considered a dispute resolution process which was relatively well defined in the contract in question. It stipulated a staged set of procedures required to be strictly observed as necessary preconditions to the right to commence proceedings. As found by Einstein J,[19] the relevant clause 28.1 required that the parties "shall" make good faith efforts to comply with the first stage procedure for dispute resolution "before" either party commences mediation, legal action or expert resolution. Failing that process, clause 28.2 provided for mediation as the second stage of the dispute resolution procedure.

33 Nevertheless, Einstein J in *Aiton Australia* considered whether the procedure defined in the contract was in fact sufficiently certain to be enforceable. The starting point for

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14 (2005) 31 WAR 187 [14].
15 *Ibid* [9], citing *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652.
16 (2009) 74 NSWLR 618.
17 [1999] NSWSC 996.
18 [1999] NSWSC 996.
19 *Supra* (Einstein J) [35].

Einstein J was *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,[20] where Giles J observed:[21]

> What is enforced is not cooperation and consent but participation in a process from which consent might come.
>
> [Emphasis added]

34 From this staring point, Einstein J reasoned:[22]

> It is for this reason that that the process from which consent might come must be sufficiently certain.
>
> This is not to suggest that the process need be overly structured. Certainly, if specificity beyond essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself.
>
> [Emphasis added]

35 Einstein J noted the findings of Giles J in *Elizabeth bay Developments Pty Ltd v Boral Building Services Pty Ltd*[23] to the effect that apart from the express agreement in the relevant contract to enter into negotiation in good faith, the agreement to mediate did not lay down a procedure for the mediation process other than the parties' presence or representation, the mediators discretion to hold private sessions with any party to the mediation, and the stipulation that, unless otherwise agreed, the parties would within 14 days of the agreement provide to each other and to the mediator, a short statement of issues outlining the nature of the dispute and the various matters in issue. His Honour Giles J concluded that the agreement to mediate being so open-ended, was unworkable, as the "process to which the parties had committed themselves would come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered".[24]

36 The mediation agreement in the contract under consideration in *Aiton Australia* lacked a provision in the clause setting out a mechanism for apportionment of the mediator's

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20 (1992) 28 NSWLR 194.

21 *Supra,* 206.

22 *Aiton Australia, Ibid,* [61]-[62].

23 (1995) 36 NSWLR 709, 714.

24 *Supra,* 715.

costs. Einstein J considered that it was not open to the court to imply a term that the parties would jointly share the reasonable remuneration of the mediator, because the suggested implied term was not so obvious that "it goes without saying".[25]

37 Einstein J then cited with apparent approval the view of commentators such as *L Boulle and R Angyal* as to current Australian case law, noting that, for a mediation or dispute resolution clause to be enforceable, it must satisfy the following minimum requirements:[26]

- It must be in the form described in *Scott v Avery*. That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings.

- The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.

- The administrative processes for selecting a mediator and in determining the mediator's remuneration should be included in the clause and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary.

- The clause should also set out in detail the process of mediation to be followed – or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.

38 Einstein J concluded in *Aiton Australia* that the subject mediation clause was unenforceable, because it contained no mechanism for apportionment of the

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[25] *Aiton Australia*, Ibid, [66]-[67], applying *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1981) 149 CLR 337, 347 (Mason J) applying *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20, 26.

[26] Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 25, June 1998, Chapter 6, par 6.20.

mediator's costs and was therefore uncertain.[27] It is to be noted however that, but for the matter in relation to the allocation of the mediator's costs, his Honour was satisfied that the remainder of the procedure provided for in the subject contract was sufficiently certain to be enforced.[28]

39 Pulling the threads together, the following principles may be stated as to a stay should be granted where a contractual dispute resolution process is expressed to be a pre-condition to litigation, and where the enforceability of such provision is put in issue:

1. The general rule is that equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable.[29]

2. The Court may, however, effectively achieve enforcement of a dispute resolution clause by default, by ordering that a proceeding commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed.[30] What is enforced by this means is not co-operation and consent of the parties but participation in a process from which consent might come.[31]

3. A circumstance which will operate to preclude the ordering of a stay on this ground arises where the particular dispute resolution clause is determined to be unenforceable, as where for example, the clause is found to be uncertain.[32]

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27 *Aiton Australia*, *Ibid,* [70] and [174].

28 *Aiton Australia*, *Ibid*, [78].

29 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 210; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 (Einstein J) [26].

30 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 (Einstein J) [26].

31 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 (Giles J at 206); *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996.

32 *L Boulle and R Angyal* Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 25, June 1998, Chapter 6, par 6.20, cited by Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996.

4. Dispute resolution clauses in contracts should be construed robustly to give them commercial effect.[33] The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.[34]

5. Honest business people who approach a dispute about an existing contract will often be able to settle it.[35] If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which nevertheless have sensible and ascribable meaning, the task of the court is to give effect to and not to impede such solemn express contractual provisions.[36] Uncertainty of proof does not detract from there being a real obligation with real content.[37]

6. A dispute resolution clause in a contract, consistently with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.[38]

7. The trend of recent authority is in favour of construing dispute resolution clauses where possible, in a way that will enable those clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.[39]

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33 *Burbank Trading Pty Ltd v Allmere Pty Ltd* (2009) 22 VR 633 (Dodds-Streeton J) [82].

34 *Robertson v Unique Lifestyle Investments Pty Ltd* [2007] VSCA 29 (Habersberger AJA) [38].

35 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSWLR 637 [70].

36 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSLWR 639 [74]; *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290 (Martin J) [10]; *Straits Exploration (Australia) Pty Ltd v Murchison United NL & anor* (2005) 31 WAR 187 (Martin J) [14].

37 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSLWR 639 [74].

38 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSWLR 637 [78]-[80].

39 *Straits Exploration (Australia) Pty Ltd v Murchison United NL & anor* (2005) 31 WAR 187 (Martin J) [14].

8. The court does not need to see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved.[40] The process need not be overly structured. However, the process from which consent might come must be sufficiently certain to be enforceable.[41] A contract which leaves the process or model to be utilized for the dispute resolution ill defined, or the subject of further negotiation and agreement, will be uncertain and unenforceable.[42]

9. An agreement to agree to another agreement may be incomplete if it lacks the essential terms of the future bargain.[43]

10. An agreement to negotiate, if viewed as an agreement to behave in a particular way, may be uncertain, but is not incomplete. The relevant question is whether the clause has certain content.[44]

11. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete.[45]

40 With these principles in mind, I will proceed to determine the application.

Conclusion as to Unenforceability

41 To my mind, sub-clause 42.2 of the relevant Contract, which provided that "In the event the parties have not resolved the *dispute* then [within a further 7 days] a senior executive representing each of the parties must **meet to attempt to resolve the *dispute* or to agree on methods of doing so**, is unenforceable". [Emphasis added]

42 The process established by the clause is uncertain. Once the operation of sub-clause 42.2 is triggered, the parties are required to do one of two things, either to meet

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40 *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 33 (Warren J) [15].

41 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 (Einstein J at 206); *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 (Giles J at 714).

42 *Elizabeth bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 (Giles J at 714).

43 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSWLR 636 [64].

44 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSWLR 636 [64].

45 *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSWLR 636 [65].

together to resolve the dispute, **or** to agree on methods of doing so. No process is prescribed to determine which option is to be pursued.

43 Indeed, sub-clause 42.2 may indeed be complied with by the parties to the Contract *without* a meeting "to attempt to resolve the dispute" if instead, they meet to "agree on methods of doing so".

44 Further, no method of resolving the dispute is prescribed, and, as expressly contemplated by the sub-clause, the method of resolving the dispute is to depend on the parties further agreement as to the method to be employed.

45 Thus further agreement is needed before the process can proceed.

46 It is one thing for a court to strive to give commercial effect to an imperfectly drafted contractual clause, which is well accepted as the approach to construction of contractual terms. It is also accepted that a valid dispute resolution clause does not require a set of rules to be set out in advance which directs the parties how an agreement is to be achieved, if agreement is possible. But, as a minimum, what is necessary for a valid and enforceable dispute resolution clause, is to set out the process or model to be employed, and in a manner which does not leave this to further agreement. It is not for the court to substitute its own mechanism where the parties have failed to agree upon it in their contract. To do otherwise would involve the court in contractual drafting, which is a distinctly different exercise from contractual construction of imprecise terms.

47 Sub-clause 42.2 fails this yardstick. The sub-clause amounts to an agreement to agree on the process of dispute resolution to be employed and is not therefore enforceable due to this inherent uncertainty.

48 For these reasons, the application for the stay must be refused on the basis that sub-clause 42.2 of the Contract is unenforceable.

49 In these circumstances, there is no necessity to consider the alternative arguments to the effect that clause 42 did not need to be complied with prior to referring the dispute

to litigation because the parties to the Contract agreed to dispense with it, or that, even if the dispute resolution clause is enforceable and remained a binding precondition to litigation in respect of claims made under the Contract, compliance with clause 42 is not a precondition to the misleading and deceptive conduct claim, or that, in any event, one of the plaintiffs, Visy Energy Pty Ltd is not a party to the Contract.

50 The Defendants' stay application should be refused.

51 I will hear the parties on costs.