SUPREME COURT OF QUEENSLAND

CITATION:	*Santos Limited v Fluor Australia Pty Ltd* [2016] QSC 129
PARTIES:	**SANTOS LIMITED** ABN 80 007 550 923 (applicant) **v** **FLUOR AUSTRALIA PTY LTD** ABN 28 004 511 942 (respondent)
FILE NO/S:	SC No 4848 of 2016
DIVISION:	Trial Division
PROCEEDINGS:	Originating application filed 13 May 2016 and application filed 30 May 2016
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2016
JUDGE:	Douglas J
ORDERS:	**1. Stay the principal proceedings filed 13 May 2016 pending the performance of the parties' obligations pursuant to cl 60 of the contract between them.** **2. Hear the parties further as to the form of the order and costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SETTLEMENT OF DISPUTES – where Santos Limited ("Santos") filed an application seeking an order that Fluor Australia Pty Ltd ("Fluor") provide it with access to certain requested materials pursuant

to a clause in the EPC contract between the parties – where Santos and Fluor are in a dispute about whether the requested materials must be provided pursuant to the EPC contract – where the parties have already exchanged detailed correspondence in relation to the issues in dispute – where Fluor is seeking a stay of Santos's application pending the parties' compliance with the dispute resolution process provided for in the EPC contract – where the parties used the contractual dispute resolution process in previous disputes and disagree about the utility of the process in the settlement of those disputes – where the parties have succeeded in compromising disputes under the EPC contract in the past – where Santos submits that the nature of the dispute makes it unlikely to be amenable to resolution by the dispute resolution process provided for in the EPC contract – whether the principal proceedings should be stayed pending the performance of the dispute resolution process provided for in the EPC contract

Admiral I Pty Ltd v Leighton Contractors Pty Ltd [2005] NSWSC 1105, distinguished

AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd [2010] 2 Qd R 101; [2009] QSC 139, cited

Cable & Wireless plc v IBM UK Ltd [2002] EWHC 2059 (Comm); [2002] CLC QB 1319, applied

Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332, cited

Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd [2012] QSC 290, cited

United Group Rail Services Ltd v Rail Corporation NSW (2009) 74 NSWLR 618; [2009] NSWCA 177, applied

Welker & Ors v Rinehart & Anor (No 2) [2011] NSWSC 1238, cited

Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563; [2005] QSC 135, considered

COUNSEL: D G Clothier QC, with C A Schneider for the applicant

G A Thompson QC, with D M Turner for the respondent

SOLICITORS: Corrs Chambers Westgarth for the applicant
Jones Day for the respondent

Background

[1] Santos Limited filed an application on 13 May 2016 seeking an order that Fluor Australia Pty Ltd provide it with access to materials requested, effectively, pursuant to cl 41.2 of a contract between the parties. This application before me is one filed on 30 May 2016 by Fluor seeking a stay of Santos's application pending the parties' compliance with the dispute resolution process provided for in cl 60 of the contract.

[2] That clause sets out a structured approach to dealing with disputes between the parties by prescribing the service of dispute notices and responses, without prejudice meetings of representatives and, if that fails to resolve the issues, a further without prejudice meeting of "Dispute Resolution Representatives". They are employees at a higher level within the disputing companies. The process, applied speedily, would take 30 business days. The parties may also then agree to some other form of dispute resolution before commencing litigation in relation to the dispute.

[3] It may be helpful to set out cll 60.1 to 60.5 in full:

> "60.1 Resolution of Disputes
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> Any Dispute between the Contractor and the Company which arises out of, or in connection with, the Contract, the Facilities or the Work, must be dealt with in accordance with this clause 60.
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> 60.2 Notice of Dispute
>
> (a) A Party may, by serving Notice upon the other Party, refer a Dispute to the Company's Representative and the Contractor's Representative for resolution (Notice of Dispute).
>
> (b) The Notice of Dispute must specify:
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> (1) the Dispute;
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> (2) particulars of the Party's reasons for being dissatisfied; and
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> (3) the position that the Party believes is correct, including the facts and provisions of the Contract and a summary of any evidence supporting its position.

60.3 Response

Within ten (10) Business Days after a Notice of Dispute is served under and in accordance with clause 60.2(a), the receiving Party must respond to the other Party by Notice, stating:

(a) its position in relation to the Dispute; and

(b) the basis for its position.

60.4 Without prejudice meeting of Representatives

(a) If a Notice of Dispute is served under and in accordance with clause 60.2(a), the Company's Representative and the Contractor's Representative must meet and, in good faith, attempt to resolve the Dispute.

(b) If the Company's Representative and the Contractor's Representative are unable to resolve the Dispute within ten (10) Business Days after its referral to them (or any longer period as the Company's Representative and the Contractor's Representative may agree in writing), either Party may refer the Dispute to the Dispute Resolution Representatives for resolution.

60.5 Without prejudice meeting of Dispute Resolution Representatives

(a) If a Dispute is referred to the Dispute Resolution Representatives (or their nominees) under clause 60.4(b) the Dispute Resolution Representatives (or their nominees) must meet and negotiate in good faith to attempt to resolve the Dispute but if the Dispute Resolution Representatives (or their nominees) are unable to resolve the Dispute within ten (10) Business Days after its referral to them (or any longer period as the Dispute Resolution Representatives may agree in writing), unless the Parties have agreed in writing as to whether the Parties should attempt to resolve the Dispute by one of the methods referred to in clause 60.5(b), either Party may refer the Dispute to litigation.

(b) The Parties may, by agreement in writing, attempt to resolve any Dispute by conciliation, mediation, expert determination or some other form of dispute resolution (each by a person and under terms and procedures to be agreed) before commencing litigation proceedings in relation to the Dispute."

[4] The formal process under the clause has not been invoked by Santos. It argues, however, that there has been sufficient information exchanged between the parties outside that process to make it clear that enforcement of the terms of cl 60 would be impractical or useless.

The dispute

[5] The parties entered into a contract originally made on or about 13 January 2011, which was amended on 26 August 2011. It relates to something called the GLNG Project which involves the extraction and processing of coal seam gas in inland Queensland and its transportation to Curtis Island near Gladstone where it is liquefied and exported as liquefied natural gas. It is a very large project which is now substantially complete. Santos estimated the amount payable to Fluor under the original contract to be about $3.7 billion.

[6] The contract amendment in August 2011 ("the EPC contract") was designed to convert the original contract from one where the amount payable was calculated by reference to a fixed lump sum component of about $1 billion, a variable unit rates component of about $1.1 billion and a costs reimbursable component of about $1.6 billion into a costs reimbursable component contract subject to various conditions. Under the terms of the varied EPC contract, the consideration payable by Santos to Fluor consisted of Fluor's actual costs, a fee of $210 million and any incentives to which Fluor was entitled. It provided a target budget estimate of about $3.576 billion. Fluor has actually claimed and been paid, however, about $5.43 billion, an overrun to the target budget estimate of about $1.854 billion.

[7] Santos says it is concerned that amounts claimed by Fluor as actual costs under the EPC contract are in fact excluded costs or otherwise do not fall within that contract's definition of actual costs and were not amounts Fluor was entitled to claim. It, therefore, sought to exercise rights it claims under cl 41.2 of the EPC contract to access Fluor's full job cost records for the project to ensure that the excluded costs have been properly allocated and not charged to Santos.

[8] Clause 41.2 and cl 41.3 provide:

> "41.2 Audits and access
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> (a) The Contractor must permit the Company or its nominees at any time and for seven (7) Years after the Final Completion Date, on written request:
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> (1) to access all Documents, accounts, records, data, information and other materials comprising or relevant to any Work; and
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> (2) to conduct audits and to inspect and take copies of all accounts, records, data, information and other materials

however stored comprising or relevant to any Work (or compliance with the Contract) in the custody or under the control of the Contractor.

(b) The focus of any audit conducted under clause 41.2(a) will include:

(1) the Contractor's and any of the Contractor's Personnel's compliance with all obligations under the Contract; and

(2) payments, invoices, receipts and records comprising or with respect to any Work.

(c) The Company may also audit any aspect of the Contractor's Work or performance, including but not limited to Payment Claims, progress, resource utilisation, or any other Contract requirement, at any time (including in respect of compliance with any Contractor's Plan as contemplated elsewhere in the Contract) and the Contractor must make available to the Company or its nominee at any time access to all relevant Project accounts, records, data and other information and materials for such purposes. The Company does not assume any responsibility to the Contractor arising out of or in connection with any audit of the Contractor's Work or performance.

(d) The Contractor must:

(1) participate promptly and cooperatively in any audits conducted by the Company or its nominees in connection with the Contract or the Project. Participation by the Contractor in audits does not in any way reduce the Contractor's responsibility to perform its obligations under the Contract; and

(2) pay to the Company any amount required to rectify any error identified in any audit conducted under clause 41.2(a) in accordance with clause 29.

(e) In the case of Documents or records stored on a medium other than in writing, the Contractor and any of the Contractor's Personnel must make available, on request by the Company, such reasonable facilities as may be necessary to enable a legible reproduction to be created.

(f) Any obligation imposed on the Contractor under this clause 41, extends to the Contractor's Personnel and the Contractor undertakes to procure that the Contractor's Personnel provide such access rights to the Company.

41.3 Scope of audit and access

(a) For the avoidance of doubt, the rights of access and audit under clause 41.2 extend to all Work (and subcontracted Work) performed in connection with this Contract.

(b) The Company must ensure that any third party auditors and accountants enter into reasonably appropriate written agreements which provide for protection of the Contractor's information, and which comply with applicable Privacy Laws."

[9] The proper construction of those clauses will be the subject of submissions in Santos's application filed 13 May 2016. The issue that arises here is whether that hearing should be delayed to permit the process under cl 60 to go forward. It is useful to consider what has happened so far in advancing the claim for information and, to some extent, to consider what has happened with similar disputes between the parties.

The progress of the dispute

[10] There has been correspondence between the parties relating to the width of Santos's request for information pursuant to cl 41.2. The initial request (Request 1754) was made by letter dated 18 December 2015.[1] By that letter Santos sought access to "a complete set of project accounts, directly extracted from Contractor's [Fluor's] accounting system(s) without manipulation, recording all the costs incurred by Contractor in performing the Work (including those costs which were Excluded Costs)."

[11] Fluor responded by letter dated 12 January 2016,[2] asking for details of the basis on which Santos asserted the project accounts previously provided were incomplete or inaccurate. Santos responded to that letter by its own letter of 13 January 2016.[3] That letter asserted that the information provided previously by Fluor was not identical to the project costs ledger which it maintained for its own purposes. The letter pointed out that Santos wanted to determine the actual costs of the whole of the project incurred by Fluor so that it could then determine how much were Excluded Costs which were not

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1 See pp. 229-30 of ex SEJ 1 to the affidavit of Simon Edward Jensen filed 13 May 2016.

2 See pp. 231-232 of ex SEJ 1 to the affidavit of Mr Jensen filed 13 May 2016.

3 See pp. 233-234 of ex SEJ 1 to the affidavit of Mr Jensen filed 13 May 2016.

the subject of a claim by Fluor to Santos and the nature of such costs, namely the types of expenses that Fluor recognised were Excluded Costs under the contract.

[12] After a reminder letter dated 25 January 2016 from Santos, Fluor replied on 27 January 2016.[4] Fluor contested Santos's right to seek documents, accounts, records or information in respect of Excluded Costs because they could not include costs comprising or relevant to the work under the contract. The letter asserted that the information Santos was seeking went beyond the entitlement conferred by cl 41.2.

[13] Santos replied by its letter of 28 January 2016,[5] setting out detailed reasons why it considered that Request 1754 fell within the scope of Santos's rights and Fluor's obligations under cl 41.2. It referred to the width of the definition of "Work" in the contract and to the fact that "Excluded Costs" were other costs incurred by the contractor "in the performance of the Work" and identifying claims relating to Excluded Costs which had been charged by Fluor to Santos when, the author of the letter asserted, it was not entitled to do so. The letter then said that Santos would proceed to enforce its rights if Fluor maintained its position. Fluor did maintain that position in its letter of 11 February 2016.[6]

Other similar disputes

[14] Mr Clothier QC for Santos also relied upon evidence of other similar disputes between the parties to argue that the current dispute was unlikely to be resolved using the cl 60 procedure. The evidence referred to two rounds of the cl 60 process having been adopted from late May through to early August 2015 in relation to disputed document requests made by Santos under cl 41.2. He submitted that Fluor's position during those negotiations remained unchanged in denying that Santos was entitled to access the requested documents. It was only after proceedings had commenced in court that Fluor made an open offer to provide substantially all of the documents originally sought by Santos in the disputed requests.[7]

[15] Mr Thompson QC for Fluor relied upon the same series of events, however, to argue that it did not follow that, because an agreement was not achieved at previous cl 60 meetings in relation to different disputes, that the agreed process should not be followed in this dispute. In that context he pointed to the fact that the previous document requests had been settled where it was likely that the terms of settlement may have been influenced by the cl 60 meetings which had preceded the settlement. In respect of one of the disputes he also pointed out that the settlement was initiated by Fluor, the original terms of the document requests were ultimately agreed to be narrowed and some

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4 See pp. 236-238 of ex SEJ 1 to the affidavit of Mr Jensen filed 13 May 2016.

5 See pp. 239-241 of ex SEJ 1 to the affidavit of Mr Jensen filed 13 May 2016.

6 See pp. 242-244 of ex SEJ 1 to the affidavit of Mr Jensen filed 13 May 2016.

7 See para 10 of the affidavit of Andrew Jon Stephenson filed 1 June 2016 and ex AJS 1 pp. 3-6.

categories of documents originally requested by Santos were agreed to be excluded with Santos not persisting in one of its requests and Fluor not refusing all requests. He argued, therefore, that the previous settlement demonstrated compromise by both parties. He also submitted that there was utility in the process if the meetings pursuant to cl 60 more precisely defined the scope of the dispute or otherwise narrowed the issues to be determined by the Court.

[16] He contested one of Mr Clothier's factual submissions in this case that the dispute here was "binary" in the sense that there were only two possible solutions to the interpretation of cl 41.2 in the context of the category of documents sought by Santos, thus justifying recourse to the Court earlier rather than later because the parties were less likely to compromise their positions. That issue, whether the dispute is so cut and dried, is not clear to me on the current state of the evidence. There may be some solution to the issue which allows for some crossover between the information relevant to "Work" and that relevant to "Excluded Costs".

[17] Mr Clothier also argued that the dispute was essentially one about the proper construction of cl 41.2, unlikely to be compromised and, therefore, much better suited to being determined speedily in court rather than by agreement of the parties.

The relevant legal principles

[18] There is little doubt about the basic approach to the resolution of disputes of this nature. It was expressed, for example, by Chesterman J in *Zeke Services Pty Ltd v Traffic Technologies Ltd*, a case where there had been a contractual reference to a binding independent determination, as follows:[8]

> "[21] The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in *Channel Tunnel*, by the High Court in *Dobbs* and *Huddart Parker Ltd v The Ship Mill Hill and Her Cargo* (1950) 81 CLR 502 (an arbitration case) and by Gillard J. in *Badgin*. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The

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[8] [2005] 2 Qd R 563, 569 at [21]. The decisions referred to by his Honour, with their citations, other than *Huddart Parker Ltd v The Ship Mill Hill and Her Cargo* (1950) 81 CLR 502, were *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 and *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188.

> onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate."

[19] See also *Welker & Ors v Rinehart & Anor (No 2)*,[9] *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd*[10] and *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd*.[11]

[20] Mr Clothier QC recognised that he faced a heavy burden in seeking to persuade me to depart from the starting point that the parties should be held to their bargain to resolve their dispute in the agreed manner. His submission was that, given the nature of the dispute and the history of the use of cl 60 between the parties before, staying the proceedings would only further delay the timely resolution of the dispute in court in all likelihood. He also argued that directions could be made so that it could be determined in a one day hearing in the civil sittings of this Court in the relatively near future. Nor would a refusal of the stay have an effect on Fluor's capacity to discuss any significant change to its clearly articulated position before such a hearing.

[21] He pointed to the fact that the negotiations by correspondence so far have occurred between a Mr Simpson who, at the time, was the company's "Representative" under cl 60.4(a) and is now its "Dispute Resolution Representative" under cl 60.5(a) and Mr Gittens for Fluor who was and remains its "Representative" under cl 60.4(a). He submitted that the dialogue that had already occurred between them went well beyond informal discussions (as had occurred in *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd*). Nonetheless there have been no direct meetings between the parties nor any negotiation between the Dispute Resolution Representatives as envisaged by cl 60.

[22] He submitted that compliance with the cl 60 procedure was unlikely to avoid further litigation, relying upon statements by Barrett J in *Admiral I Pty Ltd v Leighton Contractors Pty Ltd*,[12] that were not essential to his decision, to the effect that, in negotiations between two sophisticated commercial groups, where there had been no contact between the parties in an attempt to resolve the dispute, there was a strong indication that it would be futile to order such a meeting if commercial common sense had not already brought it about. That was a good reason for the Court not to compel resort to the ADR process. Nor was it necessary at that stage to adhere to the procedure in its entirety because of the existence there of detailed pleadings.

[23] Such an approach was submitted by Mr Thompson for Fluor to be inconsistent with the later decision of the New South Wales Court of Appeal in *United Group Rail Services*

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[9] [2011] NSWSC 1238 at [8], an appeal from which was dismissed in *Rinehart v Welker* [2012] NSWCA 95.

[10] [2009] NSWSC 332 at [53].

[11] [2012] QSC 290 at [9] – [15], [26] – [29].

[12] [2005] NSWSC 1105 at [43] – [45].

Ltd v Rail Corporation NSW[13] where Allsop P, with whom the other members of the Court agreed, described obligations such as these as "not empty … The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such."

[24] Barrett J's dicta do not seem to me to be consistent with that statement. Nor would they reflect the enforceability of the process in cl 60 in a case such as this where the parties have committed themselves to it by their agreement and there is no demonstrated unwillingness or inability in them to adhere to the process.[14] Santos's unwillingness to engage appears to relate more to a desire to have more speedy access to this Court.

[25] Some useful policy reasons why a court should enforce such an agreement were also canvassed by Colman J in *Cable & Wireless plc v IBM UK Ltd* in these terms:[15]

> "On the face of it, there can be no doubt that C & W has declined to participate in any ADR exercise. As such it is in breach of cl. 41.2. IBM is thus at least prima facie, entitled to the enforcement of the ADR agreement. However, given the discretionary nature of the remedy it is important to consider what factors might also be relevant to the way in which the court's discretion should be exercised. **Analogously to enforcement of a reference to arbitration, strong cause would have to be shown before a court could be justified in declining to enforce such an agreement. For example, there may be cases where a reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcing the agreement. Even in such circumstances ADR would have to be a completely hopeless exercise.** It is argued in the present case that because this dispute raises an issue of construction which, given that this is a long term contract, needs to be resolved by the courts as early as possible, the parties should be left to litigate it. Whereas, this would probably be a highly relevant consideration if it arose in the context of a case management conference in the absence of an agreement to refer, it must carry very much less weight in the face of an agreement to refer to ADR. **This is because parties who enter into an ADR agreement such as this must be taken to appreciate that mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are mutually commercially**

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[13] (2009) 74 NSWLR 618, 638 at [73].

[14] See *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2010] 2 Qd R 101, 112 at [25] – [26].

[15] [2002] EWHC 2059 (Comm); [2002] CLC QB 1319, 1328 (emphasis added).

> **acceptable at the time of the mediation. If therefore they agree to a reference to ADR which, as in the present case, is wide enough to cover pure issues of construction, they have at best a weak basis for inviting the court to withhold enforcement, even in a case where on the face of it resolution by the courts would be likely to be beneficial to the parties' future operation of their contract.**"

[26] His Lordship's reference to the commercial reasons why parties enter into dispute resolution agreements is significant. It provides a persuasive answer to Mr Clothier's submission that what is in issue here is a confined legal point pre-eminently suitable for determination by the Court.

[27] Here it is also significant that there is no explanation in the material for the delay between Fluor's letter of 11 February 2016 making its position clear at that stage and the delay in the commencement of this proceeding until 13 May 2016. The cl 60 process could readily have been initiated and completed by the parties within that period. Santos's failure to initiate the process then provides no good reason why it should now sidestep it with a view to having speedier access to the Court.

Conclusion

[28] The enforceability of the dispute resolution procedure adopted by the parties in cl 60 is undoubted. Here the countervailing considerations urged to justify the grant of a stay are not sufficient, in my view, to make the reference to those procedures "obviously futile" or "so slight as not to justify enforcing the agreement". The parties have succeeded in compromising such disputes in the past. The enforcement of the obligation in cl 60 will not deprive Santos of the right to have its claim determined judicially and may advance the public interest in obliging the parties to adhere to their agreement. That public interest lies in avoiding the potentially unnecessary use of court time and reducing the costs of civil litigation to both the public and litigants, as was submitted by Mr Thompson.

[29] That the dispute may be principally about a question of construction of the contract does not necessarily detract from the policy reasons for enforcing this type of dispute resolution clause for the reasons expressed by Colman J in *Cable & Wireless plc v IBM UK Ltd.*

[30] A fall-back position urged on behalf of Santos was that, because of the existing correspondence between the parties at the "Representative" level, I should stay only the operation of cll 60.2 to 60.4, leaving the procedure under cl 60.5 to go ahead with a "without prejudice" meeting of the more senior "Dispute Resolution Representatives".

[31] I am disinclined to do even that. What the parties agreed to do was to have discussions. The exchange of correspondence, even of the nature of the correspondence in this case, is no necessary substitute for a meeting between senior officers of the company who can explore each other's points of view face to face and in good faith with a view to

reaching a commercial solution. That "formal process of negotiation" not uncommonly helps parties reach an agreed position.[16]

[32] There is nothing to suggest that Santos will be prejudiced by being obliged to comply with its agreement. The history of previous dealings between the parties does not satisfy me that there is no point in enforcing this agreement as it does demonstrate compromise by both parties.

Orders

[33] Accordingly I shall stay the principal proceedings filed 13 May 2016 pending the performance of the parties' obligations pursuant to cl 60 of the contract. I shall hear the parties further as to the form of the order and costs.

[16] *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290 at [29].