SUPREME COURT OF QUEENSLAND

CITATION:	*Santos Limited v Fluor Australia Pty Ltd & Anor* [2023] QSC 77
PARTIES:	**SANTOS LIMITED** **ABN 80 007 550 923** (plaintiff) **v** **FLUOR AUSTRALIA PTY LTD** **ABN 28 004 511 942** (first defendant) AND **FLUOR CORPORATION** (second defendant)
FILE NO:	BS 12939 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	14 April 2023
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2023
JUDGE:	Applegarth J
ORDER:	1. **The application to stay the conduct of the reference until further order is dismissed.** 2. **The defendants pay the plaintiff's costs of and incidental to the stay application.** 3. **The parties submit within seven days directions for the expeditious hearing of the defendants' application to set aside the Referral Order.**
CATCHWORDS:	PROCEDURE - STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY - INHERENT AND GENERAL STATUTORY POWERS - TO STAY OR DISMISS ORDERS OR PROCEEDINGS GENERALLY - where the Court has referred questions arising on pleadings to three referees - where the defendants apply to stay the conduct of the reference until further order - where the defendants contend that that the referees failed to

comply with the Referral Order, the reference process is affected by apparent bias and lack of procedural fairness, the reference process has become a miscarriage of justice and judgment should be entered for the defendants - where the plaintiff opposes the stay on the basis that the report is close to being finalised, the stay will add to costs and delay, there will be no irreparable harm suffered from continuing, and a stay will cause prejudice to the plaintiff - whether the interests of justice are best served by granting the requested stay

Uniform Civil Procedure Rules 1999, rr 5, 367(2), 501, 502, 505D

Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd & Anor [1998] QCA 414, cited
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, cited
CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76, cited
Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (2019) 2 QR 271, cited
Santos Limited v Fluor Australia Pty Ltd & Anor (No. 4) [2021] QSC 296, cited

COUNSEL: Mr P O'Shea KC with Mr J Mitchenson for the plaintiff
Mr S Couper KC with Mr J O'Regan and Mr T Pagliano for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Jones Day for the defendants

[1] The parties are engaged in litigation on a monumental scale arising from the construction between 2011 and 2014 of the upstream component of a coal-seam gas project.

[2] By an order dated 15 February 2021 and further orders, the Court referred all questions arising on the pleadings in the current proceeding to three referees ("the Referral Order"). Hearings were held before the referees between November 2021 and August 2022. On 7 March 2023 the referees provided a draft of their report to the parties ("the Draft Report").

[3] In response to the Draft Report, the defendants have applied for orders:

(a) setting aside the Referral Order; and

(b) that judgment be entered for the defendants; or

(c) alternatively, for the separate determination of several key issues of contractual construction that arise on the pleadings, and for further directions regarding the disposition of the balance of the issues in the proceeding.

I shall refer to this application as "the substantive application".

[4] The defendants contend that:

(a) the referees have failed to comply with the Referral Order, and have acted outside their jurisdiction;

(b) the reference process is affected by apparent bias;

(c) the reference process is affected by a lack of procedural fairness;

(d) the reference process has become a miscarriage of justice; and

(e) judgment should be entered for the defendants.

[5] The defendants also apply to stay the conduct of the reference until further order, presumably until the hearing and determination of the substantive application.

[6] The defendants' best current estimate is that the substantive application will take 10 days to hear, and that it will not be ready to be heard for at least a few months. The judge who hears the substantive application will require substantial time after the hearing to consider the matter and reach a decision.

[7] The proposed stay, therefore, would prevent the referees from completing the report (which might be expected to not be different in substance to the Draft Report), and prevent the plaintiff from requesting the Court to accept the report.

[8] Rule 505D of the *Uniform Civil Procedure Rules* 1999 ("UCPR") provides for the Court to do a number of things after receiving a referee's report. The Court may accept, vary or reject all or part of the decision. It also may make an order or give judgment in the proceeding on the basis of the decision.

[9] In urging the Court to stay the conduct of the reference until further order, the defendants submit that there is no utility in allowing "a flawed process to run to its conclusion". According to the defendants, nothing of substance is to be gained by allowing the referees to complete their report and that it is invidious to expect them to continue to participate in a process that has miscarried and which cannot be remedied by the referees. One concern is that a right to complain about apprehended bias may be lost by their continuing participation in the process.

[10] The defendants submit:

(a) the next steps directed by the referees involve the making of submissions which are not capable of curing, and are not designed to cure, the matters referred to above;

(b) the referees have reached conclusions which they have made clear will not change;

(c) in those circumstances, no purpose is served in permitting the reference to continue; and

(d) to the contrary, to permit the reference to continue is against the maintenance of public confidence in the administration of justice, because it will place the

defendants in the position of dealing with an ongoing process conducted by referees where they contend that the process has irretrievably miscarried, including by reason of apprehended bias.

[11] The plaintiff opposes the stay application. It submits that:

(a) it will not make any submission to the effect that participation in the reference after the date the Draft Report was made available to the parties amounts to the waiver of any rights which the defendants may have in respect of the conduct of the reference or the proceedings, or constitute acquiescence by the defendants in the conduct of the reference or the proceeding;

(b) little remains to be done by the parties or the referees to enable the report to be completed, and the referees are close to finalising it and providing it to the Court;

(c) staying the reference will add to costs and delay;

(d) no irreparable harm will be suffered by the defendants by allowing the referees to complete their report and the plaintiff has been unable to identify any real prejudice if a stay were not granted; and

(e) the matters raised by the defendants in the substantive application should be agitated by them in an application under rule 505D to reject the report, which is heard at the same time as the defendants' application under that rule to accept it;

(f) allowing the defendants' substantive application and an application by the plaintiff to accept the report progress will be an efficient means to resolve the issues raised by the substantive application, many of which will arise on the plaintiff's application to accept the report, and allow those common issues to be determined by the same judge;

(g) doing so will lead to time and costs savings for the Court and the parties; and

(h) a stay would be inconsistent with the "just and expeditious resolution" (rule 5) of the real issues and cause significant prejudice to the plaintiff in not being able to apply to the Court to accept the referees' report and enter judgment for very substantial sums.

The issue

[12] Are the interests of justice best served by granting the requested stay?

Relevant principles

[13] In broadly analogous situations in which a court is asked to temporarily restrain certain conduct or a process, considerations affecting the interests of justice include:

(a) a provisional and inevitably imperfect assessment of the parties' prospects at a future, final determination of a substantive application;

(b) the harm that may be suffered by the applicant if a temporary restraint is not ordered;

(c) the harm that may be suffered by the respondent if a temporary restraint is granted;

(d) whether the risk of those harms eventuating may be mitigated by appropriate undertakings or orders that are aimed to avoid or reduce irreparable harm being suffered by a party; and

(e) the interests of affected third parties and the broader public interest in the administration of justice.

[14] Analogies with applications for interlocutory injunctions, applications to stay enforcement of a judgment, or applications to halt some other form of process should not be taken too far. The general principle, however, is that a court hearing such an application must do its best to avoid or minimise irreparable harm being suffered prior to the court's determination of the parties' rights at a final hearing.

[15] Any assessment of the substantive application's prospects of success is based upon materials that may differ from those at a final hearing and which, typically, the court will have less time to consider than at the final hearing. The court hearing an application to restrain a process or certain conduct is not required to undertake, and should not be expected to undertake, a mini-trial. In some cases, the court can reach only an impression as to whether the substantive application is arguable, strongly arguable, and has reasonably good prospects of success. For many reasons, the court may not be able to reach a very reliable assessment of prospects. One reason may be the complexity of issues and the volume of material. In some cases, the parties are prepared to proceed on the basis that, for the purpose of argument at the interlocutory hearing, the substantive application may be assumed to have some prospects of success.

[16] Having considered, as best it can, the parties' prospects of success at a final hearing, the next broad inquiry, sometimes captured in the phrase "the balance of convenience", involves an assessment of the consequences of granting or declining to grant the requested, temporary restraint.

[17] The successive inquiries into prospects and into the "balance of convenience" may seem to explore two different compartments. The two inquiries, however, are related. Assuming that the substantive application is at least arguable, both the applicant's prospects of success and the "balance of convenience" assessment are considered in arriving at a decision about whether the interests of justice favour a court-ordered restraint or stay.

[18] In the context of interlocutory injunctions, the issue is whether the applicant has shown a sufficient likelihood of success to justify in the circumstances the making of the requested order pending the trial.[1]

[19] Different considerations apply to applications to stay final judgments pending appeal.[2]

[20] To the extent the present stay application might be said to be analogous to an application to stay an interlocutory judgment pending appeal, an applicant to stay an interlocutory judgment should show:[3]

---

1 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 [65].

2 *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455 [12].

3 *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd & Anor* [1998] QCA 414 at [8].

> "(a) there is a good arguable case on appeal;
>
> (b) the applicant will be disadvantaged if a stay is not ordered; and
>
> (c) whether there is some competing disadvantage to the respondent should the stay be granted which outweighs the disadvantage suffered by the applicant if the stay is not granted."

[21] I turn to the specific context of this stay application. It is not in the nature of an interlocutory injunction restraining a respondent's conduct or to stay a judgment pending an appeal or some other process to set aside a judgment. The referees' jurisdiction is to inquire and to provide a report to the Court, not to give a judgment or finally determine the parties' rights.

[22] The current application seeks a stay pending the hearing and determination of the substantive application to set aside the Referral Order and for other orders for the conduct of the Court's proceeding. The stay application seeks to stop the further conduct of the reference and, if granted, will prevent the referees from completing their report, and prevent the plaintiff from applying to the court to accept a report and to give judgment in the proceeding based on findings in the report.

The jurisdiction of the court to make the requested orders

[23] Part 7 of Chapter 13 of the *UCPR* empowers the court to make an order referring a question in a proceeding to a referee to conduct an inquiry into the question, and prepare a report to the court on that question.[4] Rule 502 enables the court, on application by the referee or a party or on its own initiative, to set aside or vary an order made under rule 501.

[24] The plaintiff applies pursuant to rule 502 or, alternatively, the Court's inherent jurisdiction to set aside the Referral Order.

[25] Rule 505 provides that the Court may, on application by the referee or a party on its own initiative, give directions about the conduct of the inquiry or a matter arising under the inquiry. The present stay application is brought pursuant to rule 505 or, alternatively, the Court's inherent jurisdiction.

[26] The defendants submit that the requested stay order relates to an interlocutory order of a procedural nature, and involves a case management decision. A decision about terminating a reference is itself a case management decision.[5] The defendants draw an analogy between rule 505 and rule 367(2), which deals with orders or directions about the conduct of a proceeding. Rule 367(2) provides that in deciding whether to make an order or direction, the interests of justice are paramount. In any event, the defendants submit that the relevant question on the stay application is whether it is in the interests of justice to stay the conduct of the reference, until the hearing and determination of their substantive application to set aside the Referral Order.

[27] The plaintiff accepts that the ultimate issue on the stay application raises the general issue of whether it is in the interests of justice to stay the further conduct of the

---

4 *UCPR* rule 501.

5 *Santos Limited v Fluor Australia Pty Ltd & Anor* (No. 4) [2021] QSC 296 at [52].

reference pending the hearing and determination of the defendants' substantive application. The Court and the parties anticipate that the hearing of that application will occur in July.

The issues that bear upon the discretion to grant the requested stay

[28] If, as the parties and the Court expect, the referees adopt the course that they have indicated and do not entertain submissions that are not the proper subject for submissions in connection with the Draft Report and the finalisation of their report, then the final report will not be fundamentally different to the Draft Report.

[29] An issue between the parties on this application concerns what remains to be done by the referees, particularly what remains to be done about overlap calculations between the "Profit in Rates Claim" and delay and disruption claims. The referees have required submissions on the calculation of that overlap. The calculation of that overlap will avoid the plaintiff being doubly compensated to the extent of the overlap for different claims upon which it has succeeded. I will return to the question of what remains to be done by way of the overlap calculation.

[30] The other substantial issues that emerge from the parties' submissions on the stay application are these:

- Would allowing the reference to continue to the final report stage cause unjustifiable and possibly irreparable harm to the defendants?
- Would staying the process cause unjustifiable and possibly irreparable harm to the plaintiff?
- Does allowing the process to continue to a final report have utility or lack utility?
- Would permitting the reference to continue jeopardise the maintenance of public confidence in the administration of justice?
- Would staying the conduct of the reference be contrary to the interests of justice in achieving the just and expeditious resolution of the issues in the proceeding, including the issues about which the referees are required to report?

[31] The focus of the parties' oral submissions on the stay application related to the utility or lack of utility in ordering a stay, and arguments about prejudice to the parties or to the administration of justice if a stay were granted or refused.

[32] Helpfully, the parties did not devote time during oral submissions to suggested strengths and weaknesses in the defendants' substantive application. They were content for the Court to deal with the stay application on an assumption that the substantive application raised an arguable case. That was an efficient way to proceed in circumstances in which each party sought an early decision on the stay application before the referees were to resume a hearing on Monday, 17 April 2023, and little was to be gained by my attempting to assess whether the substantive application had good or poor prospects of success.

[33] Some further reference to the defendants' case on the substantive application is necessary, however, to explain why they contend that they should not be required to participate further in what they submit is a flawed process, and that continuing that process will have no utility.

The proceeding and the Draft Report

[34] As noted, the proceeding arises from the construction of the upstream component of a coal-seam gas project. The plaintiff, as principal, claims against the first defendant, as contractor, and against the second defendant, as guarantor. The plaintiff alleges a right to issue a negative payment certificate under clause 29.4(b) of its contract with the first defendant, in respect of alleged overpayments made during the course of the project, totalling about $1.4 billion. The plaintiff also claims other relief, comprising a claim for payment of liquidated damages of $15 million, and damages under the *Australian Consumer Law* for approximately $140 million.

[35] The referees made the Draft Report available on 7 March 2023, and directed the parties to provide certain limited further written submissions by 4 April 2023 with further oral submissions to be made on 17 and 18 April 2023.

[36] The defendants delivered submissions to the referees on 4 April 2023 setting out the basis for their position that they would not make submissions in accordance with the direction made on 7 March 2023.

[37] The plaintiff provided submissions to the referees. The defendants contend that some of their content involve the making of submissions which were not called for by the referees, and which, if acted upon by the referees, would indicate what the defendants submit is an ongoing denial of procedural fairness.

The issues to be tried upon the hearing of the substantive application

[38] Because the parties agree that the stay application should be decided without undue delay, I do not propose to detail the basis of the defendant's application to set aside the Referral Order. The defendant's submissions on the stay application about these matters are substantial and occupy about 70 of the 78 pages of their written submissions. The plaintiff responds with similarly detailed submissions. I have previewed at the start of these reasons the bases upon which the defendants seek an order that the Referral Order be set aside. Some additional matters should be mentioned.

[39] The contention that the referees failed to comply with the Referral Order centres on the argument that, despite being directed to prepare a report on "the Questions", which were defined as "those raised on the pleadings as amended from time to time", the referees did not determine the issues raised by the pleadings. Instead, they are said to have adjudicated what they understood to be the essential arguments of each party on the real issues in dispute, as appears from the parties' extensive submissions.

[40] The referees explain their approach in the Draft Report:

> 10. There are several features of the reference that we need to point out. One is the extraordinarily verbose and repetitive nature of the pleadings (which were the subject of several amendments over the

> hearing under the reference). Next, there is the disjointed manner in which the hearing proceeded. We return to that in Part 24 below. The third is the vast amount of material put into evidence. There were some 171 lay witness statements, 76 expert reports, eight joint expert reports, 6,115 pages of oral evidence and many, many thousands of documentary exhibits – not all of them short.
>
> 11. The fourth and last matter we wish to mention in this context is that the parties inflicted prodigious quantities of submissions on us. Santos' written opening submissions comprised 1,400 pages over three physical volumes; Fluor's comprised 1,486 pages over two volumes. Santos' written closing submissions comprised 2,983 pages over seven volumes. And Fluor's comprised 2,377 pages over three volumes. Then each party gave us written reply submissions: 775 pages from Santos and 780 from Fluor. And on top of all that material, there were four days of oral openings and five days of oral closings.
>
> 12. We have not dealt with every variation of every argument put by one party or the other in its submissions. It may not have been possible to do so, but even to attempt that task would have delayed the production of this Report by many months and ramped up immensely the already substantial cost of writing it, all for little if any gain. Instead, our approach has been to identify the essential arguments of each party on the real issues in dispute as they appeared from the submissions and to grapple with those arguments and the relevant evidence so as to express our conclusions on them.

[41] The defendants' submissions on the stay application extract some other statements from the Draft Report:

> "…the pleadings are so structured that it is very difficult to work out with any degree of precision, precisely what those issues were. There are several reasons for that unsatisfactory state of affairs. First, the pleadings…of Byzantine complexity…";
>
> "…in what follows, we have for the most part eschewed the traditional approach of seeking to describe the nature of the claims by reference to the pleadings. Instead, we work from the very extensive written submissions…";
>
> "…our approach has been to identify the essential arguments of each party on the real issues in dispute as they appeared from the submissions and to grapple with those arguments and the relevant evidence so as to express our conclusions on them…"

[42] At this point, it is useful to explain the scale and complexity of the proceeding. The evidence of the plaintiff's solicitor, Mr Stephenson, is that:

(a) the pleadings – being the Fifteenth Amended Statement of Claim, the Ninth Amended Defence and Counterclaim and the Sixth Amended Reply and Answer – are approximately 2,019 pages in length;

(b) the parties have disclosed 5,700,349 documents;

(c) the parties' experts have prepared eight as-built tables containing approximately 15,947 start and finish dates;

(d) there are 90 lay witnesses who produced 178 witness statements;

(e) there are 14 experts who produced 81 expert reports;

(f) there were numerous interlocutory disputes and appeals;

(g) the substantive hearing before the referees was held over 62 days from November 2021 to August 2022;

(h) the transcript of the substantive hearing runs to approximately 8,442 pages;

(i) the written submissions served by the parties in connection with the substantive hearing run to approximately 9,909 pages.

[43] The defendants' first contention is that even if it made sense to identify the real issues in dispute from the submissions, rather than from pleadings that the referees describe as being of "Byzantine complexity", this was beyond the scope of the Referral Order and not what the referees were directed to do.

[44] The approach the referees took is said to have resulted in the determination of the plaintiff's claims other than on the pleaded basis. The defendants will submit that it has caused the referees to purport to uphold both the plaintiff's claim of an entitlement to issue a negative payment certificate for approximately $1.4 billion and the ACL claim for a further approximately $140 million, on bases that were *not* pleaded and that, if the referees had determined the claims as pleaded, their findings would have required the claims to be dismissed.

[45] The defendants' next contention, namely, that the reference process is affected by a lack of procedural fairness and apparent bias, is developed in the defendants' submissions at considerable length. One aspect is the argument that the Draft Report upholds the plaintiff's case on bases that were not pleaded and in circumstances in which the pleadings required the plaintiff's case to be dismissed. Another is the alleged failure to address significant parts of the defendants' pleaded case and an alleged failure to address submissions advanced by the defendants.

[46] Another aspect is what are submitted to be:

> "…very extensive and trenchant criticism in the draft Report of the defendants, their witnesses and their legal representatives, much of which criticism the defendants will contend:
>
> (i) is unfounded;
>
> (ii) is unnecessary, and expressed in unnecessarily trenchant terms;
>
> (iii) represents a denial of procedural fairness, in that the criticism has been made without it first being put to the relevant witness or counsel, in evidence or in submissions, and without the defendants being given an opportunity to be heard on whether the criticism should be made; and

(iv) reveals an asymmetric approach by the referees, in that equivalent conduct by the plaintiff and its representatives does not attract criticism."

[47] The defendants propose to contend that most of the serious adverse findings made about the defendants, the witnesses they called and their legal representatives, have been made without these matters being the subject of cross examination or submissions or notice to the defendants or, to the extent relevant, to witnesses, and without the defendants or the relevant witnesses, being afforded an opportunity to address them.

[48] The defendants argue that this lack of procedural fairness cannot be cured by further hearings or submissions in the reference because:

(a) the referees have stated they do not wish to receive further submissions on matters on which they have expressed a clear conclusion;[6]

(b) in any event, given the conclusions in the Draft Report, issues of apprehended bias and pre-judgment have the consequence that it is not now possible for the referees to revisit those conclusions.

[49] At the hearing of their substantive application to set aside the Referral Order, the defendants propose to contend that the cumulative effect of the matters of the type identified in their current submissions mean that the reference process has miscarried in fundamental ways, such that its continuance would amount to a miscarriage of justice.

[50] The plaintiff does not accept the correctness of the defendants' contentions. Again, it is sufficient for present purposes if I attempt to summarise the plaintiff's response, while noting that neither party, upon the hearing of the stay application, invited me to embark upon a detailed consideration of the parties' prospects of success at a final hearing of the substantive application. I do not propose to do so. The competing arguments will require detailed consideration by the judge hearing the substantive application.

[51] A focus of the defendants' allegation of a failure to decide issues according to the pleadings concerns clause 29.4 of the contract. The plaintiff submits that its closing submissions about clause 29.4 referred to relevant paragraphs of its pleadings and matters advanced in the ninth amended defence. The plaintiff rejects the contention that the Draft Report adopts a construction of clause 29.4 that was disavowed by it, and submits that aspects for defendants' submission on the stay application involve a misreading of the Draft Report and do not refer to parts of the Draft Report that supported the plaintiff's primary contention about its entitlement to a payment certificate under clause 29.4.

---

6 An email dated 30 January 2023 states "This not [sic] intended to be an opportunity to make, and the referees do not propose to entertain, further submissions as to issues upon which they have expressed a clear conclusion in the draft." The referees' letter dated 7 March 2023 states "The referees reiterate their earlier advice that these submissions are not to be understood as an opportunity for the parties to reargue points that have been thoroughly canvassed in earlier submissions and dealt with in the draft report".

[52] Next, the plaintiff disputes for reasons that are developed in Annexure B to its submissions that the referees decided the "Profit in Rates Claim" on a basis that was not pleaded or articulated.

[53] Next, the contention that the Draft Report does not address "Conduct Defences" to the extent necessary to decide the claim for mechanical completion delay costs is met by reference to 11.2.6 of the Draft Report.

[54] The plaintiff responds in detail to the defendants' contention that the Draft Report demonstrates a lack of procedural fairness and apparent bias in characterising a submission of the defendants as misleading. The plaintiff seeks to place the criticism in a broader context and to contend it does not disclose apparent bias. It also responds to an argument about the referees' differential treatment of submissions by the plaintiff that were rejected, and which were not described as being "misleading".

[55] In Annexure E to its submissions, the plaintiff responds to arguments about apparent bias by arguing that examples of alleged unbalanced criticism do not withstand criticism.

[56] In the light of the sensible approach adopted by the parties on the stay application, it is sufficient for me to conclude that the substantive application is arguable, but that I cannot make an informed assessment of the defendants' prospects of success at this stage.

The harm that the defendants identify if a stay is not ordered

[57] Having argued that the referral process has miscarried by reason of the referees not carrying out the task which they were directed to carry out, the defendants having been denied procedural fairness, and the proceedings being affected by apprehended bias, the defendants submit that:

(a) the next steps directed by the referees involve the making of submissions which are not capable of curing, and are not designed to cure, the matters referred to above;

(b) the referees have reached conclusions which they have made clear will not change;

(c) in those circumstances, no purpose is served in permitting the reference to continue; and

(d) to the contrary, to permit the reference to continue is against the maintenance of public confidence in the administration of justice, because it will place the defendants in the position of dealing with an ongoing process conducted by referees where they contend that the process has irretrievably miscarried, including by reason of apprehended bias.

[58] On 4 April 2023, the solicitors for the plaintiff addressed a concern expressed by the defendants that their continuation in the referral process may lead to a finding that their right to complain about apprehended bias has been lost. The solicitors for the plaintiff wrote:

> "Santos will not make any submission to the effect that participation in the reference by your clients after 7 March 2023 amounts to the waiver of any rights which your clients may have in respect of the

> conduct of the reference or the proceedings, or constitute acquiescence by your clients in the conduct of the reference or the proceeding."

[59] The defendants make two submissions in response.

[60] First, they submit that it is, at the very least, unclear that the position taken by the opposing party can determine whether a right to complain about apprehended bias is lost. They cite passages from *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd.*[7] The relevant passages are to the effect that principles concerning election between inconsistent rights may apply when a party foregoes taking a point about bias. A party that refrains from applying to a judge to disqualify himself or herself, in order to first determine whether the judgment is favourable, may not retain the right to complain later. The interests of the other party and, in some cases, the interests of the due administration of justice have resulted in principles that govern how an affected party can proceed.[8] One basis concerns election between inconsistent rights. In addition, the due administration of justice, and not simply the interests of the other party, may dictate that a party alleging actual or apprehended bias should be put to an election.[9]

[61] Because a right to complain about apprehended bias may be lost for reasons to do with the due administration of justice, rather than an election between inconsistent private rights, the defendants submit that, notwithstanding the 4 April 2023 statement of the plaintiff's solicitors, there is a very real issue that, if the defendants continue to participate in the reference, the right to complain about apprehended bias will be lost.

[62] The defendants' second point is that, even if the right is not lost, it is antithetical to the due administration of justice to require a party to be placed in a position where proceedings in which it is involved continue in circumstances where that party has identified a substantial, arguable case of apprehended bias. Relying upon observations made by Nettle and Gordon JJ in *CNY17 v Minister for Immigration and Border Protection*[10] the defendants argue that a remedy for apprehended bias should be sought (and, if appropriate, made) at the earliest possible time, and that there is "no utility in allowing a flawed process to run to its conclusion".

[63] The defendants submit that the identified flaws in the process are incapable of remedy. They also argue that the issues raised by them have crystalised and should be resolved, and that the parties will incur expenses if the reference is permitted to continue.

The plaintiff's response

[64] The plaintiff contends that even if one were to assume for the purpose of argument that the defendants have raised a seriously arguable case in support of their substantive application, the reference should be allowed to continue so that the Draft Report is finalised and a hearing concerning its adoption or rejection is held.

---

7 (2019) 2 QR 271 at [57]-[62] ("*Oakey*").
8 *Oakey* at [58].
9 *Oakey* at [58], [61].
10 (2019) 268 CLR 76 at [71]-[72] ("*CNY17*").

[65] As to the defendants' concern that by continuing to participate in the reference, their right to complain about apprehended bias will be lost, the defendants respond that they have provided the assurance stated in the plaintiff's solicitors' letter dated 4 April 2023.

[66] The plaintiff's written submissions on the stay application add that any risk that the defendants may be taken to have waived their right to complain about apprehended bias if, at the hearing on 17 and 18 April 2023, it acts in a manner inconsistent with that right can be avoided by it "taking the point" that any submissions it makes in the 17 and 18 April 2023 hearing of the nature sought by the referees are made in the alternative to its primary position that the report is affected by apprehended bias and that it will challenge the report on that basis.

[67] The plaintiff also indicated that it would write an additional assurance to the effect that it would not make a submission that any further participation by the defendants in the reference process should result in a denial of the relief they seek on grounds related to the due administration of justice.

Will the defendants be prejudiced?

[68] I consider that the defendants' right to complain is sufficiently protected against an election argument by the 4 April letter. Moreover, insofar as considerations relating to the due administration of justice inform the loss of a right to complain about apprehended bias, the defendants hardly can be said to have adopted an ambiguous position. They complained about the Draft Report and the process that culminated in it very soon after receiving the Draft Report. They foreshadowed an application to this Court and arranged for an early directions hearing. They have made clear that they see no utility in continuing to participate in a process that they describe as flawed and incapable of remedy. Their position is nothing like a party that does not raise a concern about apprehended bias, hoping that matters will improve and that an eventual judgment will be in that party's favour.

[69] I conclude that there is no substantial risk in the circumstances that the limited participation that the defendants may be prepared to undertake prior to the completion of the report will result in the loss of a right to complain about apprehended bias. The plaintiff has said that it will not take such a point. The Court itself is unlikely to take such a point given the stance that the defendants have taken and the plaintiff's statement that it will not take this point. If the defendants thought anything further was needed to signal their position that the process is flawed and should stop, they may state to the referees and the plaintiff that any further participation by them in what remains of the process is not to be taken as foregoing the relief they seek in the substantive application.

[70] The defendants have articulated, in elaborate detail in their written submissions on the stay application, why they contend that the process is flawed and incapable of remedy by the referees. They do not suggest that they propose to invite the referees to "go back to the drawing board" and produce a new report that takes account of their concerns about process and the need to answer questions in a different way and by more specific reference to the pleadings. No one suggests that the referees plan to adopt such a course. The referees' letters to the parties emphasise the limited basis upon which further submissions will be entertained.

[71] The defendants' concern that the further submissions provided by the plaintiff to the referees include submissions that were not called for by the referees, is one which can be conveyed to the referees by repeating what has been submitted on that point by the defendants in this court.

[72] In the circumstances, I do not apprehend that, in the absence of a stay order, there will be protracted further hearings before the referees, resulting in substantial costs that will be wasted in the event the Referral Order is set aside. If, however, the Referral Order is not set aside, any costs incurred by the parties in facilitating the completion of the report and its provision to the court will have utility.

Is there utility in not granting a stay?

[73] The plaintiff submits that the reference should be allowed to conclude, so that the Draft Report is finalised, thereby allowing an application of the kind contemplated by rule 505D for the Court to accept, vary or reject all or part of the report. In response, the defendants submit that the benefit of allowing the matter to proceed to a final report, followed by a rule 505D hearing, is speculative. They argue that it is speculative to suggest that the adoption of a report favourable to the plaintiff will occur more quickly than it would if there were a stay and that, even if this was to be assumed, interest would be awarded on any judgment up to the date upon which it was entered. On this basis, there is said to be no identifiable adverse monetary consequence to the plaintiff in the reference being stayed, pending the hearing of the defendants' substantive application.

[74] I do not agree with that submission. If entry of judgment subsequent to a rule 505D hearing is delayed by the granting of a stay that delays the filing and determination of the plaintiff's rule 505D application, then the financial costs to the plaintiff from a delayed judgment may not be fully compensated by an award of interest on the judgment amount at the agreed, low contractual rate. The plaintiff will be deprived of post-judgment interest at a possibly higher rate than the contracted rate for the period of the delay. If the final report is accepted and a judgment given based on its findings, the principal sum upon which post-judgment interest would be calculated will be very large, even if the period of delay may only be a matter of months. That potential financial consequence to the plaintiff is not inconsequential.

[75] Completion by the referees of their report and its provision to the Court does not result in a judgment. The present stay application is qualitatively different to an application to stay a judgment pending appeal, or an application to set aside the judgment on some other basis. The starting point is that the successful party is entitled to the fruits of a judgment that determines the parties' rights.[11] As practically significant as the referees' report may be to the Court's future determination of the parties' rights, the report does not determine rights. It is not an adjudication of an entitlement to an interim payment.

[76] Being seized of an application to set aside the Referral Order on the bases outlined, the Court will wish to determine that application before or at the same time as it considers any cross-application by the plaintiff to accept the report and enter judgment for the plaintiff on the basis of it. In other words, there is no real risk of

---

[11] *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455 [12].

irreparable harm in the form of a judgment being entered against the defendants before the Court has heard and determined the defendants' application to set aside the Referral Order.

[77] The referees have made clear the limited grounds upon which they will entertain further submissions from the parties. Understandably, the defendants are not disposed to agitate before the referees the issues that are raised in the substantive application about past alleged flaws in the process or apprehended bias. The referees have not been asked to disqualify themselves. Any further hearing before the referees is for a limited purpose, namely, to address the matters that the referees indicated in their letter of 7 March 2023 would be considered, following which the Draft Report will be replaced by a final report.

[78] The likely costs associated with the parties' further participation in that process are relatively insignificant in the scheme of this litigation. To place that in context, the plaintiff's solicitor states that in this proceeding the plaintiff has expended over 120,000 solicitor hours, $36.5 million in expert fees, $21 million in counsel fees and $2.5 million in other costs.

[79] Permitting the process to continue has utility in enabling a rule 505D application to be brought and progressed by the Court, and thereby enable issues that are common to it and the plaintiff's substantive application to be considered by the same judge at the same time.

[80] The defendants are likely to argue that the Court should not accept, but instead should reject, the report for a number of reasons that include all of the reasons advanced on their substantive application. Therefore, the substantive application and the anticipated plaintiff's application will overlap. Those two applications should be case-managed together, with the judge allocated to hear those matters, deciding how and when they are heard. Such a course avoids any delay associated with the defendants' substantive application being heard in a few months' time, with a further application involving many of the same issues being heard at a later time, possibly by another judge, in the event the defendants' substantive application is dismissed.

[81] A significant benefit in allowing the process to continue is that it will allow, once the report is concluded, the defendants' substantive application to progress at the same time as the plaintiff's application under rule 505D for the Court to accept the report.

[82] Permitting the reference to continue at this stage also avoids the risks associated with the reference and the referees being put "on hold" for an uncertain period, pending the hearing and determination of the substantive application. If the substantive application is not successful, then the referees will be required to return to the matter and reacquaint themselves with matters with which they are presently familiar, having recently completed the Draft Report. The risk of illness or unavailability should not be ignored. The individual commitments of the referees may not permit the process to resume very soon after the Court determines the substantive application.

[83] The interests of justice and the purpose of civil litigation, as stated in rule 5, are best advanced by both applications being progressed, managed and, if appropriate, decided by the same judge.

What remains to be done?

[84] The limited scope of the submissions invited or required by the referees has been stated by them in communications to the parties. As the defendants note, the referees do not invite the parties to bolster or improve their reasoning in support of conclusions found in the Draft Report.

[85] The defendants complain that the plaintiff has made submissions that were not requested or required by the referees' recent directions. This relates to the Mechanical Completion Delay Costs issue. For the reasons developed at [86]-[88] of their outline, the defendants submit that it would be inappropriate for the referees to act upon a submission of that type.

[86] In response, the plaintiff submits in Annexure C that the argument is unfounded, and that the plaintiff's submission in relation to paragraph 11.2.6 of the Draft Report is within the terms of the referees' request sent by email on 7 March 2023.

[87] If no stay is ordered it will be for the referees to consider whether the plaintiff's submission on the Mechanical Completion Delay Costs is one that they should entertain in the light of the limited basis upon which the plaintiff's submissions on the Draft Report were invited.

[88] Neither party on the stay application suggested that that is a matter about which I should make directions. Neither party suggested that if the referees decide to entertain the plaintiff's submission that it will unduly prolong the conduct of the reference.

[89] The plaintiff's position is that the referees are "tantalisingly close" to finalising and providing their report to the Court. One remaining matter concerns "overlap calculations". The referees have required submissions on this matter. The plaintiff's submissions include a number of spreadsheets that are said to calculate an overlap between the "Profit in Rates Claim" and delay and disruption claims. Simply and perhaps inadequately stated in the context of an urgent stay application, the plaintiff succeeded on both claims. As a result, the delay costs assessment includes an impermissible profit component. The plaintiff accepts that there must be some adjustment and has made submissions in Part 6 of the recent submissions about its calculation. The plaintiff describes the matter as, essentially, an arithmetic exercise. Their solicitor says that the relevant spreadsheets are based upon evidence in spreadsheets that were before the referees.

[90] The defendants say that the sources of the spreadsheets are not identified in the plaintiff's submissions and that one might infer that the spreadsheets were prepared by one of the plaintiff's consultants on quantum issues, FTR Consulting, and that the author of the last modification of one of the spreadsheets is a Mr Stephen Tan. The defendants contend that it would be inappropriate of the referees to act upon the basis of such a calculation and that if Mr Tan were to give evidence about the basis of the calculations, the plaintiff would require leave to reopen its case to lead that evidence and that the defendants would wish to have their quantum expert, Mr

Badala, engaged in considering the plaintiff's calculations. They note that the referees were critical of Mr Badala and that if Mr Badala was to give further evidence, the referees would be disqualified from continuing to deal with the question of overlap because of their strong, adverse findings about Mr Badala's evidence. The defendants submit that, in circumstances in which a decision on the overlap issue is required in order for the report to be finalised, a necessary consequence is that the referees are disqualified from completing the report.

[91] One reason why I am not persuaded that the overlap issue disqualifies the referees from concluding the report is that it is not apparent that someone like Mr Tan will be required to give an expert report on that matter or that, if he does, the only expert that the defendants might call in response would be Mr Badala. For reasons canvassed by me during argument on the stay application, if the plaintiff is correct in characterising the exercise as essentially an arithmetic exercise based upon existing materials, it would be open, in theory at least, for the plaintiff to provide any necessary explanation required by the referees or the defendants as to the source of the information on the spreadsheets and the calculations that they perform. Any person who assisted in the preparation of those spreadsheets might provide instructions to the plaintiff's solicitors and counsel in order to clarify those matters, if any further clarification were needed. It would not entail the provision of an expert report. If the parties' submissions, including any requested clarification of the relevant parts of the plaintiff's submissions and spreadsheets, did not enable the referees to calculate the overlap, then this would be reflected in the referees' conclusions.

[92] If the defendants' arguments on the overlap issue persuaded the referees to not calculate and determine the overlap, or if for some other reason they declined to do so, then they might report this to the parties and to the Court. In that eventuality, a report might be finalised, but not include an overlap calculation, and consequential adjustments to the referees' calculations of the relevant claims that are accepted by the plaintiff to involve an overlap. It would be for the Court to determine, in the event the report is not set aside and is then accepted, by whom and when the overlap calculations would be made.

[93] In summary, I am not persuaded that the overlap issue means that a report cannot be finalised or that the referees are disqualified from concluding a report.

[94] If the process is not stayed then it will be a matter for the referees to determine whether they are in a position to resolve the overlap issue and how this is to be done. My impression is that any further consideration of the overlap issue by the referees, aided by any further submissions which they request or allow, will not take a substantial time. The costs associated with that exercise are minor in the scheme of things and if the plaintiff is found to be entitled to judgment upon claims that overlap, the calculations will need to be determined by someone, sooner or later. In the circumstances, it is best if the overlap is calculated, if it can be, by the referees who are familiar with the issues and the evidence.

Broader issues concerning the administration of justice

[95] There is no utility in allowing a flawed process to run to its conclusion. This principle was stated by Nettle and Gordon JJ in *CNY17*.

[96] The practical application of the principle depends on the relevant process being found to be flawed, or at least sufficiently apparent that a party will ask for the process to be halted. If a Court is asked to halt a process that is before another decision-maker, it must either find that the process is flawed or make appropriate orders that serve the interests of justice until it can decide that issue.

[97] A temporary restraint on the process is not granted simply because an allegation that the process is flawed is made or even where the allegation appears to have substance. Instead, the prospects that the process will be found to be flawed and final relief will be granted is considered along with a range of considerations that determine whether the interests of justice are best served by halting the process at once or allowing it to continue until the Court can determine the allegation.

[98] Practical considerations may include how far the process has gone, how much further it has to go, and the consequences for parties' rights or liberties if the process continues.

[99] If the process is obviously flawed, then allowing it to continue is likely to have no utility and doing so will expose a party to the prejudice of participating in a flawed and possibly unfair process.

[100] In some situations, including alleged flaws and apprehended bias in criminal proceedings, supervisory and appellate courts do not necessarily halt the process upon an applicant showing that it has prospects of proving at a later hearing that the process is flawed. Considerations that do not favour halting the process include dislocation and delay to the criminal justice process and prejudice to participants in it. In some cases, an allegedly flawed proceeding is allowed to continue despite the risk of it miscarrying and causing injustice. Similar issues may arise in civil proceedings, when a judge declines to disqualify himself or herself and continues a proceeding that one party alleges is flawed by apprehended bias or on some other ground.

[101] The determination of whether a process should be halted or allowed to continue is fact-specific, and includes the consequences to parties and the administration of justice in making such a determination.

[102] There is no utility in allowing a flawed process to run to its conclusion. Sometimes, however, allowing a process that is alleged by one party to be flawed to continue will have utility. Sometimes it will have utility if the prospects of it being later found to be flawed are not obvious or not thought to be high, and substantial harm will be suffered if the process is halted, but later found not to have been flawed. That may be so if the harm flowing from halting the process outweighs the harm flowing from its continuation.

[103] Insofar as public confidence in the due administration of justice is concerned, public confidence is likely to be advanced by halting an obviously flawed process. Where the process is not obviously flawed, public confidence is best served by a decision that avoids or minimises irreparable harm pending a decision as to whether the process is flawed, and which best advances the just and expeditious resolution of the matter.

[104] Public confidence in the administration of justice is best advanced by a decision that assesses, as best a court can, the likelihood that a process subsequently will be found to be flawed and that assesses the consequences to the parties and the due administration of justice of either halting the process or allowing it to continue, pending the court's determination of the substantive challenge to the impugned process.

[105] Public confidence is not necessarily enhanced by halting a process that is well-advanced, where, on balance, its continuation will assist the just and expeditious resolution of civil litigation, and where prejudice to a party in allowing the process to continue is outweighed by the prejudice to other parties and the interests of justice in halting the process. In fact, doing so may reduce public confidence in the administration of justice.

Summary and Conclusion

[106] The referees are close to finalising the report and providing it to the Court.

[107] The final report will not be fundamentally different to the Draft Report.

[108] The referees have called for submissions on the calculation of an overlap between the claims on which the plaintiff has been found by the referees to have prevailed. The process by which the referees determine the amount of the overlap is a matter for them, including a consideration of whether the plaintiff's submissions on the calculation are essentially an arithmetic exercise or call for expert evidence.

[109] If the referees decide the amount of the overlap, and make an adjustment to avoid double-compensation to the plaintiff to the extent of the overlap, then the report can be completed. If they decide to not calculate the overlap, their final report still will have utility and the Court can determine when and by whom the overlap calculation is to be determined.

[110] The defendants have not persuaded me that it will be necessary to call their quantum expert, Mr Badala, in order for the overlap to be calculated. In the circumstances, any need to calculate the overlap has not been shown to disqualify the referees from deciding the overlap issue and finalising their report.

[111] The defendants have not demonstrated that allowing the reference to continue to the final report stage will cause them unjustifiable prejudice.

[112] The defendants' concern that a right to complain about apprehended bias may be lost by their continuing participation in the process is adequately addressed by the plaintiff's statements that such participation will not be relied upon to support a submission that there has been a waiver or acquiescence, or that the due administration of justice requires the denial of relief because of the defendants' further participation. The defendants' substantive application and this stay application demonstrate that the defendants have taken the point that the process is flawed, and they may reiterate that position to the referees and to others.

[113] No irreparable harm will be suffered by allowing the referees to complete their report since, unlike a judgment or other determination that finally declares the rights

of the parties, the report does not determine the parties' rights; it remains for the court to accept, vary or reject all or part of the report.

[114] Staying the process would prejudice the plaintiff and add to costs and delay.

[115] Having the defendants' substantive application and an application by the plaintiff to accept the report progress will be an efficient means to resolve the issues raised by the substantive application, many of which will arise on the plaintiff's application to accept the report, and may allow those common issues to be determined by the same judge.

[116] Doing so will lead to time and costs savings for the Court and the parties

[117] If the substantive application succeeds, then the costs of the finalisation of the report, including any determination of the amount of the overlap, may be wasted. But if that proves to be the case, those costs are relatively small in the scheme of litigation, and the defendants can seek to be compensated for any wasted costs.

[118] If the substantive application fails, then the costs associated with the finalisation of the report will have advanced its provision to the Court and the completion of a rule 505D hearing.

[119] In circumstances in which the Court presently is not in a position to assess the prospects of the substantive application, the risk of wasted costs in the finalisation of the report is balanced by the benefits that may be derived from the report's finalisation.

[120] On balance, the just and expeditious resolution of the real issues in the principal proceeding in this Court is best advanced by permitting the report to be finalised as soon as is reasonably possible, enabling the plaintiff to bring an application for the Court to accept it, and the defendants to apply to reject it on the grounds contained in the substantive application and such other grounds as the defendants may be advised to advance.

[121] Permitting the reference to continue is unlikely to jeopardise public confidence in the administration of justice. The due administration of justice, and confidence in it, is best secured by allowing a protracted reference process that is close to finalisation to conclude with a final report, while allowing the defendants to advance their application to have the Referral Order set aside, with that application being determined by the Court before the Court deals with any application to accept the report and give judgment to the plaintiff.

[122] Public confidence in the administration of justice is best served by not delaying the time at which the plaintiff might apply to the Court to accept a final report, and, in the event that the defendants' substantive application fails, seek judgment based on that report. Public confidence is best served by a decision on the stay application that, having weighed possible prejudice to the parties' interests, arrives at a conclusion that is considered by the Court to save time and costs for the Court and the parties.

[123] I have considered matters relevant to the discretion to grant a stay in the circumstances that the reference has reached and having regard to what appears to

remain for the referees to do to finish their report and provide it to the Court. I conclude that the defendants have not established that the interests of justice are best served by granting the requested stay.

[124] I dismiss the application for a stay. There being no submission to the contrary, I order the defendants pay the plaintiff's costs of and incidental to the stay application.

[125] I propose to make directions for the progress and hearing of the defendants' substantive application.

Orders

[126] I order:

1. The application to stay the conduct of the reference until further order is dismissed.
2. The defendants pay the plaintiff's costs of and incidental to the stay application.
3. The parties submit within seven days directions for the expeditious hearing of the defendants' application to set aside the Referral Order.