

**FEDERAL COURT
OF AUSTRALIA****FEDERAL COURT OF AUSTRALIA****INPEX Operations Australia Pty Ltd v AkzoNobel NV [2023] FCA 382**

File number: WAD 162 of 2021

Judgment of: **BANKS-SMITH J**

Date of judgment: 26 April 2023

Catchwords: **PRACTICE AND PROCEDURE** - discovery - where categories of documents largely agreed by Redfern schedule in complex litigation - seven categories disputed - respective applications allowed in part

Legislation: *Federal Court Rules 2011 (Cth)* rr 20.11, 20.20

Cases cited: *Hanwha Solutions Corporation v LONGi Green Energy Technology Co Ltd* [2020] FCA 580
ML Ubase Holdings Co Ltd v Trigem Computer Inc [2007] NSWSC 859; (2007) 69 NSWLR 577
New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd [2007] NSWSC 258

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Registry: Western Australia

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

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Date of hearing: 2 September 2022

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Solicitor for the Respondents: Clayton Utz

Counsel for the Cross-Claimants: Mr PA Walker

Solicitor for the Cross-Claimants: Clayton Utz

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Solicitor for the First and Second Cross-Respondents: Corrs Chambers Westgarth

Counsel for the Third Cross-Respondent: Mr M Smith

Solicitor for the Third Cross-Respondent: Solomon Brothers

ORDERS

WAD 162 of 2021

BETWEEN: **INPEX OPERATIONS AUSTRALIA PTY LTD**
First Applicant

ICHTHYS LNG PTY LTD
Second Applicant

AND: **AKZONOBEL NV**
First Respondent

INTERNATIONAL PAINT LIMITED
Second Respondent

AKZO NOBEL PTY LIMITED
Third Respondent

AND BETWEEN: **AKZONOBEL NV**
First Cross-Claimant

INTERNATIONAL PAINT LIMITED
Second Cross-Claimant

AKZO NOBEL PTY LIMITED
Third Cross-Claimant

AND: INPEX OPERATIONS AUSTRALIA PTY LTD

First Cross-Respondent

ICHTHYS LNG PTY LTD

Second Cross-Respondent

JKC AUSTRALIA LNG PTY LTD

Third Cross-Respondent

ORDER MADE BY: BANKS-SMITH J**DATE OF ORDER: 26 APRIL 2023****THE COURT ORDERS THAT:**

1. The parties provide short minutes of order to Chambers giving effect to these reasons by 4.00 pm on 11 May 2023.
2. Any party wishing to make a submission as to the costs of the discovery applications is to file and serve a submission of no more than three pages in length within 14 days.
3. Any submission in response to a submission filed in accordance with order 2 is to be of no more than three pages in length, and is to be filed and served within 14 days thereafter.
4. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT**BANKS-SMITH J:**

- 1 This proceeding was instituted by **INPEX** Operations Australia Pty Ltd and **Ichthys** LNG Pty Ltd. INPEX is the operator of the Ichthys LNG Project, and Ichthys is responsible for its development. INPEX relevantly acts on behalf of Ichthys.
- 2 The Ichthys LNG Project is a large liquefied natural gas project, involving the extraction of gas and condensate from the Ichthys Field in the Browse Basin of Western Australia, which is then transported 890 km by undersea pipeline to the Ichthys Onshore LNG Facilities at Bladin Point in the Northern Territory for conversion into LNG for export.
- 3 INPEX entered into a contract with **JKC** Australia LNG Pty Ltd for JKC to undertake certain engineering, procurement, supply, construction and commissioning for the Ichthys onshore project.
- 4 Relevantly, one of JKC's tasks under the contract was to develop coating specifications for pipework and equipment as necessary for the scope of its works. After various communications with one or both of **AkzoNobel** NV and **International Paint** Limited, JKC directed suppliers to use a particular coating system known as Intertherm 228 (**I228**) on pipework and equipment modules. Following the use of I228, degradation and decolourisation issues arose with respect to the coated pipework and equipment.

5 JKC commenced proceedings in this Court against AkzoNobel and International Paint (WAD 448 of 2017) (**JKC proceeding**). The pleaded claim relates to the communications, selection and use of I228.

6 Separately, INPEX issued these proceedings relating to the use of I228 against AkzoNobel, International Paint and Akzo Nobel Pty Limited (**Akzo Australia**) (**INPEX proceeding**). Those respondents have brought a cross-claim in the INPEX proceeding against INPEX, Ichthys and JKC.

7 The JKC proceeding and the INPEX proceeding are now being case managed together and the trials, provisionally listed during 2024, will be heard together.

8 In the JKC proceeding the parties implemented a document disclosure regime by way of a Redfern schedule. I was asked to determine disputes on two occasions with respect to a number of categories of documents. Orders were made with reasons published to the parties by way of commentary and comments on the Redfern schedule. The schedule and reasons have been made available to the parties in the INPEX proceedings.

9 Separately, in the INPEX proceedings the parties also entered into a document disclosure regime by way of a Redfern schedule. Despite attempts to narrow the issues, it was necessary to conduct a hearing to hear submissions about the scope of the proposed discovery.

10 After the hearing a further iteration of the schedule was produced (dated 23 September 2022), culminating in an outcome where only seven categories remain in dispute.

11 Those categories are the subject of these reasons.

12 I have adopted the headings and definitions used by the parties. The disputed discovery requests are set out in full as formulated in the revised schedule.

APPLICANTS' DISCOVERY REQUESTS

Request 4(b) - Manufacturing of I228

Description

13 The applicants seek discovery of:

All documents recording which entities were involved in manufacturing 'International' coating products, for potential distribution in Australia or Asia, including I228, in the period 2008 - 2016.

14 An alternative formulation was provided by the applicants in the revised schedule, to the effect that:

The category could be limited to the coatings listed in the specifications sent in the emails referred to at SOC [19] and [27]-[28], being: Intergard 63, Interzinc 315, Intergard 269, Intergard 475HS, Interzone 954 MIO/Alum, Interzone 1000, Interseal 670HS, Intershield 851, Inthertherm 228, Interline 975, Interthane 990, Interfine 629, Intertherm 751CSA, Interzinc 22, Intertherm 50, and Interzone 485.

Consideration

15 More generally by the Redfern schedule the applicants seek documents that disclose the business structure of the AkzoNobel Group and the approach to the supply of 'International' coating products.

16 The relevance arises from the applicants' pleading that each respondent was and is subject to the *Australian Consumer Law (ACL)* of the Commonwealth and States, as they carried on business within some or all of Australia, Western Australia and the Northern Territory; or because certain conduct by the respondents relating to the identification, selection, application and discolouration of the I228 was engaged in

within Australia. For completeness, the relevant ACLs are the *Competition and Consumer Act 2010* (Cth), Schedule 2; the *Fair Trading Act 2010* (WA); and the *Consumer Affairs and Fair Trading Act 1990* (NT).

17 The plea based on the ACL gives rise to (at least) three levels of analysis. First, the applicants will need to identify which relevant respondent entity was involved in the development, manufacture and distribution of I228. Second, the applicants will need to establish the relationship between that entity and the coating applied both in Darwin and applied on modules fabricated at module fabrication yards (MFYs) in Asia, which were then transported to Darwin. Third, they will need to establish that the entity carried on business in Australia or engaged in the relevant conduct in Australia.

18 The claims under the ACL relate to certain representations allegedly made by Mr Ben Biddle and Mr Jamie Shaw regarding the availability and suitability of the I228 paint both in Asia and Australia. A question that arises is whether Mr Biddle and Mr Shaw were acting with the actual or apparent authority of the relevant respondent entity. Mr Biddle is said to have held the position of 'Market Manager Oil and Gas Australasia' for Akzo Australia, and Mr Shaw is said to have held the position of 'Manager Engineer Projects - Australasia' for Akzo Australia.

19 The respondents deny the allegations under the ACL. More particularly, they deny that AkzoNobel and International Paint carried on business in Australia in their own right or through business names or related entities, and deny that Akzo Australia carried on business in Australia as the agent of AkzoNobel and International Paint. They deny that Mr Biddle and Mr Shaw had the actual or apparent authority of each of the respondents.

20 Against that pleading backdrop, the applicants contend that they must establish which of the respondent entities were involved in the manufacture of I228; the nature of their involvement with the coating that was used on site in Darwin and on the modules fabricated at the MFYs in Asia; whether those entities carried on business in Australia or engaged in the relevant conduct in Australia; the identity of the entities on whose behalf Mr Biddle and Mr Shaw were acting in making the alleged representations to INPEX in Australia; and their position and authority with respect to those entities.

21 I accept that those matters are in issue on the pleadings. Assuming the parties are unable to narrow those pleading disputes by the use of other forensic tools or conferral, a degree of discovery relevant to those matters is relevant and inevitable.

22 Request 4 of the applicants' requests seeks documents recording which entities were involved in developing, manufacturing, marketing and distributing 'International' coating products, including I228, but within certain parameters. The respondents have agreed to the request with respect to development, marketing and distribution. It is the request that relates to manufacturing that remain in dispute.

23 As to the request at 4(b), the respondents object on the basis that what is in issue is whether the respondents carried on business *in Australia*, and so it is said that reference to manufacturing products in other countries is irrelevant and disproportionate. It is also said that the reference to 'potential use' in the request introduces imprecision at the review stage of documents and adds nothing to the reference to 'use'. They propose a formulation of the category that is limited to documents recording which entities were involved in manufacturing 'International' coating products 'in Australia or for distribution in Australia' in the period 2008-2016.

24 The difficulty with the respondents' first objection is that it artificially minimises the relevance of the documents in circumstances where it is expressly pleaded that representations were made in Australia about the availability of coating products both in Australia and Asia. As INPEX recognises, it must meet the threshold test as to the respondents carrying on business in Australia. But that question will be informed by the identity of the relevant manufacturing company and whether that company carries out activities relating to coatings in either or both of Australia or Asia and whether, having regard to the nature of such activities, it can be said to carry on business in Australia. After all, an entity may carry on business in Australia by reference to activities that occur either inside or outside of Australia. I consider the applicants are entitled to discovery as requested, subject to questions of proportionality.

25 As to whether the word 'potential' should be included in the description, viewed in isolation it might be seen, as the respondents submit, to create a level of imprecision. However, the provenance of the request is in a request said to have been made by email on behalf of INPEX to the respondents asking them to advise whether particular identified products (including I228) 'were/could be readily available throughout East and South East Asia by 2014'. The term in that context is to be understood to mean products that would or could be available for distribution in the relevant period. The imprecision is contained in that manner. It is further contained by accepting the applicants' suggestion that the coating products be limited to those set out, that is: Intergard 63, Interzinc 315, Intergard 269, Intergard 475HS, Interzone 954 MIO/Alum, Interzone 1000, Interseal 670HS, Intershield 851, Intertherm 228, Interline 975, Interthane 990, Interfine 629, Intertherm 751CSA, Interzinc 22, Intertherm 50, and Interzone 485.

26 Proportionality is to be addressed against the revised category and the scale of this litigation. I was told by the applicants that the rectification of alleged systemic defects arising out of the coating system that covers more than 300,000 m² alone of piping and equipment is expected to run to multiple billions of dollars. Such scale cannot justify inefficiency. Rather, the need for it is enhanced. In heavily fought litigation where forensic decisions have significant costs implications for all parties and for the resources of the Court, it is imperative to approach steps such as discovery open to compromise.

27 In this case, I do not consider the task asked of the respondents is disproportionate, once the coatings are limited as above.

28 The respondents refer to the extensive discovery already undertaken by them in the JKC proceedings and say that they have provided those discovered documents to the applicants in this proceeding. To the extent there is an overlap between the categories requested by the applicants and discovery that has already been made or will be made in the JKC proceedings, then the task for the respondents may in part reduce to directing the applicants more specifically to documents already discovered. The task may also be narrowed by the benefit of knowledge as to appropriately limited search filters gained from the respondents' response relevantly to categories 4(a), (e) and (f) of the applicants' request. I am not persuaded in the circumstances that compliance with the applicants' alternative request would be oppressive. It should be undertaken.

Request 6A - Internal communications regarding suitability and marketing of I228

Description

29 The applicants seek discovery, to the extent not otherwise discovered, of:

All documents evidencing internal communications between and amongst any persons or entities in the AkzoNobel Group during the period 2007 to 2016 concerning:

(a) the suitability for providing corrosion protection in onshore LNG plants of any paints produced by any entity within the AkzoNobel Group; and

(b) the marketing and promotion of any such paints, including but not limited to the development, promulgation and use of products data sheets for any such paints and/or any instructions, directions or guidance as to the suitability of such paints for corrosion protection, whether such instructions, directions or guidance were general in nature or pertained to the use of the paint for a particular project or for an actual or potential purchaser of the paint.

30 An alternative formulation of request 6A(a) that limits the paints to specified products is offered by the applicants. That formulation refers only to the suitability of I228, Interline 399 and Intertherm 228HS, and however else those products have been described internally by the respondents.

Consideration

31 The relevance of the category is said to be that the documents go to the disputed issue of authority. The applicants submitted that the documents requested will likely establish how entities in the group determined

which paints were suitable for protecting pipework against corrosion, which entities participated in that process and which entities were involved in communicating the suitability of paints for that purpose.

32 The respondents contend that although some relevant material might be captured, the category is too unfocused, unlimited by reference to particular entities in the AkzoNobel Group, by date range, by products (ameliorated to some extent by the alternative description offered) or by individuals involved. They state that the AkzoNobel Group is comprised of more than 562 entities and that there is a potentially vast number of internal communications that might respond to the category.

33 The parties disagree as to how the question of actual or apparent authority might be established at trial and now is not the time to resolve that dispute. However, it can be accepted that a live issue in the context of authority is the attribution of knowledge between a subsidiary and parent company, and so relevance is not limited to internal communications within the parties to these proceedings.

34 However, what is also important is that request 6A cannot be viewed in isolation. Request 5 made by the applicants, which is not disputed, repeats a request made in the JKC proceedings and requires production of a large number of categories of documents that should shed light on the manner in which the respondents' business operated in Australia, including directly or indirectly through related entities or agents, and should disclose information about the corporate group that will narrow the parameters for any future search similar to proposed request 6A. Further, request 5A requires production of all documents that evidence the authority of a list of identified 'Relevant Employees' in relation to the pleaded representations.

35 As request 6A is presently drafted, even in its narrower suggested alternative, I consider the potential breadth of discovery over the period of time and involving the numerous entities, and the inclusion of documents evidencing all communications to be so broad as to be oppressive, and with the associated risk that the task of production of a potential vast number of documents may hinder rather than enhance the efficient and proportional isolation of issues and evidence in this proceeding.

36 I would, however, consider directing discovery of a narrower subset of documents relevant to the question of authority, once the applicants have had the opportunity to review the documents that must now otherwise be discovered by the respondents. That review should enable the applicants to reduce the identified companies, products, persons and other search terms for the purpose of a narrower and so less onerous request.

Request 6B - 'International Paints - AkzoNobel' or 'AkzoNobel (International)'

Description

37 The applicants seek discovery of:

Any documents recording communications between 2008 and 2016 between any entity within the AkzoNobel Group and:

- (a) the INPEX Entities, the JKC Entities and/or Corrotek; and/or
- (b) the Module Fabricators concerning the Project,

using the phrase 'International Paints - AkzoNobel' or 'AkzoNobel (International)'.

Consideration

38 Again, these documents are sought by the applicants with respect to the authority question. The phrases are taken from a 'Statement of Acceptance' which is pleaded by the applicants. The Statement of Acceptance is signed by Mr Biddle as being from 'International Paints -AkzoNobel'; and the table accompanying the Statement of Acceptance contains a column with the heading 'Akzo Nobel (International) Product'. The

respondents deny that Mr Biddle sent the email attaching the Statement of Acceptance on behalf of or with the actual or apparent authority of any of the respondents.

39 However, the respondents have separately agreed to discover documents of targeted relevance providing the context of the particular correspondence, such as who drafted the Statement of Acceptance and reviewed it prior to it being sent, and the roles and responsibilities of those individuals at the relevant time. The respondents say such documents are encompassed by other categories that are not in issue, and that it is unclear how reference to such phrases in other documents will provide any assistance with respect to Mr Biddle's authority. They submitted that an indicative search across the respondents' database for communications using the identified phrases, further limited by appropriate key words, returned in excess of 400,000 documents. Further, they contended that as the database search mechanism is unable to identify the use of special characters (such as en dashes or brackets) identifying relevant documents within these 400,000 documents would be oppressive and disproportionate in the circumstances and would require manual assessment. To be fair, the applicants offered suggestions as to the manner in which search terms might be refined to assist in the search task. They suggested limitations in time and, as to the module fabricators, by reference to the particular project.

40 However, at present I would decline to direct discovery of this category. It seems to me that its breadth, and the nature of the task that the respondents' evidence suggests must be undertaken to meet it, are disproportionate to the probative value that the resulting tranche of documents might have. An order directed to a category of this breadth will not facilitate the just resolution of the proceedings as quickly, inexpensively and as efficiently as possible, as required by r 20.11 of the *Federal Court Rules 2011* (Cth). Again, once discovery of the other categories is made, it might be that a narrower request can properly be formulated.

Request 8A(d) - Websites

Description

41 The applicants seek discovery of:

All documents recording or otherwise evidencing (for the period from 2007 to September 2017) any other websites operated by any of the respondents.

42 The reference to 'other websites' in context means websites apart from www.international-pc.com and www.international-marine.com.

Consideration

43 The applicants submitted that whether or not the respondents maintained any other website bears upon whether the two websites identified in the preceding paragraph were operated by or on behalf of the respondents. They say it is unlikely that entities of their size would not have operated a website at all, and if they did not, then an inference might be drawn that the identified websites were operated on their behalf.

44 The respondents submitted that the category is too broad and any probative value would be minimal.

45 I do not accept that responding to the category is oppressive. If none were operated, there is no burden at all. If they were, it should not be a complex task to provide a list of all websites and by which entity they were operated over what period of time. Such a list, presumably compiled from source documents, might prevent the need to make more fulsome discovery, as the applicants could then seek more targeted discovery relating to any of the particular identified websites if they consider it necessary. I will order that such a list be provided by the respondents, and the question of whether further discovery should be ordered can be reserved for further consideration upon its receipt.

Request 10 - Environmental conditions

Description

46 The applicants seek discovery of:

All documents in the possession of an Australian Group Company or a Group Company (excluding any subsidiary company of a Group Company) produced during or covering the period 2008 to May 2013 and referring to or recording the environmental and climatic conditions at the MFYs and their surrounds, or at Bladin Point and its surrounds, **that may have a bearing on** operations, construction, suitability of products, corrosivity or potential corrosivity, degradation or potential degradation, or the application of coating products, including Intergard 63, Interzinc 315, Intergard 269, Intergard 475HS, Interzone 954 MIO/Alum, Interzone 1000, Interseal 670HS, Intershield 851, Inthertherm 228, Interline 975, Interthane 990, Interfine 629, Intertherm 751CSA, Interzinc 22, Intertherm 50, and Interzone 485.

47 The applicants indicated that they would be content for the emphasised words 'that may have a bearing on' to be substituted by 'that bear upon'.

48 The respondents proposed a narrower formulation as follows:

All documents that were in the possession of a Group Company (excluding any subsidiary company of a Group Company other than an Australian Group Company) during the period 2008 to May 2013 recording:

- (a) any analysis or testing undertaken in respect of the environmental or climatic conditions, or the classification of environmental conditions in relevant standards or specifications, at the MFYs and their surrounds, and at Bladin Point and its surrounds;
- (b) communications with the Applicants and / or JKC recording the environmental conditions relevant to the Ichthys Onshore Project; or
- (c) detailed reports recording the environmental conditions, or the classification of environmental conditions in relevant standards or specifications, at the MFYs and their surrounds, and at Bladin Point and its surrounds.

Consideration

49 This category is relevant to the pleaded issue of the respondents' knowledge of environmental conditions. The respondents deny that by 13 May 2013 they were aware of specific details concerning the weather conditions at the MFYs. The applicants submit that environmental conditions affect the suitability of the coating to protect steel from corrosion and other conditions that may be encountered at a site and have an adverse effect on the plant, such as exposure to moisture and UV light. They say that different coatings are suitable for different environmental conditions.

50 The respondents did not challenge the relevance of this category, but objected to it on grounds of proportionality. They say that even informal communications about the weather would be captured by the category as drafted.

51 As to this, the applicants submitted that the category is temporally limited to the period commencing on the start of the relevant period from 2008 to the Statement of Acceptance dated May 2013; geographically limited to each of the MFYs and Bladin Point; and limited to Group Companies and Australian Group Companies, excluding Subsidiaries.

52 I do not consider the category as requested by the applicants to be oppressive in nature. I accept it will require some attention from the respondents in selecting appropriate search filters, but the issue is significant and the respondents are in the position of knowing the types of documents that are likely to exist and record such information. I was initially attracted to the suggestion of counsel for the respondents that there be initial discovery of the category as refined by them, but on reflection I consider the particular documents they

describe are of such a narrow range that a second round of discovery would be inevitable. In this case I consider that the more efficient course is to direct discovery of the category sought by the applicants, with the limitations they have included, and with the substitution of the words 'that bear upon' as suggested. The relevance test will exclude documents that might do no more than make conversational comments on the weather. Discovery will inevitably include any of the documents that respond to the respondents' proposed category.

RESPONDENTS' DISCOVERY REQUESTS

Request 18 - Degradation of I228

Description

53 The respondents seek discovery of:

All documents excluding Surveillance/Inspection Reports (for the period before October 2016), and third party reports (including drafts and correspondence concerning those reports) (for the period after 23 July 2015) evidencing or recording the nature and extent of the alleged degradation of I228, or epoxy phenolics more broadly, on the Ichthys Onshore Project, including evidencing when INPEX first became aware of any alleged degradation ...

54 The applicants oppose that formulation and propose a different one:

All documents excluding Surveillance/Inspection Reports (for the period before October 2016), and final versions of all third party reports (for the period after 23 July 2015) evidencing or recording the nature and extent of the alleged degradation of I228, or epoxy phenolics more broadly, on the Ichthys Onshore Project, including evidencing when INPEX first became aware of any alleged degradation ...

Consideration

55 There seems to be no issue that third party reports relevant to degradation of I228 are relevant. However, the point of distinction is whether draft third party reports and correspondence should be discovered at this stage, rather than final versions only. I should add that during the hearing senior counsel for the applicants indicated that it was their intention to discover final versions not only of third party reports but of underlying documents that predicate the reports, such as briefs to experts (with inspection subject to privilege claims).

56 The respondents submitted that it is 'fairly typical for drafts and associated correspondence to be discovered', but did not descend into detail of the reasons or legal justification for that course. It was suggested that as litigation is likely to have been anticipated 'from the start', the final reports 'may not tell the full story'.

57 The applicants contend that draft documents are not relevant to the dispute, and that no proper justification has been given as to why they should be produced. They also contend that the applicant would be obliged to perform a broad search to identify the draft documents and ascertain whether they are subject to claims of legal professional privilege. They accept that in certain circumstances discovery of draft reports (or other correspondence) might be relevant, such as where it is necessary to look behind the content of a final report in order to understand it. However, relevance will depend upon the consideration of each document: *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [30] (White J).

58 In this context the applicants also refer to the decision of Brereton J in *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859; (2007) 69 NSWLR 577 at [45]-[46], where his Honour said:

'Proper understanding' of a document or communication will sometimes, but not always require that documents to which it responds or refers be available. It may very likely be so when the primary document contains a summary or excerpt from an earlier communication, or responds to questions which are not themselves restated in it. But I do not accept that 'a proper understanding of the communication or document' involves an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary.

59 His Honour was there addressing the production of reports over which legal professional privilege was claimed, but the observation remains instructive, and comments to similar effect were made in *Hanwha Solutions Corporation v LONGi Green Energy Technology Co Ltd* [2020] FCA 580 at [53] (Burley J).

60 In *New Cap Reinsurance*, in the context of a request for drafts of reports to creditors, White J said at [67]:

it would be oppressive to require the liquidator to give discovery of all drafts of the reports to creditors and of all work papers prepared or used in respect of such reports ... notwithstanding that the documents may be relevant, the defendant has not demonstrated that their discovery is necessary. ...

61 I am not satisfied at present that the respondents have justified production of draft (as against final) third party reports. I am not satisfied that their production is necessary at this stage, even assuming they may have some relevance (relevance was also assumed in *New Cap Reinsurance*). As this Court's Central Practice Note CPN-1 notes at para 10.6(d)(i), one of the factors that a discovery applicant must justify is that it is appropriate to make the order sought at the particular time. I consider that the appropriate course is for discovery to proceed in accordance with the formulation proffered by the applicants, so that a review of any of those documents that are produced for inspection may then be carried out. The respondents may then renew their call for discovery of drafts if there is a proper basis for doing so. They should also be in a position to better limit or describe the types of draft reports and correspondence they seek, so reducing the scope of the task to be undertaken by the applicants in isolating further documents.

62 Nothing in these reasons is intended to affect any claims that the applicants may have to limit inspection on the basis of legal professional privilege. That is a separate issue that may or may not need attention in due course.

Request 23(a) and (b) - Arbitration and insurance proceedings

Description

63 The respondents seek discovery of:

In relation to any dispute including arbitration or other proceedings between INPEX and any third parties (including but not limited to the JKC Entities) that relates to the alleged failure and subsequent rectification of I228:

(a) any documents filed or served by a party to that arbitration or other proceeding which are directly relevant to the alleged failure and subsequent rectification of I228 issues raised by the pleadings;

(b) any documents evidencing or comprising any decision or award of the arbitrator, judge or presiding member which are directly relevant to the alleged failure and subsequent rectification of I228 issues raised by the pleading; and

...

64 The applicants propose a different formulation:

In relation to any dispute including arbitration or other proceedings between INPEX and any third parties (including but not limited to the JKC Entities) that relates to the alleged failure and subsequent rectification of I228:

(a) for any resolved disputes:

(i) any documents filed or served by a party to that arbitration or other proceeding (excluding discovered documents) which are directly relevant to the alleged failure and subsequent rectification of I228 issues raised by the pleadings; and

(ii) any documents evidencing or comprising any decision or award of the arbitrator, judge or presiding member which are directly relevant to the alleged failure and subsequent rectification of I228 issues raised by the pleadings;

(b) for any ongoing or future disputes, any pleadings which are directly relevant to the alleged failure and subsequent rectification of I228 issues raised by the pleadings; and

...

Consideration

65 It appears from their submissions that the respondents consider the requested documents from other proceedings are relevant because they might contain admissions as to the applicants' knowledge, as to JKC's status as a concurrent wrongdoer, or as to other aspects of this proceeding. I note that the request falls generally within the section of the Redfern schedule that refers to 'alleged loss'.

66 The respondents did not refer to any authorities on the use that might be made of any such materials, such as authorities that address the limits on the use that might be made of evidence or findings in other proceedings; the limited weight that any admissions might have when purportedly deployed in separate proceedings; or the weight that might be given to documents such as witness statements or affidavits that have not been read or challenged.

67 However, whilst maintaining their challenge to the relevance of materials from third party proceedings, rather than resist the request, the applicants' position is that they are prepared to discover documents from *resolved* third party proceedings that are responsive to the categories 23(a) and (b), and responsive pleadings from ongoing and future third party proceedings. The applicants have already indicated that underlying relevant source documents will also be produced as part of the discovery process.

68 It should be noted that this category is to be viewed having regard to existing obligations on the applicants to discover other documents relevant to loss, as provided in the Redfern schedule. Further, the respondents already have the benefit of discovery made in the JKC proceeding. And as CPN-1 at para 10.9 notes, if an order for discovery has been made, the parties also have a continuing obligation to make discovery in accordance with r 20.20 of the *Federal Court Rules*.

69 At present, the respondents have not satisfied me that the discovery they seek, presumably on a rolling basis, of any future documents will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. Those documents may be the subject of confidentiality or other undertakings limiting their use and disclosure. Filing on the Court file does not necessarily give documents a particular evidentiary status. The proffered pleadings relating to ongoing and future matters should reveal more specifically the allegations made in them as to the failure and subsequent rectification of I228 and may open up for legitimate consideration the question of whether additional documents relating to those ongoing proceedings should be discovered in this proceeding. The potential remains to consider that question further

in due course by a renewed application and with closer consideration of any forensic relevance that identified documents may have. But I am not satisfied that discovery should be ordered at this time, other than in the terms proffered by the applicants.

ORDERS

70 The parties should, within 14 days, confer and supply draft short minutes of order giving effect to these reasons.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith.

Associate:

Dated: 26 April 2023

