FEDERAL COURT OF AUSTRALIA

JKC Australia LNG Pty Ltd v AkzoNobel NV (No 4) [2023] FCA 456

File number:	WAD 448 of 2017
Judgment of:	**BANKS-SMITH J**
Date of judgment:	12 May 2023
Catchwords:	**PRACTICE AND PROCEDURE** - discovery - settlement - applicant potentially obliged under conditional terms of settlement agreement with third party to make payment - applicant seeks damages and indemnity from respondents for its liability under the settlement agreement - whether settlement reasonable - whether documents relating to settlement discoverable
Legislation:	*Competition and Consumer Act 2010* (Cth) Schedule 2 (*Australian Consumer Law*) s 18, 236, 237, 243 *Federal Court of Australia Act 1976* (Cth) ss 37N, 37M *Federal Court Rules 2011* (Cth) rr 16.02, 20.14, 20.15
Cases cited:	*Alstom Power Ltd v Yokogawa Australia Pty Ltd* [2008] SASC 15 *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 3 - Privilege Claims)* [2021] FCA 1208 *JKC Australia LNG Pty Ltd v AkzoNobel NV* [2019] FCA 1032 *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 *PC Case Gear Pty Ltd v Instrat Insurance brokers Pty Ltd (in liq)* [2020] FCA 137 *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10 *Protec Pacific Pty Ltd v Steuler Services GmBH & Co KB* [2014] VSCA 338 *Rush & Tompkins Ltd v Greater London Council* [1988] 1 All ER 549 *Savage v Modern Mustering Pty Ltd* [2014] NTCA 6 *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; (1998) 192 CLR 603 *Wheelehan v City of Casey* [2012] VSC 10 *Yokogawa Australia Pty Ltd v Alstom Power Ltd* [2009] SASC 377

Division:	General Division
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National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	72
Date of hearing:	14 September 2022
Counsel for the Applicant:	Mr DT Miller SC with Mr MJ Smith
Solicitor for the Applicant:	Solomon Brothers
Counsel for the Respondents:	Mr PA Walker
Solicitor for the Respondents:	Clayton Utz

ORDERS

WAD 448 of 2017

BETWEEN:	**JKC AUSTRALIA LNG PTY LTD (ACN 154 383 409)** Applicant
AND:	**AKZONOBEL NV** First Respondent
	INTERNATIONAL PAINT LIMITED Second Respondent

ORDER MADE BY:	**BANKS-SMITH J**
DATE OF ORDER:	**12 MAY 2023**

THE COURT ORDERS THAT:

1. The applicant discover the documents described in the aide memoire filed 13 September 2022, adopting the alternative subcategory (d) included in that document.
2. Costs reserved.

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

REASONS FOR JUDGMENT

BANKS-SMITH J:

1 Relevant background to this application is provided in *JKC Australia LNG Pty Ltd v AkzoNobel NV* [2019] FCA 1032 and other interlocutory decisions in the proceeding.

2 Relevantly for present purposes, **INPEX** Operations Australia Pty Ltd entered into a contract (**EPC**) with **JKC** Australia LNG Pty Ltd for JKC to undertake certain engineering, procurement, supply, construction and commissioning for the Ichthys Onshore LNG **Project** in the Northern Territory.

3 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. JKC commenced this proceeding relating to the supply and use of I228 against **AkzoNobel** NV and **International Paint** Limited (**JKC proceeding**).

4 There are two important developments to acknowledge since the proceeding commenced. First, the pleadings have been amended to expand the nature of the respective claims and defences. Second, separate proceedings WAD 162 of 2021 were commenced in this Court by INPEX and **Ichthys** LNG Pty Ltd relating to the use of I228 against AkzoNobel, International Paint and Akzo Nobel Pty Limited (**INPEX proceeding**). Those respondents have brought a cross-claim in the INPEX proceeding against INPEX, Ichthys and JKC. I also note that there are ongoing related proceedings in the Western Australian Supreme Court.

5 The JKC proceeding and the INPEX proceeding are now being case managed together and the trials, listed for hearing during 2024, are to be heard together.

6 There has been mutual discovery in this proceeding by way of two lengthy Redfern schedules, with rulings made by the Court and published to the parties. Having regard to r 20.15 of the *Federal Court Rules 2011* (Cth), it was agreed that the criteria in r 20.14 apply to the discovery to be given by the parties.

7 The discovery process has led to there being (at present) only one outstanding matter for determination, and that is the scope of any discovery of documents relating to a settlement deed entered into between JKC and INPEX.

8 For the following reasons I have determined that discovery should be ordered.

The global settlement deed and the pleaded cases

9 JKC entered into a global settlement deed (**GSD**) with INPEX in October 2021.

10 The GSD was not before the Court on the application (an affidavit of Trafford Gaszik that attached a redacted version was not read and a suggestion at page 4 line 1 of the transcript that it was read is a transcription error). I was told that the reason that the affidavit was not read was confidentiality concerns linked to a related arbitration. Instead the parties proceeded on the basis of summaries of certain terms of both the pleadings and the GSD that were included in submissions. Those parts of the submissions were made the subject of a non-publication order at the time of the hearing. I am not persuaded that those orders should remain in place as the submissions speak only in generalities about the pleaded disputes between the parties and the existence of the disputes is well known and the subject of other published reasons. However, I will hear the parties separately as to this.

11 JKC pleads that it was misled or deceived by the respondents that I228 was a suitable product for use on the Project when in fact it was not. It says that but for the representations, it would not have permitted the use of I228. It pleads that it made certain warranties to INPEX under the EPC that the Project would be free of defects, and that because I228 failed, it breached those warranties. JKC pleads that as a result of those breaches, INPEX was entitled to remove the I228 and replace it with other products (referred to as the Complete Replacement Direction). JKC disputed the Complete Replacement Direction, and that dispute and other matters were sent to arbitration.

12 INPEX and JKC then entered into the GSD. According to the submissions, under the GSD, INPEX and JKC agreed to settle all disputes arising between them out of JKC's performance under the EPC on certain terms, and to pursue claims against others, including against certain insurers and the respondents. The submissions do not record whether the settlement was entered into with or without any admission of liability by the parties.

13 Under the GSD, JKC may in particular circumstances become liable to pay a significant amount to INPEX. In short, unless INPEX recovers a certain amount from its insurers or the respondents by March 2027, JKC must pay an amount to INPEX up to a specified maximum sum. It is not necessary to disclose the quantum of the amounts potentially payable by JKC under the GSD, or the sum of INPEX's claimed loss by reason of the degradation of I228, in

order to dispose of the legal issues in this application. But on any objective measure, JKC's potential exposure under the GSD is for a substantial amount, but that amount is said to be less than the potential liability it would have otherwise had to INPEX under the terms of the EPC.

14 JKC pleads in this proceeding (in its third further re-amended statement of claim) that if it becomes liable to pay INPEX under the GSD, then such liability is in respect of the repair of damaged I228 only; is for a sum less than the full amount required to repair and replace I228 and undertake remedial work; and arose as a result of the alleged misleading and deceptive conduct of the respondents in contravention of s 18 of the *Australian Consumer Law* (**ACL**).

15 JKC relies on the GSD in order to prove part of its claim for loss against the respondents. Any liability of JKC to INPEX under the GSD is one of the heads of loss relied upon for seeking compensation under s 236 of the ACL and for an indemnity under s 243 and s 237.

16 The respondents deny that the sum payable under the GSD arises as a result of their conduct and plead that the sum potentially payable by JKC under the GSD could not be only in respect of repairs flowing from the use of I228. They plead that the GSD provides that JKC and INPEX will pursue claims against insurers with respect to both 'Paint Non-conformances' (defined relevantly to mean non-conformance with the selection or use of I228) and non-conformances with respect to foam and wool insulation systems. Together these items are referred to as the 'P&I Non-conformances'. They plead that INPEX's proceedings against its insurers also concern issues relating to insulation on the Project. The respondents plead that proceedings to be pursued by JKC and INPEX under the GSD therefore extend beyond the issues relating to I228 to include issues relating to insulation on the Project. It is on that basis, they say, that any sum payable by JKC to INPEX under the GSD could not only be in respect of the damaged I228. The respondents also deny that the sum potentially payable under the GSD is a sum less than the liability that JKC would have had to INPEX in respect of INPEX's claimed loss.

17 The respondents also contend that JKC has not alleged that, or how, such payments constitute a reasonable settlement in respect of any liability JKC might have to INPEX arising from any misleading or deceptive conduct of the respondents.

18 In its reply, JKC pleads that the respondents have not alleged that JKC's liability under the GSD to the specified sum is an unreasonable settlement. Further, it pleads that but for the respondents' misleading or deceptive conduct, it would not have included I228 as a specified coating and INPEX would not have permitted its use on identified systems, so that JKC would

not have been exposed to liability to INPEX in respect of damage and degradation to I228 and the need to undertake remedial work.

19 Therefore, it is apparent that (at least) the following are in issue on the pleadings:

(a) whether JKC's potential liability to pay any sum to INPEX under the GSD arises from the respondents' conduct (causation);

(b) whether JKC's potential liability under the GSD to pay an amount to INPEX in the future is in respect of only the repair of damaged I228 or in respect of the broader claims that constitute the P&I Non-conformances (causation and quantification of loss, and an allocation argument that may be relevant to mitigation); and

(c) whether any such liability is less than the full amount for which JKC may have been liable to INPEX under the EPC (quantification of loss).

20 Further, both parties refer to the absence in the other's pleading of an express assertion that the settlement sum is respectively reasonable or unreasonable.

21 The relevance of the documents sought is to be addressed against that pleading framework.

The category

22 The respondents seek discovery of the following category of documents:

> All documents relied upon or recording matters relied upon or taken into account by [JKC] in considering, and ultimately agreeing to, the settlement recorded in the GSD, including but not limited to:
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> (a) legal advice received concerning the settlement recorded in the GSD;
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> (b) legal advice received on [JKC's] contractual warranties;
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> (c) expert opinions on the fitness for purpose of I228;
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> (d) documents in relation to the merit or quantum of all disputes referred to in the GSD; and
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> (e) records and forward estimates on the cost of remediation.

23 In the alternative to subcategory (d), they seek documents summarising or analysing the merit or quantum of all disputes referred to in the GSD.

The competing positions

24 The respondents submitted that the documents sought are relevant and should be discovered for two reasons. First, it is said that causation is in issue - that JKC must establish that the sum

it has agreed to pay was a loss caused by the respondents' conduct. They assert that JKC must prove that the settlement was a reasonable response to the alleged wrongful act.

25 Second, they assert that the settlement documents are relevant to the quantification of loss, in that they are relevant to whether the settlement responds to issues relating to I228 or responds more broadly to the P&I Non-conformance or other claims.

26 JKC accepts (para 4 written submissions) that ultimately it will need to establish that the settlement it reached with INPEX was reasonable. However, it asserted that it will seek to prove reasonableness without regard to or reliance on any legal advice it received, and so submitted that the documents sought by JKC are irrelevant to the issue in dispute and not discoverable.

Current argument is not about waiver

27 JKC's objection to discovery is primarily one of lack of relevance. It was not founded on the desire to protect without prejudice or legal professional privilege, although it was foreshadowed that such a claim was likely in the event that discovery of certain settlement documents was ordered: see generally *Rush & Tompkins Ltd v Greater London Council* [1988] 1 All ER 549; *Yokogawa Australia Pty Ltd v Alstom Power Ltd* [2009] SASC 377; and *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 3 - Privilege Claims)* [2021] FCA 1208.

Principles as to third party settlements

28 It is not uncommon for a plaintiff to be exposed to liability to a third party as a result of the unlawful conduct of the defendant. Where that occurs, the plaintiff may decide to settle a claim brought against it by the third party and then seek to recover the settlement sum from the defendant. However, the agreed settlement sum does not determine the obligations between the plaintiff and the defendant. That is determined by ordinary principles of causation and remoteness, and, where appropriate, loss. In order to recover the claimed sum from the defendant, the plaintiff must prove (amongst other things) that the settlement was reasonable: *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; (1998) 192 CLR 603. As Hayne J noted in *Unity* (at [134]), there is no injustice in leaving the wrongdoer defendant to bear the consequences of the plaintiff's decisions made in response to the harm they have incurred - 'so long as those decisions are reasonable. Reasonableness informs much of the law of contract and, in particular, the assessment of damages for breach'.

29 In *PC Case Gear Pty Ltd v Instrat Insurance brokers Pty Ltd (in liq)* [2020] FCA 137, Anderson J gave the following examples of why reasonableness is relevant to those elements of a cause of action:

(a) as to causation - for example, a settlement sum may be so exorbitant that it might be characterised as the result of the plaintiff's own conduct in negotiating the sum with the third party, rather than as a result of the defendant's breach (at [147]);

(b) as to remoteness - the possibility of the plaintiff paying the amount to the third party may no longer be considered to arise naturally from the breach (at [148]); and

(c) as to quantification of loss - it may be unreasonable for a plaintiff to accept a liability to pay a sum to a third party beyond an amount it should have paid, so that it has not mitigated its loss (at [149]-[150]) (and I add that as to issues of onus in this context, see *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10).

30 Accordingly, reasonableness of a settlement is an essential part of the proof of the claim. The reasonableness is a material fact which must be proven, and ought to be pleaded pursuant to r 16.02 (d) of the *Federal Court Rules*: *Wheelehan v City of Casey* [2012] VSC 10 at [29].

31 Guidance as to how reasonableness of a settlement is to be assessed was provided by the High Court in *Unity*. Reasonableness of the settlement must be judged objectively, not subjectively: at [6] (Brennan CJ), [129] (Hayne J). Reasonableness of the settlement must be judged by reference to material available to the parties at the time of the compromise: at [7] (Brennan CJ), [130] (Hayne J). This will require consideration of whether the party that later seeks to say the settlement was reasonable had made sufficient inquiries and had sufficient information available to it to warrant reaching a compromise: at [131] (Hayne J). There is a range of answers to the question of 'for what amount was it reasonable to compromise this claim': at [132] (Hayne J). Characterising a settlement as reasonable or not will almost always require consideration of the chances of the parties succeeding in their respective claims or defences. The prediction of likely outcomes must always be imperfect and imprecise: at [132] (Hayne J).

32 *Unity* was a case where there was uncontradicted evidence given by a director about the nature of legal advice that had been received that was relevant to the question of reasonableness. The lawyer did not give evidence. The primary judge found that the settlement was reasonable,

despite the absence of evidence from the lawyers. Once reasonableness was established, causation was established. The difference between the full indemnity that might have been paid to the insured and the settlement sum accepted by the insured resulted from the broker's breach. On the facts of that case, the primary judge was satisfied as to reasonableness, a finding that was upheld by the Full Court and then by the High Court, despite the evidence being 'exiguous': at [146] (Hayne J).

33 Each of the majority judges made observations about the relevance of legal advice in assessing the reasonableness of a settlement, confirming that it may be relevant where the settlement is made on legal advice, but that evidence of the advice is not proof in itself of the reasonableness of the settlement. For example, Brennan CJ said:

> [6] … Evidence of the advice which the insured received to induce it to accept the settlement is not proof in itself of the reasonableness of the settlement advised. The factors which lead to the giving of the advice are factors relevant to the reasonableness of the settlement but the only relevance of advice given by the insured's legal advisers to settle is that it tends to negative the hypothesis that the insured acted unreasonably in accepting the settlement.

34 As this extract indicates, there is a distinction between assessing whether a settlement was objectively reasonable and whether a person has acted reasonably or unreasonably in accepting a settlement. This application concerns the first scenario, and the statements in *Unity* must be read with that in mind. But observations on the relevance of legal advice in *Unity* remain useful because the testing of objective reasonableness may include consideration of assessments of potential liability at the time, including assessments of the available evidence, predictions and analyses, and legal representatives may have been involved in such processes.

35 For example, Hayne J said:

> [135] … It may be that calling legal advisers to give evidence about the settlement may present some question about legal professional privilege but I do not accept that the evidence of the advisers would be irrelevant or inadmissible. Often it is the advisers who will be best placed to give evidence about the matters that were taken into account in deciding to settle the case and it is they who may well be able to deal with such matters as what investigations had been made or why particular investigations had not been pursued. Sometimes there may be questions about the course of negotiations: why was this offer accepted; why was no counter offer made? Sometimes that course of negotiations may reveal why a settlement was reached when it was reached and that, in turn, may bear upon whether it was reasonable. Again, it will be those who conducted the negotiations, often the legal advisers, who will be able to speak of these matters.

36 The relevance of predictions about the outcome of litigation and known circumstances has on occasion led to a misapprehension that legal advice at the time of entry into a settlement deed must be disclosed if reasonableness is in issue: *Savage v Modern Mustering Pty Ltd* [2014] NTCA 6 at [21]-[23]; and *Protec Pacific Pty Ltd v Steuler Services GmBH & Co KB* [2014] VSCA 338 at [802]. However, a plaintiff (by which I refer to the party seeking to rely on the settlement) is not obliged to rely on legal advice it received at the time of negotiating or agreeing terms of settlement in order to establish its reasonableness. Forensically, reliance upon it may be important for the plaintiff. If they seek to rely upon it, then they may waive legal professional privilege in the advice: *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [29]. But it is open to a plaintiff to seek to establish reasonableness without reference to its legal advice.

37 It follows that a defendant cannot, simply by putting reasonableness in issue in its pleading, compel the production of advice received by the plaintiff that is otherwise privileged. There will remain a question as to whether the plaintiff seeks to rely on the advice in a manner that would amount to a waiver of privilege.

38 The Full Court in *Yokogawa* (Duggan, Sulan and Kourakis JJ) addressed some of these issues. The plaintiff (Alstom) was a party to a contract for the refurbishing of a power station. When progress under the contract was slow, Alstom entered into a settlement agreement with the operator (FPP), but blamed a joint venture subcontractor (Yokogawa) for the delay and the consequent need for it to negotiate the settlement with the operator. There were two negotiated settlements between Alstom and FPP. The primary judge ordered discovery of documents, including those surrounding both settlements, and including advice: *Alstom Power Ltd v Yokogawa Australia Pty Ltd* [2008] SASC 15.

39 The primary judge later upheld a claim of privilege by Alstom and refused to order production of documents discovered by Alstom in connection to the settlements. Yokogawa appealed this decision on privilege.

40 It was apparent on the pleadings that Alstom put reasonableness in issue: it pleaded that in the circumstances its actions in resolving potential further dispute with FPP were prudent and reasonable. The pleading raised the question of the objective reasonableness of the settlement and not the state of mind of Alstom (at [23]). There was no reference in the pleadings to legal advice. Alstom conceded that its intention was to establish reasonableness of the settlement with FPP, but said that it intended to do so by reference to the objective circumstances of the

settlements and said that no reliance would be placed on any legal advice which Alstom may have received in order to prove reasonableness (at [26]).

41 Yokogawa contended that as Alstom contended the settlements were reasonable, it followed that any legal advice which Alstom may have been given during the settlement process was relevant to the issues at trial. It asserted that Alstom impliedly waived privilege in respect of advice and without prejudice communications.

42 In the lead judgment, Duggan J held that on the case as pleaded there was no inconsistency in Alstom's conduct that amounted to a waiver of legal professional privilege. This was in contrast to the conduct of the insured in *Unity*, which (in effect) waived privilege by referring to legal advice that had been given to it in order to establish reasonableness.

43 Both Sulan and Kourakis JJ agreed that the appeal was to be dismissed for the reasons given by Duggan J.

44 At this point it is important to recognise that *Yokogawa* was about the potential implied waiver of privilege by putting reasonableness in issue, and was not a case about discovery. The Court did not comment on or criticise the decision of the primary judge to order discovery of documents relating to the settlement, including legal advice.

45 I will return to one aspect of the decision in *Yokogawa* below.

46 Another case referred to by the parties is *Protec*. In summary, and utilising the abbreviations in the reasons for convenience, the primary judge found that the defendant (Steuler), made a misleading and deceptive representation to the plaintiff (WMC) and also to Protec, contrary to s 52 of the *Trade Practices Act 1974* (Cth), that a high density polyethylene product manufactured by Steuler was suitable for use as a long term liner at the Olympic Dam Mine. Protec installed the liner. Ultimately, despite findings that the representations were made and were misleading or deceptive, the claim failed because WMC was unable to prove loss due to, amongst other things, intervening events. Separately, WMC and Protec had reached a compromise whereby Protec agreed to pay it $15 million. Protec failed to recover the $15 million from Steuler as it failed to establish the settlement was reasonable.

47 The Court of Appeal dismissed an appeal from the finding that the settlement was unreasonable. Notably, both Protec and Steuler had pleaded why the settlement amount was said to be reasonable or unreasonable respectively (at [779]-[780]). Legal advice was not one of the matters relied upon by Protec.

48 The primary judge had suggested in earlier reasons that settling for $15 million a claim said to total potentially $45.8 million might be a persuasive argument that the settlement was reasonable. However, in the final reasons determining this issue his Honour concluded that Protec had not established that the settlement amount was reasonable. The Court of Appeal found that because there was no evidence that Protec relied upon any legal advice in entering into the settlement, the judge had overstated the need for one of Protec's lawyers to give evidence about the settlement amount, but found that regardless, his Honour's conclusion on reasonableness was not wrong.

49 In upholding the finding, the Court of Appeal provided useful guidance as to the types of evidence that Protec should have evinced, particularly where there were some unusual circumstances, including that there was no indication as to how the settlement amount of $15 million was arrived at. Nor was there evidence that the settlement resulted from any recommendation or specific legal advice from Protec's legal advisers. There was also a question as to when and whether payment was to be made. The Court noted:

> [805] In these circumstances, it was incumbent upon Protec to adduce evidence which explained how the settlement amount was reasonable having regard to an assessment of Protec's potential legal liability to WMC on the pleadings that were current and the evidence that was known at the time of the settlement. No such explanation was provided. There was no evidence that Protec had analysed the causes of action upon which WMC relied against it, the defences available to Protec in relation to them and the prospects of WMC succeeding based on the applicable legal principles and the evidence as it was known at that time. There was also no evidence that Protec had analysed the quantum claimed by WMC and the amount of any damages to which WMC would be entitled if it established liability on the part of Protec.
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> …
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> [818] While many factors are relevant to the question of whether a settlement amount is legally reasonable, one factor is fundamental and must always be present. That factor is that the settlement amount is informed by an assessment of the relevant party's potential legal liability to the other party on the pleadings that were current and the evidence that was known at the time of the settlement. As discussed above, a settlement between A and B for an amount which is commercially attractive but is not based on the legal merits of their cases cannot constitute a reasonable settlement amount for the purpose of determining issues of causation, remoteness and quantum in a proceeding brought by B against C which seeks to impose on C liability for the settlement amount.
>
> (footnotes omitted)

50 *Protec* is not a discovery case, but the reasons shed light on the broad range of evidence likely to be relevant to the reasonableness question at trial, even where legal advice is not relied upon.

Proof of reasonableness in this case

51 In this case, JKC has not pleaded the reasonableness of the settlement. The respective purported pleadings on reasonableness (see [17]-[18] above) do not assist in this regard. Nor has JKC provided any particulars that might inform such a plea. Nevertheless, as I have noted, JKC accepts that it will be obliged to establish that the settlement it reached with INPEX was reasonable.

52 During the hearing senior counsel for JKC said that it had given itself an onus in terms of establishing the objective reasonableness of the settlement by way of establishing certain facts. Those facts were said to be that JKC relied on its liability to INPEX under the EPC for breach of warranties; that such liability arose because of the conduct of the respondents; that it came to a settlement that involved a cap that may be payable in certain circumstances; and that the capped liability under the GSD is less than the amount for which it would otherwise have been liable to INPEX. JKC says that this manner by which it elects to establish reasonableness does not involve reliance on legal advice or the state of mind of any person, so that any such advice is irrelevant and is not discoverable.

Consideration

53 There are a number of reasons that have informed my decision to order discovery.

54 First, I have proceeded on the basis that reasonableness of the settlement under the GSD is in issue. Although JKC has not pleaded it, it has accepted by its submissions that it must establish that the settlement is reasonable if it relies on it as a head of damage or seeks an indemnity from the respondents in this proceeding.

55 Second, I accept that the reasonableness of the settlement falls to be determined objectively. I also accept that JKC may elect to prove reasonableness without tendering or relying upon legal advice it may have received. That is its forensic choice. However, I do not accept that such a choice dictates that the settlement documents are not discoverable. It is important to differentiate between the means by which a party may seek to prove a particular fact and the question of whether documents relevant to the issue are discoverable. Generally a party cannot confine the ambit of discovery by voluntarily limiting itself to the means by which that party says it intends to prove certain facts. Under r 20.14 of the *Federal Court Rules*, the parties are obliged to discover relevant documents that might adversely affect their own case, and not only

those on which they rely. Putting aside privilege, the opposing party is entitled to have access to documents in the control of the other party that are favourable to the opposing party's case.

56 It is possible that the facts surrounding a settlement may be simple so that it is apparent that there is no context in which legal advice is relevant to the pleaded issues. In my view, this is not such a case.

57 Having regard to the pleaded case, it is readily apparent that there are issues of causation and the assessment of loss that arise from the circumstances of the GSD, as I have summarised above at [19]. In particular, questions arise on the pleadings as to the allocation of the potential sum that might be paid by JKC to INPEX to the liabilities related to I228 or to the broader P&I Non-conformances, or to other losses that may or may not be attributable to the conduct of the respondents, and whether a different allocation may have been negotiated. Questions arise as to the manner in which the quantum was calculated having regard to the timing of completion, or associated risks, of the other proceedings being undertaken against the insurers and the respondents. In saying this I do not purport to pre-empt how those matters might be addressed as the proceedings continue. However, I am not persuaded for the purposes of this application that consideration of the reasonableness of the prospective settlement obligation, conditioned as it is on factors such as the outcome and timing of other litigation, would be limited to drawing an inference from (primarily) the terms of the EPC and the GSD. This is not a simple case where a settlement sum on its face is unarguably less than the liability compromised by the payment, and where the payment is unarguably apportioned solely to that liability.

58 The assessment of whether an agreement is objectively reasonable opens up consideration of the decision making process. The decision making process that is opened up in this case inevitably gives rise to a number of propositions on the part of JKC that the respondents are entitled to test. For example, they are entitled to test whether the settlement was based on any or any proper or reasonable analysis by JKC as to its liability and the quantum of its liability. They are entitled to test whether objectively a more favourable settlement may have been secured. And that may include testing whether or not it had legal advice on those matters. That documents might have been provided for the purpose of a subjective assessment does not mean that they can never be relevant to an objective assessment.

59 The terms of the EPC are unlikely to answer all relevant questions as to quantum. As is apparent from the Court of Appeal's observations in *Protec* in the passages I have extracted

above, a broad range of matters might be relevant to the question of reasonableness, even where the plaintiff who relied on the settlement has pleaded the only matters it purports to rely upon.

60 Having regard to those parts of the GSD that have been disclosed, the disputes revealed by the pleaded case, the complexities of the interrelated disputes and the elements of causation and damage assessment that are in issue, I consider that discovery relating to the reasonableness assessment process is justified.

61 Third, the authorities to which I was referred do not go so far as to say that if the plaintiff seeking to rely upon the settlement asserts that it did not rely on legal advice in negotiating or entering into the settlement, then documents such as legal advice are not discoverable. As mentioned above, discovery of advice was ordered by the primary judge in *Yokogawa*. The Court in *Wheelehan v City of Casey* required the City of Casey to plead or particularise the manner in which it put its case on reasonableness before it would determine the question of discovery and privilege, indicating that it considered that defining that part of its claim would be critical to those issues: at [31], [41]. But it is not possible to read into that approach an indication that discovery would be limited to the particular matters that the City of Casey might then particularise for its case on reasonableness. Again, *Protec* was not a case about discovery. I note that in *Savage*, orders for discovery were set aside on appeal but in circumstances where the Master had relied upon and misapplied *Unity* and assumed an implied waiver. The substantive argument of the Court was as to waiver: at [18].

62 Fourth, I acknowledge that JKC placed significant weight in its submissions on the reasons of Kourakis J in *Yokogawa*, being his Honour's additional observations 'on the question of waiver'. According to Kourakis J, it was no part of the first of two contract cases formulated by Alstom that the settlement was reasonable, and to that extent legal advice 'was not relevant'. In summary, Kourakis J reasoned that if Alstom were found liable to FPP for an amount that exceeded the settlement sum, then Alstom would be entitled to damages for the amount of the settlement sum. The reduction in liability to FPP reflected in the settlement between Alstom and FPP would only assist Yokogawa. However, his Honour accepted that even on that argument there may be room for a mitigation argument, as potentially another deal may have been negotiated. Further, his Honour assumed that privileged communications may be 'very relevant to the issues joined' over the contractual breaches, but said that Yokogawa could not plead a case so as to unilaterally deny Alstom's without prejudice or legal professional privilege (consistent with Duggan J's reasons, which his Honour also endorsed).

63 JKC submitted that the manner in which it puts its case against the respondents was analogous, and relied on his Honour's comments to the effect that 'legal advice was not relevant'. However, that submission does not take into account that his Honour was addressing waiver (and so whether Alstom sought to use any privileged documents). His Honour accepted that privileged documents may still be relevant (at [126]).

64 As to Alstom's second formulation, which focused on the compromise of the risk of contractual liability and the fact that causation and remoteness were therefore in play, his Honour relied on the objective nature of the assessment of reasonableness in assessing that on the case put by Alstom, the legal advice was irrelevant. Again, it is to be recalled that this was said in the context of whether on Alstom's case there had been any waiver of privilege. His Honour recognised that a pleaded case that gave rise to loss assessment and mitigation issues might lead to communications being relevant to such a plea, and that the defendant could not rob the plaintiff of privileges by its plea (fn 86).

65 I acknowledge that Kourakis J took a narrow view of the relevance of legal advice, but did so expressly in the context of waiver, the particular case pleaded by Alstom and where discovery had already been ordered. Further, his Honour's reasons contemplated the relevance of advice where elements such as loss and mitigation were in issue. There is no doubt in this proceeding that the respondents may yet be faced with a difficult task if they are to assert a waiver argument against JKC. That remains to be seen. However, I do not consider that Kourakis J's reasons direct a narrow view of JKC's discovery obligations in this case, particularly having regard to the matters referred to at [55]-[60] above.

66 Finally, I return to the scope of the proposed subcategories, because at least in part JKC also asserts the discovery request should be refused on the basis that compliance would be oppressive.

67 As to subcategory (c), JKC contends that the documents within this category have already been produced. That may be so, but in litigation of this complexity, it is not for the respondents to unilaterally determine, from documents that may have already been discovered, which were relied upon with respect to the entry into the GSD. JKC should be able to meet its discovery obligations and its obligations under s 37N of the *Federal Court of Australia Act 1976* (Cth) by directing the respondents to particular experts' reports within the discovered documents, and that task can hardly be said to be oppressive.

68 As to subcategory (d), I would contemplate only the revised category proposed by the respondents. It requires JKC to discover documents relied upon with respect to entry into the GSD that summarise or analyse the merit or quantum of all disputes referred to in the GSD. I understand from the submissions that 'disputes' in the GSD is defined broadly. However it is the settlement of disputes as pleaded at para 55 of the third further amended statement of claim that is in issue. The respondents submitted that they have confined the category by the qualification that they seek only documents relied upon or recording matters relied upon or taken into account in considering and ultimately agreeing to the settlement recorded in the GSD. On the basis that only summaries or analyses of the merits or quantum of the disputes referred to at para 55 rather than source documents are sought, I do not consider compliance with the category to be oppressive and there is no evidence to that effect.

69 As to subcategory (e), JKC submitted that all such documents will be discovered in the course of complying with other categories in the Redfern schedules. On that basis, I do not consider any opposition based on oppression can be sustained, particularly in the absence of any relevant evidence to that effect. Similarly to responding to subcategory (c), JKC should be able to meet its discovery and case management obligations under s 37N of the *Federal Court of Australia Act* by directing the respondents to the relevant documents that meet the description of the subcategory within the discovered documents.

Practical matters

70 By these reason I do not purport to address issues relating to any alleged waiver of privilege by JKC. Experience suggests that claims for privilege will be maintained and it may well be that the respondents will not be permitted to inspect documents that are discoverable. This raises two matters. Before any privilege disputes are determined (should this arise) I would require JKC to plead and particularise its case on reasonableness to confirm the matters that it has raised in submissions but to which it has not otherwise committed. The respondents should then amend their defence to respond. The parameters of the pleading will inform any privilege dispute. Second, I expect the parties to confer as to how the discovery process might be undertaken efficiently, having regard to s 37M and s 37N of the *Federal Court of Australia Act* and the likelihood of privilege disputes and limits on inspection.

Orders

71 There will be orders for discovery accordingly.

Costs

72 As the parties did not address costs, I will formally reserve the question of costs and hear the parties as appropriate.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith.

Associate:

Dated: 12 May 2023