

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2017 00145

ALPHINGTON DEVELOPMENTS PTY LTD

Plaintiff

v

AMCOR LIMITED

Defendant

JUDGE: HARGRAVE J
WHERE HELD: Melbourne
DATE OF HEARING: 4 October 2017
DATE OF RULING: 5 October 2017
CASE MAY BE CITED AS: Alphington Developments Pty Ltd v Amcor Limited
MEDIUM NEUTRAL CITATION: [2017] VSC 610

PRACTICE AND PROCEDURE - Court appointed expert - When appropriate - Form of directions to ensure appropriate range of expert opinion - Application granted - *Civil Procedure Act 2010*, ss 65M, 65O.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr D V Aghion with Ms G M Douglas	Kalus Kenny Intalex
For the Defendant	Mr J W K Burnside QC with Dr O Bigos	Gilbert + Tobin

HIS HONOUR:

1 These reasons are given orally, following argument yesterday. I do not intend to set out the relevant factual context, which is well-known to the parties. I will state my reasons in the language of the argument which occurred yesterday and in the written submissions.

2 Alphington Developments (**Glenvill**) applies by summons for orders appointing a special referee to determine technical questions arising out of eight disputed UC notices. In argument, the parties accepted that, if a referral was to be made to an expert concerning those or similar questions, a Court appointed expert appointed under s 65M of the *Civil Procedure Act 2010* may be the more appropriate course. More of that later. For convenience, references in these reasons to ‘the expert’ apply to either a special referee or a Court appointed expert unless the context otherwise requires.

3 Amcor opposes the making of any referral order at this time. Amcor’s opposition may be summarised as follows:

- (1) There are threshold questions which ought first be determined by the Court.
- (2) The proposed questions involve legal issues, and not only technical issues.
- (3) General discovery should first be completed.

(1) Should the threshold questions be determined first?

4 Amcor relies principally on the contention that the Court should first determine, by way of a trial of preliminary questions, the identity of the applicable Master Plan at the time of each of the eight UC notices at issue.

5 Amcor contends that the prior determination of the applicable Master Plan at each relevant date will give certainty to the expert’s task and that, otherwise, that task will be ‘unworkable’ and the costs for the parties would ‘exponentially increase’.

6 Moreover, Amcor contends that the intricacies of each varied Master Plans which are

alleged, and the impact of those varied plans on the remediation requirements of the contract, are not known to it 'in any definitive detail'.

7 I will deal first with the last point. I do not accept that Amcor, or the expert, will have any difficulty in knowing the content of each of the allegedly varied plans as put forward by Glenvill at relevant times. The relevant amended versions are in the Application Book. They appear to be straightforward enough and involve development or refinement of the original Master Plan and each previous amended plan. No particular complexity in understanding the content or effect of the various versions was identified in argument.

8 Nor do I accept that an expert should not be appointed on grounds of unworkability or high cost. The proposed questions can each apply to either version of the Master Plan which is relevant at each applicable date. Indeed, I see no reason why a suitably qualified expert should not consider each variation which is capable of application at each of the eight relevant dates.

9 I do not accept that the possibility of increased complexity and cost, which was identified in concept only, is a good reason to refuse to refer the proposed questions to an expert when, as I think, it is otherwise appropriate to refer the questions in order to further the overarching purpose under the *Civil Procedure Act*. There is no proportionality issue raised as to costs or complexity. Indeed, Amcor argues for a much more costly and complex regime than that proposed by the plaintiff.

10 In any event, an appeal is possible in every case. If a trial judge's finding as to the applicable Master Plan at any relevant time is set aside on appeal, it would be necessary to remit the questions to the expert for reconsideration if he or she has not already considered and determined the proposed questions on the basis of the alternative Master Plans which may be applicable. Such a result would be more costly, inefficient and inconvenient for the parties than if the alternatives were considered in the first instance.

11 Further, the referral and answers to the questions on alternative bases will likely

assist the Court and the parties to understand the grounds of objection to the UC notices and, on that basis, may promote a compromise of the proceeding, some issues in the proceeding, or at least narrow some issues in the proceeding – thus furthering the overarching purpose.

- 12 In this regard, I note that clause 11.5 does not require Amcor to give any grounds for objecting to a UC notice. Amcor has not done so in its defence. Clause 11.5 provides only that the three issues stated in clause 11.5(c) will be resolved – either by the Court or by an expert, depending on the proper interpretation of an agreement reached in correspondence to dispense with the contractual expert determination procedure in the now deleted clause 18.

(2) Do the proposed questions involve legal issues?

- 13 Amcor’s contention that the proposed questions will involve legal issues, in addition to technical issues, was not pressed in oral argument. The only legal issue identified was that of the legal requirements of reasonableness arising under clause 11.2(b) and elsewhere. Clause 11.2 relates to the question in clause 11.5(c)(i) as to what adjustments, if any, Glenvill should make to the Master Plan to mitigate the effect of the unidentified contamination. In my opinion, that is an expert question in all the circumstances, not a legal one. In any event, should any presently unidentified legal issue arise in the course of the expert preparing his or her report, the expert will have the power to approach the Court for guidance.

(3) Is general discovery a necessary precondition to a referral?

- 14 I turn to consider Amcor’s contention that there should be general discovery before any referral order is made. I do not accept that contention. First, in any event, Glenvill has said that it will continue its efforts to complete coding of all its discoverable documents and will be in a position to make general discovery by mid-November. The coded documents will be both subject matter and text searchable and available to Amcor from that time. This will enable Amcor to put such documents as it wishes before the expert as part of its submissions. I will make

general discovery orders providing for mutual discovery by 15 November. The timing of discovery may impact on the timing of directions concerning the expert report process.

15 Second, the expert will, in any event, be given the power to require the parties to produce such documents as he or she considers are necessary to answer the proposed questions. If any party objects to production, and the expert considers the documents are sufficiently relevant, there will be power for the expert to approach the Court.

16 If it later transpires that a document which would likely have affected the expert's report has not been made available, that issue can be ventilated at the time of the application to adopt the report or to challenge it. As I remarked in argument, that time will be at the trial of all other issues in the proceeding.

17 I will accordingly make orders for the appointment of an expert to report on the technical questions. In my opinion, an expert appointment under s 65M of the *Civil Procedure Act* is the most appropriate course to adopt. My reasons follow.

18 First, the contract is structured in a way which, in the absence of agreement between the parties, an objection by Amcor to a UC notice will, until the issues contained in clause 11.5(c) are resolved, prevent continued Remediation Works. In circumstances where the contract price must be paid in full by 15 December 2017, it is apparent that the parties understood the resolution process under clause 11.5(c) would be undertaken promptly, so as to enable the Remediation Works to continue.

19 That apparent intention is not, in my opinion, ousted by the fact that the parties have agreed to replace expert resolution in accordance with the now deleted clause 18 with resolution by the Court. The commercial imperative to resolve the issues promptly remains. In the meantime, Glenvill has borne the remediation costs of unidentified contamination for over a year and, with consent of Amcor, is continuing to incur such costs, notwithstanding the fact that the clause 11.5(c) questions remain unresolved in respect of the eight UC notices.

- 20 Second, and further to the first reason, I do not accept that a special reference attended by all of the procedures suggested by Amcor in its proposed minutes of order is necessary in all the circumstances, including where neither the report of a special referee nor the report of a Court appointed expert under s 65M of the *Civil Procedure Act* will be determinative.
- 21 The report of a special referee is subject to adoption by the Court, in whole or in part, after hearing argument from the parties. The relevant principles were stated by the Court of Appeal in *Wenco Industrial Pty Ltd v WW Industries Pty Ltd*.¹
- 22 A Court appointed expert's report under s 65M of the *Civil Procedure Act* may be challenged by leave of the Court under s 65O(1). In considering whether or not to grant leave, the Court is required to consider all relevant considerations,² and must consider certain matters when a challenge is made, including whether there is contrary expert opinion to that contained in the report,³ whether any other expert witness knows of matters which are not known by the Court appointed expert which may be material to deciding the relevant issue,⁴ and whether allowing additional evidence would be disproportionate to the complexity of the relevant issue and the amount in dispute.⁵
- 23 In my opinion, there is no disadvantage to a party wishing to challenge a Court appointed expert's report, as opposed to the right to make submissions as to whether or not a special referee's report should be adopted. In each case, the Court has a broad discretion which is guided or limited by certain factors.
- 24 Third, s 65M(3) requires the Court to consider certain matters before appointing a Court appointed expert. I am satisfied that the costs of such an appointment in this case would not be disproportionate to the complexity and importance of the issues

¹ (2009) 25 VR 119, 126-7 [17].

² Section 65O(2)(e).

³ Section 65O(2)(c).

⁴ Section 65O(2)(d).

⁵ Section 65O(2)(b).

in dispute or to the amount in dispute.⁶ I am also satisfied that an appropriately qualified expert can be chosen,⁷ that there is a likelihood that the appointment will expedite a trial of the proceeding,⁸ or at least not delay it. I am also satisfied that, with appropriate directions in the order appointing the expert, the Court will have a range of expert opinion.⁹ To that end, I will make directions requiring that:

- (1) each of the parties provide the expert with an expert report on the questions which complies with O 44 of the *Supreme Court (General Civil Procedure) Rules 2015*, for consideration by the Court appointed expert;
- (2) the Court appointed expert must confer with the experts who provide such reports (in the absence of any representative of the parties) and endeavour to reach agreement between him or her on the one hand and the experts appointed by the parties on the other on the relevant issues;
- (3) the report of the Court appointed expert must state the areas of agreement between all experts and the areas of disagreement, and set out the reasons for disagreement; and
- (4) the Court appointed expert report must then resolve any areas of disagreement in his or her report to the Court.

25 A report prepared by this method will incorporate a range of expert opinions. Further, the report will be subject to the safeguard provided by s 65O of the *Civil Procedure Act*, in circumstances where the Court appointed expert's report will itself refer to any expert opinion which is different to the Court appointed expert's opinion and will give reasons for the differences.

26 Further, I will make directions for the parties to file written submissions to be provided to the Court appointed expert and make orders giving the expert the

⁶ Section 65M(3)(a).

⁷ Section 65M(3)(b).

⁸ Section 65M(3)(d).

⁹ Section 65M(3)(c).

power to require any party to produce a document which he or she thinks necessary to complete his or her report. The expert will, of course, have liberty to apply if there are any difficulties in obtaining documents, or for any other reason. I will hear the parties as to any further directions to be given to the Court appointed expert, including as to the documents which will be provided to the expert in the first instance.

27 The following issues remain for consideration:

- (1) What questions should be referred to the Court appointed expert for report?
- (2) Who should be appointed as the Court appointed expert?

28 I will hear the parties as to the questions and, if they cannot agree, as to the identity of the Court appointed expert.
