SUPREME COURT OF QUEENSLAND

CITATION:	*McConnell Dowell Constructors (Aust) Pty Ltd v Cardno (Qld) Pty Ltd & Anor* [2019] QSC 320
PARTIES:	**MCCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD** ACN 002 929 017 (plaintiff) **v** **CARDNO (QLD) PTY LTD** ACN 051 074 992 (first defendant) **ARUP PTY LTD** ACN 000 966 165 (second defendant)
FILE NO:	BS No 7046 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 and 11 June 2019
JUDGE:	Bradley J

ORDER:

1. **Each of the parties is to prepare a draft order with directions for disclosure and an exchange of witness summaries for the parts of the plaintiff's claim in paragraphs 35, 35A, 53, 58, 121, 140 and 145 of the Fourth Amended Statement of Claim filed 1 March 2019 (FASC) dealing with the alleged effect of the respective pre-bid work of the first defendant and the second defendant on the price at which the plaintiff bid for the contract to design and construct the Gold Coast Light Rail project.**
2. **The parties are to confer about their respective draft orders on or before 7 February 2020.**
3. **The parties are to submit to the Court an agreed order or, in the absence of agreement, each party's draft order by 21 February 2020.**
4. **Each of the parties is to prepare a draft order with directions for the determination by one or more**

referees to be appointed by the Court of the plaintiff's claims in paragraphs 68 to 99 and 184 to 202 of the FASC and the counterclaims of the first and the second defendant.

5. **The parties are to confer about their respective draft orders on or before 7 February 2020.**

6. **The parties are to submit to the Court an agreed order or, in the absence of agreement, each party's draft order by 21 February 2020.**

7. **The application filed 17 May 2019 (court document 99) is otherwise dismissed.**

8. **Costs in the cause.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CASE MANAGEMENT – GENERALLY – TRIAL – MODE OF TRIAL – ASSESSOR, SPECIAL REFEREE ETC – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – where the plaintiff has brought claims in excess of $300 million against the first and second defendants in relation to work each undertook on the design of elements of the Gold Coast Light Rail project, which the plaintiff alleges it relied upon prior to submitting its bid to design and construct the project – where the proceeding is of considerable scope, complexity and importance to the parties – where the plaintiff applies to refer some questions of fact to a referee – where the application is opposed by the defendants – whether a referral would assist in achieving the just and expeditious resolution of the real issues in the proceeding at a minimum expense

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 367, r 501, r 502, r 503, r 504, r 505, r 505A, r 505B, r 505C, r 505D

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, cited
Bass v Permanent Trustee Company Ltd (1999) 198 CLR 334, cited
Callide Power Management Pty Ltd & ors v Callide Coalfields (Sales) Pty Ltd & ors (No 2) [2014] QSC 216, cited
Callide Power Management Pty Ltd & ors v Callide Coalfields (Sales) Pty Ltd & ors (No 3) [2015] QSC 295, cited
Kadam v MiiResorts Group 1 Pty Ltd (No 4) (2017) 252 FCR 298, cited
Shape Shopfitters Pty Ltd v Shape Australia Pty Ltd [2016] FCA 610, cited

State of Queensland v Dale and Meyers Operations Pty Ltd [2010] QSC 361, cited
Watpac Civil Infrastructure Pty Ltd v Komatsu Australia Pty Ltd [2009] QSC 281, cited

COUNSEL: G A Thompson QC SG, with C Schneider and J Muir, for the plaintiff
B O'Donnell QC, with S Lumb, for the first defendant
P Freeburn QC, with M Hindman QC, for the second defendant

SOLICITORS: HWL Ebsworth for the plaintiff
Carter Newell for the first defendant
Mills Oakley for the second defendant

[1] The plaintiff (**MCD**) has made claims against the first defendant (**Cardno**) and the second defendant (**Arup**) about work each undertook on the design of elements of the Gold Coast Light Rail project (**GCLR**). MCD says it used some of that work to formulate its successful bid to design and construct the GCLR. MCD also says it has overpaid Cardno and Arup for the work they performed after the successful bid. There are other, smaller claims, including counterclaims by each of Cardno and Arup against MCD.

[2] An oral hearing was conducted on 10 and 11 June 2019 to determine MCD's application to refer some questions of fact to a special referee.[1] By its application, MCD proposed that the special referee hold a trial and provide an opinion in a report about four questions. In the alternative, MCD asked the Court to determine the questions separately from and before the trial of the proceeding. In the course of the hearing, various alternative means by which the proceeding might be managed were considered and were the subject of oral submissions put by leading counsel on behalf of each of the parties.

[3] Shortly after the hearing, statutory changes were the cause for further written submissions by the parties.

Overview of the proceeding

[4] The proceeding is of considerable scope and importance to the parties. MCD claims $316 million as damages or compensation. The solicitor for MCD estimated the trial of the whole of the claim would occupy about six months. Cardno estimates a hearing of the evidence would likely occupy about 130 sitting days. Arup did not dispute those estimates.

[5] MCD's allegations about Cardno's pre-bid work are summarised in column 1 and particularised in column 2 of Schedule A to MCD's Fourth Amended Statement of Claim (**FASC**). Schedule A is 99 pages in length. It deals with 24 pre-bid claims, mainly about Service Clash Identifiers and Drawings (**SCIDs**) and estimates made in November 2010. Cardno's responsive pleading to Schedule A is set out in 122 paragraphs, occupying 142 of the 270 page Further Amended Defence.

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1 A number of other interlocutory applications were heard and determined over these days.

[6] MCD's allegations about Arup's pre-bid work are smaller in scope. MCD asserts five pre-bid claims against Arup. These are set out in column 1 of Schedule D to the FASC.

[7] Each of the pre-bid claims is factually distinct. They cover different fields of engineering design, involving different specialties or sub-specialties. MCD alleges that Cardno in each of the 24 claims and Arup in each of the five claims acted in breach of its contractual obligation or was negligent or made a representation about the work that was misleading or deceptive.[2] The determination of these issues is likely to involve a consideration of evidence and opinion unique to each pre-bid claim.

[8] MCD characterises the pre-bid work of each defendant as "incomplete and inaccurate". MCD alleges the pre-bid work failed to take a full account of the relevant information and data that was available to each defendant during the pre-bid period (the **available data**). For the most part, the available data was in a database. There appear to be disputes about whether particular items were in the database at the time Cardno or Arup performed particular pre-bid work.

[9] In the pre-bid claims, MCD alleges the conduct of Cardno and Arup caused MCD to lose an opportunity to increase its bid price for the design and construction of the GCLR. The damages or compensation claimed for this loss of opportunity case are estimated at $118 million against Cardno and $75.5 million against Arup.

[10] MCD calculates its loss of opportunity claims against each defendant as the amount MCD says it would have added to its bid and been paid by the principal. In the case of Cardno's pre-bid work, MCD says it would have added $103.3 million[3] to its bid price; and in the case of Arup's pre-bid work, the figure is $66.5 million.[4] MCD also claims the costs it says it would have avoided incurring. These are $14.6 million in the case of Cardno and $9 million in the case of Arup.

[11] As an alternative to its loss of opportunity case, MCD claims for the cost of designing and constructing the GCLR, less the amount MCD was paid by the principal for that work. MCD says it would not have incurred the net cost if it had not been successful in its bid. It says that, if the pre-bid work of Cardno and Arup had not been incomplete and inaccurate, MCD would have increased its bid price and would not have been awarded the GCLR contract. MCD estimates its claim for damages or compensation in this "no transaction" case at about $315.7 million.

[12] There are other important, but less valuable, claims. MCD has restitutionary claims against Cardno ($3.6 million) and Arup ($2.9 million) to recover amounts it alleges are owed to MCD for overpayments. Cardno has a counterclaim for $1.37 million it says is owed by MCD for its work on the GCLR project. Arup has a counterclaim against MCD for $0.46 million for amounts it alleges are owed for its work.

Hearing on 10 and 11 June 2019

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2 In contravention of sections 52 and 53 of the *Trade Practices Act* 1974 (Cth).

3 This figure is comprised of about $58.2 million for the cost of additional work (which MCD alleges should have been included or identified in the Cardno designs MCD used in the bid process) and $45.1 million for work planning and sequencing consequent upon that additional work.

4 This figure is comprised of about $33.5 million for the cost of additional work (which MCD alleges should have been included or identified in the Arup designs MCD used in the bid process) and $33 million for work planning and sequencing consequent upon that additional work.

[13] At the hearing, MCD proposed two separate questions as alternatives to the four questions originally proposed in its application. The first would have the Court determine as a separate question everything alleged by MCD, save for allegations of reliance on alleged representations, loss and damage, consequences of alleged breaches of duty, foreseeability of loss, the restitutionary claims, and the other smaller claims. The second question was confined to the allegations in the defences of Cardno and Arup about contractual limitations on the liability of each defendant.

[14] Cardno opposed the determination of any matter as a separate question. Mr O'Donnell QC and Mr Lumb, who appeared for Cardno, submitted that the whole of the claims by MCD should be heard and determined in a single lengthy trial before a judge. They expressed particular concern about separating "liability" and "quantum". They submitted it was not possible for these broad topics to be wholly separated where MCD maintained a claim for relief under the *Trade Practices Act* and where common law negligence was in issue. There would be, they submitted, a considerable overlap in the evidence relevant to deciding whether conduct was misleading or deceptive and whether a relevant duty had been breached and evidence of the loss or damage alleged to be a consequence of the conduct or the breach.

[15] Cardno also expressed concern that findings of credit might be made in the course of determining separate questions. These might make it inappropriate for the same judicial officer to hear and determine other issues in a later part of the proceeding. This is a relevant factor, although not always a decisive one.[5]

[16] Arup, represented by Mr Freeburn QC and Ms Hindman QC, also resisted the separate question proposals. Arup was open to the possibility that the restitutionary claims made by MCD against it and Arup's own counterclaim might be the subject of a separate reference. The considerations informing the management of these aspects of the proceeding would also operate in respect of the restitutionary claims against Cardno and Cardno's counterclaim.

[17] At the conclusion of the hearing, directions were made for the parties to file any further written submissions directed to the case management directions that ought to be made for the determination of issues in the proceeding.

Post-hearing submissions

[18] On 18 June 2019, MCD filed written submissions and, on 25 June 2019, Cardno followed. Arup filed no further submissions, but indicated its agreement with the written submissions filed by Cardno.

[19] On 12 July 2019, Parts 1A and 6 of the *Queensland Civil and Administrative Tribunal and Other Legislation Amendment Act* 2019 commenced. Part 1A amended the *Civil Proceedings Act* 2011 containing provisions about referees, parties appearing before them, witnesses giving evidence and documents produced for a referee. The protections provided for referees are, generally speaking, to be as they would be if the referred matter were heard before the court. Part 6 amended the *Supreme Court of Queensland Act* 1991 to allow rules to be made about the use of referees in proceedings.

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5 *Watpac Civil Infrastructure Pty Ltd v Komatsu Australia Pty Ltd* [2009] QSC 281 at [6] (McMurdo J); *State of Queensland v Dale and Meyers Operations Pty Ltd* [2010] QSC 361 at [23] (de Jersey CJ).

[20] On 12 July 2019, the *Uniform Civil Procedure (Referees) Amendment Rule* 2019 commenced. By this amendment rule, the former rules 501 to 505 were replaced with new rules 501 to 505 and rules 505A to 505D.

[21] As MCD's application was made under rules 501 and 502, on 16 July 2019 the Court invited the parties to make any further written submissions they wished to put as to the management of the proceeding in light of the commencement of the Amendment Rule.

[22] On 8 August 2019, MCD filed further submissions and, on 19 August 2019, Cardno filed submissions. On 19 August 2019, Arup confirmed that it was content to rely upon the further submissions of Cardno.

[23] The parties' written submissions filed after the hearing did not depart in any material way from the submissions put at the hearing, save that MCD embraced the greater scope for a reference under the amended statutory scheme.

The case management of the proceeding

[24] The Court's approach to the conduct of civil proceedings is informed by the objective of the *Uniform Civil Procedure Rules* 1999 (Qld).[6] That is to avoid undue delay, expense and technicality and to facilitate the purpose of the rules, namely the just and expeditious resolution of the real issues in civil proceedings at a minimum expense.

[25] The just resolution of the real issues and the avoidance of undue technicality requires the Court to identify the real substance of a party's claim or defence and deliver a judgment applying the law to the facts admitted or found on the evidence. The expeditious resolution of those issues and the avoidance of delay require the Court to deliver such a judgment within a reasonable time. The requirement to provide a resolution at a minimum expense, and to avoid undue expense, directs the Court to undertake its role with an economic and proportionate use of resources – both the public resources of the Court and the litigants' private resources. Inefficiencies in the use of the Court's resources affect not only the immediate parties, but other litigants seeking their share of those resources. There is an obvious public interest in the efficient use of Court time funded by the community.[7]

[26] As the Professor Adrian Zuckerman has observed in a similar context:

> "The need to deliver well-founded judgments within a reasonable time and within available resources creates obvious tensions between different imperatives. Delivering speedy and high quality judgments would require more resources than are affordable. As a result compromises must be made by the legislature or by the Court. It may be decided to adopt less resource-intensive processes or perhaps to take longer reaching a resolution. While there may be several options open one thing is clear: Court adjudication involves inevitable compromises arising from the need to balance competing imperatives or desired goals. Striking such balance is the peculiar business of management."[8]

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6 See r 5(2).

7 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 182 (French CJ).

8 *Zuckerman on Civil Procedure: Principles of Practice,* 3rd ed, Sweet & Maxwell 2013, p 5 [1.12].

[27] Achieving the objective is facilitated by the Court's broad power to make orders or directions about the conduct of a proceeding. The Court may even make appropriate orders inconsistent with other provision of the rules.[9] The interests of justice are paramount in deciding whether to make such orders or directions.[10]

[28] In addition to the interests of justice, the Court is to have regard to certain additional matters in deciding whether to make an order limiting party's demands on the Court's time.[11] These matters serve as a relevant reminder of the importance of a fair trial, and having a reasonable time and a reasonable opportunity to lead evidence and cross-examine witnesses. They also identify the relevance of the complexity or the simplicity of the case, the importance of issues and the case as a whole, the volume and character of the evidence to be led, the expected time for the trial and the number of witnesses. The state of the Court lists is a matter that may also be considered.

[29] None of the parties to this proceeding raised any concern about the cost of its participation. This does not absolve the Court of its obligation to consider management of the proceeding to resolution at a minimum expense and the avoidance of undue expense. It does allow the court to include in its range of considerations a form of case management that might involve the parties incurring some expenses, such as the costs of a reference or a single expert, if that might serve the statutory objective by enabling the just resolution of the real issues by a well-founded judgment pronounced within a reasonable time. No submission was put that a reference or separate question process would increase the overall cost of the proceeding to the parties. Those processes, in this instance, might reasonably be expected reduce the public resources required for the resolution of the real matters in dispute.

[30] As Jackson J observed in *Callide Power Management Pty Ltd & ors v Callide Coalfields (Sales) Pty Ltd & ors (No 2)* [2014] QSC 216 at [62]:

> "It is all very well for parties … to be prepared to sink hundreds of millions of dollars into the litigation. It is another thing entirely to suggest that the cost to the community of providing the resources to try and decide the case should be borne in the interests of those parties without demur, or energetic attempts to see whether some other methodology short of such a trial cannot quell the controversy or parts of it."

[31] The High Court observed, towards the end of last Century:

> "It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process."[12]

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9 r 367(1).

10 r 367(2). The types of directions contemplated include those with the effect, amongst other things, of limiting the time for a trial, or the time that a party may have to present its case, limiting the number of witnesses (including expert witnesses) a party may call on any issue, limiting the time to be taken in the examination of witnesses, and limiting the time to be taken in oral submissions: see r 367(3).

11 r 367(4).

12 *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at 357-358 [51] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[32] A cautious approach to ordering separate questions can be justified, because the court may be called upon to make a discretionary judgment at an early stage of the proceeding.[13]

[33] In cases of lesser scale, it may not make any practical or logical sense to seek to separate issues.[14] In a case of this size, other considerations may prevail.

[34] The submissions put on behalf of Cardno and Arup about the management of the proceeding betray a less than perfect recognition of the useful and flexible reference procedure[15] and the savings in time and costs it may deliver. References have not been the norm in commercial litigation in this jurisdiction; and separate questions have been the subject of adverse comment by appellate courts from time to time.

[35] There was a period when Australian superior courts were reluctant to refer matters out.[16] Such decisions were affected by a view that a party had a right to have all matters determined by a judicial tribunal. The decisions drew some support from former statutory rules. That view was not universally accepted.[17] It does not reflect the present statutory framework for civil proceedings in this court or the contemporary view about the exercise of those statutory powers in most other Australian courts.[18]

[36] It has been observed elsewhere,[19] that procedures of this kind have been in use for more than 250 years.[20] They have had statutory form at least since the *Judicature Acts*.[21]

[37] A decision about the appointment of a referee or a separate question is a case management decision. It calls for close attention to the Court's role in ensuring effective, flexible principles of case management are applied to the resolution of disputes.[22] The primary question is whether the decision will facilitate the just and expeditious resolution of the real issues in the proceeding at a minimum of expense. The power to appoint a referee is to be applied to facilitate that purpose and with the objective of avoiding undue delay, expense and technicality.

[38] The ability to state a separate question, with precision, is a very useful starting point for its consideration. If the separate question cannot be formulated so as to avoid an

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13 *Callide Power Management Pty Ltd & ors v Callide Coalfields (Sales) Pty Ltd & ors (No 3)* [2015] QSC 295 at [46] (Flanagan J), citing *POS Media Online Ltd v Queensland Investment Corp* [2000] FCA 1451, [8] (Lehane J).

14 See the observations of Mortimer J in *Shape Shopfitters Pty Ltd v Shape Australia Pty Ltd* [2016] FCA 610 at [30]-[32].

15 *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 39 (Aickin J)

16 *Honeywell Pty Ltd v Austral Motors Holdings Ltd* [1980] Qd R 355 at 359-360 (Campbell J); *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762 at 765-766 (Beach J); *Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd* (1998) 19 WAR 281 at 285 (Ipp J).

17 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 at 558 (Gleeson CJ), 567 (Mahoney JA).

18 *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* (2009) 25 VR 119; *Talacko v Talacko* [2009] VSC 98 at [27]; *Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd* (2013) 84 NSWLR 410 at 412-414 [15]; *Bill Express Ltd (In Liq) v Pitcher Partners* [2014] VSC 482 at [28]. I am indebted to Lee J for his detailed treatment of this history in *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* (2017) 252 FCR 298.

19 *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* (2017) 252 FCR 298 at 308 [36] (Lee J).

20 *Gyles v Wilcox* (1740) 2 Atk 141; 26 ER 489.

21 *Supreme Court of Judicature Act* 1873 (UK), s 56.

22 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

overlap with the balance of the matters in issue, then the separate question process is unlikely to aid the expeditious resolution of the real issues.[23]

Elements of the MCD loss of opportunity and no transaction cases

[39] The proceeding, as presently constituted, involves the determination of a number of groups of issues raised by MCD's loss of opportunity and no transaction cases. These might be arranged into four elements of the MCD cases:

1. Whether in each of the 29 pre-bid claims Cardno or Arup acted wrongly (to use a broad expression) or not;

2. The effect, if any, that any wrongful conduct by Cardno or Arup had on the price at which MCD bid to do the work for the principal (the **reliance issues**);

3. Whether or not the principal would have accepted a higher bid from MCD and awarded MCD the contract to design and construct the GCLR; and

4. Assessment of the additional amount, if any, MCD would have received under the contract with the principal (the loss of opportunity case), or of the loss suffered by MCD in performing the contract with the principal (the no transaction case).

The first element

[40] There is a logical sequence. The issues comprised in the third element cannot be resolved without a determination of the issues in the second element. The issues in the fourth element cannot be resolved without a determination of the third element. There was a logical reason, therefore, to give particular attention to the first element at the hearing.

[41] The first element is also the most factually complex in MCD's cases. At the beginning of the second day of hearing, the court identified a process by which the first element might be managed in three stages.

First stage

[42] The first stage was a mechanism, analogous to agreeing a book of documents for a trial, by which the parties would identify the available data.[24] Directions were made, largely by the consent of the parties, with respect to steps to determine the extent of agreement about the available data.

Second stage

[43] The second stage was a mechanism to identify whether each of the pre-bid claims concerned an activity that the relevant defendant was obliged to do during the pre-bid period or that it represented it would do during that period (broadly, a **pre-bid**

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23 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 358 [53] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

24 These matters are raised by paragraphs [11], [21](i), [22] and [114] of the FASC, paragraphs [11], [21](d) and [22] of Cardno's defence, paragraph [44] of Arup's defence and paragraphs [8], [17](b) and [18] of MCD's reply to Cardno's defence.

obligation) or whether it was an activity to be performed in a later period of the GCLR project.[25]

[44] This would likely involve evidence, oral and documentary, as to the work each defendant was asked to do before MCD formulated and made its bid to the principal. MCD submitted that it would eliminate from its case any of its pre-bid claims if the work targeted in the claim was found not to be a pre-bid obligation.

Third stage

[45] The third stage was a process to identify whether Cardno or Arup, in performing a pre-bid obligation, breached a relevant duty (whether contractual[26] or tortious[27]) or made a relevant representation that was contrary to section 52 or 53[28] (broadly, the **breach issues**).

Submissions about the various elements

[46] Specific submissions were made about aspects of the proceeding. It is sufficient to note them.

[47] MCD submitted that before proceeding to determine questions relevant to the reliance issues, the likely success of a higher bid and the assessment of damages or compensation,[29] the Court should rule on any relevant limitation on the liability of a defendant. MCD urged that such a ruling would assist the parties resolving their disputes.

[48] Cardno, expressed a particular concern about the breach issues being determined before or separately from the reliance issues. There was some force in these submissions.

Conclusions

[49] The various separate questions proposed by MCD do not and were not intended to deal with the whole of the issues as to whether Cardno or Arup was liable to MCD for any of the claimed damages or compensation. MCD's proposed questions would not deal with causation or reliance issues at all.

[50] MCD's proposed questions could reduce the scope of matters in issue only to the extent that any of the defendants' work was to be found not to be incomplete or inaccurate (as MCD alleges) or if the information in the data room did not identify that any of the

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25 These matters arise from paragraphs [18] to [21], [23] to [26], [111] to [113] and [115] of the FASC, paragraphs [18] to [20], [21](d), [23] to [26] and [26.1] to [26.11] of Cardno's defence, paragraphs [1], [41] to [43] and [45] of Arup's defence, paragraphs [14] to [16], [17](b), [19] to [29] and [32] of MCD's reply to Cardno's defence and paragraphs [36] to [38] and [40] of MCD's reply to Arup's defence.

26 The contractual allegations arise from paragraphs [56] and [143] of the FASC, paragraph [56] of Cardno's defence, paragraph [80] of Arup's defence, paragraph [80] of MCD's reply to Cardno's defence and paragraph [75] of MCD's reply to Arup's defence.

27 The negligence claims arise from paragraphs [49] to [52] and [136] to [139] of the FASC, paragraphs [49] to [52] of Cardno's defence, paragraphs [73] to [76] of Arup's defence, paragraphs [74] to [77] of MCD's reply to Cardno and paragraphs [68] to [71] of MCD's reply to Arup.

28 The misleading conduct claims arise from paragraphs [27] to [38A] and [115A] to [125A] of the FASC, paragraphs [27] to [38A] of Cardno's defence, paragraphs [46] to [61] of Arup's defence, paragraphs [45] to [62] of MCD's reply to Cardno and paragraphs [41] to [56] of MCD's reply to Arup.

29 These are elements 2, 3 and 4 of its loss of opportunity and no transaction cases.

documents was incomplete or inaccurate. MCD would then fail on that pre-bid claim and it would not be necessary to consider it any further in the proceeding.

[51] Understood in this way, MCD's separate questions were to identify and exclude pre-bid claims by applying two early specific filters.[30] They would "filter" the pre-bid claims to eliminate those unable to survive a determination about the available data or about the extent of each defendant's pre-bid obligations. If MCD were to be wholly successful on the separate questions, the scope of the remaining matters in issue would be unaltered.

[52] It is not the role of a separate question to filter a party's claims.

[53] As the submissions for Cardno and Arup also identified, if the MCD questions were determined by a judge, there would be a risk that the determination might involve a finding about the credit of a witness. If the witness were to be called to give further evidence at a later stage of the proceeding, the judge might be asked not to her the later part of the proceeding. These difficulties with the separate question proposal might not arise if the "filtering" was accomplished by a referee or a single expert.

[54] The separate question process may be employed at any time, before or after a trial. These reasons should not be understood as limiting or excluding the possibility that such a process – including the determination of a separate question by a judge – from further consideration in any later case management decision. However, having considered the oral and written submissions, I propose to indicate a view about the manner in which the proceeding will be managed, with the objective of the just and expeditious resolution of the real issues in the proceeding at a minimum expense.

Stage one directions

[55] An order was made after the June hearing providing directions to progress the stage one issues. By complying with the directions, the parties will reveal whether there is any dispute of real substance about the available data.

[56] Cardno opposed the separate determination even of whether a particular document was available to Cardno at the pre-bid stage. It sought to have all such matters dealt with at a single trial with all other issues in the proceeding. That approach is not accepted.

[57] If the parties are unable to agree on the available data at the pre-bid stage for each of the pre-bid claims, then any remaining disputes about that matter should be the subject of a report by a referee or a single expert, in either case to a person able to interrogate the relevant database and examine the electronic documents, including the associated metadata.

[58] It is not necessary to make any specific orders about that process until after the parties have complied with the existing directions. However, it may assist the parties in complying with those directions to know that any remaining disputes about the available data will be the subject of a report by a referee or a single expert.

Element 2 – the effect of the defendants' conduct on the bid price

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[30] MCD's proposal ought not be understood as an expression that it lacks confidence in its pre-bid claims. It approaches the questions as a means of defeating contentions raised by the defendants at an early stage of the proceeding.

[59] The evidence relevant to whether (and to what extent) MCD relied on the pre-bid work of Cardno or Arup in pricing the MCD bid will likely be evidence from MCD documents generated at the time and witnesses who worked on the bid. There may be a contest as to the amount by which MCD would have increased its bid, had Cardno and Arup acted as MCD contends they ought. It is possible that other considerations affected MCD's bid price.

[60] The evidence relevant to this second element could be adduced and findings about the reliance issues could be made before the second stage of the first element is heard and determined. In part, this addresses Cardno's concerns about sequencing and separation of issues. It might also be expeditious to resolve the reliance issues before the breach issues. The factual enquiry about reliance will likely be less extensive (and expensive) than the factual enquiry about the breach issues. If MCD were to fail on the reliance issues, the parties might avoid the expense of a lengthy hearing on the breach issues.

[61] I will direct the parties to prepare a draft order with directions for disclosure and an exchange of witness summaries for the parts of the claim dealing with the alleged effect of the relevant pre-bid work of Cardno and Arup on the price at which MCD bid for the contract with the principal. If the appropriate directions cannot be agreed, the parties are to submit their competing proposed directions.

[62] Once the parties have complied with such directions, they and the Court will be in a better position to consider whether the reliance issues should be the subject of a reference or a separate determination by the Court. No directions are required at present.

Stage two and stage three directions

[63] The second stage issues (the pre-bid obligations) appear to turn on what was said and agreed by the parties during the pre-bid period. They may require expert opinion about the scope of any represented or agreed pre-bid work.

[64] There are 29 pre-bid claims across a number of different sub-specialties of engineering design. It is possible a determination of the pre-bid obligations could involve the consideration of a great deal of expert evidence. If so, the same experts might be involved in expressing opinions about the breach issues (stage three). In fact, the pre-bid obligation and the breach issues are so closely connected, drawing on the same evidence – of facts and opinions – that it would be more efficient to consider them together and in a single process.

[65] They could efficiently be heard and determined in a trial before one or more referees. The reference could involve appropriate and just limits on the time each party may have to present its case, the number of witnesses (including expert witnesses) each party may call on any issue, the time to be taken in the examination of witnesses, the time to be taken in oral submissions, and the length of any written submissions. The referee (or referees) could determine whether the rules of evidence should apply to the hearing.

[66] A reference would address the risk that a judge hearing this part of the proceeding might make a credit finding about a witness, who might be called in a trial of another part of the proceeding. As the reliance issues will be determined before the pre-bid obligation and breach issues, it is not necessary at present to make any directions about the latter issues at the present time. However, the parties should give consideration to

whether one or more referees would be appropriate and make some estimation of the length of a reference hearing.

Elements 3 and 4 – the principal's counterfactual and the assessment of damages or compensation

[67] Elements 3 and 4 of the MCD cases conclude with the assessment of any damages flowing from any breach of duty (contractual or at common law) or any compensation for misleading or deceptive conduct in respect of the pre-bid claims.

[68] Both MCD's loss of opportunity case and no transaction case turn on the decision the counterparty principal would have made if presented with a higher MCD bid. Given the way these cases are framed, an enquiry into the assessment of damages or compensation is likely to involve evidence quite distinct from the evidence that might be led as to the pre-bid work undertaken by each of Cardno and Arup.

[69] It would be premature to make directions about these parts of the claim. However, it is timely to indicate that, with due respect to the stance adopted by Cardno and Arup, there is no compelling reason such an enquiry could not be undertaken as a separate exercise after a determination of the issues in the first and second elements of the claim.

Restitutionary claims and counterclaim directions

[70] MCD's restitutionary claims and the defendants' respective counterclaim may seem small in comparison with MCD's loss of opportunity and no transaction cases, but they involve very significant sums.

[71] The detail of these claims and counterclaims are already well-known to the parties, because they have been the subject of a statutory adjudication process. They likely involve evidence from witnesses about what occurred during the GCLR project. They are unlikely to involve extensive expert evidence. They ought to be heard and determined as soon as possible, so that the effects of delay on the memories of witnesses are minimised.

[72] I will direct the parties to prepare proposals for the determination of the restitutionary claims and the counterclaims by one or more referees to be appointed by the Court. The parties are to confer about their respective proposals and submit to the Court an agreed orders and directions or, in the absence of agreement, their competing proposals.

Order and directions

[73] The directions indicated above will be made. MCD's application will be otherwise dismissed. The costs of the application are to be each party's costs in the cause.