

SUPREME COURT OF QUEENSLAND

CITATION: *Murphy Operator & Ors v Gladstone Ports Corporation (No 6)* [2020] QSC 192

PARTIES: **MURPHY OPERATOR PTY LTD**
ACN 088 269 596
(first plaintiff)
TOBARI PTY LTD
ACN 010 172 237
(second plaintiff)
SPW VENTURES PTY LTD
ACN 135 830 036
(third plaintiff)
v
GLADSTONE PORTS CORPORATION LIMITED
ACN 131 965 896
(defendant)

FILE NO/S: SC No 7495 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 25 June 2020

DELIVERED AT: Rockhampton

HEARING DATE: 16 June 2020

JUDGE: Crow J

ORDER: **1. The parties are to agree to and file an appropriate minute of order reflecting these reasons for judgment.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – APPLICATION AND ORDER – APPLICATION – where the plaintiff seeks order that defendant disclose numerous documents – where defendant resists on the grounds that the documents are irrelevant – whether the documents fall into the categories for discovery – whether the documents are relevant to issues raised in the pleadings – whether the documents ought be disclosed

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – AMOUNT AND NATURE OF SECURITY – where defendant seeks further security for costs – where plaintiff

agrees that further security for costs is required – where parties cannot agree as to form and quantum of security – where security for costs previously provided as a deed of indemnity from a company based in the United Kingdom – where the defendant submits that due to COVID-19, Brexit, and a loss of £20.2 million a further deed of indemnity would be an inappropriate form of security - whether there has been a material change in the company which provided the previous deeds of indemnity – where the appropriate quantum for security for costs needs to be assessed by the court

Uniform Civil Procedure Rules 1999 (Qld), r 211, r 223, r 670, r 671, r 673

Allen Dodd as trustee for the Dodd Superannuation Fund v Shine Corporate Ltd [2018] QSC 40, cited

Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd [2010] QSC 176, cited

Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497; [1987] FCA 102, cited

Equititrust Ltd v Tucker [2019] QSC 51, cited

Lanai Unit Holdings P/L v Mallesons Stephen Jacques [2016] QSC 2, followed

Logan APZ Pty Ltd v Council of the City of Logan [2017] QCA 288, cited

Murphy & Ors v Gladstone Ports Corporation Ltd [2019] 3 Qd R 255; [2019] QSC 12, cited

Murphy & Ors v Gladstone Ports Corporation Ltd (No 2) [2019] QSC 30, cited

Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd (No 3) [2019] QSC 118, cited

Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd (No 4) [2019] QSC 228, cited

Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd & Anor (No 5) [2020] QSC 36, cited

Pathway Investments Pty Ltd v National Australia Bank Ltd [2012] VSC 97, cited

Plyable Pty Ltd v Go Gecko (Franchise) Pty Ltd [2016] QSC 269, cited

Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 7) [2005] VSC 275, cited

Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors [2018] QSC 53, cited

State of Queensland v Allen [2012] 2 Qd R 148; [2011] QCA 311, cited

COUNSEL: L W L Armstrong QC, with M J May for the plaintiffs
D G Clothier QC, with S B Hooper for the defendant

SOLICITORS: Clyde & Co for the plaintiffs
King & Wood Mallesons for the defendant

Introduction

- [1] The history of this matter is set out in my prior judgments.¹
- [2] By application filed by the defendant on 28 May 2020 and application filed by the plaintiff on 29 May 2020, the parties raise issues as to discovery of documents, further security for costs, privilege and the appropriate timetable for the further conduct of this class action.

Further Discovery of Documents

- [3] By order of 22 February 2019, the parties were required to undertake the discovery of documents in accordance with Annexure B (“document plan”) to the order.²
- [4] The order, in retrospect, somewhat ambitiously, required for discovery of documents by two tranches on 22 February 2019 and 8 March 2019. By order of 5 April 2019 timeframes were extended to require discovery of documents by a series of five tranches, the last being required by 5 September 2019.³ It was anticipated that the tranches would result in a relatively equal disclosure of documents throughout the months of May through to September 2019.
- [5] On 11 October 2019, GPC completed its disclosure in accordance with the document plan and commenced a process of consultation as to the scope of GPC’s documents to be reviewed, and the reasonable searches to be conducted, for the purposes of that disclosure. During that process the plaintiffs effectively stated that it was not reasonable or necessary for GPC to review its hard copy documents or back up tapes at that stage.⁴
- [6] GPC’s disclosure in 2019 was an extensive task, which involved review of 233,675 documents and disclosure of approximately 27,000 documents in numerous tranches pursuant to the orders made on 12 November 2018, 22 February 2019 and 5 April 2019.⁵
- [7] On 16 January 2020, more than three months after GPC completed that disclosure, the plaintiffs sent GPC a schedule making 97 requests for additional disclosure by GPC.⁶ This was the first time the plaintiffs made any request for further disclosure.
- [8] On 23 January 2020, GPC informed the plaintiffs that it was considering these requests and would respond as soon as possible.⁷
- [9] On 5 February 2020, GPC responded further, explaining that it was in the process of conducting reasonable searches for the requested documents and would disclose

¹ *Murphy & Ors v Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255; *Murphy & Ors v Gladstone Ports Corporation Ltd (No 2)* [2019] QSC 30; *Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd (No 3)* [2019] QSC 118; *Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd (No 4)* [2019] QSC 228; *Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd & Anor (No 5)* [2020] QSC 36.

² Court document 40.

³ Court document 50.

⁴ Page 206 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

⁵ Paragraph 14 of the affidavit of Lucy Catherine Dean filed 9 June 2020.

⁶ Page 40 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

⁷ Page 53 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

those documents which fell within the categories for GPC's disclosure. GPC further explained that the searches would take some time to complete but GPC proposed to make disclosure in tranches as soon as relevant documents were located and ready to be produced.⁸ GPC also asked the plaintiffs to identify documents or categories of documents which were their highest priority, and explained that it would attempt to, subject to any practical difficulties, locate the high priority documents first.

- [10] On 19 February 2020, the plaintiffs sent GPC an updated schedule which added 73 additional requests for further disclosure.⁹ All of the additional requests related to GPC's archive boxes. The documents were identified by reference to their description in GPC's index to the archive boxes, which had provided to the plaintiffs on 5 February 2020.¹⁰
- [11] GPC then provided tranches of further disclosure in response to the plaintiffs' requests¹¹ on each of the following dates: 20 February 2020, 28 February 2020, 3 March 2020, 13 March 2020, 20 March 2020, 27 March 2020, 3 April 2020, 19 May 2020 and 26 May 2020.¹²
- [12] On 9 April 2020, GPC sent the plaintiffs an updated version of their schedule which identified the documents disclosed in response to each request or which otherwise explained the basis on which the document had not been disclosed.¹³
- [13] On 21 April 2020, the plaintiffs sent GPC a further updated schedule which identified:¹⁴
- (a) 135 requests which the plaintiffs considered "Closed";
 - (b) those requests in respect of which the plaintiffs disputed GPC's objection to producing the documents due to relevance; and
 - (c) 7 further requests for additional disclosure by GPC.
- [14] The most significant feature of the further requests were four requests for documents held on email accounts for four individuals stored on GPC's back-up tapes. This was the first time the plaintiffs requested disclosure from GPC's back-up tapes, despite:
- (a) the back-up tapes having been identified by GPC more than a year earlier;
 - (b) GPC having stated (in October 2019) that the back-up tapes contain email accounts of GPCs personnel were involved in the project during the relevant period and whose accounts may contain documents directly relevant to the issues in dispute;¹⁵

⁸ Page 55 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

⁹ Page 110-134 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020; Paragraph 17 of the affidavit of Lucy Catherine Dean filed 9 June 2020.

¹⁰ Page 56 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

¹¹ Paragraph 25 of the affidavit of Lucy Catherine Dean filed 9 June 2020.

¹² Paragraph 25 of the affidavit of Lucy Catherine Dean filed 9 June 2020.

¹³ Paragraph 18 of the affidavit of Lucy Catherine Dean filed 9 June 2020. Page 10-62 of Exhibit LCD-1 to the affidavit of Lucy Catherine Dean Filed 9 June 2020.

¹⁴ Page 30-49 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

¹⁵ Exhibit 2 to the hearing 15 October 2019.

- (c) GPC's letter to the plaintiffs on 5 February 2020 having invited the plaintiffs to identify any particular documents or categories of documents of which they sought disclosure from the back-up tapes (and archive boxes);¹⁶
- (d) the plaintiffs having foreshadowed an intention on 19 February 2020 to provide a list of email accounts they wished GPC to review (if they were on the backup tapes);¹⁷
- (e) GPC's letter to the plaintiffs on 26 February 2020 having invited the plaintiffs to identify whether such tapes were to be searched for documents responsive to all categories for GPC's disclosure or only some categories, and whether any particular categories were the highest priority for the plaintiffs;¹⁸
- (f) GPC's further letters dated 31 March 2020 and 15 April 2020 having asked the plaintiffs to make any requests for disclosure of the back-up tapes as soon as possible and having explained that responding to such requests was likely to be a time-consuming and resource-intensive process which may have implications for compliance with the court's directions;¹⁹ and
- (g) the plaintiffs having completed their detailed review of GPC's 2019 disclosure by late February or early March 2020.²⁰

[15] By letters dated 22 April 2020,²¹ 29 April 2020,²² and 19 May 2020,²³ GPC further responded to the plaintiffs' disclosure requests.

[16] On 25 May 2020, the plaintiffs sent GPC a further schedule which set out an additional 13 disclosure requests.²⁴ The total number of additional disclosure requests made by the plaintiffs since January 2020 now totalled 190.

[17] On 26 May 2020, GPC sent a further letter and schedule to the plaintiffs in relation to their disclosure requests and disclosed some documents in relation to two requests.²⁵ This schedule, which Ms Dean's affidavit describes as "GPC's Explanatory Schedule", further explained the basis on which GPC's objected to disclosure requests where the plaintiffs did not accept the objection.²⁶

[18] Although there has been considerable cooperation between the parties to facilitate disclosure, the parties have been unable to agree with respect to disclosure of 36 classes of documents which are listed in Annexure A to the plaintiff's application filed 28 May 2020. The parties have prepared a 33-page summary of their respective positions concerning the outstanding 36 items entitled "GPC Further Disclosure – Aide-memoire" which is Exhibit 1 to this application.

¹⁶ Page 55-57 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

¹⁷ Page 112 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

¹⁸ Page 69 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

¹⁹ Page 135, 168 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

²⁰ Paragraph 14 of the affidavit of James Malcom Cooper filed 29 May 2020.

²¹ Page 50-51 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

²² Page 52-58 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

²³ Page 1 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 29 May 2020.

²⁴ Page 11-15 of Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 29 May 2020.

²⁵ Page 63-72 of Exhibit LCD-1 to the affidavit of Lucy Catherine Dean filed 9 June 2020.

²⁶ Mr Cooper omits mention of the letter dated 26 May 2020 and enclosed schedule in his affidavit filed on 29 May 2020, even though paragraph 7 of that affidavit is directed at identifying correspondence exchanged by the parties since 7 May 2020 regarding the plaintiffs' requests for further disclosure.

Item 1 & 2 – Plaintiff Requests 85 & 86 - Grey S, Broadleaf Capital International 'Western Basin Dredging and Disposal Project: Dredging Risk Review Briefing note' dated February 2011 and Broadleaf Capital 'Western Basin Dredging and Disposal Project - Environmental Risk Assessment Update' dated April 2011

- [19] By paragraph 182 of the Defence, GPC admits that construction of the bund commenced in or around November 2010, the two outer ends of the bund first joined on or about 21 July 2011, and that construction of the bund continued after July 2011.
- [20] The Dredging Risk Review Briefing Note of February 2011 and the update of April 2011 appear to have been created during the construction period of the bund and on their titles, relate to risks of dredging. Accordingly, the plaintiffs submit the document is relevant to GPC's awareness of the likely risks based on information available at the time. GPC submits the documents are not relevant as it considers risks for the dredging undertaken for the Western Basin Dredging and Disposal Project (WBDDP) and not in respect of construction of the bund.
- [21] Annexure B to the document plan sets out 13 categories of documents that the plaintiff sought as relevant disclosure from GPC. Category 1 is defined to include "[d]ocuments recording, analysing or discussing benthic conditions, water quality, water currents or movements (hydrography) with the Affected Waters prior to 2010". As the documents are contemporaneous documents relevant to February and April 2011, they are not historical documents of the nature referred to in Category 1.
- [22] Category 6 is defined to include "[d]ocuments recording or discussing the risks of (or environmental risks associated with) Discharges, apparent Discharges, reports of Discharges or steps to prevent, control or remediate Discharges created or modified during the period from 1 January 2005 to present."
- [23] On their titles, the documents are likely to be relevant as recording or discussing risks in respect of discharges or steps to prevent, control or remediate discharges. As against that, Ms Deans, an experienced solicitor, familiar with the matter and in the employ of King & Wood Mallesons (KWM), the solicitors for the defendant, has deposed that she has reviewed the documents and they are not relevant.
- [24] Ordinarily, the question could have been disposed of by the defendant simply handing the documents to the court for perusal.²⁷ However, travel restrictions imposed upon the parties and the court by COVID-19 prevented the usual procedure being undertaken. There is no suggestion in the affidavit of the solicitor for the defendant that the documents are in any way confidential; the sole basis of refusal to discovery is relevance.
- [25] In the absence of production of the documents so that the issue can be definitively decided, all that I am left with is the title of the documents which gives the strong inference that the documents are relevant, and the affidavit of the defendant's solicitor swearing that upon her examination of the documents, they are not relevant.

²⁷ *State of Queensland v Allen* [2012] 2 Qd R 148 at 151 at [6].

- [26] As the documents are identified by a name which infers they are relevant, confined, and not confidential, and as a result of the inability to produce the documents due to the remote nature of the proceedings imposed by COVID-19, I consider there are special circumstances and in the interests of justice require the documents to be disclosed.²⁸

Item 3 - Request 99 - Complete contents of archive box WBSDP-A0027

- [27] The archive box is described as containing “CS100015 Design & Construction of a Bund, Haul Rd & Quarry – Tender submissions BMD Constructions, Thiess, Leighton, VDM”. The plaintiffs submit that the complete contents of the archive box are relevant as the unsuccessful tender submissions are relevant to the question of GPC’s knowledge of the significance of the design of the bund including the appropriateness of the design.
- [28] GPC maintains its objection to producing the documents, arguing they are not relevant. GPC argues that the unsuccessful tender submissions from four tenderers do not record or discuss a proposal or application to obtain or vary any relevant approvals for the bund. They do not refer to any of the documents referred to in Category 3 of Annexure B to the disclosure plan. Category 3 includes “[d]ocuments recording or discussing any proposal or application to obtain or vary any Approval concerning or effecting the design, construction or use of the Bund.”
- [29] As discussed above, there has been considerable cooperation between the parties with respect to the complicated issue of disclosure. On behalf of GPC, Ms Dean, has supervised much of the disclosure. Ms Dean has sworn that she has examined all of the documents within the electronic version of the archive box and has concluded they are not relevant to the matters pleaded in the case, nor the matters the subject of the document plan.²⁹
- [30] Pursuant to r 211(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”), documents that are required to be disclosed are those documents which are directly relevant to an allegation in issue in the pleadings.
- [31] The archive box, plaintiff request 99,³⁰ is in the same category as requests 85 and 86, insofar as Ms Dean has reviewed the documents and concluded that they are not relevant. However, request 99 differs because the description of the contents of the box, namely, the names of unsuccessful tenderers, are not among the contractors set out in paragraph 13A of Annexure B to the document plan. As such, the description of the contents of the box suggests that they are *prima facie* not relevant.
- [32] Furthermore, the submission that the unsuccessful tender submissions may be relevant to the question of GPC’s knowledge of the significance of the design of the bund wall does not lead to any fair inference that the unsuccessful tender documents are directly relevant.
- [33] I therefore dismiss the plaintiff’s application in respect of documents sought in plaintiff request 99.

²⁸ *Uniform Civil Procedure Rules 1999* (Qld) r 223(4)(a).

²⁹ Paragraph 37 of the affidavit of Lucy Catherine Dean filed 9 June 2020.

³⁰ Exhibit 1 to the hearing 16 June 2020.

Item 4 - Request 102(a), (b), (e) - i. CS100015 – Abi Group Quality Assurance - Material Testing ii. CS100015 – Abi Group Quality Assurance – QA RL5.2m to RL7.0 Bund Construction Volume 8 iii. CS100015 – Abi Group Quality Assurance – Settlement Monitoring for RL5.2 Bund Construction in archive box WBSDPA0030

- [34] Request 102 contained a request for six documents, of which, GPC accepts documents (c), (d), and (f), are relevant and have been disclosed. Requests 102 (c), (d), and (f) are: Abi Group Quality Assurance Miscellaneous Temp Shore Access CPT Results, Abi Group Quality Assurance Geotextile RL5.2m to RL7.0m, and Abi Group Quality Assurance Geotextile Seabed to RL5.2m, respectively.³¹ The documents in dispute are: 102(a), Abi Group Quality Assurance Material Testing; 102(b), Abi Group Quality Assurance QA RL5.2m to RL7.0 Bund Construction Volume 8; and 102(e), Abi Group Quality Assurance Settlement Monitoring for RL5.2 Bund Construction.³²
- [35] The plaintiffs submit 102(a) and (b) are relevant to the quality of the bund wall including the nature and/or grading and/or placement of the material used to construct the bund wall and accordingly are relevant to the appropriateness of the design or construction of the bund wall and GPC’s knowledge of those issues.
- [36] In respect of 102(e) the plaintiffs submit that the report on settlement monitoring of the bund wall is relevant to the appropriateness, design, or construction of the bund wall and resultant effects on the efficacy of the bund wall to prevent sedimentation or leaching.
- [37] In support of its submission that the documents are not relevant, GPC points out that the appropriateness of the construction of the bund wall is not an issue in dispute on the pleadings. Rather, the aspects of design of the bund wall which are in dispute relate to the control and prevention of discharge from the bund. GPC submits that the documents do not contain information pertaining to the efficacy of the bund wall to prevent sedimentation or leaching, the documents are not directly relevant to the allegations in paragraphs 59 to 65 of the Further Amended Statement of Claim (“FASOC”), and the documents do not fall within Categories 4 and 5 of the document plan.
- [38] Categories 4 and 5 of the document plan are defined as:
- “4. Documents recording or discussing any design feature of the Bund directed at preventing or controlling discharges of acid sulfate soils or potential acid sulfate soils or other potential contaminants through, around, or under the Bund Wall (**Discharges**), or any amendment of the design to include, modify or remove such a feature during the period from 1 January 2010 to 31 December 2013.
 5. Documents recording or discussing the timing of placement of material within the Bund or locations (from time to time) where material was or was to be placed within the Bund which

³¹ Exhibit LCD-1 to the affidavit of Lucy Catherine Dean filed 9 June 2020.

³² Exhibit LCD-1 to the affidavit of Lucy Catherine Dean filed 9 June 2020.

were created or modified during the period 1 January 2009 to present.”

(Original Emphasis.)

- [39] As discussed above, in the absence of the provision to the court of the documents for review, I am left with the title description of the documents, from which it may be inferred the documents may be directly relevant, and Ms Dean’s deposition at that upon her review they are not relevant.³³
- [40] It may be observed that the documents are title “Abi Group” documents, Abi Group being one of the contractors referred to in the Schedule of Contractors contained in the document plan. Further, the respondent accepts that the contested documents (102 (a), (b), and (e)) bear similar titles to the documents disclosed pursuant to requests 102(c), (d), and (f).
- [41] I conclude, as I did in respect of request 85 and 86 that, given that the documents are identifiable, on their face relevant, and have not been provided for review, there are special circumstances and it is in the interests of justice to disclose those documents.
- [42] Accordingly, the documents referred to in item 4 of the aide memoire being requests 102(a), (b) and (e) ought to be disclosed.

Item 5 - Request 103 - 'CS090304 - CS090304 - Early Works Dredging docs & Bund Wall Construction Report from Golding' in archive box WBSDP-A0031

- [43] The plaintiffs submit that the documents are relevant as the nature and scope of early work dredging is relevant to the question of causation, and the bund wall construction report including information on the nature and/or grading material used to construct the bund wall is relevant to the appropriateness of the design or construction of the bund wall and GPC’s knowledge of those issues.
- [44] GPC objects to producing the documents and submits that it is irrelevant. GPC repeats its argument that the appropriateness of the construction of the bund wall is not an issue in dispute in the pleadings but rather the aspects of the design which relate to the control and prevention of discharges from the bund is in dispute.
- [45] Ms Dean’s review of the documents shows that the Early Works Dredging documents consist of “Dredgeco” daily dredge reports and do not record or discuss design features of the bund directing, preventing, or controlling discharges as referred to in category 4. Nor do they record or discuss the timing or placement of material within the bund as referred to in category 5. The early works dredging material which is the subject of the documents was deposited offshore and not within the bund and so, it is submitted, the documents are not relevant to issues in dispute arising from paragraphs 59 to 65 of the FASOC.
- [46] Similar conclusions are drawn by Ms Dean in respect of the bund wall construction report. Paragraph 59 of the FASOC alleges breaches of duty due to a failure to halt or remediate bund wall construction, and from on or around 1 July 2011 “the base of the Bund Wall was insufficiently deep or impermeable to block the paleo-

³³ Paragraph 37 of the affidavit of Lucy Catherine Dean filed 9 June 2020.

channels under the Bund Wall”³⁴ such that “unexpected ‘piping’ of water and sediment occurred through the paleo-channels under the Bund Wall”.³⁵

[47] Thus, GPC’s knowledge of the construction of the bund wall from its very base is directly raised by the pleadings. Again, similar to requests 85 and 86, the plaintiffs are able to point to a document where:

- (a) the description infers that it is relevant;
- (b) the document is a report from Golding, a contractor referred to in the schedule of contractors; and
- (c) the documents have not been produced to the court for perusal.

I conclude that there are special circumstances and that in the interests of justice, the documents ought to be disclosed.

Items 6 & 7 - Requests 106 and 109(b) – Complete contents of archive box WBSDP-A0039 and Document(s) described as 'Abi Group – Gladstone Seawall bund Quantities – Presentation' in archive box WBSDP-A0045

[48] Request 106 refers to the archive box WBSDP-A0039, which is described as containing “Abi Group – Quality Assurance Documentation Volume 1 to Volume 7 RL 5.2m to RL 7.0 Bund Construction”. Request 109(b) is a document (possibly several) titled “Abi Group Gladstone Seawall Bund Quantities Presentation” and contained in archive box WBSDP-A0045.

[49] Requests 106 and 109(b) fall under the same category as requests 85, 86, 102 and 103. That is, in taking the description of the documents at face value they are relevant, particularly as they are documents brought into existence by Abi Group. As GPC submits, the appropriateness of the construction of the bund wall is not an issue in dispute in the pleadings, however GPC concedes that steps taken by GPC in relation to control or prevent discharge from the bund is in issue.

[50] Although no doubt the subject of expert evidence to be obtained, logically, it is difficult to accept that proper steps which ought to have been taken to control or prevent discharge from the bund is a question removed from a consideration of the appropriateness of the construction or design of the bund wall. Accordingly, I accept the plaintiffs’ submissions that GPC’s knowledge of the efficacy of the design or construction of the bund wall and in particular its characteristics in relation to the prevention of discharges from the bund is relevant to a matter in the pleadings.

[51] Accordingly, as the documents subject of requests 106 and 109(b), are:

- (a) on the face description of the documents relevant;
- (b) prepared by a contractor listed in the schedule of contractors in the document plan; and
- (c) not before this court.

³⁴ Paragraph 59aa of the Further Amended Statement of Claim filed 27 July 2018.

³⁵ Paragraph 59a of the Further Amended Statement of Claim filed 27 July 2018.

I conclude that there are special circumstances and it is in the interests of justice that the documents be disclosed.

Item 8 - Request 122 – Complete contents of archive box WBSDP-A0119

- [52] The box contains three different types of documents: daily site reports, from February, March, August and December 2011; site diary extracts related to inclement weather dredging for March 2011; and third-party audits from August 2011.
- [53] The parties run the same arguments in respect to the documents. GPC submits that a distinction with respect this request is, as show in Exhibit 1,³⁶ the daily site reports of February, March, August and December 2011 have been improperly described, as they are only for January and February 2011 not for March 2011 to August 2011. Furthermore, they “include information regarding the removal of material from the quarry”. Upon my reading of the document description it appears that they are listed as singular months, and not, as GPC submits, an inclusive time period. However, this is largely immaterial.
- [54] At Paragraph 9A of the FASOC, it is pled that the expansion of the existing fisherman’s recreation area was to reclaim an additional 170 hectares of area and involve construction of a bund into which 10 million cubic metres of dredged sediment could be deposited. That part of the project is referred to as the port extension project. The dredging and disposal project, sometimes referred to as the WDBBP, and related to the construction of an additional 235 hectares of bunded reclamation area.
- [55] It is difficult in the absence of further information to make any determination of whether the daily site reports refer to the entire site or some part of the very large area which constitutes the site. As noted above, the site reports include “information regarding the removal of material from the quarry via the haul road to construct the Bund Wall.”³⁷
- [56] The absence of locality as to the site which the reports relate to and the affirmative description of the site reports relating to the removal of the material from the quarry via the haul road, lead to the conclusion that the defendant is right in asserting that the daily site reports in January and February 2011 are not directly relevant to any issue on the pleadings.
- [57] I reach the same conclusion in respect of the site diary extracts related to inclement weather dredging.
- [58] However, in my view, the third party audits of August 2011 fall into a different category. The outer ends of the bund wall were joined on 21 July 2011. Then, it appears from the document description, audits were conducted on the project by third parties in August 2011. In my view, from the description of the documents and the timing of the documents, that is August 2011, the best inference in the absence of production of the documents for inspection by the court is that the documents are directly relevant.

³⁶ Exhibit 1 to the hearing 16 June 2020.

³⁷ Exhibit 1 to the hearing 16 June 2020.

- [59] In respect of request 122, I conclude that only third party audits of August 2011 documents ought to be discovered.

Item 9 - Request 127(a) - Document(s) described as 'CS100015 – Design and Construction of the Bund Wall, Haul Road and Borrow Pit – Environmental Obligations – November 2011' in archive box WBSDP-A0127

- [60] The title of the document suggests that it is relevant. GPC has observed the document and describes it as:³⁸

“This document is short letter which concerns the environmental obligations which are not the subject of the pleadings. The letter:

- (a) does not record or discuss any design features of the Bund directed at preventing or controlling Discharges, as referred to in Category 4;
- (b) does not record or discuss the risks referred to in Category 6;
- (c) is not relevant to the issues in dispute arising from paragraphs 59 to 63 of the FASOC”.

- [61] Given the breadth of the project as described above, it may be concluded that GPC had environmental obligations which exceeded those relating to the construction and maintenance of the bund wall. As per Exhibit 1, GPC has confirmed that this letter relates to other environmental obligations and accordingly I conclude that it is not relevant and need not be disclosed.

Item 10 - Request 128 - Variation to contract Approval ABI Group - May 2011

- [62] In the plaintiffs’ schedule of requests for additional disclosure,³⁹ the plaintiffs’ allege that the document subject of request 128 fell within Category 7 of Annexure B of the document plan. Category 7 of Annexure B of the document plan describes:

“7. Documents recording or discussing the terms of engagement of a person identified in the Schedule in connection with the Projects, or any proposal to amend any term of such engagement where the term relates to the construction or use of the Bund or any program referred to in category 2 above during the period 1 January 2010 to 31 December 2013.”

- [63] In addition to their submission that the document falls into Category 7, the plaintiffs submit the document is also relevant to the Abi Group contract referred to in paragraphs 102 and 103 of GPC’s defence. I accept the defendant’s description of the document, that is, as a brief list of the contract variations and corresponding costs. However, I conclude that the document does fall within Category 7 of Annexure B of the document plan as it records contract variations and corresponding costs in respect of the contractor Abi Group. I conclude that the document ought to be disclosed.

³⁸ Exhibit 1 to the hearing 16 June 2020.

³⁹ Exhibit LCD-1 to the affidavit of Lucy Catherine Dean filed 9 June 2020.

Items 11 & 12 - Requests 129 & 140

[64] The plaintiffs seek disclosure in respect of item 11(a) and do not press documents 11(b) through to (e) and item 12. Item 11(a) is described as “Early Works Dredging Contract - May 2010”. The plaintiffs submit that as the document is a contract in connection with the projects and as the nature and scope of early dredging works is relevant to the question of causation, that the document ought to be disclosed. As may be seen from the date of the contract, May 2010, it pre-dates the construction of the bund in November 2010 by some six months.

[65] GPC has reviewed the document, and submits that it does not relate to the project and points out that the document does not reference any person identified in the schedule of contractors contained in the document plan. In those circumstances, I accept therefore that the document is not relevant and need not be disclosed.

Item 13 – Request 149(a) – Nearfields Turbidity Modelling in archive box WBSDP-A0241

[66] The plaintiffs submit the document is relevant to GPC’s awareness of the likely risk based on information available at the time and more so they must be relevant to the parties’ hydrology expert evidence. GPC objects to producing the document, arguing the document does not fall within category 1 or 2 and “is a dissertation related to cutter suction dredging submitted to Texas A&M University and does not fall within Categories 1 or 2 as it is not related to the Affected Waters or the Projects”.⁴⁰

[67] I accept GPC’s submission that the modelling does not relate to the affected waters or projects, but rather is a dissertation on the topic of cutter suction dredging and is accordingly not directly relevant and ought not to be discovered.

Item 14 - Request 150(i) - Water Monitoring – ‘Standard for Freshwater Blue-Green Algae’ in archive box WBSDP-A0274

[68] The plaintiffs submit that the presence of toxic algae blooms is specifically raised in paragraph 87(e) of the FASOC and paragraph 213-215 of the Defence.

[69] In paragraph 213 of the Defence, intervening weather events are raised, in particular, the flood of the Awoonga Dam and the Boyne River between December 2010 and March 2011. The defence alleges that due to the unusually large influx of fresh water into the port, approximately 30,000 large barramundi were washed over the Awoonga Dam into the Boyne River, thus the 2010/2011 weather event and fresh-water spill over of Awoonga Dam is raised affirmatively in the defence as a relevant issue.

[70] Even if, as alleged by the defence, the document is a general standard with respect to water monitoring, the document is directly relevant to GPC’s knowledge of the applicable standards to manage algal blooms, an issue directly raised on the pleadings. Therefore, the document subject to request 150(i) ought to be disclosed.

⁴⁰ Exhibit 1 to the hearing 16 June 2020.

Item 15 - Request 154(e) – ‘Hydrodynamic modelling marine traffic’ in archive box WBSDP-A0294

- [71] The plaintiff submits that hydrodynamic modelling of marine traffic is relevant to the issue of causation of overall turbidity. I do consider that if the heading of the document truly describes the nature of the document, then the document would fall within categories 1 or 2 and would be required to be disclosed. However, as GPC points out, the documents are in fact tenderer proposals for marine traffic hydrodynamic modelling and reviews of such proposals.⁴¹ I accept GPC’s submission in this regard, accordingly, as the documents do not fall within categories 1 or 2 they ought not be disclosed.

Item 16 - Request 169(c) – Aurecon Australian Pty Ltd - Provision of Dredge Management Plan and associated permit amendments

- [72] These documents are contained in folder 3 of 3 in archive box WBSDP-A0365. The other two folders contained in the same archive box have already been disclosed.
- [73] The plaintiff submits that folder 3 ought to be disclosed as the costs relating to dredging may be a relevant matter in assessing what a reasonable person in the position of GPC would have done in response to risks identified in the FASOC. I accept that submission and conclude that the document subject of request 169(c) ought to be disclosed.

Items 17, 18, 19, 20

- [74] These items are now the subject of agreement and will be discovered in fortnightly tranches.

Items 21, 22 and 23

- [75] Item 21 and 22 are the subject to further searches being undertaken by GPC and item 23 is not pressed.

Item 24 - Request 178 - Minutes of Daily Site Meetings conducted at GPC’s offices between January 2011 and December 2012

- [76] The plaintiffs have been able to point to meetings chaired by either Peter O’Sullivan, Michael Jorgensen, Robert Ferguson or Robert Ryan conducted at GPC’s offices between January 2011 and December 2012 with notes being taken and recorded in a “physical ‘project day book’, in the form of a hard copy diary, which was in the possession of either Peter O’Sullivan, Michael Jorgensen or Robert Ryan”.⁴² The plaintiffs also seek all emails between Peter O’Sullivan, Robert Ryan, Michael Jorgensen, Robert Ferguson, Kieran O’Neill, John Broomhead and Leo Zussino regarding the daily site meetings.
- [77] With respect to the latter request, GPC points out that they have already undertaken the keyword searches of GPC’s electronic document management systems, Microsoft Exchange and Symantec Enterprise Vault, as part of the 2019

⁴¹ Exhibit 1 to the hearing 16 June 2020.

⁴² Exhibit 1 to the hearing 16 June 2020.

disclosure.⁴³ GPC is prepared to undertake similar searches in respect of their electronic backup tapes and will disclose documents which fall into the categories for GPC's disclosure, but submits to that it would be unduly time-consuming and costly to undertake a further review of documents the subject of their 2019 disclosure.⁴⁴

- [78] With respect to the physical project daybook, the plaintiffs first made the request for this book on 25 May 2020. The response of GPC is that it "has not located any project daybooks as described by the plaintiffs or similar documents".⁴⁵ The defendant speculates that if "such project daybook exists, they are most likely located within GPC's hard-copy archive boxes."⁴⁶
- [79] In the course of making investigations in response to this request, the defendant was alerted to the possibility that, should the daybook exist at GPC, it may be located amongst miscellaneous hard copy documents held at the RG Tanna Coal Terminal Facility ("RG Tanna Facility"). However, GPC assess the possibility as being very remote as, if that were the case, the daybook was likely to have been mistakenly archived or stored in that facility by an employee many years ago. GPC considers that it would not be reasonable, in facilitating the just and expeditious resolution of the real issues in the proceedings at a minimum of expense, to perform a manual search of the RG Tanna Facility to locate, should it exist, the daybook.
- [80] In short, GPC submits that not only is the request for the production of the daybooks extremely late, it is unreasonable to require it to search the RG Tanna Facility to locate such books. The RG Tanna Facility is an extremely large facility, however, as the facility is a coal terminal, it can be logically concluded that the vast majority of the area of the RG Tanna Facility is not office space.
- [81] It is true, as GPC submits, that the request for the disclosure of the daybook was made only very recently. Further, it is true that it may be extremely difficult, perhaps impossible, to locate, should it exist, the daybook. However, it is an inescapable conclusion that the document, if it still exists, would be directly relevant to the issues raised in the proceedings.
- [82] The document or documents being a project daybook in hard copy diary form and identified as being previously in the possession of Peter O'Sullivan, Michael Jorgensen or Robert Ryan may reasonably lead to a confined train of inquiry in an attempt to locate the project daybooks. I accept the plaintiffs' submission that the books, if located, may be highly relevant. There is more than an objective likelihood that the books did at some point exist as ordinarily daily site meetings are common for construction projects. In the circumstances, in my view, it is appropriate that GPC do make a reasonable search for the project daybooks.
- [83] The plaintiffs have sought disclosure of the daybooks by 29 June 2020. Due to the fact that the request was recently made, that is an insufficient time in which to order GPC to produce the daybooks. GPC ought to be afforded a further 2 weeks to

⁴³ Affidavit of Lucy Catherine Dean filed 15 June 2020.

⁴⁴ Affidavit of Lucy Catherine Dean filed 15 June 2020.

⁴⁵ Exhibit 1 to the hearing 16 June 2020.

⁴⁶ Exhibit 1 to the hearing 16 June 2020.

13 July 2020 to make a reasonable search for the project daybooks and either discover them or alternatively file and serve on the plaintiffs an affidavit stating;

- (a) whether or not the project daybooks ever existed;
- (b) if the daybook did exist, the circumstances in which the project daybooks ceased to exist or passed out of the possession or control of GPC; and
- (c) the steps undertaken by GPC in its reasonable search for the project daybooks including identification of the persons who made the searches, the dates and times those persons made such searches, and what was done in respect of such searches.

Item 25 - Request 179

[84] This request relates to documents concerning Environmental Sub-committee meetings held between GPC and environmental managers of Santos and/or QGC and/or Arrow and/or APLNG. As pointed out by GPC, they have already disclosed the environmental subcommittee meeting minutes which has resulted in the disclosure of 35 documents. Having obtained the subcommittee minutes, the plaintiffs also now request disclosure of:

- (a) the tape recordings of the subcommittee minutes;
- (b) transcripts of such tapes processed by Kelly Spain;
- (c) all emails from Ms Spain to Mr O'Neill with regard to the transcripts, attaching the transcripts, and the production of minutes of the meeting;
- (d) With regard to the transcripts and/or the minutes of the meetings, all emails between Ms Spain and any of the following (singularly or otherwise) persons:
 - (i) Mr Broomhead;
 - (ii) Mr O'Sullivan;
 - (iii) Mr Jorgensen;
 - (iv) Mr Ryan; and
 - (v) Mr Ferguson.
- (e) Any drafts of the transcripts or such meeting minutes.

[85] The position of GPC is that it has disclosed the minutes and that it will disclose any such documents falling within the categories when it performs searches of the backup tapes. However, having already expended considerable resources upon discovery, it does not propose to further perform searches of its electronic document management systems.

[86] In my view, a reasonable and proportionate discovery of relevant documents supports the approach undertaken by the defendants, that is with the discovery of the actual environmental subcommittee minutes together with an undertaking to disclosure correspondence which falls into the categories requested by request 179

and indeed in addition from request 178 to 190 and the further disclosure required of the backup tapes.⁴⁷

- [87] I conclude that the other documents sought by request 179, being the tape recordings, the transcripts and all emails, have not been shown to be directly relevant and represent a disproportionate and unreasonable approach to discovery of documents, particularly in a case where the parties have been relieved of the general duties of disclosure because of the extreme complexity of the task required to be undertaken.
- [88] Therefore, on the basis that further searches relating to request 179 be conducted on the backup tapes, the documents of request 179 need not be further discovered.

Items 27 to 36

- [89] Item 27 to 36 are not pressed as GPC have undertaken to make searches for such documents as part of the searches being required with respect to the backup tapes. GPC has invited the plaintiffs to assist in the determination of any further keywords involved in the extensive further searches to be undertaken.

Further Security for Costs

- [90] Rules 670 and 673 of the UCPR provide as follows:

“670 Security for costs

- (1) On application by a defendant, the court may order the plaintiff to give the security the court considers appropriate for the defendant’s costs of and incidental to the proceeding.
- (2) This rule applies subject to the provisions of these rules, particularly, rules 671 and 672.

...

673 Way security given

- (1) If the court orders the plaintiff to give security for costs, the security must be given in the form, at the time, and on any conditions the court directs.
- (2) If the court does not specify the form of security to be given—
 - (a) it must be given in a form satisfactory to the registrar; and
 - (b) the registrar’s approval of the form of security must be written on the order before it is issued.
- (3) The plaintiff must as soon as practicable after giving security serve on the defendant written notice of the time when, and the way, the security was given.”

⁴⁷ Affidavit of Lucy Catherine Dean filed 15 June 2020.

- [91] In the present case, the parties agree that the pre-requisite for a security for costs order, pursuant to r 671 of the UCPR, has been fulfilled and that it is appropriate that the court further order the plaintiffs to give further security “the court considers appropriate”.
- [92] On 22 February 2019, the plaintiffs were ordered, for the reasons set out in *Murphy & Ors v Gladstone Ports Corporation*,⁴⁸ to provide \$430,000 in security for costs “up to and including to the completion of disclosure” by:
- (a) delivering to the Defendant’s solicitors a Deed in the form of the Deed annexed to this order and marked “Annexure A”, that is, the duly executed AmTrust Europe Limited (UK) company number 122 9676) (**AmTrust**);
 - (b) paying in to Court the sum of AUD\$30,000, which the Defendant may call upon if AmTrust fails to pay any amount to the Defendant under the Deed referred to in subparagraph (a) above.
- [93] Prior to that application, the parties had agreed that security ought to be given and the amount of the security be \$400,000, but disagreed as to the form of the security. Ultimately, the plaintiff prevailed in its argument for the provision of the security by way of the AmTrust deed.
- [94] On 22 October 2019, the plaintiffs were ordered to provide further security of costs in the further sum of \$520,000 again by way of an AmTrust deed in the same terms as the deed referred to in the order of 22 February 2019.
- [95] In this application, the parties are in dispute as to the form and quantum of the security. GPC argues that a further AmTrust deed will not provide appropriate security as there has been a material change in circumstances to the company and, in terms of quantum, GPC seeks a further \$997,000. Conversely, the plaintiffs submit that a further AmTrust deed would be sufficient and a quantum of \$500,000 ought to be ordered.
- [96] In *Murphy & Ors v Gladstone Ports Corporation*,⁴⁹ I concluded that a deed of indemnity in a specific form would provide appropriate security. Relevantly, I said:
- “[15] Although deeds of indemnity of the type offered by AmTrust are the subject of numerous decisions concluding that the form of the security is adequate, whether a deed of indemnity will ‘provide a fund or asset against which a successful defendant can readily enforce an order for costs against’ unsuccessful plaintiffs is a question of fact to be determined by reference to the deed provided and the evidence in the application (and not by reference to any seemingly acceptable practice in AmTrust offering a deed of indemnity in other cases).
- [16] In the present case, the deed of indemnity which is offered provides for an unconditional and irrevocable undertaking on behalf of AmTrust to pay to GPC any sum or sums (up to \$400,000) which the plaintiffs are legally liable to pay the

⁴⁸ [2019] 3 Qd R 255.

⁴⁹ [2019] 3 Qd R 255 at 263-264, 264.

defendant. Various terms of the deed of indemnity have been the subject of correspondence with the deed being materially altered in favour of the defendant, that is, many of the issues between the plaintiffs and the defendant have been resolved, however, two issues of significance were unable to be resolved.

[...]

[19] The financial statements of AmTrust have been audited with a clear audit certificate from KPM[G] Auditors. There is no reason to think, therefore, on the evidence thus far advanced, that (if the deed of indemnity is enforceable) with the provision of \$30,000 in actual security to enable the judgment to be enforced, there is much, if any, risk in the defendant being unable to access the \$400,000 security for costs.”

(Footnotes omitted.)

[97] The plaintiff proposes an order for security for costs in the value of \$500,000 to “be provided by delivering to the defendant’s solicitors a Deed executed by AmTrust Europe Ltd (UK Company Number 1229676) (**AmTrust**) in a form to be agreed between the parties.”⁵⁰

[98] GPC senior counsel was rightly critical of the form of the order proposed. Senior counsel for the defendant pointed out that such an order would not provide for appropriate security as previous grants for security for costs by way of deed were made on the basis of a specific deed. As noted above, provisions of the deed have been agreed between the plaintiffs and GPC in prior cases through negotiations set out in correspondence with, as I concluded above, “the deed being materially altered in favour of the defendant”.⁵¹

[99] As may be inferred by the parties entering into the deed in the same terms for both the 22 February 2019 and 22 October 2019 provisions of security for costs, the terms of the deed are adequate.

[100] As explained by Mr May, counsel for the plaintiffs, the intention of the plaintiffs is to enter into a deed in the same terms as that provided for in the orders of 22 February 2019 and 22 October 2019. GPC’s principal argument, however, is that a deed of indemnity is not appropriate at all because there has been a material financial change in the circumstances of AmTrust as noted in its financial statements for the year ended 30 December 2019.

[101] In *Murphy & Ors v Gladstone Ports Corporation* I said:⁵²

“[18] In terms of the practical receipt of any monies payable under the deed of indemnity, the plaintiffs point to the audited financial statements of AmTrust showing that it is a company of substance, i.e. having total assets (as at 31 December 2017)

⁵⁰ Exhibit 2 to the hearing 16 June 2020.

⁵¹ *Murphy & Ors v Gladstone Ports Corporation* [2019] 3 Qd R 255 at 264.

⁵² *Murphy & Ors v Gladstone Ports Corporation* [2019] 3 Qd R 255 at 264.

of almost £2 billion, having total equity of over £382 million, and reporting annual profits of almost £69 million.”

- [102] In support of their submissions that AmTrust has experienced a material change in financial circumstances, GPC refers to the company’s Report and Financial Statements for the year ended 31 December 2019⁵³ and the company’s Solvency and Financial Condition Report for the year ended 31 December 2019.⁵⁴ GPC points to the reduction in annual profit from £46, 000 in 2018 to a loss of £20, 237, 000 in 2019.⁵⁵ This can be further compared with the profit of £69 million as noted in *Murphy & Ors v Gladstone Ports Corporation*.⁵⁶
- [103] However, the financial statements show relatively stable amounts of total assets, almost £2 billion in 2017,⁵⁷ £1,932,394,000⁵⁸ in 2018 and £1,868,853,000 in 2019.⁵⁹ Similarly, with respect to equity for shareholders funds, they recorded at approximately £379,889 in 2018 and £351,045,000 in 2019.⁶⁰
- [104] The 2019 annual report and financial statements are signed on 4 May 2020 and recognise two main external risks, namely Brexit and COVID-19. GPC relies upon those external risks, to submit there has been a change in circumstances which renders the provision of security by way of a deed of indemnity by AmTrust as an inappropriate form of security.
- [105] Whilst a selective reading of the AmTrust reports, exhibited to the affidavit of Mr McDonnell,⁶¹ support the submission that there has been a material change to the company bought on by, among other things, Brexit and COVID-19, a more detailed reading of those reports supports the opposite conclusion.
- [106] Page 16 of the solvency and financial condition report is a diagram showing the legal structure of the AmTrust Group, of which AmTrust Europe Ltd is a part of. The diagram identifies several limbs of the AmTrust Group’s including AmTrust Europe Ltd’s Irish based insurers, AmTrust International Underwriters DAC. As well as its existing and new Italian based insurers, AmTrust Italia Holdings LLC and AmTrust Assicurazioni S.p.A.
- [107] The director’s strategic report to the annual report and financial statements shows that the company has for some time been executing on its “Grow/Fix/Exit/Brexit” initiative.⁶² The policy would appear to have many aspects, but relevantly includes “transferring all EEA [European Economic Area] business to other AmTrust Group companies”.⁶³
- [108] This policy appears to be that insurance written by the company in the UK is to be retained, but insurance which has its genesis in European companies is to be written

⁵³ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁵⁴ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁵⁵ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁵⁶ *Murphy & Ors v Gladstone Ports Corporation* [2019] 3 Qd R 255 at 264.

⁵⁷ *Murphy & Ors v Gladstone Ports Corporation* [2019] 3 Qd R 255 at 264.

⁵⁸ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁵⁹ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶⁰ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶¹ Affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶² Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶³ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

or transferred to non-UK based members of the AmTrust Group. The effect of Brexit may be seen on page 21 of the annual report and financial statements, namely approximately £70 million worth of insurance premiums, previously written by the company is now being written by its European associates.

[109] However, as also demonstrated on that page, the effect on earned premiums of the company net insurance is a decrease of approximately £7.5 million. The deterioration in reported profit from £46, 000 in 2018 to a loss of £20,237,000 in 2019 is driven largely by the balance on the “general business technical account” showing a loss in 2019 of £36,015,000. In the 2018, the same metric was a loss of £7,855,000. The calculation of the loss on balance of general account of £36 million shown on page 21 of the annual reports and financial statements.⁶⁴

[110] More explanation of the technical result is contained in the solvency and financial condition report.⁶⁵ The solvency report records:

“The Company’s net technical result in 2019 was a loss of £36m, primarily driven by reserve strengthening on medical malpractice, professional indemnity and certain exited lines of business.

Further information on the company’s business performances included in section A.”

It is apparent that the technical gains and losses are quantified using actuarial methods in an attempt to fairly measure the profitability of the corporation on an accruals basis.

[111] As to the 2019 technical loss, the insolvency and financial condition report, records:⁶⁶

“This increase in miscellaneous financial loss is primarily attributable to the increase in net premiums earned and the increase in general liability is the result of incremental claims development in both the medical malpractice and PI sublines of the business. This deterioration in claims incurred was related to certain older underwriting years in the medical malpractice public liability segment and two specific funded schemes in the PI solicitor’s book (mostly from the 2015 and 2016 underwriting years).”

[112] As to the effect of Brexit strategy, as said on page 23, the net premiums written have increased in the United Kingdom “by £19 million versus prior year to £164 million (2018: £145 million), primarily due to an increase in the legal expenses business...”

[113] In conclusion, the effect of Brexit upon the company has been a decrease in revenue in terms of the net premiums written. However, premiums written to companies in the United Kingdom by AmTrust Europe Ltd (which haven’t been transferred), have

⁶⁴ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶⁵ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶⁶ Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

shown signs of improvement. Furthermore, the loss shown in 2019 appears to be driven by reassessment of costs of claims incurred in the long tail schemes of medical malpractice in the two specific PI solicitors' books.

- [114] The directors, as recorded in the report and financial statements, confirm that they believe that “the company has considerable financial resources and a balance book of business...the company has adequate resources to continue in operation existence for the foreseeable future...[and] the going concern basis for preparing the Financial Statements is appropriate.”⁶⁷
- [115] By their report of 4 May 2020,⁶⁸ the independent auditor, KPMG, have confirmed that they have audited the financial statements of the company and the financial statements give a true and fair view of the state of the company's affairs as of 31 December 2019. The auditors concluded that they had nothing to report on the going concern of the company, specifically after having undertaken a detailed analysis as to the impact of the uncertainties due to COVID-19. As to the impact of COVID-19, the directors record on page 8 of the annual report and financial statements “[g]iven the maintenance of a 100% SCR solvency ratio after incorporating this stress scenario, it would indicate the Company could continue to honour its obligations through an additional 1 in 200 event level stress.”⁶⁹
- [116] The annual report and financial statements have dozens of acronyms. The acronym SCR stands for the Solvency Capital Requirement. The SCR recorded an increase of 6% from the 2018 level of 130% to 136% in 2019. This indicates an increase in the solvency position of the company in 2019. Furthermore, the stress scenario by which the company has been tested is set out on pages 8 and summarised on page 9 of the annual report and financial statement which shows quite drastic assumptions under the stress scenario, including a 50% reduction in gross written premium and a 25% decrease in 2021 and a 50% increase in bad debt expenses over the next 6 months.
- [117] The experience of the company as set out has been nothing like that, rather, the actual increase in bad debt expense measured is projected to be up to 4% over the next 6 months and the reduction in gross written premiums expected to be in the range of 5 to 10% over the next 12 months. Accordingly, in assessing the appropriateness of the corporation to provide security by way of deed for a sum in the vicinity of AUD\$2 million enables me to conclude, as I previously have, that “there is no reason to think...there is much, if any, risk in the defendant being unable to access the...security for costs.”⁷⁰
- [118] I conclude that there has not been a material change in circumstances and that the security ought to be given by way of the deed in the same terms, as annexures A to the order of 22 October 2019, with the necessary alterations to reflect the increase in the security provided
- [119] As to quantum of the security, senior counsel for GPC has accurately set out the relevant principles as follows:

⁶⁷ Page 16 of Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶⁸ Page 24 of Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁶⁹ Page 12 of Exhibit JAM-2 to the affidavit of Justin Anthony McDonnell filed 16 June 2020.

⁷⁰ *Murphy & Ors v Gladstone Ports Corporation* [2019] 3 Qd R 255 at 264.

- (a) parties are not encouraged to devote extensive resources to questions of security;⁷¹
- (b) assessing likely costs in large-scale litigation is not a simple matter and necessarily involves elements of uncertainty;⁷²
- (c) the amount does not need to be determined with mathematical precision and the process does not require a full assessment of costs but by its nature requires a “broad brush” assessment;⁷³
- (d) it is not incumbent on the defendant to present evidence on a security for costs application as though it were preparing a costs statement for past costs, or supplementing the statement as if for a final costs assessment;⁷⁴
- (e) the process of estimation undertaken by a judge determining a security for costs application embodies to a considerable extent necessary reliance on the “feel” of the case the judge has after considering relevant factors,⁷⁵ and the adoption of a broad approach to arrive at a pragmatic outcome which is regarded as appropriate;⁷⁶
- (f) while the court does not seek to provide the defendant with an indemnity for the expenses of defending the claim, it should provide protection against the risk that an order for party and party costs in the defendant’s favour might not be satisfied;⁷⁷
- (g) it is relevant to consider whether the security sought is proportionate to the quantum of the claim;⁷⁸ and
- (h) the involvement of a funder loosens slightly the stringency which normally attaches to the calculation of the appropriate security amount.⁷⁹

[120] By its letter of 17 March 2020,⁸⁰ GPC advised they intended to seek a third tranche of security for costs “to the completion of reply evidence, due on 23 October 2020” asserting the sum of \$1.7 million was appropriate by an increase in security in the sum of \$780,000. The sum was quantified with reference to Schedules A and B attached to that letter.

[121] The reply of Clyde & Co dated 24 March 2020,⁸¹ records that the plaintiffs thought the request was premature, that the future costs attached “appear to posit no better

⁷¹ *Lanai Unit Holdings P/L v Mallesons Stephen Jacques* [2016] QSC 2 at [52].

⁷² *Pathway Investments Pty Ltd v National Australia Bank Ltd* [2012] VSC 97 at [43].

⁷³ *Lanai Unit Holdings P/L v Mallesons Stephen Jacques* [2016] QSC 2 at [43]; *Equititrust Ltd v Tucker* [2019] QSC 51 at [111]; *Logan APZ Pty Ltd v Council of the City of Logan* [2017] QCA 288 at [49]; *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2018] QSC 53 at [82], [91].

⁷⁴ *Lanai Unit Holdings P/L v Mallesons Stephen Jacques* [2016] QSC 2 at [54].

⁷⁵ *Logan APZ Pty Ltd v Council of the City of Logan* [2017] QCA 288 at [45], referring to *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 515; *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd* [2010] QSC 176 at [41]; *Plyable Pty Ltd v Go Gecko (Franchise) Pty Ltd* [2016] QSC 269 at [48]; See also *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2018] QSC 53 at [83]-[84].

⁷⁶ *Equititrust Ltd v Tucker* [2019] QSC 51 at [113].

⁷⁷ *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 7)* [2005] VSC 275 at [5(5)].

⁷⁸ *Pathway Investments Pty Ltd v National Australia Bank Ltd* [2012] VSC 97 at [47].

⁷⁹ *Allen Dodd as trustee for the Dodd Superannuation Fund v Shine Corporate Ltd* [2018] QSC 40 at [20].

⁸⁰ Page 233-234 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

⁸¹ Page 238-239 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

than ball park figures” and that they would “continue to take a pragmatic approach to any further requests for security”. GPC replied on 9 May 2020, asserting that the figures were “not ball park figures” and had been detailed and calculated in a manner necessary to substantiate an application for further security.⁸²

- [122] It is important to bear in mind that the request for the third tranche of security for costs at \$1.7 million was intended to provide the defendant with security “to the completion of reply evidence due on 23 October 2020” which accords with the directions made by the order of 22 October 2019.
- [123] By its application filed 28 May 2020, GPC has sought further security in the amount of \$997,000 for security “up to and including delivery of plaintiff’s expert evidence”. The timetable that was set by the orders of 22 October 2019 required delivery of the plaintiff’s expert evidence by 8 May 2020. As deposed to by Mr James Cooper on behalf of the plaintiffs,⁸³ the timetable set out in the order of 22 October 2019 has been substantially disrupted by late disclosure from the defendants and the restrictions placed upon the plaintiffs and their legal advisors imposed by the COVID-19 pandemic.
- [124] Thus, the further security sought by GPC of \$997,000 does not include security for the steps set out in paragraphs 11 to 15 of the order of 22 October 2019. That is, it excludes, from the prior estimate of \$1.7 million, any costs relating to the delivery of GPC’s lay and expert evidence and the amendment of the defence previously ordered to occur by 2 October 2020.
- [125] With reference to Schedule B, the schedule of future costs, attached to KWM’s letter of 17 March 2020,⁸⁴ it would exclude all of the expert witness estimated costs and lay witness costs which were estimated to be \$3.272 million. It would also be expected to cause some decrease to the estimates for solicitor’s fees for communications and advices estimated at \$415,000, case management, conferences and interlocutory applications at \$245,000 and unallocated or miscellaneous costs at \$220,000.
- [126] In his affidavit filed 28 May 2020,⁸⁵ Mr McDonnell solicitor for the defendant, estimates that the \$997,000 sought in the defendants application would, with a 20% discount, equate to a recovery of standard costs, calculated at 65% of the solicitor’s fees, 90% of counsel’s fees and 100% of other disbursements for the period from 12 October 2019 to the delivery of GPC’s expert evidence.⁸⁶ By adopting the standard costs percentages outlined in Mr McDonnell’s affidavit⁸⁷ and applying them to the totals in Schedule A of the letter of KWM dated 17 March 2020,⁸⁸ it can be quantified that the solicitor’s standard costs ought to be \$343,112, counsel’s fees equals \$32,422 and disbursements are \$4,664.

⁸² Page 240 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

⁸³ Affidavit of James Malcolm Cooper filed 29 May 2020.

⁸⁴ Page 237 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

⁸⁵ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁸⁶ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁸⁷ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁸⁸ Page 236 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

- [127] With respects to the future costs estimated in Schedule B,⁸⁹ accepting the estimates for communications and advice at \$415,000, disclosure at \$150,000 and allowing one half of the case management conferences and interlocutory applications at a further \$60,000 quantifies the total solicitor's fees estimate to be \$625,000. In terms of a standard costs order following the 55% reduction the total would be \$406,250.
- [128] Similarly, allowing one half of the counsel's fees for case management conferences and interlocutory applications at \$125,000, i.e. \$62,500 and reducing that by 10% as estimated by Mr McDonald quantifies counsel's fees at a further \$56,250. Therefore, according to Schedules A and B,⁹⁰ standard costs up to the delivery of the plaintiff's expert evidence ought to be \$747,448 which, if reduced by 20% as is suggested by Mr McDonnell,⁹¹ quantifies security at \$674,158.
- [129] GPC's estimate of \$997,000 for further security is set out in detail in the affidavit of Mr McDonnell.⁹² At paragraph 32, Mr McDonnell deposes to the actual costs being incurred by GPC in the period from 12 October 2019 until 19 May 2020 being \$979,486.50. In Schedule A, KWM estimated their actual costs, with regard to solicitor's fees for disclosure, was \$125, 189 at 9 March 2020.⁹³ In his affidavit, Mr McDonnell estimates the actual cost, with regard to solicitor's fees for disclosure was \$341, 640 at 19 May 2020.⁹⁴ Thus, from 9 March to 19 May 2020, GPC has expended a further \$216, 451 on solicitor's fees for disclosure than anticipated.
- [130] Mr McDonnell has used his expertise to predict likely future costs to estimate a standard costs figure of \$1,246,801.58⁹⁵ following which Mr McDonnell applies a 20% discount; a 20% discount having been accepted by Martin J in *Allen Dodd as trustee for Dodd Superannuation Fund v Shine Limited*.⁹⁶
- [131] Relying on the principle that parties are not encouraged to devote extensive resources to questions of security, the plaintiffs have not brought extensive evidence from a costs assessor. This is appropriate as a costs assessor cannot reasonably estimate the work required of the defendant to properly prepare its defence, even in the general sense which Mr McDonnell has been able to because of his expertise and familiarity with the proceedings. Senior counsel for the plaintiff submits that the adoption of 65% of solicitor's fees to be assessed on a standard basis is "somewhat ambitious" and that because of the very high level of generality, the discount from the proposed figures ought to be 40%, rather than 20%.
- [132] More importantly, as senior counsel for the plaintiff points out, "it is not possible to identify the extent of costs incurred prior to 12 October 2019 which are attributable to disclosure, so as to compare them with the cost estimate that underpinned the earlier security." It is clear that a significant portion of the identified costs relate to disclosure, i.e. 35% for the period from 12 October 2019 to 19 May 2020, \$341,640.10 out of \$979,486.50, incurred and 26% of the estimate after 19 May 2020 (\$232,990 out of \$878,999).

⁸⁹ Page 237 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

⁹⁰ Page 236-237 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

⁹¹ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁹² Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁹³ Page 236 of Exhibit RWT-1 to the affidavit of Robert William Tooth filed 14 May 2020.

⁹⁴ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁹⁵ Paragraph 45 of the affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁹⁶ [2018] QSC 40 at [35].

- [133] Senior counsel for the plaintiff submits that the failure to identify the amounts related to disclosure in respect to the prior security for costs orders ought to lead to the exclusion of the costs incurred with respect to disclosure and the estimate of further disclosure from the amounts set out by Mr McDonnell.⁹⁷ This reduces the total of actual and estimated standard costs from \$1,246,801.58 to \$873,292.01, which, if reduced by 20%, is approximately \$700,000 and if reduced, as urged by the plaintiffs, by 40% is a sum of approximately \$523,000.
- [134] The difficulty with the complete acceptance of that submission is that the disclosure process and costs have been much higher than previously anticipated as demonstrated by paragraph 32 of Mr McDonnell's affidavit.⁹⁸ As set out in paragraphs 26(e) to (i),⁹⁹ despite considerable work being undertaken in respect of the document plan as set out in the document management protocol (Annexure A to the order of 22 February 2019) there have been 190 requests by the plaintiff for additional disclosure from GPC, those requests being made in tranches of 97 requests made on 16 January 2020, 73 requests on 19 February 2020, 7 further requests made 21 April 2020, and 13 further requests made 25 May 2020. This has resulted in more than 5,000 further documents being reviewed and causing 1,034 additional documents to be disclosed in 8 tranches from 20 February 2020 to 19 May 2020.
- [135] As set out above, the vast majority of those additional document requests have been addressed, which required substantial work and it would seem more work than what had been anticipated. Accordingly, I cannot accept the submission for the plaintiffs to deduct the entirety of disclosure costs from the estimates provided for further security. However, the criticism that failure to identify the portion of the costs previously allowed for in the security for costs estimates is valid and prevents an accurate analysis of what portion further costs for disclosure ought to be reasonably allowed as a part of the further order for security of costs.
- [136] In summary therefore, the evidence does not allow the "thin brush" approach to be utilised and authority compels a broad brush to be utilised. In my view, it is appropriate in the present case, utilising the broad brush to reduce the standard costs estimate on solicitor's fees from 65% to 60% in respect of standard costs. Thus, per paragraph 45,¹⁰⁰ the solicitor's fees are reduced to \$1,161,397, then a 30% discount in lieu of a 20% discount ought be applied, which takes into effect the high level of generality necessary in the estimates which have been provided and the inability to distil the appropriate percentage of costs relating to disclosure. This quantifies a costs figure at \$812,978 ($\$1,161,397 \times 70\%$).
- [137] Utilising a broad brush approach, I conclude that the plaintiffs ought to provide further security for costs to GPC in the sum of \$800,000. This is to provide further security for the defendant's costs of and incidental to this proceeding up to and including delivery of the plaintiffs' expert evidence. Further, in my view, the security ought be provided in the form of a further AmTrust deed, similar to those previously provided.

⁹⁷ Paragraph 45 of the affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁹⁸ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

⁹⁹ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

¹⁰⁰ Affidavit of Justin Anthony McDonnell filed 28 May 2020.

Privilege

- [138] In its application filed 28 May 2020, the defendant also sought an order that the plaintiffs provide the defendant with “a copy of any assumptions, instructions or brief provided to Mr John Thynne and an index of all materials provided to Mr Thynne and, to the extent they have already been disclosed to the defendant, a copy of materials.”
- [139] Mr Thynne’s report of 1 September 2017 refers to an instruction letter from the plaintiff’s solicitor and a memorandum from the plaintiff’s solicitor. GPC sought disclosure of these documents. On 15 June 2020, the day prior to the return of the application, the plaintiff served an affidavit claiming privilege upon the documents. As the affidavit raised issues in relation to the claim for privilege that had not been previously identified, the matter could not proceed, and accordingly, by consent, the defendant’s application for disclosure of the Thynne documents was adjourned to a date to be fixed.

Timetable

- [140] The plaintiffs have proposed orders setting a timetable for the further conduct of the proceedings and trial dates for the 11 weeks commencing 9 August 2021. The plaintiffs claim that due to late discovery of documents by the defendant and the effect of COVID-19, they have been unable to prepare their case as anticipated and accordingly seek extensions upon previously set time limits.
- [141] The defendant opposes the extension of time proposed by the plaintiffs’ draft order, noting that the time limits imposed upon the plaintiffs in the draft order have been extended, but the time limits imposed upon the defendant in the proposed draft orders have been curtailed.
- [142] The defendant also raises legitimate concerns as to the vague nature of some of the directions as delivery of lay witness affidavits or outlines, i.e. “other than for those lay witnesses whose evidence requires further disclosure from GPC”. Also in respect of expert evidence, the proposed directions suggesting service of “a first tranche of expert reports on 28 August 2020” and “the remainder of their expert reports by 23 October 2020.” I accept the force of the criticism of the defendant made upon the form of the orders as the orders ought to be more precise.
- [143] Should further indulgences be made to the parties in respect of the further conduct of the proceeding, they ought to be made evenly in terms of time frames. As the practical ability of the parties to comply with the time frames has been hindered, particularly by COVID-19, and as the proposed order for timetables will depend upon some extent to the disclosure orders made by the reasons for judgment and to allow parties the time to negotiate as to a fair and reasonable timetable (or place on the record their submissions as to the timetable), I propose to adjourn the application for directions as to timetable to a date to be fixed in the week commencing 6 July 2020.

Orders

- [144] The parties are to agree to and provide an appropriate minute for orders reflecting these reasons for judgment. The further directions hearing ought be set down on Friday 10 July 2020 or as soon thereafter as is suitable to the parties.