

SUPREME COURT OF QUEENSLAND

CITATION: *Brisbane Airport Corporation Pty Limited v Arup Pty Limited* [2020] QSC 202

PARTIES: **BRISBANE AIRPORT CORPORATION PTY LIMITED**
ACN 076 870 650
(plaintiff/respondent)
v
ARUP PTY LIMITED
ACN 000 966 165
(defendant/applicant)

FILE NO: BS 10025 of 2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 30 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 22 May 2020

JUDGE: Applegarth J

ORDER: **1. Pursuant to r 483(1) of the *UCPR*, there be a first trial of all issues other than and separately from those concerning:**

- (a) the quantum of the plaintiff's claimed damages for the necessary and reasonable work (if any) to rectify the NAE (being the issues in paragraphs 44, 61, 62, 64, and 65 of the Further Amended Statement of Claim and the corresponding allegations in the Amended Defence and the Reply);**
- (b) any issues as to the plaintiff's failure to mitigate its loss; and**
- (c) any issues as to betterment to the plaintiff from the rectification works, and its quantification.**

2. Reserve costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – OF LIABILITY

AND DAMAGES – where the defendant applies for a separate trial on liability issues – where the dispute concerns alleged defects in the design of an airport apron and taxiway where both liability and quantum are contested – where the quantum case is in a state of flux due to uncertainties about early rectification works and altered operational restrictions related to reduced air traffic during the COVID-19 pandemic – whether a separate trial on liability would result in savings in time and costs to both parties – whether a separate trial on liability would enhance the prospects of resolution – whether a separate trial on liability would be just and convenient

Uniform Civil Procedure Rules 1999 (Qld), r 483(1)

Advance Traders Pty Ltd v McNab Constructions Pty Ltd [2011] QSC 212, cited

Byrne v People Resourcing (Qld) Pty Ltd [2014] QSC 39, cited

Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 3) [2015] QSC 295, cited

Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 240 FCR 276; [1999] FCA 718, cited

COUNSEL: G D Beacham QC, with M H Martinez, for the plaintiff/respondent
S L Doyle QC, with S D McCarthy, for the defendant/applicant

SOLICITORS: Holding Redlich for the plaintiff/respondent
Schweikert Harris for the defendant/applicant

- [1] This is a large and complex case.¹ Both liability and quantum are contested. The present issue is whether or not there should be a separate trial on liability.

Background

- [2] In 2002 Brisbane Airport Corporation (“BAC”) entered an agreement with Arup in relation to engineering consultancy services at the Brisbane airport. By 2004 BAC had developed a proposal to expand the apron and taxiway of the northern concourse of the Brisbane International Terminal. The project became known as the Northern Apron Expansion (“NAE”) project. In the following years Arup provided geotechnical, engineering and other services to BAC pursuant to certain retainers. Construction of the NAE commenced in 2006 and was completed in 2008.
- [3] In December 2010 BAC first identified significant cracks in the NAE. In the years that followed, BAC, Arup and others investigated their cause.

¹ Some of the issues that existed at the time are identified in *Brisbane Airport Corporation Pty Ltd v Arup* [2017] QSC 232.

- [4] On 29 September 2016 BAC sued Arup for negligence and, in the alternative, for contravention of the *Trade Practices Act 1974* (Cth) arising out of alleged representations in relation to the design of the NAE.
- [5] BAC alleges that Arup's design of the NAE is defective in five respects, and that extensive works are required to rectify each of those defects.
- [6] If Arup is found liable in any one or more of these five respects, then the basis of its liability and the nature of the defect will be relevant to the extent of rectification works required to address the particular defect and therefore the quantum of damages to be awarded to BAC.
- [7] A major and contentious aspect of BAC's quantum claim is the staging of rectification works. The cost of the rectification scheme which it claims is based upon a proposed program of work in the cracked area of the pavement (Phase 1 Works) and the uncracked areas (Phase 2 Works). The sequencing and cost of undertaking this work depends on operational restrictions that BAC has instructed its experts to assume.
- [8] In essence, the operational restrictions relate to the alleged inability to close bays or taxiways to perform work otherwise than in "off-peak" periods and only allowing the contractor to work on one front or stage at any one time. As I understand the matter, the presently proposed rectification plan involves work during off-peak periods and divides repair areas into conventional and "expedient" construction zones. The expedient zone is where there will be limited time to place and cure the concrete before the area must be reopened to aircraft traffic at the end of each construction shift. That work can only be undertaken during this limited period requiring, at considerable expense, equipment to be moved in and out of the zone for each shift. In addition, these time limits require a form of concrete which sets more quickly and is more expensive. These time and other requirements substantially increase the cost of rectification.
- [9] Arup contends that BAC's presently formulated quantum claim and its instructions to its experts are premised on operational restrictions that no longer exist because of the COVID-19 pandemic.
- [10] Arup applies for a separate trial on liability. More precisely, it seeks orders pursuant to r 483(1) of the *UCPR* for there to be a trial first of all issues other than and separately from the following issues:
- (a) the quantum of BAC's claimed damage for the necessary and reasonable work (if any) to rectify the NAE;
 - (b) any issues as to BAC's failure to mitigate its loss; and
 - (c) any issues as to betterment to BAC from the rectification works, and its quantification.
- (collectively, the "Remaining Issues").

For simplicity I refer to the application as one for a separate trial on liability.

- [11] Arup submits that it is just and convenient to order a separate trial on liability because:

- (a) BAC, in light of the COVID-19 pandemic and the resultant reduction in air traffic, is contemplating performing early rectification work which would result in changes to important assumptions underpinning its current quantum evidence concerning operational restrictions imposed on the works. The extent of any such work, the extent of any relaxed operational restrictions, the programming, sequencing and ultimate cost of the works, and the extent of any remaining issues as to mitigation of loss are all unclear and will not be clarified so as to permit the preparation of new evidence until a wholly uncertain time in the future.
- (b) Whether or not BAC undertakes early rectification work, the scope and extent of a trial on the Remaining Issues depend upon the Court's findings as to liability. If Arup succeeds at a liability trial, there will be no occasion for a trial on the Remaining Issues. Assuming some measure of success for BAC, a liability trial will determine, with certainty, the defects (if any) and the area of the pavement to which those defects apply. On the other hand, a trial on all issues now will require the parties to address (at significant cost) a multitude of rectification possibilities, some of which will be made irrelevant by the Court's findings on liability.
- (c) Overall, there are good reasons to make the orders sought.

[12] BAC opposes Arup's application for a separate trial on liability, contending that:

- (a) the prospect of time and cost savings is of limited weight – there is uncertainty whether and to what extent such savings would be achieved, and savings on the preparation of expert evidence as to quantum will accrue only to Arup (BAC having delivered its evidence already);
- (b) there is a real probability that a separate trial will delay the proceeding as a whole;
- (c) overall, a separate liability trial will inhibit rather than encourage settlement; and
- (d) the separate trial will be lengthy, require the determination of contested factual issues, and involve experts who will also give evidence in the quantum case.

The issues

[13] The general issue is whether it is just and convenient to make the order. Consistent with r 5 of the *UCPR* and the authorities governing applications of this kind, the Court should ensure the efficient and timely resolution of the case, consistent with doing justice to both sides.² I would add that the interests of justice also require consideration of the appropriate and efficient use of finite judicial resources.

[14] More specifically, the parties' submissions raise the following issues:

1. Does the current uncertainty as to early rectification work and altered operational restrictions because of reduced air traffic during the COVID-19 pandemic and its aftermath favour a separate trial on liability over a trial of all issues?

² *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 3)* [2015] QSC 295 at [44] ("*Callide*").

2. Is a separate trial on liability likely to enhance or reduce the prospects of resolving the Remaining Issues, and thereby avoid a trial of the Remaining Issues, or at least reduce its length?
3. Is the prospect of savings of time and costs relied upon by Arup outweighed by the prospect of a delay in the proceedings as a whole and other disadvantages, such as the calling of expert witnesses at the separate trials?

Relevant principles

- [15] The principles governing the discretion to make an order under r 483 of the *UCPR* are not in dispute. They have been canvassed in a number of authorities.³ These decisions affirm the utility of orders for the determination of a separate question in appropriate cases.
- [16] The starting point is that generally all issues of fact and law in a matter should be determined at one trial. The ultimate question is whether it is just and convenient to make an order for separate determination. A cautious approach should be adopted in deciding to order a separate trial.⁴
- [17] Granting an order for determination of a separate question can avoid the necessity for a lengthy trial, or reduce a trial's length. However, care must be taken in ensuring that having separate trials of different issues is not productive of delay, additional expense, appeals and uncertainty.⁵ If the effect would be to prolong rather than shorten the litigation, this will be a factor tending against the determination of a separate question.⁶
- [18] An order for the determination of a separate question may be just and convenient where the separate determination will contribute both time and cost savings by substantially narrowing the issues in dispute, or where the separate determination could lead to disposal of the action or settlement of the litigation.⁷ An order may also be appropriate to avoid the necessity for a lengthy trial or at least to reduce the expected length of a trial.⁸
- [19] Determination of a separate question at a preliminary trial is unlikely to be just and convenient where there is a significant overlap of factual and legal issues at both stages of the hearing. This is especially so if the same witnesses will need to be called at both hearings of the proceedings, particularly if the Court is asked to form a view as to the credibility of such witnesses.⁹
- [20] The prospect of a significant saving of time and cost, while a relevant consideration, is not determinative. In a case such as this, a decision about whether it is just and convenient to make an order under r 483 involves a balancing exercise, weighing factors that favour an order against factors which do not. The third issue which I have identified above involves this kind of weighing process.

³ *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 240 FCR 276 (“*Reading*”) at 279-280; *Advance Traders Pty Ltd v McNab Constructions Pty Ltd* [2011] QSC 212; *Byrne v People Resourcing (Qld) Pty Ltd* (“*Byrne*”) [2014] QSC 39.

⁴ *Callide* at [46].

⁵ *Byrne* at [3], citing *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 332 [436].

⁶ *Reading* at 280 [8].

⁷ *Reading* at 279 [8].

⁸ *Byrne* at [3].

⁹ *Reading* at 280 [8].

- [21] That balancing exercise is undertaken on the basis of what is known at the time of the application and what can be reliably predicted at that time about the future course of events. Assumptions about matters such as prospective savings and the expected timing of trials may be falsified. In such an event, it may be possible, if an order for separate trials is shown to no longer have the utility originally expected, for the order to be vacated and for the trial to proceed to determine all issues. Pragmatic considerations in such a case and the interests of justice may lead to a different order being made and for the trial of all issues to be conducted in the conventional way, or in brackets of evidence. This may be so if it is just and convenient to have a bracket of evidence on liability, followed by a bracket of evidence on quantum. A suitable but not lengthy separation between those parts may facilitate the orderly preparation and efficient conduct of the second part of the trial, and also allow settlement to be explored in the light of the evidence given in relation to liability.
- [22] The practice of ordering separate trials and then later vacating that order should be rare, since it undermines the finality of decisions and may be productive of unnecessary costs. However, changed circumstances which clearly falsify assumptions upon which an order for a separate trial were made may make it just and convenient to revisit the making of such an order in the light of significantly changed circumstances. They may require a new balancing exercise to be undertaken to decide whether it remains just and convenient to have separate trials.

Alleged defects and their proposed rectification

- [23] As noted, BAC alleges that Arup's design of the NAE is defective in five respects. Its case is that these alleged defects involved a breach of duty and that each defect requires extensive rectification works. The following table, which is based upon the evidence of BAC's expert, identifies the alleged defect and BAC's case as to the required rectification works.

Alleged Defect in the statement of claim	Element of BAC's pleaded rectification works
Arup specified 400mm for the concrete thickness of the panels, whereas BAC alleged that it ought to have been 520mm (par 48(a))	A combination of 525mm thick panels, with 640mm thick expedient concrete in zones where there will be limited time to place and cure the concrete before it must be reopened to aircraft traffic at the end of each construction shift
Arup did not adequately compact the sand subgrade (par 48(b)) permitting it to become further compacted under aircraft loads	Sand improvement works to increase the density of the lower 1 metre of sand by the use of polyurethane resin grout injections in two stages – the cracked area of the pavement (Phase 1) and the uncracked area of the pavement (Phase 2). Additionally, the inclusion of sub-surface drainage is said to become "critical" because the polyurethane injections reduces the permeability of the sand and so that water does not back-up in the upslope portions of the NAE

Arup did not specify sub-soil drainage (par 48(c))	A new unlined open drain along the eastern edge of the NAE, subsoil perimeter drains in the Phase 1 area, and the use of a joint sealant to impede the entry of surface water
Arup specified panel sizes (length x breadth) of approximately 7m x 7m whereas it ought to have specified dimensions of no greater than 6m (par 48(d))	Replacement of the concrete panels with 5m x 5m panels
For the panels on the eastern edge of the NAE, Arup specified reinforcing tie-bars of 36mm diameter at 375mm centres, whereas it ought to have specified 16mm diameter bars at 750-760mm centres (par 48(e))	Specification of 16mm bars at 750-760mm centres

Arup's case on potential costs savings

- [24] Counsel for both parties helpfully prepared a trial plan based on certain working assumptions about the presentation of lay and expert evidence. Their estimate is that a separate liability trial will take 15 days and a separate quantum trial will take 16 and a half days. The evidence from Arup is that a trial on the Remaining Issues which occupies 16 days will cost it alone approximately \$1.9 million. The cost to BAC of conducting a 16 day trial on the Remaining Issues has not been estimated, however, is likely to be substantial.
- [25] Arup notes that if it succeeds entirely on the liability issues, there will be no occasion for a trial on the Remaining Issues. That is said to be a powerful consideration in favour of a separate trial being ordered.
- [26] Next, Arup submits that if a liability trial establishes some but not all of the alleged defects, then the relevant defects will be identified and the aspects of the rectification work and associated direct and indirect costs for alleged defects in respect of which liability is not found should fall away. Its argument is that the multitude of rectification possibilities will be reduced by the Court's findings on liability to a certain and defined set of issues. The length of, and the legal costs associated with, the trial of the Remaining Issues should reduce accordingly.
- [27] Arup also submits that BAC may succeed only in respect of its case on the current cracking but fail to establish that the balance of the pavement will not last the 40 year design life. On that basis, the area of the rectification works would be identified (and limited to the cracked bays), and the scope of the works would be determined by the extent of defects found to have caused the cracking.
- [28] Pavement thickness is not alleged to be a cause of the current cracking, whereas it is alleged to be a cause of the future cracking. If the Court found that pavement thickness was the only defect, then conceivably some aspect of the Phase 2 Works would be required, but not any of the Phase 1 Works.
- [29] The expected life of the pavement and the resultant contention (and assessment) as to betterment is submitted by Arup to likely vary depending upon what rectification

work is found to be reasonably necessary in light of the defects (if any) found on the issue of liability.

- [30] In general, Arup submits that a trial on liability will determine, with certainty, the defects (if any) and the area of the pavement to which those defects apply.
- [31] On the other hand, if there is one trial on all issues, the parties' experts will be required to consider and address:
- (a) Arup's rectification scheme for monitoring and replacing cracked panels only when necessary;
 - (b) the rectification works if each of BAC's alleged defects is established;
 - (c) the rectification works if one or a combination of alleged defects are found (but not all of them);
 - (d) the rectification works if both the Phase 1 Works and Phase 2 Works are required, in circumstances where one or the other may (depending upon liability findings) not be required;
 - (e) the cost of the works applicable to each of the possible rectification scenarios; and
 - (f) the impact of the (presently uncertain) operational and staging restrictions applicable to each of the possible rectification scenarios.
- [32] BAC responds to Arup's arguments about potential savings by acknowledging the potential time and cost savings that may result from having issues of liability tried first. If, for example, Arup was to succeed on liability (either at trial or on appeal), both parties would be saved the costs of preparing for and conducting a quantum trial which is estimated to take 16 and a half days. However, BAC submits that the extent of time and cost savings pointed to by Arup are uncertain and that this diminishes the weight of this consideration. For example, there is no estimate of how much time or cost would be saved if Arup's experts were required to consider some but not all of the elements of BAC's rectification design. BAC suggests that the savings may be relatively small if the experts will have to consider two or three of the five elements. The cost savings which would occur if all liability issues were determined against BAC must be balanced against the uncertain amount of savings if BAC succeeds on all or most of its defect claims.
- [33] BAC also contests Arup's argument that there are multiple "rectification scenarios" which will be reduced in number with consequential significant savings if there is a separate liability trial. According to BAC, rather than there being multiple "rectification scenarios", there is rectification work comprising various elements and, depending upon the Court's finding on liability, Arup may not be liable for the cost of all of the elements. BAC submits that, in that event, it will be necessary to exclude certain costs, for example, by the excision of parts of the expert evidence where costs have been differentiated between each element of the rectification design. It gives the example that if BAC failed on the contention regarding the thickness of the concrete (the first row in the table), the cost of additional concrete to make thicker panels would be removed from the quantum award.
- [34] Some of BAC's submissions in this regard have force. However, I am not presently satisfied that Arup's arguments about a liability trial reducing a multitude of

rectification possibilities are answered by the possibility of undertaking a simple excision exercise. There may be a different rectification program and methodology, depending upon the relevant defect that is found, and what is required to rectify it. It is not apparent to me that the method or program for carrying out works if all of the defects are established in respect of the whole of the area would be the same program or methodology that might apply to address fewer defects or defects over a smaller area.

- [35] The most demonstrable costs savings relate to a possible confining of BAC's case on quantum in a geographic sense to the area of current cracking if it fails to establish that the balance of the pavement is defective and will not last a 40 year design life. However, costs savings are likely to arise in preparation for and in the conduct of a quantum trial if an earlier liability trial identifies the defects (if any) for which Arup is liable. This will focus attention on the steps required to rectify that defect. It will make the quantum case less complex and is likely to substantially reduce the length of the trial of quantum issues and the legal costs associated with preparing for it.
- [36] I conclude that there will be a substantial saving of time and costs if liability is resolved entirely in Arup's favour (either at trial or on appeal). If, however, Arup is found liable in respect of some but not all of the alleged defects, then there will still be a substantial, albeit uncertain, costs saving. If Arup is found liable in respect of all the defects then the costs savings in respect of any quantum trial will be far less. However, on any scenario under which Arup is found liable for at least some defects, a separate trial may have other benefits in facilitating settlement, which I will later address.
- [37] I am persuaded that Arup's proposal will reduce the costs to the parties of preparing for a trial on all issues in which experts and others will be required to consider a multitude of rectification possibilities. The substantial costs of a quantum trial may be avoided altogether. However, if the liability trial finds Arup liable in some respects then there is likely to be a significant saving of costs in preparation for and in the conduct of a trial of the Remaining Issues.
- [38] BAC argues that the identified savings that will result in relation to the preparation of expert evidence as to quantum will only accrue to Arup, BAC having delivered its evidence already. As a result, it submits that any time and costs savings would accrue disproportionately to Arup. BAC would enjoy some time and costs savings if the quantum trial was truncated. It acknowledges that there would be a similar benefit in the reduction in the use of the Court's time.
- [39] I am not persuaded that the fact that BAC has already incurred significant costs in preparing its quantum evidence, whilst Arup has yet to deliver much of its quantum evidence, makes it unjust to make an order which is likely to achieve an overall costs saving. To the extent that Arup would save the costs of preparing quantum evidence in the coming months, that saving may eventually accrue to BAC's benefit if Arup succeeds entirely on liability or successfully defends some parts of BAC's claim. In any case, it does not deflect from the broader point of the potential costs savings to both parties of avoiding or at least reducing a quantum trial which is estimated to take 16 and a half days.
- [40] Further, and for reasons to be explored in connection with the next topic, some of the costs which BAC has incurred in preparing its case on quantum may be wasted

if earlier and different rectification work is undertaken as the result of a reduction in air traffic.

- [41] I conclude that a separate trial on liability has the prospect of resulting in substantial savings of time and costs. The costs savings are likely to be in the order of millions of dollars if a quantum trial is avoided altogether. They are still likely to be significant if the rectification issues become focused and reduce in number in the light of findings on liability.

The case on quantum is in a state of flux

- [42] Arup argues that the current uncertainty as to early rectification work and altered operational restrictions because of reduced air traffic favours a separate trial on liability. According to Arup, the extent of evidence required for a trial on the Remaining Issues depends upon the presently uncertain extent of (and in any event, controversial) operational restrictions imposed on the performance of any rectification works.
- [43] As noted, the reduction in air traffic as a result of the COVID-19 pandemic has prompted BAC to contemplate early rectification work. The extent of any such work, the extent of any relaxed operational restrictions and, as a result, the ultimate cost of the works remain uncertain. Arup argues that these matters will not be clarified so as to allow for the preparation of evidence until a wholly uncertain time in the future.
- [44] At the time of the hearing before me on 22 May 2020, BAC had been carefully considering whether it would be able to undertake certain rectification work on the NAE with the rectification of defective slabs occurring whilst aircraft movements on them are reduced. Such an early rectification plan had the benefit of minimising the need for complex staging requirements to ensure minimal interruption to the operation of the airport. A decision on the early rectification plan involved many considerations. At the time of the hearing of the application I was advised that if the early rectification plan proceeded it would require a number of stages of approvals and planning processes, like any other project undertaken at the airport.
- [45] I indicated that I would be prepared to receive further evidence if a decision was made to proceed with the early rectification plan. A supplementary affidavit filed on 11 June 2020 indicated that BAC's Chief Executive Officer had endorsed the early rectification plan to proceed to the "design and approval phase". BAC is preparing its procurement strategy and tender documents to engage a contractor. It is currently negotiating with a party to develop a concept design. If the final design is progressed, there will be an initial tender for works. Approval will be required from BAC's Board for the capital expenditure. BAC currently expects that the final design for construction will be completed by the end of September 2020 and currently expects to finalise a construction contract in either October or November 2020.
- [46] Of course, unexpected developments may prompt BAC to alter its plan to undertake early rectification. However, assuming it proceeds as expected, new quantum evidence will be required. The current assumptions underpinning BAC's expert evidence and quantum evidence will be altered. However, until at least the construction contract is awarded in late 2020, no-one will know the extent of the

works expected to be undertaken, their programming and the extent of any relaxed operational restrictions.

- [47] Therefore, BAC's quantum case is in a state of flux and is likely to remain uncertain for a substantial period.
- [48] It is unclear whether BAC intends to perform some or all of the rectification work it pleads. The operational restrictions which its experts have been asked to assume for the purpose of their evidence on rectification and the cost of rectification cannot be safely assumed in the light of changed circumstances. It seems wasteful of time and costs for the parties to prepare for a trial involving quantum issues which are founded upon assumed operational restrictions that reflect a substantial component of the costs of rectification. Proceeding to a liability trial avoids a large waste of time and costs which would be incurred by addressing not only a multitude of rectification possibilities, but also rectification scenarios based on operational restrictions which are likely to be altered and replaced by an early rectification plan.
- [49] BAC submits that if it decides to proceed with the early rectification work, then the quantum case becomes simpler and this in fact favours having a trial on all issues in 2021. It argues that if a contract is awarded in late 2020 then it will be the contract price and the actual cost that will determine the basis for its quantum case. There will be an actual contract cost based upon actual staging restrictions. It submits that the matter would still be capable of being tried in 2021, although not as early as a liability trial could be conducted.
- [50] I accept that the letting of a contract to undertake certain rectification works is likely to alter and simplify BAC's quantum case. However, a number of issues will remain, possibly until after a contract is awarded and a proposed program of works is fixed.
- [51] In opposing the present application BAC points out that a liability trial will not resolve the current controversial issues concerning the staging of rectification and the extent to which operational restrictions and their cost can be mitigated. However, even if a contract is let in October or November 2020 which defines the extent of rectification work and its staging, there remains a real prospect that the staging of works and operational restrictions will remain an issue. Just as Arup presently argues that BAC's current quantum fails to work around assumed operational restrictions, there is a prospect that a similar issue will arise in respect of an early rectification plan.
- [52] In any event, even if these matters do not emerge as substantial issues after an early rectification plan is adopted, the fact that BAC's case on quantum is in a state of flux favours, in my view, an order for a separate trial on liability. If a contract is let with a different program of works than that assumed for the purpose of assessing quantum in this case, then this will require consideration by experts on both sides. Arup is likely to require disclosure of documents in relation to the program of works, the occupation of premises and departure lounges and the extent to which then known and reasonably predicted operational restrictions affect the undertaking of early rectification works.
- [53] In my view, the uncertainties presented by the changed operational environment and the processes involved in awarding any contract for early rectification works makes it very unlikely that a trial of quantum issues can be conducted in 2021.

- [54] More generally, it seems entirely wasteful of costs to require Arup to respond to BAC's current case on rectification and quantum when, in all likelihood, changes in operations at the airport and an early rectification plan will require BAC to substantially amend its quantum claim.
- [55] I conclude on the first substantial issue that the current uncertainty as to early rectification work and altered operational restrictions because of reduced air traffic during the COVID-19 pandemic and its aftermath favours a separate trial on liability.

Will a separate trial prolong the proceeding as a whole?

- [56] If a separate trial on liability (and any appeal therefrom) resolves the issue of liability entirely in Arup's favour then that will shorten the proceeding as a whole by obviating the need for a trial of the Remaining Issues, currently estimated to take 16 and a half days.
- [57] If a separate liability trial resolves liability issues in BAC's favour, then it may facilitate resolution of the Remaining Issues by way of settlement so as to obviate the need for a separate trial of the Remaining Issues. It will at least shorten the length of any trial of the Remaining Issues. However, a separate trial on liability creates the real prospect that the proceeding as a whole will be delayed.
- [58] BAC estimates the length of the proceeding under different scenarios as follows:

Year/month	Separate trial of liability	Trial of all questions
2021		
March	Trial on liability	
June	Judgment	Trial
December	Appeal	Judgment
2022		
March	Decision on appeal	
July		Appeal
December	Trial on quantum	Decision on appeal
2023		
March	Judgment	
September	Appeal	
December	Decision on appeal	

Obviously, this table is based upon assumptions about the availability of trial dates and that appeals are likely. The parties accept that a decision on liability is likely to

be appealed because of the substantial quantum that would either follow a finding on liability, or be unrecoverable because of a dismissal of the liability case. A substantial judgment on quantum also carries the likelihood of an appeal.

- [59] The table helpfully prepared by BAC necessarily relies upon fairly general estimates and, save in a few respects, Arup does not dispute that it provides a foundation for comparison. Arup does, however, contest the table's assumption that a trial on all issues could be prepared between now and June 2021. This is submitted to be a very optimistic estimate, particularly because of the early rectification issues which will require a revised round of pleadings, disclosure and expert reports. Even on the existing directions, certain expert reports will not be finalised until 30 September 2020. If, as must be presently assumed, BAC proceeds with its early rectification work, then the preparation of quantum evidence could not usefully commence until the scope of the work and the operational assumptions, including operational restrictions, are known. These are unlikely to be known until late 2020 at the earliest. Therefore, I accept Arup's submission that BAC's table is excessively optimistic as to when a trial on all issues could be prepared and heard.
- [60] If a separate liability trial is ordered and if liability was not established following any appeal, then the whole proceeding might end, according to this timetable, in around March 2022. If there is a trial on liability followed by a trial on quantum in late 2022, followed by an appeal from the quantum judgment, the whole proceeding might end in late 2023. If, however, there is a trial of all issues, followed by an appeal, then the proceedings would be likely to end sometime later than BAC estimates. On a very optimistic view, any appeal might be decided by late 2022. It is more likely that the proceeding would end with a decision on an appeal in early 2023. This would be earlier than the alternative separate trials scenario which would have a decision on appeal concerning quantum in late 2023.
- [61] Therefore, I accept that there is a real prospect that a separate trial will delay the proceeding as a whole as well as some prospect that a separate trial may, depending on its outcome, lead to the whole proceeding ending earlier than for a trial on all issues. The former seems a more likely prospect. Therefore, the risk of prolongation, overall, tends to favour a trial on all issues.

Which course is more likely to enhance the prospects of resolution?

- [62] Arup submits that an order for a separate trial will, as a consequence of any trial on liability, increase the prospects of settlement. The parties have already conducted a mediation over a couple of days, assisted by a joint expert report on liability. Arup submits that the outcome of a trial on liability, even if there is an appeal, is likely to make settlement easier to achieve. Without a trial of liability issues, the parties are likely to remain diametrically opposed on their assessment of liability.
- [63] In response, BAC submits that Arup has not delivered its quantum evidence and if it was not required to deliver its quantum evidence until mid to late 2022, there would be no capacity for the parties to meaningfully engage on quantum, there being no alternative case on rectification and no alternative quantum. BAC accepts that while a judgment on liability would remove one significant point of contention, it would leave the highly contentious issue of quantum standing in the way of any settlement. It argues that the prospect of a trial on all issues ought to have the effect of focusing both parties on the risk of an adverse outcome, and is therefore more likely to lead to a settlement.

- [64] Both parties' arguments have merit. I infer that the parties have been unable to resolve the matter to date because they have significantly different assessments of BAC's prospects on liability and also the realistic quantum of its claim. As a general rule, if parties have different assessments of prospects on both liability and quantum, then this makes a case much harder to settle than if they have a broadly similar view on at least one of those issues. Although the provision of Arup's expert evidence may better inform both parties on the issue of quantum, the lines of disagreement are essentially known to each other by virtue of the pleadings and their current evidence. I apprehend that a major issue in relation to quantum are the assumptions about operational requirements upon which BAC's case is based. Those operational requirements have changed in the light of reduced air traffic and therefore the parties must await the evolution of BAC's revised case on quantum in the light of those changed circumstances and the distinct possibility of early rectification work.
- [65] BAC correctly accepts that a trial on liability (and any appeal from it) will have an effect on settlement because it will remove that significant issue between the parties. It seems unlikely that the evidence on quantum will be available until well into 2021. In my view, the prospects of settlement will be enhanced if there is a liability trial as soon as reasonably possible, ideally in the first half of 2021. For the reasons already discussed, if liability is established on a certain basis then this will inform the defects for which Arup is legally liable and focus the case in relation to rectification costs for which it is liable.
- [66] Overall, I consider that a separate trial on liability is likely to enhance the prospects of resolving the Remaining Issues by settlement. If the resolution of liability issues does not result in a settlement of the case, it will at least narrow the remaining issues and reduce the cost of preparing for a trial of the remaining issues and that trial's length.

Other issues

- [67] Arup submits and BAC accepts that there is no overlap of issues of substance in the proposed two stages of hearing. As noted, counsel for the parties have agreed a trial plan based on all issues presently in dispute. There is only one topic that is common, namely the work performed by way of maintenance on the cracked panels. That topic is relevant to contributory negligence and also to the quantum trial as the factual basis for a reduction in damages.
- [68] This is not a case in which the honesty of any witness is likely to be an issue. However, if separate trials are ordered the expert engineers (Dr Rollings and Mr Woodman) and one lay witness for BAC will need to give evidence at both trials. There is no overlap of Arup's lay witnesses. Although their honesty is not likely to be in issue, the need to recall the two experts is a factor against the making of an order. That factor is not, however, of the same significance as a case in which credit issues arise. Moreover, as I mentioned at the hearing of this application, it occurs to me that the task confronting an expert witness in having to give evidence over a number of consecutive days both in relation to the adequacy of the design (liability issues) and the rectification issues (quantum) is significant, as is the task upon the cross-examiner. The effective presentation of the experts' evidence and the effective exploration of different aspects of their evidence might be enhanced somewhat by the expert not being required to give continuous evidence on all issues.

- [69] The fact that the liability trial will be lengthy and involve contested factual issues makes ordering a separate trial less attractive than it would be if the prior, separate determination involved a point of law such as an issue of contractual interpretation or some other point of law. Nevertheless, where there is hardly any overlap between issues of liability and quantum and the trials can be separated, the unfortunate requirement for the experts to give evidence at both trials is not said to be determinative of the application.
- [70] BAC does not submit that it will be prejudiced by any delay that results from having separate trials. It does not contend that it cannot afford the cost of rectification and there is no suggestion that Arup could not meet any judgment, including interest. The possibility of being compensated by an award of interest for delay is not a complete answer. Justice is best achieved by the expeditious resolution of issues without delay. That said, this is not a case in which evidence is likely to be lost through some additional delay. It should be recalled that although cracks were identified in December 2010, it was not until 29 September 2016 that BAC commenced these proceedings. The proceeding having been delayed in its commencement, and having had a necessarily complex interlocutory course, further delay is undesirable. However, in the overall scheme of matters, and in the current state of flux concerning BAC's quantum, the additional delay, if any, produced by an order for separate trials is not so prejudicial to BAC as to make it unjust or inconvenient to order separate trials.

Is the prospect of savings of costs and time by ordering separate trials outweighed by the prospect of a delay in the proceedings as a whole and other disadvantages?

- [71] On balance, I consider that the interests of justice and doing justice to both parties favours ordering a separate trial on liability. That course carries the prospect of significant costs savings. Such a course will resolve liability (subject to any appeal on liability). By that time BAC's quantum case will be clearer than it presently is or is likely to be for some substantial time until at least a contract for early rectification works is let and the program of works and their cost is assessed, pleaded and considered by Arup. One apparent reason as to why the proceedings have not settled to date is because of uncertainty on issues of both liability and quantum. A separate trial on liability, preferably conducted in the first half of 2021, will remove one significant element of uncertainty and thereby help facilitate resolution of the Remaining Issues by settlement or a shortening of any quantum trial.
- [72] Some factors weigh in favour of having a trial of all issues. However, with BAC's quantum case in a state of flux, such a trial is unlikely to be ready for some substantial time. In my view, it is just and convenient to conduct a liability trial before then. The prospect of savings of time and costs, and also facilitating settlement, favours a separate trial on liability. These considerations, in my view, and the other matters relied upon by Arup outweigh the risk that a separate trial will delay the conclusion of the proceeding as a whole and the other disadvantages to which BAC points.
- [73] The uncertainty injected in relation to quantum by the prospect of early rectification work and its significant implications for the preparation and conduct of a trial on quantum favour a separate trial on liability. It would be wasteful of costs and time to require Arup to prepare evidence, including expert evidence, in the coming months to respond to BAC's case on quantum as presently pleaded and formulated.

That case is bound to change because of altered operations at the airport and the real prospect of early rectification work. The need to avoid wasted costs on quantum issues which are almost certain to change is a factor which strongly favours ordering a separate trial on liability.

[74] Overall, I conclude that it is just and convenient to order a separate trial on liability.

Other matters

[75] If the assumptions upon which this decision is based are falsified by subsequent events and there is a significant change in circumstances, it may be possible for a different decision to be made concerning the trial of the Remaining Issues. If, for example, quantum issues suddenly became clearer or narrowed to a significant extent so as to allow a quantum trial to be conducted in 2021, then the Court would be open to reviewing the staging of the trial. However, as presently advised, the parties should proceed on the basis that there will be separate trials and seek any further directions which are required in order to have the matter set down for a 15 day liability trial in the first half of 2021.

[76] Subject to any submissions as to the form of order, there will be an order for a separate trial in the terms of Arup's application.

[77] On the question of costs, my preliminary view is that the costs of and incidental to the application should be costs in the proceedings or at least Arup's costs in the proceedings so as to reflect its measure of success in obtaining orders which were opposed. BAC sought its costs in the event the application was dismissed.

[78] Presently I intend to reserve costs. If the parties agree an appropriate order as to the costs of the application, then I will make such an order. Otherwise, either party may seek to make short oral submissions on costs at the next review. The costs of the application will remain reserved until the issue is raised at any review hearing or at the conclusion of the trial, at which point the parties and the Court will be better informed as to whether predictions made by the parties in their submissions were justified.

[79] The parties should submit any agreed directions to progress the matter to a trial. If they cannot agree directions then I will review the matter on the earliest mutually convenient date.