IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2023 02627

BETWEEN:

DARRYL JOHN BAXTER & ORS
(according to the attached Schedule) — Plaintiffs

v

BERRYBANK DEVELOPMENT PTY LTD (ACN 146 466 882)
& ANOR (according to the attached Schedule) — Defendants

JUDICIAL REGISTRAR:	Baker JR
WHERE HELD:	Melbourne
DATE OF HEARING:	14 February 2024
DATE OF RULING:	12 June 2024

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr S Frauenfelder	DST Legal
For the Defendants	Dr A Hanak KC Mr S McArdle Mr N Baum	Baker & McKenzie

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JUDICIAL REGISTRAR:

A Introduction

1 The plaintiffs' claim concerns the Berrybank Wind Farm, which is comprised of 69 wind turbines in Berrybank, Victoria, that are owned and operated between the two defendants (who I will collectively refer to as 'Berrybank' for the purposes of this application).

2 The five plaintiffs own and reside at properties near to the wind farm. They allege that since about July 2021, the turbines have emitted air pressure waves perceived as sound, infrasound or vibration over their properties. They say that this has caused a substantial interference to the use and enjoyment of their lands, is unreasonable, and constitutes a nuisance. They are seeking damages and an injunction in respect of this nuisance.

3 Berrybank admits that the turbines emit noise while they are in operation, but denies that it constitutes a nuisance. The questions of what and how much noise is actually being generated by the turbines are central to the dispute between the parties.

4 Despite being commenced almost a year ago, the claim is still at an early stage. The parties have recently turned their minds to arrangements that will need to be made for expert evidence in the proceeding, including in relation to the measurement and analysis of noise data at the plaintiff's properties.

5 On 4 October 2023, Berrybank applied for orders pursuant to s 65L of the *Civil Procedure Act 2010* (Vic) ('the Act') requiring the appointment of a single joint expert to conduct noise measurements and analysis at the properties. The orders sought also require the parties to confer in relation to a list of suitable experts and the materials to be provided to that expert, as well as authorising the appointed expert to enter the properties that are the subject of the claim to conduct noise measurements and any other steps necessary to ensure the reliability of those measurements.

6 The plaintiffs oppose this course, suggesting instead that an independent expert could perform the noise measurements and then provide that data to the parties' separate experts for them to perform their own analyses. The defendants accept that noise

measurement is an appropriate role for a joint expert to perform, but they suggest that the joint expert should be directed to perform the subsequent analysis of the data collected as well.

7 I heard the application pursuant to a referral order made by Daly AsJ on 20 November 2023 pursuant to r 84.04(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules').

8 For the reasons below, while I acknowledge the force of many of the arguments made by the defendants, I consider that the preferable approach is the more confined role of a joint expert proposed by the plaintiffs.

B The evidence

9 The plaintiffs relied on an affidavit of their solicitor, Domenica Tannock, sworn on 1 November 2023. The defendants relied on two affidavits of their solicitor, Peter Lucarelli, sworn on 3 October 2023 and 15 November 2023.

10 The affidavit material identifies that the events leading up to the present dispute unfolded as follows.

11 It is apparent that the plaintiffs have expressed concerns about noise from the wind farm, and about the noise assessments being conducted there, for some time. Prior to this proceeding being issued, all of the plaintiffs had engaged their own expert, Mr Huson, to conduct noise testing at their properties (for one of the plaintiffs, this occurred after the wind farm had already been constructed, and in all other cases it occurred prior to the construction).[1]

12 The parties had been corresponding concerning the plaintiffs' noise complaints since July 2022.[2] On 18 August 2022, Mr Lucarelli wrote to Ms Tannock in response to correspondence complaining about the defendants' responses to the plaintiffs' noise concerns and complaints. In that letter, amongst other things, Ms Tannock was asked

1 Tannock affidavit, [24]-[25].
2 Lucarelli 3 October 2023 affidavit, [9].

to 'indicate whether each of your seven clients would be prepared to consent to testing and the collection of noise level data in and around their properties'.[3]

13 Ms Tannock responded on 14 September 2022, stating that:

> Each of my clients will consent to testing and the collection of noise level data at their properties, provided the testing and collection is conducted in accordance with the NSZ6808:2010 by an acoustician of good standing, and provided also that all relevant data is made available to my clients' acoustician for independent analysis and assessment.[4]

14 The letter otherwise discusses arrangements for a potential meeting between the parties to seek to resolve the dispute.

15 That meeting ultimately occurred on 25 October 2022, and evidently was unsuccessful in resolving the parties' disagreement. The following day, Ms Tannock wrote again to Mr Lucarelli, stating (amongst other things):

> I notified you in September 2022 that my clients would agree to noise testing at their properties. … My clients would be amenable to practical solutions such as your client providing soundproofing of their homes to try to reduce noise levels but consider that soundproofing would be ineffective unless and until there has been a proper assessment of actual noise levels received at their homes.[5]

16 In that letter, Ms Tannock also provided a 'preliminary analysis' of noise data measurements from one property conducted by Mr Huson earlier in 2022.[6]

17 Mr Lucarelli responded on behalf of the defendants on 22 December 2022, noting that some noise level assessments had not been able to take place as some of Ms Tannock's clients had refused permission to allow the testing to be done on their properties. The defendants made a proposal to engage a mutually agreed acoustic consultant to monitor noise levels and collect audio data for six weeks at the affected properties, for the raw data collected to be shared between the parties (on agreed terms concerning privacy, confidentiality and the provision of supporting technical details), and for the

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3 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 2.
4 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 4.
5 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 5.
6 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 6; Tannock affidavit, [25].

appointed acoustic consultant to prepare a report detailing their findings. The defendants offered to bear the costs of this exercise.[7]

18 Ms Tannock replied to this letter on 13 January 2023. In relation to the defendants' proposed course of action, she stated:

> In principle, I will advise my clients to agree to [the defendants'] proposal for testing and I will seek my clients' instructions to consent subject to and conditional upon the appointment of a mutually agreed, suitably qualified, and independent acoustic consultant of good integrity, and provided there is mutual agreement in relation to the methodology for the proposed testing and assessment which must accord with NZS6808:2010 and the findings of her Honour in *Uren v Bald Hills Wind Farm Pty Ltd [2022] VSC 145*.[8]

19 Mr Lucarelli responded on 31 January 2023, proposing three possible acoustic consultants to the plaintiffs.[9]

20 Ms Tannock responded by email later that day, confirming one of the three names proposed by Mr Lucarelli, Gustaf Reutersward, as the plaintiffs' preferred acoustician. Ms Tannock also wrote:

> …please confirm whether your client agrees to produce the raw data referable to its proposed testing, and provide the proposed methodology for the proposed testing and assessment which must accord with NZS6808:2010 and the findings of her Honour in *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145.[10]

21 A misunderstanding or disagreement appears to have arisen around this time concerning a suggestion that some of the plaintiffs had refused to have noise testing performed at their properties in accordance with this agreement. On 31 January 2023, Ms Tannock wrote again to Mr Lucarelli, noting that she had received instructions from two of her clients to the effect that they had not refused any further noise testing at their properties, but that rather each had said on two or more occasions that they would not agree to further testing being conducted by a firm previously engaged by the defendants, Marshall Day Acoustics, but 'would otherwise provide access to a mutually agreed, suitably qualified and independent acoustician to conduct further noise monitoring' at their properties. The relationship between the parties appears to

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7 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 15.
8 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 17.
9 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 18.
10 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 20.

have deteriorated through this exchange. Ms Tannock said that the defendant's 'misrepresentation of [her] clients' true positions appears designed to portray them in a negative, uncooperative light and this erodes trust.'[11]

22 Mr Lucarelli replied by letter dated 16 February 2023, rejecting the suggestion that the defendants had misrepresented any of the plaintiffs' positions, and noting that the defendants' understanding was derived from correspondence from Ms Tannock in November 2022 (which was not in evidence on this application). In response to Ms Tannock's request for confirmation that the raw data from any noise testing would be made available, Mr Lucarelli said:

> We refer you to the proposal in our letter dated 22 December 2022 that the raw data be shared between our respective clients on agreed terms relating to privacy, confidentiality, and the provision of supporting technical information.

23 Mr Lucarelli otherwise noted that the defendants were preparing a draft form of agreement for the joint noise monitoring program, which would be circulated for the plaintiffs' consideration and input as soon as possible.[12]

24 That protocol appears to have ultimately been circulated on 4 June 2023. In the covering email that attached this document, Mr Lucarelli wrote:

> Our client has prepared the **attached** noise testing protocol which sets out the terms of the joint noise monitoring program.
>
> Those terms includes, among other things, the appointment of a jointly-selected independent acoustician to conduct noise level measurements at your clients' properties in accordance with NZ Standard 6808-2010 and any applicable findings made by Richards J in *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145.
>
> Our client agrees to appointing Gustav Reutersward of SLR Consulting as the consultant responsible for implementing the program, as suggested by your email dated 31 January 2023.
>
> We look forward to receiving your confirmation that the attached protocol is agreed so that arrangements can be made for the consultant to be engaged and the noise testing undertaken.

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11 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 22.

12 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 24-25.

> Finally, the attached protocol is provided without any admission of liability on the part of our client in regards to the matters raised by your clients relating to the Berrybank Wind Farm.[13]

25 The protocol attached to this document[14] provided, relevantly, that:

(a) Mr Reutersward would be engaged to carry out testing and implement the protocol;

(b) the defendants would bear the costs of Mr Reutersward's engagement and the implementation of the protocol;

(c) Mr Reutersward was required to measure and assess noise generated by the wind farm at the plaintiff's properties in accordance with NZ Standard 6808-2020 and a methodology statement that he would prepare;

(d) in addition to having testing conducted in accordance with the NZ Standard, the plaintiffs could request that noise levels inside their homes also be assessed by Mr Reutersward;

(e) testing (other than any internal testing requested) was to be conducted in accordance with the requirements of the NZ Standard, having regard to a set of extracted findings from the *Uren* decision that were included in an annexure; and

(f) after the completion of the noise monitoring program, Mr Reutersward was to prepare a report documenting his results in accordance with the NZ Standard.

26 The protocol also contained terms relating to the provision of the raw data from the monitoring to the plaintiffs upon request (once Mr Reutersward's report had been delivered and/or 'relevant potential resulting actions have been taken' by the defendants and Mr Reutersward had performed additional measurements – though it is not clear on the face of the documents whether one or both of these conditions needed to be satisfied before the plaintiffs' right to obtain the raw data was enlivened), privacy and confidentiality, the precise terms of which are not presently relevant.[15]

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13 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 26.
14 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 27-36.
15 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 30-31.

27 On 13 June 2023, Ms Tannock replied briefly, stating 'My clients do not agree to the proposed noise testing protocol dated 4 June 2023. They do not agree to the terms of the proposed Methodology, Confidentiality and Provision of Data'.[16] The reasons for this position were not stated.

28 On 16 June 2023, Ms Tannock emailed Mr Lucarelli again, noting that she had been instructed that the defendants had contacted some of the plaintiffs seeking a meeting to discuss the noise testing protocol, and reiterating that the plaintiffs do not agree to the protocol. Ms Tannock asked Mr Lucarelli to advise whether he had instructions to accept service on behalf of the defendants.[17]

29 The following day, Mr Lucarelli replied by letter to Ms Tannock, noting that the draft protocol had accommodated the preferences and concerns that the plaintiffs had previously communicated, and that '[n]o substantive feedback or suggestions were provided' in response. Mr Lucarelli asked that Ms Tannock propose any amendments that would make the protocol acceptable to the plaintiffs, and confirm whether the plaintiffs would be willing to attend a meeting to discuss the protocol.[18]

30 Ms Tannock wrote back later on 17 June 2023, criticising the defendants' prior correspondence for, among other things, presenting the noise testing protocol as a completed document without seeking the plaintiffs' input.[19] She was critical of the proposal for failing to include a requirement that the joint expert should consult with Mr Huson, and for the fact that it failed to make any reference to or acknowledge the plaintiff's long-standing noise complaints.

31 The writ in this proceeding was issued two business days later, on 20 June 2023.

32 Subsequently, on 20 September 2023, Mr Lucarelli wrote to Ms Tannock to propose that a single joint expert be appointed in the proceeding in connection with noise testing and analysis, pursuant to s 65L of the Act.[20] That letter stated, in part:

> We envisage that the single joint expert would, at a minimum, carry out testing and analysis to establish a base line level of understanding of the noise at the

16 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 37.
17 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 38.
18 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 40-41.
19 Tannock affidavit, exhibit DST-1, 38-39.
20 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 42-45.

> plaintiffs' properties. Such data capture and analysis is labour intensive, time consuming, costly, requires ongoing site access and needs to be carried out in a transparent and technically robust way. Thus, there appears to be merit in having a single joint expert gather and analyse such evidence according to a single set of instructions and methodology, with the efficiencies and transparency of this work being carried out by one agreed expert.
>
> We understand that even once such evidence is prepared, there may be remaining differences of position between the parties concerning noise, and the parties may wish to reserve the right to fall further evidence.

33 The defendants noted that the protocol they had previously circulated could provide a starting point for instructions to any joint expert, and that if this approach was pursued the defendants would accommodate the views previously expressed by the plaintiffs concerning compliance with the NZS6808:2010 standard and findings from the decision of Richards J in *Uren v Bald Hills Wind Farm Pty Ltd ('Uren')*.[21] The defendants also stated that they would agree to any raw data that was collected by a joint expert being made available to both parties.

34 Ms Tannock replied on 25 September 2023, disagreeing with Mr Lucarelli's characterisation of the parties' prior correspondence.[22] In relation to the substance of the defendants' joint expert proposal, Ms Tannock noted the defendants' prior use of Marshall Day Acoustics to conduct noise assessments, which were relied upon for the purpose of seeking planning approvals for the wind farm. Ms Tannock's stated position was that, in light of the certifications filed by the defendants that the denials in their defence have a proper basis, 'it is not appropriate for the defendants to engage new experts to re-do their noise testing for the purposes of this litigation'. She stated that the plaintiffs have previously engaged Mr Huson to perform noise testing at their properties, and that the plaintiffs intend to rely on Mr Huson's evidence at trial.

35 On 28 September 2023, Mr Lucarelli replied, noting that the previous Marshall Day Acoustics reports commissioned by the defendant did not respond to the plaintiffs' present claim, and that the defendants propose to adduce expert evidence in response to the plaintiffs' allegations.[23] Mr Lucarelli also sought clarification as to the plaintiffs' attitudes towards the single joint expert proposal in advance of an upcoming

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21 [2022] VSC 145.
22 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 56-57.
23 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 59-60.

directions hearing, and otherwise requested that the plaintiffs produce certain documents pursuant to s 2 of the Act.

36 Ms Tannock responded to this letter on 2 October 2023, stating that the plaintiffs 'will consent to the appointment of Les Huson as the single joint expert but otherwise they do not agree to the defendants' proposal'.[24] In the event the defendants did not agree to the appointment of Mr Huson in this capacity, the plaintiffs proposed that the parties' experts should be asked to address common questions in their expert reports, to assist the trial judge in determining contested issues.

37 In relation to the requirement for noise testing to be undertaken in connection with this proceeding, Ms Tannock advised that the plaintiffs would permit access to their properties for Marshall Day Acoustics to measure the received noise levels close to their houses on behalf of the defendants. The plaintiffs sought to coordinate access to the relevant sites for Mr Huson at the same time, so that he could conduct measurements concurrently.

38 The defendants' present summons was then issued on 4 October 2023.

39 Ms Tannock wrote to Mr Lucarelli by email on 16 October 2023 in relation to an unrelated request for documents, and in the course of that correspondence addressed the present application. Ms Tannock questioned why Marshall Day Acoustics (who had performed testing for the defendants previously in connection with the wind farm's permit compliance requirements) was not being used for noise testing in this proceeding, when the plaintiffs had indicated they would agree to their presence on their properties for this purpose. Ms Tannock also appears to suggest that it was inconsistent for the defendants to object to Mr Huson's evidence or his appointment as a joint expert, while calling for discovery or production of the noise testing data he had previously collected at the properties.

40 Mr Lucarelli responded by way of a letter dated 18 October 2023.[25] Amongst other topics in this letter Mr Lucarelli noted that expert evidence in this proceeding was a separate process than noise monitoring done for compliance purposes under the

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24 Lucarelli 3 October 2023 affidavit, exhibit PML-1, 61-63.

25 Lucarelli 15 November 2023 affidavit, exhibit PML-2, 83-84.

relevant planning permits for the wind farm, and that within the context of this litigation the defendants had proposed the use of an independent expert. Mr Lucarelli noted that it would not be possible for Mr Huson to be engaged as an independent joint expert or a court-appointed expert as he had already been engaged by the plaintiffs in connection with this proceeding.

41 Over the course of 18 and 19 October 2023 there was further email correspondence between Ms Tannock and Mr Lucarelli, which does not appear to have been terribly successful in narrowing the issues between the parties.[26] Although the parties provided some clarification of their own views in the course of this email chain, it does not materially alter the substance of the parties' positions concerning this dispute.

42 On 23 October 2023, Ms Tannock wrote again to Mr Lucarelli in relation to the defendants' single joint expert proposal.[27] She stated that the plaintiffs objected to the orders sought in the summons, but that in an effort to resolve the dispute they would agree to allow access to their properties to a 'suitably qualified independent acoustic expert' for up to six weeks, for the purposes of installing noise monitoring equipment in accordance with the 2010 New Zealand standard, collecting raw data and sending it to the parties' separate acoustic experts for analysis and assessment. The offer was said to be conditional on the defendants' agreement that they would provide the plaintiffs' expert, Mr Huson, with data that he requests relevant to his analysis and assessment of any joint-collected data.

43 Mr Lucarelli responded to this letter on 26 October 2023, noting that the defendants did not agree to the plaintiffs' proposal and that they considered the appointment of a single joint expert would best serve the just and efficient resolution of the real issues in dispute.[28] Mr Lucarelli also noted that the defendants considered that internal noise testing would also be required at the plaintiffs' properties, as there were aspects of the plaintiffs' statement of claim referring to the effects of the wind farm noise while the plaintiffs were inside. This internal noise would not be able to be assessed by only measuring noise levels near the plaintiffs' homes as Ms Tannock had proposed.

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26 Lucarelli 15 November 2023 affidavit, exhibit PML-2, 86-91.
27 Tannock affidavit, exhibit DST-1, 40.
28 Tannock affidavit, exhibit DST-1, 41-42.

B.1 Other relevant matters

44 It was common ground that the question of whether the wind farm was compliant with its licence conditions in respect of noise would be assessed by reference to a New Zealand standard from 2010, 'NZS6080:2010 – Acoustics – Wind farm noise', which was in evidence.[29] The standard addresses, amongst other things, how noise data related to wind farms is to be measured (including in relation to the type of noise and the timing and location of measurements involved) and how that data is to be used in assessing whether prescribed noise limits have been met or breached.

45 The parties were agreed that any expert appointed to conduct measurements and perform analyses of the collected data in this proceeding would be required to do so in accordance with the requirements of the 2010 New Zealand standard. It appears to not yet be settled between the parties whether such an expert would be required to perform work beyond this (for example, the defendants suggested that internal noise data from within the plaintiffs' properties may be required, while the plaintiffs suggested that this kind of measurement may not be necessary as it is not required by the standard and can be calculated based on external sound levels).

46 A prior version of this standard was a significant feature in the decision of Richards J in *Uren,* which the parties made numerous references to in the course of this application. In that case, the plaintiffs claimed in nuisance against the defendant due to noise transmitted from its wind farm near their properties. Compliance with the permit conditions in respect of that wind farm was to be assessed by reference to a 1998 New Zealand standard. Although the 1998 and 2010 standards are similar in respect of their underlying methodologies, the 2010 standard is materially different and reflects the significant development of knowledge in the field between those dates.[30]

47 There were three expert acoustic witnesses called by the parties in that proceeding, and although they were not asked a common set of questions between the parties,

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29 Lucarelli 15 November 2023 affidavit, exhibit PML-2, 35-76.

30 See, e.g., *Uren,* [236]-[237].

ahead of the trial they did confer and produce a joint report, identifying reasons for any areas of disagreement between them.[31]

48 The three experts adopted differing approaches to the measurement and analysis tasks asked of them, which appear to have reflected various common practices and assumptions within the acoustician community, but which her Honour considered ultimately did not reflect what was required by the 1998 standard. Notably, her Honour identified that:

> While the NZ Standard was adopted more than 20 years ago, and is referenced in the planning permits for many wind farms and now in Div 5, Pt 5.3 of the Environment Protection Regulations, it appears not to have been the subject of any judicial consideration. This has had the unfortunate consequence that acoustic experts have developed their own interpretations of the NZ Standard, which have diverged in significant respects. I accept that, in assessing compliance with condition 19(a), Mr Turnbull applied an interpretation of the NZ Standard that he believed to be correct. However, for the reasons given, I have reached a different view. Ultimately, the proper interpretation of the NZ Standard is for a court or tribunal adjudicating a question of permit compliance; it is not a matter for acoustic experts.

49 It was not disputed by the parties in this application that a similar approach would be taken to the 2010 New Zealand standard. The interpretation of that standard will be a matter for the Court to determine, and not the experts or the parties.

50 Ultimately in *Uren*, her Honour concluded that the approaches taken by two of the three expert witnesses were not appropriate means to assess compliance with the 1998 standard.[32] Her Honour accepted that the approach taken by the expert called by the plaintiffs, Mr Huson, was the proper one for assessing compliance.[33]

C Applicable principles

51 The power relied upon for the defendants' application comes from s 65L of the Act, which provides as follows:

> **Single joint experts**
>
> (1) A court may order that an expert be engaged jointly by 2 or more parties to a civil proceeding.

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31 Ibid, [130].
32 Ibid, [197]-[206].
33 Ibid, [211].

(2) A court may make an order for the engagement of a single joint expert at any stage of the proceeding.

(3) In making an order to engage a single joint expert, the court must consider—

(a) whether the engagement of 2 or more expert witnesses would be disproportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute in the proceeding;

(b) whether the issue falls within a substantially established area of knowledge;

(c) whether it is necessary for the court to have a range of expert opinion;

(d) the likelihood of the engagement expediting or delaying the trial;

(e) any other relevant consideration.

(4) A single joint expert is to be selected—

(a) by agreement between the parties; or

(b) if the parties fail to agree, by direction of the court.

(5) A person must not be engaged as a single joint expert unless he or she consents to the engagement.

(6) Any party who knows that a person is under consideration for engagement as a single joint expert—

(a) must not, prior to the engagement, communicate with the person to obtain an opinion on the issues concerned; and

(b) must notify the other parties to the proceeding of the substance of any previous communications on the issues concerned.

(7) Unless the court orders otherwise, a single joint expert's report may be tendered in evidence by any of the parties to the proceeding.

52 If a single joint expert is appointed pursuant to s 65L, then s 65N of the Act provides direction as to how this is to be effected:

Instructions to single joint expert or court appointed expert

(1) If a single joint expert is engaged or a court appointed expert is appointed in a proceeding, the parties to the proceeding must endeavour to agree on—

(a) written instructions to be provided to the single joint expert or the court appointed expert concerning the issues arising for the expert's opinion; and

(b) the facts and assumptions of fact on which the expert's report is to be based.

(2) If the parties cannot agree on any of the matters referred to in subsection (1), the parties must seek directions from the court.

53 Section 65O of the Act provides that where a single joint expert has been engaged in relation to an issue, the parties may not adduce other expert evidence about that issue without leave:

Prohibition on other expert evidence without leave

(1) Except by leave of the court, a party to a proceeding may not adduce evidence of any other expert witness on any issue arising in proceedings if, in relation to that issue—

(a) a single joint expert has been engaged; or

(b) a court appointed expert has been appointed.

(2) Without limiting any powers of the court, in determining whether to grant leave, the court must consider—

(a) whether one party does not agree with the evidence, or an aspect of the evidence, in the report of a single joint expert or the report of a court appointed expert, as the case requires;

(b) whether allowing additional evidence to be adduced would be disproportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute in the proceeding;

(c) whether there is expert opinion which is different to the opinion of the single joint expert or the court appointed expert, as the case requires, which is, or may be, material to deciding the issue;

(d) whether any other expert witness knows of matters which are not known by the single joint expert or the court appointed expert that are, or may be, material to deciding the issue;

(e) any other relevant consideration.

54 Also of relevance in that Act is s 65G(1):

Party to seek direction of court to adduce expert evidence

(1) Unless rules of court otherwise provide or the court otherwise orders, a party must seek direction from the court as soon as practicable if the party—

(a) intends to adduce expert evidence at trial; or

(b) becomes aware that the party may adduce expert evidence at trial.

(2) Subsection (1) does not apply to the Magistrates' Court unless Magistrates' Court rules of court specify that the requirement to seek directions set out in subsection (1) applies to civil proceedings, or specified classes of civil proceeding, in that Court.

55 In considering the defendants' application, the Court is required[34] to seek to give effect to the overarching purpose in s 7 of the *Civil Procedure Act*, "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute."

56 Despite the age of the *Civil Procedure Act* at this stage, there appear to be few authorities considering the use of a single joint expert under s 65L specifically. Most of the directly applicable guidance identified by the parties was drawn from judgments in other jurisdictions, where comparable or equivalent language is used in similar provisions, such as those concerning the use of a court-appointed expert or referee.

57 The principles used in considering and applying provisions such as s 65L flow from the overarching purpose in the Act. There is no pre-defined test for the section to be directly applied, and the matters set out in s 65L(3) are not a set of criteria to be checked off or counted against one another. Rather, the Court's task appears to be to evaluate the full range of considerations present in a particular case, having specific regard to the items set out in s 65L(3), and form a conclusion as to whether the use of a single joint expert is more consistent with the overarching purpose and effective case-management of the proceeding than the alternative.

58 There is plainly a traditional presumption in favour of a party being given the opportunity to call all of the evidence in support of its position that it wishes to in respect of a disputed area of a case, and the just and fair conduct of a proceeding will no doubt often require that to occur. However, that position is not absolute – the Act has been described as having 'changed the litigation landscape',[35] and it includes a

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34 *Civil Procedure Act 2010* (Vic) s 8.

35 *Mandie v Memart Nominees Pty Ltd* [2016] VSCA 4, [42].

requirement for parties to seek directions about expert evidence in a proceeding at an early opportunity,[36] as well as provisions for the use of joint and court-appointed experts.[37]

59 In considering similar provisions to s 65L in New South Wales, in *Walker Group Constructions v Bluescope Steel and QBE Insurance*,[38] McDougall J stated:

> I would be the first to agree with WGC's position that where there are detailed allegations of disputes and those detailed allegations are denied, the appointment of a single expert is unlikely to be productive of any real saving in time or costs. It may readily be conceded that the usual case where a single expert ought be appointed is the one where the matters calling for expert opinion are either essentially uncontentious or relatively uncomplicated, or (in some cases at least) relate only to the assessment of damages. Of course, the general discretion given by r 31.37 [similar to s 65L of the *Civil Procedure Act*] is not to be read as being, in some way, constrained by those typical situations where it is engaged. Nor can it be suggested that the general discretion conveyed by the rule can only be exercised where those considerations are engaged.

60 Case-management purposes, and the utility of joint processes in assisting (if not forcing) parties to confer and ultimately clarify or narrow the issues in dispute, have been highlighted as particular advantages of the use of joint experts (or experts appointed independently of parties, in other contexts).[39]

D The parties' positions

D.1 The defendants' submissions

61 The defendants say that the level and character of the noise at the plaintiffs' properties is a key issue in the dispute, and that the use of a single joint expert to provide evidence about this is consistent with the overarching purpose of the Act. It would be efficient and cost-effective to have the complex and time-consuming work of conducting noise measurements performed once by a single expert.

62 Further, the defendants say that the measurement and analysis of noise data in accordance with the 2010 New Zealand Standard falls within a recognised area of

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36 *Civil Procedure Act 2010* s 65G.
37 Ibid, ss 65L-65M.
38 [2017] NSWSC 678.
39 See, e.g., *Wu v Statewide Developments Pty Ltd* [2009] NSWSC 587 at [11]; *Spralja v Bullard & Ors (No 2)* [2019] VCC 1799 [11].

expertise. The collection of such objective data in accordance with the standard is not an issue that would be materially assisted by having a range of experts providing opinions. In addition, the presence of a range of expert opinion would be less important in this proceeding, where under the defendants' proposal the joint expert would be jointly briefed, allowing for the use of alternative instructions or assumptions.

63 The position advanced by the defendants was that the scope of the joint expert's role was a matter to be determined subsequently, once a decision has been made to proceed with a single joint expert. This interpretation was said to be supported by the wording of s 65N of the Act. Despite this, the defendants accepted that there needed to be a sufficient understanding at this stage of the nature of the expert evidence to be led, at a broad level, to enable the Court to consider the issued required under s 65L. In this regard, the defendants' proposal as to the use of a single joint expert is the same as it proposed to the plaintiffs in the noise testing protocol it circulated in 2023. However, the scope of any expert role may change following the conferral that would be required subsequently under s 65N.

64 In relation to the plaintiffs' reliance on the reasons in *Uren*, the defendants contend that in that proceeding there was a difference of approaches or opinions between the experts in that case but not a 'sharp divergence' as the plaintiffs suggest. Further, there was nothing in that case to suggest that the measurement of noise and weather/environmental data in accordance with a relevant standard does not fall within established fields of engineering knowledge.

65 The defendants note that the use of a single joint expert would require the parties to confer and seek to agree on a single set of instructions, including as to the methodology to be used by the expert. This would assist in potentially narrowing the scope of the dispute between the parties, as well as limiting the potential for minor differences that might arise between multiple experts.

66 On the issue of proportionality, the defendants do not contend that having multiple experts engaged in this proceeding would be disproportionate to either the complexity or importance of the issues in dispute, or the amount in dispute in the

proceeding. Rather, they consider the appointment of a single joint expert would be more efficient and cost-effective.

67 In relation to questions of cost, the defendants have offered to pay for the single joint expert, so any prejudice to the plaintiffs in this regard should be removed.

68 In relation to other forms of prejudice to the plaintiffs, the defendants noted that the plaintiffs would not be precluded from calling additional expert evidence with the Court's leave, pursuant to s 65O of the Act. It appears from the defendants' attitude in the course of the hearing of this application that were the plaintiffs to apply for such leave, the defendants consider that they would not face a terribly high bar to clear on that application.

69 In response to the plaintiffs' alternate proposal that a single expert should be used to collect relevant noise data, which would then be provided to the parties' separate experts for analysis, the defendants contend that the most efficient course would be for the joint expert to perform analysis of the data as well, if they are already going to be engaged to perform work for the parties in this proceeding.

D.2 The plaintiffs' submissions

70 The plaintiffs' view is that there is not a 'substantially established area of knowledge' within which a single joint expert could opine in this case, and that it is necessary for the Court to be provided with a range of expert opinions at trial. They point to the *Uren* decision,[40] as well as subsequent communications by Marshall Day Acoustics, as evidence of the fact that there are significant divergences of expert opinion within the relevant field concerning wind farm noise measurement and the assessment of that noise against relevant standards.

71 The plaintiffs say that the availability of a range of expert opinion will enable the Court to better assess and identify any deficiencies in experts' methodologies, and without it there is an unacceptable risk that the Court might act on an incorrect or incomplete opinion from a single expert. The benefit of this approach is apparent from the reasons in *Uren*.

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40 See, e.g., *Uren*, [175].

72 Further, given the importance of the noise data to the proceeding, the use of multiple experts would not be disproportionate.

73 The plaintiffs disagree with the defendants' reliance on s 65O of the Act as a safeguard against any prejudice to them. They consider that if it is assumed that contradictory expert evidence will be required, then the process will inherently be less efficient than just allowing the parties to call their own experts. They would need to engage an expert in the background in any event to assist them in relation to the instructions to be given to a single joint expert, so regardless of the outcome there will be multiple experts involved in the proceeding and therefore the single joint expert approach could not be said to be more efficient than the traditional course expert evidence might take.

74 Further, they say that it cannot be assumed that they would inevitably be granted leave to rely upon contradictory or alternate expert evidence at trial if a single joint expert was appointed. There are a range of factors a Court would have to consider in such an application,[41] but the starting position is that they would be prevented from relying on their own evidence by s 65O absent leave being granted.

75 As to other relevant considerations, the plaintiffs note that they have already engaged their own expert, Mr Huson. The plaintiffs identified a concern that the data collected by Mr Huson would be excluded due to s 65O of the Act if a single joint expert is appointed.

76 The plaintiffs also note that if a single joint expert were required be used by the Court, they would be put in a position of having to pay for expert evidence twice (either through having already engaged Mr Huson, or through being required to engage an expert in the background to assist their solicitors in dealing with the single joint expert's instructions and report). This was said to be unfair in circumstances where the plaintiffs are all individuals and the defendants are large corporate entities.

77 In relation to what the outcome of the application should be, the plaintiffs noted their preferred approach of a joint collection of noise measurement data, with the data to be provided to the parties' separate experts for analysis. The plaintiffs noted that there

41 See, e.g., *Wu v Statewide Developments Pty Ltd* [2009] NSWSC 587, [17].

are other steps that can be taken to promote efficiency and the management of costs, including the use of an agreed set of common questions, joint expert reports and concurrent evidence.

E Analysis

78 As at the end of the application, both parties had accepted that a single joint expert could usefully perform the work of collecting the noise data from the properties in accordance with instructions provided by the solicitors involved in the proceeding. The scope of such an expert's role in relation to the measurement of noise data appears to not be fully resolved yet, as there may still be a disagreement between the parties as to whether internal measurements at the plaintiffs' properties will be required to be conducted. For present purposes this issue can be put to one side, however.

79 The dispute between the parties comes down to whether such an expert should also perform the next stage of work involved, being the analysis of that data, or instead whether the single joint expert's noise-measurement data should be provided to the parties' separate experts for them to perform their own analyses.

80 Section 65L(3) of the Act includes a number of matters that the Court is required to consider in relation to the use of a single joint expert in a proceeding. It is convenient to address these in turn.

E.1 *Whether the engagement of 2 or more expert witnesses would be disproportionate to (i) the complexity or importance of the issues in dispute; and (ii) the amount in dispute in the proceeding.*

81 On the face of the pleadings, and based on the parties' submissions in this application, it is clear that issues around the level and nature of the noise at the plaintiffs' properties are central to this dispute. For an issue of this potential significance, and as appears to have been accepted by the defendants, I do not consider that having multiple experts engaged in this proceeding would be disproportionate to the importance of the issues in dispute.

82 It is less clear whether multiple experts might be considered disproportionate to the complexity of the issues in dispute, as opposed to the importance of those issues. On one view, the fact that the expert exercise should be significantly driven by the

2010 New Zealand standard which, as above, will not be a matter of expert interpretation but can instead be the subject of instructions from the lawyers involved, there may be some force to the suggestion that the complexity of the issues is comparatively lower. Whether this is the case or not remains to be seen, however at this stage of the proceeding, as a result of the detailed and specialised nature of the work, I am not satisfied that the use of multiple experts would be disproportionate.

83 In this regard, I note that neither party submitted that the use of multiple experts would be disproportionate to any part of sub-paragraph (i) of this factor.

84 As to sub-paragraph (ii), there was no evidence in this application as to the amounts in dispute or the likely cost of the potential expert exercise. It is therefore not possible to form any firm views about the second element of s 65L(3)(a). At a high level, though, it appears uncontroversial to observe that the cost of one expert is likely to be lower than the cost of two or more.

85 Moreover, there is likely a range of possible outcomes for the plaintiffs in this proceeding if they establish liability on the part of the defendants, ranging from significant to much more modest amounts. If the plaintiffs achieve success but only are entitled more modest damages, then there is a prospect that a particularly expensive expert exercise could amount to a sizeable portion of any overall award, and therefore might raise questions about proportionality. Conversely, if the plaintiffs succeed at trial and are awarded damages on the other end of the spectrum, then clearly no issues around proportionality would arise.

86 In the absence of any specific evidence or submissions on this point, I consider that this can only be a neutral factor in evaluating the appropriateness of appointing a single joint expert.

E.2 ***Whether the issue falls within a substantially established area of knowledge***

87 The parties were at odds on the question of whether there was a 'substantially established area of knowledge'.

88 The defendants contend that the measurement and assessment of wind farm noise in accordance with the 2010 New Zealand standard falls within such a substantially

established area. They note the existence of the standard itself and the experts who developed it. They note further that there was nothing in the *Uren* decision to suggest that the measurements and calculations required by the standard do not fall within well-established fields of engineering knowledge.

89 In contrast, the plaintiffs referred to matters such as the *Uren* decision, and a publication by Marshall Day Acoustics following the delivery of that decision, to indicate that a substantially established area of knowledge is not present here. The plaintiffs emphasised that in the *Uren* case there was a sharp divergence in the approaches taken by the experts, which they say reflects the lack of a substantially established area of knowledge in which expert opinions could be formed.

90 I prefer the defendants' approach to this issue, for the following reasons.

91 It appears to me that the plaintiffs' argument runs the risk of conflating, or at least blurring, the 'issue' and the 'area of knowledge' referred to in the Act. They are separate concepts expressed at different levels of specificity. If the issues for which the experts are to be engaged concern the collection and analysis of noise data at the properties in accordance with some field-specific practices or standards, then it makes less sense to approach the 'area of knowledge' in which that issue is located as being essentially identical in focus. Rather, the area of knowledge would be the broader application of principles and techniques of noise measurement and analysis which in the present case could be used to apply the contents of the standard.

92 As to whether the area of knowledge is 'substantially established', I note the evidence pointed to by the defendants of the substantial body of experts who contributed to the New Zealand Standards, which is strongly suggestive of a recognised and well developed area of scientific expertise. The number of experts or potential experts identified in this application and in the *Uren* decision also supports the conclusion that there exists an established expert community with specialist qualifications, who apply common practices and techniques in the performance of their work. This suggests a substantially established field of knowledge.

93 As a matter of interpretation, I have difficulty accepting that the existence of divergent or differing opinions amongst experts within a field means that an area of knowledge

within which they might give evidence is not 'substantially established'. The language of the statute only requires that the area be substantially established, which suggests a significant level of common knowledge or methodologies but falls short of requiring unanimity amongst experts. Moreover, 'established' suggests an area that is not nascent, untested or undeveloped, rather than something that is certain or static. The existence of the New Zealand standards and the expert community involved in their development again suggest that this is not the case here.

94 When read in the context of s 65L(3) as a whole, imposing a more stringent requirement of unanimity to establish a 'substantially established area of knowledge' would also seem to limit the utility of sub-paragraph (c), 'whether it is necessary for the court to have a range of expert opinion'. It would seem that a range of expert opinion would be relevant where there is likely to be divergence amongst experts. If a precondition for using a single joint expert was the existence of a uniformity of views within a field, having sub-paragraphs (b) and (c) considered separately would make less sense. The more logical interpretation of s 65L(3), in my view, is that a 'substantially established area of knowledge' can still exist where there is a diversity of views within a field, and that sub-paragraphs (b) and (c) are addressing different, though related, considerations.

95 Further, the plaintiffs' reliance on any differences between the experts in the *Uren* proceeding appears to be blunted by the fact that this proceeding is taking place after the publication of that judgment. This means that the lawyers and experts engaged in the present proceeding will have the benefit of those reasons when considering how the expert process is to be approached. Although it is accepted that then 2010 standard is a different document than the one considered in that case, significantly, in *Uren* the Court found that the interpretation of the New Zealand standard is a matter for the Court, not acoustic experts. This limits the relevance of any divergence of views amongst experts in that case.

96 Finally, both parties' acceptance of the fact that a single joint expert would be appropriate for at least the collection of noise data, and that analysis of that data would be an appropriate topic for expert evidence (whether separately or by a joint expert)

strongly supports the conclusion that the field within which such experts operate represents a substantially established area of knowledge.

97 Although the language of the Act does not express the s 65L(3) factors as criteria or items about which it is necessary to express specific conclusions, to the extent it is necessary to do so, I am satisfied that the issues for which a single joint expert might be engaged (including both the collection and analysis of noise data in accordance with the 2010 standard) fall within a substantially established area of knowledge.

E.3 ***Whether it is necessary for the court to have a range of expert opinions***

98 The plaintiffs again pointed to the divergent approaches taken by the experts in the *Uren* case, noting that a diversity of expert opinion would enable the Court to assess the relative strengths and weaknesses of each expert's approach, and allow it to better identify any deficiencies in any particular expert's methodology.

99 As above, I think the plaintiffs' reliance on the *Uren* decision is hindered by the fact that the reasons are now available to the parties and any experts. The result of that decision is that issues around differing methodologies would be able to be addressed by the parties providing clear instructions as to how the expert task was to be undertaken, potentially including by providing alternative sets of instructions to be followed in the event the parties have differing views about the interpretation and application of the relevant standard.

100 The defendants emphasised that there was not as sharp a divergence between the experts in *Uren* as the plaintiffs suggest, and that in any event the decision in that case establishes that the interpretation of the standard is a legal question for the Court to address. As such, if there are differences in opinion between the parties as to matters of interpretation, that can be addressed in the course of jointly briefing an expert. Further, the plaintiffs can always seek leave to adduce further expert evidence if they disagree with the joint expert's results.

101 While I accept that the consequences of the divergences apparent between the *Uren* experts were likely not as extreme as the plaintiffs have contended in this application, nonetheless I consider the plaintiffs' arguments are stronger than the defendants in relation to the issue of the necessity of a range of expert opinions.

102 The work involved in the analysis of the collected data is undoubtedly specialised and complex, and it is probably unrealistic to expect that all issues that might arise in the interpretation of the New Zealand standard could be addressed solely by the provision of adequate instructions by the parties' lawyers. To that extent, it seems likely that in practice, even following the *Uren* decision, there may be some differences in approach or interpretation between different experts that could arise, which would be able to be more readily identified where there are multiple experts involved in a proceeding who are able to assist the Court. This seems particularly so in circumstances where there has been no judicial consideration of the 2010 New Zealand standard to date, and so there is a prospect that the reasons in *Uren* may not completely address any areas of uncertainty in interpreting or applying the more recent standard.

103 In this regard, I think there is real force to the plaintiffs' points concerning the benefits of having multiple experts available to assist the Court in understanding the strengths and weaknesses of their approaches, and in identifying any issues or deficiencies in the methodologies that are employed. Self-evidently, the approach of having experts confer and produce a joint report addressing areas of disagreement with each other's opinions would not be possible in a single joint expert scenario.

104 There is also a practical component to this issue, in that having evidence available from multiple experts reduces the chances of the Court being left with no useful evidence on a point in the event the trial judge interprets an aspect of the standard differently than the parties and/or the experts. In the *Uren* case, three experts took different approaches, and the trial judge was ultimately able to prefer the evidence of one expert. If a single joint expert was used in this proceeding and the trial judge ultimately approaches the Standard in a different way to them, then absent the parties briefing the expert to produce a large number of permutations of their evidence to cover all possibilities, there is a greater risk that the Court might not have useful expert material available, which could delay or disrupt the trial.

105 For these reasons, I would conclude that in the present circumstances (and in particular until a court has considered the 2010 New Zealand standard), having the

parties call their own experts is more likely to be conducive to the just and efficient conduct of the trial in this proceeding.

E.4 ***The likelihood of the engagement expediting or delaying the trial***

106 In my view, this consideration has little to no work to do in the present circumstances. The proceeding is at a very early stage and a trial date has not yet been set. Whether or not a single joint expert is ordered, the parties would need to take time to work through the process of obtaining expert evidence, and it is highly unlikely that the timing or the conduct of the trial would be materially altered depending on the outcome of this application.

E.5 ***Any other relevant considerations***

107 There are a number of relevant other factors identified by the parties that should be noted when considering the application.

108 The defendants have offered to pay for the single joint expert exercise. This substantially limits one area of prejudice that might otherwise have been said to affect the plaintiffs, in that they would not in any event have been exposed to the risk of having to pay for multiple different experts.

109 The plaintiffs point to the fact that they had already engaged their own expert, Mr Huson, in connection with the proceeding. In contrast, the defendants note that it appears Mr Huson has only performed limited work collecting data to date, and that the data he has collected could be provided to a joint expert performing any analysis, so it would not be wasted.

110 I consider the prior engagement of an expert to be a neutral factor in this exercise. I accept the defendants' contentions that the data will not be wasted as any joint expert could still consider it. However, as much as the plaintiffs suggest that the defendants ought not be allowed to buy their way into a single joint expert exercise by offering to pay for the costs involved, I think equally a party should not be in a position to stymie the prospect of such an exercise being ordered by pursuing their own expert evidence without seeking the Court's directions first, as is required by s 65G of the Act. I do not

think the plaintiffs' prior engagement of Mr Huson should be considered to be a factor for or against the use of a single joint expert.

111 The plaintiffs also suggested that appointing a single joint expert would inevitably require the parties to engage their own experts behind the scenes, and that therefore it could not be said that the defendants' proposed approach would be cheaper or more efficient than the alternative – the counterfactual scenario the plaintiff suggested was having three experts involved rather than two, under the defendants' proposed approach. This proposition has some superficial attractiveness, but on balance I consider it is too hypothetical to permit much reliance to be placed on it, for two principal reasons.

112 First, the cost consequences of the parties engaging their own experts in this way are far from certain – doing so would be 'at the party's own risk',[42] but questions of whether such costs would be recoverable could only be assessed at a later point in the proceeding.

113 Second, the plaintiffs' position assumes that the defendants would adopt the same course as them and brief their own expert as well. I do not think this can necessarily be assumed. Further, in relation to any application under s 65O of the Act, the most likely scenario is that only one party, rather than both, would seek to make such an application (since if one party is unhappy with the joint expert's opinions, presumably the opposing party would be likely to be happier with them). As such, there seems to be just as much of a chance that the outcome of the defendants' proposed approach would be two sets of expert costs being in issue, rather than three as the plaintiffs suggest. If this is the case, there may not be much difference in terms of cost compared to the tradition approach of each party calling their own expert.

114 I therefore do not place much weight on issues of costs in comparing the defendants' proposed approach with the status quo.

115 Finally, in earlier correspondence, the plaintiff suggested that they would agree to Mr Huson being used as a joint expert to conduct noise measurements. In light of the approach evident in s 65L(5) of the Act, I agree with the defendants' view that this

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42 *Walker Group Constructions v Bluescope Steel and QBE Insurance*, [21].

would not be appropriate. The expert to be used for this task should not have had any prior engagement by either party in connection with this proceeding.

F Determination

116 In my view, this application is a particularly close-run contest, and there are compelling arguments made by both the plaintiffs and defendants. On its face, a dispute of this kind appears well suited to the use of single joint experts for both the collection and analysis of noise data, where a party who might disagree with the results of that analysis was not faced with a particularly high barrier to seeking leave to adduce their own alternate expert evidence on such issues.

117 However, in the circumstances of this case I consider that the approach that will be most conducive to the efficient and effective conduct of the litigation, and most consistent with the overarching purpose of the Act, is for the role of the single joint expert to be confined to the measurement and collection of noise data at the plaintiffs' properties, with that data to be provided to the parties for their own analyses.

118 This approach has the advantage of providing a common set of data for both parties to work from, and limits the imposition on the plaintiffs' lives that would otherwise result from multiple monitoring exercises being required.

119 In my view, the most persuasive factor in the analysis is the benefit to the Court of having a range of expert opinions available to it at trial.

120 Significantly, particularly in circumstances where the 2010 New Zealand standard has not yet been considered by a Court, the use of multiple experts for the analysis of the data appears likely to better assist the Court in understanding and assessing the experts' evidence, given the parties' instructions may not necessarily perfectly align with how the Court will interpret the 2010 standard (even with the benefit of the *Uren* decision). It also guards against a risk of the Court being left without any useful expert evidence, in the event that the Court adopts an interpretation of the 2010 standard that does differ from a party's assumptions and instructions.

121 It is not clear whether the parties still propose to engage Mr Reutersward for the purposes of the data collection exercise, or whether some other appointment may be

under consideration. I will allow the parties an opportunity to confer about this point before an order is made, so that the identity of the proposed joint expert can be agreed.

122 Finally, despite the plaintiffs' success in confining the scope of the single joint expert's role, this should not be interpreted as a signal that the parties' experts will otherwise be left to their own devices, with any differences between them to only be explored at trial. As noted, the *Civil Procedure Act* envisages that the Court will take an active role in managing expert evidence processes in civil proceedings.

123 Given the history apparent in the correspondence that is in evidence in this application, it appears that this is an appropriate case for the Court to adopt such a position. I expect that the parties should anticipate being asked to confer in order to seek to identify common questions and briefing materials that should be provided to their respective experts. Longer-term, it may be appropriate for the parties to consider the use of a joint report and/or a conclave process between their experts, to better identify and explain any differences that may exist between them ahead of trial.

G Conclusion

124 I therefore intend to make an order for the appointment of a single joint expert pursuant to s 65L(1) of the *Civil Procedure Act*. The scope of that expert's work will be to measure and collect noise data at the properties identified in the statement of claim, for the purposes of provision to the parties' acoustician experts.

125 The parties are to confer as to the identity of the single joint expert and advise the Court within 14 days if agreement has been reached, and if so, the order will be made and sent out to the parties. If the parties cannot reach agreement by that stage, the Court will contact the parties to advise of a procedure by which the expert will be selected by the Court, pursuant to s65L(4) of the Act.

126 The next step after that order is made will be for the parties to confer and seek to agree on the instructions, facts and assumptions to be provided to the joint expert, pursuant to s65N(1). As part of this process, it will be necessary for the parties to reach a position on the issue of whether internal noise monitoring is included in the scope of the expert exercise in this proceeding. If the parties cannot reach agreement on this, they should seek directions from the Court pursuant to s65N(2).

127 The parties did not address the question of the costs of the application in their submissions. To assist with the parties' consideration of this issue, I express a preliminary view that the appropriate order is that the costs of the application should be costs in the proceeding. This is principally because:

(a) although the outcome is closer to the plaintiffs' preferred position than the defendants', there will be a single joint expert appointed for the data collection task, and in that respect the application has been partially successful;

(b) it would have been necessary for an application to be made, or for the matter to come before the Court to discuss expert evidence, in any event pursuant to either s 65G or s65L of the Act; and

(c) given the history of correspondence between the parties, including the lack of substantive engagement by the plaintiff with the prior expert proposals issued by the defendants, I do not think it was unreasonable for the defendants to have pursued the application in the way they did.

128 In the event any party wishes to make submissions about the appropriate costs order in the circumstances, they are to file and serve any written submissions on the point of no more than 3 pages in length, within 14 days, and the issue will be determined on the papers shortly thereafter. If neither party files any submission concerning costs in that time, I will make an order that the costs of the application are the parties' costs in the proceeding.

SCHEDULE OF PARTIES

S ECI 2023 02627

BETWEEN:

DARRYL JOHN BAXTER	First Plaintiff
PETER RAYMOND FURLONG	Second Plaintiff
PATRICIA MARY MATHEWS	Third Plaintiff
BARRY RAYMOND WHITE	Fourth Plaintiff
RUSSELL NORMAN WHITE	Fifth Plaintiff
- v -	
BERRYBANK DEVELOPMENT PTY LTD (ACN 146 466 882)	First Defendant
BERRYBANK 2 ASSET PTY LTD (ACN 642 735 288)	Second Defendant

CERTIFICATE

I certify that this and the 30 preceding pages are a true copy of the reasons for ruling of Baker JR of the Supreme Court of Victoria delivered on 12 June 2024.

DATED this twelfth day of June 2024.

SUPREME COURT OF VICTORIA
Associate to a Judicial Registrar

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Associate