To appoint or not to appoint?

When should you consider the appointment of referees and assessors?

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The Honourable Justice Jenni Hill

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To appoint or not to appoint – when should you consider the appointment of referees and assessors? Justice Jenni Hill[1]

Traditionally, the Supreme Court of Western Australia has not embraced the use of referees and has, to my knowledge, appointed an assessor on only one occasion.[2] This is in contrast to the practice in most other superior courts where, particularly in the commercial list of the Supreme Court of New South Wales, referees are appointed on a regular basis, including to hear what is, in effect, the entire dispute.[3]

The position in Western Australia is based on a view that where litigants have chosen to commence proceedings in a superior court, they are entitled to have a judge decide all issues of fact and law. However, this view has changed over time and no longer prevails. As Professor Adrian Zuckerman observed:[4]

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

So, is it time for a change in Western Australia?

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[1] The views expressed in this paper are those of the author.
[2] ***Barnel Investments Pty Ltd v Conceptual Technologies Pty Ltd [No 3]*** [2023] WASC 486.
[3] See, eg, Justice Bergin, 'Presentation of Commercial Cases in the Supreme Court of New South Wales' (Conference paper, LexisNexis Commercial Litigation Conference, 26 October 2005).
[4] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 3rd ed, 2013) [1.12].

A brief history of nearly everything (to do with referees)

In Western Australia, the ability of the court to appoint both assessors and referees is set out in Div 4 and 5 of the *Supreme Court Act 1935* (WA) (Act) as well as in O 35 of the *Rules of the Supreme Court 1971* (WA) (Rules). At present, there are no practice directions in the Supreme Court which address the appointment of referees or assessors.

Relevant legislative provisions

Division 4 of the Act is entitled 'Inquiries and Trials by Referees' and Div 5 deals with 'Assessors'. Both divisions specifically exclude their operation in the criminal jurisdiction of the court.

The Act contemplates two types of reference: first, the referral of a question in a civil matter for inquiry or report,[5] and second, the referral of a civil action (or any question or issue of fact arising therein) to be tried by a referee.[6] There are a number of important distinctions between these sections.

A reference under s 50 of the Act requires a 'question arising in any cause or matter' to be identified and be the subject of referral. The referral can be made by the judge on their own volition, without the consent of the parties. A referee who has been appointed to provide a report to the court does not dispose of the action, nor do they determine any matter in issue between the parties.[7] Once a report has been produced by the referee, the report is adopted in whole or in part by the judge. In deciding whether or not to adopt the report of the referee, the judge is exercising a judicial discretion.[8]

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[5] *Supreme Court Act 1935* (WA) s 50(1).
[6] *Supreme Court Act 1935* (WA) s 51(1).
[7] ***Mullin v Monico*** (1877) 3 CPD 142.
[8] ***Wilden Pty Ltd v Green [No 6]*** [2018] WASCA 198 [53]; ***Highway Construction Pty Ltd v Commissioner of Main Roads*** [2011] WASCA 27 [25]; ***Super Pty Ltd v SJP Formwork (Aust) Pty Ltd*** (1992) 29 NSWLR 549; ***Wenco Industrial Pty Ltd v WW Industries Pty Ltd*** [2009] VSCA 191.

In contrast, a reference under s 51 of the Act can only be made in one of three defined circumstances, being:

(a) if all the parties (who are not under a disability) consent; or

(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation, which cannot, in the opinion of the Court or a judge, conveniently be done by the Court; or

(c) if the question in dispute consists wholly or in part of an account.

Where one of these applies, the judge can order the entire action (which does not require the identification of a question) or any question or issue of fact (which does require identification of the question or issue) to be tried before a referee. Because an order under s 51 is an order that the action, question, or issue be tried by the referee, the report does not require adoption by the judge. Instead, the report has the equivalence of a jury verdict.[9]

In all references, the referee has the authority and is required to conduct the reference in the manner directed by the court or judge. In undertaking this work, the referee is deemed to be an officer of the court.[10] Their remuneration is also determined by the court or a judge.[11]

Where a question of law arises on the reference, the referee has the power (and must, if directed by the judge) state in the form of a special case for the opinion of the court, any question of law which arises in the course of the reference.[12]
Section 56 of the Act enables the court to appoint one or more 'specially qualified' assessors to assist the court 'if it thinks it expedient' so to do. The assessor or

[9] *Supreme Court Act 1935* (WA) s 52(2).
[10] *Supreme Court Act 1935* (WA) s 52(1).
[11] *Supreme Court Act 1935* (WA) s 52(3).
[12] *Supreme Court Act 1935* (WA) s 54.

assessors sit with the judge to hear the cause or matter 'wholly or partially'. The remuneration to be paid to the assessor is determined by the court.
Order 35 of the Rules deals with both assessors and referees. In relation to trials with assessors, O 35 r 1 provides that the trial shall take place in such manner and on such terms as directed by the court.

The remainder of O 35 addresses hearings before a referee. Importantly, the Rules provide that unless otherwise directed by the court the trial will proceed in a similar manner as actions tried by a jury, and evidence will be taken in the same manner as if it were a trial conducted by a judge (except that the referee has no ability to order imprisonment).[13]

The effect of the Act and the Rules is that 'unless otherwise directed', the referee is bound by the laws of evidence and is required to hear the matter as a trial. This is different to the position in other superior courts.

Western Australian case law on the appointment of referees

The only case in Western Australia which specifically addresses an application for the appointment of a referee is the 1998 decision of Ipp J in ***Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd***.[14] This action concerned leaking roofs in approximately 170 units at a retirement village. The plaintiff alleged the first defendant, a firm of architects, was negligent in the design of the retirement village, and the second defendant, the builder, was negligent in its performance of the contract to build the units and other buildings at the village. Third party proceedings were commenced by the defendants against the suppliers of tiles, alleging the tiles were defective and not fit for purpose, and that the advice given by the suppliers was negligent or defective.

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[13] *Rules of the Supreme Court 1971* (WA) O 35 r 5.
[14] ***Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd*** (1998) 19 WAR 281.

Two primary questions were raised for determination in those proceedings: first, whether the roofs of each of the units leaked, and if so, where; and second, what was the cause or causes of the leaks. The second defendant and third parties opposed the appointment of a referee, and the third parties contended there was no single or even uniform cause of the leaks and that every unit had to be considered independently.

Ipp J dismissed the application for the appointment of a referee. His Honour accepted the observations of Rogers CJ in ***Telecomputing PCS Pty Ltd v Bridge Wholesale Acceptance Corporation (Aust) Ltd***[15] that there were generally only two circumstances in which it was appropriate for a referee to be appointed: first, where the litigation involved intricate technical expertise for its proper understanding and resolution; and second, where it was necessary for the court to undertake a detailed examination of large numbers of items such as the task involved in taking an account, where disputed invoices and other matters would have to be checked.

Ipp J referred to a number of factors that he took into account in reaching his decision and for its differing approach from the practice in courts in New South Wales (NSW). These factors included:[16]

(a) the present state of the civil lists, which enabled trials to occur within a 'matter of months of entry for trial'. This was in comparison to the then position in NSW where there was a two-year delay between entry and the commencement of hearings;

(b) the fact that in NSW, there were a number of referees 'well known to the court' with extensive experience, including retired judges of the court. At the time,

[15] ***Telecomputing PCS Pty Ltd v Bridge Wholesale Acceptance Corporation (Aust) Ltd*** (1991) 24 NSWLR 513, 517.

[16] ***Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd*** 284 - 285.

this was not the position in Western Australia and Ipp J commented that it was not then 'the general custom for retired judges to be appointed referees';

(c) what was described as a public policy that when parties sought a resolution of their dispute by the court, the court should resolve the dispute either through a court appointed mediator or judicial decision. Ipp J expressed the view that it was only in exceptional circumstances that:[17]

> [T]he court would refer a task ordinarily performed by the court as part of its traditional function to some outside person who would require the parties to pay fees for services that the parties would ordinarily expect the court to render free of charge;
>
> and

(d) the fact that a referee had not been identified, and there was no evidence that a suitably qualified referee would be available nor what their costs would be.

In his decision, Ipp J summarised the position that applied in each of the states at that time. At that time, NSW was the outlier (in regularly appointing referees) with a more conservative approach being adopted in Victoria and Queensland. Two reasons were given for the differences in policy and practice between the States: first, the practical experience in NSW in listing complex construction cases; and second, the difference in the relevant provisions of the Supreme Court Acts. In NSW, referees are not bound by the rules of evidence. In contrast, in all other states, unless a judge otherwise orders, proceedings before a referee were to be conducted in the same manner as a trial before a judge.[18]

In NSW, the rationale for their different approach was explained by Gleeson CJ in ***Super Pty Ltd v SJP Formwork (Aust) Pty Ltd*** (with whom Mahoney and Clarke

[17] ***Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd*** 285.
[18] ***Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd*** 284 - 285.

JJA agreed) as follows:[19]

> The proposition that all litigants are entitled to have a Judge (or, presumably, a Master) decide all issues of the fact and law that arise in any litigation is unsustainable.

This position appears to have been adopted in NSW from at least the late 1980s. The approach taken by the NSW Supreme Court in considering an application for the appointment of a referee was summarised by Smart J in ***Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd*** in the following terms:[20]

> [The court] has power to appoint a referee against the wishes of both parties although it is understandably cautious in doing so. Each opposed application for the appointment of an arbitrator or a referee has to be considered on its own merits in the light of all the prevailing circumstances. In some cases no reference will be appropriate whereas in others it will be appropriate to refer the whole of the proceedings or some issues. On occasions the reference will be to determine the issues and others to inquire and report. The matters which will generally require consideration include: (a) the suitability of the issues for determination by a referee and the availability of a suitable referee; (b) the delay before the court and hear and determine the matter and how quickly a suitable referee can do so. Building and engineering matters, because of the length and complexity, often require either the judge or the referee to devote extensive time after the hearing to considering and resolving the issues; (c) the prejudice the parties will suffer by any delay; (d) whether the reference will occasion additional costs of significance or is likely to save costs; € the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.

In Victoria and Queensland, the position in the 1990s was that the courts were reluctant to appoint a referee if one party objected.[21] This reflected the view that if a party wanted to have the decision of a judicial tribunal and not simply the decision

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[19] ***Super Pty Ltd v SJP Formwork (Aust) Pty Ltd*** [1992] 29 NSWLR 549, 558.
[20] ***Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd*** (1987) 8 NSWLR 123, 129 - 130.
[21] See, eg, ***AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd*** [1982] VR 762, 765.

'a person skilled in the appropriate scientific field', this should occur.[22] The courts in these states agreed with the view expressed by Philp J in ***Silk v Eberhardt***, in refusing an application for a referee that:[23]

> It is very likely in this case that the fact finding process will be a difficult one and it is likely there will be conflicting views and opinions of expert witnesses. In my opinion the fact finding process will be more satisfactorily handled by a judicial officer than by a person who lacks the training, experience and skills of a trial court judge. In a complex case of this sort there will be problems arising as to the admissibility of evidence and a person lacking legal training will find such matters very difficult to decide.

His Honour went on to express the view that a referee should not be appointed because of 'the great costs to the parties involved' if this was to occur and that the 'judge should do the work'.

Given this approach, the courts in Victoria, Queensland and Western Australia required an applicant to show there were special circumstances that would justify the appointment of a referee.

So, has anything changed?

At different times over the last almost 30 years, most, if not all, of the superior courts in Australia have walked back from what was the traditional position and are now appointing referees in increasing numbers, particularly in relation to large-scale construction disputes.

Part of the reason for this change is the recognition that the appointment of a referee or an assessor is, at its heart, a case management decision. Over the last 10-15 years, there has been a change in emphasis in case management decisions from the rights of the individual parties to the proceedings to broader considerations,

[22] ***Honeywell Pty Ltd v Austral Motors Holdings Ltd*** [1980] Qd R 355, 360.
[23] ***Silk v Eberhardt*** (1959) QWN 29.

including the allocation of judicial resources, the rights of other litigants more generally and a more significant focus on the achievement of just but timely and cost-effective resolution of disputes.[24]

This change reflects the increasing emphasis on the equivalent provisions of O 1 r 4A and 4B of the Rules to eliminate delays in the determination of proceedings, for costs to be proportionate, and to maximise the efficient use of judicial and administrative resources.

As the plurality of the High Court stated in ***Aon Risk Services Australia Ltd v Australian National University***:[25]

> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

An explanation for the change in approach to the appointment of a referee was contained in the opening observations of Lee J of the Federal Court of Australia in ***Kadam v MiiResorts Group 1 Pty Ltd [No 4]***:[26]

> An informed participant or observer would likely conclude that the conduct of modern litigation reflects a number of interrelated developments, several of which are relevant for present purposes. The first is the increased complexity and size of litigation. The second, connected to the first, but also partly explained by technological innovation, is the size and scale of the evidentiary material placed before courts in the process of quelling disputes. The third is the commercialisation of the law, discussed by a number of economic analysts of civil procedure who have observed

[24] As reflected by the High Court in ***Aon Risk Services Australia Ltd v Australian National University*** [2009] HCA 27; (2009) 239 CLR 175.
[25] ***Aon Risk Services Australia Ltd v Australian National University*** [13].
[26] ***Kadam v MiiResorts Group 1 Pty Ltd [No 4]*** [2017] FCA 1139; (2017) 252 FCR 298 (citations omitted). See also ***McConnell Dowell Constructors (Aust) Pty Ltd v Cardno (Qld) Pty Ltd*** [2019] QSC 320 [35] (Bradley J).

that the primary modern method of remuneration of lawyers provides an incentive to maximise work and perform tasks that may genuinely be thought desirable or justifiable, but are unnecessary for the determination of the true issues in proceedings. The fourth is that the courts are an arm of government dependent upon public resources at a time of focus on efficient allocation of those resources.

The response to these and related developments has caused what might be described as a revolution in case management. Over the last 20 years, almost every Australian jurisdiction has introduced a provision by either legislation or by way of Rules of Court, setting out the 'overriding' or 'overarching' purpose of procedural rules …

Of course, this stress on active case management is not entirely new nor has it arisen spontaneously. In 1935, the Supreme Court of the United States appointed an Advisory Committee comprised of academics and lawyers (including a former Senator), to prepare a unified system of general rules for federal courts. The procedural rules that resulted, two years later, provided that the rules were to be construed and administered "to secure the just, speedy and inexpensive determination of every action and proceeding. More recently, in 1996, the report by Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, highlighted how considerations of public and private efficiency necessitated major reform, and the regulatory result of the Woolf Report (Civil Procedure Rules 1998 (UK), r 1.1) was the immediate progenitor of the various Australian case management reforms.

The developments in modern litigation which partly spurred this case management revolution have deep roots. Like turning a battleship, it is to be expected that there is some 'time lag' before the changes sought to be wrought by the procedural reforms become fully realised. Many practitioners, however, were 'early adapters' and it is fair to say that behavioural change is generally evident, but no-one with experience of large scale litigation would suggest that there is not further work to be done. One way is to recognise that the efficiency of commercial litigation in this Court would be enhanced by the profession giving increased and early attention to the prospect of suitable questions arising in a proceeding being referred to a referee for inquiry and report.

It is now over seven years since the commencement of the overarching purpose provisions and over a quarter of a century

> since Gleeson CJ, the then Chief Justice of New South Wales, said in ***Super Pty Ltd v SJP Formwork (Aust) Pty Ltd***:
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> > The proposition that all litigants are entitled to have a judge … decide all issues of fact and law that arise in any litigation, is unsustainable.

To these observations, I would add the following. It is generally accepted, at least since the High Court's decision in ***Aon v Australian National University***, that inefficiencies in the use of the court's resources affect not only the parties to the particular proceedings, but also other litigants who are seeking their share of those resources. There is an obvious public interest in the efficient use of court time funded by the community. As Jackson J observed in ***Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 2)***:[27]

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

Western Australia has been a somewhat late arrival to this changing landscape. The first judgment which expresses a contrary view to that of Ipp J in ***Bold Park*** is the decision of Vaughan J in ***DM Drainage & Constructions Pty Ltd as trustee for the DM Unit Trust trading as DM Civil v Karara Mining Ltd [No 6]***.[28] In that case, Vaughan J referred to the disproportionate use of resources of the parties and the court in a trial that went for 50 days. This was, in his view, incompatible with the objects of O 1 r 4B of the Rules. His Honour referred to the expert evidence and

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[27] ***Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 2)*** [2014] QSC 216 [62].
[28] ***DM Drainage & Constructions Pty Ltd as trustee for the DM Unit Trust trading as DM Civil v Karara Mining Ltd [No 6]*** [2021] WASC 410.

the case more generally as 'one of death by a thousand spreadsheets'.[29]

In his ultimate conclusion, Vaughan J stated that:[30]

> In the course of preparing these reasons I have often reflected on the disproportionate use of public resources that has been consumed by the litigation. I accept that various aspects of the litigation demanded judicial determination. But much in dispute could and should have been dealt with by a referee once the underlying legal issues were dealt with. Most if not all of the Schedule D and E claims could have been readily determined by means of a referee report and consideration of whether such a referee's report ought to be adopted. There is ample power in the court's rules for this to occur.
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> Historically there has been a reluctance to require reference to a referee over the objection of one or both parties to an action (many such objections being grounded in the circumstance that one or both of the parties will have to contribute to the referee's remuneration).
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> This litigation is testament to why that historical reluctance should be put aside. It is incompatible with the goal and objects enshrined in O 1 r 4A and r 4B of the Rules of the Supreme Court. In my respectful view, sentiments to the contrary, such as those expressed in ***Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd***, are no longer appropriate having regard to O 1 r 4A and r 4B of the Rules and the disproportionate use of scarce judicial resources that are employed in determining a large scale commercial building or construction dispute.

Despite these comments being made more than two years ago, we are yet to see a referee appointed by the Supreme Court of Western Australia. This should not and cannot be taken to be a rejection or disagreement with the sentiments expressed by Vaughan J but rather a reflection of the settlement of a number of large-scale construction cases which would have been eminently suitable for a referral out.

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[29] ***DM Drainage & Constructions Pty Ltd as trustee for the DM Unit Trust trading as DM Civil v Karara Mining Ltd [No 6]*** [23].

[30] ***DM Drainage & Constructions Pty Ltd as trustee for the DM Unit Trust trading as DM Civil v Karara Mining Ltd [No 6]*** [3783] - [3785] (citations omitted).

What is the difference between a referee and an assessor?

A referee is appointed by the court to conduct an inquiry and produce a report to the Court on the specific questions that are asked of them. They remain subject to the control and direction of the court.

The Federal Court Referee and Assessor Practice Note describes the findings of a referee as being akin to the verdict of a special jury. It stresses that a referee is not a delegate of the court and does not exercise judicial power.[31]

Generally, there are two types of referees:

(a) a subject matter referee who has expertise in an area of specialised knowledge; or

(b) an independent fact-finder, such as a retired judge or senior barrister, who is experienced in resolving factual disputes.

At present, referees are being used in a wide range of matters. In addition to their relatively common use in large-scale construction disputes, they are also being appointed to issues raised in applications filed in the Corporations List. These include:

(a) the question of insolvency of a company;

(b) the reasonableness of the claim for remuneration of a liquidator;

(c) valuation of shares;

(d) quantum assessments; and

(e) determining relevant foreign law.

[31] Federal Court of Australia, *GPN-REF – Referee and Assessor Practice Note*, 3 November 2022.

The role of an assessor is fundamentally different. The assessor does not give evidence or resolve any issues in dispute. Their role is to assist the judge in understanding the evidence. That is, the assessor assists the court to fulfil its role of resolving contested factual issues. An assessor will only be appointed where the judge considers this assistance is necessary or desirable. In most cases, this only occurs where the expert evidence is particularly complex.

What do you need to think about in considering whether a referee or assessor should be appointed?

The first thing to note is that this is not entirely a matter for the parties. The court has the power to appoint a referee or assessor without the consent of the parties, although it is generally recognised that the absence of consent will make the process more challenging.

In appointing a referee, it is necessary to identify both the potential person or persons who are competent and available, and to define the question or questions they will be asked. In defining the question, consider whether it is possible to separate the legal questions in the case (which need to be decided by the judge) from the factual issues. It is important that the question be settled carefully so that all parties (including the court and the referee) knows who is doing what. This requires everyone (including the judge) to have a good understanding of the dispute and what is and is not suitable or amenable to a reference out.

In relation to the appointment of an assessor, the question is essentially one for the trial judge. As was noted by Burt CJ in ***Rowan v Minister for Works*** on the hearing of an appeal against an order dismissing the application for the appointment of an assessor:[32]

[32] ***Rowan v Minister for Works***, unreported decision, FCt of WASC, 14 September 1984.

> In my view, the case is not one in which the court is likely to be aided by the appointment of assessors. But having said that, may I say two things: Whether aid is required or not, I think is essentially a matter for the judgment of the trial Judge who will be seized of it. The other thing I would like to say, that unless some ground be laid in fact for supposing that the trial Judge will require such aid, then assessors ought not to be appointed by some order of the court made by someone other than the trial Judge. I am not to be taken as saying that the power to do so is not there but I would have thought generally, and essentially as a matter of practice, it would be better in cases in which one or other of the parties thinks that the Judge will require the aid if the application were to be made to the trial Judge.

The challenge, in respect of the appointment of an assessor, is how to raise this. The commentary in *Civil Procedure Western Australia* suggests that where a party wishes to persuade a judge to take the course, they should apply by summons supported by affidavit evidence 'laying the ground in fact for supposing that he or she would require the aid of assessors'.[33]

For cases in the commercial and managed cases list, it is a matter which should be considered at an early stage of proceedings and raised as early as possible with the managing judge. Where a strategic conference is held, this is a good opportunity to consider the possibility of a referral or appointment of an assessor. However, in some cases, it will not necessarily be clear until a later stage in the proceedings that the matter is one which is suited to the appointment of a referee or assessor.

As explained before and to the best of my knowledge, the only case in which an assessor has been appointed to assist the court is the matter of ***Barnel Investments Pty Ltd v Conceptual Technologies Pty Ltd***, which I handed down on 22 December 2023.

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[33] Michael Gething, Matthew Curwood and Rachel Joseph, *Civil Procedure Western Australia* (Lawbook) [35.1.2].

Two experts were appointed as assessors to assist the court in understanding and assessing the expert evidence that was adduced at trial: Dr Peter Stepien (an electrical and computer engineer) and Dr Duncan Gilmore (a mechanical engineer).

The process for their appointment was undertaken by the previous case manager, Tottle J, and the nomination of assessors done by the President of Engineers Australia.

Justice Tottle did not give any written reasons for his decision to appoint assessors. I understand that the question as to whether a question or issue should be the subject of a referral out was initially raised by his Honour. After consideration of a number of issues, including the proximity of the matter to trial (at that stage, the trial was listed to commenced in approximately three months), it was ultimately determined that it was more appropriate to appoint assessors.

Justice Tottle's orders set out the role of the assessors, who were to take such part in the proceedings as directed by the trial judge, as including:

(a) advising the trial judge on any matter within the skill and experience of the assessor;
(b) attending the whole or any part of the trial and reading any admissible document or documents; and
(c) providing his or her opinion or advice (whether in a written or oral form) to the trial judge in relation to any issue arising in the proceeding.

Ultimately, both Dr Stepien and Dr Gilmore attended the opening addresses at trial, as well as the concurrent expert evidence, and were provided with the transcript of the proceedings.

In my view, this case was a perfect example of a case where it was both appropriate and necessary for assessors to be appointed. To explain why I hold this view, I will give a brief overview of the proceedings.

The dispute between the parties arose out of the supply of a Micro Hydro Pump Up Power Station. At trial, there was no dispute that the power station did not supply the power required under the relevant contracts. The primary issue was why this was the case. The plaintiffs said this was because of a fundamental concept or design issue with the power station. This was denied by the defendants, who said there was no design issue and contended the problem was one of installation (for which it was not responsible).

The fundamental design issue identified by the plaintiffs in that case was whether the power stations were designed as perpetual energy machines (a machine that can do work infinitely without there being an external source of energy) and, as a consequence, did not and could not generate electricity.

This submission raised the first and second law of thermodynamics which, in simple terms are that:

(a) energy cannot be created or destroyed; it can only be altered in form; and

(b) when energy changes from one form to another, entropy (that is, the amount of energy which is unavailable to do work) increases. Put another way, when energy is converted from one form to another, some energy will be wasted or not able to be used. As a consequence, the efficiency of a system is always less than 100%.

The resolution of this issue raised relatively complex technical and scientific issues, including those of computational fluid dynamics modelling. To a significant extent, the answer to the question depended on which (if any) of the parties' experts should be accepted. The plaintiffs' experts were a chartered engineer and an

aeronautical engineer who was an expert in computational fluid dynamics. The defendant's experts were an electrical engineer and a mechanical engineer who had undertaken computational fluid dynamics modelling.

Without reliving the technical evidence that was adduced at trial, the experts agreed that there were three forms of energy can be extracted from water: potential energy (the energy water obtains as a result of being at height); kinetic energy (the speed or flow rate of water); and water pressure energy (the energy water has from being stored at a certain pressure which is released when the water is released from this pressure). The primary difference between the experts was whether the potential energy in water was a source of energy for the power station.

The evidence of the plaintiffs' experts was that the potential energy could not be extracted because the power station was designed as a closed loop. The defendants' experts did not agree.

In addition to this issue, a number of subsidiary issues were raised by the plaintiff as to the components used in the power station and its installation. This was the subject of detailed evidence from the electrical engineers. Ultimately, it was not necessary for me to resolve all of these issues.

As I specifically noted in my reasons for decision:[34]

> Both Dr Stepien and Dr Gilmore were of significant assistance in preparing for the trial, asking questions of the experts in the concurrent sessions, and providing their opinion or advice in relation to the issues raised in these proceedings.

[34] ***Barnel Investments Pty Ltd v Conceptual Technologies Pty Ltd [No 3]*** [25].

This was because they had the ability to explain the issue clearly, identified the significant factors that were relevant to the issue and, importantly, assisted in preparing for and running the expert conclaves to ensure that the necessary evidence was adduced and that each of the experts were given an opportunity to explain the basis for the opinions expressed in their reports.

Conclusion

The increasing complexity of modern commercial litigation, together with the size and scale of evidence sought to be adduced (particularly in complex construction matters), and the need to deploy judicial resources efficiently, mean that we need to continue to review what we are doing to see whether it remains fit for purpose. It is critical that each of us, with the roles that we play in the justice system, consider whether the old ways of doing things remain relevant, or whether we need to adopt different approaches or processes.

In my view, the time has come for Western Australia to embrace the use of referees to assist in the determination of disputes. We now have a wealth of experienced former judges, registrars and other experts who are well-suited to determining discrete questions or issues. Let us use the opportunity to move to the stage where we can say, to adopt the famous quote from LP Hartley, '[t]he past is a foreign country; they do things differently there'.[35]

[35] L.P. Hartley, *The Go-Between* (Penguin Books, 2010).