SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2018] QSC 53
PARTIES:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST** **ACN 097 049 315** (first plaintiff) **EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST** **ABN 26 010 309 529** (second plaintiff) **H&J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H&J TRUST** **ACN 077 333 736** (third plaintiff) **v** **MONTO COAL 2 PTY LTD** **ACN 098 919 414** (first defendant) **MONTO COAL PTY LTD** **ACN 098 393 072** (second defendant) **MACARTHUR COAL LIMITED** **ACN 096 001 955** (third defendant)
FILE NO:	BS 8609 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	15 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2018
JUDGE:	Crow J
ORDERS:	**1. The application is dismissed.** **2. As to costs:** **a. If the parties are agreed as to the appropriate costs**

order the defendants are directed to file consent order with the Registrar by 4 pm on 20 March 2018.

b. If the parties cannot agree on the appropriate order, the plaintiffs are directed to file and serve written submissions on this issue on or before 4 pm on 23 March 2018, the defendants are directed to file and serve written submissions on this issue on or before 27 March 2018, and the plaintiffs are to file any reply within two business days of receipt of the defendants' submissions.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – PLAINTIFF'S OR APPLICANT'S IMPECUNIOSITY – GENERALLY – where the defendant applied for a security of costs order for the defendants' future costs of and incidental to the proceedings – where there was a previous consent order for security of the defendants' costs – where the plaintiff corporations had paid up capital equal to or less than $100 – where the plaintiff corporations' had a cumulative 49 per cent interest in the joint venture project in dispute – where the value of that interest in the joint venture project was disputed – where the joint venture agreement granted rights of pre-emption to the defendants – where the plaintiffs submitted they could apply for the appointment of a statutory trustee for the sale of joint venture assets under s 38(1) *Property Law Act* 1974 (Qld) – whether the plaintiffs would be unable to pay an order for costs

Property Law Act 1974 (Qld), s 38(1), s 39(1)
Uniform Civil Procedure Rules 1999 (Qld), r 671, r 672

Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd [2010] QSC 176, considered
Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497; [1987] FCA 102, applied
Hall v Busst (1960) 104 CLR 206; [1960] HCA 84, distinguished
Harpur v Ariadne Australia Ltd (No 2) (1984) 2 Qd R 523, cited
Lanai Unit Holdings Pty Ltd v Mallesons Stephens Jacques [2016] QSC 2, considered
Ngatoa v Ford (1990) 19 NSWLR 72, cited
Re Permanent Trustee Nominees (Canberra) Ltd [1989] 1 Qd R 314, applied

Robson v Robson & Anor [2008] QCA 36, considered

COUNSEL:	A Pomerenke QC, with A C Stumer, for the applicants/defendants P L O'Shea QC, with J Chapple, and D Fuller, for the respondents/plaintiffs
SOLICITORS:	Allens Lawyers for the applicants/defendants Holding Redlich for the respondents/plaintiffs

[1] By an application filed 4 December 2017 the defendants apply for an order pursuant to r 670 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*"), that the plaintiffs give security in the sum of $4 million for the defendants' further costs of and incidental to the proceedings.

Background

[2] Almost ten and a half years ago, on 1 October 2007, the plaintiffs commenced proceedings against the defendants in respect of a dispute over the Monto Coal deposit. There are 215 documents filed in the current proceedings and many other documents filed in the Court in associated proceedings. The plaintiffs' claim for damages exceeds $1 billion. The amended consolidated statement of claim filed 3 April 2014 is 60 pages in length, the current defence (being the third further amended defence filed 21 April 2017) is 177 pages in length, the current reply (being the further amended reply of 20 June 2017) is 367 pages in length and the current rejoinder (being the rejoinder filed 9 October 2017) is 59 pages in length. The plaintiffs presently intend to call nine witnesses and, according to the parties' joint report to the Court of 2 February 2018, the defendants intend to call 50 witnesses. More than 30,000 documents have been discovered. The case is being managed with the intent of setting a 16 week trial early next year.

[3] The proceeding concerns the Monto Coal Joint Venture ("MCJV") which was established for the purpose of carrying out the Monto Coal Project.

[4] The MCJV is constituted under a Joint Venture Agreement dated 16 May 2002 (the Joint Venture Agreement). Under the Joint Venture Agreement:

(a) the plaintiffs hold a 49 per cent interest in the MCJV (with 39.2 per cent held by the first plaintiff, 4.9 per cent held by the second plaintiff and 4.9 per cent held by the third plaintiff);

(b) the first defendant (Monto Coal 2) holds the remaining 51 per cent interest in the MCJV.

[5] Monto Coal 2 was until 1 April 2008 a wholly owned subsidiary of the third defendant (Macarthur) and since that date Macarthur has been the majority shareholder of Monto Coal 2.

[6] The second defendant (Monto Coal) is the manager of the Monto Coal Project pursuant to a Management Agreement dated 16 May 2002 (the Management Agreement). Monto Coal is a wholly owned subsidiary of Macarthur.

[7] The Joint Venture Agreement envisages the development of the Monto Coal Project in two stages:

(a) Stage 1 is defined (in cl 1) to mean Mining Operations producing between 1 million and 1.5 million tonnes of saleable coal per annum;

(b) Stage 2 is defined (in cl 1) to mean the Mine Development and Mining Operations beyond Stage 1 with the expectation of production being 10 million tonnes or more of saleable coal per annum.

[8] Clause 4.1(f) of the Joint Venture Agreement requires the Participants to act in good faith towards the other Participants.

[9] Clause 5.1 of the Joint Venture Agreement provides:

> "The Participants must use all reasonable efforts to obtain the grant of the Mining Lease and to, having regard to all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project, develop Stage 1 within three years of the Commencement Date [i.e. by 16 May 2005]. For the avoidance of doubt, Monto Coal 2 agrees not to have any regard to the profitability of any other ventures entered or to be entered into by its holding company, Macarthur Coal, or any of its Related Corporations."

[10] Under cl 6 of the Joint Venture Agreement, the Participants agreed to undertake the Stage 2 Feasibility Study during the Stage 1 Mine Development.

[11] The development of Stage 1 of the Monto Coal Project has not been achieved and the Stage 2 Feasibility Study has not been undertaken.

[12] The Mining Lease (as defined in the Joint Venture Agreement) was granted on 21 April 2005.

[13] The plaintiffs allege (*inter alia*) that:

(a) cl 5.1 of the Joint Venture Agreement contained an unconditional obligation to commence mining operations producing between 1 million and 1.5 million tonnes of saleable coal per annum within three years of the Commencement Date (i.e. by 16 May 2005);[1]

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[1] Reply, paragraph 62(s). See also *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* [2014] QSC 282 at [18], [21].

(b) Monto Coal 2 was obliged to pay for and develop Stage 1 and undertake the Stage 2 Feasibility Study unless and until it was in possession of information from which it could be determined that the Monto Coal Project was not economically viable.[2]

[14] The plaintiffs allege that Monto Coal 2 has breached the Joint Venture Agreement by (*inter alia*):

(a) voting in favour of a resolution (on 4 July 2003) to suspend work on the Monto Coal Project and subsequently using its majority interest to maintain that suspension;[3]

(b) failing to take any reasonable steps to develop Stage 1 of the mine;[4]

(c) ignoring or refusing requests by the plaintiffs to proceed with development of the mine;[5]

(d) failing to undertake the Stage 2 Feasibility Study;[6] and

(e) exercising its right to vote on the Management Committee for the MCJV in bad faith and with regard to extraneous interests.

[15] The plaintiffs allege that Monto Coal 2 has continued to breach the Joint Venture Agreement (including by acting in bad faith) throughout the period from 2003 to 2012.[7]

[16] The plaintiffs allege the breaches of the Joint Venture Agreement by Monto Coal 2 have caused them damage because (*inter alia*) they have:[8]

(a) lost the opportunity to earn a profit from the sale of coal from Stage 1 and Stage 2; and/or

(b) lost the opportunity to sell their respective interests in the MCJV at a value reflecting the stage to which the Monto Coal Project would have advanced had Monto Coal 2 not breached its obligations.

[17] The defendants deny the allegations that Monto Coal 2 has breached the Joint Venture Agreement.

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2 Reply, paragraph 134.

3 Amended Consolidated Statement of Claim (**ACSOC**), paragraph 20(a).

4 ACSOC, paragraph 20(b).

5 ASCOC, paragraph 20(c)

6 ASCOC, paragraph 20(d).

7 ACSOC, paragraph 27.

8 ACSOC, paragraph 23.

[18] The defendants maintain that on a proper construction of the Joint Venture Agreement:[9]

(a) the obligation of the Participants to develop Stage 1 within three years of the Commencement Date was not absolute or unconditional;

(b) cl 5.1 of the Joint Venture Agreement required only that the Participants use reasonable efforts to develop Stage 1 within three years of the Commencement Date (i.e. by 16 May 2005);

(c) in making reasonable efforts, the Participants were required to have regard to all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project;

(d) in assessing all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project, the Participants were required to act in good faith and reasonably.

[19] As to the allegations of breach, the defendants maintain that:

(a) by 4 July 2003 (when it voted in favour of suspension), Monto Coal 2:

(i) had formed the view, reasonably and in good faith, that the Monto Coal Project was not then economically viable in light of the then current and predicted coal prices;[10]

(ii) had formed the intention, reasonably and in good faith, to take no steps to cause the Joint Venture Management Committee to make the decisions necessary to complete development of Stage 1 by 16 May 2005;[11]

(b) between 4 July 2003 and 16 May 2005, Monto Coal 2:

(i) continued to hold the view, reasonably and in good faith, that the Monto Coal Project was not economically viable in the form contemplated by the Joint Venture Agreement;[12]

(ii) continued to hold the intention, reasonably and in good faith, to take no steps to cause the Joint Venture Management Committee to make the decisions necessary to complete development of Stage 1 by 16 May 2005;[13]

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9 Third Further Amended Defence (**3FAD**), paragraph 83.

10 3FAD, paragraphs 129A and 129B.

11 3FAD, paragraphs 129C and 129D.

12 3FAD, paragraphs 130B, and 130C.

13 3FAD, paragraphs 130D and 130E.

(c) between 16 May 2005 and May 2012, Monto Coal 2 reasonably and in good faith:[14]

(i) continued to assess whether it should cause the Joint Venture Management Committee to make decisions necessary to develop a mine;

(ii) formed the view that it should not take those steps;

(d) between 4 July 2003 and May 2012, Monto Coal 2 took steps to cause the Joint Venture Management to continue to prepare for the possible development of the mine, including (inter alia), obtaining the grant of the Mining Lease, continuing exploration activities and regularly assessing the feasibility of the Monto Coal Project.[15]

[20] As to the issue of damages, the defendants plead that, even if Monto Coal 2 was in breach of the Joint Venture Agreement (which is denied), that breach has not been causative of any loss to the plaintiffs because (*inter alia*):[16]

(a) if Stage 1 of the Monto Coal Project had been developed by 16 May 2005, it would not have made any profits;

(b) if the Stage 2 Feasibility Study had been conducted by 16 May 2005 it would not have shown the Monto Coal Project to be profitable, with the consequence that Monto Coal 2 would not have exercised its vote in favour of development of Stage 2;

(c) if the development of Stage 2 had been achieved, it would not have earned any profits because the capital costs and operating costs would have exceeded revenue.

[21] The allegations concerning loss and damage will be the subject of extensive expert evidence from the plaintiffs and the defendants. The topics to be covered by the expert evidence include mine planning, geology, environmental approvals, port and rail capacity, water, coal handling and preparation, foreign exchange, coal markets and financial modelling of cash flows.[17]

[22] In addition to the claims against Monto Coal 2, the plaintiffs seek relief:

(a) against Macarthur Coal for allegedly inducing Monto Coal 2 to breach the Joint Venture Agreement; and

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14 3FAD, paragraph 156E.

15 3FAD, paragraph 134(b), paragraph 161(d) and Schedule 3.

16 3FAD, paragraphs 163(e), (f) and (i).

17 Affidavit of Michael Ilott dated 4 December 2017 at paragraph 47(d)(iv).

(b) against Monto Coal for allegedly breaching the Management Agreement by failing to use reasonable efforts to obtain the Mining Lease (even though the Mining Lease was granted on 21 April 2005).

[23] The defendants deny the allegations relied upon by the plaintiffs in support of that relief.

[24] In summary, the proceeding commenced by the plaintiffs is complex. It involves allegations of breach of contract extending over a lengthy period and allegations of bad faith conduct against multiple executives and employees of Monto Coal 2 and Macarthur over that period.

Reason to believe plaintiffs will be unable to pay an order for costs

[25] The power of the court to order security for costs is enlivened if one or more of the prerequisites listed in r 671 of the *UCPR* is satisfied.

[26] By application filed 27 November 2007 (Document 6) the defendants applied for security for costs. The parties reached agreement on 7 December 2007 and on 11 December 2007 (Document 10) a consent to judgment or Order of Registrar was filed in the Supreme Court requiring the plaintiffs to provide security for the defendants' costs of and incidental to the proceedings in the sum of $250,000. Paragraph 6 of that order provided:

> "The parties shall have liberty to apply for orders that the amount of security be either increased or decreased."

[27] In the period of over nine and a half years from 11 December 2007 until 26 June 2017 and despite numerous interlocutory steps being undertaken, neither party utilised the liberty to apply for orders requiring the amount of security to be either increased or decreased.

[28] By letter of 26 June 2017 the defendants' solicitor wrote to the plaintiffs' solicitor seeking further security for costs on the basis that the costs expended had exceeded the security provided "by an order or magnitude". The defendants made reference to the low value of the plaintiffs' assets recorded in their respective financial statements. By its letter of 26 June 2017 the defendants sought a further $2 million in security "to cover their costs up to and including the first day of trial". That estimate has been usurped by the current application in which the applicant defendants seek $4 million by way of security for costs.

[29] The defendants request that the Court exercise its jurisdiction to make an order that the plaintiffs provide security for costs pursuant to r 671(a) *UCPR*.

[30] Rule 671(a) relevantly provides:

> "**671 Prerequisite for security for costs**

The court may order a plaintiff to give security for costs only if the court is satisfied –

(a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them;"

[31] Rule 672 of the *UCPR* provides:

"**672 Discretionary factors for security for costs**

In deciding whether to make an order, the court may have regard to any of the following matters –

(a) the means of those standing behind the proceeding;

(b) the prospects of success or merits of the proceeding;

(c) the genuineness of the proceeding;

(d) for rule 671(a) – the impecuniosity of a corporation;

(e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;

(f) whether the plaintiff is effectively in the position of a defendant;

(g) whether an order for security for costs would be oppressive;

(h) whether an order for security for costs would stifle the proceeding;

(i) whether the proceeding involves a matter of public importance;

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding."

[32] In *Robson v Robson & Anor*[18], Muir JA and McMeekin J, utilising the text and structure of *UCPR* rr 671 and 672 accepted that an application for a security for costs is ordinarily a two stage process. The first stage requires the applicant to show that a prerequisite for security for costs under *UCPR* r 671 is satisfied. The second stage requires the applicant to satisfy the Court that security ought to be ordered by reference to the relevant *UCPR* r 672 discretionary factors. In *Robson*, Muir JA and McMeekin J

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[18] [2008] QCA 36.

concluded that *UCPR* r 671(h) was an exception to the two stage process because of the breadth of *UCPR* 671(h) which required the Court to have reference to the *UCPR* r 672 discretionary factors in determining whether the prerequisite in *UCPR* r 671(h) is satisfied. *UCPR* r 671(h) is not relied upon by the defendant in the present case.

[33] Senior counsel for each of the parties agree that a second application for security for costs, often referred to as a "top up" application, is to be decided without presumption in favour of or against an order and is to be decided by the proper application of *UCPR* rr 671 and 672: see, for example, *Robson & Ors v Robson*[19] where, in the circumstances then applying, McMurdo J (as he then was) refused a "top up" application for security for costs.

[34] With respect to the threshold or prerequisite issue, namely satisfaction of *UCPR* r 671(a), cost estimates have been provided setting standard costs for the further conduct of the matter prior to the trial between, on the defendant's estimate, $4 million, and on the plaintiff's estimate, $2.5 million.

[35] The historical financial statements of the three plaintiff corporations show that on the basis of the financial statements alone, the three plaintiff corporations could not meet a costs order of the magnitude suggested by the material. So much is frankly conceded by Mr O'Shea QC, who appears for the plaintiffs

[36] Each of the plaintiff companies are small proprietary companies. The first plaintiff has a paid up capital of $2, the second plaintiff has a paid up capital of $100 and the third plaintiff has a paid up capital of $2. Each of the plaintiff corporations is the trustee of a trading trust and, under s 72 of the *Trusts Act* 1973 (Qld), as trustees have a right of indemnity out of trust assets for all expenses reasonably incurred in or about the execution of the trust. Although the plaintiff corporations have the benefit of successive costs orders made in their favour against the defendants in respect of a series of past interlocutory applications, the materials suggest that those costs orders in total will probably not exceed $250,000.

[37] It is common ground therefore that the only asset of value that the three plaintiff corporations may be able to access is the plaintiff corporations' interests in the MCJV project.

[38] The essential issue is whether the plaintiff corporations' interests in the MCJV is sufficient to meet any likely costs order in the event their actions are dismissed.

[39] I have had the benefit of extensive written and oral submissions as to the nature, extent and valuation of the plaintiffs' interests in the MCJV. In this unusual case it is not suggested that an order for even several millions of dollars for security for costs will stifle the litigation as the director of the first plaintiff corporation, Mr Wallin, is a man of substantial wealth.

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[19] [2010] QSC 378.

[40] It is not in dispute that the Monto Coal Project has, in the past, been a project of significant value. It is not in dispute that the value attributed to the Monto Coal Project has varied significantly over the past ten years. The assumptions underlying an estimate of a proper valuation of the project include: the actual and predicted prices obtained for thermal coal on the international coal market, variance in foreign exchange rates, and cost alterations in extraction, production, railing and shipping of the coal products. One could infer that the initial valuation of the coal project was in the vicinity of $40 million from the $20 million paid for a 51 per cent share in 2002.

[41] There have been transactions with respect to the interests in the MCJV between the defendants and its associated companies. In particular the evidence shows that in July 2005 Monto Coal 2 and Macarthur announced an agreement to sell 25.5 per cent interest in the Monto Coal Project for $29.4 million[20], and in 2008 Macarthur sold 19.61 per cent of its shares in Monto Coal 2 (equivalent to a 10 per cent interest in the Monto Coal Project) for $48.5 million.[21] If accepted as fair market transactions, it would suggest that in 2008 the Monto Coal Project was valued in the vicinity of $485 million, i.e. the project had a twelve-fold increase in value in the six years between 2002 and 2008. That 2008 transaction, however, occurred almost a decade ago. Furthermore, senior counsel for the defendants points to the conditional requirement of the 2005 sale to the China Huaneng Group and the context of the 2008 sale, it occurring in relation to a larger transaction in which McArthur Coal purchased all of the shares in Custom Mining Ltd. I accept the submission that the past transactions are not necessarily a reliable guide as to the current value of the MCJV project.

[42] The affidavit material includes a current valuation of the MCJV project by Mr Geoffrey Hall.[22] Mr Hall considers that the current value of the Monto Coal Project is $100 million.[23] The opinion is based on an analysis of 19 transactions involving the sale of undeveloped thermal coal deposits in Australia between August 2009 and August 2016.[24] The period selected post-dates the period of peak coal prices in July 2009.

[43] Utilising the 19 transactions Mr Hall arrived at a minimum value of 20 cents per tonne, for total resource, thereby valuing the MCJV project at a minimum of $81.3 million.[25]

[44] Mr Hall also valued the project based on the measured and indicated coal resource (of 248.3 tonnes) at the median price pertaining since 2011 of 50 cents per tonne, placing the value of the project up to $124.2 million.

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20 See affidavit of Toby Boys dated 19 February 2018 at paragraph 10(b).

21 See affidavit of Toby Boys dated 19 February 2018 at paragraph 10(d).

22 Annexure 1 to Mr Boys's affidavit, pages 334 to 561.

23 See p 117 of Mr Hall's report (page 450 of the exhibit).

24 See paragraph 461.

25 See paragraph 460.

[45] Mr Hall has adopted the average of these two measures in valuing the Monto Coal Project at $100 million. Whether or not Mr Hall's analysis is correct is matter for trial, however it is the only evidence of a current value.

[46] I would further reflect that if Mr Hall had adopted the lowest price paid of five cents per tonne based on total resource (with the exception of the E Galilee project) then the Monto Coal Project would have a value of approximately $20.3 million (adopting 406.3 million tonnes). Even on this most conservative measure the plaintiffs' interests are valued at $9.95 million (49 per cent of $20.3 million).

[47] The defendants point to an alternative 'nominal' valuation of $1 million to $2 million that is contained in Mr Hall's supplementary report of 10 November 2017. However, that valuation is based on the hypothetical as is set out in paragraph 7 of Mr Hall's supplementary report of 10 November 2017:

> "If I had instead assumed that Monto Coal 2 Pty Ltd (being the holder of a 51% interest in the joint venture) was not acting in the manner in which the Plaintiffs believe they should be (*ie*., that they were not working cooperatively and proactively towards the development of the Monto Coal project at each of the relevant dates), my estimates of the undeveloped value of the project would have been different."

[48] In my view this is an improper basis on which to determine the correct value. I would further note that the arbitrary value of $1 million to $2 million for the Monto Coal Project is less than half the value of the ten parcels of land which had been acquired by the MCJV project. Mr Lyons, valuer of Taylor Byrne Valuers, in his report of 19 February 2018, places the value of the real property of the Monto Coal Project at $4,220,000.

[49] For the purposes of the current interlocutory application the best evidence before the Court of the value of the Monto Coal Project is the valuation by Mr Hall in the sum of $100 million. Furthermore, the onus is on the defendants to show that one of the prerequisites is satisfied under *UCPR* r 671.[26] There is no such cogent evidence.

[50] The valuation of the Monto Coal Project at approximately $100 million, for the purposes of this application, does not necessarily fix the plaintiffs' interests at 49 per cent of that value, i.e. some $49 million. The true position depends on the ability of the plaintiffs to realise their 49 per cent interest, which requires reference to the provisions of the Joint Venture Agreement of 16 May 2012.

Monto Coal Joint Venture Agreement of 16 May 2012

[51] The rights to transfer an interest in the joint venture is regulated by cl 12 of the Joint Venture Agreement. In particular, cl 12.2 of the agreement provides the non-

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[26] See *Idoport Pty Ltd v National Australia Bank Ltd* (2001) NSWSC 744 at [60] – [62] per Einstein J.

transferring participants with a right to acquire the interests of the transferring participant "for a specific cash consideration and on terms and conditions to be set out in the offer which are consistent with this clause 12".

[52] In the event that the plaintiffs' claim fails at trial, the plaintiffs will have the right pursuant to cl 12 to sell their interests in the joint venture to third parties, first having made an offer to the defendants as non-transferring participants.

[53] In the event that there is no willing purchaser the plaintiffs submit that the plaintiffs could apply for the appointment of a statutory trustee for sale of joint venture assets under
s 38(1) of the *Property Law Act* 1974 (Qld). Section 38(1) of the *Property Law Act* 1974 (Qld) provides:

> "**38 Statutory trusts for sale or partition of property held in co-ownership**
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> (1) Where any property (other than chattels personal) is held in co-ownership the court may, on the application of any 1 or more of the co-owners, and despite any other Act, appoint trustees of the property and vest the same in such trustees, subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition."

[54] The availability of a remedy under s 38(1) of the *Property Law Act* 1974 (Qld) is a matter of substantial debate. It is accepted that by the parties that a mining lease is properly capable of being the subject of a s 38 order (as a mining lease is not "chattels personal"): see the broad definition of "property" in Schedule 1 of the *Acts Interpretation Act* 1954 (Qld) and *O'Grady v North Queensland Co Ltd*.[27]

[55] Whilst it is not in issue that the Court has the power pursuant to s 38(1) to order a statutory trustee for sale be appointed; the parties differ is as to the proper exercise of the discretion where the jointly owned property is subject to a joint venture agreement.

[56] In *Re Permanent Trustee Nominees (Canberra) Ltd v Coral Sea Resort Motel Pty Ltd,*[28] Connolly J helpfully summarised the development of the law regarding the rights conferred upon co-owners, as follows:

> "It is necessary to say a word about the nature of the rights conferred by s.38 of the *Property Law Act*. His Honour has carefully set out the history of partition actions and I shall not go over the same ground. Whether it be correct to say that the right to partition has become an incident of the property of a co-owner: *Hayward v. Skinner* [1981] 1 N.S.W.L.R. 590, it is a proprietary remedy in which the co-owners alone

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27 [1990] 2 Qd R 243.

28 [1989] 1 Qd R 314 at 320-321.

are interested. There was, as his Honour points out, a time before the Statutes of Partition in the 16th century when there was no such right save in the case of coparceners. There followed a long period when physical division was the only remedy available; and this was followed by a substantial period during which there was jurisdiction also to order sale and division of the proceeds, this being regarded as the primary remedy. See the *Partition Act* 1911 which was repealed by the *Property Law Act*.

Section 38(1) of that Act confers the jurisdiction in facultative terms where any property other than chattels personal is held in co-ownership. The learned judge has said that nonetheless the power has been held to be mandatory in effect. I do not, with all respect, consider that this view is correct. Of course, in the ordinary case of co-owners, without any additional feature, there was virtually no defence to the old partition action. To such an extent was this so that the judgment was largely a formality and even trustees for infants were not obliged to put on a defence. The rights of the parties were adjusted after judgment, which directed the usual accounts and inquiries and the action was commonly set down on further consideration after such accounts and enquiries had been taken and made. The approach of the court under the Act of 1911, under which sale was required to be ordered in lieu of partition if parties interested to the extent of a moiety or upwards requested it, unless the court saw good reason to the contrary, is summarised in 21 *Halsbury* (1st ed.) para.1578. The burden was discharged by showing that great hardship would be inflicted on one of the parties, especially when the court considered that the party requesting a sale was actuated by vindictive motives; or that the property was unsaleable by reason of a right of entry, but could be partitioned; or was temporarily much depreciated in value; or was almost valueless except in connection with another property. However it had been held that good reason to the contrary was not shown by proving the mere dissent of the other persons interested; or that the owner of a moiety occupied the entirety for commercial purposes, or even as a mansion house; or that it was an old family property. It may be seen therefore that in modern times there are few defences to partition proceedings based merely on the circumstances of the parties. To say therefore that the exercise of the jurisdiction is virtually mandatory is an adequate statement for most cases but it is, in my opinion not strictly the law and should be avoided.

For my part I see no reason why the parties to this agreement should not be permitted to forego, by mutual agreement, the right to have it partitioned or sold by an order of the court, at least for a limited period. Clause 6 of the management agreement has the effect of supporting the right of pre-emption conferred by cl.6 of the contract of sale. The scheme of the latter is to require an offer to sell at a realistic price for, upon its refusal, the offeror cannot sell at a lesser price within a period

> of six months without re-offering the property at that lesser price to the other co-owner. When the six months has expired he must start again. The effect of the provisions read together is that the right of pre-emption exists for a year. It can of course be brought to an end by an order under s.38 but only after one year's notice. The rights of co-owners to apply to the court for relief are proprietary in character for they are conditioned only upon the applicant being a co-owner. The legislation since the 16th century has been directed to improving the position of the co-owner by first removing the impossibility of partition, and later removing the inconvenience and sometimes absurdity which could result from physical division. The parties here had a mutual interest in their investment having some reasonable continuity."

[57] Connolly J pointed in *Re Permanent Trustee Nominees (Canberra) Ltd*, out that since the High Court's decision in *Hall v Busst*[29], it has been established as a principle of law in Australia that a complete contractual restraint on alienation of a co-owner's proprietary rights is contrary to public policy and thus such a clause will be struck out by the Court as void.[30] Nonetheless a series of Australian and earlier English decisions seems to me to support the view that some restraints on the disposition of jointly owned property will be upheld. It seems to me that since 1960 astute lawyers drafting commercial contracts would have been careful to avoid a complete contractual constraint on the alienation of co-owner's rights.

[58] *Re Permanent Trustee Nominees (Canberra) Ltd* is a good example of this. That case concerned the conduct of a motel resort busines.. The land upon which the motel resort premises was erected was held by tenants in common subject to both a primary agreement and a further management agreement. Clause 6 of the management agreement provided as follows:

> "As a separate and severable covenant, the Parties hereby agree that neither of them will (except after twelve (12) months prior notice in writing to the other of them) make application to the Court for the appointment of trustees on statutory trusts for sale or partition pursuant to the provisions of Division 2 of Part V of the Property Law Act 1974 as amended."

[59] With respect to this clause, Kelly SPJ said:[31]

> "The next matter for consideration is whether the clause is void as amounting to a restraint on alienation and so contrary to public policy (*Hall v. Busst* (1960) 104 C.L.R. 206). To my mind a covenant which does no more than to require the giving of a period of notice, even as

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29 (1960) 104 CLR 206.

30 At 323.

31 At 316.

long as twelve months, before steps may be taken to obtain an order to have land held on the statutory trust for sale cannot properly be regarded as amounting to a restraint on alienation. The view of the majority (Dixon C.J., Fullagar and Menzies JJ.) in *Hall v. Busst* was that the principle applicable to a condition against alienation of land is applicable also to a contractual restraint on such alienation. Dixon C.J., at 218, said:

> 'The ground for denying the validity of a contractual restriction upon alienation is that it is a principle of the law that private property should be fully alienable. See per Jessel M.R. in *In re Ridley*; *Buckton v. Hay* (1879) 11 Ch.D., at pp. 648, 649 and *Sweet* (1917) 33 L.Q.R. 236. *Cruise*, 2 Dig. p. 6, in effect expresses a view that a contractual restriction upon the alienation of an absolute estate if unqualified should be considered void and this seems to accord with modern views of policy.'

In my view a covenant such as that which is being considered here does not come within the notion of a restraint on alienation as it is generally understood in the cases in that the property is still fully alienable and the covenant goes only to the procedure whereby this may be brought about under s.38 of the *Property Law Act*.

I proceed then on the basis that there was nothing to prevent the parties from entering into a covenant such as that contained in cl.6 of the management agreement. The question then arises whether regard should have been had to that clause in dealing with the application made under s.38. Whilst the matter does not appear to have been the subject of determination by an appellate court, it may, I think, now be accepted that mandatory effect is not necessarily to be given to the word 'may' in s.38(1) and that there is a limited discretion in the court to refuse to make an order under that subsection. Certainly a contrary view is taken in *Hayward v. Skinner*, but a number of decisions which indicate a judicial view that in some circumstances the court does have a discretion are conveniently collected in *Ex parte Eimbart Pty Ltd* [1982] Qd. R. 398, 401-402 and see also *Re Bolous* [1985] 2 Qd. R. 165. The question which remains very much at large is in what circumstances should the discretion be exercised and, for present purposes, whether this may be done where there is a covenant such as that in cl.6.

In *Stephens & Anor. v. Debney* (1960) 60 S.R. (N.S.W.) 468, 470, Myers J. said:

> 'I am not prepared to attempt to define the matters which would serve to defeat an application under the section, but I am of opinion that the existence of a covenant not to make an application would be a sufficient answer to an application.'

In *Re McNamara* (1961) 78 W.N. (N.S.W.) 1068 the same learned judge said:

> 'As I have previously said I do not consider that there is an absolute duty in the Court to make an order merely because the parties are co-owners, and although I adhere to my refusal to attempt to define the nature of the matters which would be a bar to the application, what I had in mind was some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent.'

Like Myers J. I would not attempt to define the matters which would serve to defeat an application under the section. However, in my opinion the existence of some contractual obligation with which an order for the appointment of trustees on the statutory trust for sale would be inconsistent is one such matter which may have that result. Whether in the event it does so is a matter for the court, but it certainly gives rise to a discretion which it is then required to exercise as to whether an order should be made. In the present case cl.6 of the management agreement does impose a contractual obligation to give a period of notice before the application is made, and where, as is clearly the case here, a notice in compliance with that obligation has not been given, the making of an order pursuant to such an application would be inconsistent with that obligation.

On the view which the learned judge took he had no regard to cl.6 of the management agreement before making the order which he did and in my opinion he was required to do so. This raised a threshold question which, had it been determined in favour of the appellant, would have had the result that an order would not have been made at that stage. In my view effect should have been given to cl.6 and I am unable to see any compelling reason why this should not have been done."

[60] Mr O'Shea QC points to the reasons for Kelly SPJ at page 317 and emphasises the "limited discretion in the Court to refuse to make an order under that subsection" but concedes, as Kelly SPJ found, that a court ordinarily ought to have reference to important contractual provisions between the parties as well as fiduciary duties. Viewed in this manner it is clear that cl 12 of the Joint Venture Agreement here is not a complete contractual prohibition from the alienation of an interest in the Joint Venture Project such as that struck down by the High Court in *Hall v Busst,* but rather a provision much closer to that considered by the Full Court in *Re Permanent Trustee Nominees (Canberra) Ltd*.

[61] Needham J, in *Ngatoa v Ford*[32], expressly agreed with the conclusions of the Full Court in *Re Permanent Trustee Nominees (Canberra) Ltd* despite conflicting authority in

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32 (1990) 19 NSWLR 72 at 77.

Needham J's own court. Needham J concluded in that case where an application was made to appoint trustees of sale of parcels of rural land the subject of a partnership agreement:

> "The making of an order for sale in the present case would be inconsistent with the rights of the defendant under cl 4 of the deed. Clause 3 provided the circumstance in which the plaintiff might dispose of his interest in land. It is not a valid distinction to say that the plaintiff here is not seeking to sell his share, but the whole of the land. The effect is the same."

[62] The Full Court's reasons in *Re Permanent Trustee Nominees (Canberra) Ltd* were expressly adopted by the New South Wales Court of Appeal in *Williams v Legge*.[33]

[63] In addition to cl 12 of the Joint Venture Agreement, Mr O'Shea relies upon cl 4.2 of the Joint Venture Agreement which provides as follows:

> "4.2 Each Participant is not entitled to obtain partition of the joint venture assets or any interest in the joint venture whether by way of physical partition, sale or otherwise and each Participant:
>
> (a) agrees that no statute providing for partition or partition and sale is applicable for the purpose of this agreement; and
>
> (b) waives any right to partition the joint venture assets."

[64] Mr O'Shea QC refers to cl 4.2 of the Joint Venture Agreement in support of his submission that the parties, by directly seeking to prohibit applications for partition of the joint venture assets must have accepted, subject to cl 12, that an application pursuant to
s 38(1) was available as a remedy to participants in the event of a failure to sell to a third party or other participants. There is force in that submission.

[65] As can be seen from the valuation reports made available to the Court, the metrics of a project can vary incredibly. Such variance can be caused by many factors. It can easily be understood why participants in a joint venture would not enter into such an agreement if the parties retain an easy right of partition of joint venture assets. Coal mining is an expensive business and the partition of a mining lease may render an entire project commercially unviable, particularly considering the likely substantial fixed costs in constructing a coal handling and preparation plant. Mr O'Shea QC submits, by reference to cl 4.2 and cl 12 construed on a long legislative and case law history, that in the event of a disagreement between joint venture participants, which is otherwise irremediable, each joint venture participant does retain its statutory rights pursuant to s 38(1) (albeit subject to the contractual provisions). I accept this submission. I conclude therefore that in the event that the plaintiffs' proceedings are dismissed and are ordered to pay the defendants' costs, and the defendants do not avail themselves of clause 12, it

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[33] (1993) 29 NSWLR 687, in particular see page 692.

is likely that the plaintiff companies will have recourse to their interests in the joint venture, and seek to sell to third parties.

[66] In paragraph 4 of the second affidavit of Michael Gerard Ilott sworn 23 February 2018, Mr Ilott deposes to the plaintiffs disclosing a Deed of Variation of a Put and Call Option Deed in respect of the second defendant's interests in the Monto Coal Project. The Call and Put Option Deed of 29 April 2011 and the Deed of Variation dated 5 June 2017 are annexed to Mr Ilott's second affidavit.

[67] The original Call and Put Option Deed of 29 April 2011 is a complicated document. In summary it evidences an agreement between the second plaintiff, Atwood Holdings Pty Ltd and MYK International Pty Ltd granting an option to MYK International Pty Ltd to purchase the second plaintiffs' interests in the Monto Coal Project. The price for entry into the call and put option deed is the call option fee, it is $4,900,000. The call and put option deed in its original 29 April 2011 form attached the pro forma sale and purchase agreement. The pro forma sale agreement reflects the agreement which must be entered into should the call option be exercised. That pro forma sale and purchase agreement importantly in cl 4.1 sets the purchase price for the second plaintiff's 4.9 per cent interest in the Monto Coal Project at $10 million. By the Deed of Variation of 5 June 2017, cl 4.1 of the pro form sale and purchase agreement is amended to redefine the purchase price for the second defendant's 4.9% project interest from $10 million down to $4.9 million.

[68] The defendants point to the Deed of Variation of 5 June 2017 as not only evidence of the significant deteriorations in the value of a plaintiff's interest in the project which has recently occurred, but also the plaintiffs' ability to take steps potentially to divest themselves of their joint venture interest. These Deeds, it is said, cast doubt upon the real value of the defendants' interests in the MCJV. On the other hand the plaintiffs are able to suggest that a 4.9 per cent interest in the Monto Coal Project is recently valued at $4.9 million which is consistent with Mr Hall's valuation.

[69] In order to meet the argument that the first and third plaintiffs may take steps to significantly decrease the value of their interests, the defendants through the third affidavit of Toby Michael Boys sworn 27 February 2018, provide evidence that the first and third plaintiffs:

> "Have not entered into any such transfer agreement or any option agreement; and
>
> Have no present intention of entering into any such agreements and the first plaintiff company"

[70] The first and third plaintiff company both have undertaken to the Court to give the defendants 30 days' written notice prior to entering into any transfer or option agreement.

[71] These undertakings meet the substantial concern raised by the defendants.

[72] Furthermore, it has to be acknowledged that cl 8 of the call and put option deed of 29 April 2011 recognises the rights of the transferee to the call option, MYK, may only take an interest in the Monto Coal Project which is only on the basis that the second plaintiff complies in all respects with cl 12 of the Joint Venture Agreement which imposes the pre-emptive rights in favour of the defendants with respect to the transfer of the second plaintiff's project interest.

[73] I conclude from the foregoing that the defendants have not satisfied the Court in terms of *UCPR* r 671(a) that the plaintiff corporations will not be able to pay the defendants' costs if ordered to pay them. Whilst that finding is sufficient to dispose of the application, in deference to the careful submissions put both on behalf of the applicant and the respondents, I shall set out my conclusions in respect of the other two issues which were the subject of dispute between the parties.

UCPR Rule 672 Discretionary Factors

[74] As I have set out earlier, the means of those standing behind the proceedings in respect of the first plaintiff are substantial, however, as I have found above, the currently available evidence suggests that the first plaintiff's interests in the Monto Coal Project are also of substantial value.

[75] I was invited by senior counsel for the defendants to form a conclusion, albeit a preliminary conclusion, that there were low prospects of success in the proceeding. I declined such an invitation. As ought to be apparent, the dispute between the plaintiffs and the defendants is complicated. It is anticipated that almost 60 witnesses will be called in a trial period spanning 16 weeks and in respect of which questions of credit may loom large. It is not possible on the basis of the information provided to form any view of the likely prospects of success or merits of the proceeding.

[76] There is nothing in the material to suggest that the plaintiffs' claim is not genuine. The plaintiff companies have been litigating for more than 10 years and although a precise amount has not been specified, the plaintiffs have spent a considerable sum pursuing their causes of action. In paragraph 52 of Mr Ilott's affidavit, Mr Ilott deposes to the defendants incurring legal costs exceeding $12 million. It is apparent from the financial statements disclosed and from associated documents such as the put and call option, that the plaintiff corporations have been put into substantial funds as and when required, in order to fund this complex and long-standing litigation. As reflected earlier, an order for security for costs, even in the sum of $4 million would neither be oppressive nor stifle litigation, having regard to the substantial means of those who control the plaintiff companies, in particular, the first plaintiff company.

[77] *UCPR* r 672(k) refers to the issue of delay. That there is delay in the action is manifest. Ordinarily that would be a powerful factor against exercising the discretion in favour of acquiring substantial security for costs. The defendants seek to meet this concern by reference to the principles set out by Jackson J in *Lanai Unit Holdings Pty Ltd v*

Jacques.[34] That is, the defendant corporations have sought proportional security for costs relating only to the potential further costs which will be incurred in the defence of the plaintiffs' claims. Whilst the seeking of a proportional order for costs goes a long way to meeting the issue of delay, it does not overcome the prejudice to the plaintiff corporations completely.

[78] As set out above, paragraph 6 of the consent order of 11 December 2007 provided for either party to have liberty to apply to either increase or decrease the amount of security. It would seem from the limited amount of the security ($250,000), that neither party considered that the litigation could become as long-standing and complex as it has. Jackson J in *Lanai Unit Holdings Pty Ltd v Jacques*[35] has gathered the relevant cases providing guidance upon the discretionary factor of delay. I conclude on the material that delay in the conduct of the litigation, and more importantly, the delay in the application for further security for costs has caused some prejudice to the plaintiff corporations in that they have no doubt incurred great expense in continuing the conduct of this litigation. Therefore on the balance, the delay in the litigation favours a discretionary refusal of an order for security for costs.

[79] The defendants' principal argument in respect of the discretionary features is based upon the reasons of Connolly J in *Harpur v Ariadne Australia Ltd (No 2),*[36] namely the self-evident principle that in cases where it is shown that a plaintiff corporation has an inability to meet an order for costs, that will always be a consideration of great weight in exercising the discretion to award security for costs. As set out above, and because of the plaintiff corporation's interests in the MCJV, I do not accept, on the current evidence, that it has been shown that the plaintiff corporations lack means to meet any potential costs order.

[80] I would conclude on the basis that the plaintiff corporations have an interest of value in the joint venture, that the discretionary factors weigh more in the plaintiff corporations' favour and against the order for security for costs. A factor, as Connolly J would put it, "of great weight" in exercising the discretion to order security for costs is the means or lack of means of a plaintiff. If I had acceded to Mr Pomeranke QC's submission that the plaintiff corporations' interests in the joint venture were of little or no value, then that factor of great weight would have tipped the balance in the defendant corporations' favour.

Quantum of security

[81] Rule 670 *UCPR* states that the court may order that the plaintiff give "the security the court considers appropriate for the defendant's costs of and incidental to the proceeding".

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34 [2016] QSC 2, and in particular see paragraphs [24]-[29].

35 [2016] QSC 2 at [24].

36 [1984] 2 Qd R 523 at 529.

[82] The approach to fixing the quantum to be provided by way of security "is not a finely tuned mathematical exercise": *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd*.[37]

[83] The guiding principles in relation to the quantum of security were set out in the reasons of French J (as he then was) in *Bryan E Fencott &Assocs Pty Ltd v Eretta Pty Ltd:*[38]

> "Beyond the limits imposed by the meaning of the word, there is nothing to limit the amount of security which can be ordered: *Imperial Bank of China, India, and Japan v Bank of Hindustan, China, and Japan* (1866) 1 Ch App 437 at 438 per Knight Bruce LJ.
>
> It is clear that the security may extend not only to future costs but also to costs already incurred: *Brocklebank & Co v King's Lynn Steam Ship Co* (1878) 3 CPD 365; *Procon (Great Britain) Ltd v Provincial Building Co Ltd* [1984] 1 WLR 557; *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (above).
>
> In fixing the amount of the security the court must look first at the whole case and take into account, inter alia, the chance of it collapsing without coming to trial. It is not bound to give the amount of security which a defendant says will be the amount of his costs: *Dominion Brewery Ltd v Foster* (1897) 77 LT 507.
>
> The court may in such a case, order somewhat less than if there seems to be every prospect that the action will be fought to a finish: *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction (supra)* at 720.
>
> The court does not set out to give a complete and certain indemnity to a defendant: *Menhaden v Citibank NA* (1984) 1 FCR 542 at 547 per Toohey J.
>
> The process of estimation embodies to a considerable extent, necessary reliance on the 'feel' of the case after considering relevant factors: *Pearson v Naydler (supra)* at 907."

[84] That passage has been frequently quoted or cited with approval in Queensland courts: see e.g. Kilmac Investments Pty Ltd v NHLS & Co Ltd;[39] Cherbourg Food Processing Company Pty Ltd (in liq) v Enterprises (Qld) Pty Ltd;[40] Logan APZ Pty Ltd v Council of the City of Logan.[41]

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37 [2010] QSC 176 at [41] per Daubney J.

38 (1987) 16 FCR 497 at 515.

39 [2008] QSC 240 at [17] per Martin J.

40 [2012] QSC 162 at [53] per Ann Lyons J.

41 [2017] QCA 288 at [45] per Gotterson JA, with whom McMurdo JA and Mullins agreed.

[85] In the present case two experienced legal practitioners have vastly different estimates of the probable future costs of the defendants. Mr Ilott, an experienced litigation solicitor acting for the defendants estimates the probable future costs (to commencement of the trial) originally in the sum of approximately $4 million, and more recently (see paragraph 25 of Mr Ilott's second affidavit) the costs from 4 September 2017 up to and including the first day of trial in the sum of $5,000,030.

[86] The defendants rely upon an estimate of costs prepared by barrister, Mr Graham Robinson, who estimates the costs up to and including the first day of trial in the amount of $2,531,709.

[87] In support of its submission that the Court should accept Mr Robinson's cost estimates, the plaintiffs point principally to Mr Robinson's undisputed independence and his long-standing expertise in the estimation of costs. The defendant corporations, however, urge the Court to adopt Mr Ilott's costings, neither attacking Mr Robinson's independence or expertise but rather pointing out the unusually complex nature of the case and urging the Court to accept the proposition that Mr Ilott, having conduct of the defendants' case, will be likely to have more accurate knowledge of the likely level of costs.

[88] A substantial matter of dispute in respect of the costings is the estimation of the future costs of the experts to be called in the defendants' case. Mr Ilott has estimated the costs at approximately $2.4 million and Mr Robinson has estimated the costs at approximately $1.3 million.

[89] The plaintiff corporations, being faced with the disparate quantifications of the cost of expert reports, have sought disclosure from the defendants as to the estimates of costs of each of the likely experts to be called by the defendants. The defendants have not, and are not obliged to provide that disclosure.

[90] The basis therefore for Mr Ilott's guesstimation of the cost of expert evidence of $2.4 million is not something which is capable of being assessed by reference to the likely amount of work being undertaken. The cost is based on the experts own estimation, a self-assessment. I note that by far the largest amount of expert fees being sought by the defendants' experts relates to the feasibility of mine planning, mine evaluation, geology, mine equipment and on-tenement infrastructure, including the coal handling and processing. The fact that several experts may require some 3,647.3 hours work at an average of $440 per hour, charging a total of $1,604,870 is conceivable but there is no ability to measure whether that estimate is reasonable. Mr Robinson's estimate of such expert costs is 2,400 hours at $330 per hour. Similar considerations, but in respect of lesser amounts, apply to each of the other of the several types of experts proposed in the defendants' case.

[91] As reflected by Daubney J in *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd*,[42] the assessment can only occur with the broadest of brushes. It seems to me that

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42 [2010] QSC 176.

absent an ability to test the fine detail of the Defendants' estimation the justice of the case requires a mid-view of the two disparate assessments, that is by accepting the costs at $3.25 million. It is accepted that this is the simplistic average of the two estimates, however, there is no other basis of choosing between the experts accepting, as I do, the equal competing considerations of Mr Robinson's unquestioned independence and expertise and Mr Ilott's far better knowledge of the conduct of the case.

Conclusion

[92] For the reasons which I have set out above I refuse the defendants' application.

[93] I direct that the parties confer with respect to agreement on the issue of costs and should a costs order be agreed, the parties are directed to provide the consent order in respect of costs to my Associate within three days.

[94] If the parties cannot agree as to the appropriate costs order within three days, the plaintiff is directed to file written submissions on the issue of costs within seven days. The defendant is to file and serve written submissions on costs within 10 days and the plaintiff is to file any necessary reply on the law within two days of receipt of the defendants' submissions.