SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd* & Ors [2018] QSC 308
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/S:	SC No 8609 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	19 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 and 14 December 2018
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **1. The plaintiffs should be given leave to amend their statement of claim and reply in the form identified in the annexures to the second affidavit of Mr Boys sworn 30 November 2018.** **2. The plaintiffs must pay the defendants' costs thrown away by the amendments, to be assessed on the indemnity basis.** **3. Consequential alterations to the timetable should**

be made along the lines of those contained in the proposal provided during argument by senior counsel for the defendants.

4. I will hear the parties on the question of the appointment of a facilitator for the purposes of chairing the joint expert conferences, facilitating their conduct and assisting the attending experts to produce the joint expert reports which are the object of the joint expert conferences.

5. I will hear the parties on the question of costs of the applications before me.

6. I direct the parties to bring in minutes of orders consistent with these reasons.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CASE MANAGEMENT – GENERALLY – where the proceeding concerns complaints made by a junior joint venture partner about the conduct of a senior joint venture partner in relation to decisions made in the course of performing a joint venture for exploitation of a coal deposit – where a counterfactual proposition critical to the plaintiffs' case is that a Stage 2 feasibility study would have demonstrated that the development of Stage 2 of the joint venture would have been profitable – where the plaintiffs and defendants had both filed various expert reports – where the plaintiffs were ordered to file and serve their expert reports in reply by a particular date – where the plaintiffs have now delivered their expert reports in reply, albeit a few weeks late – where the defendants complain that the plaintiffs' expert reports in reply present a different substantive case – where, three months prior to trial, the plaintiffs seek leave to rely on at trial the expert reports which were delivered out of time and seek leave to amend their pleadings to permit their reliance on their amended case advanced in the expert reports in reply – where permitting the plaintiffs to do so would result in alterations to the present timetable for trial – whether the plaintiffs should have leave to amend their pleadings in order to permit their reliance on the changed case advanced in the purported expert evidence in reply – whether the plaintiffs should be permitted to deliver, under the guise of expert reports in reply, expert reports from individual experts from whom they had not previously delivered reports

Aon Risk Services Ltd v Australian National University (2009) 239 CLR 175, cited

Birla Mt Gordon Pty Ltd v Miccon Hire Pty Ltd [2013] QCA 363, cited

Monto Coal 2 Pty Ltd v Sanrus Pty Ltd [2014] QCA 267, related

COUNSEL:	P L O'Shea, with M G Lyons and W E Wilde, for the plaintiffs A M Pomerenke, with H Stowe, for the defendants
SOLICITORS:	Holding Redlich for the plaintiffs Allens for the defendants

Introduction

[1] It is sufficient for present purposes to say that this proceeding concerns complaints made by a junior joint venture partner about the conduct of the senior joint venture partner in relation to decisions made in the course of performing a joint venture for exploitation of a coal deposit at Monto.

[2] The plaintiffs occupy the position of the junior joint venture partner and the first defendant, that of the senior joint venture partner. The second defendant was the manager of the joint venture under a management agreement. The third defendant has either owned all or the majority of the shares in the first and second defendants.

[3] For present purposes, it may be accepted that there is a commonality of interest between all the plaintiffs and that there is also a commonality of interest between all the defendants.

[4] There is a commonality of interest between all the plaintiffs. There is also a commonality of interest between all the defendants, at least sufficient to make that observation for present purposes.

[5] Amongst other things, there was a written joint venture agreement which referred to two stages in the possible exploitation of the subject coal resource:

(a) Stage 1, namely "mining operations producing between 1,000,000 and 1,500,000 tonnes of saleable coal per annum"; and

(b) Stage 2, namely "the mine development and mining operations beyond Stage 1 with the expectation of production being 10,000,000 tonnes or more of saleable coal per annum".

[6] In brief summary, the plaintiffs contend that the defendants breached the joint venture agreement by failing to develop Stage 1 of the project by 16 May 2005 and by failing to undertake a Stage 2 feasibility study in that time. The plaintiffs allege the defendants' decision-makers made relevant decisions in bad faith.

[7] The plaintiffs claim that by reason of the impugned conduct of the defendants they have:

(a) lost the opportunity to earn a profit from the sale of coal from Stage 2 of the project and to royalties therefrom;

(b) further or alternatively, lost the opportunity to sell their interests in the joint venture; and

(c) thereby suffered loss of about $1.2 billion.

[8] In respect of their loss of opportunity case, the plaintiffs allege, amongst other things, that had it not been for the alleged breaches of the joint venture agreement, the Stage 2 feasibility study would have been prepared by May 2005 and would have demonstrated that the development of Stage 2 would have been profitable and, accordingly, that development would have proceeded. The defendants deny this and plead that if a Stage 2 feasibility study had been undertaken and completed by May 2005, it would not have shown the project to be profitable.

[9] The proposition that the Stage 2 feasibility study would have had an outcome which would have led to the continuation of Stage 2 is an essential element in the causation hypothesis underlying the plaintiffs' case. If the Stage 2 feasibility study would not have shown the project to be profitable, then it could not be shown that the participants in the joint venture agreement would have voted to proceed with Stage 2, and the plaintiffs would not be able to establish the loss of opportunity to earn a profit from the sale of coal from Stage 2.

[10] Accordingly, that a Stage 2 feasibility study would have demonstrated that the development of Stage 2 would have been profitable is a counterfactual proposition critical to the plaintiffs' case. For present purposes I will refer to it as **the critical counterfactual proposition.** (I interpolate that I do not mean to suggest that it is the only critical counterfactual proposition forming part of the plaintiffs' case).

[11] This proceeding commenced in 2007 and has had a long and unsatisfactory interlocutory history, some of which is canvased in the Court of Appeal decision of *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd* [2014] QCA 267.

[12] This proceeding commenced in 2007 and has had a long and unsatisfactory interlocutory history. Some of which is canvased in the Court of Appeal decision of *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd* [2014] QCA 267.

[13] Ultimately, the proceeding was set down for trial by orders made on 9 May 2018. On that date and amongst other things:

(a) the plaintiffs were ordered to file and serve expert reports in reply by 14 September 2018;

(b) a timetable was set for joint expert conferences to occur so the joint expert reports identifying the areas of agreement and disagreement could be produced by mid-November 2018;

(c) a mediation was to take place by 30 November 2018; and

(d) this proceeding was set down for a 16 week trial commencing on 11 March 2019.

[14] The plaintiffs could not meet the timetable and sought an extension of time in respect of the delivery of their export reports in reply.

[15] At a hearing on 30 July 2018, the defendants complained that no adequate case was advanced for the extension of time which the plaintiffs had sought. The defendants complained that the plaintiffs should not be permitted an extension of time which imperiled the trial dates and would cause prejudice to the defendants. Further, the defendants complained that some matters in the material which was before the Court suggested that the plaintiffs might be seeking to develop a new substantive case through expert evidence purporting to be delivered in reply, and the defendants submitted that that prospect should not be countenanced.

[16] The plaintiffs obtained an extension, albeit not as extensive as that which they had sought. Unsurprisingly, the Court adopted a wait-and-see attitude in relation to the defendants' complainant about the possibility of the plaintiffs presenting a different substantive case. By orders made on 30 July 2018, and amongst other things:

(a) the plaintiffs were ordered to file and serve expert reports in reply by 2 November 2018;

(b) a timetable was set for joint expert conferences to occur so that the joint expert reports identifying the areas of agreement and disagreement could be produced by 21 December 2018; and

(c) a mediation was to take place by 31 January 2019,

but the trial date of 11 March 2019 remained the same.

[17] A difficult case management issue now arises. The plaintiffs have now delivered all their expert reports in reply, albeit a few weeks late. That delay alone is problematic but greater difficulty arises because the defendants' expressed concerns about the plaintiffs' intentions have proven to be prescient and the plaintiffs now seek to amend their case to reflect the adoption of the outcome of the expert analyses which they delivered in reply.

[18] The issue comes before me by way of the following applications:

(a) the plaintiffs' application for –

(i) leave to rely on at trial the reports which were delivered outside the timeframe set by the earlier order;

(ii) leave to amend their statement of claim and their reply in a manner which would permit them to rely on the new case;

(iii) consequential alterations to the pre-trial timetable; and

(b) the defendants' cross-application for an order that the plaintiffs not be permitted to rely on at trial certain expert reports which, although delivered within time are, the defendants contend, objectionable for various reasons, including that they are bound up in the new case which should not be permitted, or that they cannot be regarded as having been authorised by the order to deliver expert reports in reply.

[19] I also have before me the plaintiffs' application for a minor extension of time for compliance with orders made by me on 16 November 2018. I do not understand that application to be resisted. Those orders should be made.

[20] I also have before me the defendants' application for orders granting leave to file and serve an amended rejoinder in a particular form. Putting to one side the question of costs, the substance of the orders sought is not resisted and should be made.

[21] The form of the plaintiffs' application, so far as it concerns expert reports and permitted amendment, was that they only sought leave to amend if they were otherwise permitted to deliver the expert reports. I think it is wrong to consider the issues in that order. The real issue is whether the plaintiffs should be permitted to amend their case. If the plaintiffs are not permitted to amend, then that will have consequences for the evidence they should be permitted to rely on a trial.

[22] These reasons will deal with the two principal issues in contention, namely:

(a) whether the plaintiffs should have leave to amend in order to permit their reliance on the changed case advanced in the purported expert evidence in reply; and

(b) whether the plaintiffs should be permitted to deliver, under the guise of experts reports in reply, expert reports from individual experts from whom they had not previously delivered reports.

The plaintiffs' case is pleaded by explicit reference to expert opinion

[23] In order to resolve the principal issue before me, one must first address the nature of the problem, if any, created by the plaintiffs' proposed course of conduct.

[24] In order to do that, one must first appreciate the enormous complexity which underlies the critical counterfactual proposition, namely that a 2005 Stage 2 feasibility study would have demonstrated that development of Stage 2 would have been profitable.

[25] A moment's reflection about the considerations which would necessarily inform an assessment of the feasibility of a coal mining development would suggest that there must

be a number of factual, legal and technical propositions which would inevitably inform the formulation of the assessment of feasibility. They would necessarily include:

(a) propositions about the nature of the coal resource, including the geology of the area in which the coal seam was to be found and the nature, location and technical attributes of the coal seam itself;

(b) propositions about the method by which the resource could be exploited, including the mining tenements which could be obtained, and the legal and other requirements involved in so doing; the mine planning; the development of a coal handling and preparation plant at the mine; development of other project infrastructure at the mine; and development of other infrastructure necessary to transport coal from mine to market;

(c) propositions about matters which would inform the financial evaluation of the costs of getting the coal from its *in situ* positon through the mine onto market; and

(d) propositions about matters which would inform the financial evaluations of the income which could be obtained from the coal, including concerning the markets available, the price of coal and relevant currency exchange rates.

[26] A generic explanation of the way in which a thermal coal mine is developed is set out in an affidavit by Ms Morrison for the defendant. That evidence confirms what I have said.

[27] One does not have to have had much experience of the world of technical expertise to realize that if the critical counterfactual proposition is supportable, there might be more than one way in which expert support for (and proof of) the requisite propositions might be performed so as to give rise to a conclusion which supports the critical counterfactual proposition.

[28] A prudent defendant would want to have a plaintiff's case in relation to such matters clearly articulated. Such a defendant would seek to pin down whether the plaintiff's case involved one or multiple alternative ways of reaching the result that the critical counterfactual proposition was supported. Such a defendant would seek to identify clearly the propositions to which I have made reference.

[29] The rules of pleading accommodate such concerns. Although there are others, critical rules include:

(a) A plaintiff must plead the material facts which establish the causal link between the impugned conduct and the loss which is said to flow from it.

(b) A plaintiff must plead the material facts, but not the evidence by which they will be proved.

(c) The material facts must be pleaded and sufficiently particularised so that the defendant both knows the case it has to meet and has the plaintiff confined to that case, such that no change is permitted without first obtaining the leave of the court.

[30] Compliance with these rules would require the plaintiffs to plead and to particularise the critical counterfactual proposition.

[31] Where, as this case does, establishing the critical counterfactual proposition turns on expert opinion, the pleader's task is a difficult one. Pleading at too high a level of generality will be an embarrassing pleading as the defendants will legitimately complain that they cannot sufficiently understand the case they have to meet, and they are unfairly being asked to respond to what can properly be described as a movable feast. On the other hand, pleading with too high a level of specificity will likely descend into pleading evidence not material

facts, and have the potential downside of greatly confining the case to a particular mode of proving the material facts.

[32] Prior to the plaintiffs' present application to amend, it appeared that the choice made by the plaintiffs was to plead and to particularise its case as to the critical counterfactual proposition explicitly by reference to particular expert reports. It has done so in its statement of claim and in its reply in the manner and to the extent demonstrated by the table to Mr Morrison's affidavit, which is CFI340, at [20]. (In some respects, the text of that table does not accurately record the precise wording of the pleading paragraphs to which it refers. But where that is so, I have had regard to the wording of the underlying pleading).

[33] The form of the reply confirmed that which the defendants had already (and in my view, reasonably) concluded, namely that the plaintiffs' case as to the critical counterfactual proposition and as to damages was confined to that set out in the expert opinions which the plaintiffs had obtained from Mr Hill, Mr Hall and Mr Freeman in 2017 and delivered to the defendants. As will appear, that judgment had informed the defendants' preparation for trial, particularly in relation to the way in which they had sought and obtained expert opinion evidence.

[34] The expert opinions which the plaintiffs had obtained from Mr Hill, Mr Hall and Mr Freeman had been delivered by the plaintiffs in response to court orders made on 1 March 2017 that the plaintiffs "file and serve any expert reports which they intended to rely upon at trial". The opinions comprised:

(a) from Mr Hill, the August 2017 report and the April 2014 report which he had updated. (Mr Hill's reports are also referred to, respectively, as the Xenith 2014 and Xenith 2017 reports);

(b) from Mr Hall, the October 2017 report (and a brief supplementary report dated 10 November 2017);

(c) from Mr Freeman, a report dated November 2017.

[35] The expert reports delivered by the plaintiffs in 2017 supported the critical counterfactual proposition. Amongst other things, the financial modelling there presented produced a cash flow which had regard to capital costs, operating costs, coal sale price and exchange rates and from which a project net present value of $51 million at 10 per cent discount was calculated.

[36] Of particular significance are reply paragraphs [163](d) and [163](f), which are in the following terms (emphasis added):

> 163. The Plaintiffs deny the allegations in **paragraph 163** of the Amended Defence on the following basis:
>
> …
>
> (d) as to paragraph 163(g), the Plaintiffs deny the allegations on the basis that, had a Stage 2 feasibility study been undertaken, it would have shown the Monto Coal Project to be profitable, **and the Plaintiffs provide further and better particulars by reference to Part A of the report of Mr Hill dated August 2017**.
>
> …
>
> (f) as to paragraph 163(i), the Plaintiffs deny the allegations because:
>
> (i) the revenue from the Monto Coal Project would have exceeded the costs **(and further particulars of which are set out in the expert reports of Mr Hall dated 20 October 2017)**; and
>
> (ii) the Plaintiffs would not have suffered losses due to the need to pay Cash Calls to fund the development of Stage 2;

…

[37] I make the following observations.

[38] **First**, so far as the critical counterfactual proposition is concerned, that pleading very considerably pinned down the plaintiffs' case. Some idea of the extent that that was so may be gleaned by examining the relevant part of the table of contents to that report:

[39] **Second**, the cross-reference to the Hall report of 20 October 2017 achieved the same effect in relation to the plaintiffs' damages case. The 119 page body of that report and its considerable spreadsheet annexures set out a wealth of significant detail as to the financial modelling which underpinned the plaintiffs' case. In reaching his conclusions, Mr Hall was asked to assume that the development of Stage 2 was undertaken in accordance with the mine development set out in part B to Mr Hill's August 2017 report, also known as the Xenith 2017 report. Again, some idea of the extent of that assumption (and therefore the degree of particularity and confinement created by the plaintiffs' pleading) may be gleaned by the relevant part of the table of contents to that report:

[40] **Third**, it is evident that, contrary to the rules of pleading, the plaintiffs' case as to the critical counterfactual proposition and as to the damages case was that which was advanced in the reply. The plaintiffs had not, as they should have done, advanced that case in their statement of claim. In some respects, the form of the statement of claim was obviously outdated. At the time the reply finally committed the plaintiffs to the case concerning the critical counterfactual proposition as set out in part A of the Xenith 2017 report, the statement of claim was still in the form in which it was filed in April 2014. Relevant particulars of the critical counterfactual proposition were those which had been delivered in February 2014. The Xenith 2017 report represented a departure from some aspects of the details then particularised.

[41] However, the defendants do not complain about that departure, because they had been prepared to deal with the case presented by the plaintiffs' expert reports in 2017 and had, in fact, done so. As Ms Morrison explains at [21] of her affidavit:

> Having received the bulk of the plaintiffs' expert reports by the end of October 2017, the defendants' experts prepared expert reports responding to the plaintiffs' expert evidence. Those reports were filed between the dates of 20 April 2018 and 31 May 2018 (but for one report filed 1 June 2018 for which the defendants obtained leave).

[42] Ms Morrison's affidavit explained that the experts which the defendants engaged were instructed to approach their report in four parts as follows:

(a) Part 1 – the experts were to identify those aspects of Xenith 2014 and Xenith 2017 reports which they disagreed with.

(b) Part 2 – the experts were asked to assume Xenith's 2014 and Xenith's 2017 geological model, mine plan, proposed operation and timing but otherwise substitute any amounts of cost or revenue which they believed to be more appropriate for that development and operation.

(c) Part 3 – the experts were asked to develop a Stage 2 feasibility study which they would have prepared as at May 2005 assuming only that the mine was to produce 10mtpa of product coal as was specified in the Joint Venture Agreement; and

(d) Part 4 – related to quantum of loss and damage and required the experts to develop inputs for the 8 different cashflow models being the alternative 'likely actual' scenarios referred to in table in paragraph 13 above. They were based upon the Xenith's proposed mine development and operation.

[43] The table set out in Ms Morrison's affidavit at [22] describes how the 13 experts called by the defendants respond to the matters dealt with by the three experts from whom the plaintiffs had delivered reports.

[44] The upshot of the defendants' expert opinion on the critical counterfactual proposition was to conclude that the project net present value was:

(a) (based upon their part 2 instructions) negative $1.1 billion at 10 per cent discount as at May 2005; and

(b) (based upon their part 3 instructions) negative $1.2 billion as at May 2005.

[45] The plaintiffs' reply, which confined the plaintiffs' case in the way I have explained, was filed and served after all of the defendants' expert reports were delivered and before the plaintiffs had yet delivered expert reports in reply.

The plaintiffs' expert reports in reply

[46] On 30 July 2018, the plaintiffs were ordered to file and serve their expert reports in reply on or before 2 November 2018, the order specifically providing that "on or before" meant earlier, if available.

[47] The table set out in Ms Morrison's affidavit identifies the reports which were delivered. A total of 17 new reports were delivered comprising:

(a) 3 new reports from Mr Hill;

(b) 2 new reports from Mr Hall;

(c) 3 new reports from Mr Freeman;

(d) 9 new reports from 7 persons who had not previously delivered expert reports.

[48] I can now deal briefly with the second of the two principal complaints by the defendants.

[49] The defendants complain that the new experts addressed areas of expertise which previously the plaintiffs had addressed by Mr Hill. They point out, correctly, that the only proper inference is that the plaintiffs had made the forensic judgment that Mr Hill was an appropriate expert for all of the areas of expertise with which he had dealt.

[50] The defendants contend that the contemplation of the order authorising expert reports in reply could not be thought to admit of the possibility of some expert other than Mr Hill addressing the matters of expertise on which he had opined, unless good reason were demonstrated.

[51] Other things being equal, there would be much to be said for that construction of the orders which had been made. But I think that the time to take that point and to crystallize what was the intention of the judge then managing the case was when it first became obvious that the plaintiffs proposed to deliver reports from experts other than those from whom it had already delivered reports. At the latest, that would have been on 30 July 2018.

[52] I think it is too late presently to take that point.

[53] However, the defendants' other complaints have much more merit. The defendants say that the expert reports in reply disclose a case which is substantially different to the case which the plaintiffs have pleaded and particularised. They oppose the plaintiffs being permitted to change their case.

[54] It is necessary to identify the nature of the change which is proposed and to evaluate its effect in terms of the nature of the dislocation which might occur if the change is permitted.

The nature of the change which is proposed

[55] In order to evaluate the nature of the change which is proposed, I have before me both the proposed pleading amendments and the fresh expert opinion which the amendments are designed to permit.

The plaintiffs' application for leave to amend

[56] I turn first to identify the nature of the proposed pleading amendment.

[57] The plaintiffs' application is that they have leave to file and serve an amended statement of claim and an amended reply in the form exhibited to the second affidavit of Mr Boys sworn 30 November 2018.

[58] For the purposes of forming a view on the plaintiffs' application, it suffices to note –

(a) the proposed amendments to paragraph 23 and schedule 1 of the statement of claim; and

(b) the proposed amendments to paragraph 163 of the reply.

[59] Those amendments are identified by the tracked changes below:

23. By reason of Monto Coal 2's breaches of the Joint Venture Agreement:

(a) the development of Stage 1 has not been achieved;

(b) the Stage 2 Feasibility Study has not been undertaken;

(c) the plaintiffs have lost the opportunity to earn a profit from the sale of coal from Stage 1 and Stage 2, ~~and~~ to earn Royalties under the Monto Coal Royalty Deed, and the value of free carried interest in Stage 1 capital costs;

Particulars

(a) Stage 1 would have been completed ~~and would have been profitable~~.

(b) The Stage 2 Feasibility Study (as that term is defined in clause 1 of the Joint Venture Agreement) would have been prepared by about May 2005;

(c) Coal produced from Stage 1 would have obtained market acceptance and would have been sold ~~at a profit~~ during Stage 1;

(d) The Stage 2 Feasibility Study would have demonstrated that Mine Development of Stage 2 would have been profitable with a Net Present Value of $518 million as set out in paragraphs 9 to 31 of the report of Mr Hall dated 21 November 2018. The plaintiffs no longer rely upon paragraphs 4 and 5 of its further and better particulars served on 14 February 2014.

(e) The Joint Venture Participants or the Manager would have convened a Meeting of the Management Committee to vote on whether Mine Development of Stage 2 should be undertaken;

(f) Each of the Participants' Representatives, would have attended that meeting and, acting in the best interests of the Joint Venture in accordance with clause 7.5 and 7.6 of the Joint Venture Agreement, would have exercised their vote in favour of undertaking the Mine Development of Stage 2;

(g) Coal would have been produced and sold from Stage 1 and Stage 2 at a profit with a net present value of $2,569m, the plaintiffs' share of which is $1,002m, as calculated in paragraphs 13 of, and Annexure B to, the report of Mr Hall dated 30 November 2018;

~~(h) The total export coal sold from Stage 2 in any calendar year would have exceeded 1,500,000 tonnes;~~

~~(i) Probable purchasers included (at least):~~

~~(i) EPDC (the Japanese power utility whom Talbot addressed, as alleged in paragraph 24(e) of the Consolidated Statement of Claim); and~~

~~*(ii) China Hua Neng Group Hong Kong Limited (or an associated entity);*~~

~~*(j) likely purchasers and markets are those identified in the Barlow Jonker Marking Reviews (executive summaries of which are referred to in the Monto Coal Project Stage 1 Feasibility Study - Final Report dated January 2002);*~~

(k) Monto Coal 2 would have paid its Respective Proportion (being 51%) of the Royalty payable to the plaintiffs quarterly at a rate of 1% of the FOBT price at which export Coal was sold, such royalty having a net present value of $47m as calculated in paragraph 13 of, and Annexure B to, the report of Mr Hall dated 30 November 2018.

(l) The plaintiffs would have received a free carried interest in Stage 1 capital costs, such interest having a net present value of $16m as calculated in paragraph 13 of, and Annexure B to, the report of Mr Hall dated 30 November 2018.

~~*(l) the plaintiffs will supply further particulars of these markets likely buyers after disclosure and the provision of expert reports;*~~

(d) further or alternatively, the plaintiffs have lost the opportunity to sell their respective Interests in the Joint Venture at a value which would reflect the stage to which the Monto Coal Project would have advanced, had Monto Coal 2 not breached its obligations; and

(e) the plaintiffs have thereby suffered loss.

Particulars

~~*(A) Had Stage 1 been developed in accordance with the obligations in the Joint Venture Agreement, the Participants would have been producing coal by May, 2005, at the latest.*~~

~~*(B) Those operations would have yielded profits for the plaintiffs, and the value of their Interests in the Monto Coal Joint Venture would have been enhanced, as summarised in Schedule 1 and as further particularised in the Sumner Hall Report dated 8 November 2010.*~~

(C) The Plaintiffs have lost the opportunity to earn a profit from the sale of coal and to earn royalties produced from Stage 1 and Stage 2, and a free carried interest in Stage 1 capital costs, as pleaded in paragraph 23(c) and Schedule 1 and as further particularised above ~~in the Sumner Hall Report dated 8 November 2010.~~

~~*(D) The plaintiffs will provide further particulars of their loss and damage prior to trial, following receipt of expert evidence.*~~

…

163. The Plaintiffs deny the allegations in **paragraph 163** of the Amended Defence on the following basis:

(a) the matters pleaded in this Amended Reply;

(b) as to paragraph 163(e), the Plaintiffs deny the allegation on the basis of the matters set out in paragraphs 129A to 129D and 130B to 130E hereof

(c) as to paragraph 163(f)~~, the Sumner Hall Report dated 8 November 2010:~~

(i) ~~contains particulars of the allegation in paragraph 23(c)(a) of the Statement of Claim that Stage 1 would have been completed and would have been profitable and further particulars will be provided in the form of expert reports before trial;~~

(ii) ~~estimates the Plaintiffs loss of income from Stage 1 to be $220.2Million;~~

(iii) ~~concludes that~~ Stage 1 of the Monto Coal Project would have ~~positive~~ earnings before income tax, depreciation and amortisation of ~~$8.565~~ negative $3.655 million in 2004 and ~~$18.064~~ $10.835 million in 2005, as calculated in Annexure B to the report of Mr Hall dated 30 November 2018;

(iv) ~~concludes that the capital costs of Stage 1 development would be recovered by the 2006 financial year;~~

(d) as to paragraph 163(g), the Plaintiffs deny the allegations on the basis that, had a Stage 2 Feasibility Study been undertaken, it would have shown Stage 2 of the Monto Coal Project to be profitable, with a Net Present Value of $518 million as set out in ~~and the Plaintiffs provide further and better particulars by reference to Part A of the report of Mr Hill dated August 2017~~ paragraphs 9 to 31 of the report of Mr Hall dated 21 November 2018.

(e) as to paragraphs 163(h), the Plaintiffs ~~do not admit the allegations on the basis that they remain uncertain as to the truth or falsity of the allegation having regard to the fact that the Defendants particularise the allegation by reference to an expert report of Mr Samuel dated 31 May 2018 and the time for the Plaintiffs to reply to that report has not fallen due:~~

(i) deny the allegations in sub-paragraph (i), and rely upon the matters pleaded in sub-paragraph (iii) hereof;

(ii) admit the allegations in sub-paragraph (ii);

(iii) say that the plaintiffs would have met the Cash Calls made on them under the Joint Venture Agreement to develop Stage 2 by:

(A) using cash available to them;

(B) using the proceeds of sale of shares in Macarthur Coal issued pursuant to clauses 1 and 4.3 of the Asset Sale Agreement;

(C) using the proceeds of selling down equity in the Monto Coal Project;

Particulars

As set out in paragraph 14-40 of, and Annexure D to, the report of Mr Hall dated 30 November 2018, cumulative cash calls in the amount of $102.7 million would have been met by the use of cash, proceeds of sale of shares and proceeds of selling down equity.

(f) as to paragraph 163(i), the Plaintiffs deny the allegations because:

(i) the revenue from the Monto Coal Project would have exceeded the costs (and further particulars of which are set out in paragraph 13 of, and Annexure B to, the expert report of Mr Hall dated ~~20 October 2017~~ 30 November 2018); and

(i) the Plaintiffs would not have suffered losses due to the need to pay Cash Calls to fund the development of Stage 2;

(g) as to paragraph 163(k), the Plaintiffs deny the allegations on the basis that:

(i) the Plaintiffs did give a default notice, and the Plaintiffs repeat and rely upon paragraph 148 hereof;

(ii) further, or in the alternative, the Plaintiffs have no obligation under clause 11.2 of the Joint Venture Agreement to serve a default notice;

(iii) further, or in the alternative, even if the events set out in sub-paragraphs 163(k)(i)(A) to (C) of the Amended Defence had occurred:

(A) the Defendants would not have accepted or agreed that Monto Coal 2 was acting in breach of the Joint Venture Agreement, or alternatively would not have taken the necessary steps to achieve completion of Stage 1 and undertake the Stage 2 Feasibility Study;

(B) in the premises of sub-paragraph (A), the chain of causation would not have been broken by reason of the Plaintiffs' inaction;

(iv) further, or in the alternative, in the premises of sub-paragraph (iii), the Plaintiffs did not fail to mitigate their loss;

(h) as to paragraph 163(m), the Plaintiffs deny the allegations on the basis that the Plaintiffs' claim to damages is not too remote;

(i) as to paragraph 163(n), the Plaintiffs deny the allegation on the basis that the Plaintiffs' calculation of damages takes into account the value of the Plaintiffs' interest in the Monto Coal Project.

…

SCHEDULE 1 – SUMMARY OF PLAINTIFFS' LOSS AND DAMAGE

~~**Loss and Damaged Suffered by the Plaintiffs ($ millions)**~~			
	~~**Loss of Income From Failure to Develop Monto Coal Project**~~	~~**Less Value of Monto Coal Project As Is**~~	~~**Loss and Damage Suffered**~~
~~Estimated loss of income / value of Stage 1~~	~~228.9~~	~~7.2~~	~~221.7~~
~~Estimated loss of income / value of Stage 2~~	~~2,250.6~~	~~124.2~~	~~2,126.4~~
~~**Total estimated loss of income / value**~~	~~**2,479.5**~~	~~**131.4**~~	~~**2,348.1**~~
~~Joint venture interest of the Plaintiffs~~	~~49.0%~~	~~49.0%~~	~~49.0%~~
~~**Portion attributable to the Plaintiffs**~~	~~**1,215.0**~~	~~**64.4**~~	~~**1,150.6**~~
~~Loss of Royalty~~			~~20.5~~
~~Loss of free carry through Stage 1~~			~~15.4~~
~~Loss of free carry on Stage 2 feasibility study~~			~~6.7~~
~~**Total loss suffered by the Plaintiffs**~~			~~**1,193.2**~~
~~**Loss suffered by Sanrus Pty Ltd**~~			~~**954.56**~~
~~**Loss suffered by Edge Developments Pty Ltd**~~			~~**119.32**~~
~~**Loss suffered by H&J Enterprises (Qld) Pty Ltd**~~			~~**119.32**~~

Loss and Damage Suffered by the Plaintiffs ($ millions)	
Value of loss of opportunity discounted back to May 2005	
Value of 10% interest sold in 2005 to fund cash calls	40
Value of remaining 39% interest	1,002
Value of Burnett Coal Royalty	47
Value of free carried interest in Stage 1 capital costs	16
Gross loss discounted back to May 2005	**1,105**

Loss and Damage Suffered by the Plaintiffs ($ millions)	
Deduct: current value of 49% interest in undeveloped project discounted back to May 2005	(27)
Net loss and damage as at May 2005	**1,078**
First Plaintiff	$862.4m
Second Plaintiff	$107.8m
Third Plaintiff	$107.8m

[60] In a pleading sense, the nature of the case in respect of the critical counterfactual proposition is completely altered. I observe:

(a) The plaintiffs have rectified the existing inconsistency between the statement of claim and the reply by deleting the outdated connection to the February 2014 particulars, but not by inserting a connection to part A of the Xenith 2017 report.

(b) To the contrary, the now consistent case abandons the case that the Stage 2 feasibility study would have demonstrated a net present value of $51 million in the manner identified in the Xenith 2017 report and now advances a case that there would have been a net present value of $518 million as set out in the 21 November 2018 report by Mr Hall.

The extent of the real change

[61] It is also clear that the extent of the change is much more than merely numerical. This is not just a case of expert reports being updated and new calculations being done with the consequence of changes to the figures in a pleading being required.

[62] First, by order I made on 16 November 2018, I required the plaintiffs to notify the defendants of the parts of the existing expert reports on which they no longer proposed to rely should leave to amend be given. Exhibit RLM9 to Ms Morrison's affidavit is the response. It demonstrates that the plaintiffs no longer wish to rely upon –

(a) a large amount of Mr Hill's two previous reports, including a great deal of part A of the report (to which their reply had previously committed them);

(b) Mr Freeman's 2017 report;

(c) most of the opinion evidence of Mr Hall, to which their reply had also previously committed them.

[63] Second, I received a great deal of evidence and submission which was addressed at trying to explain to me the extent and significance of the changes which underlay the proposed pleading change. There was some factual disagreement between the parties on the significance of the changes.

[64] Ms Morrison addressed the nature of the changes in her affidavit at paragraph [17] to [18], [29] to [36] and Exhibit RLM7. RLM7 was a spreadsheet which tried to analyse the fundamental variables which informed the plaintiffs' case concerning the critical counterfactual proposition that a Stage 2 feasibility study would have demonstrated that development of Stage 2 would have been profitable by giving rise to a Net Present Value of $51 million. RLM7 was updated by Ms Morrison, and I received a submission from the plaintiffs which responded item by item to it. Mr Boys' primary affidavit also addressed what he contended was the significance of the changes. I have reviewed that material.

[65] I was not invited by either side to seek to resolve all of the disputes, but, rather, I was invited to conduct a broad brush assessment of the extent of the real change.

[66] Applicable case law suggests that in cases of this nature one should not take "an unduly narrow approach in ascertaining the real issues in controversy, even if they are not sufficiently expressed in the pleading": see *Aon Risk Services Ltd v Australian National University* (2009) 239 CLR 175 at [83] and *Birla Mt Gordon Pty Ltd v Miccon Hire Pty Ltd* [2013] QCA 363 at [85].

[67] Doing the best I can, I conclude that the case which the plaintiffs now seek to advance by an amended pleading and further expert opinion which would be authorised by the amended pleadings represents a significant change to the case which had been pleaded and particularised. I have already adverted to the fact that the critical counterfactual proposition had changed from a $51 million outcome to a $518 million outcome. But the most important thing is that the defendants had been entitled to regard the plaintiffs as having confined their case as to the critical counterfactual proposition by reference to a particular analysis and the assumptions which informed it, and it is clear that that analysis has materially changed in very many ways from that which had been previously particularised. Some indication of the materiality of changed variables was expressed in the written submissions of the defendants at paragraph 7(c)(i) to (vii) as follows:

> 7 The substitution of the New Reports has the effect of:
>
> …
>
> (c) Substantially broadening the issues in dispute between the parties (contrary to the narrowing of issues that one might expect to result from reports "in reply"). These issues are addressed in Ms Morrison's affidavit at [17]-[18], [29]-[36] and "RLM-7". For instance:
>
> (i) Having addressed the single Stage 2 mining lease (**ML**) over the entire EPC 613 area (to be granted by mid 2005) proposed in the Original Reports, the Defendants' experts will now have to address a new ML boundary with a 2 staged approach to the grant of MLs: a Stage 2A ML to be granted by May 2006 and a Stage 2B ML to be granted in February 2008. The plaintiffs' new approach involves the acquisition of the entire town of Mulgildie.
>
> (ii) Having addressed the single mine plan proposed in the Original Reports, the Defendants' experts will now have to address two new, alternative, mine plans designated A53 and A64.
>
> (iii) Having addressed coal production starting in mid 2007 as proposed in the Original Reports (coinciding with the date of completion of the CHPP), the Defendants' experts will now have to address coal production starting in mid 2006, with a new large raw coal stockpile capable of holding 1.5 million tonnes of ROM coal to enable production to ramp up prior to completion of the CHPP in July 2007.
>
> (iv) Having addressed the strip mining method proposed in the Original Reports, the Defendants' experts will now have to address a new mining method (the panel mining method) which appears to maximise "dozer push".
>
> (v) Having addressed the single mining schedule (developed using XPAC software) proposed in the Original Reports, the Defendants' experts will now have to address two new, alternative schedules for A53 and A64 (developed using different software known as Spry, being software which the Defendants' experts do not have).
>
> (vi) Having addressed the mine dump limits proposed in the Original Reports, the Defendants' experts will now have to address what appear to be significantly different mine dump limits (developed using software known as Deswik, being software which the Defendants' experts do not have).
>
> (vii) Having addressed the forecast coal price of $A53 proposed in the Original Reports, the Defendants will now have to address an exercise of a fundamentally different kind. It involves assessing the probabilities that the coal prices would fall within 4 scenarios, incorporating those scenarios into cashflows, adding in a further "actual scenario" based

on the prices that actually eventuated post-2005, and then coming up with a probability weighted future cashflow analysis. It is this probability weighted future cashflow analysis that ultimately yields the NPV of +**$530 million**. This novel methodology had not featured in the case before. The coal price forecasting aspects will have to be addressed by the Defendants' existing expert, Mr Barkas. Further, Ms Morrison considers it likely that the Defendants will have to retain a further expert to address the probability weighted future cashflow analysis (including as to whether it is an appropriate methodology for assessing what would have been shown in a bankable feasibility study as at May 2005).

The effect of the proposed changed case

[68] Ms Morrison's affidavit addressed in detail the way in which the defendants would need to respond to the changed case and to the extent of cost, inconvenience and time which would be associated with the need to respond to the case if I permitted the case to proceed. I accept her evidence. I set it out below.

77. Should the plaintiffs be granted leave to rely upon their new expert reports at trial, Parts 1, 2 and 4 of the defendants' feasibility experts' reports will be redundant and they will need to prepare new Part 1, 2 and 4 reports (including inputs for cashflow modelling) to respond to the plaintiffs' new Stage 2 feasibility study and damages case.

78. The defendants took 6 months to prepare their Part 1, 2, 3 and 4 reports earlier this year. The reports cannot be progressed concurrently because some reports cannot be progressed until other reports are completed or views formed. For example, Mr Ellis' geological ply model was required to be built before Mr Parker could progress his mine planning. Mr Ben Hall cannot calculate equipment hours until Mr Parker has selected the appropriate equipment for his mine plan based upon his equipment scheduling. Ms Power cannot complete financial modelling until all inputs are received from all experts.

79. The total cost to the defendants of the preparation of their above expert reports (excluding 2 experts reports which were not responsive to the plaintiffs') was $4,958,525.28. Should the plaintiffs obtain leave to rely upon the November expert reports which have been delivered I estimate that of those cost approximately $2.5 million of those costs will be wasted due to Parts 1, 2 and 4 of the reports having to be redone on the basis of the new case.

80. All of the defendants' feasibility experts (but for Mr Ellis and Mr Morton in respect of port capacity and is affected to a lesser extent) will need to completely re-do their Part 1, 2 and 4 reports. I have spoken with each of the relevant experts retained by the defendants to understand the additional work which will be required to be carried out by those experts in preparing responsive reports to the plaintiffs' new expert reports. I have received cost estimates from the defendants' experts to carry out this work.

81. That work would involve experts carrying out the following work:

(a) Fred Parker in respect of Mine Planning and Feasibility;

(i) I am informed by Mr Parker and believe that

(A) he will need to audit all of the Xenith 2018 mine plan modelling. (including margin ranking, production scheduling, equipment scheduling, dozer push and truck haulage);

(B) the largest part of his work will be auditing the operating hours for truck haulage of waste and coal because that is the largest operating cost for the mine. The software which is used for truck haulage is a tool which simulates what the operator wants it to simulate. If unrealistic parameters are applied the program will still tell you that a haulage route is possible and report equipment hours. To audit it you must look at the status of pit and dump development and see how the trucks are getting from each dig block to a dump block at that instant. Once a particular route is confirmed Mr Parker must work out the truck hours required for that route are reasonable given truck performance criteria;

(C) Mr Parker must also audit sequencing in the pit. There must be a logical sequence within each panel of excavators and trucks mining

waste and coal with dozer push of waste occurring as well. For example there cannot be a dozer push activity in a particular area if the overlying coal seam has not been removed or if the previous panel has not been completely mined to create a void for the dozer push waste;

(D) currently Xenith 2018 uses less truck hours than the defendants' experts which I am informed by Mr Parker requires investigation; and

(E) the same checking needs to be carried out in respect of both the A53 mine plan and the A64 mine plan.

(F) assess the capital and operating costs associated with the both of the new mine plans and provided for in the feasibility modelling

(G) assess the capital and operating costs associated with the both of the new mine plans and provided for in the "actual case" damages modelling

(b) Lucy Power in respect of CHPP and Financial Modelling;

(i) The most significant work for Ms Power is auditing the 8 alternate Xeras models and 8 excel cashflow models referred to above and then the further 4 excel spreadsheets developed by Mr Hall referred to above. I am informed by Ms Power and believe that

(A) this is extremely time consuming and tedious work

(B) the names between the Xeras and Xcel models and the written expert reports differ and amounts are combined differently in different models. By way of example in Excel "indirect costs Contractor" provided a lump sum $ amount. In Xeras the same item is referred to as "administration Contractor" and is in $ per tonne.

(C) when preparing her expert report previously, it took the best part of one day to work out how one number had been derived. I am informed that Ms Power and Mr Ben Hall have been using the Xeras product for 10 and 15 years respectively and would be amongst the top 10 Xeras users in the world but it can take several hours to work out what the plaintiffs experts have done in respect of any one input.

(D) The structure of the 2018 Excel spreadsheets is different to the 2017 structure and further, the spreadsheets don't match line for line. They are in differing orders from one spreadsheet to the next.

(E) this lack of clarity in the models and reports double or triples the amount of time required for Ms Power to audit the models

(F) there are numerous unexplained changes in the new excel spreadsheets which make it impossible to compare to the previous. For example in Xenith 2017 "Demurrage and Sales" was a combined rate of 0.89/t. In Xenith 2018 there is an amount "Marketing and Sales" of 0.49/t

(c) Ben Hall in respect of Onsite Infrastructure;

(i) I am informed by Mr Hall and believe that

(A) he must audit data in the various cashflow models and reports and assess the new capital costs and operating costs amounts provided for in the feasibility modelling

(B) assess the actual capital costs and operating costs amounts provided for in the "actual" damages models

(C) he too is affected by similar issues to those referred to by Ms Power above which results in a very time consuming and tedious task.

(d) Tim Cavanagh in respect of Land Acquisition/compensation;

(i) I am informed by Mr Cavanagh and believe that

(A) he will need to ascertain which properties fall within Stage 2A and are to be acquired by May 2006 (including the town of Mulgildie) and

opine as to the likely capital cost and which properties fall within Stage 2B and are to be acquired by February 2008 and opine as to the likely capital cost allowed for in the feasibility modelling

(B) assess the actual capital costs and operating costs amounts provided for in the "actual" damages models

(e) Gary Harradine in respect of Power and Water and offsite infrastructure;

(i) I am informed by Mr Harradine and believe that he will need to

(A) audit Mr Freeman's proposed solutions and consider whether they will provide the mine with its necessary requirements

(B) assess the capital and operating costs of the proposed solutions and used in the feasibility modelling

(C) assess the actual capital costs and operating costs amounts provided for in the "actual" damages models

(D) which properties will need to be acquired for the plaintiffs new proposed water and power corridor and estimate a capital cost

(f) Ross Hunter in respect of rail solution and capex;

(i) I am informed by Mr Hunter that he will need to

(A) assess the feasibility of the new rail solution proposed by Mr Freeman which will also include an assessment of the fitness for purpose of timber bridges and old tunnels on the existing rail line which Mr Freeman opines can be upgraded. Mr Hunter will then need to assess the capex estimate provided by Mr Freeman

(g) Euan Morton in respect of rail charges;

(i) (i) I am informed by Mr Morton and believe that he will need to calculate the rail charges based upon the new capital cost of the new rail solution

(h) Peter Smith in respect of Environmental Approvals;

(i) I have been informed by Peter Smith, and I believe, that

(A) Mr Smith has limited time over the next few months. He has been retained as an expert in another long running and complex proceeding which is also set down for trial in 2019. Mr Smith is currently participating in expert conclaves in those proceedings and has a report due to be filed in February 2019.

(B) In order to respond to the Plaintiffs' new mine plan and consider the reasonableness of the proposed methodology, Mr Smith would have to attend a site visit at Mulgildie. This visit is necessary for Mr Smith to assess the properties and businesses which would be affected by the new mine plan and determine whether they are private, commercial or government premises.

(C) In order to respond to the Plaintiffs' new proposal for a mining lease application in two stages Mr Smith will have to consider the approvals process for a staged application. This will include considering federal as well as state legislation relevant to the approval process, including considering whether an Environmental Impact Statement is triggered under federal legislation.

(D) In order to understand the impact of Plaintiffs' proposal for a new ML boundary, Mr Smith will have to identify the sensitive receptors and then do an assessment of the proposed new location against each receptor. This involves Mr Smith considering how the location of each element of the Plaintiffs' new mine plan may affect nearby dwellings, businesses and other facilities. This is a detailed process which Mr Smith needs to undertake from scratch.

(i) Rod Masters in respect of Rehabilitation and Mine Closure;

(i) Mr Masters will need to

(A) consider the new mine plans and

(B) assess the capital and operating costs of the proposed solutions and used in the feasibility modelling

(C) assess the actual capital costs and operating costs amounts provided for in the "actual" damages models

(j) John Barkas in respect of Coal Price and Exchange Rates.

(i) Mr Barkas will need to consider the methodology used by Messrs Browne and Hall to select coal price forecasts and exchange rates to use in the feasibility modelling

82. Tony Samuel will need to respond to a new damages case. Mr Samuel will need to audit the new cashflow modelling for the damages case and the modelling relied upon in respect of the cash call amounts which would need to be met by the plaintiffs, the modelling to ascertain the sell down and the Stage 1 modelling which has been used in the damages calculations.

83. Mr Tonkin, the Project finance expert engaged by the defendants will need to consider the plaintiffs new feasibility information and opine as to whether project financing would have been made available.

84. The defendants will need to retain a new expert to consider and respond to Mr Browne's and Mr Hall's probability weighted analyses.

85. Disclosure will need to be given by the plaintiffs as to paragraph 163(e) of their proposed amended reply exhibited to the Second Boys Affidavit. Subpoenas will need to be issued to entities referred to in Mr Freeman's new reports: for example the entities Mr Freeman says, contrary to Mr Morton's evidence, would not have been likely contenders for port capacity

86. Below is each of the defendants' experts' estimate as to the time they will require given their Christmas leave plans and other work commitments to prepare a report in response to the plaintiffs' new expert reports.

Expert	**Estimate of time to provide responsive report**
Fred Parker – Mine Planning, Feasibility	22 March 2019
Lucy Power - CHPP	8 March 2019
Lucy Power – Financial Modelling	26 April 2019
Ben Hall – Onsite Infrastructure	5 April 2019
Peter Smith – Environmental Approvals	Mid-April 2018
Rod Masters - Rehabilitation	1 March 2019
Tim Cavanagh – Land acquisition and compensation	End of January 2019
Ross Hunter – Rail solution	Late-January 2019
Euan Morton – Port capacity, pro and rail charges	Mid-March 2019
Gary Harradine – Power, water	18 February 2019
John Barkas – Coal Price/Exchange Rates	End-February 2019
Tony Samuel – Damages	Two weeks following receipt of inputs from other expert reports. Based on Lucy Power's

Expert	Estimate of time to provide responsive report
	estimate, 10 May 2019.
Danie Van Aswegen – Valuation	4 February 2019

87. Supplementary summaries of evidence will also need to be obtained from approximately 5 lay witnesses. Supplementary summaries will need to be prepared in respect of the 4 living directors of MC2 in respect of new assumptions now made by the plaintiffs experts: for example, whether they would have agreed to the joint venture applying for 2 MLs in 2 stages, how they would have viewed the results of the Stage2 feasibility study and NPV and whether they would have voted in favour of proceeding with Stage 2. Further a supplementary summary will need to be obtained from Mr Cantwell in respect to Mr Freeman' proposed new rail solution and possibly from Mr Galt concerning port capacity.

88. Should the plaintiffs obtain leave to rely upon their new reports the additional burden which will be placed upon the defendants' legal team will be extremely substantial in view of the scale and complexity of the litigation, the proximity of trial, and the normal steps associated with trial preparation. The additional steps which will be required include

(a) all members of the defendants legal team understanding the plaintiffs' new case

(b) liaising with the defendants' existing 15 experts and a new expert (referred to above) about the new case in relation to the preparation of expert responses. In my view it is necessary for the defendants' experts to prepare responsive written reports because there is a substantially new case to meet involving new assumptions, data, and methodologies much of which is the subject of either complex and technical mine modelling or otherwise complex financial modelling. In my view the defendants would be prejudiced in having to attend a joint conclave and prepare joint reports without the benefit of written reports and at trial without the benefit of the court having their written responsive reports.

(c) the liaising with experts will need to occur concurrently with preparation for the trial and during the trial. Further those reports which cannot be completed until late March and April will mean that the plaintiffs' lay witnesses will have completed giving their evidence before the defendants' expert reports are completed.

(d) all members of the defendants legal team will need to understand the defendants' experts' responses to the new case. There is no time currently in the trial timetable for the defendants' counsel to devote time to getting on top of the defendants' experts' responsive reports

(e) supplementary evidence will need to be obtained from lay witnesses and supplementary summaries prepared

(f) further disclosure will need to be given by the plaintiffs which the defendants will need to review and factor into cross examination of the plaintiffs' lay witnesses and documents added to the trial bundle.

[69] I conclude that permitting the plaintiffs to amend their pleadings as they seek and to deliver the new expert opinion which would then be authorised, which would inevitably cause enormous costs which have been incurred by the plaintiffs to have been wasted, it would cause a great deal of additional work for the defendants, and it would also cause significant dislocation to the current timetable, including at least some adjournment.

Should the plaintiffs have the leave to amend which they seek?

[70] The issues which must be addressed on a late application for leave to amend and on late applications for leave to adduce new expert opinions are very well known. It is necessary only to refer to the two cases I have already mentioned, namely, *Aon Risk Services Australia v Australian National University* and *Birla Mt Gordon Pty Ltd v Miccon Hire Pty Ltd*.

[71] I propose to analyse the issue by reference to the following considerations:

(a) the point the litigation has reached relative to the trial;

(b) the extent of any failure to comply with the directed timetable;

(c) the adequacy of the plaintiffs' explanation for its delay in presenting the real case it wanted to take to trial;

(d) the prejudice which would be caused to the defendants if leave is granted;

(e) the prejudice which would be caused to the plaintiffs if leave is refused, including whether the plaintiffs might be denied a fair opportunity to present their real case;

(f) the effect on other litigants awaiting resolution of their proceedings; and

(g) the extent to which prejudice on either side can be ameliorated by alteration to the existing timetable.

[72] I do so under separate headings below.

The point the litigation has reached

[73] I have referred already to the long and unsatisfactory extended interlocutory process in this case which commenced in 2007.

[74] Critical dates for present purposes are:

(a) **1 March 2017**, which was when a timetable was first set for the plaintiffs' expert reports and the defendants' expert reports. The due dates were, respectively, 25 August 2017 and 15 December 2017. No provision was made for reply expert reports. Notably, the plaintiffs were also required to file and serve any further amended reply and answer.

(b) **5 October 2017**, which was when the dates set on 1 March 2017 were changed to on the one hand 20 and 27 October 2017 for the plaintiffs' expert reports, and on the other hand 28 February 2018 for the defendants' expert reports. Again, no provision was made for reply expert reports. The plaintiffs had jointly reported to the judge managing the case that they request that consideration be given to setting down a trial date in the second half of 2018.

(c) **23 November 2017**, which was when - the plaintiffs' expert reports having been received - 20 April 2018 was set as the date for the defendants' expert reports; provision was made for expert reports in reply by 8 June 2018; and a timetable set for joint expert reports to be done by 10 August 2018. Although a time for expert reports in reply was set at this date, the defendants had, by letter dated 28 August 2017, flagged their intention to object if the reply reports sought to change the plaintiffs' case. Importantly, it was ordered that except with the leave of the Court, no party would be permitted at the trial of the proceeding to adduce expert evidence other than in the form of a report which had been filed to the date of that order or was filed in accordance with orders made by the Court.

(d) **9 May 2018**, which was when the proceeding was set down for a 16 week trial commencing on 11 March 2019. By this time, all but a few of the defendants' expert reports had been delivered. As I have already indicated, most of the remainder were delivered by 31 May 2018 and the last by 1 June 2018. Expert reports in reply were required by 14 September 2018; joint expert reports by mid-November 2018; and mediation by 30 November 2018.

(e) **30 July 2018**, which was when the timetable for expert reports in reply was extended to its current date, 2 November 2018. It was also the date by which the defendants had flagged again their concern about any change to the plaintiffs' case. Evidence

before the managing judge from the plaintiffs was to the effect that it was not anticipated that the plaintiffs' expert reports would prepare a "new mine plan". As I have already mentioned, that expectation proved wrong because the plaintiffs now not only present one but two new mine plans.

(f) **30 November 2018**, which is the effective date by which all the expert reports in reply were in fact received.

(g) **11 March 2019**, the scheduled commencement for the trial.

[75] The proposed change is being made three months out from the trial. On any view it is late and disruptive.

The extent of the failure to comply with the directed timetable

[76] The extent of failure to comply with the directed timetable is comparatively minor, although it did create the *fait accompli* of non-compliance with the joint expert conference timetable. Ultimately, there was less than a month delay in getting the whole package of expert opinion in reply delivered. The real problem is the extent of the change wrought by the new reports, which is now sought to be accommodated by an amendment to the pleaded case.

The adequacy of the plaintiffs' explanation for its delay in presenting the real case it wants to take to trial

[77] The plaintiffs' senior counsel advanced to me the proposition that the parties had joined issue on causation and loss by reference to expert reports rather than by pleadings. He sought to persuade me that the defendants had, in effect, by their conduct of the interlocutory stages of this proceeding acquiesced in the notion that the plaintiffs could alter their case by expert opinion in reply.

[78] I reject that submission. It will be apparent from what I have already said that there was no such acquiescence. Indeed, the defendants have on a number of occasions evinced concerns as to the possibility that the plaintiffs might do exactly what they have purported to do and have always consistently contended that that was unacceptable. Further detail appears in the chronology which is RLM11 to Ms Morrison's affidavit.

[79] The highest at which the proposition could arguably be put is that the defendants must be taken to have acquiesced in the extent of the departure between the case pleaded and particularised in the statement of claim and that pleaded and particularised in the reply by reference to the Xenith 2017 report of Mr Hill. But even if that is right, it is not the present problem.

[80] Otherwise, the submission of the plaintiffs as to the adequacy of their explanation was put in their written submissions in the following way:

> 43. The explanation for the delay is set out in Mr Boys' affidavit. In short, the plaintiffs' experts were required to respond to a substantial volume of detailed, technical and interrelated material from the defendants which departed in fundamental ways from the premises on which the plaintiffs' initial reports and the Stage 2 Scoping Study and Information Memorandum had been prepared. Substantial work was required to respond. Despite investing a substantial amount of time and resources and using their best efforts the plaintiffs' experts were not all able to complete all of that work by **2 November 2018**. Most of them completed most of the work a short time after.
>
> 44. The plaintiffs sought to minimise the effect of the delay by requesting Messrs Hill, Visca, Freeman and Hall provide as much of their reports as possible, as soon as possible, to enable the defendants' expert to commence their consideration. By **16 November 2018**, the plaintiffs had served all reports relevant to the calculation of the NPV as at **May 2005**, save for the final calculation of Mr Hall, which was served on **22 November 2018**. The reports served after that date related to the assessment of loss and damage, which were essentially the earlier reports with particular inputs updated for actual prices and costs.

[81] I am prepared to accept that the plaintiffs proceeded as expeditiously as possible to develop expert opinion in response to that adduced by the defendants. That explains, factually, the timing of their application for leave to amend. It is some explanation as to why it might be thought that they only knew of the need for a new case once their experts examined the defendants' expert opinion evidence. On the other hand, that the case involved the critical counterfactual proposition and that the plaintiffs' ability to support that proposition turned on expert opinion evidence has been obvious since early 2014. If presentation of the altered case is so important, why was that case not presented in the first place? There is no explanation before me which answers that question.

[82] The plaintiffs' evidence before me and their counsel's submissions before me proceeded on the wrong assumption that the plaintiffs' case as to the critical counterfactual proposition was unconfined in any way and could be changed dependent on whatever new or altered theories their expert reports in reply (including many from experts retained for the first time in reply) might advance. This assumption and those submissions were misconceived.

[83] To my mind, the risk of the defendants' experts identifying critical flaws in the plaintiffs' expert analyses is a risk which the plaintiffs must be taken to have accepted. If the only way in which the plaintiffs could respond to the defendants' expert analyses was to make a fundamental change to their pleaded case, then that might mean that the case as pleaded must fail. I am unable, however, to say whether that truly is the position which obtains consequent upon a reading of the plaintiffs' 2017 expert reports with the defendants' expert reports. But whether or not that is so, to my mind, by proceeding in the way they have, the plaintiffs have run a real risk that it might be too late to shoehorn a new case into the trial already set down.

The prejudice which would be caused to the defendants if leave is granted

[84] I have already adverted to the prejudice in terms of wasted costs and dislocation to the trial and preparation for trial which would be suffered by the defendants. That prejudice is, undoubtedly, considerable. I will shortly address the extent to which it might be ameliorated by timetable alterations. But one matter may be mentioned immediately: I agree with the defendants' submission that any significant delay in the existing trial dates is neither feasible nor just. As the defendants submit:

> Finally, it is necessary to say something further about why deferring the trial dates is neither feasible nor just:
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> (a) These proceedings were commenced in 2007. The Plaintiffs claim damages in excess of $1 billion. There is inherent prejudice to the Defendants in having a case of that nature remaining unresolved.
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> (b) Further, the key allegations of breach of the Joint Venture Agreement relate to the period from 2002 to 2005. At that time, the directors of Monto Coal 2 were:
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> (i) Keith Ernest De Lacy, who will be 78 years old this year;
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> (ii) Kenneth Talbot, who is deceased having died in an accident in 2008;
>
> (iii) Donald Ian Nissen who will be 74 years old this year and who has suffered a transient ischemic attack, also referred to as a mild stroke; and
>
> (iv) Roger Marshall, who will be 80 years old this year.
>
> The longer the trial of this proceeding is delayed, the greater the risk that these key witnesses will die or be incapacitated or their recall of the key events will be diminished.
>
> (c) Further, of the lay witnesses whom the Defendants intend to call at trial none remain employed by, or under the control of, the Defendants. Hence, delay in the trial of this proceeding increases the risk that these witnesses will become unavailable to be called in the case.

(d) The Plaintiffs have made multiple allegations of bad faith conduct against numerous former officers and executives of the Defendants. These people have expressed concern about having been named by the Plaintiffs as having engaged in bad faith towards the Plaintiffs and about having those allegations hanging over their heads. A delay to the trial of this proceeding will prolong the period in which the witnesses are prevented from disputing the allegations in open court.

The prejudice which would be caused if leave is refused

[85] I should observe that thus far, all the considerations that I have addressed point towards refusing the plaintiffs' application. I should not be thought to say that there are no considerations pointing the other way. There are and they are significant.

[86] If leave to amend is refused then a significant problem is created for the plaintiffs and, counter-intuitively, for the defendants also in the way in which the trial would run.

[87] The defendants submit that the expert reports in reply are outside the case as presently pleaded and particularised and if leave to amend is refused, leave to rely on the expert reports should also be refused. No submission to the contrary was advanced. It will be recalled that except with the leave of the Court, the plaintiffs would not be permitted to adduce expert evidence at the trial, other than in the form of a report which has been filed in accordance with the orders made by the Court.

[88] Assume for the moment that the result of refusal would be that the trial would then be able to run with only the plaintiffs' 2017 reports and the defendants' 2018 reports. That would cause prejudice to the plaintiffs in the form of preventing them from advancing an alternative means by which their expert opinion suggested they could establish the critical counterfactual proposition. There would be a real sense that the plaintiffs will have been denied an opportunity to present their real case.

[89] I do not think that it sound or realistic to think that ruling in favour of the defendants would simply mean that the trial would then be able to run with only the plaintiffs' 2017 reports and the defendants' 2018 reports recording the expert opinion upon which I would be required to determine the case. That is because there would still be expert opinion capable of being used which was within the ambit of the current (unamended) pleadings.

[90] On one view, it is true the plaintiffs' failure to produce reports which express only such opinion should mean that the plaintiffs could never rely on the expert opinion at trial except by producing revised reports and then seeking further leave. But there would remain the real possibility of such an application being made, consequent upon an exercise either in redaction or in reformulation of the plaintiffs' 2018 reports, so as to produce admissible written expert opinion. When I say admissible, I mean by reference to the current, unamended state of the pleadings. So, for example, the plaintiffs' written submissions contended:

> The plaintiffs' reply evidence identifies that there are number of fundamental problems with that evidence which, if accepted, has a significant effect on the defendants' evidence. For example:
>
> (a) the new geological model which is one of the key bases to the defendants' NPV is, in Mr Turner's opinion, unreliable, contains critical errors and does not take into account the available evidence;
>
> (b) the derivation of a declining real coal price by Mr Barkas was, in Mr Browne's opinion, methodologically flawed and based on an incorrect interpretation of critical data;
>
> (c) Mr Samuel's discount rates are, in Mr Hall's opinion, inappropriate to the assessment required.

[91] If that is true, then that evidence is something which should be capable of being adduced somehow in this proceeding, even if the plaintiffs are not permitted to amend their pleadings. Refusal of the plaintiffs' application would not solve the potential for further dislocation when the plaintiffs made an attempt to adduce opinion that was truly responsive. The discretionary considerations which would inform resolution of such an

application would, even if I was persuaded against the plaintiffs on the current application, be entirely different.

[92] Of course, on another view, however, the question of ruling on relevance is a matter for the trial process. On that view, I should refuse the leave to amend but allow the reports to be delivered, contemplating that only that part of the reports which was relevant on the current pleadings would be admitted at trial. No exercise has been done which suggests that there is any easy or obvious way in which the relevant could be dissected from the irrelevant if the amendment application was refused. Fragmentation in the reception by me of expert opinion would seem likely.

[93] Further and importantly, the timetable has always contemplated that there must be a process of joint expert conferences and joint expert reports. The latter would identify where the experts are in agreement and where they are in disagreement and why. Having that process performed rigorously and efficiently is an absolutely critical part of pre-trial processes for a trial of this nature. Some part of the opinions expressed in the plaintiffs' 2018 expert reports would inevitably come out as a legitimate part of the explanation for the differences between experts, even if the application to amend is refused. That would be so because the experts' performance of their duty, in accordance with the Court's requirements, would require them to express that explanation. Insofar as those expressions of opinion and any explanation were relevant on the pleadings, they would be admissible. If leave to amend was refused, how might it be possible to ensure that the experts did not spend their time examining irrelevant issues during the joint expert process? I find it difficult to imagine how the joint expert conferences could be run in such a way as would produce the outcome which would be helpful to me as the trial judge ultimately obliged to resolve the real issues in this case.

<u>The effect on other litigants awaiting resolution of their proceedings</u>

[94] That this is a factor that sounds against any significant change to the period of time allocated by the Court calendar to this case is obvious. This case has and will impose a considerable demand on the Court's resources. Any solution which significantly changes the period of time allocated by the Court calendar to this case causes difficulty in the Court's administration and affects other litigants.

<u>The extent to which prejudice on either side can be ameliorated by alteration to the existing timetable</u>

[95] The plaintiffs' suggestion for ameliorating prejudice was unpersuasive. It involved imposing on the defendants more limited time to respond to the plaintiffs' changed case than had been identified as necessary by Ms Morrison. No solution which did so would be satisfactory in my view.

[96] I gave consideration to whether one solution might be to adjourn the commencement of the trial by a significant period, say, until the beginning of June 2019. At my direction, the parties specifically considered the merits of that proposition. The plaintiffs, unsurprisingly, supported the option. On the other hand, questions of fairness to the defendants, to which I have already adverted, sound against the notion. Ms Morrison provided a further affidavit which addressed the possibility and which expressed other good reasons why that would not be an appropriate solution. The solution is unsatisfactory from a Court administration perspective as well. I reject it.

[97] During the course of argument before me, I pressed senior counsel for the defendants to produce a proposal for the best way in which the prejudice to his clients could be ameliorated in the event that I was persuaded to grant leave to amend and to rely on the experts' opinion in reply. The proposal so developed is reproduced below:

DEFENDANTS' PROPOSED TIMELINE

Defendants' Evidence

1. On or before 30 March 2019 the defendants file and serve the first tranche of the expert reports of those experts other than those named in paragraph 2 upon which they intend to rely at trial.

2. On or before 14 May 2019 the defendants file and serve the expert reports of Peter Smith; Lucy Power; Tony Samuel and Danie van Aswegen and any further lay witness summaries arising out of any matter contained in the expert reports filed by the plaintiffs on or after 1 November 2018 and the expert reports filed pursuant to paragraph 1 or this paragraph 2.

Expert Evidence – Joint Expert Reports

3. By 30 May 2019 the parties are to confer to agree upon:

   (a) the questions to be answered at each joint conference of experts; and

   (b) the materials to be placed before the experts.

4. By 3 June 2019 the parties are to provide to each of the experts:

   (a) the name of the corresponding expert or experts with whom the expert is to meet;

   (b) the questions to be answered by those experts at the joint conference of experts;

   (c) the materials agreed to be placed before those experts.

5. The joint conference of experts take place in the period 17 June 2019 to 1 July 2019.

6. As soon as practicable after each joint conference, and no later than 1 July 2019 joint reports signed by all participating experts are to be delivered to the parties and filed by the plaintiffs with the court. Such joint reports are to include issues in respect of which the experts are in agreement and statements of issues about which the experts do not agree with reasons as to why agreement has not been reached.

Commencement and Adjournment of Trial

7. Extend the time for commencement of the trial from 11 March 2019 to 8 April 2019.

8. After completion of the evidence of the plaintiffs' lay witnesses, the court will adjourn for 2 weeks, after which the plaintiffs' lay witnesses may be recalled for any cross examination arising from the defendants' experts (sic) reports.

9. After completion of the evidence of the defendants' lay witnesses the court will adjourn for 2 weeks after which the evidence of the expert witnesses will be given.

10. Leave is granted to the defendants to recall any of the plaintiffs' lay witnesses for cross examination arising from any matter:

    (a) contained in any expert report filed by the defendants which report had not been filed as at the date in paragraph 9;

    (b) or arising from any joint report filed after a joint conference.

Openings

11. By 18 March 2019 the plaintiffs:

    (a) provide to the trial judge and the defendants their written opening (containing document IDs for documents referred in therein);

    (b) upload the written opening to the Online Review Book.

12. By 1 April 2019 the defendants:

    (a) provide to the trial judge and the plaintiffs their written opening (containing document IDs for documents referred in therein);

    (b) upload the written opening to the Online Review Book.

[98] The defendant, of course, did not propose that that solution should be adopted. Their position was resolutely against it. Their position was resolutely that the plaintiffs' application should be dismissed. It is true that the solution is, in some respects, still

unsatisfactory. For example, many of the difficulties for the defendants identified in Ms Morrison's affidavit at [88] quoted at [68] above would still apply.

The discretionary balance

[99] Many of the considerations affecting the exercise of the discretion sound against permitting the plaintiffs to continue in the way they propose.

[100] On the other hand, ruling against the plaintiffs does, in fact, deny them the opportunity of advancing a case which their experts do support. That would not be lightly done if some other feasible option was open.

[101] Moreover, ruling against the plaintiffs seems to me likely to give rise to a high risk of fragmentation of the expert opinion evidence and to concomitant, likely, inefficiencies at trial. This also is unsatisfactory.

[102] I found identification of what is the just resolution of the problem created by the plaintiffs' conduct to be a difficult task.

[103] Doing the best I can, I think the solution which creates the best outcome for the conduct of the trial consistent with the application of settled legal principle and which ameliorates the prejudice likely to be suffered by the parties in the best way I can is as follows:

(a) the plaintiffs should be given leave to amend in the form they seek;

(b) the price they should pay for that privilege is that they should be required to pay the defendants' costs thrown away by the amendments, to be assessed on an indemnity basis;

(c) subject to one matter on which I will invite submissions, consequential alterations to the timetable should be made along the lines of those contained in the proposal provided to me by senior counsel for the defendants.

[104] The matter on which I invite submissions is whether it might be helpful in the circumstances of this case for an order which requires the parties jointly to appoint a facilitator for the purposes of chairing the joint expert conferences facilitating their conduct and assisting the attending experts to produce the joint expert reports which are the object of the joint expert conferences. Such a person might be a senior silk or even a retired judicial officer.

[105] I will hear the parties on that question and on the question of costs of the applications before me.

[106] Otherwise, I direct them to bring in minutes of orders consistent with these reasons.