SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QSC 162	
PARTIES:		
	First Plaintiffs:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST ACN 097 049 315**
		AND
	Second Plaintiffs:	**EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST ABN 26 010 309 529**
		AND
	Third Plaintiffs:	**H&J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H&J TRUST ACN 077 333 736**
		AND
	First Defendants:	**MONTO COAL 2 PTY LTD ACN 098 919 414**
		AND
	Second Defendants:	**MONTO COAL PTY LTD ACN 098 393 072**
		AND
	Third Defendants:	**MACARTHUR COAL LIMITED ACN 096 001 955**
FILE NO/S:	SC No BS8609/07	
DIVISION:	Trial Division	
PROCEEDING:	Application	
DELIVERED ON:	Date of Orders: 18 June 2019	
	Date of Publication of Reasons: 26 June 2019	
DELIVERED AT:	Brisbane	
HEARING DATE:	17 June 2019	
JUDGE:	Bond J	

ORDER: **Date of Orders: 18 June 2019**

The orders of the Court are that:

1. The plaintiffs' application for:

(a) an order permitting the plaintiffs to adduce expert evidence in the form of the report of Mr Chris Hartley filed 10 June 2019; and

(b) an order varying the table in Schedule A to the order of 3 June 2019 so as to admit the participation of Mr Hartley in the joint expert conclaves,

is refused.

2. The parties are directed to inform the facilitator of the terms of this order as soon as is practicable.

3. The plaintiffs pay the defendants' costs of the application incurred after 13 June 2019, to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – EXPERT REPORTS AND EXPERT EVIDENCE – OTHER MATTERS – 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 pre-trial case management regime imposed on the parties deadlines for filing and serving expert reports – where the plaintiffs sought leave to adduce new expert evidence on day 31 of a long and factually complex trial and shortly before the expert conclaves and joint expert reports process was due to commence – where the plaintiffs had enjoyed a significant indulgence in being permitted to amend their case based on new expert evidence shortly before the trial was due to commence which imposed a considerable burden on the defendants – where the plaintiffs must be taken as having made a forensic decision in finalising the case they would take to trial at the time the amendment was permitted – where the defendants would suffer prejudice if the plaintiffs were granted leave to amend – whether the plaintiffs should be granted leave to rely on additional expert evidence at trial

Uniform Civil Procedure Rules 1999 (Qld), Ch 11 Pt 5

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

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

Dye v Commonwealth Securities Limited [2010] FCAFC 118, cited

Northern Health v Kuipers [2015] VSCA 172, cited

Sanrus Pty Ltd v Monto Coal 2 Pty Ltd [2018] QSC 308, cited

Thomas v Powercor Australia Ltd (Ruling No 3) [2011] VSC 391, considered

COUNSEL:	K Downes QC with A Low for the applicants/plaintiffs A Stumer for the respondents/defendants
SOLICITORS:	Holding Redlich for the applicants/plaintiffs Allens for the respondents/defendants

Introduction

[1] The trial of this proceeding concerns complaints made by junior joint venture partners about the conduct of the senior joint venture partner in relation to decisions made in the course of performing a joint venture for the exploitation of a coal deposit at Monto in Queensland.

[2] The two sides had entered into a written joint venture agreement in May 2002 which expressed various obligations in relation to the following 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 expectations of production being 10,000,000 tonnes or more of saleable coal per annum".

[3] In brief summary, the plaintiffs contend that the defendants breached the joint venture agreement by deciding to suspend all work on the Monto Coal Project in July 2003 and, accordingly, 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 the absence of good faith and for contractually impermissible purposes. The defendants say that appropriate decision-makers formed and acted on the view that the project was not economically viable, in a contractually permissible way.

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

(a) lost the opportunity to earn a profit from the sale of coal from Stage 2 of the project and to receive 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.

[5] The trial is factually complex. From a lay witness and documentary evidence point of view, it requires consideration of the reasons and motivations for decisions made in 2002 to 2008 and whether the decisions might have changed in particular hypothesised circumstances. From an expert opinion point of view, it will involve consideration of disputed expert opinion evidence on many of the expert disciplines involved in assessing the economic viability of a coal mining project. Without being exhaustive, the relevant fields of expertise include geology; operating and capital cost assessment; mine design and planning; coal markets; coal price and exchange rates; and financial modelling.

[6] The trial commenced on 8 April 2019. The plaintiffs' lay witness evidence and documentary evidence has been adduced. The defendants are part of the way through their lay witnesses. Facilitated expert conclaves aimed at producing joint expert reports which identify where the experts agree and disagree, and, in respect of the latter, why, are to take place between 14 June 2019 and 8 July 2019. The joint expert reports are to be produced by 15 July 2019 (except for two which must be produced by 22 July 2019). Oral evidence from the expert witnesses will commence on 5 August 2019. The period between close of the defendants' lay evidence and the commencement of the oral evidence of the experts will be spent by the respective lawyers engaging with the joint expert reports as soon as they are available and in preparation for the oral evidence including cross-examination. The present timetable has oral submissions concluding in October 2019.

[7] On 10 June 2019 (which was day 31 of the trial and four days before the commencement of the expert conclaves), the plaintiffs applied, amongst other things, for –

(a) an order permitting them to adduce in the trial further expert evidence in the form of a report of Mr Chris Hartley, who is an expert in coal marketing; and

(b) an order varying orders previously made concerning facilitated joint expert conclaves scheduled to take place between 14 June 2019 and 8 July 2019 so as to permit Mr Hartley's participation.

[8] Leave to rely on Mr Hartley's report was required because was it was obtained well after the expiry of court-ordered deadlines for the delivery of the expert reports. The last relevant requirement about expert reports was imposed by me on 21 December 2018, on the occasion I granted the plaintiffs the very significant indulgence of permitting them to reshape their case according to then newly obtained expert opinion evidence, notwithstanding the fact that the trial had been scheduled to commence on 11 March 2019.

[9] The plaintiffs' application was argued before me on the evening of 17 June 2019.

[10] On the afternoon of 18 June 2019 I refused the plaintiffs' application, advising the parties that the exigencies of the trial were such that I would have to give my reasons at a later date.

[11] These are my reasons for refusing the plaintiffs' application.

Relevant legal principles

[12] The considerations referred to in the context of a late pleading amendment in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 may be applied to the late service of an expert report: *Thomas v Powercor Australia Ltd (Ruling No 3)* [2011] VSC 391 per J Forrest J at [12] – [13], cited with evident approval in *Northern Health v Kuipers* [2015] VSCA 172 per Kyrou and McLeish JJA at [29].

[13] The applicant for leave bears the onus of establishing that it is appropriate for leave to be granted: *Dye v Commonwealth Securities Limited* [2010] FCAFC 118 per Marshall, Rares and Flick JJ at [17]. The discretion is not to be approached on the basis that the plaintiffs have a "right" to change their case subject to the payment of costs: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 per Gummow, Hayne, Crennan, Kiefel and Bell JJ at [96] and [111]. It is necessary to exercise the discretion judicially, having regard to the relevant considerations.

[14] The considerations referred to in *Aon Risk Services* are also consistent with the case management objectives in r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**): *Birla Mt Gordon Pty Ltd v Miccon Hire Pty Ltd* [2013] QCA 363 at [88] (Morrison JA, Holmes JA and Boddice J agreeing). As Sofronoff P (McMurdo JA and Applegarth J

agreeing) observed in *Allianz Australia Insurance Limited v Mashaghati* [2018] 1 Qd R 429 at [55] and [56]:

> […] relevant expert evidence which has not been dealt with in accordance with the rules may still be admitted in evidence if the interests of justice in ensuring a fair trial require it. The power of the Court to grant leave to a party to tender a non-compliant report or to permit oral evidence to be given by an expert is unfettered by any express provision of the rules. However, the discretion is informed by the purpose of the rules set out in rule 5, namely to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. The discretion is also informed by rule 5(2) which obliges the Court to apply the rules with the objective of avoiding undue delay, expense and technicality.
>
> Of course, these express provisions which guide the Court in the exercise of discretion are subject to the overarching obligation of the Court to ensure that a trial is fair.

[15] The considerations which must be weighed in the balance on this application are:

(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.

[16] I examine the relevant considerations under separate headings later in this judgment. Before so doing, it is necessary to record some aspects of the chronology of the steps taken in this litigation.

Relevant steps taken in the litigation

The plaintiffs' first round of expert reports

[17] As at 1 March 2017 paragraph 23 of the plaintiffs' Amended Consolidated Statement of Claim, was, relevantly, in the following terms (emphasis added and amendments not identified):

> 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 2 and to earn Royalties under the Monto Coal Royalty Deed;**
>
> **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;**
>
> […]
>
> (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 purchases and markets are those identified in** the Barlow Jonker Marketing Reviews (executive summaries of which are referred to in the Monto Coal Project Stage 1 Feasibility Study Final Report dated January 2002);

[18] It was obviously relevant for the plaintiffs' causation and measure of damages case to consider –

(a) the quantum of product coal likely to be produced during stage 1 and stage 2 if those stages were developed as the plaintiffs allege they should have been; and

(b) the likelihood that all or any part of the quantum of product coal produced could be successfully marketed and sold at relevant times.

[19] In that regard, the pleading revealed that the plaintiffs intended to prove that Monto coal would have obtained market acceptance during Stage 1. Amongst other things, the plaintiffs and their advisers realized that their case would inevitably have to deal with was the extent to which the physical characteristics of the Monto coal (including in particular its relatively low Hardgrove Grindability Index (**HGI**)[1]) would have impacted on those considerations. The evidence which I have received during the trial demonstrates that this was a live issue at the time the impugned decisions were made. And, as will appear, the plaintiffs' expert opinion was alive to the issue since at least 2014.

[20] On 1 March 2017 the plaintiffs were ordered to file and serve any expert reports which they intended to rely upon at trial by 25 August 2017. This is the first deadline which must be regarded as having applied to expert opinion addressing the subject matters dealt with in Mr Hartley's report.

[21] The plaintiffs complied with that order by serving the expert reports referred to in the table below.

Report	Date Served	Subject of the Report
Ken Hill (**the Hill 2017 report**)	August 2017	Part A of the report updated certain aspects of the expert report of Ken Hill (**the Hill 2014 report**) which had been served in 2014. Part B of the report addressed the quantum of damages by developing the 'likely' actual cashflow which would have eventuated from the development and operation of the Stage 2 mine.
Jamie Freeman	November 2017	Port and Rail
Jeffrey Hall	20 October 2017	Damages – calculating 8 alternate damages scenarios
Jeffrey Hall	10 November 2017	Damages

[22] The form of the two Hill reports was a little unusual. For reasons which will become clear, it is necessary to explain that in a little more detail.

The Hill 2014 report

[23] The author of the Hill 2014 report was Mr Ken Hill of Xenith Consulting Pty Ltd. Mr Hill held a Bachelor of Civil Engineering (Honours) and a Post Graduate Diploma in Business Administration and had over 25 years of mining industry experience. He was a member of

[1] Broadly speaking, the lower the HGI, the harder and less "grindable" is the coal.

the Australasian Institute of Mining and Metallurgy. His industry experience was set out in Appendix A to his report.

[24] The report contained an expert statement signed by Mr Hill, recording that he had been briefed by the plaintiffs' then solicitors to provide his opinion as to whether it was likely that an expert conducting a feasibility study on the Monto Coal Project, in or about May 2005, would have concluded that the proposed mine development was commercially viable; and recommended that the proposed mining operations should proceed.

[25] The statement also recorded that Mr Hill had engaged the assistance of the following "subject specialists":

(a) Shane Domaschenz of Xenith with consideration to the development of the Monto Coal Project Stage 2 Technical Study;

(b) lrfan Visca of Xenith Consulting with consideration to financial modelling;

(c) Myfanwy Godfrey of Xenith Consulting with consideration to geological modelling;

(d) Ross Stainlay of M Resources with consideration to coal quality, washability and market pricing;

(e) John Simmons of Sherwood Geotechnical and Research Services with consideration to mine geotechnical design and advice;

(f) Steve Laracy of Larpro with consideration to mine infrastructure and coal preparation plant design and capital cost estimation; and

(g) Alex Armstrong of EH and S Systems with consideration to mine environmental impacts and assessment.

[26] Mr Hill's statement recorded that (emphasis added):

> I have delegated this work in a manner to ensure I understand what has been done and that **I agree with the assumptions, methodology and conclusions and opinions reached for the work performed by these specialists**.

[27] The statement went on to deal with the usual matters required of expert reports by Chapter 11 Part 5 of the UCPR, including that Mr Hill genuinely held the opinions stated in the report and represented his true and complete professional opinion; and he knew that his paramount duty was to assist the Court on matters relevant to his area of expertise. Appendix B to the Hill 2014 report contained an expert statement made by each subject specialist stating that the specialist had been retained by the plaintiffs' then solicitors to act as an expert and to prepare a report for the assistance of the Court in relation to the proceeding. The statement in each case dealt with the usual matters required of such statements by Chapter 11 Part 5 of the UCPR.

[28] In the introduction to his report Mr Hill explained the role of the 7 subject specialists in these terms (emphasis added):

> I have prepared this Expert Report by project managing the contributions of various experts in their particular fields to deliver a consistent and integrated opinion. **I have engaged the various experts in each particular field to undertake a defined scope of work and author the various chapters of this report. I have reviewed their contributions and my comments are set out in the Executive Summary[2] and Introduction**. The opinions and analyses of these experts cover each of the following disciplines:
>
> [There followed an identification of the experts and their disciplines to similar effect to that set out in Mr Hill's expert statement.]
>
> The independent experts above have authored the various sections of this report excluding the Expert Statement, Executive Summary and Introduction which I have authored. **I have reviewed the work of the**

[2] The executive summary of the report has been struck through and is not relied on by the plaintiffs.

experts during this study as well as in the formulation of this report and I understand and agree with the conclusions reached. I have the necessary expertise to form a view about the opinions they have expressed.

[29] The introduction of the Hill 2014 report provided (emphasis added):

> 2.2.6 Coal Quality and Market Appraisal
>
> Xenith engaged Ross Stainlay of M Resources Pty Ltd (M Resources) to undertake a review of the coal quality and market placement aspects of Monto. M Resources were asked to undertake the following tasks:
>
> - Review and audit of quality assumptions
> - Preparation of coal specification sheets
> - Comparison with traded thermal coals
> - Briefly review and audit yield assumptions and product quality impacts
> - Trace pricing history of thermal coals ex Newcastle in the relevant study period
> - Back calculate product pricing based on 5,500 NAR
> - **Comment on the most appropriate coal markets and the suitability for Asian utilities.**
>
> **The main results of this review are the CHPP yield prediction, coal product specification and coal price forecast. These results have been incorporated in the mine planning and economic modelling**.

[30] Section 9 of the body of the Hill 2014 report was entitled "Coal quality and market appraisal". The section provided that it had been written by Mr Stainlay. Amongst other things:

(a) The section considered the relationship between the physical characteristics of Monto coal (including its low HGI) and its attractiveness to the market.

(b) It acknowledged that low HGI might prove a concern in these terms:

> The one property that poses a potential problem with end-users is the Hardgrove Grindability Index (HGI). The HGI value of approximately 35 places this coal at the extreme end of major traded coals and thus is of potential major concern to utility boiler operators.
>
> It could be argued that there are compensating features of this coal that should partly offset any HGI concerns.
>
> The Monto thermal coal is likely to be highly reactive in the combustion zone of modern pulverised fuel (pf) boilers. This feature, coupled with the low nitrogen levels, means that good boiler performance should be achievable at a courser grind size, without sacrificing NOx emission or carbon burnout levels — two areas of particular interest to boiler operators.

(c) In section 9.5 the report expressed certain opinions about typical power station mills and mill capacity with a view to supporting the proposition that using a coarser grind size could be achievable in practice, observing:

> The low fuel ratio and projected high combustibility of Monto coal leads to the possibility of grinding to a coarser particle size in order to offset mill throughput caused by the low HGI. This is shown in Figure 9.8. It has been demonstrated that this is achievable in practice if the equipment at the boiler permits the feed for each mill to be sourced from a separate stockpiles, with the fine, milled products joining before entering the furnace.

The Hill 2017 report

[31] The Hill 2017 commenced with an expert statement similar in format to that which had been set out in the Hill 2014 report. The question which the report addressed was different, however. It stated that Mr Hill had been instructed to provide an opinion as to:

(a) what work would have been required to be performed by the expert in conducting the "Stage 2 Feasibility Study", in particular having regard to relevant definitions in the joint venture agreement;

(b) whether an expert having conducted a "Stage 2 Feasibility Study" during the period 16 May 2002 to 16 May 2005 would have stated that the proposed "Mine Development" of "Stage 2" was commercially viable and recommended to the joint venture participants that "Mine Development" of "Stage 2" should proceed; and

(c) the likely cash flows that would have been obtained from "Mining Operations" of the Monto Coal Project, taking into account the likely amount of revenue that would have been generated and the likely amount of capital and operating costs that would have been incurred by the joint venture participants.

[32] The statement recorded that (emphasis added):

> To assist me in forming my opinions I have engaged the assistance of various subject specialist experts as identified in items a) to c) below. **I have managed this work in a manner to ensure I understand what those experts have done and that I agree with the assumptions, methodology, conclusions and opinions reached for the work performed.** The experts from whom I have obtained assistance are:
>
> (a) Irfan Visca of Xenith Consulting with consideration to financial modelling
>
> (b) Ross Stainlay of M Resources with consideration to coal quality, washability and market pricing
>
> (c) Steve Laracy of Larpro with consideration to mine infrastructure and coal preparation plant design and capital cost estimation

[33] As had the equivalent statement in his previous report, the statement went on to deal with the usual matters required of expert reports by Chapter 11 Part 5 of the UCPR, including that Mr Hill genuinely held the opinions stated in the report and that the report represented his true and complete professional opinion; and he knew that his paramount duty was to assist the Court on matters relevant to his area of expertise. Appendices B and C to Mr Hill's report contained expert statements made by Irfan Visca and Steve Laracy. There was no similar expert statement of Mr Stainlay.

[34] In the executive summary in the body of the report, Mr Hill relevantly wrote (emphasis added):

> l have prepared this Expert Report by undertaking work myself, supervising Xenith employees and overseeing the contributions of various experts in their particular fields. **I have engaged various experts in each particular field to undertake defined components of the work and author the various chapters of this report. The opinions and analyses of these experts cover each of the following disciplines and are found in the following sections of this report:**
>
> - Coal quality, washability and market pricing — Ross Stainlay of M Resources
>   - Sections 3.3.7 and 3.3.13
> - Mine infrastructure, coal preparation plant design and capital cost estimation — Steve Laracy of Larpro
>   - Sections 3.3.8 to 3.3.11 and 4.4.5.
> - Financial modelling — lrfan Visca of Xenith
>   - Sections 3.6, 3.7, 4.6 and 4.7
>
> **The independent experts above have authored the various sections of this report stated above. I have reviewed the work of the experts during this study as well as in the formulation of this report and I understand and agree with the conclusions they have reached. I have prepared the remainder of this report. l have the necessary expertise to form a view about the opinions they have expressed.** They have also been given the UCPR rules and provided their opinion consistently with those rules.
>
> […]
>
> Ross Stainlay (CV and Capability Statement in Appendix C) of M Resources has conducted a specialist review of Monto coal quality, washability and potential market placement. He considers it preferable that Monto coal be washed in a preparation plant for the production of a consistent, lower ash, higher Calorific Value (CV) product. He considers a target clean coal product ash of 12 % (air dried) as a viable and

achievable product. It is Ross Stainlay's view that the positive compensating features of Monto coal would help ameliorate HGI pricing impacts.

[35] Coal product quality and HGI discount was dealt with in paragraph 3.3.13 at pages 35 – 38 of the Hill 2017 report. The report expressed a revised assessment of the calorific value of Monto coal and explained why that opinion was expressed. It then expressed a revised "Indicative Monto Product Coal Specification". Finally the report expressed these propositions:

(a) A possibility existed that the HGI of Monto coal was higher than ranges earlier expressed.

(b) There were several compensating features of Monto coal that should partly offset any HGI concerns. The report then repeated the proposition in the last paragraph of the quote at [30](b) above.

(c) Customers would have some ability to mitigate the impact of low HGI by grinding to a coarser particle size. This would offset the reduced mill throughput rates caused by the low HGI.

(d) By June 2005 there would have been at least 12 months production and sales from Stage 1 operations. Although it was possible that a strong market in 2005 for thermal coal might have reduced the need for a pricing discount, it was still considered prudent to provide a discount to reflect low HGI. The relevant discount was stated and the opinion expressed that the size of the discount was expected to reduce after three years as "market opportunities were developed and customers gained experience in utilising Monto coal".

The defendants' first round of expert reports

[36] The defendants' experts prepared expert reports responding to the plaintiffs' expert evidence. The following 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):

Report	Date Served	Subject of the Report
Ross Hunter	27 April 2018	Rail infrastructure
Peter Smith	27 April 2018	Environmental
Euan Morton	27 April 2018	Rail and port (forecast capacity)
Euan Morton	27 April 2018	Rail and port (project operation)
Ben Hall	4 May 2018	Mine infrastructure and equipment
Lucy Power	4 May 2018	Coal handling and preparation plant and yield
Tim Cavanagh	4 May 2018	Land valuation
Lucy Power	4 May 2018	Financial modelling
Fred Parker	4 May 2018	Mine planning
Gary Harradine	16 May 2018	Power, water, offsite infrastructure
Lucy Power	16 May 2018	Financial modelling (replacing report of 4 May 2018)
Rod Masters	22 May 2018	Rehabilitation and mine closure
Tony Samuel	31 May 2018	Loss and damage
John Barkas	31 May 2018	Coal pricing
Fred Parker	31 May 2018	Mine planning (15 mtpa case) (supplementary)

Report	Date Served	Subject of the Report
Chris Tonkin	31 May 2018	Project finance
Peter Ellis	31 May 2018	Geology
Lucy Power	31 May 2018	Financial modelling (15 mtpa case) (supplementary)
Danie Van Aswegen	31 May 2018	Resource valuation
Rob Yeates	31 May 2018	Mine development
Fred Parker	1 June 2018	Summary report

[37] One of the expert reports filed by the defendants was the expert report of Mr John Barkas dated 31 May 2018. Mr Barkas is the Managing Director of Metalytics, a specialist consultancy that provides high-level independent advisory services and applied microeconomic analysis on commodity market economics and project evaluation in the mining and metals industries. Mr Barkas' report relevantly addressed coal pricing, including by addressing the Hill 2014 and Hill 2017 reports.

[38] Amongst other things, Mr Barkas expressed the following opinions:

(a) The reports contained "misconceived pricing and marketing projections".

(b) The reports incorporated unrealistic and/or inconsistent economic and market assumptions and other inappropriate inputs including:

> […] forecast pricing that does not adequately account for the below-standard energy content and poor grindability of the proposed Monto coal product in comparison with internationally traded thermal coal, nor for the effect on price of a sudden and substantial addition to export supply

(c) Another ground upon which he concluded that the conclusions in the Hill reports were unreasonable was:

> The [Hill] Reports' analysis of the potential markets for Monto coal is also manifestly insufficient to justify a conclusion on the Project's economic viability, as it essentially consists only of unsupported claims that forecasts made in 2005 indicated significant growth. Such claims need to be assessed, in my opinion, by at least comparing the projected rate and timeframe of this growth with the proposed addition of an extra 10 million tonnes per year from Monto beginning in 2007 and any other increases in new export supply already committed from other sources. However, there is no attempt in the [Hill] Reports to identify potential customers and their thermal coal requirements at a time when growth in exports to Australia's largest export destination, Japan, was projected to be meagre, the overall market outlook was uncertain and, according to ABARE's forecast, expected new thermal coal projects already under construction in New South Wales and Queensland in 2005 would potentially be more than sufficient to supply Australia's forecast increase in thermal coal exports in the period to 2010.

Plaintiffs' second round of expert reports

[39] On 30 July 2018, the plaintiffs were ordered to file and serve their expert reports in reply on or before 2 November 2018. This is the second deadline which must be regarded as having applied to expert opinion addressing the subject matters dealt with in Mr Hartley's report.

[40] The following expert reports were delivered by the plaintiffs to the defendants prior to 16 November 2018 and on the dates set out below:

Expert	Date of Delivery of Report	Topic covered
Troy Turner	1 November 2018	Geology
Robert Simpson	2 November 2018	Onsite infrastructure
Ken Hill	6 November 2018	Mining

Expert	Date of Delivery of Report	Topic covered
Peter Hansen	2 November 2018	Environmental approvals
Anthony Bailey	6 November 2018	Land valuation
Chris Clarkson	1 November 2018	Coal Handling and Preparation Plant (**CHPP**) and yield
Jamie Freeman	2 November 2018	Port, rail, power and water
Irfan Visca	7 November 2018	Financial modelling
Shaun Browne	7 November 2018	Coal price forecasts and exchange rates, coal markets and competition
Jeffrey Hall	2 November 2018	Calculation of loss and damage and calculation of NPV of Stage 2 Feasibility Study
Ken Hill	15 November 2018	Mine planning and Schedule

[41] On 16 November 2018 I ordered that:

> 3 By 4 pm on 30 November 2018 the plaintiffs must:
>
> (a) provide to the defendants copies of any further expert reports which they propose to seek leave to rely upon at trial;
>
> (b) file and serve an affidavit exhibiting any amended pleading which they propose to seek leave to file and serve;
>
> (c) file and serve an application:
>
> (i) seeking leave to rely upon any expert reports for which leave is required consequent upon the plaintiffs failure to comply with order 2 of the orders made by Douglas J on 30 July 2018;
>
> (ii) seeking leave to filed and serve any amended pleading; and
>
> (iii) seeking such variations to the timetable currently set by Court order as it contends are requisite, should leave be granted;
>
> (d) file and serve affidavit evidence in support of the applications referred to in Order 3(c) above;
>
> (e) notify the defendants of the parts of their expert reports which the plaintiffs do not propose to rely upon, should leave be granted.

[42] The following further expert reports were delivered by the plaintiffs pursuant to the orders made 16 November 2018:

Expert	Date of Delivery of Report	Topic covered
Irfan Visca	16 November 2018	Financial modelling associated with Stage 2 Feasibility Study and damages
Jamie Freeman	15 November 2018	Port, rail, power and water
Jeffrey Hall	21 November 2018	Stage 2 Feasibility NPV
Jamie Freeman	22 November 2018	Port, rail, power and water
Irfan Visca	30 November 2018	Financial modelling for damages case
Ken Hill	30 November 2018	Modelling of production volumes, quantities and equipment and haulage modelling for the 'likely actual cashflow'
Jeffrey Hall	30 November 2018	Calculation of loss and damage

[43] On 30 November 2018, the plaintiffs brought the application contemplated by paragraph 3(c) of my order of 16 November 2018. Amongst other things, the plaintiffs sought leave to amend their pleadings; and an order that the experts retained by the plaintiffs and defendants who had filed reports in the proceeding respectively, must attend joint conferences during the dates and in respect of the areas of expertise set out in Annexure A to the application for the purpose of preparing joint reports of those experts. No report had ever been filed by Mr Stainlay and the plaintiffs did not propose that he participate in the proposed joint conferences. I will return to the significance of that fact.

[44] The application was argued before me on 13 and 14 December 2018. In my oral judgment of 19 December 2018 – published as *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* [2018] QSC 308 – I made these observations (emphasis added):

> [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.
>
> […]
>
> [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.

[45] As my judgment subsequently recorded, I was persuaded – over the defendants' strenuous objections – to allow the plaintiffs' application.

[46] The indulgence which I thereby granted the plaintiffs was a very significant one, especially given the proximity of the trial date. It permitted the plaintiffs to make substantive changes to the case which they had already flagged to the defendants by their pleadings and by the content of the first round of their expert reports. It permitted the plaintiffs to rely on a total of 17 new expert reports purportedly delivered "in reply", but which in reality provided support for the substantively changed case articulated in the amendments. It permitted that outcome a little less than 3 months out from the commencement of the trial. It resulted in the imposition of a considerable additional burden on the defendants by virtue of the fact that their solicitors, barristers and experts would have to engage with the changed case in a very short time. My reasons recognised that the prejudice thereby caused to the defendants could not be completely ameliorated.

[47] All of the foregoing caused major dislocations to the timetable, the salient features of which were recorded in my orders of 21 December 2018. I make the following observations about those orders.

[48] As I have mentioned, I gave leave to the plaintiffs to amend their pleadings in the form which they sought and I gave the plaintiffs leave to rely on the further expert reports which they had delivered: orders at [1] to [6].

[49] I adjourned the commencement of the trial from 11 March 2019 to 8 April 2019: order at [21].

[50] Allowing the plaintiffs' application meant that the defendants' expert reports could not be finalised by the commencement of the trial. I made orders requiring the defendants' further expert reports to be delivered in two tranches: first by 29 March 2019 and second by 14 May 2019: order at [7]. However, I did not impose any limitation on the matters which could be dealt with by the defendants' reports. (It would hardly have been fair to do so, because it was only after the amendments and the new expert reports that the defendants could really regard the plaintiffs' case to be taken to trial as having been finalised.) Notably, I also made no provision for any plaintiffs' expert reports in yet further "reply". To the contrary, the orders I made put an end to the delivery of further expert reports by the plaintiffs (and, once the two tranches of further reports were delivered, by the defendants), because I also ordered that, except with the leave of the Court, no party would be permitted at the trial to adduce any expert evidence other than in the form of a report which had been filed to that date or filed in accordance with the orders which I had made: order at [19(b)].

[51] Of course one very significant problem for the conduct of the trial was that permitting the plaintiffs to take the course they sought meant it would no longer be possible to conduct expert conclaves or to obtain joint expert reports before the commencement of the trial. Yet the scope of expert opinion evidence in the trial would be enormous: the plaintiffs'

first round of expert reports comprised 5 reports from 3 experts; the defendants then delivered 21 expert reports from 15 experts; the plaintiffs then delivered 18 expert reports "in reply"; and it was then unknown how many reports would be contained within the contemplated further round of defendants' expert reports, but it was obvious that it would be extensive.

[52] It was (and remains) vital for the proper conduct of the trial that the process of conducting expert conclaves and obtaining joint expert reports occur expeditiously and fairly to both sides. I accepted the defendants' proposal that expert conclaves be programmed to occur during the trial between 10 June 2019 and 1 July 2019 with a view to finalising joint expert reports by 8 July 2019: order at [8] to [18]. I required the appointment of a facilitator (subsequently identified as the Honourable Robert McDougall QC, retired judge of the Supreme Court of New South Wales) to chair the expert conclaves and to facilitate the production of joint expert reports.

[53] That timetable allowed the plaintiffs' experts the period between the delivery of the further defendants' expert reports, which was to occur no later than 14 May 2019, and 14 June 2019 to engage with the further defendants' expert reports. As I have mentioned, there was no provision for plaintiffs' expert reports in reply. My contemplation was that if any disputes remained between experts at the end of the conclaves in relation to the reports which had been delivered in accordance with Court orders, then the nature of the disputes and the reasons therefore would have to be expressed in the joint expert reports. I ordered that, except with the leave of the Court, expert opinion evidence would not be received at trial from an expert unless the expert had participated in the directed joint expert conference process and in the subsequent joint expert report: order at [20].

[54] The constraints mentioned in [50] and [53] above constitute the final court-ordered constraints which must be regarded as having applied to expert opinion addressing the subject matters dealt with in Mr Hartley's report.

[55] In order to ameliorate to some extent the burden imposed on the defendants I also ordered:

> 22. 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 reports filed in accordance with paragraph 7 above.
>
> 23. 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.
>
> 24. Leave is granted to the defendants to
>
> (a) recall any of the plaintiffs' lay witnesses for cross examination arising from any matter:
>
> (i) contained in any expert report filed by the defendants which report had not been filed as at the date in paragraph 22;
>
> (ii) or arising from any joint report filed after a joint conference; or
>
> (b) recall any of the defendants' lay witnesses to lead further evidence in chief arising from any matter:
>
> (i) contained in any expert report filed by the defendants which report had not been filed as at the date in paragraph 22;
>
> (ii) or arising from any joint report filed after a joint conference

<u>The shape of the plaintiffs' case as to coal marketing consequent upon the December 2018 application</u>

[56] On 21 December 2018 the plaintiffs filed their amended statement of claim pursuant to the leave which I gave them. Paragraph 23 of the statement of claim was amended in the following manner:

> 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;

[…]

~~(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 Marketing Reviews (executive summaries of which are referred to in the Monto Coal Project Stage 1 Feasibility Study – Final Report dated January 2002);~~

[57] Paragraph 3 of my order of 21 December 2018 required the plaintiffs to provide particulars in response to a request which the defendants made by letter dated 20 December 2018. On 18 January 2019, the plaintiffs provided further and better particulars of paragraph 23(c)(c) as follows:

2. As to paragraph 23(c)(c) of the FASOC, "market acceptance" of the coal means that the coal would have been successfully marketed to customers by way of export sales. There is no allegation of any particular market. The customers would have comprised primarily power generation companies in Asia, including Japan, South Korea, Malaysia, Thailand, Philippines and Taiwan with potential for sales to power generation companies in Europe, China and India.

3. Coal produced from Stage 1 would have obtained market acceptance by about May 2005.

[58] The result was that so far as the pleaded case was concerned:

(a) It was still relevant for the plaintiffs' causation and measure of damages case to demonstrate –

(i) the quantum of product coal likely to be produced during Stage 1 and Stage 2 if those stages were developed as the plaintiffs allege they should have been; and

(ii) the likelihood that all or any part of the quantum of product coal produced could be successfully marketed and sold at relevant times.

(b) In that regard, the pleading revealed that the plaintiffs still intended to prove that Monto coal produced from Stage 1 would have obtained market acceptance by about May 2005, in that the coal would have been successfully marketed to customers by way of export sales to the customers mentioned in the particulars.

(c) Amongst other things, one of the issues which the plaintiffs' case would still have to deal with was the extent to which the physical characteristics of the Monto coal (including in particular its relatively low HGI) would have impacted on what the plaintiffs sought to prove.

[59] The plaintiffs' expert opinion evidence which had been adduced touching upon coal marketing was contained in –

(a) the Hill 2014 and Hill 2017 reports to which I have earlier referred; and

(b) the report of Mr Browne dated 7 November 2018, for which the plaintiffs obtained leave to rely upon at trial on 21 December 2018.

[60] Amongst other things:

(a) Mr Browne's report engaged with Mr Barkas's criticism that Hill 2014 and Hill 2017 reports did not address the issue of marketing large volumes of low HGI coal.

(b) Mr Browne opined, amongst other things, that he disagreed with Mr Barkas' criticism of Mr Hill, including in particular the criticisms that I recorded at [38] above.

(c) Mr Browne's report stated:

> [58] Mr Barkas does not take into account that the marketing campaign that would have occurred prior to Stage 1, and the trial shipments during Stage 1 production would have all contributed to the book build[10] that would have supported the proposed production profile of the mine." […] [Footnote 10 provided "A book build is a process where by a seller compiles a list of off taking parties and allocates these tonnages against the scheduled production of the mine."]
>
> […]
>
> [67] […] Mr Barkas misunderstands the reasons for New Acland and Wilkie Creek producing small tonnages in comparison to the Monto planned quantity, and also fails to mention other exporting mines producing lower HGI coal from the port of Brisbane, namely Jeebropilly and New Oakleigh. […] The low HGI coals from these mines had gained wide acceptance in the market by 2005 […]
>
> [68] From my experience, there was interest from the end-users of these coals for additional volumes above their contract levels […] The range of low HGI coals entering the market was quite broad, with these coals typically in the range of 35-50, with some even falling outside this range. I am aware that in 2005 Indonesian producers had not had any issues marketing these coals. I am also aware that these Indonesian coals were very similar to Surat style coals, as they too had low fuel ratio, high volatility and good burn out characteristics, that allowed coarser grind to offset the higher HGI and maintain mill throughput.
>
> [69] Because other mines had already been working on market acceptance for low HGI coals in Asia, the Monto Project would have been marketing to end users who were already familiar with this style of coal. By demonstrating similar performance through both pulverising mills and boiler performance, the establishment of this coal would have been less difficult than the effort required by the original producers of this style of coal in the late 1990s, who first established market acceptance and suitability of this coal in the market. As a result, in my opinion, discounting for this coal would have been limited to the period of the initial trial cargoes to end users, to establish performance equivalence to similar coals in the market and suitability to end users."
>
> [70] Mr Barkas' concern that there was a limited market for this type of coal and the doubts he expresses about future coal burn in Japan are not matter I agree with. […]

[61] The following observations may be made as to the shape of the plaintiffs' case as to coal marketing consequent upon the December 2018 application.

[62] The plaintiffs had obviously made a forensic decision not to call Mr Stainlay. No report had been filed by him and his name was not mentioned in Annexure A to the plaintiffs' application of 30 November 2018, which explained the plaintiffs' then-proposed modification to the expert conclave timetable and which made no provision for Mr Stainlay to attend any of the conclaves. Instead the plaintiffs' application proposed that the material in the Hill 2014 and Hill 2017 reports; Mr Barkas' report and Mr Browne's report would be considered in an expert conclave attended by Mr Browne for the plaintiffs and Mr Barkas for the defendants.

[63] When asked by me, Senior Counsel for the plaintiffs conceded[3] that I should infer that the plaintiffs must, as at the time of the plaintiffs' December 2018 application, have decided not to call Mr Stainlay in support of those parts of the two Hill reports that Mr Stainlay wrote and that they were intending to rely on Mr Browne and Mr Hill himself in support of that material. In this regard, I have already recorded that Mr Hill had expressed his reports in terms which suggested he had the expertise to adopt and support the work of the other experts he had commissioned, which would include Mr Stainlay.

[64] One curiosity was that in argument before me on the present application, Senior Counsel for the plaintiffs also seemed to suggest that although Mr Hill had made the statements about his expertise and his support for the opinions of the specialists including Mr Stainlay, he might not actually have the expertise to do so.[4] Such an argument suited the plaintiffs' argument that they would suffer prejudice if the application was refused. I make the following observations:

(a) First, both Mr Hill's reports were read on the present application by the plaintiffs and they contain the statements that he could adopt and support the work of the other experts, to which I have referred.

(b) Second, Mr Boys', solicitor for the plaintiffs, evidence before me on the present application – which, as will appear, did make some comments about some degree of gap of expertise of Mr Browne with a view to explaining the need for an additional report – did not address the expertise of Mr Hill or suggest that the plaintiffs had resiled from their intention to rely on the two reports by Mr Hill[5] (including the parts written by Mr Stainlay and adopted by Mr Hill).

(c) Third, perhaps Mr Hill does not have sufficient expertise to express opinions adopting the work of Mr Stainlay. But perhaps he does, as he asserts. The plaintiffs cannot have it both ways. Whilst the question of the admissibility of the relevant parts of Mr Hill's reports is a question for another day, the continued intention of the plaintiffs concerning reliance on the Hill 2014 and Hill 2017 reports and the evidence before me on this application are hardly compelling reasons to conclude that it is appropriate to dispose of the present application on the basis that Mr Hill lacks the expertise he asserts. I will return to that issue.

[65] Before me, Mr Boys deposed that after receipt of the defendants' expert report from Mr Barkas dated 31 May 2018:

(a) he considered Mr Barkas's report and considered that Mr Barkas "lacked credibility in the area of the marketability of coal";

(b) the plaintiffs' legal team decided that a response report would be required from an expert in coal markets and coal price forecasting and therefore engaged Mr Browne rather than Mr Stainlay to provide the report delivered on 8 November 2018; and

(c) it was considered "unnecessary to obtain an individual response report from Mr Stainlay on coal quality and coal marketing at that time".

[66] I interpolate that it is interesting that Mr Boys should express the proposition that the plaintiffs' legal team's judgment was qualified by the phrase "at that time". If the plaintiffs' legal team thought that they could reserve to the plaintiffs the right to call

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[3] Transcript, p 37-2 line 43.

[4] Transcript p 36-142 line 15. The submission was that Mr Hill's report was not admissible without calling all of the sub-experts.

[5] There are in fact some parts of the Hill reports which are not relied on (and have been struck through), consequent upon the change to the plaintiffs' case that I permitted them to make in December 2018, but it is not presently relevant to remark upon them. The parts which I have mentioned in this judgment are not struck through.

further expert evidence at some later juncture if and when it suited them, this was an error. It should have been obvious to them that the course they were embarked upon which led up to the application of 30 November 2018 would, if it were permitted to occur, inevitably require them to commit finally to the case and the expert opinion evidence which they wished to take to trial. And, as I have already recorded, my orders of 21 December 2018 had that effect.

[67] I accept the defendants' submission that for the purposes of the present application I should find that as at 21 December 2018 it was plain that:

(a) the plaintiffs were aware of the issue of marketing large quantities of low HGI coal;

(b) the plaintiffs had elected not to serve any individual expert report of Mr Stainlay on this issue, but instead elected to continue to rely upon the parts of the Hill 2014 and Hill 2017 reports that addressed the topic of low HGI coal; and

(c) the plaintiffs had elected to have Mr Browne address the risks that low HGI coal posed to the marketing of Monto coal and not to have any other better qualified person address that issue.

The defendants' second round of expert reports

[68] Between 29 March 2019 and 27 May 2019, the defendants delivered 24 expert reports as follows:

Report	Date Delivered	Subject of the Report
Lucy Power	29 March 2019	CHPP
Rod Masters	29 March 2019	Rehabilitation and mine closure
Stephen Gray	8 April 2019	Statistical analysis of calculation of loss and damage by Hall and Browne
Peter Ellis	8 April 2019	Geology
Ross Hunter	8 April 2019	Rail infrastructure
Ashley Conroy	9 April 2019	Coal markets
Ben Hall	12 April 2019	Mine infrastructure and equipment
Tim Cavanagh	12 April 2019	Land valuation
Gary Harradine	15 April 2019	Power, water, offsite infrastructure
Euan Morton	Unfiled	Rail and port
Stephen Gye	18 April 2019	Coal price and exchange rate
John Barkas	23 April 2019	Coal pricing
Fred Parker	1 May 2019	Mine planning
Ross Crump	2 May 2019	Coal markets
Danie Van Aswegen	14 May 2019	Resource valuation
Peter Smith	14 May 2019	Environmental
Rob Yeates	14 May 2019	Mine development
Lucy Power	15 May 2019	Financial modelling

Report	Date Delivered	Subject of the Report
Tony Samuel	15 May 2019	Loss and damage
Chris Tonkin	15 May 2019	Project finance
Fred Parker	16 May 2019	Mine planning (supplementary)
Lucy Power	Delivered 22 May 2019	Financial modelling (supplementary)
Fred Parker	24 May 2019	Mine planning (supplementary)
Fred Parker	28 May 2019	Mine planning (supplementary)

[69] For present purposes the reports of Mr Conroy and Mr Crump are relevant. They addressed various issues concerning the export market for low HGI thermal coal and also responded to Mr Browne's report.

[70] Mr Conroy is a qualified mechanical engineer who has specialised in coal fired power plants, coal quality and utilisation and has also been employed for many years in technical marketing roles for sales to Japan, Korea, Taiwan, Malaysia, Philippines and Thailand. The defendants retained Mr Conroy to prepare an expert report addressing the low HGI of Monto coal and the effect of low HGI on usage in power plants. The report is lengthy and contains a great amount of technical detail. But amongst other things:

(a) The report set out an overview of how coal-fired power stations worked in 2005;

(b) The report explained HGI, what it represented and its significance to coal-fired power stations and their design;

(c) The report expressed the view that Asian coal customers were sensitive to HGI values less than 40. It explained that view was based on their concern that their power stations were not designed for low HGI coals, and the use of these coals might exceed the available milling capacity of the power stations and cause a resultant reduction in the generating output of the power stations.

(d) It addressed, by reference to the specification of Monto coal which the plaintiffs' experts relied on, the question of which coal properties customers for thermal coal placed most reliance upon. It expressed the view that a customers' highest priority was to assess the risk that the use of a coal would restrict the operation of their power station in any way. It concluded that having regard to the Monto coal specification the only property which would have caused concern to potential customers in 2005 would have been the low HGI value.

(e) It explained the impact of low HGI on the pulveriser capacity of coal-fired power plants and how it would tend towards reducing the output of the plant, as compared to its design capacity.

(f) It sought to identify the design coal specifications relevant to HGI of the customers identified in the plaintiffs' case and expressed a view as to whether such customers would have considered that Monto coal met their design coal specifications and pulveriser capacity requirements. Based on data which the report identified, it expressed the view that the customers would not have considered that Monto coal met their design coal specifications. The extent to which they considered whether Monto coal met their pulveriser capacity requirements would have depended on the installed pulveriser capacity at the individual power stations and the operating margins which the operators of those stations stipulated.

(g) The report then more closely examined the question of whether there were practical limitations associated with milling low HGI coal to a coarser grind (which was the possibility suggested in the Hill 2014 and Hill 2017 reports and supported in the report of Mr Browne), and also examined what the approach of customers would have been to that question.

(h) The report examined the implications for marketing to customers of the possibility of blending high HGI coals with lower HGI coal.

(i) The report opined that there was no feature of Monto coal which was sufficiently attractive to customers to make up for its low HGI.

(j) The report responded to specific parts of Mr Browne's report.

[71] Mr Crump has been a thermal coal marketer for approximately 40 years and had been tasked with selling Wilkie Creek thermal coal (which had a HGI similar to Monto coal) to export markets including Japan, Korea and Taiwan in the period 2003 to 2005. The defendants retained Mr Crump to prepare an expert report on thermal coal marketing and in particular, marketing of low HGI coal of a similar specification to the assumed Monto coal specification prior to 2005. Amongst other things, Mr Crump's report:

(a) stated at 7.11:

> Based upon my experience and knowledge gained over 25 years up until 2005, in my opinion the major power utilities in Japan, Korea and Taiwan:
>
> (a) preferred:
>
> (i) large volume supply contracts which provided long term supply security;
>
> (ii) interchangeable supply source (which had the benefit of providing competition) and supply security;
>
> (iii) loading ports capable of handling capesize (+100,000 tonne) and panamax size vessels (+55,000) to minimize shipping costs;
>
> (iv) supplied by multiples mines producing similar base load energy quality coal of 6700kcal/kg, notably with HGI greater than 45.
>
> (b) there was limited demand for, and significant resistance to, the purchase of low HGI coal (in the sense of coal with an HGI of less than 45), by Asian power utilities;
>
> (c) by reason of that fact, any supplier of low HGI coal would encounter very significant challenges seeking to market low HGI coal into Japan specifically, and Asia generally.

(b) stated at 8.8, that it was "highly improbable that Monto coal would have received thermal coal market acceptance by May 2005, other than to the limited existing consumers of EPDC (demand <1Mt), JJPC (demand <1Mt) and Tohoku EPC (<1Mt)".

(c) stated at 8.11 that it was inconceivable to assume sales of Monto coal of the magnitude of up to 10Mtpa.

(d) responded to specific parts of Mr Browne's report.

<u>The position at which the trial had reached by the time of the present application by the plaintiffs</u>

[72] As I have mentioned, between 29 March 2019 and 27 May 2019, the defendants delivered 24 expert reports. In the meantime, the trial commenced on the scheduled date of 8 April 2019.

[73] By 30 May 2019 the plaintiffs' lay witness evidence had concluded and the plaintiffs had, with some limited exceptions, concluded the tender of the documentary evidence on which they relied. The defendants were part of the way through their lay witness evidence.

[74] In an affidavit filed 30 May 2019, Mr Boys flagged to the Court the plaintiffs' intention to seek leave to be permitted to adduce a new expert report to respond to certain matters raised in the expert reports of Messrs Conroy and Crump.[6] He proposed that the application would be made when the report was obtained. The report of Mr Hartley was obtained on 10 June 2019 and the application for leave was filed on that date and listed for argument on the evening of 17 June 2019.

[75] By 10 June 2019, some minor changes had been made to the dates for the expert conclaves. The arrangements in relation to the expert conclaves were:

(a) A preliminary conference to be attended by the facilitator and all experts who had delivered reports was scheduled for 14 June 2019.

(b) Seventeen conclaves were to take place between 14 June 2019 and 8 July 2019.

(c) The conclaves were to be organised by reference to the following subject matters: geology; offsite water supply; offsite power; rail; port; onsite mine infrastructure; other offsite infrastructure; equipment and labour operating costs; CHPP design and product yield; mining lease area land acquisition; mining lease area environmental approvals; mine rehabilitation and mine closure; mine planning; coal markets; coal price and exchange rates; financial modelling, and loss and damage.

(d) All but two joint expert reports were to be finalised by 15 July 2019, with the last 2 being finalised a week later. Those dates were significant because 15 July 2019 was the commencement for a 3 week adjournment in the trial, after the conclusion of the defendants' lay witnesses. During that period, the contemplation was that the lawyers for each side and I would digest with the contents of the joint expert reports, with a view to the expert opinion evidence commencing on 5 August 2019.

[76] Mr Hartley is a coal marketer. He has been in the industry of coal marketing since 1985 and has experience as a mine geologist and in marketing thermal coal. Mr Hartley's report addresses matters concerning coal marketing, said to be in reply to matters addressed by two of the defendants' experts, namely Mr Conroy and Mr Crump. Amongst other things, Mr Hartley's report:

(a) addressed discrete paragraphs of the Conroy Report (paragraphs 8.10, 11.8 and 11.12) and of the Crump Report (which paragraphs fall within sections 7, 8 and 10).

(b) addressed particular issues concerning the marketability of the Monto coal, including:

(i) whether the Monto thermal coal would have received market acceptance at all (for example, at paragraphs 1.2, 1.5, 1.6, 2.2, 2.3, 2.5, 2.10);

(ii) if so, whether that would occurred by 2005 (at paragraph 2.6);

(iii) the extent of that market acceptance (at paragraph 2.7);

(iv) the nature of any discount on price which would have been necessary in order to sell the Monto coal (at paragraph 2.4).

(c) contained other material which, during the course of argument before me, the plaintiffs determined that they would not press, if leave were otherwise given, namely paragraphs 2.11 to 2.14 which included evidence as to the likely forecast prices of thermal coal in the period from 2003 to 2005, and paragraph 4.0 which raised new examples of low HGI coal deposits as being relevant to the marketability of Monto coal.

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[6] Mr Boys first advised the defendants' solicitors of this intention in a letter dated 24 May 2019.

[77] If the plaintiffs were permitted to rely on Mr Hartley's evidence, that would affect at least two of the conclaves, namely:

(a) the coal markets conclave, scheduled to be held between 14 June 2019 and 5 July 2019, with a view to having a joint expert report by 15 July 2019, and to be attended by Mr Browne for the plaintiffs; and Messrs Conroy and Crump for the defendants; and

(b) the coal price and exchange rate conclave scheduled to be held between 14 June 2019 and 5 July 2019, with a view to having a joint expert report by 15 July 2019, and to be attended by Messrs Browne and Mr Hall for the plaintiffs; and Messrs Barkas, Gye, Gray, Crump and Samuel for the defendants.

[78] An added complication was that Mr Hartley was only available to attend the joint expert conclaves between 14 June 2019 and 2 July 2019 but would then be overseas during the period 3 July 2019 until 12 August 2019. Any involvement post 2 July 2019 by him would have to involve electronic and not in-person participation by him. He was willing to make himself available to do that.

Analysis of the relevant considerations

The point the litigation has reached relative to the trial

[79] The plaintiffs' application was made almost six months after the date when the plaintiffs had already been given a very significant indulgence to permit them to reshape their case according to newly obtained expert evidence. The application was made on day 31 of the trial itself. Indeed the application was made almost literally on the eve of the commencement of the already disrupted schedule for expert conclaves and joint expert reports. On any view the application is very late.

[80] The foregoing considerations are adverse to the plaintiffs' application.

The extent of any failure to comply with the directed timetable

[81] The part of the plaintiffs' case of which Mr Hartley's report is said to be probative – namely whether Monto coal could have been successfully marketed as alleged by the plaintiffs – has been part of their case since at least 2014. That much was obvious from the form of the Hill 2014 report. Certainly it was present in the plaintiffs' statement of claim as at March 2017, as is apparent from the part of the then statement of claim which I have quoted at [17] above.

[82] On 1 March 2017 the plaintiffs were ordered to file and serve any expert reports which they intended to rely upon at trial by 25 August 2017. The plaintiffs should have had all of their expert opinion evidence on which they intended to rely at trial ready then. But they did not.

[83] On 30 July 2018, the plaintiffs were ordered to file and serve their expert reports in reply on or before 2 November 2018. They did not comply with that direction either. Instead – as the defendants had long feared – the plaintiffs filed reports which could not be regarded merely as reply reports, but were reports which supported a substantially altered case.

[84] In December 2018, I dealt with the plaintiffs' application that the substantially altered case should be permitted to run in the trial which had been scheduled to commence only a few months later. I gave the plaintiffs leave, but, for reasons I have explained, the defendants were entitled to think that the plaintiffs, by that time at least, were finally committed to the case and the expert opinion evidence which they wished to take to trial, and my orders of 21 December 2018 had that effect. The imposition of such restrictions formed part of the way in which I sought to address fairly the procedure which should follow, consequent upon the plaintiffs obtaining the leave they sought.

[85] The extent of the plaintiffs' failure to comply with the directed timetable is considerable.

[86] The foregoing considerations are adverse to the plaintiffs' application.

The prejudice which would be caused to the defendants if leave is granted, and its ability to be ameliorated

[87] The first aspect of prejudice to the defendants is the burden which would be imposed on the defendants' expert witnesses in the context of their already-scheduled involvement in the expert conclaves. They would be expected to engage with a new expert report mere days before their involvement in what is already a complicated and intellectually demanding task. At least one of them has other reporting commitments. I agree with the defendants' solicitors' Ms Morrison that this would be an unfair burden to impose on them. It would certainly be prejudicial to the defendants. And it would properly be regarded as all the more unfair in light of the burden under which the defendants were already labouring consequent upon my orders of 21 December 2018.

[88] The second aspect of prejudice to the defendants would be the denial to the defendants of the ability to conduct the forensic steps which parties in their position would usually be in a position to conduct, before asking their own expert witnesses to respond to their opponents' expert report. I refer to the forensic investigation of the various sources relied on in the report and a consideration whether their use in the report may be supported.[7] Part of such investigations by parties in the defendants' position would also usually involve conferring with their own expert witnesses about the new report. None of this could occur in the context of the long scheduled expert conclaves. And even if it could, it would necessarily be done in an unfairly tight timetable. And again, this would properly be regarded as all the more unfair to the defendants in light of the burden under which they were already labouring consequent upon my orders of 21 December 2018.

[89] The third aspect of the prejudice lies in the fact that some aspects of the factual matters either asserted by Mr Hartley or assumed by him could have been dealt with by some of the defendants' lay witnesses who have already given their evidence. It is an incomplete answer to this problem to say that the defendants can recall the witnesses. Forensic judgments have already been made as to the manner by which the evidence of those witnesses was adduced, and as to the assumptions which were put to them. Those judgments cannot be unmade. In any event, it is not usually desirable for a party to recall a witness and to expose the witness to further cross-examination. The leave which I granted to the defendants in my orders of 21 December 2018 (see [55] above) was intended to give them a right, which at their option they might exercise, to ameliorate prejudice already caused. It was not intended to authorise the plaintiffs to impose that course on the defendants.

[90] The prejudice I have identified under this heading could not be ameliorated unless I was prepared to adjourn some or all of the expert conclaves to a date outside the present timetable and to accept the disruption and inevitable prolongation to the trial timetable which that would entail. I did not understand the plaintiffs' application to suggest that course was appropriate. I would have been most unwilling to contemplate that course if it had been suggested. Because it was not suggested, it is not necessary to examine the impact on other litigants of prolongation of this already very long trial.

[91] The foregoing considerations are adverse to the plaintiffs' application.

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[7] Ms Morrison deposed to the use of subpoenas in relation to part of Mr Hartley's report. That part is no longer pressed by the defendants, but the more general proposition I have identified is nevertheless relevant.

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

[92] In his affidavit of 30 May 2010, Mr Boys deposed to the following (emphasis added):

> 14. Following receipt of the Conroy and Crump reports, I conferred with Mr Stainlay and Mr Browne in relation to those reports.
>
> 15. I am informed by Mr Stainlay, and believe, that:
>
> (a) He suffers from ill-health due to ongoing treatment for bladder cancer, which requires him to take daily medication and attend treatment in hospital every few weeks;
>
> (b) Because of this, he does not wish to be engaged to provide any further expert reports, attend joint expert meetings or appear at the trial of this proceeding;
>
> (c) He wishes to restrict his involvement in the proceeding to providing assistance in relation to the matters set out in the sections of the [Hill] 2014 and [Hill] 2017 reports written by him, such as providing information about the source of data and documents used in those reports.
>
> 16. **As such, the plaintiffs are unable to engage Mr Stainlay to provide assistance in relation to the matters raised in the Conroy and Crump reports.**
>
> 17. **As a result of my discussions with Mr Browne, I formed the view that Mr Browne does not have the relevant expertise to deal with all of the coal technology and coal marketing matters raised in the Conroy and Crump reports**.
>
> 18. **Accordingly, due to the matters identified above, the plaintiffs wish to have the opportunity to adduce expert evidence from a coal marketing expert in relation to the matters raised in the Conroy and Crump reports regarding coal technology, coal quality and coal marketing which are unable to be addressed by Mr Stainlay or Mr Browne.**
>
> 19. Since receipt of the Crump and Conroy reports, the plaintiffs have taken urgent steps to identify potential experts with the relevant expertise and availability to consider the Conroy and Crump reports, provide a report in response and participate in the joint reporting process. The plaintiffs have been able to identify and engage Mr Chris Hartley, who is an expert in coal technology and marketing, to provide a report in relation to the Crump and Conroy reports.
>
> 20. I am informed by Mr Hartley, and I believe, the following matters:
>
> (a) Mr Hartley has reviewed and considered the Crump and Conroy reports and is in the process of preparing a report in relation to the matters raised in those reports.
>
> […]
>
> (c) Mr Hartley is working as quickly as he can to prepare the report referred to above. Mr Hartley anticipates, based on his progress to date, that he will be able to deliver a report by Friday, 7J une 2019;
>
> (d) Mr Hartley is available to attend the joint expert meetings between 14 June 2019 and 2 July 2019, but will then be overseas during the period 3Ju1y 2019 until 12 August 2019. However, Mr Hartley believes that he will be able to participate in the joint expert process and prepare a joint report by 2 July 2019.

[93] In his affidavit of 16 June 2019, Mr Boys deposed at paragraph 4 to the following (emphasis added):

> (a) The Conroy Report was delivered to the plaintiffs' solicitors on 9 April 2019. Shortly after receipt of the Conroy Report, I conferred with Mr Stainlay about it. As set out in paragraph 15 of my 30 May 2019 affidavit, Mr Stainlay indicated that he did not wish to be engaged to provide any further reports, be involved in the joint expert meetings or give evidence at the trial. I subsequently conferred with Mr Stainlay again when the Crump Report was delivered on 2 May 2019, but Mr Stainlay's position (that he did not wish to be engaged) had not changed;
>
> (b) Had Mr Stainlay indicated to me that he was willing to be further engaged following delivery of the Conroy and Crump Reports, I would have sought instructions from the plaintiffs to engage Mr Stainlay and would have nominated him to attend the joint expert conferences and prepare a joint report in relation to the topics on coal marketing, and to coal technology and coal pricing (limited to price adjustments for coal quality), rather than seek a new expert. I would have also obtained instructions from the plaintiffs for Mr Stainlay to give evidence at the trial;

(c) Because Mr Stainlay said to me that he was unable to assist with Mr Conroy's report, in about mid-April 2019 I obtained further instructions and caused urgent inquiries to be made in relation to a potential independent coal marketing expert who would be available to be engaged by the plaintiffs in this proceeding;

(d) Based on inquiries that were made, I identified that there are a relatively limited number of people who have the relevant expertise to be able to provide independent expert opinion in relation to coal marketing (in particular);

(e) It was not until late April 2019 that I was able to identify Mr Chris Hartley as being a person who has the relevant expertise, experience and independence to be able to act in the matter;

(f) In the period from 30 April 2019 to 24 May 2019, Mr Hartley undertook work to review the Conroy and Crump Reports and the related material which was briefed to him to ascertain whether he would be able to provide a report;

[…]

(i) Based on the inquiries that were made and the timeline set out above, I do not consider that Mr Hartley's report was able to be provided any earlier than 10 June 2019.

[94] The plaintiffs submissions advanced the proposition that:

> At the heart of the leave application is the proposition that the plaintiffs' former marketing expert, Mr Ross Stainlay, could have attended the expert conclave process and responded to these sections of Conroy and Crump reports as part of the joint report.

[95] In my view the plaintiffs' explanation does not withstand scrutiny.

[96] First, it assumes that, but for Mr Stainlay's illness, the plaintiffs would have been able to require Mr Stainlay to attend the conclaves and respond to the evidence of Messrs Conroay and Crump. But that is a false assumption. As I have explained, by December 2018 the plaintiffs had made a forensic decision not to call Mr Stainlay and, so far as coal markets were concerned had chosen instead to rely on Mr Browne's report and whatever ability they have to prove the material in the Hill 2014 and Hill 2017 reports without calling Mr Stainlay. The defendants were entitled to think that the plaintiffs, by that time at least, were finally committed to the case and the expert opinion evidence which they wished to take to trial, and my orders of 21 December 2018 had that effect. As I have said, the imposition of those restrictions formed part of the way in which I sought to address fairly the procedure which should follow, consequent upon the plaintiffs obtaining the leave they sought. They would have applied just as much to a new report from Mr Stainlay as to a new report from Mr Hartley.

[97] Second, it posits that Mr Hartley's report could not have been obtained earlier than it was by reference to the fact that the Conroy and Crump reports were obtained for the first time in April and May 2019. But that cannot be accepted either. I observe:

(a) The plaintiffs bear the onus of proof on causation and measure of damage. That the discharge of that onus would require them to adduce evidence addressing the likelihood that Monto coal could have been marketed successfully in such quantities and at such prices as would justify their claim should have been obvious to them from at least March 2017.

(b) The plaintiffs made forensic decisions as to the manner by which they would discharge their onus in the first round of expert opinion, namely by the Hill 2014 and Hill 2017 reports, in the form of paragraphs written by Mr Stainlay, but adopted by Mr Hill, who contended that it was within his expertise to support those opinions.

(c) By December 2018, having received some countervailing evidence from the defendants' Mr Barkas, the plaintiffs had delivered the report of Mr Browne and had made the forensic decision to support the coal marketing aspect of their case through the evidence of Mr Hill and Mr Browne. They had made the forensic decision not to

seek to call Mr Stainlay. Their case was confined by reference to Mr Browne's report and their ability to prove the material in the Hill 2014 and Hill 2017 reports without calling Mr Stainlay.

(d) Now, having received further countervailing evidence from the defendants' Messrs Conroy and Crump, they want to adduce a new expert report.

(e) The part of the plaintiffs' case of which Mr Hartley's report is said to be probative has been part of the plaintiffs' case for years. Insofar as Mr Hartley says anything which is not already in the Hill 2014 and Hill 2017 reports, there is no demonstrated reason why the plaintiffs could not have already adduced such matters as part of their case.

(f) The plaintiffs say that Mr Browne cannot respond to all of the things which Conroy and Crump say, but the scope of the gap is unclear. Nothing at all is said about Mr Hill, other than the assertion – which is contrary to what he said in his own expert report – that it is not within his expertise to opine on such matters.

(g) In the present context, I do not regard it to be an adequate explanation or justification for the plaintiffs' application that evidence called by their opponent causes their lawyers to change their minds as to the adequacy of the forensic choices they made as to the manner by which the plaintiffs would seek to discharge their onus.

[98] Finally, there is an underlying theme in the plaintiffs' argument that the problem was caused by the fact that they received the Conroy and Crump reports late and they contained material not expressed in the defendants' first round of expert reports. There are a number of reasons why that is unpersuasive. First, as I said in the previous paragraph, it is the plaintiffs' case. It is their task is to organise the evidence which will, if accepted, discharge their onus of proof. It is not for the defendants to point out weaknesses in the case so that the plaintiffs may have an opportunity to correct them. Second, the responsibility for the disrupted and abbreviated timetable before trial was that of the plaintiffs. Third, as I have explained, my orders of 21 December 2019 did not impose any constraint on the nature of the reports which the defendants were permitted to deliver within the timetable I set.

[99] The foregoing considerations are adverse to the plaintiffs' application.

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

[100] It will be apparent from remarks I have already made that in my view the plaintiffs have already had a fair opportunity to present their real case. Indeed, they have already been granted one major indulgence in that area. This consideration is adverse to the plaintiffs' application.

[101] Nevertheless, the exercise of the present discretion is not about punishing parties for past errors, it is about exercising the discretion judicially by reference to all considerations. Accordingly it remains necessary to assess the degree of prejudice which the plaintiffs might suffer if leave is refused, and to balance that prejudice against the other relevant considerations.

[102] Refusing the application will have the result that the plaintiffs will be left in the position they were in December 2018 so far as the proof of the coal marketing part of the case. The extent to which that will prejudice them is a little difficult to assess reliably.

[103] Mr Boys deposes that Mr Browne does not have the relevant expertise to deal with all of the coal technology and coal marketing matters raised in the Conroy and Crump reports. But that means that Mr Browne does have the relevant expertise to deal with some of those

matters. How much of the matters cannot be dealt with by Mr Browne is not demonstrated by the evidence. The result is that on the evidence there is an undefined gap in the ability of the plaintiffs to respond to matters raised by the Conroy and Crump reports and to address them in the relevant expert conclaves.

[104] However the evidence suggests that the gap could be addressed by someone with the expertise of Mr Stainlay. The plaintiffs suggest that because of Mr Stainlay's illness-induced desire not to give evidence, the gap can only be met by being permitted to rely on Mr Hartley's report. But Mr Boys' evidence did not address the position of Mr Hill who had asserted that he had the expertise to express an opinion agreeing with the parts of his two reports that Mr Stainlay wrote. If Mr Hill truly had that expertise, why could he not participate in the conclave? That is unexplained by the evidence. As I have explained, the evidence on the present application does not contain compelling reasons to conclude that it is appropriate to dispose of the present application on the basis that Mr Hill lacks the expertise he asserts.

[105] It is notable that the plaintiffs do not submit that if Mr Hartley's report is unavailable to them, there will be no evidence from which I could conclude that they had proved the requisite likelihood that Monto coal could have been marketed successfully in such quantities and at such prices as would justify their claims. As I have said, they continue to rely on the relevant parts of the Hill 2014 and Hill 2017 reports; on Mr Browne's evidence and in submissions before me Senior Counsel for the plaintiffs suggested that there were other ways in the evidence of proving the matters set out in Hill 2014 and Hill 2017 than just by relying on Mr Stainlay.[8]

[106] Doing the best I can, I think that I should conclude that the plaintiffs will suffer some prejudice by being denied the opportunity to rely on Mr Hartley's report. The prejudice is that they will be denied the opportunity to supplement their case by reference to expert opinion evidence from someone more appropriately qualified than the witnesses they had committed to call. Moreover, If I assume in their favour that Mr Hill lacks the expertise he asserts, there will be some undefined gap in their ability to respond to the Conroy and Crump in the expert conclaves, and that gap would not be caused by their own choice not to have Mr Hill attend the conclaves on coal marketing.[9] If the evidence of Conroy and Crump is admitted in the trial, it will be placed before me with the benefit of commentary by the plaintiffs' Mr Browne (to the extent that at the conclave he disagrees with it), but there will be some undefined part of their evidence in respect of which I will be deprived the advantage of commentary by an expert called by the plaintiffs.

[107] The existence of this prejudice is a factor which does support the plaintiffs' application. It could only be ameliorated by granting the application.[10]

Conclusion

[108] My overriding obligation is to ensure that the trial is fair.

[109] In balancing the considerations that I have identified, I am driven to the conclusion that the plaintiffs have been given a fair opportunity to present their case, and, in the particular factual context which exists, it would be decidedly unfair to impose on the defendants the

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[8] Transcript, pp 36-143 lines 44 – 46 and 36-147 line 23.

[9] Of course the converse is also true. If Hill has the expertise he asserts, then any gap would be caused by the plaintiffs' choice not to have Hill attend the coal markets conclave. The plaintiffs could hardly rely on that. By making the assumption I express, I am giving the plaintiffs the benefit of any doubt on the question of Hill's expertise.

[10] An alternative would be to adjourn some or all of the expert conclaves to a date outside the present timetable and to accept the disruption and inevitable prolongation to the trial timetable which that would entail. But that course was not suggested and would have been most unattractive: see [90] above.

prejudice which I have identified, for the sake of avoiding the prejudice to the plaintiffs which I have identified.

[110] The onus was on the plaintiffs to persuade me that the balance of the relevant considerations favoured granting their application. For the foregoing reasons, I conclude that they failed.