# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QCA 160 |
| PARTIES: | **SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST**<br>ACN 097 049 315<br>(first appellant)<br>**EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST**<br>ABN 26 010 309 529<br>(second appellant)<br>**H & J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H & J TRUST**<br>ACN 077 333 736<br>(third appellant)<br>**v**<br>**MONTO COAL 2 PTY LTD**<br>ACN 098 919 414<br>(first respondent)<br>**MONTO COAL PTY LTD**<br>ACN 098 393 072<br>(second respondent)<br>**MACARTHUR COAL LIMITED**<br>ACN 096 001 955<br>(third respondent) |
| FILE NO/S: | Appeal No 6710 of 2019<br>SC No 8609 of 2007 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – [2019] QSC 162 (Bond J) |
| DELIVERED ON: | 20 August 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 5 August 2019 |
| JUDGES: | McMurdo JA and Applegarth and Bradley JJ |
| ORDERS: | **1. Appeal allowed.**<br>**2. Set aside the orders in paragraphs 1 and 3 of the orders made on 18 June 2019.**<br>**3. The appellants be permitted to adduce expert evidence in the form of the report of Mr Chris Hartley filed 10 June 2019, save for paragraphs 2.11 to 2.14 and 4.**<br>**4. The respondents pay to the appellants their costs of** |

**the application in the trial division.**

5. **The respondents pay to the appellants their costs of the appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – ADMISSION OF EVIDENCE – where the appeal concerns a decision made during the course of a long, complex and ongoing trial – where the appellants as plaintiffs sought, but failed to obtain, leave from the trial judge to adduce new expert evidence – where the trial 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 the exploitation of a coal deposit – where a pre-trial case management regime imposed deadlines on the parties for filing and serving expert reports, and on experts from each side to attend joint conclaves – where that regime did not provide the appellants a right to submit expert evidence in reply but did provide them an opportunity to contest the respondents' expert evidence through the provision of joint reports resulting from joint conclaves of experts – where the evidence sought to be adduced rebuts evidence from two of the respondents' experts and does not reveal any new case – where the appellants' prosecution of the case has warranted strong criticism – whether the trial judge's assessment of the relevant likely prejudice to the respondents was incorrect in principle – whether the trial judge erred by not granting leave to rely on additional expert evidence at trial – whether the Court of Appeal should re-exercise the discretion by allowing the appellants to tender the additional expert evidence

*Allianz Australian Insurance Limited v Mashaghati* [2018] 1 Qd R 429; [2017] QCA 127, cited
*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, cited
*House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited

COUNSEL: B W Walker SC, with D de Jersey and A Psaltis, for the appellants
J C Sheahan QC, with A C Stumer, for the respondents

SOLICITORS: Holding Redlich for the appellants
Allens for the respondents

[1] **McMURDO JA:** This is an appeal from a decision made during the course of a long trial, which is ongoing, to refuse the appellants leave to adduce opinion evidence from an independent expert, Mr Chris Hartley. The evidence is relevant to an important issue in the case and, as I will discuss, is responsive to evidence which will be called by the respondents. The appellants required the trial judge's leave for Mr Hartley's evidence, because of orders which his Honour made at a pre-trial hearing

last December.[1] The application for leave was heard on 17 June 2019, and was dismissed on the following day, with extensive reasons for judgment published on 26 June 2019.[2]

[2] The appellants have the formidable task of persuading this Court to reverse a discretionary judgment, and on a matter of practice and procedure.[3] Nevertheless, each case must be considered in the light of its own particular circumstances, and, if there is a demonstrated basis, according to *House v The King*,[4] for interfering with the decision, this Court should do what is necessary to avoid a substantial injustice.[5]

**The proceeding**

[3] This proceeding involves a dispute between the two sides of a joint venture agreement, made in 2002, for the development and operation of a coal mine. The agreement provided for two stages of the project, with expressed aspirations of certain levels of production of saleable coal per annum. However, the project was short lived. The appellants' case is that the respondents breached the joint venture agreement by deciding to suspend all work on the project in July 2003, even before the completion of stage one. The respondents' case is that, in good faith, their representatives decided that the project was not economically viable, in which case the respondents were entitled to terminate the agreement, and there was no breach of contract or other wrongdoing in suspending, and not resuming, the project.

[4] The appellants claim that by this wrongful termination, they lost the opportunity to receive royalties and derive profits from the sale of coal, and that, further or alternatively, they lost the opportunity to sell a valuable interest in the joint venture. Overall they claim damages of the order $1.2 billion.

[5] By any measure, this is a very large and complex piece of litigation. As the trial judge said, the trial requires a consideration of the reasons and motivations for decisions made in a period from 2002 to 2008, as well as a consideration of what decisions might have been made in certain hypothesised circumstances.[6] The trial will involve disputed expert opinions on many subjects, for which the relevant fields of expertise will include geology, operating and capital costs assessment, mine design and planning, coal markets, coal price and exchange rates, and financial modelling.[7] Relevantly for this appeal, it will involve a substantial issue of whether coal, having the particular grade and qualities of that which would have been extracted from this mine, would have been marketable at all, and, if so, at certain prices.

[6] Clearly, litigation of this scale and complexity requires extensive case management and substantial compliance with any procedural regime which the Court puts in

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1 *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2018] QSC 308. The orders consistent with those reasons were made on 21 December 2018 ("the December orders").

2 *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QSC 162 ("Reasons").

3 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177; [1981] HCA 39 citing the statement of Jordan CJ in *In re the Will of FB Gilbert (dec)* (1946) 46 SR (NSW) 318 at 323; [1946] NSWStRp 24.

4 (1936) 55 CLR 499 at 505; [1936] HCA 40.

5 *Just GI Pty Ltd & Ors v Pig Improvement Co Australia Pty Ltd* [2001] QCA 48 at [14].

6 Reasons at [5].

7 Reasons at [5].

place, so that the case can be tried with fairness to each party and without undue cost and delay.

[7] The appellants' prosecution of this case, which they commenced in 2007, has warranted the strong criticism which it received in the judge's reasons for the December orders.[8] The case was first set down for trial by orders made in May 2018. At that stage, each side had served a number of expert reports and what apparently remained was for the appellants to serve expert reports in reply. It was ordered that this be done by 14 September 2018, and a timetable was imposed for joint expert conclaves, which would identify the areas of agreement and disagreement, to occur by mid-November 2018. A mediation was ordered to take place by 30 November 2018, and the case was set down for trial for 16 weeks commencing on 11 March 2019.

[8] The appellants did not meet that timetable, and by orders made on 30 July 2018, the time for the service of their expert reports in reply was extended until 2 November 2018, with consequential extensions of time for the joint expert conclaves and the mediation, but with the trial dates remaining unchanged.

[9] Again, the appellants were late in serving their further expert reports, albeit by only a few weeks this time. The more important problem, the judge accepted, was that the expert reports raised a substantially new case. Consequently the appellants had to apply not only for leave to rely on those further reports, but also for leave to amend their pleadings so that they could correspond with that evidence. The respondents argued that the appellants should not be permitted to rely on these latest expert reports, and that amendments to the pleadings should not be permitted. It was that controversy which the trial judge had to resolve last December.

**The December orders**

[10] The judge decided that the appellants should be allowed to amend their pleaded case and to adduce the evidence which was the subject of the expert reports which by then they had delivered. As the more recent of those reports raised a new case, the judge ruled that the respondents should be permitted to meet that case by the provision of further expert reports. His Honour declined to impose any limitation on the subject matter of the respondents' further reports, later observing that it would have been unfair to do so.[9] He made no provision for any expert reports "in reply" from the appellants' side.

[11] His Honour postponed the commencement of the trial to 8 April 2019. Orders were made requiring any further expert reports from the respondents to be delivered in two tranches, the first by 29 March and the second by 14 May. Consequently, the trial was to commence before all of the expert reports had been provided and, of course, before the experts had conferred with those on the other side of the record, to produce a joint report which identified the points on which they agreed and which explained their differences.

[12] It is necessary to set out those parts of the December orders which related to expert evidence:

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8 See also this Court's judgment in *Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd as trustee of the QC Trust & Ors* [2014] QCA 267.

9 Reasons at [50].

"Plaintiffs' expert evidence in reply

4. The plaintiffs have leave to rely upon the following expert reports at trial:

…

(d) the reports of Mr Ken Hill filed on 7 November 2018, 16 November 2018 and 30 November 2018;

…

(g) the report of Mr Shaun Browne filed on 8 November 2018; and

…

…

Defendants' Evidence

7. On or before:

(a) 29 March 2019 the defendants file and serve the first tranche of the expert reports of those experts other than those named in subparagraph (b) upon which they intend to rely at trial;

(b) 14 May 2019 the defendants file and serve:

…

(ii) any further lay witness summaries arising out of any matter contained in the expert reports filed by the plaintiffs on or after 1 November 2018 and the expert reports filed pursuant to subparagraph (a) or this sub-paragraph (b).

Expert Evidence – Joint Expert Reports

…

9. Without prejudice to the right to object to any expert evidence at trial, the experts retained by the plaintiffs and the experts retained by the defendants will attend joint conferences for the purpose of preparing joint reports.

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

(a) how many joint expert conferences should be convened;

(b) the attendees for each joint conference;

(c) the questions which should be answered at each joint conference; and

(d) the materials to be placed before the experts for that purpose.

11. In default of agreement, the parties are to seek the direction of the Court on those matters.

12. By 3 June 2019, the parties are to identify for each of the experts:

    (a) the joint conference(s) at which the expert is required to attend;

    (b) the attendees for each such joint conference;

    (c) the questions which should be answered at each joint conference;

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

13. By 15 February 2019, a facilitator ("the facilitator") is to be jointly appointed by the parties for the purposes of chairing the joint expert conferences, facilitating the conduct of the joint expert conferences and assisting the attending experts to produce the joint expert reports which are the object of the conferences.

…

15. The following directions are made in relation to the facilitator:

    (a) The facilitator is directed to chair the joint expert conferences and to act as an impartial facilitator to assist the nominated experts to produce the joint expert reports within the time frame referred to below.

    (b) The facilitator will be responsible for the manner by which the joint expert conferences are conducted.

    (c) The parties will brief the facilitator with a copy of this order, copies of the pleadings, particulars, and the expert reports.

    ...

16. The facilitator and the experts are directed to meet during the period 10 June 2019 to 1 July 2019 for the purposes of the conduct of the joint expert conferences and the subsequent production of joint expert reports as soon as practicable and no later than 8 July 2019.

17. The following directions are made in relation to the joint expert conferences:

    (a) The purpose of the joint expert conference is to enable the attending experts to prepare a joint expert report which, so far as possible, will identify the matters of expert opinion which are agreed and matters of expert opinion which are not agreed in relation to those questions.

    …

    (d) All matters which are discussed at the joint expert conferences will be confidential and 'without prejudice'. However:

(i) the joint report that is subsequently produced by the experts will not be confidential;

(ii) the experts may disclose matters discussed at the joint expert conferences with the parties or their legal representatives, after the joint report has been signed by the relevant experts and the facilitator …

(e) Neither the parties nor their legal representatives are to attend the joint expert conferences.

18. The following directions are made in relation to the joint expert reports:

(a) The precise form of the joint expert report is a matter for the attending experts (with the assistance of the facilitator) to determine…

(b) As far as possible, the joint expert report should canvass issues or groups of issues separately and distinctly in a way which permits succinct answer of the identified questions and, in the course of so doing, identification of:

(i) relevant statements of agreed opinion;

(ii) relevant statements of matters not agreed between experts with short reasons why agreement has not been reached;

(iii) relevant statements of matters in respect of which no opinions could be given e.g. issues involving credibility of testimony or disputed fact.

…

(e) No party or its legal representatives can seek or require to view the joint expert report (or any drafts thereof) before it has been finalised and signed by the relevant experts and the facilitator.

Evidence at Trial

19. Except with leave of the Court:

…

(b) no party will be permitted at the hearing of this proceeding to adduce any expert evidence other than in the form of a report which has been filed to date or filed in accordance with these orders.

20. Further, except with the leave of the Court, opinion evidence will not be received at trial from an expert unless that expert has participated in the directed joint expert conference process and in the subsequent joint expert report."

[13] By orders made on 29 March 2019, each side was allowed more time for the provision of expert reports. The appellants were given leave to rely on a further report of Mr Ken Hill filed on 15 March 2019 and a further report of Mr Shaun Browne filed on 21 March 2019. The respondents were given leave to file and serve, amongst other reports, expert reports by Mr Ashley Conroy and Mr Ross Crump (neither of whom had previously provided a report). Subsequently, the dates for the provision of the reports by Mr Conroy and Mr Crump were extended, and those reports were filed on 9 April and 2 May respectively. It is to those reports that Mr Hartley's report responded.

[14] Prior to the filing and service of Mr Hartley's report on 10 June 2019, there had been no report from him. Consequently, unless the Court ordered otherwise, the appellants were precluded from adducing this evidence because, in the terms of paragraph 19(b) of the December orders, Mr Hartley's report had not been "filed to date or filed in accordance with these orders." Further, although in one way Mr Hartley met the description of an expert retained by the appellants,[10] it could not have been thought that he was entitled to participate in the experts' conclaves when he was not a witness from whom opinion evidence could be adduced at the trial.

[15] As I have said, the December orders provided for the trial to commence some weeks before the experts' conclaves and the provision of joint expert reports. The intention of the trial judge was that, in the meantime, the Court would hear the evidence of lay witnesses in the appellants' case and then lay witnesses in the respondents' case. The December orders made particular provision for the respondents to be able to further cross-examine the appellants' lay witnesses, and further examine their own witnesses, on any matter arising from the further expert reports to be filed by the respondents or, importantly for this appeal, "arising from any joint report filed after a joint conference".[11] Those directions were designed to meet the potential prejudice to the respondents from the lay evidence being given before the steps for the finalisation of the expert evidence had been completed.

**The relevant witnesses**

[16] Throughout this litigation, it has been necessary for the appellants to prove that the coal, which they say could and should have been mined under this project, was coal which could have been sold and sold at prices of the order which would have made the project viable and which would have yielded the benefits which the appellants claimed to have lost. The appellants recognised at least some years ago that this required the assistance of expert testimony about the marketing and pricing of coal.

[17] To that end, the appellants procured expert reports from Mr Hill in 2014 and again in 2017. Mr Hill is a civil engineer with a graduate diploma in Business Administration and has over 30 years of experience in the mining industry. He was retained by the appellants to provide an opinion as to whether it was likely that an expert conducting a feasibility study on the project, in or about May 2005, would have concluded that the proposed mine development was commercially viable and recommended that mining operations should proceed.

[18] In his 2014 report, Mr Hill revealed that he had compiled his report with the assistance of certain "subject specialists", whom he identified. They included

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10 In terms of paragraph 9 of the December orders.

11 Paragraphs 24(a)(ii) and 24(b)(ii) of the December orders.

Mr Ross Stainlay, on the subjects of "coal quality, washability and market pricing". Thus, Mr Hill wrote that although he had delegated this work to the specialists, including Mr Stainlay, he had done so in a way in which he understood what the specialists had done, and that he agreed with the "assumptions, methodology and conclusions and opinions reached for the work performed by these specialists". His report dealt with the matters required of expert reports under Chapter 11, Part 5 of the *UCPR*. It also contained a statement by each of these specialists, which dealt with the same matters required by Chapter 11, Part 5. As to Mr Stainlay's work, Mr Hill wrote that Mr Stainlay had been asked to, amongst other things, "[c]omment on the most appropriate coal markets and the suitability [of the coal from this mine] for Asian utilities."

[19] Within the 2014 report by Mr Hill was a section entitled "Coal Quality and Market Appraisal". It was said to have been written by Mr Stainlay, and considered the relevance of the physical characteristics of the coal from this area, including what was described as its "low HGI",[12] and the attractiveness of such coal in the market.

[20] Mr Hill's report of 2017 addressed some further questions, including what work would have been required to be performed by an expert conducting a feasibility study for stage two of the project, and what would have been the likely cash flows derived from mining operations. Again, Mr Hill wrote that he had engaged the assistance of various subject specialists and, again, Mr Stainlay was identified as a specialist whom he had engaged on the subject of coal quality, washability and market pricing. Mr Hill wrote that he held the opinions stated in the report, including those of the specialists. There were similar statements by some of those specialists, but in this report, none by Mr Stainlay.

[21] From April to June 2018, the respondents provided what the trial judge described as their first round of expert reports. Relevantly they included a report by Mr John Barkas, served on 31 May 2018, on the subject of coal pricing. Mr Barkas directly addressed the 2014 and 2017 reports by Mr Hill. He was strongly critical of them, describing their pricing and marketing projections as "misconceived" and their economic and market assumptions as "unrealistic and/or internally inconsistent". In particular, Mr Barkas wrote that the forecast pricing, according to Mr Hill's reports, did not adequately account for the "below-standard energy content and poor grindability" of the coal from this mine, in comparison with internationally traded thermal coal, or for the effect of a "sudden and substantial addition to export supply" upon the price of coal in a relevant market.

[22] Next followed what the trial judge described as the appellants' second round of expert reports. They included the first report by Mr Browne, delivered on 7 November 2018, on the subjects of coal price forecasts and exchange rates, coal markets and competition in those markets.

[23] On 30 November 2018, a further report by Mr Hill was delivered but limited to the subjects of production volumes, quantities, and equipment and haulage modelling, rather than the matters upon which Mr Hill had provided the opinion of Mr Stainlay.

[24] For the hearing which resulted in the December orders, the appellants provided a list of the witnesses whom they proposed would participate in the conclaves of experts. They included Mr Hill and Mr Browne, but not Mr Stainlay. As I have noted, under

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12 Hardgrove Grindability Index.

the December orders, the appellants were allowed to rely upon the report of Mr Browne as well as the reports by Mr Hill. Mr Browne's report engaged with Mr Barkas on his criticism of the Hill reports, and disagreed with that criticism. But it was only Mr Browne who responded to the report of Mr Barkas. At the hearing of the present application before the trial judge, senior counsel then appearing for the appellants conceded that his Honour should infer that, by the hearing which resulted in the December orders, the appellants had decided not to call Mr Stainlay and that they were intending to rely only on Mr Browne and Mr Hill in relevant respects.

[25] The next in this rally of reports was the provision of those of Mr Conroy and Mr Crump, in April and May of this year respectively. They addressed issues about the export market for low HGI thermal coal and they responded to Mr Browne's report. Mr Conroy wrote that customers would not have considered that coal from this project would meet their design coal specifications, and that there was no feature about this coal which would have been sufficiently attractive to customers to make up for its low HGI value. In his report, Mr Crump wrote that it was highly improbable that the coal would have received market acceptance by May 2005 (other than in a certain limited context) and that it was inconceivable to assume sales of the coal at the levels suggested in the appellants' case.

[26] Faced with the reports of Mr Conroy and Mr Crump, the appellants retained Mr Hartley. His report responded directly to the opinions of Mr Conroy and Mr Crump. The questions which were put to, and answered by, Mr Hartley identified opinions stated in their reports, and asked whether Mr Hartley agreed with them. It is not suggested for the respondents that Mr Hartley went further, let alone that his report suggested some new and unpleaded case. In essence, Mr Hartley's report set out the reasons for his disagreement with certain opinions which those witnesses had expressed. The report also set out factual matters, and, in the course of argument before his Honour, counsel appearing for the appellants conceded that, if leave was otherwise given to rely on Mr Hartley's report, certain parts of it should be deleted because of the difficulties which the respondents might have in answering those factual matters within the time available if the trial was not to be delayed.[13] In this Court, that concession is maintained.

[27] When the application for leave to adduce the evidence from Mr Hartley was heard on 17 June, the trial had commenced, as scheduled, and the appellants' evidence (apart from expert evidence) had been tendered. Evidence was then being given by lay witnesses in the respondents' case. A facilitator had been appointed for the conclaves of experts, which had been scheduled to occur between 14 June and 8 July, with joint expert reports to be produced by 15 July.[14] Oral evidence from the expert witnesses was scheduled to commence on 5 August 2019.

[28] There were two relevant experts' conclaves which had been convened. One was described as the coal markets conclave, to be attended by Mr Browne, Mr Conroy and Mr Crump. The other was the so called coal price and exchange rate conclave, to be attended by Mr Browne, Mr Barkas, Mr Crump and others.[15] Mr Hartley was available to attend those conclaves but only until 2 July, after which he would be overseas until 12 August, but could participate remotely.

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13 Namely paragraphs 2.11 to 2.14 and paragraph 4.0 of the report.

14 Save for two reports, of no present relevance.

15 Reasons at [77](b).

**The reasoning of the trial judge**

[29] The trial judge said that the relevant considerations were:[16]

(1) the stage at which the litigation had reached when the application was made;

(2) the extent of any failure by the appellants to comply with the directed timetable;

(3) the prejudice which would be caused to the respondents if leave was granted, and the extent to which that prejudice could be ameliorated;

(4) the adequacy of the appellants' explanation for their delay "in presenting the real case [they] wanted to take to trial";

(5) the prejudice which would be caused to the appellants if leave was refused, including whether the appellants might be denied a fair opportunity to present their real case.

[30] His Honour identified those considerations after referring to, amongst other cases, *Aon Risk Services Australia Ltd v Australian National University*,[17] and the judgment of this Court in *Allianz Australia Insurance Limited v Mashaghati*.[18] The trial judge quoted this passage from the judgment of the President (with whom Applegarth J and I agreed) in that case:

> "[55] [R]elevant 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 r 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 r 5(2) which obliges the Court to apply the rules with the objective of avoiding undue delay, expense and technicality.
>
> [56] 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."

[31] In *Allianz*, the President said that *Aon Risk Services Australia* stands for the "proposition that a just resolution of proceedings remains the paramount objective and that while speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution, these factors must not detract from a proper opportunity being given to the parties to put their case."[19]

[32] After setting out the relevant history of the litigation, and, in particular, the steps in the provision of expert reports, the trial judge discussed each of the considerations which he had identified.

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16 Reasons at [15].
17 (2009) 239 CLR 175; [2009] HCA 27.
18 [2018] 1 Qd R 429; [2017] QCA 127.
19 [2018] 1 Qd R 429 at 451 [101]; [2017] QCA 127 at [101].

[33] As to the first of them, he observed that "[o]n any view the application is very late", which was adverse to the appellants' application.[20]

[34] His Honour's discussion of the second consideration was not so clearly correct. The appellants had not failed to comply with the timetable prescribed by the December orders, in respect of Mr Hartley's report, because no time for such a report had been ordered. It is apparent that his Honour was referring to something earlier than the December orders, because he observed that Mr Hartley's report was proposed for an issue which had been part of the appellants' case since at least 2014, and his Honour had traced the history of the litigation in 2017 and 2018. What is evident from this reasoning is an understandable frustration with the history of the conduct of the appellants' case.

[35] The third consideration was the prejudice which would be caused to the respondents if leave was granted. His Honour identified and described three aspects of prejudice which, he said, resulted in something which could not be ameliorated without disruption to, and the inevitable prolongation of, the trial timetable.[21]

[36] The first aspect of prejudice was what his Honour described as the burden which would be imposed on the respondents' expert witnesses. His Honour said:[22]

> "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 the light of the burden under which the defendants were already labouring consequent upon my orders of 21 December 2018."

[37] The evidence of this prejudice was in an affidavit by a solicitor for the defendant, Ms Morrison, the relevant part of which was as follows:

> "44. Currently:
>
> (a) both Messrs Conroy and Crump are involved in the Coal markets joint conclave; and
>
> (b) 5 of the experts retained by the defendants, namely Messrs Barkas, Gye, Gray, Crump and Samuel, are involved in the Coal price and Exchange rate conclave.
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> 45. Mr Barkas and Mr Gray have substantial issues to cover in the Coal price and Exchange rate conclave. Mr Conroy and Mr Crump have substantial issues to cover in the Coal markets conclave. In my view, it is unfair to the defendants to expect the 6 experts retained by them to rush the joint conclaves and/or the preparation of joint reports by 2 July to suit Mr Hartley's convenience, should the plaintiffs be given leave.

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20 Reasons at [79]-[80].
21 Reasons at [90].
22 Reasons at [87].

Mr Conroy's other commitments

46. I have provided a copy of Mr Hartley's expert report to each of Mr Conroy and Mr Crump. Mr Conroy has said to me and I believe that:

    (a) he has existing (other) work commitments with deadlines for reporting at the end of next week which would be jeopardised if, in addition to attending the expert conclave next week, he had to also prepare to respond to the matters now raised in Mr Hartley's report; and

    (b) if the date by which time his joint report has to be finalised was brought forward from 15 July to 2 July, this would present him with difficulties around other commitments he has."

[38] Notably, the view which was expressed in paragraph 45 of the affidavit had been formed apparently without asking Mr Conroy or Mr Crump anything about Mr Hartley's report. This report is not lengthy,[23] and it is unusual that Mr Conroy and Mr Crump had not been asked to read it and indicate whether it would present substantial difficulties for them within the time which was available.

[39] Further, the appellants' solicitors were not suggesting that, given Mr Hartley's availability, the joint reports had to be prepared by 2 July. Mr Hartley was only able to be physically present for the conclaves until that date, but he was able to participate after then by other forms of communication.

[40] As for the other commitments of Mr Conroy, it is to be noted that the expert conclaves were to commence on 14 June and that Mr Conroy's other commitments involve things which had to be done by the end of the week ending 21 June, well before the end of the period for the conclaves on 8 July.

[41] The second aspect of prejudice was not the subject of any evidence, apart from the statement in paragraph 47 of Ms Morrison's affidavit that she had not had the opportunity to confer (other than in a very preliminary way) with Mr Conroy or Mr Crump about her opinions in respect of Mr Hartley's report. His Honour said:[24]

> "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. 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

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23 Comprising 21 pages.

24 Reasons at [88].

> which they were already labouring consequent upon my orders of 21 December 2018."

[42] His Honour referred to "the forensic investigation of the various sources relied on in the report" and a consideration of whether their use in the report may be supported. Mr Conroy and Mr Crump may wish to investigate those sources, but the need for conferences between the respondents' lawyers and the independent experts, about Mr Hartley's report ahead of the experts' conclaves, was not apparent. It was for Mr Conroy and Mr Crump to consider Mr Hartley's criticisms of their reports, and to decide whether they did or did not accept them.

[43] The third aspect of prejudice was the subject of this evidence in Ms Morrison's affidavit:

> "48. Mr Hartley makes various factual assertions in his report which can no longer be dealt with by the defendants' lay witnesses who have already given evidence. For example, paragraph 2.3(e), the last paragraph in 2.5, and the bullet points in 2.6 of Mr Hartley's report. In my view, it would not be fair to the defendants' witnesses to have to be recalled to give evidence about the assertions in Mr Hartley's report."

[44] On this point, the trial judge said:[25]

> "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."

[45] The fourth of his Honour's considerations was the adequacy of the appellants' explanation for their delay in presenting "the real case [they] wanted to take to trial". With respect, that overstated somewhat the effect of Mr Hartley's report. As I have said, Mr Hartley did not reveal any new case. Instead, it was evidence which the appellants proposed to adduce to strengthen a case which they had pleaded at least by the end of 2018. His Honour appears to have decided that the appellants' conduct of the litigation, prior to the December orders, counted against them on the present question.

[46] On this subject, the appellants sought to rely upon the unavailability of Mr Stainlay, as at June 2019, through illness, as an explanation for having to go to a different witness, namely Mr Hartley. His Honour remarked that this submission assumed that, but for Mr Stainlay's illness, the appellants would have been able to have

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25 Reasons at [89].

Mr Stainlay attend the conclaves and respond to the evidence of Mr Conroy and Mr Crump. His Honour said that this was a false assumption, because, by December 2018, the appellants had made a forensic decision not to call Mr Stainlay, choosing instead to rely only upon Mr Browne and Mr Hill.[26] His Honour said:

> "The defendants were entitled to think that the plaintiffs, by [December 2018] 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."[27]

[47] His Honour went further, saying that Mr Hartley's evidence could and should have been obtained much earlier, because it went to issues upon which the appellants, as the plaintiffs, bore the onus of proof. And insofar as Mr Hartley said anything which was not in the 2014 and 2017 reports of Mr Hill, "there [was] no demonstrated reason why the [appellants] could not have already adduced such matters as part of their case."[28]

[48] His Honour rightly discerned "an underlying theme in the [appellants'] 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 [respondents'] first round of expert reports."[29] He said that it was not for the respondents to point out weaknesses in the appellants' case, so that the appellants might have an opportunity to correct them, and that the responsibility for the abbreviated timetable, under the December orders from which the appellants sought to be relieved, was that of the appellants whose defaults had made those orders necessary.[30]

[49] The trial judge then turned to the matter of the prejudice which would be caused to the appellants if leave was refused. There was evidence for the appellants that Mr Hartley had been retained, because their solicitor had come to the view that Mr Browne did not have the relevant expertise to deal with all of the points raised by the Conroy and Crump reports. His Honour fairly observed that the solicitor's evidence did not descend to the particulars of which matters could not be dealt with by Mr Browne, with the result that there was "an undefined gap in the ability of the [appellants] to respond to matters raised by the Conroy and Crump reports and to address them in the relevant expert conclaves."[31]

[50] His Honour said that the evidence suggested that this "gap" could be addressed by someone with the expertise of Mr Stainlay. Undoubtedly, Mr Stainlay has a serious illness and, through no fault of anyone, he is unable to assist in the presentation of the appellants' case. But his Honour rejected the suggestion that Mr Stainlay's absence could only be met by allowing Mr Hartley's report to be used. The judge said that the solicitor's evidence did not address the position of Mr Hill, and that the

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26 Reasons at [96].
27 Reasons at [96].
28 Reasons at [97](e).
29 Reasons at [98].
30 Reasons at [98].
31 Reasons at [103].

appellants had not provided compelling reasons to conclude that Mr Hill lacked the expertise which he had asserted in his reports.[32]

[51] His Honour concluded, in relation to the likely prejudice to the appellants, as follows:[33]

> "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. 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. 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."

[52] His Honour's ultimate conclusion was expressed as follows:

> "[108] My overriding obligation is to ensure that the trial is fair.
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> [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 prejudice which I have identified, for the sake of avoiding the prejudice to the plaintiffs which I have identified.
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> [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."

**The arguments**

[53] The appellants' argument acknowledges the difficulties of challenging a discretionary judgment on a procedural question, particularly where the trial judge here has the advantage of a familiarity with the evidence and the issues, having embarked upon the trial some months ago after extensively managing the case prior to the trial. Nevertheless, the appellants submit, the trial judge erred in being too influenced by what had happened before December 2018, and by making factual errors in his assessment of the likely prejudice to the parties depending upon the outcome of the application. Further, it is submitted that this is a case where the decision is so unreasonable or plainly unjust that it may be inferred that in some way there has been a failure to properly exercise the discretion.[34]

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32 Reasons at [104].
33 Reasons at [106].
34 *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40.

[54] The respondents' argument seeks to support in all respects the trial judge's reasoning. It is submitted that the burdens upon the respondents from the December orders were so onerous that the judge was right to conclude that the respondents should not be further burdened by this evidence, especially at this stage of the trial and so close to the conclaves of experts. The judge was well placed to assess where the interests of justice lay, and made no error in the exercise of his discretion to refuse the application. It is submitted that his Honour explicitly rejected an approach of punishing the appellants for their past defaults and that his Honour's reference to that history was necessary for an understanding of the burden which was already upon the respondents from an interlocutory regime which was put in place to enable the appellants, close to the trial, to advance an amended case.

**Consideration**

[55] The trial judge was correct to observe that the disallowance of Mr Hartley's evidence would not mean that the appellants would be without evidence which, if accepted, would prove their case. But clearly the apprehension on the appellants' side was that their case needed to be strengthened by the evidence of Mr Hartley. Clearly also, that apprehension had come from the reports of Mr Conroy and Mr Crump. The evident concern was that, if what was said by those two witnesses could not be specifically answered, their evidence could be critical in precluding the proof of the appellants' case.

[56] Whether Mr Hartley's evidence would be critical to the outcome could not be decided, one way or the other, at that time. But there was a real prospect, rather than a theoretical or far-fetched one, that his evidence would be critical. It fairly appears that it is a concern about the impact of Mr Hartley's evidence on the final outcome which explains the respondents' strenuous opposition to this application.

[57] His Honour had to assess the *relevant* prejudice to the respondents by allowing the evidence of Mr Hartley to be given. Of course, that was not the prejudice which they might suffer by the Hartley evidence being persuasive and important for the outcome of the litigation. It was the prejudice which would be caused to the respondents, by the imposition of a burden in the conduct of their case, beyond any burden which they had to bear by the case progressing according to the December orders. To assess that prejudice, it is necessary to say more about the effect of the December orders.

[58] According to the reasons which his Honour gave in December 2018, and which he confirmed in the subject judgment, the intended effect of those orders was to prevent another round of expert evidence being provided by the appellants within the three or four months prior to the commencement of the trial, when the respondents would be preparing their evidence, including expert evidence, to meet a substantially amended case. Nevertheless, the December orders did not deprive the appellants of the right to contest the expert evidence for the respondents, not only by cross-examination, but also by expert evidence which was responsive to the evidence of the experts retained by the respondents. Under the December orders, that opportunity was given to the appellants through the provision of joint reports of experts. As I have set out, the orders specifically permitted, indeed required, the experts to not only identify the differences between them, but to provide reasons for those differences.[35]

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35 Paragraph 18(b)(iii) of the December orders.

[59] Importantly, in participating in that process of conferring and reporting, an expert was not limited by the December orders to what they had said in their report. To provide short reasons for disagreeing, each expert had to do more than repeat their previous statement.

[60] The December orders anticipated that the respondents might wish to recall witnesses, for cross-examination or further examination-in-chief, not only for something contained in an expert's report provided according to those orders, but also for something "arising from any joint report filed after a joint conference".[36] Again, there was the anticipation that something more could come from a statement of reasons in the joint report, than a restatement, in the same or different terms, of the experts' reports. Further, the provision for the recall of witnesses, who had not given opinion evidence, anticipated the possibility that there would be matters of fact, as well as of opinion, which might warrant further evidence. The nature of much of the expert evidence, at least that about the marketability of the coal, was that the experts' opinions were not expressed upon factual premises which were defined and agreed; rather, the experts could differ as to what were the relevant facts, as well as to the weight to be given to them, in forming an opinion.

[61] Consequently, the evidence of Mr Conroy and Mr Crump was susceptible to criticism, within a joint report, by a witness who had provided a report and who had attended the relevant conclave. Putting aside the current misgivings about the extent of the expertise of Mr Hill and Mr Browne, the effect of the December orders was that either of them could have disagreed with Mr Conroy and Mr Crump, and written short reasons for that disagreement which would have become part of the evidence within the joint report. In this way, the appellants had the means to provide expert evidence in reply.

[62] As already noted,[37] the appellants have conceded that some of it is not pressed. There is no submission that the report raises a new issue, rather than being, as it is expressed to be, purely responsive to the opinions of Mr Conroy and Mr Crump. The Hartley report contains evidence of why some of the opinions of Mr Conroy and Mr Crump are incorrect, as was always possible under the December orders.

[63] It is correct to say that Mr Conroy and Mr Crump did not have the same time to consider the Hartley report, ahead of a conclave, that they had to consider, for example, Mr Browne's report. But Mr Browne could have explained his disagreement for reasons which went beyond what was in his report. By Mr Hartley's report, they would have had the reasons to disagree with their opinions within a report before going to the conclaves. The respondents' complaint of prejudice from that shortness of time lacked weight, in the absence of evidence that either witness had read the Hartley report and was unable to discuss it with Mr Hartley in the coming weeks.

[64] This Court was informed that there was a debate presently before the trial judge about whether the joint reports had, in some cases, contained material outside what was permitted by the December orders. That debate has now been resolved by a judgment delivered on 12 August 2019.[38] In that judgment, there is an extensive discussion of what material was permitted by the December orders. But it is his

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36 Paragraph 24(a)(ii), (b)(ii) of the December orders.

37 Paragraph [26] above.

38 *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 4)* [2019] QSC 199.

Honour's reasoning in the judgment under appeal which must be considered. This most recent decision does not refer at all to the evidence of Mr Crump and Mr Conroy, but does refer to the evidence of Mr Hill and Mr Browne, although not in ways which are presently relevant. The decision is relevant for its impact upon the timing of the provision of oral evidence from expert witnesses, to which I will return. For the purposes of that debate, the trial judge was provided with evidence of a document which was provided to those witnesses who participated in the conclave on the subject of "Coal Price and Exchange Rate". Counsel for the respondents informed this Court that the parties had agreed upon the provision of this document, which was intended to provide guidance to the experts for their participation in the conclave and the preparation of the joint report. It was said that, by this consensus, and not a direction by the Court, the experts were instructed as follows:

> "An expert who had not addressed an issue or matter in their reports may not address that issue or matter, for the first time in the conclave. For the sake of clarity, this does not prevent an expert responding to a fact or opinion on an issue or matter in another expert's report if the issue or matter is addressed in the first expert's report."

Those instructions were conducive to a debate about whether a certain "issue or matter" had been addressed by an expert, the outcome of which could depend upon the level of abstraction at which the issue or matter was described. Be that as it may, it was conceded in this Court that this limitation, as to an issue or matter, was not contained in the December orders or any other order.

[65] As to the prejudice from lay witnesses having to be recalled, as I have said, this was anticipated by the December orders. Again, there was no relevant prejudice by the Hartley report adding to any burden of the December orders.

[66] For these reasons, I have concluded that the judge's assessment of the likely prejudice to the respondents was incorrect in principle. Any suggested prejudice had to be a *relevant* prejudice, and it was necessary to assess the extent to which, if at all, the use of the Hartley report would contribute to the respondents' burden in preparing for and conducting their case, beyond that which they may have borne by the operation of the December orders. In my respectful view, his Honour either failed to identify that the prejudice had to be of that kind, or failed to appreciate the potential operation of the December orders.

[67] Further, the judge's factual findings as to the first and second aspects of prejudice were not supported by the evidence.

[68] For these reasons, the appellants have established an error of principle and errors of fact which call for the relevant discretion to be exercised by this Court. I turn to the question of whether this Court should reach a different outcome from the dismissal of the appellants' application, and, if so, the particular orders which should be made.

**Re-exercising the discretion**

[69] For the above reasons, the relevant prejudice to the respondents could be no more than minimal. No significant prejudice was demonstrated by the evidence before the trial judge. There have been further steps taken in the trial since the judgment was

given, and, as already noted, this Court was informed of a current debate about the process of the conclaves and the reports from them. The conclaves in which Mr Hartley would have participated, had the application been granted by the trial judge, have taken place. However, there is no evidence presented to this Court that, as matters presently stand, the interests of justice would now favour the disallowance of Mr Hartley's evidence, if that was not the case at the end of June. Instead, it is submitted for the respondents that, in the event that this Court decided that there was an error which warranted the re-exercise of the discretion, the case should be remitted to the trial judge to do so. That course was opposed by the appellants.

[70] If this Court is to order that the appellants be allowed to tender Mr Hartley's evidence, it should be left to the trial judge to make any consequential orders, including for the convening of a conclave between Mr Hartley, Mr Conroy and Mr Crump, as the judge considers appropriate. But to leave the question of whether the discretion should be re-exercised in the appellants' favour to the trial judge would be conducive to a further controversy in the trial and to further delay and cost. There would also be an understandable difficulty for the judge in revisiting the same question. Therefore, it is for this Court to determine whether the appellants should be allowed to adduce the evidence from Mr Hartley.

[71] When this appeal was heard on 5 August, the information available to this Court,[39] was that the evidence of Mr Conroy and Mr Crump was to be given on 5 September, towards the end of the one month period in which all of the expert evidence was to be received. The Court had also been informed that there would be time for Mr Hartley's evidence to be given on the following day. It seems that the timing of the evidence of Mr Conroy and Mr Crump might be postponed by his Honour's most recent decision, by which there will be an adjournment of the trial for three weeks in the middle of the period which had been allowed for expert evidence, adding about a month to the length of the trial.

[72] Presumably, by now Mr Conroy and Mr Crump have been given Mr Hartley's report. Again there is no evidence that, having read it, either witness would have any significant difficulty in addressing Mr Hartley's evidence at the trial, and in conferring with Mr Hartley prior to their oral evidence. This is not a case where the course which is proposed would result in any significant delay, affecting the parties, other litigants, or the resources of the Court.

[73] On the other hand, there is at least the prejudice to the appellants as the trial judge found. Further, I am unable to agree with his Honour that the prejudice from not being able to use the Hartley evidence would be largely, if not completely, avoided by the use of evidence from Mr Hill and Mr Browne. There is a sworn statement of the appellants' solicitor that Mr Browne lacks expertise in relevant respects. The solicitor's view may be incorrect, but for present purposes, it must be given weight. Indeed that view has some support from the submissions in this Court for the respondents, in which it was said that the appellants had now retained "a real coal marketer" (Mr Hartley).

[74] I accept that the appellants should have retained Mr Hartley, or some other witness of his level of experience and expertise, at a much earlier stage in the litigation, instead of engaging the experts about whom their lawyers now hold reservations

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39 A letter from the appellants' solicitors to the Registrar of the Court of Appeal dated 27 June 2019, seeking an expedited hearing.

about the witnesses' expertise and experience. It must also be accepted that a court should not appear to be too accommodating of litigants who do not prosecute their cases according to the requirements of the rules and the standards which courts rightly require in modern commercial litigation. Those considerations, however, are not decisive, at least in this case, where no significant prejudice to the other parties is demonstrated.

[75] In my conclusion, the interests of justice favour the appellants being permitted to adduce the evidence of Mr Hartley, contained in his report filed on 10 June 2019. The consequential directions for that evidence to be given, including for any conclave with Mr Conroy and Mr Crump, should be left to the trial judge.

**Orders**

[76] I would order as follows:

1. Appeal allowed.
2. Set aside the orders in paragraphs 1 and 3 of the orders made on 18 June 2019.
3. The appellants be permitted to adduce expert evidence in the form of the report of Mr Chris Hartley filed 10 June 2019, save for paragraphs 2.11 to 2.14 and 4.
4. The respondents pay to the appellants their costs of the application in the trial division.
5. The respondents pay to the appellants their costs of the appeal.

[77] **APPLEGARTH J:** The issue in this appeal is whether the appellants have demonstrated that the trial judge's exercise of a discretionary judgment, on a matter of practice and procedure, was vitiated by an error of the kind described in *House v The King*[40], which justifies appellate intervention to avoid a substantial injustice. I am not persuaded that they have. The trial judge did not act on a wrong principle. He did not mistake the facts, particularly on the matter which was the focus of much of the appellants' submissions: their choice to rely on Mr Hill and Mr Browne as their experts in relation to coal marketing and to not file an expert report by Mr Stainlay.

[78] The appellants did not establish by evidence what aspects of the reports of Mr Conroy and Mr Crump their own expert, Mr Browne, did not have the relevant expertise to deal with. Mr Browne claimed expertise and experience in marketing the relevant coal at the relevant time. Because the appellants deliberately omitted to identify what aspects of the evidence of Mr Conroy and Mr Crump Mr Browne could not respond to, there was, as the trial judge found, some "undefined part of their evidence in respect of which [the Court] will be deprived the advantage of commentary" by an expert called by the appellants.[41]

[79] The trial judge was also correct to conclude that the appellants' explanation for delay in presenting an expert report from someone with the expertise of Mr Hartley was inadequate. Before the trial judge, the appellants submitted that "At the heart

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40 (1936) 55 CLR 499 at 505.

41 Reasons at [106].

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."[42] However, that explanation did not withstand scrutiny for the reasons expressed by the trial judge.[43]

[80] The appellants' real complaint is that they were disadvantaged by the fact that they received the Conroy and Crump reports late and those reports contained material not expressed in the respondents' first round of expert reports.[44] Under the framework created by the December 2018 orders which the appellants had obtained, they could not file an expert report in reply without leave and neither Mr Stainlay nor another expert with similar qualifications was entitled to participate in the pending expert conclave on coal marketing because they had not filed an expert report.

[81] This complaint, packaged by the appellants as significant prejudice, is a consequence of two things. First, the choice of the appellants over a lengthy period to not file an expert report by Mr Stainlay (or a similarly qualified expert) which, along with other expert evidence about coal marketing relied upon by them, might discharge the appellants' onus of proof. Secondly, it is the consequence of the orders obtained by the appellants in December 2018 which, in the interests of securing a fair trial for all, permitted the respondents to file reports by experts like Mr Conroy and Mr Crump and, purposely, did not provide for the appellants to file an expert report in reply by someone like Mr Stainlay or Mr Hartley.

[82] In other words, the "prejudice" about which the appellants complained to the trial judge was a consequence of:

(a) choices made by them about the number and kind of expert witnesses they would call about coal marketing, in circumstances in which it must have been anticipated that the respondents might call experts like Mr Conroy and Mr Crump; and

(b) orders made in December 2018 which, in the interests of justice, did not permit the appellants to file a late expert report in reply.

[83] In those circumstances, and where the appellants' delay in providing an expert report of the kind produced by Mr Hartley was not adequately explained, the appellants' alleged prejudice had little claim for the favourable exercise of the trial judge's discretion so as to avoid injustice and ensure a fair trial for all.

[84] The exercise of discretion was not one which simply required a weighing of claimed prejudice to the appellants in not being able to rely upon the expert report of Mr Hartley against the claimed prejudice to the respondents in doing so, such that the respondents had to demonstrate significant prejudice which outweighed prejudice to the appellants. The trial judge evaluated prejudice and other factors in the exercise of a discretion which depended, ultimately, on whether the interests of justice favoured its exercise. The claimed prejudice to the appellants could not be seen in isolation. It could not be viewed simply as the prejudice in being deprived of the opportunity to rely on an expert report in reply on a potentially important issue. This is because the ground rules set for the trial by the December 2018 orders

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42 Reasons at [94].
43 Reasons at [96]-[97].
44 Reasons at [98].

provided for that very thing, and the appellants had earlier chosen not to rely on an expert like Mr Stainlay or Mr Hartley to file an expert report.

[85] In exercising a broad discretion in those circumstances, the trial judge did not need to be satisfied that the prejudice claimed by the respondents outweighed the prejudice claimed by the appellants. He did not find that it did. Instead, having carefully considered many matters, his Honour concluded that in all the circumstances, including the context and purpose of the December 2018 orders, it would be unfair to impose on the respondents the prejudice which he had identified for the sake of avoiding some, but an ill-defined, prejudice to the appellants. Those circumstances included that the prejudice of not being able to rely on an expert report like Mr Hartley's was an intended consequence of orders made in December 2018 to ensure a fair trial.

[86] In my view, to allow the appellants to rely on a reply report by Mr Hartley without an adequate explanation (for example, that he was to replace an expert in the same field who had filed a report and was unexpectedly unable to give evidence) would have disturbed a framework which was carefully constructed to ensure a fair trial. It also would have relieved the appellants of the consequences of choices made by them not to call Mr Stainlay or an expert with similar expertise to him at the trial. To allow the ground rules established for a fair trial to be disturbed without adequate justification would have been unfair to the respondents and contrary to the interests of justice in a broader sense. The trial judge was entitled to be persuaded in the circumstances that, balancing all relevant considerations, the appellants had not discharged the onus that was upon them.

[87] His Honour's conclusion did not depend on finding that the practical prejudice to the respondents in dealing with Mr Hartley's late report was significant or insurmountable. Viewed in its proper context, the prejudice to the respondents concerned the unfairness in allowing the appellants to do what the December 2018 orders envisaged should not be done, namely rely on an expert report in reply in circumstances where:

- there was no adequate explanation why the respondents had not sought to rely upon an expert report in relation to the subject matters dealt with in the Hartley report much earlier;
- the appellants frankly acknowledged that they had decided to not call Mr Stainlay as an expert and not file a report by him;
- the respects in which the appellants' existing experts on coal marketing were unable to respond at the relevant conclave to the evidence of Mr Conroy and Mr Crump was not defined at all in the appellants' solicitor's expression of opinion that Mr Browne did not have the relevant expertise to deal with *all* the matters raised in the Conroy and Crump reports. Those matters raised in the Conroy and Crump reports about which Mr Browne supposedly lacked relevant expertise were not stated by the solicitor, let alone addressed in evidence from Mr Browne.

[88] Next, even if it was thought that the trial judge gave too much weight to the practical prejudice to the respondents (and third parties including the experts and the facilitator) in having to respond at such a late stage to Mr Hartley's report, giving

too much weight to a relevant consideration is not a ground to vitiate the exercise of a discretionary judgment on the basis explained in *House v The King*.

[89] Moreover, the appellants still have not shown that appellate intervention is required to avoid a substantial injustice. They have not shown that Mr Browne's supposed inability to deal with some undefined parts of the evidence of Mr Conroy and Mr Crump caused some actual prejudice to the fair conduct of the expert conclave or a shortcoming in the joint report produced at it. Mr Browne claimed experience in the relevant field and he had the benefit of Mr Hartley's report to inform and bolster his response to Mr Conroy and Mr Crump.

**Factual background**

[90] I have had the great advantage of reading the reasons of McMurdo JA, and gratefully adopt his Honour's summary of the facts giving rise to this appeal. In the interests of expedition, I will not refer to many of the matters which are contained in those reasons or attempt to detail the facts which appear in the substantial judgment under appeal. The essential facts may be summarised as follows.

[91] The appellants always had the burden of proving that:

(a) the Monto coal, with its characteristics (including in particular its relatively low HGI), would have obtained "market acceptance" by about May 2005; and

(b) the quantum of coal likely to be produced during Stage 1 and Stage 2 could be successfully marketed and sold at relevant times.[45]

[92] To prove its case in that regard the appellants proposed to rely on the Hill 2014 and Hill 2017 reports and the report of Mr Browne dated 7 November 2018, for which the appellants obtained leave to rely upon at trial on 21 December 2018.[46]

[93] The appellants decided not to rely upon Mr Stainlay as an expert witness. They did not file an expert report by him consisting of those parts of the Hill 2014 and Hill 2017 reports that Mr Stainlay wrote or, indeed, any expert report by Mr Stainlay.

[94] In December 2018, over opposition, the appellants obtained leave to plead and present a new case based on expert reports which were not truly "in reply".

[95] They did so on the basis that to be able to go to trial in early 2019 on that new case, the appellants' expert evidence was taken to be closed (subject to what might emerge from the conclaves).[47] In other words, no provision for any plaintiffs' expert report in yet further "reply" was made. The orders put an end to the delivery of further expert reports by the appellants and it was unknown how many reports would be contained within the contemplated further round of defendants' expert reports. However, "it was obvious that it would be extensive".[48] There was no limitation (subject to relevance) on the matters which could be dealt with by the respondents' further reports.[49]

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45 Reasons at [56]-[58].
46 Reasons at [59].
47 Reasons at [50]-[51].
48 Reasons at [51].
49 Reasons at [50].

[96] In summary, orders made as a result of the appellants' application to present a new case at trial but still retain trial dates in the first half of 2019 created a framework for the fair and proper conduct of the trial. These included the respondents being able to rely upon expert reports which were yet to be filed, including, as might be expected, experts in coal marketing to respond to Mr Browne's report and otherwise highlight weaknesses in the appellants' case about market acceptance of the Monto coal and likely sales of it in the quantum contended for by the appellants. The orders have been helpfully set out in the reasons of McMurdo JA at [12]. Most importantly, they provided that, except with leave of the Court, no party would be permitted to adduce any expert evidence other than in the form of a report which had been filed at the date the orders were made or filed in accordance with them (Order 19(b)). They also provided that, except with leave, 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 20). The retained experts were required to attend joint conferences for the purpose of preparing joint reports (Order 9), and where matters were not agreed between experts the joint report was to contain "short reasons why agreement has not been reached" (Order 18(b)(ii)).

[97] As may be seen, the orders made as a consequence of the appellants' application to significantly alter its case but, at the same time, retain trial dates in the first half of 2019, were intended to serve the interests of justice. To ensure a fair trial in the circumstances, they:

(a) did not make provision for the appellants to provide expert reports in reply; and

(b) provided a mechanism for the appellants' experts who had produced an expert report to attend conclaves and respond to any of the respondents' expert reports (including those to be provided in the coming months) by a statement in the joint report as to why identified matters were not agreed between the experts.

[98] Brought in the middle of the trial, the appellants' June 2019 application seeking leave to rely on the report of Mr Hartley attempted to alter in a significant way a framework which was designed to ensure a fair trial for all parties. If leave was granted, then there would be an expert report in reply, whereas expert reports in reply had purposely not been provided for in the carefully crafted orders of December 2018. A grant of leave would permit and require the author of the new report, Mr Hartley, to participate in pending conclaves, and require busy experts engaged by the respondents and a busy facilitator (charged with the conduct of 17 conclaves over a short period) to respond at short notice to the information and opinions contained in the Hartley report. The experts would be required to do so in the middle of a trial when the respondents' solicitors were already operating under the intense demands imposed upon them in defending a complex new case and assisting in the orderly conduct of 17 conclaves involving an enormous number of expert witnesses.

[99] The application, which sought to disturb the framework laid down by the trial judge to achieve a fair trial, and which was apt to disrupt the conduct of planned conclaves, was not justified by the appellants on the basis of some new or unanticipated development. There was nothing new or unanticipated in the reports of Mr Conroy and Mr Crump. The provision by the respondents of reports by

experts with qualifications and experience in coal marketing was allowed by a court order. They might have been anticipated in order to counter the appellants' reliance on the Hill reports (insofar as they dealt with coal marketing) and Mr Browne's evidence and, more generally, to meet the appellants' case about the market acceptability and expected sales of Monto coal with a low HGI.

[100] The essential issue for the trial judge was whether it was in the interests of justice to allow a departure from the established framework for the conduct of the trial by allowing an expert reply at all, let alone one provided at such a late stage.

**The findings of the trial judge**

[101] As appears in his comprehensive reasons, the trial judge:

(a) identified and applied relevant principles; and

(b) gave careful consideration to the steps in the litigation, including the sequence of expert reports about coal quality, coal markets and coal pricing.

[102] As to Mr Stainlay, the trial judge noted that the appellants had obviously made a decision to not call him. No report had been filed by him and his name was not mentioned in the appellants' application in late 2018 about the proposed modification to the expert conclave timetable. Instead, the appellants proposed that the material in the Hill 2014 and Hill 2017 reports, Mr Barkas' report (relied upon by the respondents) and Mr Browne's report would be considered in an expert conclave attended by Mr Browne for the appellants and Mr Barkas for the respondents.[50] As was conceded in June 2019 before the trial judge, at the time of the December 2018 application the appellants had decided not to call Mr Stainlay in support of those parts of the two Hill reports that Mr Stainlay wrote. They intended to rely on Mr Browne and Mr Hill in support of that material.[51] Having canvassed the evidence in relation to the appellants' approach to the provision of expert evidence about coal markets and the marketability of the Monto coal, the trial judge found 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."[52]

[103] The appellants do not challenge those findings of fact.

[104] The trial judge proceeded to analyse the reports of Mr Conroy and Mr Crump as well as the report of Mr Hartley. Having done so, his Honour concluded:

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50 Reasons at [62].
51 Reasons at [63].
52 Reasons at [67].

"[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."

[105] In addressing relevant considerations to the exercise of the discretion, the trial judge noted that the application for leave to rely upon Mr Hartley's report "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."[53] That finding was clearly correct.

[106] Next, the trial judge turned to the departure involved with the directed timetable and framework. This included the fact that the issue of whether Monto coal could have been successfully marketed as alleged by the appellants had been part of the case since at least 2014, that the appellants had been ordered to file and serve any expert reports upon which they intended to rely at trial by 25 August 2017 but did not do so, that they did not comply with further orders made on 30 July 2018 for expert reports in reply to be filed before 2 November 2018 and, instead, filed reports which supported a substantially altered case. In referring to these matters, the trial judge was not awarding demerit points. This background explained the basis upon which he dealt with the appellants' substantially altered case which was allowed, at their request, to run to trial a few months later. The appellants were given leave, but, as the trial judge 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."[54]

Importantly, the trial judge stated:

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53 Reasons at [79].

54 Reasons at [84].

> "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."[55]

[107] In making that statement of fact, the trial judge was not expressing frustration with the appellants' past conduct of the case. He was making the important point that the framework of orders and the directed timetable had been set to achieve a fair trial and that the restrictions upon the appellants in relying upon further expert reports was an integral part of ensuring a fair trial.

[108] The appellants' June 2019 application, if granted, was not about an expected report (again) arriving late. Granting leave to allow the appellants to rely upon a report such as Mr Hartley's was inconsistent with orders which purposely did not make provision for the appellants to provide reports in reply and which created a mechanism for the appellants to respond to the respondents' expert reports, namely by having an expert who was entitled to attend a relevant conclave express any disagreement with that evidence by way of short reasons in the joint expert report.

[109] The trial judge next considered the prejudice which would be caused to the respondents if leave was granted, and the respondents' ability to ameliorate that prejudice. Since this is a matter about which I find myself unable to agree with McMurdo JA, I shall return to discuss the trial judge's findings and my views on that matter.

[110] The next relevant consideration addressed by the trial judge was the adequacy of the appellants' explanation for their delay. I have already noted the appellants' solicitor's simple and unhelpful expression of opinion that Mr Browne did not have the relevant expertise to deal with "all of the coal technology and coal marketing matters raised in the Conroy and Crump reports."

[111] The appellants' submissions to the trial judge that, at the heart of their application, was a proposition that Mr Stainlay could have attended the expert conclave process and responded to the Conroy and Crump reports was correctly rejected by the trial judge. The appellants did not file any report by Mr Stainlay. They chose to rely instead on Mr Browne's report and whatever part of the Hill 2014 and Hill 2017 reports might be admitted on the issue of coal marketing without calling Mr Stainlay. The trial judge reiterated that the restrictions imposed by the orders of 21 December 2018 were made on the basis that the respondents were entitled to think that the appellants were finally committed to the case and the expert opinion evidence that they wished to take to trial. As his Honour 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."[56]

[112] The trial judge correctly observed that whilst the appellants contended that Mr Browne could not respond to all of the things which Mr Conroy and Mr Crump say, "the scope of the gap is unclear" and that nothing was said about Mr Hill's expertise to opine on such matters.[57]

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55 Reasons at [84].
56 Reasons at [96].
57 Reasons at [97](f).

[113] Having considered the relevant evidence in its proper context, the trial judge concluded that the appellants had not given an adequate explanation or justification for changing the forensic choices they made about the manner in which they would seek to discharge their onus.[58]

[114] Finally, in considering the adequacy of the appellants' explanation for their delay, the trial judge responded to what was described as an underlying theme in the appellants' argument that the problem was caused by the fact that the Conroy and Crump reports were received late and contained material not expressed in the respondents' first round of expert reports. The trial judge correctly found that argument unpersuasive. First, it was the appellants' case and it was their task to organise the evidence which, if accepted, would discharge their onus of proof. It was not for the respondents to point out weaknesses in the case so the appellants would have an opportunity to correct them. Secondly, the responsibility for the disrupted and abbreviated timetable before trial was that of the appellants. Thirdly, as the trial judge explained, the orders of 21 December 2018 did not impose any constraint on the nature of the reports which the defendants were permitted to deliver within the timetable which was set.[59]

[115] Having concluded that the appellants had not provided an adequate explanation for their delay, the trial judge turned to the prejudice which would be caused to the appellants if leave was refused. The trial judge gave appropriate consideration to this factor, including the appellants' failure to properly identify the respects in which, according to the appellants' solicitor, Mr Browne did not have the relevant expertise to deal with "all" of the matters raised in the Conroy and Crump reports. The trial judge correctly found that how much of the matters cannot be dealt with by Mr Browne "is not demonstrated by the evidence."[60] The result was that, on the evidence, there was "an undefined gap" in the ability of the appellants to respond to matters contained in the Conroy and Crump reports and to address them in the relevant conclaves. After dealing with aspects of Mr Hill's evidence, and making an assumption in the appellants' favour for the purpose of the application, namely that Mr Hill lacked the expertise which he asserted, the trial judge concluded that the appellants would suffer "some prejudice by being denied the opportunity to rely on Mr Hartley's report."[61] Still, there was an "undefined gap" in the appellants' ability to respond to the Conroy and Crump evidence in the expert conclaves. The result would be that, if the evidence of Conroy and Crump was admitted at the trial, it would be without the benefit of commentary by Mr Browne (to the extent that at the conclave he disagreed with it) in respect of some undefined part of their evidence.[62]

**The trial judge's exercise of the discretion**

[116] Importantly, the trial judge did not state that having assessed, as best he could, the prejudice which would be caused to the appellants if leave was refused and the three specific aspects of prejudice which would be caused to the respondents if leave was granted to allow a new report from Mr Hartley, that the prejudice to the respondents outweighed the prejudice to the appellants. Instead, the trial judge considered a number of matters, including claimed prejudice, the framework created by the

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58 Reasons at [97](g).
59 Reasons at [98].
60 Reasons at [103].
61 Reasons at [106].
62 Reasons at [106].

December 2018 orders in ensuring the proper and fair conduct of the trial, the absence of any adequate explanation by the appellants for departing from that framework at that point, and the choice made by them not to call Mr Stainlay (or a similarly qualified expert in coal marketing).

[117] The position might have been different if the appellants had filed a report by Mr Stainlay and intended to have him attend expert conclaves and give evidence at the trial. If that had been the case it might have been reasonable to treat Mr Hartley as some kind of substitute for Mr Stainlay who, unfortunately, was unavailable to give evidence. However, the fact of the matter is that the appellants did not file any report by Mr Stainlay, did not intend to call him as a witness at the trial and the respondents had no expectation that he (or any substitute) would be an expert witness in the case.

[118] Having considered matters in their proper factual context, including the carefully constructed framework created by the December 2018 orders in relation to expert evidence, the trial judge concluded that the appellants had been given a fair opportunity to present their case. Having balanced relevant considerations, some of which favoured the appellants and some which did not, the trial judge correctly identified that his overriding obligation was to ensure a trial that is fair.[63] Having considered matters in their proper context, the trial judge concluded that it would be unfair to impose on the respondents the prejudice which he had identified for the sake of avoiding the prejudice to the appellants which he had identified. The appellants failed to discharge the onus of persuading the trial judge that the interests of justice favoured granting the application.[64]

**Appellate intervention**

[119] The appellants accept that an appeal from a discretionary decision of the nature made by the trial judge requires them to persuade this Court that the judgment was vitiated by an error of the kind explained in *House v The King*. They also acknowledge that appellate courts should exercise "particular caution" in reviewing a decision that concerns a matter of practice and procedure. A "tight rein" must be kept on appellate intervention in such cases.[65] In addition, an appellate court generally ought not interfere with such a decision unless the decision will work a "substantial injustice".[66]

[120] The need for caution is heightened in a case such as this in which a proceeding has been "managed by the primary judge who is intimately acquainted with the issues in dispute as well as the evidence".[67] Considerable deference should be paid to a trial judge with such a familiarity in evaluating the disadvantage which may be suffered by one party if leave is refused or by the other party if leave is granted. The trial judge is in a position of great advantage over this Court in evaluating the consequences of a grant of leave on both the conduct of the trial and participants in the trial process. The participants include witnesses, the facilitator of expert

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63 Reasons at [108].

64 Reasons at [110].

65 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177 citing the statement of Jordan CJ in *In re the Will of FB Gilbert (dec)* (1946) 46 SR (NSW) 318 at 323; *Hollingsworth & Ors v Johnston & Anor* [2018] QCA 351 at [28].

66 *Just GI Pty Ltd & Ors v Pig Improvement Company Australia Pty Ltd* [2001] QCA 48 at [14].

67 *Robson & Anor v Robson & Ors* [2010] QCA 330 at [35].

conclaves, the lawyers in the case as well as representatives of the parties who had an expectation that the appellants' expert case was to be taken as closed in December 2018, subject to what might emerge from the conclaves, including the contents of joint reports about points of difference.

[121] These principles about appellate restraint in substituting evaluations are apposite in respect of the appellants' challenge to the trial judge's findings about prejudice.

[122] More generally, appellate intervention which depends upon a discretionary judgment being vitiated by an error of the kind explained in *House v The King* is not established by arguments which, in substance, amount to a contention that the trial judge placed far too much weight on a particular consideration, such as prejudice to the respondents if leave was granted.

**The first main issue on this appeal**

[123] Have the appellants demonstrated that the trial judge's exercise of a discretionary judgment on a matter of practice and procedure was vitiated by an error of the kind described in *House v The King*?

**The trial judge did not act upon a wrong principle**

[124] The contention that the trial judge erred in acting upon wrong principles and in failing to have regard to the paramountcy of the interests of justice and the need to ensure a fair trial was not developed in oral submissions. It may be disposed of quickly. The trial judge clearly recognised that his objective was to exercise the discretion if the interests of justice in ensuring a fair trial required it.[68] The trial judge's reasons, in their content and in their conclusion, recognised that there was a need to balance various factors outlined in the leading authorities, and that, in doing so, the overriding obligation was to ensure a trial that is fair.[69]

**The trial judge did not mistake the facts**

[125] The appellants' contention that the trial judge was mistaken as to the facts in relation to Mr Stainlay cannot be sustained. The respondents' detailed submissions on this point as developed in paragraphs 18 to 33 of their written submissions and in the oral submissions of Mr Sheahan QC should be accepted. Briefly stated, Mr Stainlay was not a proposed witness. He had not filed a report in the proceeding and would not have been entitled to attend a joint expert conference with Mr Conroy and Mr Crump. Mr Stainlay had never been put forward as a prospective witness in any of the many trial plans which had been ventured and he was not included amongst the expert witnesses nominated in the appellants' applications in late 2018. He was not enlisted to respond to Mr Barkas' report. Mr Browne was. The trial judge was correct to conclude that by December 2018 the appellants had not filed a report by Mr Stainlay and had decided not to call him as a witness in the proceeding.[70]

[126] The appellants have not established that the trial judge erred in mistaking the facts as to Mr Stainlay or mistook any other facts.

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68 Reasons at [14] and the authorities cited and quoted therein.
69 Reasons at [108].
70 Reasons at [61]-[63].

**Relevant and irrelevant considerations**

[127] Allied with the appellants' challenge to the trial judge's findings about Mr Stainlay are arguments about the consequences of the appellants having made a "forensic decision" not to rely upon Mr Stainlay. The appellants argue that such a forensic decision did not in fact preclude Mr Stainlay from participating in the expert conclaves because the time for them to nominate attendees to participate had yet to arrive when the appellants' forensic decision was made in 2018. They are correct to contend that, as a matter of principle, a party is ordinarily not to be deprived of a fair trial by being held to a forensic decision which was made as a result of a mistake of fact or law, or where the circumstances have relevantly changed. However, the problem for the appellants is their inability to establish by acceptable evidence that the decision to not rely upon Mr Stainlay was the result of any such mistake, as distinct from a decision which they later came to regret. The appellants failed to identify in their evidence such a mistake or a relevant change of circumstances. The provision by the respondents of expert reports by people with the expertise of Mr Conroy and Mr Crump is not said to be something which was not anticipated. It might reasonably have been anticipated by way of response to at least Mr Browne's evidence or, more generally, to meet the appellants' case by calling experts with relevant expertise in relation to coal marketing.

[128] A party in the appellants' position is not necessarily held to a forensic decision, particularly where the decision was made as a result of a mistake of fact or law, or where circumstances have relevantly changed. However, the appellants did not advance before the trial judge a sufficient reason to allow them to depart from the decisions which they had made to not call Mr Stainlay to support the parts of the Hill reports which he had written, to counter the evidence of Mr Barkas or to support their case about coal marketing in some other way.

[129] Insofar as the appellants contend that the trial judge erred in not taking into account relevant matters or taking into account irrelevant matters, I would not regard the choices made by the appellants not to include Mr Stainlay as a witness and to not include him in the joint expert processes, or the choice made by the appellants to rely upon Mr Hill to support the sections of his reports written by Mr Stainlay, as irrelevant matters. The choices made by the appellants about the expert evidence they wished to rely upon were clearly relevant to the discretion. Also, the trial judge's findings about those choices were not erroneous.

[130] More generally as to relevant considerations, the trial judge identified, based upon the leading authorities, a number of relevant considerations and examined them under separate headings in his reasons.[71] The selection of those considerations was convenient for the purposes of exposition, and allowed a structured assessment of whether the appellants had discharged the onus of persuading the trial judge that, ultimately, relevant considerations favoured granting the application in the interests of justice. Consideration of those several matters was not a mechanical exercise of weighing different factors, some of which favoured granting the application and others which did not. Prejudice to the respondents if leave was granted and prejudice to the appellants if leave was refused were two of many factors. The exercise of discretion was not a matter of simply weighing prejudice to the appellants against prejudice to the respondents.

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71 Reasons at [15].

[131] Further, it was, and remains, important not to see the asserted prejudice to the appellants (in not being able to call Mr Hartley as a witness at the trial) in isolation or out of context. To do so would be an error. Viewed out of context, the appellants' case on prejudice is that they would be deprived of the evidence of an expert on an important topic in response to the evidence of Mr Conroy and Mr Crump. However, the asserted prejudice arises in the context of the December 2018 orders which were intended to ensure a fair trial. Those orders were not appealed against by the appellants despite the restriction they placed on the appellants relying upon expert reports of the kind Mr Hartley produced. As noted, the December 2018 orders, in the interests of ensuring a fair trial, intentionally deprived the appellants of the opportunity to file a further expert report in reply even if that had the effect of depriving the appellants of the evidence of an expert such as Mr Stainlay or Mr Hartley on a topic which would be addressed by a further report or reports filed by the respondents pursuant to those orders. Rather than permitting an expert report in reply, the December 2018 orders created a process by which the appellants' experts might respond to further expert evidence from the respondents. This was by having an expert in that field, who had already filed a report, attend a conclave where points of disagreement could be identified and stated in a short report.

[132] The appellants had an expert in, broadly speaking, the same field as Mr Hartley, namely Mr Stainlay. However, they chose not to file his report, chose not to include him as a witness in the trial or a participant at the planned conclaves and chose, instead, to counter the respondents' case on coal markets and the marketability of the Monto coal with the expert report of Mr Browne.

[133] The appellants relied upon the Browne Report on, among other things, the topic of coal markets. It addressed matters in connection with low HGI coal. Mr Browne's report stated matters based on his experience about the interest from end users of such coal. His report stated that in the period up to 2005 he was "actively working in the market for Surat and West Moreton Basin Coals" and as a result, he knew "that there was a market for these types of coals."

[134] The appellants' solicitor's affidavit about Mr Browne did not state that he lacked any expertise on the issues of coal technology and coal marketing. Instead, his affidavit was uninformative (one might say deliberately so) as to which of the matters raised in the Conroy and Crump reports Mr Browne did not have relevant expertise to deal with (at least in the solicitor's opinion).

[135] Critically, so far as the appellants' attempt to discharge their onus on the application before the trial judge was concerned with the prejudice they might suffer if Mr Browne, but not Mr Hartley, attended a conclave at which Mr Conroy and Mr Crump participated, the appellants did not proffer any evidence from Mr Browne as to which parts, if any, of the Conroy and Crump reports he lacked expertise to deal with. This was an important omission in circumstances in which Mr Browne ventured opinions about the market for low HGI coal at the relevant time, based upon his experience in actively working in the market.

[136] In circumstances in which the appellants' evidence did not provide even the slightest detail about the things stated by Mr Conroy and Mr Crump to which Mr Browne was unable to respond, it would have been wrong for the trial judge to infer that those matters were significant and that, as a consequence, the prejudice which the appellants asserted was significant.

[137] The trial judge was correct to conclude, based on the evidence before him, that the gap in the matters about which Mr Browne might respond was unclear or undefined. The evidence did not permit the trial judge to conclude that the contents of Mr Hartley's report reflected the gap. The trial judge also was correct to conclude that, doing the best he could, the appellants would suffer "some prejudice by being denied the opportunity to rely on Mr Hartley's report", but that the extent to which he would be deprived of the benefit of commentary by Mr Browne (to the extent that at the conclave he disagrees with the evidence of Mr Conroy and Mr Crump) was undefined.[72]

[138] It might be said that the importance of Mr Hartley's evidence could be inferred by the respondents' strenuous opposition to the application to admit it. That is one inference, but not one which I would readily act on in the absence of evidence which might easily have been given by the appellants' solicitors or by Mr Browne about matters in respect of which he lacks experience or expertise and which are the subject of Mr Hartley's report. The respondents' strenuous opposition is not a sufficient basis to infer that Mr Hartley's evidence is likely to be critical on this aspect of the case. A reasonable explanation for the respondents' strenuous opposition to the application is an understandable desire to require the appellants to abide by the ground rules laid down by the December 2018 orders. Their opposition is consistent with a proper sense of grievance that the appellants, having obtained leave to present a new case on the basis of orders which were premised on their expert evidence being taken to be closed (subject to what would emerge at the conclaves through the process set down by those orders), seek to disrupt the framework which was set in the interests of ensuring a fair trial for all parties. The respondents' resistance to the application is consistent with a sense of the injustice in allowing the appellants to put on an expert report in reply, being something which the December 2018 orders purposely did not allow, and to allow it in circumstances in which the appellants have not advanced an adequate explanation. The appellants have not explained their desire to now call an expert with similar expertise to Mr Stainlay on the basis of a mistake about facts or law or a material change of circumstances which could not have been anticipated.

[139] Absent evidence from the appellants which properly explains their desire to resile from their decision to not enlist Mr Stainlay as an expert as something done on the basis of a mistake of fact or law, one is left to conclude that the appellants now regret not having enlisted a specialist such as Mr Stainlay (or Mr Hartley) to file a report about a relevant subject matter. However, their inability, without leave, to file an expert report in reply by Mr Stainlay (or in his place Mr Hartley) is a consequence of:

(a) the price the appellants were prepared to pay in order to secure the orders which they did in December 2018 that made no provision for expert reports in reply and made detailed directions about how the appellants' experts might respond to further expert reports from the respondents; and

(b) the appellants' choices to not file a report by Mr Stainlay, and to not identify him or anyone else who, in addition to Mr Browne, would attend the expert conclaves about marketing the relevant kind of coal and give evidence at trial.

[140] The disadvantage in not being able to file and rely upon Mr Hartley's report without leave is a consequence of the December 2018 orders and choices made by the

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72 Reasons at [106].

appellants as to the number of expert witnesses they would rely upon and who those experts would be.

[141] Doing the best one can in the absence of evidence from the appellants which might inform the respects in which Mr Browne was thought by the appellants' solicitor to not have the required expertise to respond to *all* of the matters raised in the Conroy and Crump reports, one might infer that, as a result of the choices made by them, the appellants are at a disadvantage in choosing a generalist over a specialist. However, that was a disadvantage of the appellants' own making when they decided to not file a report by Mr Stainlay or nominate him as a proposed witness.

[142] As senior counsel for the respondents argued in this appeal, in the context of an extremely difficult and important contested application in December 2018 for leave to amend and to adduce evidence in support of their amended case, the appellants elected to present a more attractive case for the relief they were seeking, and the more attractive case was a smaller case with fewer experts. They deliberately did not include Mr Stainlay. However, by the application brought in June 2019 the appellants, having "banked the benefit" of the 21 December 2018 orders, now wish to avoid the disadvantage of not having an extra expert.

[143] As to the alleged prejudice to the appellants in having Mr Browne, but not Mr Hartley as well, at the relevant experts' conclaves, even now the appellants do not say that at the relevant expert conclave Mr Browne was unable to respond to any significant extent to the matters raised by Mr Crump and Mr Conroy, aided as Mr Browne must have been by Mr Hartley's report. In seeking appellate intervention and a re-exercise of the discretion to avoid what the appellants claim is a substantial injustice, the appellants do not seek to adduce any evidence in this Court about the joint expert report that was produced as a result of a conclave about coal marketing which was attended by Mr Browne. If Mr Browne lacked the expertise to respond to the matters raised by Mr Conroy and Mr Crump, then his inability to agree with matters stated by them presumably would be identified and attributed to his lack of expertise about those matters. No such evidence is forthcoming from the appellants.

[144] Further, as to the prejudice which the appellants will suffer if they are not entitled to rely upon Mr Hartley's report at the trial, the appellants will still be able to cross-examine Mr Crump and Mr Conroy at trial on the basis of Mr Hartley's report and any further information which Mr Hartley provides to the appellants' lawyers on matters relevant to their evidence. The appellants will not have the advantage of Mr Hartley's report going into evidence, but that disadvantage was one which flowed from the appellants securing the orders which they did in December 2018 and their decisions to not enlist Mr Stainlay or, in his place, Mr Hartley as an expert who had filed an expert report.

**Overview of alleged prejudice to the appellants in not being given leave to rely on Mr Hartley's report**

[145] Ultimately, the disadvantage of not being able to rely upon a new report by a new expert to respond to Mr Conroy and Mr Crump is a function of:

- the December 2018 orders which, in the interests of justice, and to enable the appellants to present their new case at a trial in early 2019, limited reports in reply and provided a process by which the appellants might respond to any further reports from the respondents;

- the appellants' decision to not file expert reports from Mr Stainlay or to nominate him as a witness; and
- the appellants' decision to rely upon Mr Hill and Mr Browne as their expert witnesses about coal marketing.

The reports of Mr Conroy and Mr Crump were not unanticipated. They did not relate to a subject matter which must have taken the appellants by surprise. Their reports relate to subjects directly relevant to the matters about which the appellants assumed the onus of proof and made choices about the experts who they would rely upon to prove those matters.

[146] The trial judge was correct to conclude that if the appellants were not given leave to rely upon Mr Hartley's report they would suffer some prejudice, but that the extent of that prejudice was ill-defined by the appellants' evidence. The extent of the claimed prejudice should not be guessed at in the absence of evidence which was reasonably available from Mr Browne or through a more informative affidavit from the appellants' solicitor about Mr Browne's expertise and the specific respects in which he did not have the expertise to deal with some matters raised in the Conroy and Crump reports.

[147] The prejudice asserted by the appellants in not being able to rely upon a report by Mr Hartley should not be viewed in isolation, since to do so may give the impression that the appellants were simply and unfairly deprived of the opportunity to call expert evidence in reply on an important issue. The trial judge had regard to the appellants' claim of prejudice and did so in its proper factual context. His ultimate conclusion depended on that particular factual context. That context showed that the disadvantage of not being able to rely on Mr Hartley's report was the consequence of:

- orders made in December 2018 which created a framework for the appellants' expert witnesses to respond at conclaves and in joint expert reports about matters of disagreement;
- decisions made by the appellants about the expert evidence and the expert witnesses it proposed to rely upon, being decisions which the appellants had not shown to be the result of a mistake of law or fact, or from which the appellants should be allowed to resile due to a relevant change of circumstances.

**The exercise of a discretion concerned with fairness**

[148] Even without regard to the prejudice which would be suffered by the respondents if leave was allowed, the foregoing gives rise to significant questions about fairness and, ultimately, whether the interests of justice warranted a grant of leave. Why, having chosen to go to trial on a new case on the basis of orders which, in the interests of justice, restricted the appellants' entitlement to rely on expert reports in reply, and having made choices about the expert evidence to be called in support of its new case, should the appellants be allowed to rely on a report in reply?

[149] Expressed slightly differently, the question is this: having obtained the benefits of the December 2018 orders on the basis that their expert evidence was at a close and that there would be no expert reports in reply, why should the appellants be allowed to rely on a report in reply, thereby disturbing the framework which was carefully constructed to ensure a fair trial?

[150] Irrespective of how these kind of questions are precisely framed, they compel the answer that to allow the appellants to rely upon Mr Hartley's report in those circumstances would be unfair.

[151] The trial judge correctly viewed the exercise of his discretion as depending not simply upon the weighing of claimed prejudice in isolation, but as involving the exercise of a discretion which required a number of considerations to be assessed in their "particular factual context".[73] Once the claimed prejudice to the appellants was viewed in the context of the December 2018 orders and the forensic choices made by the appellants about the expert evidence upon which they would rely at trial, it would have been appropriate for the trial judge to not accord much weight to prejudice which was the natural consequence of the December 2018 restrictions on expert reports in reply.

[152] The asserted prejudice to the appellants therefore had a poor claim on the favourable exercise of a discretion which is informed by considerations of fairness and the obligation to ensure a trial that is fair in the particular circumstances. Such asserted prejudice had even less claim on the favourable exercise of a discretion where the appellants' evidence did not prove the extent of prejudice and left the trial judge to do the best he could in identifying some undefined part of the evidence of Mr Conroy and Mr Crump which, in the appellants' solicitor's opinion, Mr Browne lacked the expertise to address.

[153] In circumstances in which the prejudice to the appellants in not being given leave to rely upon Mr Hartley's report had such a poor claim on the favourable exercise of a discretion, and other relevant considerations such as the timing of the application and the inadequacy of the appellants' explanation for their delay counted against exercising the discretion in the appellants' favour, it was not incumbent upon the respondents to show significant, tangible prejudice if Mr Hartley's report was to be allowed. Again, it is possible to view prejudice to the respondents in isolation in terms of the practical prejudice of their experts and others being required to respond to an unexpected report, at very short notice, when they were already busy. In addition, and whether viewed as a type of prejudice or separately as an aspect of fairness, there is the unfairness or disadvantage to the respondents in disturbing a framework which was set in place to achieve a fair trial at which the respondents would be required to meet the appellants' new case, but not required, in the absence of leave, to deal with new expert reports in reply or, indeed, any new expert reports.

[154] Whether or not this last matter is treated as a type of prejudice, the same issue arises. The issue is whether or not the interests of justice justified disturbing a framework for the reception of expert evidence which was ordered in the interests of justice, particularly in circumstances in which the prejudice to the appellants was ill-defined and their explanations for bringing the expert report into play were judged to be inadequate.

[155] I conclude that the trial judge would have been entitled to dismiss the application, irrespective of the weight he assigned to three aspects of specific prejudice which would be encountered by the respondents if leave was granted.

**Specific prejudice to the respondents if leave was granted for the Hartley report**

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[73] Reasons at [109].

[156] The trial judge addressed this issue at [87] to [91] and identified three categories of prejudice to the respondents. The appellants' written submissions contend that no real prejudice was demonstrated, that the evidence of prejudice relied on by the respondents was "at best conjectural and in truth speculative", and that the trial judge erred in his assessment of the probable impact of Mr Hartley's report on the management of the case. The appellants' submissions do not descend to any detail in support of these contentions.

[157] The first aspect of prejudice to the respondents was a burden which would be imposed on their expert witnesses in the context of their already scheduled involvement in the expert conclaves. The trial judge found that they would be expected to engage with a new expert report mere days before their involvement in what was already a "complicated and intellectually demanding task".[74] At least one of them had other reporting commitments. The trial judge considered that this would be an unfair burden to impose on them and, all the more unfair in light of the burden under which the respondents were already labouring as a consequence of the 21 December 2018 orders.

[158] McMurdo JA at [63] concludes that the respondents' complaint of prejudice from the shortness of time that Mr Conroy and Mr Crump had to consider the Hartley report "lacked weight" in the absence of evidence that either witness had read the Hartley report and was unable to discuss it with Mr Hartley in the coming weeks. The absence of evidence from Mr Conroy or Mr Crump about the Hartley report and their ability to respond to it in a short time did deprive this complaint of some weight. However, its lack of weight did not alter the fact that the respondents' expert witnesses (not to mention the busy facilitator) would be prejudiced in preparing for what was already a complicated and demanding task. This factor warranted some weight, particularly in the context of the respondents' submissions to the trial judge that the Hartley report involved a series of material variations and additions to the appellants' case as to the Hypothetical Stage 2 Feasibility Study. As those submissions noted, the appellants' new case, based on Mr Hartley's report, differed from relevant parts of Mr Hill's 2014 and 2017 reports and relevant parts of Mr Browne's report by, in effect, proposing that the problem of marketing large quantities of low HGI coal would have been addressed in the Hypothetical Stage 2 Feasibility Study. In addition, the respondents' submissions to the trial judge noted that Mr Hartley's report in relation to a marketing strategy for the initial one million tons of Monto coal was a new scenario not previously advanced in the appellants' expert evidence, their lay evidence or their pleading. In my view, given the advantage enjoyed by the trial judge in assessing those submissions and his familiarity with the evidence in the case, it was appropriate to accord some weight to the burden which would be imposed on, among others, the respondents' expert witnesses.

[159] The second aspect of prejudice was that the respondents would be denied the ability to conduct the kind of investigations which parties in their position would usually conduct before asking their own expert witnesses to respond to their opponent's expert report. Again, in my view, the trial judge was entitled to accord weight to the disadvantage the respondents suffered in not being able to undertake this kind of preparation so as to assist their own expert witnesses to respond to the facts and contentions relied on in Mr Hartley's report. As the trial judge observed, even if those

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74 Reasons at [87].

investigations could occur in the context of the long scheduled expert conclaves, it would have to be done in any "unfairly tight timetable".[75] The appellants' submissions do not engage with this aspect of prejudice. Simply to say that Mr Hartley's report was of limited length, confined to certain topics and responsive to the Conroy and Crump reports does not deny the fact that the respondents and their expert witnesses were entitled to a reasonable time to investigate its contents and respond, in a careful and measured way, to a report which, on the appellants' case, was critical to their success.

[160] The third aspect of prejudice relates to the distinct possibility that some aspects of the factual matters asserted or assumed by Mr Hartley could have been dealt with by some of the respondents' lay witnesses who had already given their evidence. The trial judge considered that it was an incomplete answer to this problem to say that the respondents could recall the witnesses, and gave reasons for that conclusion. In my view, the trial judge was entitled to identify this as a relevant aspect of prejudice, and it was not incumbent upon the respondents to positively assert that they would need to recall certain witnesses and expose those witnesses to further cross-examination. The respondents' submissions to the trial judge contained considerable detail about the respects in which the respondents had already adduced evidence from four witnesses as to the likely response by Monto Coal 2 to the Hypothetical Stage 2 Feasibility Study. Without descending to the detail contained in paragraph 55 of the respondents' submissions to the trial judge, the point is that the relevant witnesses were cross-examined on a different basis to the one advanced in Mr Hartley's report. Those submissions advanced a plausible case that the respondents would be prejudiced if the appellants were permitted to contend for a certain scenario based upon the substantial variation to the appellants' case involved in Mr Hartley's report.

[161] The inconvenience and distress of requiring witnesses to be recalled should be accorded substantial weight. The respondents' witnesses had been inconvenienced by numerous delays to the trial occasioned by the appellants' amendments and failure to comply with directions. They had given their evidence based on certain assumptions and even if they were able to be recalled, it was unfair to them to be subjected to two sets of cross-examination involving different assumptions concerning the Hypothetical Stage 2 Feasibility Study. The trial judge was correct to observe that it is not usually desirable for a party to recall a witness and to expose the witness to further cross-examination.

[162] It may be said that lay witnesses were always exposed to a risk of being recalled if, for example, issues emerged as a result of disagreements in the course of an expert conclave, for instance, where one of the appellants' experts at that conclave disagreed with aspects of the reports of Mr Conroy and Mr Crump. However, that possibility of being recalled flowed from conclaves at which experts nominated by the appellants, and who had filed a report as at December 2018, would attend. It differs from what may flow from the attendance at a conclave by Mr Hartley with a new report based on different scenarios to those contained in the Browne Report. The fact that the December 2018 orders anticipated that lay witnesses might have to be recalled does not alter the fact that granting leave in relation to Mr Hartley's report was likely to necessitate lay witnesses being recalled to address different assumptions and facts to those which arose from the Hill reports and the Browne

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75 Reasons at [88].

Report in relation to the problem of low HGI coal. The trial judge was entitled to conclude that this aspect gave rise to a relevant prejudice to the respondents and to their lay witnesses.

[163] Also, if one assumes in the appellants' favour that Mr Hartley brings to the conclave table information, analysis, scenarios and opinions which Mr Browne cannot, then the respects in which Mr Hartley will respond to Mr Conroy and Mr Crump necessarily will be different to Mr Browne's response to the same material. On that basis, the content of the joint expert report will be different and, on the appellants' case, different in significant respects by virtue of Mr Hartley's report and participation. As a result, lay witnesses who are recalled will deal in their second round of evidence with matters which they would not be required to address if they only had to be recalled to deal with matters arising from Mr Browne's response at the conclave to Mr Conroy and Mr Crump.

[164] In summary, the trial judge was entitled to place some weight on each of the three aspects of prejudice. His Honour did not overstate the extent of the claimed prejudice or make errors of fact in discussing it. For instance, he did not characterise each aspect of prejudice as grave or insurmountable. Each aspect was relevant prejudice which would be occasioned by the late introduction of Mr Hartley's report. It differs from the difficulties or disadvantage that the respondents were required to encounter in dealing with the product of expert witness conclaves that occurred part way through the trial and after the lay witnesses had given their evidence. The December 2018 orders created the possibility that the defendants' expert witnesses, their lay witnesses and their lawyers might have to respond to matters raised by an expert witness such as Mr Browne at an expert conclave at which he responded to the expert evidence of Mr Conroy and Mr Crump. These orders gave a reasonable expectation that the appellants' expert evidence had closed in December 2018. Therefore, the respondents and their witnesses should not be expected or required to respond to a new expert report which took a different approach to the issue of marketability to the one which had been advanced by Mr Browne.

[165] I am unable to agree, with great respect, with McMurdo JA that there was no relevant prejudice by the Hartley report adding to any burden of the December 2018 orders. The Hartley report was an unexpected and late burden which unfairly added to the burden imposed upon the respondents, their expert witnesses and certain lay witnesses who had already given their evidence.

[166] The trial judge's evaluation of prejudice should be accorded appropriate deference, given his familiarity with the issues and the evidence and his ability to assess the extent to which the Hartley report constituted a substantial variation to the appellants' existing case, which had previously been based on the Hill 2014 and Hill 2017 reports and parts of the Browne Report in relation to low HGI coal. If, despite this, the trial judge accorded the prejudice claimed by the respondents more weight than it deserved, this does not mean that his discretion miscarried. In my view, the judge's findings as to the aspects of prejudice were findings which were open to him on the evidence. I do not agree that they were not supported by the evidence and I do not agree with the conclusion of McMurdo JA that the trial judge's assessment of the likely prejudice to the respondents involved an error of principle.

**Conclusion on the issue of appealable error**

[167] I conclude that the appellants have not demonstrated that the trial judge's exercise of a discretionary judgment on a matter of practice and procedure was vitiated by an error of the kind described in *House v The King*.

**Would appellate intervention be required in any case to avoid a substantial injustice?**

[168] If I had agreed that the trial judge's assessment of the respondents' prejudice was vitiated by the errors found by McMurdo JA, then I would not have concluded that those errors created a substantial injustice which required this Court's intervention and an order that the appellants be permitted to rely on the Hartley report.

[169] For the reasons which I have given, particularly in the section headed "The exercise of a discretion concerned with fairness",[76] even if little weight was given to the three aspects of practical prejudice discussed by the trial judge,[77] the appellants would not have discharged the onus of proving that the interests of justice favoured granting their application. They would not have established that the interests of justice warranted disturbing a framework for the reception of expert evidence which was ordered in the interests of justice, particularly in circumstances in which the prejudice to them was ill-defined and their explanations for bringing the expert report into play were judged to be inadequate. Such an order was not necessary to ensure a fair trial.

[170] For those reasons, I would dismiss the appeal with costs.

**Additional considerations**

[171] Certain considerations, which arise from High Court authority, warrant mention at this point. They are concerned with the interests of justice in a broader sense than the interest of the respondents in not being unfairly disadvantaged by the late introduction of a new report by a new expert when the ground rules for the trial did not envisage that course (absent a good reason to do so).

[172] In my respectful opinion, to allow the appeal and order the Hartley report be adduced into evidence on the basis of what I would regard as a different view to that of the trial judge in assessing prejudice to the respondents would carry certain unintended risks.

[173] The Court should not risk being perceived to reward the appellants' unmeritorious attempt to "saddle up" (if I may use that expression) another expert on coal marketing at the last minute. This is especially so when that reward is granted essentially on the basis of a different evaluation to that of the trial judge about the extent of prejudice caused by that unexpected expert's report. I describe the attempt as unmeritorious because it was inspired by a change of mind (or change of heart) by the appellants about whether to rely on an additional expert like Mr Stainlay or Mr Hartley. Allowing that indulgence may be perceived, understandably, by some as unjustifiably disturbing a framework which was designed to achieve a fair trial.

[174] To allow the appeal and order Mr Hartley's report into evidence in the present circumstances (which include important findings of fact by the trial judge which are undisturbed) is apt to give experts, lay witnesses, lawyers and employees associated

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76 [148]-[155] above.
77 Reasons at [87]-[89].

with the respondents a sense of injustice. This is in the sense that the appellants took the benefit of the orders made last December, but reneged on paying the agreed price. That price was that there be no new expert reports from the appellants, especially one introduced mid-trial, unless (at least) an adequate explanation was given for the delay. The trial judge correctly found that there had not been such an explanation.

[175] The trial judge was well-placed to assess the practical prejudice to the respondents in allowing the Hartley report into evidence so late in the case, in terms of preparation for and conduct of the trial. His Honour also was well-placed to assess less tangible, but still important, consequences to participants in the trial. These were the anxiety, distress or exasperation to experts seeking to assist the court, to lawyers struggling under huge burdens and to lay witnesses (some of them elderly) who faced the prospect of being recalled to respond to the assertions and assumptions contained in a new report from a new expert witness.

[176] The anxieties occasioned to trial participants of new issues being raised towards the end of a trial are a relevant consideration.[78] So too is raising the false hope that the appellants' team of expert witnesses had finally been selected in December 2018.

[177] Allowing the appellants, at this late stage and without adequate justification, to have another expert run in the race has the potential to dash legitimate expectations and add to the anxiety of trial participants. It also has the potential to diminish the confidence of trial participants (not to mention others) that the Court, having set the rules for a fair race, will stick to them.

[178] Another associated risk is that other litigants will be encouraged to treat court orders of the kind made by the trial judge as somehow provisional and able to be circumvented when the opportunity presents itself, provided the other party cannot show significant, tangible prejudice. Such an outcome rewards parties who, without good reason, resile from positions taken by them, and alters the ground rules created for a fair trial. It encourages poor practices in litigation.

[179] In their submissions on legal principles, the appellants refer to the statement of French CJ that a relevant consideration is "the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification."[79] That consideration is apposite. The trial judge did not accede to an application which was made without adequate explanation or justification.

[180] His Honour was concerned to ensure a fair trial for all the parties. In my view, the appellants have failed to establish that the exercise of discretion was vitiated by an error of the kind described in *House v The King*, let alone one which justifies appellate intervention to avoid a substantial injustice.

[181] **BRADLEY J:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

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78 *Aon Risk Services Australia Pty Ltd v Australian National University* (2009) 239 CLR 175 at 214 [101] citing *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220.

79 *Aon Risk Services Australia Pty Ltd v Australian National University* (2009) 239 CLR 175 at 192 [30].