SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 6)* [2019] QSC 214	
PARTIES:	First Plaintiffs:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST ACN 097 049 315**
		AND
	Second Plaintiffs:	**EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST ABN 26 010 309 529**
		AND
	Third Plaintiffs:	**H&J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H&J TRUST ACN 077 333 736**
		AND
	First Defendants:	**MONTO COAL 2 PTY LTD ACN 098 919 414**
		AND
	Second Defendants:	**MONTO COAL PTY LTD ACN 098 393 072**
		AND
	Third Defendants:	**MACARTHUR COAL LIMITED ACN 096 001 955**
FILE NO/S:	SC No BS8609/07	
DIVISION:	Trial Division	
PROCEEDING:	Application	
DELIVERED ON:	29 August 2019 (Oral judgment)	
DELIVERED AT:	Brisbane	
HEARING DATE:	28 August 2019	
JUDGE:	Bond J	
ORDER:	**The orders of the Court are that:**	

1. Direct that the plaintiffs have leave to produce a further report from Mr Hartley (P) by 3

September 2019.

2. Direct that the further report of Mr Hartley must be limited to matters which are responsive to such matters raised in JER14 as were within the scope of the matters he dealt with in his original report.

COUNSEL: P L O'Shea QC with M Lyons, W Wild and A Low for the plaintiffs
A M Pomerenke QC, A C Stumer and H W D Stowe for the defendants

SOLICITORS: Holding Redlich for the plaintiffs
Allens for the defendants

[1] The directions I am about to make deal with the consequences of the plaintiffs being permitted to rely on an expert report by Mr Hartley (P) which they delivered during the conduct of this trial. As I mentioned in previous judgments in this matter, I will use post-nominals P and D to distinguish between experts called by the plaintiffs and those called by the defendants.

[2] The plaintiffs had sought leave to rely on that report, so as to supplement evidence which they already had from a Mr Browne (P), in order to respond to the defendants' two experts, Mr Conroy and Mr Crump. Amongst other things, the plaintiffs' solicitor deposed as follows:

> 17. As a result of my discussions with Mr Browne, I formed the view that Mr Browne does not have the relevant expertise to deal with all of the coal technology and coal marketing matters raised in the Conroy and Crump reports.
>
> 18. Accordingly, given the matters identified above, the plaintiffs wish to have the opportunity to adduce expert evidence from a coal marketing expert in relation to the matters raised in the Conroy and Crump reports regarding coal technology, coal quality and coal marketing which are unable to be addressed by Mr Stainlay or Mr Browne.

[3] In my reasons in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 2)* [2019] QSC 162, I explained why I regarded it to be wrong and unfair to the defendants to permit the plaintiffs to adduce the proposed report from Mr Hartley (P). I made orders accordingly on 17 June 2019 and provided reasons for judgment on 26 June 2019.

[4] Thereafter the timetable for convening expert conclaves proceeded roughly in the way that had been timetabled.

[5] Messrs Browne (P), Crump (D) and Conroy (D) attended a conclave on coal marketing between 24 June 2019 and 12 July 2019, and on 15 July 2019 produced a joint expert report (**JER**) 14 on coal markets. JER 14 identified important matters of agreement between Mr Browne (P) and Mr Crump (D). Amongst other things JER 14 stated that a reasonable representation of each expert's projection of market destination and forecast coal price relativity that is expected to be paid for Monto coal, from the commencement of production and until production had reached 10 Mtpa, was as represented in Table 1 and Table 2 to the JER 14. Table 1 represented Mr Browne's (P) view and Table 2 represented Mr Crump's (D) view.

[6] Inputs derived from JER 14 formed part of the foundation for subsequent joint expert reports:

(a) JER 15 on Coal Prices involved conclaves between 14 June 2019 and 8 July 2019 and resulted in a report dated 17 July 2019 which, amongst other things, produced an Excel spreadsheet which the report described as providing:

> A range of coal price and exchange rate forecast discussed in section 2 together with the views of the sales mix for Monto coal and price differentials by market segment as proposed by but not agreed between Mr Browne and Mr Crump, both of whom participated in conclave 14.

The purpose of that spreadsheet was to facilitate the transfer of data from that conclave to other conclaves.

(b) JER 16 on Financial Modelling involved conclaves between 17 June 2019 and 15 July 2019 and resulted in the joint report dated 15 July 2019. That conclave involved experts from both plaintiffs and defendants using the material generated in JER 14 by Browne (P) and Crump (D).

(c) JER 17 on Loss and Damage involved conclaves between 14 June 2019 and 15 July 2019 and resulted in the joint expert report dated 15 July 2019. And, again, that conclave involved experts from both plaintiffs and defendants using the material generated in JER 14 by Browne (P) and Crump (D).

[7] There the matter stood until my decision in relation to Mr Hartley's report was overturned by a majority in the Court of Appeal: see *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QCA 160. The appeal was argued on 5 August 2019 and judgment was delivered on 20 August 2019.

[8] The relevant outcome of that decision was an order that the plaintiffs be permitted to rely on Mr Hartley's (P) report, save for paragraphs 2.11 to 2.14 and 4, which the plaintiffs did not press either before me or the Court of Appeal. Although the remedy which the plaintiffs had sought on appeal was also an order that further expert conclaves be convened involving Mr Hartley, the majority did not make that order. Instead, they determined that the consequential directions including for any conclaves to be held should be left to me.

[9] I have heard argument on what consequential directions should be made.

[10] Neither the plaintiffs nor the defendants sought an order convening further conclaves to be attended by Mr Hartley (P) and Messrs Conroy (D) and Crump (D). There was no dispute between them that the appropriate way to deal with admitting the report of Mr Hartley (P) was for Mr Conroy (D) to provide a further report responding to Mr Hartley (P) by 28 August 2019, and for Mr Crump (D) to do the same by 2 September 2019. It was then proposed that Mr Hartley (P) would give evidence on 10 September 2019, Mr Conroy (D) on 11 September 2019 and Mr Crump (D) on 12 September 2019.

[11] The issue of controversy concerning consequential directions was that the plaintiffs sought a direction that they be permitted to deliver a further expert report from Mr Hartley (P), addressing the subject matters concerning coal marketing on which Mr Browne (P) was able to express opinions in JER 14. The plaintiffs say that if the orders made on 17 June 2019 by me had permitted Mr Hartley's (P) evidence to be relied on, he would have attended the conclave for JER 14 and would have expressed opinions on the matters dealt with by Mr Browne. Accordingly, the plaintiffs say that in addition to the directions to which I have referred I should also make a direction which permits Mr Hartley (P) to produce a further report addressing matters dealt with in JER 14. That report will be produced by 3 September 2019.

[12] The defendants oppose that course. They say that Mr Browne (D) has dealt with those matters already and the plaintiffs should not be permitted to superimpose a second expert where they already have one. They say, further, that the plaintiffs' proposed course ignores the history of the whole basis upon which Mr Hartley (P) was put forward in the first place. He was put forward to address matters which Mr Browne (P) was unable to deal with. The defendants complain that the plaintiffs now want to get more evidence from Mr Hartley (P) on matters with which Mr Browne (P) has plainly been able to deal. And in

this regard, it is notable that the plaintiffs make no submission that Mr Browne's (P) evidence in JER 14 is outside his expertise and they explicitly do not resile from it.

[13] The defendants also pointed out (and in their reply argument the plaintiffs agreed) that if Mr Hartley (P) was permitted to do this and came to any different outcome than support for Mr Browne's (P) view, then it would be necessary for the experts on both sides who had relied on inputs from JER 14 to revise the material which they expressed in relevant subsequent joint expert reports. The defendants' submission was that the prejudice of yet further disruption to the timetable should be avoided. The state of the evidence before me does not reveal anything about whether Mr Hartley (P) will agree or disagree with Mr Browne's (P) expression of view. Accordingly, I cannot assess the magnitude of the potential for disruption.

[14] The discretion I must presently exercise is a discretion confined by my duty to be faithful to the decision of the majority judgment of the Court of Appeal. That judgment determined that I should have authorised the plaintiffs to supplement the evidence of Mr Browne (P) by the evidence of Mr Hartley (P). In *Commonwealth v McCormack* [1984] 155 CLR 273 at 276, Murphy, Wilson, Brennan, Deane and Dawson JJ referred with approval to the observation by Lord Field in *Cox v Hakes* (1890) 15 App Cas 506 at 547 that: "*Restitutio in integrum* is the right of every successful appellant." The plaintiffs are right to say that if I had made the order that the majority said I should have made, then Mr Hartley (P) would have been present at JER 14 and would have been able to address the same matters which Mr Browne (P) addressed. It is a powerful argument for the plaintiffs to advance that I should formulate directions now which would, so far as is practicable, enable them to be put in the position they would have been in if that had occurred. I agree that exercising my discretion in a way which is faithful to the majority judgment means that I must give the plaintiffs the leave they seek.

[15] I agree with the defendants that this is an incongruous outcome. The plaintiffs sought to rely on Mr Hartley (P) so they could cover matters which were unable to be addressed by Mr Browne (P), and my decision permits the plaintiffs to adduce evidence from Mr Hartley (P) on matters which demonstrably were able to be addressed by Mr Browne (P). The material before me does not permit me to know whether the nature of the events after my decision (in terms of the outcome of JER 14 and what they revealed about Mr Browne's (P) real ability to speak on these matters, and the interconnectedness between the outcome of JER 14 and other joint expert reports) were ever drawn to the attention of the Court of Appeal. But it's not for me to speculate on these matters. It is for me to exercise my discretion confined in the way I've described. The incongruity and the potential for further disruption must be accepted as a consequence of the Court of Appeal's decision.

[16] I direct that the plaintiffs have leave to produce a further report from Mr Hartley (P) by 3 September 2019. I direct that the further report of Mr Hartley (P) must be limited to matters which are responsive to such matters raised in JER 14 as were within the scope of the matters he dealt with in his original report.

[17] I observe that *restitutio in integrum* cuts both ways. If the defendants find that whatever Mr Hartley (P) produces is something which their experts could have given an answer to at the conclave for JER 14 beyond what they have already expressed, I would entertain an application from the defendants for orders formulated to ensure that they are not prejudiced.