SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 7)* [2019] QSC 241	
PARTIES:	First Plaintiff:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST ACN 097 049 315**
		AND
	Second Plaintiff:	**EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST ABN 26 010 309 529**
		AND
	Third Plaintiff:	**H&J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H&J TRUST ACN 077 333 736**
		AND
	First Defendant:	**MONTO COAL 2 PTY LTD ACN 098 919 414**
		AND
	Second Defendant:	**MONTO COAL PTY LTD ACN 098 393 072**
		AND
	Third Defendant:	**MACARTHUR COAL LIMITED ACN 096 001 955**
FILE NO/S:	SC No 8609 of 2007	
DIVISION:	Trial Division	
PROCEEDING:	Application	
DELIVERED ON:	27 September 2019	
DELIVERED AT:	Brisbane	
HEARING DATE:	9 September 2019; 10 September 2019; 12 September 2019	
JUDGE:	Bond J	
ORDER:	**1. The plaintiffs are granted leave to rely on the further supplementary report of Mr Freeman dated 8 September 2019 [EXP.010.111.0001].**	

2. In relation to the defendants' objections to –

(a) Expert Report of Mr Freeman dated 2 November 2018 [EXP.010.005.0001];

(b) Expert Report of Mr Freeman dated 22 November 2018 [EXP.010.007.0001]

(c) Joint Expert Report on Offsite Water Supply of Mr Freeman and Mr Harradine (D), with contributions from Mr Smith (D), Mr Cavanagh (D), Mr Simpson (P) and Ms Power (D), dated 15 July 2019 [EXP.500.004.0001_2];

(d) Joint Expert Report on Offsite Power Supply of Mr Freeman and Mr Harradine, with contributions from Mr Smith (D), Mr Cavanagh (D) and Mr Simpson (P), dated 15 July 2019 [EXP.500.011.0001_2]; and

(e) Joint Expert Report on Port of Mr Freeman and Mr Morton (D) [EXP.500.026.0001_2]; and

(f) Further Supplementary Report of Mr Freeman dated 8 September 2019 [EXP.010.111.0001]

I make the rulings set out in Schedules 1, 2 and 3 to these reasons.

CATCHWORDS: EVIDENCE – ADMISSIBILITY – OPINION EVIDENCE – EXPERT OPINION – GENERALLY – where the plaintiffs sought to adduce expert evidence in the form of a report from an expert in rail and other infrastructure as it relates to the development of a mine – where the defendants objected to extensive parts of the reports produced by the expert and some portions of the joint expert reports for which he was responsible – where the bases of the objections included that the matters contained in the report are not properly the subject of expert opinion, that the expert is not adequately qualified to make the impugned statements and that the opinions stated are not based wholly or substantially on the expert's expertise – whether the objections to the expert reports should be upheld

Uniform Civil Procedure Rules 1999 (Qld), r 149

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588, considered

Holdway v Arcuri Lawyers (A Firm) [2009] 2 Qd R 18, considered

Lee v Abedian [2017] 1 Qd R 549, considered

Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016] QSC 221, considered

HG v The Queen (1999) 197 CLR 414, considered

Makita (Aust) Pty Ltd v Sprowles (2001) 52 NSWLR 705, considered

Oztech Pty Ltd v Public Trustee of Queensland [2019] FCAFC 102, considered

R v Naidu [2008] QCA 130, considered

Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 1) [2018] QSC 308, considered

Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 4) [2019] QSC 199, considered

Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 5) [2019] QSC 210, considered

COUNSEL: K E Downes QC with D B O'Sullivan QC, J P O'Regan and D M Turner for the plaintiffs

D Clothier QC with A M Pomerenke QC, A C Stumer, E L Hoiberg and M J Hafeez-Baig for the defendants

SOLICITORS: Holding Redlich for the plaintiffs

Allens for the defendants

Introduction

[1] This judgment is a sequel to *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 5)* [2019] QSC 210 (***Sanrus No. 5***), which was a decision in which I provisionally dealt with some of the extensive objections which had been made during the trial of the present proceeding to expert opinion evidence which the plaintiffs sought to adduce from Mr Freeman (P).[1]

[2] Mr Freeman had produced three expert reports for the purpose of this proceeding –

(a) Report dated 2 November 2018 [EXP.010.005.0001];[2]

(b) Supplementary Report dated 15 November 2018 [EXP.010.006.0001]; and

(c) Report (Actual Costs) dated 22 November 2018 [EXP.010.007.0001].

[3] He also participated in four joint expert conclaves which led to the production of the following four joint expert reports –

(a) Joint Expert Report for Offsite Water Supply dated 15 July 2019 by Mr Freeman, Mr Simpson (P), Mr Harradine (D), Mr Smith (D), Mr Cavanagh (D) and Ms Power (D) [EXP.500.004.0001_2];

(b) Joint Expert Report for Offsite Power Supply dated 15 July 2019 by Mr Freeman, Mr Simpson (P), Mr Harradine (D), Mr Smith (D) and Mr Cavanagh (D) [EXP.500.011.0001_2];

(c) Joint Expert Report for Port dated 22 July 2019 by Mr Freeman and Mr Morton (D) [EXP.500.026.0001_2]; and

(d) Joint Expert Report for Rail dated 24 July 2019 by Mr Freeman, Mr Hunter (D), Mr Morton (D) and Mr Cavanagh (D) [EXP.500.027.0001_2].

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[1] In this proceeding, because there are so many expert witnesses, I have usually adopted the convention of distinguishing between expert witnesses called by the plaintiffs and those called by the defendants by inserting post-nominals "P" and "D", respectively. Because Mr Freeman is mentioned so often in these reasons, I will not repeat the post-nominal for him, but will continue to do so in relation to other expert witnesses.

[2] The trial is being conducted as an electronic trial. Numerical references in this format identify relevant documents with precision.

[4] In *Sanrus No. 5*, I identified the stage at which the trial had reached and the procedural context in which the objections had been advanced. I also identified and explained the decisions which I had reached by the application of general legal principle to parts of Mr Freeman's reports to which objection had been taken and which I had time to consider. I had only ruled specifically on 25 of the 120 objections which had been pressed. But I also stated that those rulings were provisional only, because I required some further submissions on an alternative argument presented by the plaintiffs. I published *Sanrus No. 5* before having received those submissions and before having finalised my ruling on all the objections, because it was my expressed hope[3] that ruling on some of the objections would lead to agreement on the remainder of the objections. That hope proved misplaced. Having now received further submissions, this judgment finalises the rulings which I make in relation to the objections dealt with in *Sanrus No. 5*.

[5] I also recorded in *Sanrus No. 5* that: (1) a pleading objection had been advanced by the defendants, and (2) objections had been advanced to other parts of the reports of Mr Freeman, but that I had not then required the plaintiffs to respond to those issues.[4] Those matters were not ruled upon in *Sanrus No. 5*. After I allowed the plaintiffs sufficient time to respond to them, the plaintiffs determined not to press a previous complaint about late notice. Having now received submissions from both sides on the merits of those further objections, this judgment will now express rulings in relation to them.

[6] I received extensive oral and written submissions before I published my decision in *Sanrus No. 5*. Since then I have received further extensive oral and written submissions, including submissions which relied to some extent on arguments earlier put. All up I received some 12 separate written submissions, not counting the schedules which recorded the particular objections and responses thereto.

[7] Amongst other things, the pleading objection changed shape somewhat. The defendants contended (and I agree) that it had become apparent for the first time during the course of the submissions that the plaintiffs sought to advance a case in reliance on the proposed evidence of Mr Freeman, which suggested that it was part of their counterfactual case to contend that expert advice would have been given and acted on from time to time during the 3 years prior to the time the Stage 2 Feasibility Study would have been prepared, not just in the form of the Stage 2 Feasibility Study itself. The defendants contended that the plaintiffs could not be permitted to advance such an unpleaded case and that the evidence of Mr Freeman could not be received for that purpose. It will be necessary to address this pleading objection, first.

[8] Just prior to the commencement of the oral argument in respect of these final rulings, the plaintiffs delivered for the first time yet another report of Mr Freeman (**the further supplementary Freeman report**). They sought leave to rely on it in the first instance only in support of their resistance to the objections to the other reports of Mr Freeman. They proposed that they would in due course apply for leave to rely on that new report in the trial, because it was in part a response to the rulings I had made, and to those which I might make if objections were successful. After it became apparent during the course of argument that that course would create analytical difficulties, they determined that they should bring their application for leave. The application was resisted and I heard argument on the question of leave; on the admissibility of the report in any event; and on its utility in relation to the other admissibility questions, if I gave leave to rely on it and if it were otherwise admissible. It will be necessary to address the question of leave in relation to the further supplementary Freeman report, second.

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[3] *Sanrus No. 5* at [6].
[4] *Sanrus No. 5* at [31].

[9] Thereafter the body of this judgment will identify the general principles which inform the disposition of the various objections to Mr Freeman's evidence. Schedules to the judgment (the structure of which I will explain) will set out the particular rulings which I make. Although the Schedules often contain brief reasons, the reasons there expressed should be read with the reasons expressed in the body of the judgment. All up, I am required to rule in respect of 148 objections in respect of the existing evidence of Mr Freeman, 25 of which I have already provisionally ruled upon.

[10] Because of the extent of the issues on which my ruling is required I adjourned the further conduct of the trial (the next witness being Mr Freeman) until I could finalise my judgment.

The defendants' objection to the plaintiffs' attempt to advance a new unpleaded case

Overview of the nature of the plaintiffs' case

[11] The trial of this proceeding concerns complaints made by junior joint venture partners (the plaintiffs) about the conduct of the senior joint venture partner (the first defendant, Monto Coal 2) in relation to decisions made in the course of performing a Joint Venture for the exploitation of a coal deposit at Monto in Queensland. For present purposes it is not necessary to describe the bases on which liability is sought to be attributed to the second and third defendants.[5]

[12] The two sides of the Joint Venture had entered into a written Joint Venture Agreement in May 2002 which expressed various obligations in relation to the following two stages in the possible exploitation of the subject coal resource:

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

(b) Stage 2, namely "the Mine Development and Mining Operations beyond Stage 1 with the expectations of production being 10,000,000 tonnes or more of saleable coal per annum".

[13] In brief summary, in this proceeding the plaintiffs contend that Monto Coal 2 breached the Joint Venture Agreement by deciding to suspend all work on the Monto Coal Project in July 2003 and, accordingly, by failing to develop Stage 1 of the Project by 16 May 2005 and by failing to undertake a Stage 2 feasibility study in that time (or, indeed, at any time up to 31 December 2008). The plaintiffs allege Monto Coal 2's decision-makers made relevant decisions in the absence of good faith and for contractually impermissible purposes.

[14] The plaintiffs claim that by reason of the impugned conduct of Monto Coal 2 they –

(a) lost the opportunity to earn a profit from the sale of coal from Stage 2 of the project and to receive royalties therefrom and also lost the value of free carried interest in Stage 1 capital costs; and

(b) further or alternatively, lost the opportunity to sell their interests in the Joint Venture at a value which would reflect the stage to which the Monto Coal Project would have advanced had the impugned conduct not occurred.

[15] Because this is a loss of opportunity case, the plaintiffs rely on *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 and *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2018] 2 Qd R 584 to contend that there are two stages of analysis. The

[5] Because it will make this judgment more intelligible as a coherent piece of analysis, I will repeat parts of what I wrote in *Sanrus No. 5* in the body of this judgment. This and the following 4 paragraphs are repetitions of *Sanrus No. 5* at [7] to [11].

first, they contend, is concerned with proof of causation of an identifiable loss of some kind and the second, they contend, involves assessing the quantum of the loss. The plaintiffs contend that the first stage is to be assessed on the basis of proof on the balance of probabilities and the second, by reference to the Court's assessment of the possibilities and probabilities of occurrence of the relevant hypothetical scenario or scenarios.

The plaintiffs' causation hypothesis

[16] Rule 149 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) requires plaintiffs to set out a statement of all the material facts on which they rely, including by stating specifically any matter that if not stated specifically might take another party by surprise. Of course, the purpose of pleading material facts is not just to avoid surprise: it is to enable the pleader's case to be defined and confined and to enable the defendants to plead to that case, thereby defining and confining the issues for decision. That is reinforced by the terms of r 157 UCPR.

[17] It is a trite proposition of law that defendants are entitled to a direct and unambiguous identification of the material facts relied on to establish the causal link between the conduct which plaintiffs impugn and the loss they allegedly suffered, and which identification at least arguably establishes that link.

[18] I made this point in *Lee v Abedian* [2017] 1 Qd R 549 at [81] and in *Chan v Macarthur Minerals Ltd* [2017] QSC 13 at [39]. The defendants particularly sought comfort from my observation in *Lee v Abedian* (at [81](f)) that:

> The defendants are entitled to have the plaintiff pinned down to a causation hypothesis which is not characterised by imprecision and ambiguity and which, at least arguably, establishes the requisite causal connection between the implementation of the conspiracy and the suffering of loss. If there is more than one causation hypothesis, then the statement just made must apply to each one. The pleading device of merely cross-referring back to events alleged to have happened is unlikely to be a satisfactory way of addressing a proper plea of causation. There must be a direct and unambiguous identification of the material facts relied on to establish the causal link which the law requires. And it must be something which makes narrative sense. The defendants should not be required to cherry pick through the pleading to work out what the case is that they have to meet in this regard.

[19] In *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221, Jackson J collected some further general statements of principle, to similar effect. His Honour made it clear that he was doing so to demonstrate that there was no shortage of case law for the proposition that the plaintiff must plead a relevant counterfactual scenario to establish the alleged causal link between breaches of contract or negligence and the loss. His Honour observed (footnotes omitted, emphasis added):

> [26] However, there is no shortage of relevant case law [which stands as such authority]. In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*, Chesterman J said:
>
> > "**In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of** (here the relevant non-disclosure) **and the alleged later event** (here the making of the dragline agreement) **stand to each other in the relation of cause and effect**. […]"
>
> [27] Another well-known judgment in this area is *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*, where French J said:
>
> > "**The material facts establishing the necessary causal link should be pleaded**. In cases of contravention of s 52 said to be constituted by misrepresentation this will generally require more than appears in the opening words of par 50: 'by reason of such conduct ...'.

> Some guidance to the proper approach may be derived from the ordinary rule of pleading applicable in cases of fraud of which Lord Watson said in *Dow Hager Lawrance v Lord Norreys* (1890) 15 App Cas 210 at 221:
>
> > '... The ordinary rule of pleading applicable to cases of fraud, ... was thus expressed by Earle Selborne in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697: "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. **Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect**.'
>
> A perusal of the relevant precedents in [Bullen, Leake & Jacob's *Precedents of Pleadings* 12th ed, pp 702–7] supports the view that the approach enunciated by Lord Watson is equally applicable to actions for negligent misstatement."""

[20] As the Full Court of the Federal Court said in *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102 at [30]:

> There should be no doubt about whether any particular cause of action is relied upon. At a minimum, the pleading should be pellucidly clear about the causes of action, or claims, relied upon by the applicant, including any claims made upon an alternative hypothesis. **The explicit clarity with which a claim is expressed should ensure that there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged**, much less to decide whether a particular cause of action is raised. The same basic requirement applies to any defence raised in answer to a claim.

[21] The result is that where a party's causation hypothesis depends on establishing a particular counterfactual scenario to establish the alleged causal link between breaches of contract and the loss which it is said would have eventuated if the conduct which the party impugns had not occurred, that counterfactual scenario must be pleaded and particularised in accordance with the rules of pleading. This should be done with the degree of clarity referred to in *Oztech Pty Ltd v Public Trustee of Queensland*. The pleading so framed must at least arguably establish a reasonable inference that the impugned conduct and the claimed loss stand to each other in the relation of cause and effect.

[22] In *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 1)* [2018] QSC 308 (***Sanrus No. 1***), I explained that significant changes were made to the plaintiffs' case by the delivery of new expert reports in reply towards the end of 2018. I permitted the plaintiffs to amend their pleading to accord with the case identified in the reports so delivered. The causation hypothesis contained in that pleading was set out in their statement of claim at [23]. It is in now the following terms, having been slightly modified since I permitted the amendments recorded in *Sanrus No. 1* so as to articulate alternative net present value (**NPV**) calculations as set out in subsequently delivered expert reports (emphasis added):

> 23. **By reason of Monto Coal 2's breaches of the Joint Venture Agreement**:
>
> (a) **the development of Stage 1 has not been achieved**;
>
> (b) **the Stage 2 Feasibility Study has not been undertaken**;
>
> (c) **the plaintiffs have lost the opportunity to earn a profit** from the sale of coal from Stage 1 and Stage 2, to earn Royalties under the Monto Coal Royalty Deed, and the value of free carried interest in Stage 1 capital costs;
>
> ***Particulars***

(a) ***Stage 1 would have been completed***.

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

(c) ***Coal produced from Stage 1 would have obtained market acceptance*** *and would have been sold during Stage 1;*

(d) ***The Stage 2 Feasibility Study would have demonstrated that Mine Development of Stage 2 would have been profitable with a Net Present Value of $518 million as set out in paragraphs 9 to 31 of the report of Mr Hall dated 21 November 2018*** *or alternatively $501 million as set out in paragraphs 14 and 15 and "Hall Attachment 1" to the Supplementary Joint Report on Financial Modelling of Mr Hall and Ms Power dated 29 July 2019 [EXP.500.036.0001].*

(da) ***In the alternative to sub-paragraph (d), The Stage 2 Feasibility Study would have demonstrated that Mine Development of Stage 2 would have been profitable with a Net Present Value of $408 million as set out in paragraphs 20 to 29 and "Hall Attachment*** *7" to the Supplementary Joint Report on Financial [Modelling] of Mr Jeffrey Hall and Ms Lucy Power dated 29 July 2019 [EXP.500.036.0001].*

(e) ***The Joint Venture Participants or the Manager would have convened a Meeting of the Management Committee to vote on whether Mine Development of Stage 2 should be undertaken. [The meeting of the management committee would have been convened in about May or June 2005****.[6]];*

(f) ***Each of the Participants' Representatives, would have attended that meeting and, acting in the best interests of the Joint Venture in accordance with clause 7.5 and 7.6 of the Joint Venture Agreement, would have exercised their vote in favour of undertaking the Mine Development of Stage 2. [The parties' representatives would have attended the management committee meeting to vote in favour of undertaking the mine development of Stage 2 in about May or June 2005.]****;*

(g) *Coal would have been produced and sold from Stage 1 and Stage 2 at a profit with a net present value of $2,569m, the plaintiffs' share of which is $1,002m, as calculated in paragraph 13 of, and Annexure B to, the report of Mr Hall dated 30 November 2018 or alternatively with a net present value of $2,481m, the plaintiffs' share of which is $968m, as calculated in paragraphs 14 and 21 of the Supplementary Joint Report on Loss and Damage of Mr Jeffrey Hall and Mr Tony Samuel [EXP.500.048.0001];*

(ga) *In the alternative to sub-paragraph (g), coal would have been produced and sold from Stage 1 and Stage 2 at a profit with a new present value of $2,481m, the plaintiffs' share of which is $943m, as calculated in paragraphs 22 and 29 of the Supplementary Joint Report on Loss and Damage of Mr Hall and Mr Samuel [EXP.500.048.0001]*

(h) *[Previously deleted]*

(i) *[Previously deleted]*

(j) *[Previously deleted]*

(k) *Monto Coal 2 would have paid its Respective Proportion (being 51%) of the Royalty payable to the plaintiffs quarterly at a rate of 1% of the FOBT price at which export Coal was sold, such royalty having a net present value of $47m as calculated in paragraph 13 of, and Annexure B to, the report of Mr Hall dated 30 November 2018 or, in the alternative, as calculated in paragraphs 14 and 21 of the Supplementary Joint Report on Loss and Damage of Mr Hall and Mr Samuel [EXP.500.048.0001], or in the further alternative, as calculated in*

[6] The sentence in square brackets in this and the next subparagraph are taken from particulars separately delivered, and recorded a little later in the consolidated statement of claim, but recorded here for sense. Other particulars applicable to this paragraph but not presently relevant are not included.

paragraphs 22 and 29 of the Supplementary Joint Report on Loss and Damage of Mr Hall and Mr Samuel [EXP.500.048.0001].

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

[23] The following observations may be made about the causation hypothesis as pleaded:

(a) The counterfactual propositions are pleaded as particulars, when they should be pleaded as material facts. For present purposes that deficiency may be put to one side, as the defendants did not take that point before me.

(b) It is evident that the plaintiffs' causation hypothesis does depend on establishing a particular counterfactual scenario. The plaintiffs' case is that no decision to suspend Stage 1 would have been made and Stage 1 would have been completed and –

(i) there would have been prepared by about May 2005 a particular document (namely "The Stage 2 Feasibility Study"); and

(ii) the Stage 2 Feasibility Study document would have had a particular content (namely in specified alternative ways it would have demonstrated that Stage 2 would have been profitable with a particular NPV as set out in identified parts of an expert report).

(c) The former proposition is apparent from the use of the definite article and the phrase "would have been prepared" in particular (b) and the repetition of the definite article in particulars (d) and (da). And the latter proposition is evident from particulars (d) and (da), where three alternative NPV propositions are set out, each by reference to particular aspects of an identified expert report.

(d) The plaintiffs accepted in oral argument before me that it was absolutely clear that although the particular stated that the Stage 2 Feasibility Study would have been prepared "by May 2005" (which, I observe, at first blush might be thought to contemplate the possibility that it might form part of the plaintiffs' case that the document would have been prepared at some earlier unspecified time between May 2002 and May 2005), in fact the plaintiffs' case was based on the document being prepared (in the sense of finalised) in about May 2005.[7]

(e) The concession was appropriate. There are multiple confirmations of that proposition to be found in the terms of the expert reports cross-referenced in particulars (d) and (da), including in the fact that, amongst other things, the expert analysis relies on information which could not have existed in earlier years. For example:

(i) In the report of Mr Hall dated 21 December 2018, there references to the NPV calculation being done "as at May 2005": see at [9], [13], [23], [26] and [31]. The calculation is based on coal price forecast scenarios as at that date, including a scenario which was based on information available in May 2005 and one based on coal prices that approximated the trend of actual prices from 2005 to 2018: see at [13] *et seq*. The calculation says that it use best academic practice from 2005: see at [28].

(ii) The NPV calculation in the referenced parts of the Supplementary Joint Expert Report for Financial Modelling dated 29 July 2019 [EXP.500.036.0001] also expresses NPV calculations "as at May 2005". Further, at [15] the report states

[7] Transcript day 72, T72-8 lines 17 – 32.

that the NPV was calculated using the differential between the spot coal price and the benchmark coal price set at the actual discount or premium observed for the years 2004 and 2005, and then set at a 1% discount for the years beyond 2005. The actual discount observed in 2004 and 2005 would not have been used had the Stage 2 Feasibility Study been prepared at a time prior to 2005.

(iii) Paragraph 24 of the Supplementary Joint Expert Report for Financial Modelling [EXP.500.036.0001] referred to at particular (da) refers to the benchmark coal price being set at US$45 from April 2004 to March 2005. This information similarly would not have been available to be included when assessing the probability of the IM Scenario for the purpose of the Financial Modelling Report if the Stage 2 Feasibility Study been prepared for a time prior to 2005.

(f) That a Stage 2 Feasibility Study having one or other of the pleaded alternative contents would have been prepared in about May 2005 is a critical part of the counterfactual scenario. That much is made clear by particulars (e) and (f) which reveal that it is the plaintiffs' case that shortly after that document would have been prepared, a Joint Venture Management Committee meeting would have been convened at which there would have been a vote in favour of undertaking the mine development of Stage 2. It is obvious that it is the decision at that meeting which would necessarily have taken account of the Stage 2 Feasibility Study which it is alleged would have been available, which is the gateway to the proposition that profits would have been earned during Stage 2.

(g) The result is that, in terms of counterfactual decisions by or on behalf of the Joint Venture, the statement of claim plainly directs the reader to the content of the Stage 2 Feasibility Study prepared in the time frame I have identified and to the decision of the Joint Venture Management Committee which would have been made shortly after the document was received.

[24] The problem is that the identification of the date of production and of the content of the Stage 2 Feasibility Study and the decision made at the Joint Venture Management Committee meeting is only an incomplete statement of the counterfactual scenario on which the plaintiffs' case is based. It was common ground before me that it is now and was at the time of *Sanrus No. 1* implicit in the plaintiffs' case that in order for the Stage 2 Feasibility Study to have been produced in about May 2005 having the content alleged, over the previous 3 years a whole raft of other counterfactual propositions concerning decisions, agreements and acts made by the Joint Venture but also by various third parties (land-holders, statutory bodies and regulators, corporate infrastructure providers and the like) –

(a) would have had to come to pass; and

(b) would have had to come to pass in a particular time frame.

[25] None of those counterfactual propositions have been pleaded. It is convenient to refer to these as **the plaintiffs' unpleaded counterfactual case**.

[26] An idea of the nature of the plaintiffs' unpleaded counterfactual case may be obtained from the following submissions advanced by the defendants as part of their written opening submissions on causation and damages (footnotes omitted, emphasis original):

> 39. […] the plaintiffs' expert evidence proceeds on numerous assumptions as to decisions, agreements and acts by the joint venture and third parties between mid-2002 and May 2005. These assumptions are essential to the plaintiffs' causation case. Most notably:

(a) It is alleged that the mining lease application for Stage 2, environmental impact statement process for Stage 2 and the processes for land compensation agreements for Stage 2 (and all associated expenditure) would have commenced in mid-2002 and been successfully concluded at particular times. This assumes, on the plaintiffs' case, that these steps would have commenced within months of the execution of the Joint Venture Agreement and been progressed before the grant of the Stage 1 mining lease, which on the plaintiffs' case would have been granted in March 2003.

(b) It is assumed that early works arrangements and associated approval processes would have been entered into with third parties prior to the completion of the Stage 2 Feasibility Study and any final investment decision for Stage 2. The early works arrangements and associated approval processes include (without being exhaustive):

(i) (**Rail**) rail design and approvals commencing in January 2003, a conditional contract for rail infrastructure executed in early 2004 and a commitment to an arrangement for $20 million in long lead procurement items (sleepers and rails) in January 2005.

(ii) (**Water**) entry into an Early Works Reimbursement Deed with SunWater in July 2004, with detailed design from September 2004 to March 2005 and relevant approvals commencing in December 2004;

(iii) (**Power**) entry into an early works arrangement with Powerlink for power supply in July 2004, with design and procurement processes commencing in November 2004;

(iv) (**Road**) engineering and approvals for the Burnett Highway diversion by Main Roads commencing in May 2002, with construction commencing in June 2005;

(v) (**Accommodation Village**) purchase of the necessary land, development approval, and the design and construction of an Accommodation Village to support the Stage 2 mine workforce between May 2002 and May 2005.

(c) It is assumed that an agreement for port capacity would have been executed between mid-2004 and mid-2006 and a conditional agreement may have been executed prior to an investment decision for Stage 2.

(d) It is assumed that the engineering and procurement for the Stage 2 mine and CHPP would have commenced in May 2004.

40. Those matters of timing are critical to the plaintiffs' case on causation. That is because, on the plaintiffs' case, those steps would have been taken prior to the Stage 2 Feasibility Study being completed and prior to the joint venture making a decision on whether to proceed with Stage 2 development. If those steps had not been taken, Stage 2 of the Monto Coal Project could not have proceeded in the manner which the plaintiffs allege in their expert reports. […]

[27] Until the ground shifted during the course of argument (in the manner I will shortly explain), it seemed to be common ground that the foregoing passage could be regarded as broadly representative of the nature of the relevant unpleaded counterfactual propositions forming part of the plaintiffs' case.

[28] Compliance with the rules of pleading required the plaintiffs to frame their pleading in such a way that the plaintiffs' unpleaded counterfactual case was identified at an appropriate level of detail in the pleading. If it was critical to the counterfactual proposition that a decision would have been made in May or June 2005 based on a Stage 2 Feasibility Study having a particular content prepared in May 2005, that there would have been, for example, antecedent decisions to enter into particular contracts in a particular form and that such contracts would have been entered into by a particular time, then those matters were material parts of the counterfactual case and should have been pleaded. The plaintiffs' failure to do so was a major deficiency in their pleading.

[29] It must be acknowledged that that deficiency and its significance has been ameliorated to some extent by the fact that the pleading was delivered in the context of a proceeding which was case managed, including by orders which –

(a) required the parties to deliver witness summaries in respect of their lay witness evidence;

(b) required the parties to deliver the expert opinion evidence on which they intended to rely in the form of written expert reports;

(c) constrained the parties from adducing evidence in chief from a lay witness about a topic not identified in a summary of evidence filed in accordance with the orders, except with the leave of the Court; and

(d) constrained the parties from adducing any expert evidence at the hearing other than in the form of a report filed in accordance with the orders, except with the leave of the Court.

[30] As I explained in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 4)* [2019] QSC 199, the purpose of the superimposition on a case conducted by pleadings, of orders requiring the parties to identify to their opponents during the pre-trial process the evidence by which they intend to prove their pleaded cases, is also grounded in a desire to require the parties to define and confine their cases. I wrote (at [15], emphasis added):

> It is axiomatic that if case management orders have required the parties to disclose to their opponents the way they intend to prove their respective pleaded cases, that course was required because the Court determined that it would serve to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. But recitation of that sort of motherhood statement is not a sufficient articulation of the purpose of requiring such a course. **The underlying purpose is to avoid surprise to the other party and to allow the issues to be narrowed, albeit at a more granular level than is achieved by the delivery of pleadings. It is to allow any eventual trial to proceed in a more efficient manner than it might otherwise have proceeded. In order to fulfil that purpose, it must follow that there is some degree to which the parties are confined to the manner of proving their case which they have flagged by the material which they have delivered in compliance with such case management orders. That is why such orders conventionally also specify that the parties may not deliver evidence outside the constraints of the orders concerned, except with leave of the Court. The extent of confinement which must be regarded as having been achieved by such orders and the attitude which must be taken to applications for leave will be very much a question of fact and degree, and will vary from case to case.** The considerations which would be relevant to the exercise of a discretion to permit evidence to be adduced outside the constraints imposed by the case management orders of the type under discussion are similar to those applicable to pleading amendment: see *Sanrus No. 2* at [12] to [15].

[31] It must also be recognised that the extent of the amelioration of any pleading deficiencies achieved by such orders is not complete, for a number of reasons.

[32] **First**, the evidential material which each side provides to their opponent consequent upon such directions is <u>proposed</u> evidence. It is not a pleading. It does not actually bind the party providing it in the same way as does a pleading. If a pleaded allegation is admitted on the pleadings, no evidence is required on the admitted fact and the admission may not be withdrawn without leave. On the other hand, a plaintiff's witness summary (or expert report) and a defendant's witness summary (or expert report) delivered before trial might well suggest that the witnesses agree on a fact or on an opinion, but that does not bind either party in the same way as a pleaded admission.[8] Even if the proposed evidence is admitted into evidence at the trial, either party can still ask the trier of fact not to accept one aspect of the evidence it adduces at trial, or ask the trier of fact to prefer one aspect of the evidence it adduces at trial over another.

[33] A **second** and related point is that, for one reason or another, the proposed evidence may not actually find its way into evidence at the trial. A party may choose not to call the

[8] The only constraint would be that leave would be required to adduce new or different evidence from the particular witness concerned.

witness or to tender the expert report. Or, the proposed evidence might be held out because of successful objections as to its admissibility.

[34] **Third**, in any event the extent of the clarity which a party obtains concerning the fact and nature of any unpleaded counterfactual propositions in an opposing party's pleading would necessarily derive from their own analyses of the opposing party's evidence rather than from the opposing party having committed to a statement in their pleading which defined and confined their case. Pleadings are required so that a party does not have to work out itself what is the opposing party's case. As the Full Court of the Federal Court said in *Oztech Pty Ltd v Public Trustee of Queensland* in the passage I have earlier quoted, the pleading party should ensure that "there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged". *A fortiori*, when a party has left the definition of its case to be divined from its evidence, delivered in a case which has been managed in the way I have described.

[35] Within those limitations, it is nevertheless true that a degree of clarity concerning the fact and nature of the plaintiffs' unpleaded counterfactual case must be regarded as having been provided in the evidentiary material filed and served by the plaintiffs consequent upon the case management orders which were made. As I remarked in *Sanrus No. 1* (at [33], emphasis added):

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

[36] The emphasised part of the quoted observations did not continue to be literally true after the events dealt with in *Sanrus No. 1*. Amongst other things, the plaintiffs had advised the defendants that they would not rely on some of the expert evidence they had previously delivered, and that included a report delivered by Mr Freeman in 2017. That abandonment of reliance on particular aspects of the expert evidence was formalised by my orders of 21 December 2018 which gave the plaintiffs leave to rely on the new reports and which provided (by order 6):

> [6] The plaintiffs not be permitted at trial to rely upon the reports or the sections of the reports identified in the spreadsheet emailed from Holding Redlich to Allens on 30 November 2018, which appears at Exhibit RLM-9 to the affidavit of Robyn Morrison affirmed 10 December 2018. For the avoidance of doubt, this order is without prejudice to the defendants' right to object to any of the remaining sections of the reports at trial. [9]

[37] Even though the defendants were now confronted with an altered suite of expert reports expressing the plaintiffs' unpleaded counterfactual case and their case as to damages, the assumption by the defendants that the plaintiffs' case as to the critical counterfactual proposition and as to damages was confined to that set out in the expert opinions necessarily had to continue once I permitted the case to continue to trial on the basis of a

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[9] Mr Freeman's 2017 report was one of the reports covered by the spreadsheet referred to in the order. The plaintiffs also specifically confirmed during oral argument that they did not intend to rely on that report: see Transcript day 60, T60-59 line 18 – T60-60 line 14 and Transcript day 70, T70-14 lines 1 – 12. In that exchange neither I nor counsel had evidently remembered order 6 of my orders of 21 December 2018 which rendered that confirmation unnecessary. Nevertheless, there was a time subsequent to that exchange when it appeared that the plaintiffs sought to change the status quo and sought to rely on the 2017 report, notwithstanding their earlier confirmation. However after I raised the point with them, they resiled from that course and informed me that they did not rely on that report and that I need have no regard to the relevant part of their written submissions: see Transcript day 72, T72-2 lines 1 – 26 and T72-4 lines 4 – 12.

pleading amended to accord with the case articulated in the new raft of expert reports identified in *Sanrus No. 1*.

[38] As will appear, the defendants in fact had conducted analyses of what the plaintiffs' case was as disclosed by their expert reports. That is apparent from –

(a) the defendants' own pleaded response to the plaintiffs' causation hypothesis;

(b) the defendants' own evidential material (including expert reports) delivered in response to case management orders;

(c) the tenor of some of the questioning which occurred during the lay witness evidence; and

(d) the terms of the defendants' written opening on causation and damages, to which I have already referred.

[39] It was not suggested in argument before me that there was any other aspect of the very extensive pleadings in this proceeding which should be regarded as a pleading of the plaintiffs' unpleaded counterfactual case to which I have referred, or as remedying the pleading deficiency which I have identified. Nevertheless, for completeness, it is appropriate to identify some aspects of the pleadings other than the statement of claim.

[40] It is appropriate to juxtapose the relevant parts of the defendants' defence at [163] (which pleaded the traverse of the statement of claim at [23]) and the plaintiffs' reply at [163] (which pleaded the traverse of the defence at [163]). I do so below (emphasis added):

Fifth Further Amended Defence to the Second Further Amended Consolidated Statement of Claim filed 21 May 2019	**Fourth Further Amended Reply to the Fifth Further Amended Defence filed 21 August 2019**
[163] As to paragraph 23 of the statement of claim, the defendants: (a) admit that development of Stage 1 has not been achieved; (b) admit that the Stage 2 Feasibility Study has not been undertaken; (c) otherwise deny the allegations contained therein believing them to be untrue for the reasons pleaded in subparagraphs (d) to (n) below; (d) for the reasons pleaded in paragraph 162 above, Monto Coal 2 has not breached the Joint Venture Agreement; (e) if Monto Coal 2 has breached the Joint Venture Agreement (which is denied) **any such breach or breaches were not causative of any loss to the plaintiffs because for the reasons pleaded in paragraphs 129A to 129D and 130B to 130E above, Monto Coal 2 was not obliged and in any event would not have taken steps to cause the Joint Venture Management Committee to make the decisions necessary to achieve development of Stage 1 and undertake the Stage 2 Feasibility Study by 16 May 2005**; (f) if Stage 1 had been developed by 16 May 2005, no profits would have been earned by the plaintiffs because the costs of Stage 1 would have exceeded revenue;	[163] The Plaintiffs deny the allegations in paragraph 163 of the Amended Defence on the following basis: (a) the matters pleaded in this Amended Reply: (b) **as to paragraph 163(e), the Plaintiffs deny the allegation on the basis of the matters set out in paragraphs 129A to 129D and 130B to 130E hereof** (c) as to paragraph 163(f): (i) [omitted] (ii) [omitted] (iii) Stage 1 of the Monto Coal Project would have earnings before income tax, depreciation and amortisation of negative $3.655 million in 2004 and $10.835 million in 2005, as calculated in Annexure B to the report of Mr Hall dated 30 November 2018 or, in the alternative, negative $0.154 million in 2004 and $10.515 million in 2005, as calculated in "Hall Attachment 1" (Tab "Revised Browne Actual Spot") to the Supplementary Joint Report on Loss and Damage of Mr Hall and Mr Samuel [EXP.500.048.0001]; (iv) [omitted] (d) as to paragraph 163(g), the Plaintiffs deny the

Fifth Further Amended Defence to the Second Further Amended Consolidated Statement of Claim filed 21 May 2019	**Fourth Further Amended Reply to the Fifth Further Amended Defence filed 21 August 2019**
(g) had the Stage 2 Feasibility Study been undertaken and completed by 16 May 2005 it would not have shown the Monto Coal Project to be economically viable or feasible, so that Monto Coal 2 would not have caused or permitted its Representative on the Joint Venture Management Committee to vote in favour of development of Stage 2; (ga) if a Stage 2 Feasibility Study had been undertaken and completed by 16 May 2005 **which adopted the assumptions and conclusions relied upon by the plaintiffs' experts in this proceeding**, Monto Coal 2 would not have caused or permitted its Representative on the Joint Venture Management Committee to vote in favour of development of Stage 2; […][10] (ha) further, if a Stage 2 Feasibility Study had been undertaken and completed by 16 May 2005 **which adopted the assumptions and conclusions relied upon by the plaintiffs' experts in this proceeding**, Monto Coal 2 would not have been able to obtain finance for the development of Stage 2 because a financier would not have agreed to provide funding to Monto Coal 2 for the costs of Stage 2 development on the basis of a Stage 2 Feasibility Study adopting those assumptions and conclusions; [particulars omitted] (i) if the development of Stage 2 had been achieved (which is denied): (i) no profits would have been earned for the plaintiffs because the capital costs and operating costs would have exceeded revenue; (ii) the plaintiffs would have suffered losses due to the need to pay Cash Calls to fund the development of Stage 2. […]	allegations on the basis that, had a Stage 2 Feasibility Study been undertaken, it would have shown Stage 2 of the Monto Coal Project to be profitable, with a Net Present Value of $518 million as set out in paragraphs 9 to 31 of the report of Mr Hall dated 21 November 2018, or in the alternative $501 million as set out in paragraphs 14 and 15 and "Hall Attachment 1" to the Supplementary Joint Report on Financial Modelling of Mr Hall and Ms Power dated 29 July 2019 [EXP.500.036.0001] or in the further alternative, $408 million as set out in paragraphs 20 to 29 and "Hall Attachment 7" to the Supplementary Joint Report on Financial Modelling of Mr Jeffrey Hall and Ms Lucy Power dated 29 July 2019 [EXP.500.036.0001], and Monto Coal 2 would have caused its Representative on the Joint Venture Committee to vote in favour of development of Stage 2; [particulars omitted] (da) as to paragraph 163(ga), the Plaintiffs deny the allegations on the basis of the matters pleaded in paragraph 23 of the Amended Consolidated Statement of Claim and paragraph 163(d) of this Amended Reply; […] (ea) as to paragraph 163(ha), the Plaintiffs: (i) do not admit the allegation that Monto Coal 2 would not have been able to obtain finance for the development of Stage 2 because a financier would not have agreed to provide funding to Monto Coal 2 for the costs of Stage 2 development on the basis of a Stage 2 Feasibility Study which adopted the assumptions and conclusions relied upon by the Plaintiffs' experts. The Plaintiffs have made reasonable inquiries and remain unaware of the truth or falsity of that allegation; (ii) otherwise deny the allegation that Monto Coal 2 would not have been able to obtain finance for the development of Stage 2 because Monto Coal 2 would have been able to obtain funding for the development of Stage 2 from Macarthur Coal, selling down equity in the Monto Coal Project or by a combination of both funding from Macarthur Coal and selling down equity in the Monto Coal

[10] Subparagraph (h) was an allegation about an alleged inability of the plaintiffs to meet the cash calls which would have been requisite if stage 2 had proceeded. I have not reproduced it and the particulars associated with it (or the corresponding paragraph in the reply) for present purposes.

Fifth Further Amended Defence to the Second Further Amended Consolidated Statement of Claim filed 21 May 2019	Fourth Further Amended Reply to the Fifth Further Amended Defence filed 21 August 2019
	Project; (f) as to paragraph 163(i), the Plaintiffs deny the allegations because: (i) the revenue from the Monto Coal Project would have exceeded the costs (and further particulars of which are set out in paragraph 13 of, and Annexure B to, the expert report of Mr Hall dated 30 November 2018), or in the alternative, in Hall Attachment 1 to the Supplementary Joint Report on Loss and Damage of Mr Hall and Mr Samuel [EXP.500.048.0001]. (ii) the Plaintiffs would not have suffered losses due to the need to pay Cash Calls to fund the development of Stage 2; […]

[41] The following observations may be made:

(a) In defence [163](e) the defendants plead a positive counterfactual case, namely that the conduct which the plaintiffs impugn would not have caused any loss to the plaintiffs because for the reasons articulated in the cross-referenced paragraphs Monto Coal 2 was not obliged and in any event would not have taken steps to cause the Joint Venture Management Committee to make the decisions necessary to achieve development of Stage 1 and undertake the Stage 2 Feasibility Study by 16 May 2005.

(b) The cross-referenced paragraphs were the paragraphs of the defence which advanced the defendants' case about the views which Monto Coal 2 had in fact formed over the years. Thus:

(i) Paragraphs 129A to 129D asserted that by 4 July 2003 Monto Coal 2 had formed the view that the Monto Coal Project was not then economically viable in light of the then current and predicted thermal coal prices; identified the factors to which it had had regard to form that view; and asserted that it had formed the intention to take no steps to cause the Joint Venture Management Committee to make the decisions which would be necessary to complete development of stage 1 by 16 May 2005.

(ii) Paragraphs 130B to 130E asserted that in the period from 4 July 2003 to 16 May 2005, Monto Coal 2 continued to hold the view that the Monto Coal Project in the form contemplated by the Joint Venture agreement was not economically viable in light of the then current and predicted thermal coal prices, identified the factors to which it had had regard to continue to hold that view and asserted that it continued to hold the intention to take no steps to cause the Joint Venture Management Committee to make the decisions which would be necessary to complete development of stage 1 by 16 May 2005.

(c) It follows that the positive case advanced by the defendants relied on the counterfactual proposition that Monto Coal 2 would have continued to hold the

views asserted and would not have caused decisions to be made to achieve development of Stage 1 and undertake the Stage 2 Feasibility Study by 16 May 2005.

(d) Reply [163](b) traverses the defendants' counterfactual case on the basis of the matters set out in reply [129A] to [129D] and [130B] to [130E]. The cross-referenced paragraphs are the paragraphs in the reply which grapple with the truth or falsity of the propositions which the defendants had advanced in relation to the views which say that, historically, they did have and why they had them, and, amongst other things, contend that if some of the alleged views were actually held then they were held in breach of contract because they were not held in good faith or reasonably. There is nothing in reply [163](b) or the cross-referenced paragraphs which pleads what I have described as the plaintiffs' unpleaded counterfactual case as the reasons for the traverse of the defendants' positive counterfactual case, or which contradicts the defendants' proposition concerning the steps which they would not have taken by reference to a case concerning steps which they would have taken for particular reasons.

The defendants' complaint about the plaintiffs' attempt to advance a new case

[42] Amongst other things, it is evident that, prior to my ruling in *Sanrus No. 5*, the plaintiffs had flagged that their intention was to conduct their case on the basis that it was possible to prove some of the plaintiffs' unpleaded counterfactual case (namely the fact and timing of numerous decisions, agreements and acts by the Joint Venture and third parties between mid-2002 and May 2005) by eliciting Mr Freeman's opinion that various decisions, agreements and acts would have occurred.

[43] Thus it was that Mr Freeman's reports contained multiple expressions of his opinion as to what the Joint Venture would have actually done in hypothetical circumstances prevailing up to and after 2005. Similarly, they contained multiple expressions of his opinion as to what third parties such as Queensland Rail (**QR**), Gladstone Ports Corporation (**GPC**) (also referred to as GPA), SunWater and Powerlink would have done in hypothetical circumstances prevailing up to and after 2005. In fact a substantial part of his reports related to the taking of steps by such third parties, including that the Joint Venture would have entered into particular contracts with particular terms prior to and after completion of the Stage 2 Feasibility Study.

[44] For example, Mr Freeman opined –

(a) in relation to the joint venture that:

(i) the Joint Venture would have taken a calculated investment decision on the timing of a commitment to a port agreement to manage the risk that it may not have obtained port capacity;[11]

(ii) port capacity for Stage 2 tonnage would have been discussed and secured (by a port agreement) at the same time as Stage 1 tonnage or separately in the period 2003 to 2004;[12]

(iii) the Joint Venture was well progressed with discussions with QR in late 2002 and if it had committed to further studies in late 2002 or early 2003, it would have been able to commit to conditional rail capacity from late 2003/early 2004;[13]

[11] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [231].
[12] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [245], [261] and [263].
[13] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [66].

(iv) the Joint Venture would have opted for Powerlink to construct the necessary power infrastructure rather than Ergon Energy or doing the construction itself;[14]

(v) the Joint Venture would have entered into a Connection Agreement with Powerlink in mid-2004, which would have dealt with certain matters, including early-works prior to the completion of a bankable feasibility study;[15]

(vi) the Joint Venture would have entered an Early Works Reimbursement Deed with SunWater prior to the completion of the Stage 2 Feasibility Study and would later have executed a Water Transport and Supply Agreement with SunWater, an indicative schedule for both being July 2004 for the former and July 2005, for the latter;[16]

(b) in relation to the third parties that:

(i) QR would have determined that, although Mr Hunter's (D) 'New and Existing Monto Alignment' was a valid option, QR would have preferred the 'Rebuild Existing Monto Line' solution to cater for trains with 86 wagons with a gross weight of 104t per wagon with a track loading of 26TAL;[17]

(ii) It is likely that QR would have paid for the upgrade of the Monto Branch Line;[18]

(iii) GPC would not have allocated capacity to other mining projects in preference to the Joint Venture;[19]

(iv) GPC would have entered a commercial agreement with the Joint Venture which was conditional upon mining lease approval or contained an option to ramp up tonnage from a nominated date, negotiated during 2003 and 2004;[20]

(v) GPC could have accelerated planned port expansions had there been sufficient demand for such capacity at an earlier stage than was contemplated;[21]

(vi) The Joint Venture and SunWater would have preferred an alternative water pipeline route to that proposed by Mr Harradine (D);[22]

(vii) SunWater would have been prepared to construct, own and operate the water pipeline, and the Joint Venture would likely have accepted this proposal;[23]

(viii) The Joint Venture would have entered into a Connection Agreement with Powerlink in mid-2004, which would have covered early works requirements and the scope of works.[24]

[45] In *Sanrus No. 5*, I ruled that Mr Freeman could not express an admissible expert opinion on what the Joint Venture would have done in hypothetical circumstances. Further, in relation to third parties, I ruled that in principle it was not a proper matter for expert opinion evidence that an expert qualified by having specialised knowledge of the industry

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[14] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [389](b).
[15] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [367] and [390].
[16] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [313], [315] [316] and [329].
[17] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [18], [52], [56], [95], [104] and [205].
[18] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [199].
[19] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [220] and [221].
[20] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [261] and [262]
[21] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [24], [254] and [259].
[22] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [27] and [286].
[23] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [29].
[24] Expert Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] at [367], [389], [390] and [391].

in which a particular identified corporate person operated, could express an opinion as to what that corporate person would have done in hypothetical circumstances. In principle, the expression of expert opinion as to what the Joint Venture or corporate third parties would have done (or how they would have contracted) is not admissible to prove the fact of what they would have done (or the fact of how they would have contracted).[25] I will return to that issue later in this judgment.

[46] At the time I wrote *Sanrus No. 5*, the plaintiffs' submission was that the expert evidence of Mr Freeman was relevant to two overarching questions[26] which arose in the proceeding, namely –

(a) the content of the Stage 2 Feasibility Study; and

(b) the assessment of the quantum of the plaintiffs' loss, in the event I determined that the plaintiffs have suffered some compensable loss.

[47] It was in the context of the possibility that I might rule as I ultimately did as identified at [45] above, that the plaintiffs advanced a fallback argument, namely that at the least the evidence to which the defendants had objected could be regarded as expressing Mr Freeman's views as to matters which would have been considered by appropriately qualified and competent experts who were preparing a hypothetical bankable feasibility study for the Monto Coal Stage 2 Project, and as identifying what conclusions those experts, acting with reasonable care and skill, would have reached on those matters. As then advanced, the argument was expressed for the purpose of proving what the content of the Stage 2 Feasibility Study referred to in the statement of claim at [23] would have been. As I have explained in my analysis at [23] above, that meant proving what the content of a document prepared in about May 2005 would have been.

[48] I recorded the fallback argument in this way in *Sanrus No. 5*:

> [63] During the course of oral argument before me, and without abandoning resistance to the objections advanced by the defendants to the general admissibility of the evidence, the plaintiffs advanced a fall back argument. That argument was that at the least the evidence to which the defendants had objected could be regarded as expressing Mr Freeman's views as to matters which would have been considered by appropriately qualified and competent experts who were preparing a hypothetical bankable feasibility study for the Monto Coal Stage 2 Project, and as identifying what conclusions those experts, acting with reasonable care and skill, would have reached on those matters.
>
> [64] There is support – albeit retrospective support, because that is not how Mr Freeman's underlying reports are in fact expressed – for reading the reports in that way to be found in the joint expert reports for offsite power supply; offsite water supply and rail. The following paragraphs appear in the joint expert report in respect of rail (and similar words appear in the other two reports):
>
> > 2.2 The purpose of this JER is to set out what the experts to this report agree or disagree with respect to rail for the Monto Coal Stage 2 Project (the Project). It is important to note that this report has been prepared, as have our underlying individual reports, to address what matters relevant to rail would have been considered by appropriately qualified and competent people who were preparing a hypothetical bankable feasibility study (BFS) for the Monto Coal Stage 2 Project, and what conclusions those people, acting with reasonable care and skill, would have reached on those matters.
> >
> > 2.3. The plaintiffs' experts have been asked to assume that preparation of the hypothetical BFS occurred from 2002 to 2005. The defendants' experts have been asked to consider the preparation of that hypothetical BFS as at May 2005. This difference in instructions is the principal source of the differences of opinion noted in Section 4 of this JER.
> >
> > 2.4. When we say that something would or would not have been decided or done, or that something is or is not correct, or is or is not reasonable, that is to be read in each case as

[25] *Sanrus No. 5* at [55] – [56].
[26] See *Sanrus No. 5* at [21].

> expressing a conclusion that in, our opinion, those notionally preparing the hypothetical BFS would have reached on that "something".

[49] Later the plaintiffs shifted their ground. From Mr Freeman's statements being "admissible for the purpose of proving the content of the Stage 2 Feasibility Study", the proposition became, effectively, "admissible for the purpose of proving the content of advice (or communications) which would have been available to the Joint Venture from expert consultants from time to time during the period 2002 to 2005 in the course of work done for the Stage 2 Feasibility Study". The proposition seemed to be that if the reports were admissible for the latter purpose, that evidence would, in turn, provide a foundation from which I could be asked to infer that the Joint Venture would have acted on such advice or communications once it was given to them, and in turn, that the event advised upon or communicated about (namely the plaintiffs' unpleaded counterfactual case) would have come to pass.

[50] The plaintiffs' argument was put in this way in written submissions before me (footnotes omitted):

> 11. As to the plaintiffs' case, as identified at [13] to [23] of *Sanrus No 5*, it requires, amongst other things, a determination as to what the hypothetical Stage 2 Feasibility Study would have demonstrated.
>
> 12. To do so, it is important to appreciate of what the Stage 2 Feasibility Study consists.
>
> 13. The Stage 2 Feasibility Study required by the Joint Venture Agreement is a process of investigation and study, and not merely the final report that records the results of that process. It is a process that occurs over time.
>
> 14. This is apparent from:
>
> (a) clause 6 of the JVA, which provides the Participants are "*to undertake the Stage 2 Feasibility Study during the Stage 1 Mine Development*" – the study is something undertaken during a period, not merely a report. Had the parties intended to refer only to the final report, the obligation would have been to *produce* or complete the study *by* the end of the Stage 1 Mine Development;
>
> (b) the definition of "Stage 2 Feasibility Study" in clause 1, which includes tasks to be undertaken (exploration to prove up the Stage 2 resource and various studies), rather than defining it as a report which addresses certain topics;
>
> (c) the obligation in clause 5.1 to use all reasonable efforts to develop Stage 1 with 3 years of the Commencement Date – indicating that the parties expected that Stage 1 Mine Development may take place over an extended period.
>
> 15. As such, it is not the plaintiffs' case (as the defendants appear to argue) that the Stage 2 Feasibility Study is confined (temporally) to May 2005 and consists of just the final report. If that was the plaintiffs' case, then the plaintiffs would have not instructed experts such as Mr Freeman to assume that a Stage 2 Feasibility Study would have been performed between 2002 and 2005.
>
> 16. The Stage 2 Feasibility Study includes, as well as the final report, the investigations that the persons undertaking the Stage 2 Feasibility Study would pursue and the conclusions they would form while undertaking that process.
>
> 17. These conclusions would be available to the Joint Venture as they were arrived at, and not only revealed for the first time in a final report in May 2005.
>
> 18. Accordingly, the defendants' submission that evidence as to matters prior to May 2005 cannot be evidence of matters considered by experts undertaking the feasibility study is without substance.

[51] The plaintiffs argued that they could seek to establish the facts pleaded in the statement of claim at [23] in whatever way they thought fit. They contended that the various counterfactual propositions contained in what I have defined as the plaintiffs' unpleaded counterfactual case were to be regarded as evidence of the material facts pleaded and particularised in the statement of claim at [23] and not matters which were necessary to be pleaded.

[52] The defendants objected that the plaintiffs –

(a) had not pleaded –

(i) that the Joint Venture/Monto Coal 2 would have received advice or information from consultants engaged by them in the period prior to May 2005 (when the Stage 2 Feasibility Study would have been completed) to the effect they could or should enter into contracts with third parties in respect of the construction or use of infrastructure for Stage 2 (Stage 2 infrastructure contracts); or

(ii) the timing, content or basis of any such advice or information; or

(iii) the timing or terms of any such contracts; and

(b) had not pleaded the Joint Venture/Monto Coal 2 would have entered into Stage 2 infrastructure contracts in the period prior to May 2005 either –

(i) in consequence of advice or information of the kind referred to in (a) above;

(ii) because the Joint Venture Agreement obliged them do so; or

(iii) because they would have voluntarily done so,

and contended that it was not now open to the plaintiffs to advance such a case.

[53] The complaint about there not being a pleading that the Joint Venture Agreement obliged the defendants to bring about the Stage 2 infrastructure contracts became unnecessary to rule upon. That occurred because the plaintiffs by their written submissions stated (emphasis added):

> […] that in this case, clause 6 of the Joint Venture Agreement afforded to the parties a wide latitude as to the steps to be taken to discharge the obligation to undertake a bankable feasibility study during the period prescribed by the clause (viz. between 16 May 2002 and completion of the Stage 1 Mine Development). **The relevant counterfactual inquiry is therefore not "what steps did the JVA require the parties to take" to undertake a bankable feasibility study. The relevant inquiry is simply "what would have happened in fact"** if Monto Coal 2 had not breached (inter alia) clause 6 of the agreement, and instead caused a bankable feasibility study to be undertaken during the prescribed period. In undertaking that inquiry, the Court is to assume that Monto Coal 2 would have performed in its own interests having regard to the factors prevailing at the time, and acted in good faith, with its own commercial interests very much in mind (paragraph 27 above). That assessment is to be made having regard to all of the evidence. The Court is called upon to decide what, in all probability, would have happened, had the contract not been broken in the respects established, or (as the case may be) alleged.

[54] Accordingly, it seems that the plaintiffs acknowledge that performance of the Joint Venture Agreement according to its terms would have permitted a range of discretionary choices, and it is not the plaintiffs' case that the only discretionary choices consistent with performing it according to its terms were the choices which would have led to the occurrence of the unpleaded counterfactual case. Rather their case is that the choices which would have led to the occurrence of the unpleaded counterfactual case are the choices which, having regard to all the evidence, would nevertheless probably have been made. I agree that if it does not form part of the plaintiffs' counterfactual case to assert the unpleaded counterfactual events would have occurred because performance of the Joint Venture Agreement according to its terms mandated the particular choices which would have led to the occurrence of those events (such that it would have been a breach of contract not to make those choices), then the plaintiffs would not have to plead that fact. But if the contrary had been the case, it would have been incumbent on the plaintiffs explicitly to plead that case. In any event, once the plaintiffs clarified that they did not advance a breach case in this way, the defendants did not pursue this aspect of their complaint.

[55] The remaining issues raised by the defendants' objection do require examination.

Discussion

[56] Insofar as the plaintiffs' argument suggests that the fair reading of the statement of claim at [23] was that it was a reference to things which would have been demonstrated from time to time during a 3 year process culminating in May 2005, rather than to a particular document prepared by about May 2005, I reject that proposition for the reasons expressed at [23] above. Particular (b) of the statement of claim at [23] was a reference to a particular document, namely the Stage 2 Feasibility Study which would have been prepared by about May 2005. A 3 year process is not "prepared by about May 2005". And when particular (d) refers to what the Stage 2 Feasibility Study would have demonstrated, it was referring to the content of the particular document prepared as at about May 2005, which in turn would have been the subject of the meeting referred to in particular (e) and the vote referred to in particular (f).

[57] I reject also the plaintiffs' argument which I have recorded at [51] above concerning what was required of their pleading. For the reasons I have expressed at [16] to [21] above, where, as here, a party's causation hypothesis depends on establishing a particular counterfactual scenario to establish the alleged causal link between breaches of contract and the loss which it is said would have eventuated if the conduct which the party impugns had not occurred, that counterfactual scenario must be pleaded and particularised in accordance with the rules of pleading.

[58] The plaintiffs' difficulty is that they have only pleaded and particularised part of the counterfactual case which they say that they should be permitted to advance.[27]

[59] The first missing part is what I have defined as the plaintiffs' unpleaded counterfactual case, namely that various decisions, agreements and acts by the Joint Venture but also by various third parties (land-holders, statutory bodies and regulators, corporate infrastructure providers and the like) would have occurred and that they would have occurred at or by particular times.

[60] The second missing part is the added ingredient that not only would those events have come to pass, but the mechanism by which that would have occurred is what it is convenient to refer to as **the unpleaded advice case**, namely a case to the effect that –

(a) appropriately qualified and competent experts like Mr Freeman would have been engaged as consultants for the Joint Venture over the 3 year period before the completion of the Stage 2 Feasibility Study; and

(b) as and when they formed professional judgments from time to time during that 3 year period on matters referable to the various decisions, agreements and acts of the kind under discussion, they would have conveyed those professional judgments to the Joint Venture; and

(c) the Joint Venture would have acted on the professional judgments so communicated; and

(d) accordingly, that is why the various decisions, agreements and acts would have occurred at or by relevant times.

[61] The plaintiffs argued that, **first**, because of the way that this case has been managed they must be permitted to advance the plaintiffs' unpleaded counterfactual case, which means

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[27] Contrary to the plaintiffs' submission, there is nothing in the decision of Boddice J in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* [2014] QSC 23 at [40], inimical to this analysis. In any event, we are here concerned with the fairness of the conduct of a trial based on the pleading in the form which I permitted to be advanced by orders of 21 December 2019.

they must be able to point to any admissible evidence and inferences therefrom which support their argument that the various decisions, agreements and acts by the Joint Venture and the third parties would have occurred, and that they would have occurred in a particular time frame. And if that is so, then, **second**, they must, in the particular context of a case which has been managed in that way, be permitted to contend that the way that the various decisions, agreements and acts by the Joint Venture and the third parties would have occurred is because of the plaintiffs' unpleaded advice case, there being no relevant distinction between the former course and the latter course.[28] They say that the defendants are engaged in hair-splitting.

[62] I disagree with the second proposition and reject the contention that the defendants are engaged in hair-splitting. I agree with the defendants' submission that even if the plaintiffs should be permitted at the end of this trial to ask me to infer from the evidence admitted in the trial that the various counterfactual propositions inherent in the plaintiffs' unpleaded counterfactual case would have occurred at the times necessary for the Stage 2 Feasibility Study to have the content which they allege, there is a substantial difference between permitting them to take that course, and permitting them to run a case to the effect that particular consultants were likely to have been retained and would likely have provided a series of advices about the entry into contracts and the like, which would have been acted upon, with particular consequences.[29] Permitting them to run such a case could not be contemplated unless the plaintiffs had at least set out sufficient specificity of that case so as to give their opponents the chance by their evidence to engage with matters such as: (1) the likelihood of an expert of a particular kind or with particular qualifications being retained, (2) the timing and content of the hypothesised advice, (3) the factual foundation of the advice at the time it would allegedly have been given, and (4) the factual likelihood of that advice being accepted or rejected, which would also have required an examination of the state of the factual information which would have existed at the time the decision would have been made (the state of thermal coal prices being amongst the more important). The defendants rightly complain that the relevant lay witnesses have come and gone in this trial without that happening.

[63] In fact, the defendants submit – and I agree – that neither the pleadings, nor the course of the lay evidence to date, nor the content of Mr Freeman's reports relied on in this trial, nor the plaintiffs' written opening submissions, fairly revealed to the defendants that the plaintiffs were advancing the unpleaded advice case.

[64] As to pleadings:

(a) The way I reach my conclusions above that the plaintiffs' unpleaded counterfactual case was not but should have been pleaded in the plaintiffs' statement of claim applies equally to justify the conclusion that the plaintiffs' unpleaded advice case was not but should have been pleaded in the plaintiffs' statement of claim.

(b) Moreover, if this sort of case had formed part of the plaintiffs' case, one would have expected it to be revealed by the form of the traverse of defence [163](e) which appears in reply [163](b). If the plaintiffs' denial of the defendants' positive counterfactual case was founded on the proposition that, contrary to the defendants' assertion, the requisite decisions would have been made because consultants would have been retained and particular professional judgments which they formed would have been communicated and acted upon at particular times during the 3 years prior

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[28] Transcript day 71, T71-35 line 43 – T71-36 line 15 and T71-72 lines 19 – 30.

[29] The position is not materially different to my observations concerning why it would have been necessary to plead a breach case if a breach case had been part of the plaintiffs' unpleaded counterfactual case: see at [54] above.

to the time that the Stage 2 Feasibility Study would have been prepared in May 2005, then that should have been pleaded.

[65] As to the course of the lay evidence:

(a) Neither side sought to elicit evidence from their lay witnesses by reference to an hypothetical scenario which posited that particular professional judgments (presumably the ones which were consistent with what Mr Freeman's professional judgments would have been) had been communicated to them from time to time during the three year period before the Stage 2 Feasibility Study was prepared in about May 2005 and which sought to elicit from them how they would have reacted to such communications.

(b) Nor have the plaintiffs sought to put such scenarios to the defendants' lay witnesses, including in particular the persons who would have been expected to make decisions in consequence of such advice being received.

(c) My attention was drawn to some questioning of lay witnesses by each side which could be characterised as engaging with whether some of the counterfactual assumptions made by the plaintiffs' experts (including Mr Freeman) would have come to pass. The defendants suggested that their questioning could be characterised as an attempt to undermine those assumptions. What is significant is that none of the material to which my attention was drawn engaged with an advice case along the lines of that which the plaintiffs now wish to pursue. In particular, none of the questioning was directed to the unpleaded advice case.

[66] As to the content of Mr Freeman's reports which were delivered consequent upon case management orders:[30]

(a) In fact Mr Freeman's reports in the form delivered did not directly address at all the fact, timing or content of professional advice or communications which appropriately qualified and competent people who were retained to prepare a Stage 2 Feasibility Study would have given to their clients from time to time over the period concerned. Rather, as I have already stated, the form of the reports was to seek to prove directly what the Joint Venture and various third parties would have done in hypothetical circumstances prevailing up to and after 2005 by having Mr Freeman express his views as to what would have occurred. In *Sanrus No. 5*, I explained why that was inadmissible. But the present point is that the form of the reports were not directed towards the unpleaded advice case.

(b) The plaintiffs say that it must have been clear to the defendants that one purpose of proving Mr Freeman's expert opinions was to support what I have referred to as the plaintiffs' unpleaded advice case. I disagree. The apparent explanation for Mr Freeman's reports that I permitted in December 2018 was that that which I have identified in the previous subparagraph. The defendants could not fairly have been expected to divine from the form of Mr Freeman's reports that the plaintiffs were in fact proposing to rely on his evidence for the purpose of supporting the unpleaded advice case: cf my observations at [34] above. Notably, that does not seem to be a divination which the defendants did make.[31]

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[30] Excluding of course the November 2017 report which the plaintiffs advised they did not rely on and which was the subject of my orders of 21 December 2018 at [6] quoted at [36] above.

[31] I have made observations about the evidence of lay witnesses. Further I have referred to how the defendants identified the unpleaded assumptions which were implicit in the plaintiffs' case. There is no similar identification of unpleaded assumptions concerning advice which would have been given by expert consultants from time to time during the 3 years before the preparation of the Stage 2 Feasibility Study as at May 2005. And, as will appear, the

(c) I reject the proposition that the defendants should reasonably have been expected to discern from the events of December 2018 that the plaintiffs were advancing such a case. If that is truly what the plaintiffs thought they were doing through Mr Freeman's evidence, then they should have pleaded that case, and done so with all the clarity that the law requires. Of course, doing so would necessarily have altered the complexion of the issues which I dealt with in *Sanrus No. 1*.

(d) The plaintiffs rely on the fact that the peculiar chronology of the delivery of the expert reports on which the plaintiffs have chosen to rely for the trial meant that Mr Freeman's principal report of November 2018 was a reply to certain of the defendants' expert reports. But the defendants' experts were – consistently with what they had been asked to do (and, I might observe, consistently with my analysis[32] of the statement of claim at [23]) – addressing the position of an expert advising on the preparation of a Stage 2 Feasibility Study **as at May 2005**. Mr Freeman on the other hand was asked to assume that "a Stage 2 Feasibility Study would have been performed between 2002 and 2005". That might suggest that work was being done during that period for the ultimate preparation of the Stage 2 Feasibility Study as at May 2005, but when read with the pleading and the actual form of Mr Freeman's report (which, as I have said, did not directly address at all the fact, timing or content of any advices which would have been given to a putative client), that did not even approach being sufficient fairly to disclose to the defendants that the case being run was something along the lines of the unpleaded advice case. There is a substantial difference between a case which focuses on the content of a Stage 2 Feasibility Study being prepared as at May 2005 and the decision which would have been made consequent upon its delivery (which is what the statement of claim at [23] suggests), and a case which also focuses on the premises of a whole series of antecedent interim communications and the decisions which would have been made consequent upon their receipt at particular (mostly unspecified) times during the 3 years before the preparation of the Stage 2 Feasibility Study.

(e) The plaintiffs also point to the statement made in the joint expert reports for offsite power supply; offsite water supply and rail produced in July 2019 to which I have referred in *Sanrus No. 5*, quoted at [48] above. As I there observed, that was a retrospective proposition, because it was not stated in the individual reports of Mr Freeman. And, notably, the lay witness evidence had already been adduced by that time. But even as at July 2019 when those joint reports were delivered, that was not enough to disclose fairly to an opponent that the plaintiffs' case included the unpleaded advice case. The observations made in the previous subparagraph would still apply.

[67] As to the plaintiffs' written opening on causation and damages:

(a) That document was provided only in July 2019, by which time the lay evidence had been adduced.

(b) I quoted the principal relevant part of the written opening in *Sanrus No. 5* at [12]. Nothing in that part of the opening fairly disclosed to the defendants that the unpleaded advice case formed part of the plaintiffs' case in this proceeding.

(c) Subsequent parts of the written opening discuss the agreement and disagreement between Mr Freeman and relevant defendant's experts. But the discussion is all in the context of what they say in respect of the content of a hypothetical feasibility

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defendants' experts addressed the position of an expert advising on the preparation of a Stage 2 Feasibility Study **as at May 2005**.

[32] See at [23] above.

study for the Stage 2 mine as at May 2005, or their agreements and disagreements as to whether the assumptions on which the plaintiffs' Stage 2 Feasibility Study turns would have come to pass.

(d) My attention has not been drawn to any parts of the opening which fairly disclosed to the defendants that the unpleaded advice case formed part of the plaintiffs' case in this proceeding.

[68] The plaintiffs however submitted that the parties must be treated as having otherwise broadened the scope of the issues in dispute in this proceeding to include the case I have described as the unpleaded advice case.

[69] The law relevant to answering that question was sufficiently summarised for present purposes in *Holdway v Arcuri Lawyers (A Firm)* [2009] 2 Qd R 18. Keane JA (with whom McMurdo P and Mackenzie AJA agreed) stated (at [60] – [61], footnotes omitted, emphasis added):

> [60] Discussion of the causation issue must commence with an appreciation of the purposes served by the system of pleadings in civil litigation, and the consequences of parties choosing to broaden the issues in dispute beyond the scope of the pleadings. In *Gould v The Mount Oxide Mines Ltd (In Liq) & Ors,* Isaacs and Rich JJ said:
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> > "Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. **But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.** There is abundant authority for this, even if the matter were required to rest on authority only. See, for instance, *Nevill v Fine Art and General Insurance Co* ((1897) AC 68 at 76); *Browne v Dunn* (6 R 67 at p 75), the relevant passage being quoted fully in *Rowe v Australian United Steam Navigation Co* (9 CLR, 1 at p 24). There are qualifications, no doubt, and each case must depend for the proper application of the principle upon its own facts. It has been laid down by the Privy Council that 'As a rule relief not founded on the pleadings should not be granted.' 'But in this case' (said their Lordships) 'the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule': *Sri Mahant Govind Rao v Sita Ram Kesho* (25 Ind App 195 at p 207). *Nocton v Lord Ashburton* ((1914) AC, 932) is a decisive authority that even where fraud is charged and the charge fails, the plaintiff does not necessarily fail. He may still have a sufficient cause of action left. **But in the present instance the defendants, whatever course might have been open to them at the hearing, unquestionably adopted that of fighting the claims as presented in argument upon the evidence as if the particular claims made had been specifically alleged, and as if there were no other evidence upon those claims which the defendants desired to adduce. There is no suggestion even now that other evidence would have been available; and it is perfectly obvious that any objection raised could have been instantly met by a formal amendment, and that no further evidence would have been offered**. The case has been fully tried out, as far as the parties desired, on the three matters before us, and the only question is whether the judgment appealed from as to the challenged items should be affirmed, modified or reversed on the merits."
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> [61] More recently, in *Banque Commerciale SA v Akhil Holdings Ltd* the High Court reiterated that observance of the rules of pleading is intended to facilitate the fair determination of the real issues in dispute between the parties, and is not an end in itself. Their Honours said:
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> > "The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In liq)* ((1916) 22 CLR 490, at p 517), per Isaacs and Rich JJ. **In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case**

> **against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities**. See, eg, *Browne v Dunn* ((1893) 6 R, at p 76); *Mount Oxide Mines* ((1916) 22 CLR, at pp 517 – 518).
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> **Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference** …"

[70] The plaintiffs say, **first**, that it is demonstrable that the defendants must be taken either to have deliberately chosen to engage with the unpleaded counterfactual propositions identified in their expert reports or that they acquiesced to the plaintiffs' advancing the case founded on those unpleaded counterfactual propositions. **Second**, they say that it would be unfair to permit the defendants to hold them to their pleaded case in circumstances where it must have been apparent to the defendants that the plaintiffs advanced a case which was broader than that pleaded.

[71] I accept that the considerations to which I have referred at [28] to [38] above suggest that the defendants must be taken to have assumed that the plaintiff's case as to their counterfactual propositions was that **fairly** disclosed by the pleadings as narrowed and confined by the expert reports which the plaintiffs were permitted to rely on at trial.

[72] It follows that there is a solid foundation to the plaintiffs' argument that the defendants have, during the course of this hearing, already engaged with the validity of some of the assumptions on which the plaintiffs' experts opinions rest. I have mentioned already the nature of some of the questioning of the lay witnesses. Further, evidence has been adduced from some experts already which plainly sought to do so: see, for example, the evidence of Mr Smith (D) and Mr Masters (D).

[73] That foundation will be reinforced if the defendants call all their experts and their reports go into evidence. The plaintiffs took me to parts of the experts reports from defendants' experts who have not yet been called, but which were delivered in compliance with case management orders, which they submitted (and I agree) demonstrated that it is plain that defendants' experts reports filed and served in compliance with case management orders have specifically sought to engage with whether or not particular assumptions underlying the plaintiffs' expert reports would have come to pass.

[74] I agree with the plaintiffs that it is too late for the defendants now to contend that the plaintiffs may not seek to prove the truth of the counterfactual assumptions which were fairly disclosed to the defendants by the pleadings as narrowed and confined by the expert reports delivered pursuant to case management orders and which the defendants have engaged with in either by: (1) evidence which has been adduced at this trial or questions which have been made of witnesses who have given evidence in this already, or (2) evidence which by the form of their expert reports the defendants have made it clear that they are ready and able to deal with at this trial.

[75] But because the plaintiffs did not comply with the rules of pleading and left the definition of a large part of their counterfactual case to be divined from their proposed evidence, delivered in the case which has been managed way I have described, the problems to which I referred at [31] to [35] above exist. The result is that sometimes it will be clear and sometimes it will not be clear what unpleaded counterfactual propositions have been fairly disclosed and deliberately, or by clear acquiescence, engaged with. The point of present importance is that nothing to which the plaintiffs took me justifies the proposition that the

plaintiffs have fairly disclosed and the defendants have already engaged with the unpleaded advice case, in either of the ways mentioned in the previous subparagraph. Rather, for the reasons expressed at [62] to [67] above, I think that the contrary conclusion is clear.

[76] The plaintiffs' unpleaded advice case adds a very different complexion to the nature of the counterfactual case that the defendants could reasonably have thought they were meeting, and the defendants were entitled to have such a case clearly communicated to them, so that they could meet it in their lay and expert evidence. The defendants cannot be taken to have deliberately chosen to conduct litigation (or to have acquiesced in the conduct of litigation) on a basis not ever fairly disclosed to them. That is a proposition about the fair conduct of litigation, which I reject. If the plaintiffs' counterfactual causal path had involved the unpleaded advice case or anything like it, then such a counterfactual causal path would have had somehow to be fairly disclosed to (and engaged with by) the defendants in order for the deliberate choice or acquiescence argument to work.

[77] The plaintiffs' argument about deliberate choice is not supportable in relation to the unpleaded advice case. Neither is the plaintiffs' argument about acquiescence.

[78] Before leaving this point, I should specifically deal with the contention that reaching such a conclusion involves unfairness to the plaintiffs.

[79] The plaintiffs can hardly suggest that the defendants' hands were tied in relation to their ability to object to the admissibility of any parts of the defendants' expert reports:

(a) First, my orders of 21 December 2018 at [6] (quoted at [36] above) prevented the plaintiffs from relying on parts of Mr Hill's 2014 and 2017 reports, and parts of Mr Hill's first 2017 report, the whole of Mr Freeman's report of 2017 and the whole of Mr Hall's second 2017 report. But it specifically preserved the defendants right to object to any of the remaining parts of the reports at trial.

(b) Second, my orders of 21 December 2018 at [9] to [18] provided for expert conclaves and joint expert reports in a manner I have discussed at length in *Sanrus No. 2*. But that process was (at [9]) specifically stated to be "without prejudice to the right to object to any expert evidence at trial".

(c) Third, my orders of 21 December 2018 specifically set a timetable for notification of objections to expert evidence.

[80] Accordingly, it could not follow from the mere fact that it must have been obvious to the defendants that the plaintiffs intended to advance a form of case which was broader than that pleaded, that the defendants could not object to the plaintiffs advancing such a case. Litigation is adversarial. Nevertheless, absence of surprise is a very relevant consideration. If, for example, it was obvious that the defendants could not possibly resist an amendment application by the plaintiffs to fix a pleading deficiency, there would no utility in upholding the defendants' present objection and it might legitimately be said that it would be unfair for the defendants to take such a pleading point belatedly.

[81] It will be apparent from [71] to [75] above, that I think that there are aspects of the plaintiffs' unpleaded counterfactual case which it would be unfair to conclude that the plaintiffs may not seek to demonstrate at this trial. However for reasons I have explained at length, I reject the plaintiffs' contention that this proposition can be advanced in relation to the unpleaded advice case. I have concluded that it was the plaintiffs who did not fairly reveal that case to the defendants. There is no unfairness to the plaintiffs in not permitting them to advance such a case. I reject the plaintiffs' submission that the defendants could not possibly resist an application by them to amend to permit the unpleaded advice case to be advanced. To the contrary, I would expect that, amongst other things, the

considerations to which I have referred at [62] to [67] above would loom large – and, it presently seems to me, persuasively – in the defendants' resistance of such an application.

Conclusion

[82] In my view, the plaintiffs cannot on the present state of the pleadings be permitted to advance the unpleaded advice case. And I reject their submission that the parties must be treated as having otherwise broadened the scope of the issues in this proceeding to include that case. The defendants' objection as to the plaintiffs being permitted to advance that case should be upheld.

The further supplementary report of Mr Freeman

[83] At [8] above, I identified the circumstances which led to the plaintiffs seeking leave to rely on the further supplementary Freeman report. As I mentioned, that leave was opposed.

[84] There was no dispute that leave was required. It was common ground that the considerations applicable to leave to rely upon new expert evidence were those set out in *Sanrus No. 1* at [70] – [71] and *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 2)* [2019] QSC 162 at [12] – [15].

[85] For their part, the plaintiffs contended that –

(a) the question of whether to grant leave is primarily concerned with a balancing of the prejudice to be suffered by the plaintiffs if leave is refused against any prejudice to the defendants if it is granted;

(b) the prejudice to the plaintiffs was significant;

(c) the prejudice to the defendants was minimal; and

(d) the balance therefore favoured the grant of leave.

[86] I observe that I do not think that that is an adequate statement by way of general principle, and I would rely on what I said in the two *Sanrus* cases to which I have referred.

[87] The plaintiffs recognised that the application was made at a very late stage, but explained the delay by referring to the following matters –

(a) Mr Freeman's November 2018 reports were prepared under the pressure of having to meet court ordered time limits;

(b) the impetus for the application was the ruling in *Sanrus No. 5*, which upheld objections to the existing Freeman reports, and which led to the plaintiffs' advisers determining to approach Mr Freeman about the preparation of a supplementary report;

(c) a submission that:

> […] having regard to the volume and timing of the service of the objections and associated submissions between 8 August 2019 and 24 August 2019, the nature of the objections taken (often on several discrete grounds in relation to numerous paragraphs and sentences) and the late withdrawal of numerous objections, the plaintiffs cannot be criticised for not realising prior to the decision in *Sanrus No 5* being handed down that, instead of spending their time attempting to address and make submissions about the numerous objections, they should instead be giving up and focussing on preparing a new report of Mr Freeman.

(d) a submission that the plaintiffs had not delayed in making the application once the need for it to be made had become apparent.

[88] As to this, I observe that I do not regard the first proposition as a persuasive explanation for the need for yet another report from Mr Freeman. The third submission is impossible to accept, in light of the fact that the plaintiffs have explicitly not given up on resisting the

objections. There is some merit, however, in the second and fourth propositions. In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [19], the High Court identified as one of the reasons why the general rule was that a ruling on admissibility should be made before the party who tendered the evidence closed its case was so that the party might "then know whether it must try to mend its hand". I regard the substance of the plaintiffs' explanation to be that the further report represents their attempt to remedy the position which they had themselves created by seeking to rely at trial on expert reports which were inadmissible to the extent identified in *Sanrus No. 5*. Of course that being the real explanation does not mean that a discretion should be exercised in favour of permitting the alleged remedial course.

[89] The plaintiffs contended that the prejudice to the defendants of the grant of leave was minimal, but the prejudice to them of the denial of leave substantial. They submitted (footnotes omitted, emphasis added):

> The evident prejudice to the plaintiffs from a refusal of leave is significant, for if leave is not granted and the defendants' objections are upheld such that evidence about the topics referred to in the supplementary report are not admitted on any basis, **the plaintiffs will be without evidence which is important to their case in seeking to establish the counterfactual process, being matters relevant to the offsite power supply, offsite water supply, port and rail which would have been considered by appropriately qualified and competent people who were preparing a hypothetical bankable feasibility study for the Monto Coal Stage 2 Project, and as identifying the conclusions which those people, acting with reasonable care and skill, would have reached on those matters, assuming the preparation of the hypothetical bankable feasibility study in the period from 2002 to 2005**.
>
> In addition, the supplementary report of Mr Freeman (P) assists in the interpretation of the 2 November 2018 report (and informs the issue of whether the objections to that report should be upheld, which is important to the plaintiffs' case) because it identifies a process which Mr Freeman (P) considers that an expert would have undertaken during the Stage 2 Feasibility Study in 2002 - 2005, which includes identification of likely terms which the infrastructure provider would agree upon and subsequent negotiations of those terms. This means that Mr Freeman's (P) evidence in the 2 November 2018 report which has been expressed in terms of what an infrastructure provider would have done should be construed as being an opinion as to what an expert would have considered were the likely terms on which an infrastructure provider would have entered a contract, subject to negotiation of those terms which needed to follow.

[90] Although they disputed some aspects of detail concerning some timing aspects of the explanation which the plaintiffs advanced, in my view the resolution of the application rises and falls on whether I am persuaded to refuse leave because of what the defendants characterised as their three primary reasons for opposing leave, namely their submissions that –

(a) the report is directed towards the plaintiffs' unpleaded advice case and the plaintiffs should not be permitted to advance that case;

(b) the report is objectionable in many respects; and

(c) the report does not cure the admissibility defects in Mr Freeman's earlier reports.

[91] The first proposition is correct. For reasons which I have explained in the first section of this judgment, the defendants were correct to submit that the plaintiffs should not be permitted to advance the unpleaded advice case in this trial. The further supplementary report is principally directed to that case. As will appear, and for the reasons advanced in Schedule 3 to this judgment, the second proposition is also correct and there is not much of the supplementary report which survives my rulings on the defendants' objections. To my mind the question then becomes whether, to the extent that there is some admissible material in the report, there is any reason to deny to the plaintiffs such advantage as they might be able to establish for their case by reference to that material.

[92] Even though a substantial argument can be advanced in favour of not exercising a discretion to permit reliance on a report which is directed to inadmissible purposes and only contains small components of admissible material, bearing in mind there are no particular adverse consequences to the conduct of this trial in permitting it to be relied on, I think the balance of considerations favours the grant of leave. It is not necessary to consider the third of the defendants' primary reasons for opposing leave.

The principles which inform the disposition of the objections

Expert opinion evidence must satisfy the *Makita* criteria

[93] In *Sanrus No. 5* at [45] to [49] and [51] to [52], I sought to identify relevant aspects of the criteria which expert opinion evidence must meet in order to be admissible. In argument before me for the purpose of making final rulings in relation to the objections to the reports of Mr Freeman, the plaintiffs did not dispute the correctness of that identification of general principle. I will reproduce that previous identification of general principle at [94] to [100] below.

[94] In *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85], Heydon JA stated that for expert opinion evidence to be admissible, it must meet the following criteria:

(a) it must be agreed or demonstrated that there is a field of "specialised knowledge";

(b) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;

(c) the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";

(d) so far as the opinion is based on facts "observed" by the expert, those facts must be identified and admissibly proved by the expert;

(e) so far as the opinion is based on "assumed" or "accepted" facts, those facts must be identified and proved in some other way;

(f) it must be established that the facts on which the opinion is based form a proper foundation for it; and

(g) finally, the expert's evidence must explain how the field in which the expert has expertise – as established pursuant to (a), (b) and (c) – applies to the facts assumed or observed so as to produce the opinion propounded.

[95] This passage of the reasons of Heydon JA in *Makita* has been applied by the Queensland Court of Appeal on multiple occasions, including *R v Naidu* [2008] QCA 130 at [68]; *R v Kleimeyer* [2014] QCA 56 at [31]; *R v Mackenzie* [2016] QCA 277 at [37]; *Woolworths Limited v Grimshaw* [2016] QCA 274 at [24] and *Beaven v Wagner Industrial Services Pty Ltd* [2018] 2 Qd R 542 at [44]. As will appear, his Honour developed his thinking and expressed it further in *Dasreef Pty Ltd v Hawchar*.

[96] Four aspects of the *Makita* criteria are relevant to the disposition of the defendants' objections to Mr Freeman's reports.

[97] **The first relevant aspect of the *Makita* criteria is that the expert opinion must be on a matter which is a proper matter for expert opinion**. As to this:

(a) That is what the first three of the *Makita* criteria address. There must be a field of specialised knowledge, in which the witness is demonstrated to be "expert" by specified training, study or experience, and the opinion must be wholly or substantially based on the witness's expert knowledge.

(b) If the expert's reasoning is not, on analysis, dependent on his or her specialised knowledge, and merely expresses a process that could have been undertaken by the trier of fact (whether a judge sitting alone or a jury) without the expert's assistance, it is not admissible as expert opinion evidence.[33]

(c) The importance of this aspect of the law was explained by Gleeson CJ in *HG v The Queen* (1999) 197 CLR 414, in the following passage (footnotes omitted, emphasis added):

> [43] To paraphrase what was said by Dixon CJ in *Clark v Ryan* about the expert witness in that case, **the evidence the defence sought to lead from [the expert] really amounted to putting from the witness box the inferences and hypotheses on which the defence case wished to rely**.
>
> [44] This was not a trial by jury, but in trials before judges alone, as well as in trials by jury, **it is important that the opinions of expert witnesses be confined**, in accordance with s 79, to opinions which are wholly or substantially based on their specialised knowledge. Experts w**ho venture "opinions" (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted**. The opinions which Mr McCombie was to be invited to express appear to provide a good example of the mischief which is to be avoided.

(d) His Honour's remarks, although specifically directed at the statutory expression of this common law rule, are just as applicable to the common law rule itself.

(e) A failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight: *Dasreef Pty Ltd v Hawchar* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [42].

(f) Notably, because demonstration of these matters could come only from the evidence given by the expert, the need to direct attention to these matters requires that the opinion be presented in a form which makes it possible to answer that question: *HG v The Queen* per Gleeson CJ at [39] and *Dasreef Pty Ltd v Hawchar* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [36].

[98] **The second relevant aspect of the *Makita* criteria is that the facts on which the opinion is based must be identified by the expert**. As to this:

(a) This is part of what the fourth and fifth of the *Makita* criteria address. In *R v Naidu*,[34] Fraser JA said that '[i]t is unquestionably the law that expert opinion evidence is inadmissible if the opinion is not expressed upon a state of facts both **identified** and proved in evidence' (emphasis added).

(b) In *Dasreef Pty Ltd v Hawchar* at [64] Heydon J called this **the "assumption identification rule"**. His Honour observed (footnotes omitted, emphasis added):

> There is no doubt that the assumption identification rule exists at common law. **Expert evidence is inadmissible unless the facts on which the opinion is based are stated by the expert – by way of proof if the expert can admissibly prove them, otherwise as assumptions to be proved in other ways.** Thus Dixon J said that the assumptions of fact on which an expert opinion rested had to be "adverted to by the witness".

(c) The previous two subparagraphs demonstrate that a failure to identify the state of facts on which the expert opinion is expressed goes to the admissibility of the evidence, not its weight.

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[33] *Clark v Ryan* (1960) 103 CLR 486 at 491 – 492 (Dixon J); *DPP v Jordan* [1977] AC 699 at 717 – 718 (Wilberforce L); *ASIC v Rich* (2005) 53 ACSR 110 at [280]; *Honeysett v The Queen* (2014) 253 CLR 122 at [43] – [46]; *R v Butler* [2010] 1 Qd R 325, [60] (Keane JA).

[34] [2008] QCA 130 at [68].

(d) Heydon J explained the purpose of the "assumption identification rule", in these terms in *Dasreef Pty Ltd v Hawchar* (at [65]) (footnotes omitted):

> The rule facilitates the operation of the proof of assumption rule and other rules of admissibility. It helps to distinguish between what the expert has observed and what the expert has been told; to ensure that the expert is basing the opinion only on relevant facts; to ensure that experts do not pick and choose for themselves what aspects of the primary evidence they reject, what they accept, how they interpret it and what the court should find; and to ascertain whether there is substantial correspondence between the facts assumed and the evidence admitted to establish them.

(e) His Honour's reference to the "proof of assumption rule" was to the common law rule that an expert opinion is not admissible unless evidence has been, or will be, admitted, whether from the expert or from some other source, which is capable of supporting findings of fact which are sufficiently similar to the factual assumptions on which the opinion was stated to be based to render the opinion of value: *Dasreef Pty Ltd v Hawchar* at [66]. When in *R v Naidu*, Fraser JA referred to "and proved in evidence", I apprehend it was to this requirement.

[99] **The third relevant aspect of the *Makita* criteria is that to the extent that the opinion rests on facts "observed" by the expert, they must be admissibly proved by the expert**. As to this:

(a) That is part of what the fourth of the *Makita* criteria addresses. Whilst it is often the case that experts will not seek themselves to prove some or all of the facts on which their opinion is founded, *Makita* recognises that there is no reason why that cannot occur, so long as it is done in an admissible way.

(b) An expert might well prove, for example, a particular experiment, analysis done or set of observations made by the expert and then express an opinion based on the results of the experiment, the outcome of the analysis or the content of the observations. In that way the expert would be both a witness of fact (as to the experiment, analysis or observations) and a witness of expert opinion (as to the expert opinion properly drawn within the scope of the expert's demonstrated expertise based on the facts so demonstrated). Sometimes the dividing line between fact and law in this respect might be unclear. For example, an expert might need demonstrated specified training, study or experience for the experiment, analysis or observations to be valid.

(c) The important point is that insofar as a litigant seeks to prove facts on which an expert opinion is based by way of the expert's own evidence, that proof must be done in an admissible way by that expert. If the expert witness' own evidence of the facts is not admissible to prove them, then the most that that part of the expert's evidence could be regarded as, is a statement of what the expert assumed to be true for the purpose of the expert formulating the expert's opinion evidence.[35] If those assumptions are not confirmed in some other way by admissible evidence in the proceeding, then the expert opinion evidence will not be admissible.

[100] **The fourth relevant aspect of the *Makita* criteria is that the expert must state, in chief, the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert so as to reveal that the opinion is based on the expert's expertise**. As to this:

(a) That is what the final of the *Makita* criterion addresses. In *Makita* (at [59]) Heydon JA had earlier observed that if an expert's report is to be useful it must comply with the prime duty of experts in giving opinion evidence, namely to furnish the trier of

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[35] c.f. *Beaven v Wagner Industrial Services Pty Ltd* [2018] 2 Qd R 542 per Fraser JA at [4].

fact with criteria enabling evaluation of the validity of the expert's conclusions. His Honour's observations in this regard have been followed in the Queensland Court of Appeal: *R v Sica* [2014] 2 Qd R 168 per Muir and Gotterson JJA and Applegarth J at [104]; *R v Lentini* [2018] QCA 299 per Sofronoff P, with Philippides JA and Henry JA agreeing, at [55].

(b) In *Dasreef Pty Ltd v Hawchar* at [91], Heydon J called this rule **the 'statement of reasoning rule'**, and explained that the rule is important both from the point of view of how courts must be expected to act in relation to expert opinion and from the point of view of fairness to the opposing party.

(c) As to the importance of the rule from the point of view of the Court, His Honour stated (at [92] – [94], footnotes omitted, emphasis added):

> 92. Sir Owen Dixon, speaking extrajudicially, said: "courts cannot be expected to act upon opinions the basis of which is unexplained." In *R v Jenkins; Ex parte Morrison* Fullagar J quoted that statement with approval, and added that expert scientific witnesses should be asked to "explain the basis of theory or experience" on which their conclusions rest. On appeal Rich and Dixon JJ approved what Fullagar J had said. **The witness must explain the basis of theory or experience because the court is not limited to examining the conclusion or the expertise of the expert witness: it must look to the "substance of the opinion expressed." Since choosing between conflicting experts depends in part on "impressiveness and cogency of reasoning" their "processes of reasoning" must be identified**. […]
>
> 93. ***Function of the statement of reasoning rule***. The rule protects cross-examiners by enabling them to go straight to the heart of any difference between the parties without the delay of preliminary reconnoitring. **It also aids the court in a non-jury trial, because at the end of the trial it is the duty of the court to give reasons for its conclusions**. And it aids jurors, because at the end of the trial they have the duty of assessing the rational force of expert evidence. If there is not some exposition of the expert's reasoning it will be impossible for the court to compose a judgment stating, and for the jurors to assemble, reasons for accepting or rejecting or qualifying the expert's conclusion.
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> > **"The process of inference that leads to the [expert's] conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about the reliability of them."**
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> As Lord Cooper, the Lord President, said in *Davie v Magistrates of Edinburgh*:
>
> > "The value of [expert opinion] evidence depends … above all upon the extent to which [the expert's] evidence carries conviction …
> >
> > [T]he defenders went so far as to maintain that we were bound to accept the conclusions of [an expert witness]. This view I must firmly reject as contrary to the principles in accordance with which expert opinion evidence is admitted. […] **[The] duty [of expert witnesses] is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. … [T]he bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert."**
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> 94. **It is sometimes said that these words deal with weight only, not admissibility. But this is contradicted by the Lord President's use of the word "admitted"**.

(d) As to the importance of the rule from the point of view of fairness to an opposing party, citing *Lewis v The Queen* (1987) 88 FLR 104 at 124, Heydon J wrote that the rule required the reasoning to be stated in chief because the opposing party is not to be left to find out about the expert's thinking for the first time in cross-examination.

[101] The particular aspects of the objections advanced by the defendants which are informed by this analysis will be identified later in this judgment and in the rulings which I make as expressed in the Schedules to this judgment.

Proof of what a person would have done in hypothetical circumstances

[102] An important but, in one respect, disputed aspect of general principle dealt with in *Sanrus No. 5*, concerned how evidence might be adduced as to what a person would have done in hypothetical circumstances, should proof of that hypothetical fact be relevant in a proceeding.

[103] In *Sanrus No. 5* at [54], I recorded that the plaintiffs did not dispute the following summary of principle set out in the defendants' submissions:

(a) A witness may give evidence of what he or she would have done in hypothetical circumstances. Such evidence is not opinion evidence, but evidence of fact.[36]

(b) Similarly, a witness with appropriate authority may also give factual evidence of what his or her corporate employer would have done in a hypothetical set of circumstances.[37]

(c) On the other hand, evidence of what *another person* would have done in hypothetical circumstances, or what a *reasonable person* would have done in hypothetical circumstances, is opinion evidence.[38] There are generally three circumstances in which such evidence can be given:

(i) A suitably qualified professional expert may give evidence of the content of general practices of professionals in his or her field, or to put it another way, evidence about what professionals generally do in stated circumstances.[39] Outside the field of professional practices, an expert may give similar evidence about the content of industry practices.[40]

(ii) A suitably qualified professional expert may go beyond evidence of the content of general practices, by expressing an opinion about the practice of competent and careful professionals in specified circumstances which are recurring or typical.[41] However, evidence of what an expert would himself or herself do in hypothetical circumstances is inadmissible.[42]

(iii) A suitably qualified professional expert may go beyond evidence of the general practice of competent and careful professionals in stated circumstances, and give evidence of what, in stated circumstances which are out of the ordinary and not amenable to observations about a developed practice, a competent and careful professional would be expected to do.[43] It has been suggested that

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[36] See *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75-76; *Seltsam Pty Ltd v McNeill* [2006] NSWCA 158 at [118] – [123]; *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299 at [53] – [55]; *Vella v The Queen* [2015] NSWCCA 148 at [117] – [119].
[37] See *Hughes Aircraft Systems International v Airservices Australia* (1997) 80 FCR 276 at 280; *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299 at [56] – [58].
[38] *Beslic v MLC Ltd (No 2)* [2016] NSWSC 746 at [96].
[39] *ASIC v Vines* (2003) 48 ACSR 291 at [13], [20]; *Lucantonio v Kleinert* [2009] NSWSC 853 at [8](1); *Howe v Fischer* [2014] NSWCA 286 at [81].
[40] *ASIC v Vines* (2003) 48 ACSR 291 at [20].
[41] *ASIC v Vines* (2003) 48 ACSR 291 at [21]; *Lucantonio v Kleinert* [2009] NSWSC 853 at [8](3); *MB v Protective Commissioner* [2000] NSWSC 718 at [2] – [5]; *Adler v ASIC* (2003) 46 ACSR 504 at [617] – [620], [632].
[42] *ASIC v Vines* (2003) 48 ACSR 291 at [31].
[43] *ASIC v Vines* (2003) 48 ACSR 291 at [22] – [26]; *MB v Protective Commissioner* [2000] NSWSC 718 at [5] – [10]; *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 at [380]; *Weller v Phipps* [2010] NSWCA 323 at [76].

> some additional and special qualification over and above the ordinary training and experience of a professional in the field is required in order to be able to express an opinion of this kind.[44]

[104] In *Sanrus No. 5*, the plaintiffs sought to extend the principles identified in the previous paragraph, to justify the conclusion that it was permissible for an expert qualified by having specialised knowledge of the industry in which a particular identified corporate person operated, to express an opinion as to what that corporate person would have done in hypothetical circumstances as proof of that fact.

[105] I rejected the plaintiffs' argument, in these terms:

> [56] […] That subject matter is not a proper matter for expert opinion. The plaintiffs were not able to identify any authority which supported the argument beyond the authorities which permit experts to give evidence of the content of industry practices and of the practices of consumers or industry participants generally. In my view those cases do not permit of such an extension. As Allsop CJ observed in *Gambro Pty Ltd v Fresenius Medical Care Australia Pty Ltd* [2007] 245 ALR 15 at [24] in relation to cases which authorised expert opinion evidence about how customers in the market would react in hypothesised circumstances "… it goes without saying that [the expert] cannot say what any particular individual person would have done on a particular day."
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> [57] That is not to say that an expert might not be able to give admissible factual evidence concerning practices or procedures in an industry. But the expert would have to do so in an admissible way. And, as we have seen in the principles stated at [103](c) above, in some circumstances an expert might go on to express opinion based on the expert's admissible factual evidence. But in so doing, the expert would have to comply with the *Makita* criteria.
>
> [58] Nor is it to say that factual evidence about a corporate person's particular past conduct or practices might not be admissible, with a view to providing an evidentiary basis for a submission that the trier of fact should draw a particular inference about that person's likely conduct in hypothetical circumstances. But the proof of past conduct or practices would have to occur in an admissible way. And whether the trier of fact should draw the inference contended for based on the evidence of past conduct or practices is a matter for the trier of fact. It is not a proper subject for expert opinion evidence. Permitting that to occur would usurp the function of the trier of fact and would permit the party seeking to adduce such evidence to engage in precisely the type of conduct criticised by Gleeson CJ in in *HG v The Queen* quoted at [97](c) above.

[106] In written submissions which they placed before me for the purpose of my making final rulings in relation to the objections to the reports of Mr Freeman, the plaintiffs advanced what seemed to me to be contradictory positions.

[107] First, they submitted that "where the causation case involves the taking of a step which in fact was not taken, it is orthodox to call expert evidence to opine as to the content of the hypothetical step"[45] and "where the hypothetical step involves a particular third party, case-law indicates that a person with relevant expertise may give evidence as to the prospects of that third party acting in a particular way".[46] But later in the same submissions they wrote:[47]

> The plaintiffs do not contend that what the Joint Venture would have done is properly the subject of expert evidence. The Joint Venture is not a body about which one can have specialised knowledge that would permit such opinion evidence to be given.

[108] I agree with the proposition in the last quote. If the Joint Venture and the third parties like QR, GPC, SunWater and Powerlink are not bodies about which one could have specialised

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[44] *MB v Protective Commissioner* [2000] NSWSC 718 at [9].
[45] Plaintiffs' submission in response to the objections to Mr Freeman's reports for hearing on 9 September 2019 [SBM.010.037.0001] at [38].
[46] Plaintiffs' submission in response to the objections to Mr Freeman's reports for hearing on 9 September 2019 [SBM.010.037.0001] at [41].
[47] Plaintiffs' submission in response to the objections to Mr Freeman's reports for hearing on 9 September 2019 [SBM.010.037.0001] at [93].

knowledge as would permit expert opinion evidence to be given as to what they would and would not do, then my ruling in *Sanrus No. 5* was correct.

[109] Despite this it did seem to me that the plaintiffs sought to challenge the correctness of my ruling in *Sanrus No. 5*, and invited me to reconsider it. The defendants took the same view of the plaintiffs' argument, and submitted that I should not reopen a ruling which had already been decided. At first during the course of oral argument, the plaintiffs confirmed that their intention was to persuade me to reconsider my ruling. Later, also during the course of oral argument, they changed that position and indicated that they would accept the ruling for the purposes of my making the final rulings which I had to make, but, as I had invited them to do, would reserve their ability to argue on appeal that the ruling in *Sanrus No. 5* was incorrect. Unfortunately, this approach did not inform their written submissions or the schedule by which they advanced, item by item, their suggested rulings in relation to the impugned parts of Mr Freeman's reports. Some attempt to remedy that flaw was made orally.

[110] In any event, and for completeness, I should indicate that I have considered the written submissions which each side provided to me which addressed the correctness of my rejection of the plaintiffs' argument in *Sanrus No. 5*. I agree, for the reasons set out in the defendants' written submissions, that the plaintiffs did not advance any submissions which cast any doubt on the conclusion which I reached in *Sanrus No. 5*.

[111] For the purposes of making my final rulings I will proceed on the basis of the correctness of my ruling in *Sanrus No. 5*.

[112] This has a number of implications.

[113] **First**, as I explained in *Sanrus No. 5*, it is not open to Mr Freeman to give expert opinion evidence as to what the Joint Venture would have done in hypothetical circumstances for the purposes of proving that fact.[48] That means that if it is ever relevant to any issue in this proceeding that I make a finding as to whether the Joint Venture would have done that thing in those hypothetical circumstances (or if it is ever relevant to making a finding on the possibilities or probabilities of that happening), Mr Freeman's opinion that the Joint Venture would have done that thing cannot form part of the body of the evidence to which I could have regard in order to make that finding. Examples of opinion evidence of Mr Freeman covered by this ruling include:

(a) The statement in the last sentence of [389](b) of the Report dated 2 November 2018:[49]

> In my opinion it is likely that the Joint Venture would have selected option (ii) given the time constraints were manageable, the capital cost would be amortised over the life of the asset rather than being funded upfront, and in my experience, it was an easier and faster process to acquire an easement when undertaken by a statutory Government Owned Corporation.

(b) The statement at [39] – [40] of the Report dated 22 November 2018:[50]

> I consider that the Joint Venture could have negotiated a port agreement in 2003-2004, with the costs of the port services stated in the contract in line with that recorded by GPC for 2003. In my experience these would have escalated at CPI throughout the negotiation period until contract execution.

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[48] The plaintiffs often sought to avoid this ruling by suggesting that Mr Freeman's evidence should be construed as intending to refer to a possibility (e.g. "could" rather than "would", or the existence of an "opportunity"), rather than directly saying what the joint venture or a third party would have done. I was not persuaded. The submission often flew in the face of the language used. And even if the language permitted of it, the language used still had implicit in it a statement about what the joint venture or a third party would have thought or would have been prepared to consider and was still impermissible.

[49] See my ruling in Schedule 1, item 16.

[50] See my ruling in Schedule 1, item 96.

> In my opinion a likely term for a port agreement would be 10 years commencing 1 July 2007 with a renewable option for a further 10 years. In my experience port agreements had options to renew at 5-year or 10-year intervals.

[114] **Second**, as I explained in *Sanrus No. 5*, it is not open to Mr Freeman to give expert opinion evidence as to what GPC, or SunWater, or Powerlink would have done in hypothetical circumstances for the purposes of proving that fact.[51] That means that if it is ever relevant to any issue in this proceeding that I make a finding as to whether one of those bodies would have done that thing in those hypothetical circumstances (or if it is ever relevant to making a finding on the possibilities or probabilities of that happening), Mr Freeman's opinion that the corporation would have done that thing cannot form part of the body of the evidence to which I could have regard in order to make that finding. Examples of opinion evidence of Mr Freeman covered by this ruling include:

(a) The statement at [288] of the Report dated 2 November 2018, in relation to what SunWater would have done "[…] however I consider it unlikely that Sunwater would have objected to HDPE pipe as a suitable product."[52]

(b) The statement at [38](b) of the Report dated 22 November 2018, in relation to the Joint Venture securing port capacity allocation with GPC:[53]

> I disagree with this opinion as capacity was available during the feasibility period and would have been allocated to the Joint Venture upon execution of a port agreement.

[115] **Third**, the question whether Mr Freeman can give admissible factual evidence on what QR would have done in particular hypothetical circumstances, or whether such evidence must be dealt with in the same way as GPC, SunWater and Powerlink remains to be ruled upon. If it transpires that he cannot give such admissible factual evidence on what QR would have done, then his various statements as to what QR would or would not have done, must be dealt with in the same way as similar expressions of opinion in relation to GPC, SunWater and Powerlink. As I explained in *Sanrus No. 5* at [61](a):

> Mr Freeman's opinions in relation to QR are in a different category to the other corporations. He was at some relevant times an employee of QR. I do not think it is yet appropriate to express an evaluation as to whether the nature of his role might have been such that he could give admissible factual evidence of what QR would have done in a hypothetical set of circumstances. I would not make findings on that question at this time. If he was not in that position, then the observations I make in relation to GPA, SunWater, or Powerlink would apply. However even if he was, it would be necessary for the expression of his opinions to meet the assumption identification rule and the statement of reasoning rule.

[116] **Fourth**, what I have said in the previous three paragraphs does not exclude the possibility that Mr Freeman might be able to give admissible factual evidence concerning: (1) practices or procedures in an industry; or (2) particular conduct or practices of one of the corporate persons mentioned. But he would have to do so in an admissible way, and if any of the evidence involved opinion evidence, it would have to comply with the *Makita* criteria and the principles stated at [103] above. If all those criteria were met, evidence might be capable of being elicited from Mr Freeman which could form part of the relevant body of evidence for the purposes mentioned in the preceding three paragraphs.

[117] The particular aspects of the objections advanced by the defendants which are informed by the foregoing analysis will be identified later in this judgment and in the rulings which I make as expressed in the Schedules to this judgment.

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[51] See footnote 49.
[52] See my ruling in Schedule 1, item 39.
[53] See my ruling in Schedule 1, item 95.

The plaintiffs' fallback argument

[118] There is another way in which the plaintiffs sought to justify use in this trial of the various impugned statements by Mr Freeman about what the Joint Venture would or could have done, or what third parties would or could have done, or how either would or could have contracted, and that is as part of the fallback argument presented by the plaintiffs to which I have referred at [46] to [48] above. That is a subject to which I will now turn.

[119] The plaintiffs' fallback argument was that at the least the evidence to which the defendants had objected could be regarded as expressing Mr Freeman's views as to matters which would have been considered by appropriately qualified and competent experts who were preparing a hypothetical bankable feasibility study for the Monto Coal Stage 2 Project, and as identifying what conclusions those experts, acting with reasonable care and skill, would have reached on those matters.

[120] Based on this proposition, the plaintiffs then contended that evidence of what the professional judgments of relevant experts would have been was then probative in two ways. **First**, for the purpose of proving what would have been the content of the Stage 2 Feasibility Study referred to in the statement of claim at [23]. As I have explained in my analysis at [23] above, that meant proving what would have been the content of a document prepared in about May 2005. **Second**, for the purpose of supporting the unpleaded advice case.

[121] Since I have ruled in this judgment that the unpleaded advice case may not be advanced by the plaintiffs, the second possibility need not be considered further.

[122] In the remainder of this judgment and in the Schedules to it, I will refer to **the plaintiffs' fallback argument** as the argument that the impugned statements and opinions by Mr Freeman may be admitted to prove Mr Freeman's views as to matters which would have been considered by appropriately qualified and competent experts who were preparing a hypothetical bankable feasibility study for the Monto Coal Stage 2 Project, and as identifying what conclusions those experts, acting with reasonable care and skill, would have reached on those matters, for the limited purpose of proving what would have been the content of the Stage 2 Feasibility Study prepared in about May 2005.

[123] In *Sanrus No. 5*, I raised a number of questions for further submission concerning the plaintiffs' fallback argument. I received extensive argument in writing and orally about those questions. As I understood it, all or almost all of the impugned parts of Mr Freeman's reports were said to be within the scope of the plaintiffs' fallback argument.

[124] The course I will take to explain my response is to record and to explain the conclusions I draw in relation to the points of principle underlying the objections by the defendants, and otherwise to deal with the objections in the course of the expression of the rulings which I record in the various Schedules to this judgment.

[125] First, the defendants submitted that, in principle, evidence is not admissible through Mr Freeman, for the purpose of proving decisions, agreements and acts made by the Joint Venture and by various third parties (land-holders, statutory bodies and regulators, corporate infrastructure providers and the like) because none of those counterfactual propositions have been pleaded. As to this:

(a) As I explained at [71] to [75] above, I think there are aspects of the plaintiffs' unpleaded counterfactual case which it would be unfair to conclude that the plaintiffs may not seek to demonstrate at this trial.

(b) For reasons I have explained –

(i) I have ruled that Mr Freeman could not express an opinion on what the joint venture (or third parties) would have done (as to which see [104] to [116] above); and

(ii) I have ruled that the plaintiffs may not advance the unpleaded advice case and, it would follow, evidence admitted as relevant to the plaintiffs' fallback argument could not be admitted for the purpose of the unpleaded advice case.

(c) I will continue to apply the rulings referred to in [125](b)(i) and [125](b)(ii). However it should not be inferred that I accept the generality of the defendants' proposition advanced in the chapeau of the present paragraph.

(d) For the defendants to succeed on this objection, it would be necessary for them to persuade me – as they have successfully done in relation to the plaintiffs' unpleaded advice case – that the relevant counterfactual proposition to which the impugned evidence was directed was not a counterfactual proposition which had been fairly disclosed and deliberately, or by clear acquiescence, engaged with in the way I have earlier discussed in the first section of this judgment.

[126] Second, the defendants advanced an argument related to the first argument, namely that sometimes the matters to which the impugned evidence was directed were matters which, by the time of preparation of the Stage 2 Feasibility Study as at May 2005, would have been hypothetical anterior facts which either would or would not have happened. Accordingly, evidence directed to them could not be characterised as an input by way of opinion into a Stage 2 Feasibility Study as at May 2005. I agree that if the impugned evidence is not capable of being so regarded, it could not fall within the scope of the plaintiffs' fallback argument. I agree with the defendants' submission that hypothetical anterior facts said by an expert to have occurred prior to the preparation of the Stage 2 Feasibility Study as at May 2005, can only be treated as assumptions of underlying facts for otherwise admissible opinion evidence (and not as proof of the truth of the facts asserted). So if Mr Freeman opines that the Joint Venture could or would have obtained a contract with a third party in particular terms in 2003 or 2004, that is not admissible to prove that fact for reasons already stated. But nor could it be an input into the Stage 2 Feasibility Study as at May 2005 because by that time, the contract either would or would not have been obtained and if it had been its terms would have been known.

[127] The evidence which was subject to the foregoing two arguments was that identified in item 1 of the schedule to the defendants' written submissions in reply and the way in which I have disposed of the objection may be seen in –

(a) Schedule 1 items 5, 7, 9, 10 – 15, 18, 25, 37 – 39, 43, 47, 51, 55, 58, 60, 61, 74, 77, 78, 92, 95, 96, 102 – 108, 113, 115, 122 – 124, 126, 131, 134, 136, 137, 145, 146, 150 – 152, 155 and 156; and

(b) Schedule 2 items 1, 5, 8, 10, 14, and 16 – 18.

[128] Third, the defendants submitted that any of Mr Freeman's opinions which rely on post-2005 documents could not possibly be seen as informing the content of a Stage 2 Feasibility Study as at May 2005. I agree that if it is apparent that the impugned evidence is founded on information which could not have been available at the relevant time, then it could not fall within the scope of the plaintiffs' fallback argument. The evidence which was subject to this objection was that identified in item 2 of the schedule to the defendants' written submissions in reply and the way in which I have disposed of the objection may be seen in -

(a) Schedule 1 items 62, 63, 75, 78 – 80, 82, 94, 117, 118, 139, 148, 152 and 154; and

(b) Schedule 2 items 2 and 7.

[129] Fourth, the defendants submitted that opinions in Mr Freeman's 'Actual Costs' report dated 22 November 2018 [EXP.010.007.0001] could not possibly be read as being an input into a Stage 2 feasibility study because he provided his costs estimate on the basis of what would have in fact occurred. The evidence which was subject to this objection was that identified in item 3 of the schedule to the defendants' written submissions in reply and the way in which I have disposed of the objection may be seen in –

(a) Schedule 1 items 92 – 98; and

(b) Schedule 2 items 12 and 13.

[130] Fifth, the defendants submitted that Mr Freeman's opinions on port capacity were objectionable for a variety of reasons:

(a) they could not be relied on for the purpose of supporting the unpleaded advice case;

(b) even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules;

(c) they could not be regarded as falling within the scope of the plaintiffs' fallback argument because:

(i) insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a Stage 2 Feasibility Study as at May 2005; and

(ii) insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a Stage 2 Feasibility Study as at May 2005.

[131] The evidence which was subject to these objections was that identified in item 4 of the schedule to the defendants' written submissions in reply and the way in which I have disposed of the objection may be seen in –

(a) Schedule 1 items 12 – 14, 25, 37 – 39, 61 – 63, 74, 75, 77 – 80, 82 – 83, 94, 96 and 140 – 157; and

(b) Schedule 2 items 2, 6 – 8, and 15 – 18.

[132] As will appear from my rulings in the schedules, even if the impugned statements and opinions of Mr Freeman are otherwise inadmissible to prove the facts which they apparently seek directly to assert, if they are within the scope of the plaintiffs' fallback argument they may be admitted on the limited basis referred to at [122]. But if such statements and opinions are admitted only for that purpose, they are not admitted on any broader basis. They cannot be relied on in support of the unpleaded advice case, because I have ruled that the plaintiffs cannot be permitted to advance that case. Nor could admission for that limited purpose be a means by which the operation of the principles discussed at [104] to [116] above could be avoided. As I have said, they could not be treated as proof of the truth of the facts which they apparently seek directly to assert.

Some objections will be postponed until my final judgment

[133] In *Sanrus No. 5*, I explained that I would apply the general rule expressed in *Dasreef Pty Ltd v Hawchar* to which I have earlier referred, namely that ordinarily a trial judge should not defer ruling on admissibility until judgment.

[134] I also explained that my application of the general rule would be subject to some caveats.

[135] One of those caveats concerned the application of the proof of assumption rule. In *Sanrus No. 5*, I explained that there was often a difficulty with applying the proof of assumption rule before all the evidence was in and before the trier of fact was in a position to evaluate all the evidence in the trial in context. Whilst I thought it was possible that if the evidence was clearly discrete and encapsulated that I might be persuaded to apply the proof of assumption rule before my final judgment, I had not thought it appropriate to do so in relation to the items which I had examined at that time.

[136] In this regard, although the defendants had advanced multiple objections based on an alleged inability of the plaintiffs to prove the assumptions on which impugned parts of the reports were based, after examining my ruling in *Sanrus No. 5*, they advised me that they were content for me to postpone ruling on such objections until my final judgment on the merits. The plaintiffs did not demur to this course. Accordingly, that is the course which I will follow. The result is that, the schedules which express my final rulings will not deal with the proof of assumption objection. To the extent that provisional rulings had included statements that I would not rule on such questions, I have removed those statements from the final expression of my rulings because they are now otiose.

[137] Another obvious caveat to my application of the general rule concerns the expression of opinions by Mr Freeman on what QR would have done in particular hypothetical circumstances. For the reasons I have previously explained, I would postpone ruling on the admissibility of those opinions until my final judgment on the merits of this proceeding.

My rulings

[138] As to Schedule 1:

(a) Columns 1 to 4 reproduce the equivalent columns from the schedule which expressed my provisional rulings in *Sanrus No. 5*.

(b) Column 5 reproduces a submission which the defendants had made as to the suggested ruling but I have added to it a summary of relevant further submissions which the defendants made in written submissions in reply.

(c) Column 6 reproduces a submission which the plaintiffs had made as to the suggested ruling.

(d) Column 7 sets out my final ruling for each item. Because my final ruling had to consider the plaintiffs' fallback argument which was not dealt with in *Sanrus No. 5*, that has led to the need to make some alterations to the form of the provisional rulings which were expressed in the schedule to that judgment. I have not tracked the changes I have made and have simply expressed the final ruling I would make in respect of those items in which I had only expressed a provisional ruling.

[139] As to Schedule 2:

(a) This Schedule identifies additional objections advanced by the defendants as referred to at [5] above.

(b) It largely reproduces a schedule prepared by the parties, but I have added to it a summary of relevant further submissions which the defendants made in written submissions in reply.

(c) Column 7 sets out my final ruling for each item.

[140] Schedule 3 largely reproduces the schedule by which the defendants advanced objections to the admissibility of the further supplementary report of Mr Freeman, supplemented with a final column setting out my ruling.

[141] The rulings expressed in the final column of each of the Schedules are to be read with the matters discussed in the body of these reasons.

Conclusion

[142] For the reasons set out above and in the Schedules to these reasons, I make the following orders:

1. The plaintiffs are granted leave to rely on the further supplementary report of Mr Freeman dated 8 September 2019 [EXP.010.111.0001]

2. In relation to the defendants' objections to –

   (a) Expert Report of Mr Freeman dated 2 November 2018 [EXP.010.005.0001];

   (b) Expert Report of Mr Freeman dated 22 November 2018 [EXP.010.007.0001];

   (c) Joint Expert Report on Offsite Water Supply of Mr Freeman and Mr Harradine (D), with contributions from Mr Smith (D), Mr Cavanagh (D), Mr Simpson (P) and Ms Power (D), dated 15 July 2019 [EXP.500.004.0001_2];

   (d) Joint Expert Report on Offsite Power Supply of Mr Freeman and Mr Harradine, with contributions from Mr Smith (D), Mr Cavanagh (D) and Mr Simpson (P), dated 15 July 2019 [EXP.500.011.0001_2]; and

   (e) Joint Expert Report on Port of Jamie Freeman and Euan Morton (D) [EXP.500.026.0001_2]; and

   (f) Further Supplementary Report of Mr Freeman dated 8 September 2019 [EXP.010.111.0001],

   I make the rulings set out in Schedules 1, 2 and 3 to these reasons.