SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 9)* [2019] QSC 278	
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 ACN 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:	18 November 2019	
DELIVERED AT:	Brisbane	
HEARING DATE:	15 November 2019	
JUDGE:	Bond J	
ORDER:	**The orders of the Court are that:**	
	1. I dismiss the plaintiffs' application.	
	2. I will hear from the parties on the question whether I	

should modify the current trial plan by making the following directions:

(a) the plaintiffs file and serve their written closing submissions by 4:00pm on 27 November 2019;

(b) the defendants file and serve their written closing submissions by 4:00pm on 4 December 2019;

(c) the parties make oral closing submissions commencing on 9 December 2019 and concluding on 20 December 2019 (although the time available on 17 December 2019 will be limited to half a day);

(d) the period for oral closing submissions is to be divided between the parties in a manner agreed between them or, in default of agreement, as ruled on by me.

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – OTHER MATTERS – where the plaintiffs applied for directions so as to extend the time until the delivery of written submissions – where the defendants opposed the application – where the court was required to balance the prejudice which would be visited upon the parties and the administration of justice – whether leave should be granted

Uniform Civil Procedure Rules 1999 (Qld), r 5

COUNSEL: P L O'Shea QC, with K E Downes QC and J Menzies, for the plaintiffs

J C Sheahan QC, with A M Pomerenke QC, A C Stumer, and E L Hoiberg, for the defendants

SOLICITORS: Holding Redlich for the plaintiffs

Allens for the defendants

[1] Both sides to this litigation have, at least to all appearances, always been sufficiently resourced for its size and complexity. For the trial, the plaintiffs have briefed a team of 3 senior counsel and at least 10 junior counsel and they also have a large team of instructing solicitors. For their part, the defendants have a team of 3 senior counsel and 3 junior counsel and also a large team of instructing solicitors. They also engaged two other junior counsel to assist with discrete items and who otherwise did not have a substantive role in the case.

[2] Since before the commencement of the trial in April 2019 and up to about 7 August 2019, trial plans produced by the parties had provided that the plaintiffs would produce their final written submissions within a relatively short time after the conclusion of the evidence. The precise length of time varied from plan to plan between 8 and 11 working days after the conclusion of the evidence.

[3] The trial plan produced on 7 August 2019 (CRT.500.006.0001)[1] was one such plan. It had been produced by the plaintiffs and contemplated as follows –

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

(a) the expert evidence would conclude on 15 October 2019;

(b) the plaintiffs' written submissions would be delivered **8 working days later** on 25 October 2019;

(c) the defendants' written submissions would be delivered on 1 November 2019; and

(d) oral closing addresses would commence on 11 November 2019 and conclude on 22 November 2019.

[4] That trial plan had particular significance because it formed part of the basis on which I disposed of an application by the plaintiffs to allow fresh evidence to be adduced from certain of its experts. In *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 4)* [2019] QSC 199 (***Sanrus No. 4***) I made these observations concerning that trial plan:

> [81] The formulation of the trial plan in relation to the expert evidence was a matter of evident complexity. Assessment of the impact of the delays which would be occasioned by allowing the foregoing new material to be adduced is also a complex issue.
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> [82] During the course of argument I was shown a draft trial plan (CRT.500.006.0001) which sought to plot the impact on the existing trial plan of allowing the fresh evidence and permitting responsive material as proposed. The argument before me proceeded on the basis that I could use that document to assess that impact for the purpose of making my decision.
>
> [83] Essentially, the reception of the new evidence would require changing the order of some witnesses, would introduce a 3 week break in the middle of the period for the expert opinion evidence and, overall, would add about another month to the length of the trial. The parties would be able to use the 3 week break usefully for work on their ultimate submissions. One consequence was to eat into the time available to me to work on the judgment after submissions are received. If the court calendar was to allocate me the same amount of judgment writing time, reception of the new evidence would mean that I would not be able to return to an ordinary judicial calendar listing until about a month later in 2020 than originally contemplated.

[5] So far as the remarks made in the last two sentences of the quote are concerned, I interpolate that the court calendar had allocated to me a significant period of judgment-writing time to commence directly after the conclusion of the closing addresses, so that I could commence writing the judgment immediately. In a case of this complexity, involving the many issues of lay and expert witness credibility and reliability that it does, it is obviously desirable that I be permitted to commence that task without having to take on any other work after the conclusion of the evidence, and whilst the evidence, and the argument, were fresh in my mind.

[6] Without more, I would have inferred that at all material times up until 7 August 2019, the plaintiffs by their legal advisers must have appropriately satisfied themselves that the amount of time allocated before written submissions were due in the various trial plans concluding with the 8 working days allocated by the 7 August 2019 trial plan provided them an adequate opportunity to present their case. That must have been so else they would not have put that trial plans before me on the basis that they did. However, that conclusion does not need to be left on the basis of inference. The evidence of the plaintiffs' solicitor before me (which I accept) was that: (1) he had consulted with counsel about whether the timing in the 7 August 2019 trial plan was likely to be able to be achieved having regard to whatever commitments counsel had, and (2) it had been his considered judgment at that point that the plaintiffs would meet the deadline.

[7] Not much changed in draft trial plans thereafter so far as the time period which it was contemplated would elapse between close of evidence and the date on which the plaintiffs would be required to deliver their written closing submissions. I had, by the orders I made in *Sanrus No. 4*, specifically provided a mechanism by which the parties could present any significant disagreement about the trial plan. The evidence of the plaintiffs' solicitor before me (which I accept) was that he was conscious that it was imperative to raise with

me in a timely way any significant questions about the plaintiffs' compliance with the timetable. No suggestion of difficulty was made, until very recently. I was not required to rule on any disagreements.

[8] On 27 September 2019, the plaintiffs proposed a revised trial plan (CRT.500.017.0001) as to which I observe as follows:

(a) The expert evidence would conclude on 20 November 2019.

(b) The plaintiffs' written submissions would be delivered **12 working days** later on 6 December 2019.

(c) The defendants' written submissions would be delivered on 13 December 2019.

(d) Oral closing addresses would commence on 3 February 2020.

(e) The February 2020 date was explained by Senior Counsel for the plaintiffs as a consequence of counsel availability, rather than an inability to have the closing submissions prepared in sufficient time.

[9] On 2 October 2019, the defendants responded with a revised trial plan (CRT.500.018.0001) as to which I observe as follows:

(a) The expert evidence would conclude on 12 November 2019.

(b) The plaintiffs' written submissions would be delivered **9 working days** later on 25 November 2019.

(c) The defendants' written submissions would be delivered on 2 December 2019.

(d) Oral closing addresses would commence on 9 December 2019 and conclude on 20 December 2019.

[10] On 8 October 2019, the plaintiffs then produced a revised trial plan (CRT.500.019.0001) as to which I observe as follows:

(a) The expert evidence would conclude on 12 November 2019.

(b) The plaintiffs' written submissions would be delivered **8 working days** later on 22 November 2019.

(c) The defendants' written submissions would be delivered on 29 November 2019.

(d) Oral closing addresses would commence on 5 December 2019 and conclude on 18 December 2019.

(e) The evidence of the plaintiffs' solicitor before me (which I accept) was that this plan was a genuine, considered, evidence-based judgment that these proceedings could conclude by 18 December with a fair opportunity for the plaintiffs to put its case before the court.

[11] On 24 October 2019, a further revised trial plan (CRT.500.021.0001) was prepared by the plaintiffs as to which I observe:

(a) The expert evidence would conclude on 13 November 2019.

(b) The plaintiffs' written submissions would be delivered **8 working days** later on 25 November 2019.

(c) The defendants' written submissions would be delivered on 2 December 2019.

(d) Oral closing addresses would commence on 5 December 2019 and conclude on 18 December 2019.

(e) The evidence of the plaintiffs' solicitor before me (which I accept) was that this plan too was a genuine, considered, evidence-based judgment that these proceedings could conclude by 18 December with a fair opportunity for the plaintiffs to put its case before the court and that in forming that judgment he had consulted with counsel about their ability and availability to meet the plan and that the plan took that into account.

[12] Save for some uncontroversial tidying up of the electronic trial record, the evidence in the trial was finalised upon the conclusion of the cross-examination of the last expert witness in the case on 14 November 2019, which was day 102 of the trial. Until that time, there had been no indication that there would be any insurmountable hurdles preventing compliance with the timetable or any suggestion that the time it allowed did not provide the plaintiffs with a fair opportunity to present their case. By that day there had been a slight modification to the previous trial plan consequent upon discussion before me as to the desirability of allowing me further reading time before oral closing submissions commenced, such that –

(a) the plaintiffs' written submissions would be delivered **6 working days** later on 22 November 2019;

(b) the defendants' written submissions would be delivered on 29 November 2019; and

(c) 10 working days of oral closing submissions (save for half a day in which I was required to address a criminal sentencing matter) would commence on 5 December 2019 and conclude on 18 December 2019.

[13] The foregoing represented the status quo of the trial as at the commencement of the final day of the evidence. Although – given the complexity of the trial – the time allowed between close of evidence and delivering written submissions had always been tight, both sides had always known those limitations and, I had presumed, been managing their resources accordingly. The court calendar had been adjusted to allocate to me 9 weeks judgment-writing time commencing on my return from leave on 27 January 2020, which was a period intended, as before, to permit me to commence the judgment-writing task without having to take on any other work after the conclusion of the trial, and whilst the evidence, and the argument, were fresh in my mind.

[14] Against that background, on the morning of 14 November 2019, the final day of evidence in the trial, the plaintiffs made an oral application which revealed for the first time that they now thought they could not comply with the deadline for final written submissions and they needed at least a 3 week extension of time. The defendants strenuously opposed that application and required it to be made formally and supported by evidence. I heard the application on 15 November 2019. By that time the plaintiffs had also filed a further application – which they told me they intended to pursue during the oral closing submissions whenever that occurs – to change the mode of trial by seeking to have me appoint a special referee to prepare a report for the court after I made certain findings in presumably some form of interim judgment.

[15] By their application to modify the current timetable, the plaintiffs sought the following directions –

(a) the plaintiffs file and serve their written closing submissions by 13 December 2019;

(b) the defendants file and serve their written closing submissions by 20 December 2019; and

(c) the parties make oral closing submissions commencing on 3 February 2020 or such other date as was fixed by me.

[16] I will come back to the way in which the plaintiffs sought to justify their application and to my evaluation of that justification.

[17] It is appropriate first to evaluate the effect which acceding the application would have on –

(a) the defendants;

(b) the administration of justice generally, in the sense of its effect on court resources and the competing claims by litigants in other cases awaiting hearing in the court;

(c) the administration of justice in relation to this case particularly, in the sense of its effect on my ability to perform my duty.

[18] The prejudice which would be suffered by the defendants is set out in detail in the affidavit of the defendants' solicitor. I accept him as a witness of truth. No part of his evidence was challenged by the plaintiffs. He deposed that, subject to the plaintiffs delivering their written submissions as scheduled, the defendants were in a position to deliver their closing submissions on 29 November 2019 and to conclude oral closing addresses in accordance with the current timetable. However, he deposed that the defendants could not place themselves in a position to make oral closing submissions commencing on 3 February 2020. Work and leave commitments affected the availability of their counsel. He deposed that:

> 40. Mr Sheahan, Mr Pomerenke, Mr Stumer and Ms Hoiberg are key members of the defendants' counsel team. The first time they are all available to devote any significant time to this matter after 20 December 2019 is mid-April 2020.
>
> 41. In my experience, a delay of that magnitude in the delivery of closing oral addresses will cause significant dislocation to the defendants' presentation of closing addresses. This is because, at present, counsel for the defendants are fully immersed in the issues in the case. After a delay of several months, it will be necessary for counsel to re-familiarise themselves with a substantial body of evidence and it will take a large amount of time for counsel to do so. I anticipate this period will be not less than 3-4 weeks. The defendants will have to bear the costs of doing so which I anticipate, based on 6 day working weeks, is likely to be between $954,000 and $1,272,000. This excludes any fees for [the defendants' solicitors] to assist in the preparation of the closing addresses.

[19] Apart from counsel availability and costs considerations, the defendants' solicitor also pointed to the unfairness of yet further prolongation of the resolution of allegations of commercial impropriety against various lay witnesses called by the defendants. I agree that these are material substantial considerations. The plaintiffs did not argue that they were not. Nor did they contend that there was any reasonable basis on which I could set them aside and accede to their application that oral submissions should occur in February 2020. Based on the defendants' solicitor's evidence, the defendants submitted, and I accept, that the consequence of acceding to the plaintiffs' application about the date for filing of their written submissions would be that oral closing submissions would need to be adjourned until May 2020.

[20] The defendants' solicitor raised two other fairness considerations.

[21] First, he deposed:

> 42. Further, to delay the closing oral addresses until after mid-April will be unfair and prejudicial to the defendants as compared to the matter being completed before Christmas 2019. If oral addresses are completed after April 2020, the plaintiffs will be armed with the defendants' closing written addresses for several months. I am concerned about the prospect of the plaintiffs seeking to re-open their case or amend, again, their statement of claim based on the gravamen of the defendants' written closing addresses, and relying on the further delay in timetable to suggest there is no material prejudice if they do so.

[22] Those observations really boil down to a concern that if the present application succeeded, it might permit the plaintiffs to embark upon a course which would presently fail, but

which might gain in prospects because of the effluxion of time. It is perhaps understandable that the defendants' solicitor might express such a concern. But I do not accord it any weight.

[23] Second, he deposed:

> 46. On any metric, this has been a long and difficult trial.
>
> 47. The conduct of a trial of this magnitude imposes a substantial personal toll upon the key team members responsible for the majority of the workload in the case and their families. The defendants' legal team has been working on the assumption that this case will conclude this year, and there will be further personal toll (including anxiety) imposed on them if the matter is prolonged. This will include the ongoing concerns that the plaintiffs will have yet another go at their case (as I refer to in paragraph 42 above).

[24] I have no doubt these observations are factually true. I am not sure whether, in the present discretionary calculus, it is legitimate to give weight to the toll imposed on legal advisers or their families. Out of an abundance of caution I will not do so. However I do think that the defendants could legitimately point to a reasonable perception of being unfairly treated (and their opponents preferentially treated), if the defendants have organised their resources to meet the deadline, and their opponents have not, yet obtained an extension in the circumstances which in fact attend that application.

[25] Of course, the delay, cost and unfairness considerations, which I have indicated I accept, are not the only adverse consequences of acceding to the plaintiffs' application. Adjournment of the oral argument until May 2020 would give rise to significant prejudice to the administration of justice both generally and in the particular.

[26] As to the former:

(a) The problem with that adjourning the oral argument until May 2020 is that it would clash with two commercial list trials I have already set down before me: a five day trial commencing 11 May 2020 and a ten day trial commencing 18 May 2020. It is unclear whether another judge could be made available to hear those trials.

(b) The presently listed 9 weeks in judgment-writing at the commencement of 2020 would no longer be appropriate as it would precede the oral argument in the case. I would have to be listed in other matters. Time for judgment-writing would then have to be re-allocated to a date after the conclusion of oral argument in May 2020.

(c) The dislocation to the court calendar which would follow is a significant impost on court resources and a serious prejudice to the competing claims of other litigants to those resources.

[27] As to the latter:

(a) I have already explained that the court calendar had been adjusted to allocate to me 9 weeks judgment-writing time commencing on my return from leave on 27 January 2020, which would permit me to commence that task without having to take on any other work after the conclusion of the trial, and whilst the evidence, and the argument, were fresh in my mind.

(b) But the problem described by the defendants' solicitor in relation to the effect of dislocation on the defendants' trial counsel exists in an equivalent way in relation to a trial judge.

(c) Presently I too am fully immersed in the issues of the case and in a good position to evaluate arguments presented to me. But I will not be in that position if the oral argument is adjourned until May 2020. Especially is that so if in the interim I have had to be listed in other matters (as I think would be likely). And even if the court

calendar could be adjusted (yet again) to allocate me reading time to try to put myself back in the position in which I now am, experience suggests that the adjournment would greatly increase the difficulty of doing so. As the trial judge in this case, in my view the introduction of that sort of gap between the close of evidence and final submissions is most undesirable.

(d) That undesirability is rendered the more so because it would mean that I would be asked to make findings on the credit of lay witnesses almost a year after their evidence had been given. That is unsatisfactory at any time.

[28] Against these considerations, what is the case for acceding to the plaintiffs' application?

[29] I have before me an affidavit of the plaintiffs' solicitor.

[30] The first point made in that affidavit was an identification of "relevant background". The contents of this section was a reference to the agreed trial plan as at 5 April 2019; an identification that the expert opinion evidence called by the defendants had enlarged since then; and a suggestion that the additional expert evidence had reduced the time available to prepare closing submissions. This was a wholly inadequate attempt to identify relevant background. Any reasonable attempt to do so would have included a consideration of the facts which I have identified at [1] to [13] above. A more balanced depiction of the relevant background appears in the defendants' solicitor's affidavit at [9] to [24]. The plaintiffs' solicitor was cross-examined on his affidavit and it is his evidence on cross-examination to which I have referred at [6], [7], [10](e) and [11](e) above. His affidavit was structured so as to suggest that the inability to meet the deadline was due to the defendant's service of additional expert reports. The problem with that hypothesis is that the great bulk of the defendants' expert reports had been received before the 7 August trial plan and all but a very few had been received by the 24 October 2019 trial plan. I reject that explanation.

[31] Having given the inadequate identification of relevant background, the plaintiffs' solicitor then deposed as follows on information and belief from the relevant counsel:

(a) As to written closing submissions in relation to the expert witnesses:

(i) Senior Counsel and Junior Counsel were responsible for coal marketing (and related issues). Senior Counsel had informed him that closing submissions in relation to these topics could be delivered by 22 November 2019;

(ii) Senior Counsel and Junior Counsel were responsible for geology, port and rail. Senior Counsel had informed him that closing submissions in relation to these topics could be delivered by 22 November 2019;

(iii) Senior Counsel and Junior Counsel were responsible for all offsite and onsite infrastructure (including power and water). Junior Counsel had informed him that closing submissions in relation to these topics would not be able to be finalised (including being settled by two Senior Counsel) before 13 December 2019. Junior Counsel had informed him that he had not been able to commence drafting closing submissions on these topics (except in relation to water which has been started) because he has been required to assist two of the Senior Counsel with cross-examination of witnesses, assist another Senior Counsel with objections to the Freeman reports (including drafting written submissions), assist with the evidence in chief of Mr Freeman, Mr Simpson and Mr Visca, and himself cross-examine Mr Ben Hall and Ms Power. The submissions to be drafted by Junior Counsel would need to be settled by Senior Counsel;

(iv) Senior Counsel and Junior Counsel were responsible for financial modelling. Junior Counsel had informed him that closing submissions in relation to this topic would not be able to be finalised (including being settled by Senior Counsel) before 13 December 2019;

(v) Senior Counsel and Junior Counsel were responsible for land acquisition, environmental approvals and mine maintenance and rehabilitation. Junior Counsel had informed him that he expected that closing submissions in relation to these topics could be delivered by 22 November 2019;

(vi) Senior Counsel and Junior Counsel were responsible for mine planning and related issues. Senior Counsel had informed him that closing submissions in relation to these topics could be delivered by 22 November 2019;

(vii) Senior Counsel and Junior Counsel were responsible for coal prices and net present value. Senior Counsel had informed him that, because of the complexity of these topics and because he needed to settle other submissions as referred to above, he did not believe that he could finalise the closing submissions on these topics by 22 November 2019 and would require additional time. Senior Counsel had informed him that, upon further reflection, he considered that, if he settled closing submissions about coal marketing and mine planning by 22 November 2019, he would need up to 6 December 2019 to finalise the closing submissions on coal prices and net present value to an acceptable standard. Senior Counsel had informed him that he may need an additional week to 13 December 2019 to achieve that, taking into account other parts of the closing submission which he is settling such as liability;

(viii) Senior Counsel and Junior Counsel were responsible for valuation. Junior Counsel had informed him that closing submissions in relation to this topic would not be able to be finalised (including being settled by Senior Counsel) before 13 December 2019.

(b) As to written closing submissions in relation to liability:

(i) Junior Counsel had informed him that, between in or about May and July 2019, two junior counsel (supervised by another) had performed the following tasks towards preparing the closing submissions:

A reviewing the transcripts of lay witnesses;

B researching issues identified by the supervising junior counsel; and

C drafting.

(ii) Junior Counsel had informed him that, from in or about July 2019 to September 2019, the three junior counsel mentioned in the previous subparagraph (overseen by another) did the following tasks towards preparing the closing submissions:

A research of issues; and

B drafting.

(iii) A further Junior Counsel had been allocated primary responsibility for drafting the closing submissions on liability, with assistance from other counsel. He had been in this role since about mid-September 2019 (with some distraction because of the need to assist with cross-examination), and expert witnesses were reallocated to other counsel as a consequence. That Junior Counsel had informed him that:

A there was no prospect of the closing submissions on liability being finalised and ready by 22 November 2019;

B the earliest that they might be finalised could be, but would not certainly be, 6 December 2019 but in that event they would not be settled by Senior Counsel or able to be reviewed by the plaintiffs; and

C if the submissions were to be delivered on 22 November 2019, they would be incomplete and have undeveloped sections.

(iv) He did not regard it to be satisfactory or appropriate for written submissions to be provided to the Court which had not been reviewed by the plaintiffs or settled by the Senior Counsel who was running the case and who had been primarily responsible for the witnesses giving the lay evidence in the trial. In making this statement he was taking into account the nature of the allegations being made against the defendants and the quantum being claimed.

(c) As to written closing submissions in relation to causation and damages, Senior Counsel responsible for that task had informed him that he was preparing submissions on causation and damages but they would need to be reviewed by the Junior Counsel with responsibility for the liability submissions following the final preparation of the liability submissions, and it was his view that the causation and damages components of the proposed closing submissions cannot be settled until after this has occurred.

[32] The plaintiffs' solicitor's affidavit certainly reveals an unfortunate tale of disarray in the plaintiffs' camp as at the last day of the evidence in the trial and mere days before final submissions are due.

[33] How could the plaintiffs be in this position given the events which I have recorded?

[34] The plaintiffs submit that "[t]here can be no doubt that the plaintiffs have underestimated their ability to prepare closing submissions, which is why the plaintiffs have previously indicated that they could do the task by 22 November 2019." But the plaintiffs' solicitor did not depose to that proposition. Nor did his affidavit depose that he was so informed by any of the counsel briefed by the defendants. In fact I think it is notable that his affidavit did not even attempt to examine the trial plans to which I have earlier referred, or the implications of the fact that the plaintiffs had promoted them. And because it did not do so, his evidence provided no explanation as to how it could be that he could have formed the views (having consulted with counsel) which I have recorded at [6], [7], [10](e) and [11](e) above concerning various iterations of the trial plan, yet find that mere weeks after the last consultation he could be informed by counsel of the matters identified above. The truth is that the plaintiffs' solicitor has not seriously attempted to explain why the plaintiffs arrived at the position in which they now find themselves.

[35] The defendants submit that "[i]t is apparent that the plaintiffs' desire for an adjournment stems, at best, from a mismanagement of resources, rather than an inadequate opportunity to present their case." That is certainly one explanation which is open. It is hard to understand how it could consistent with proper management of resources that the facts which I have identified at [1] to [13] above could occur. And the failure of the plaintiffs' solicitor to address the question of explanation squarely, makes it easier to draw that inference. Whilst I would infer that that is at least part of the explanation, I do not think I have a sufficient evidentiary basis to conclude that it is a complete explanation. A complete explanation may involve underestimation by someone. Other explanations are also possible.

[36] But I think that the critical question is not how the plaintiffs came to be in the position in which they find themselves. The critical question is whether the current timetable and the way in which the trial has been conducted combine to afford the plaintiffs a fair and sufficient opportunity to present their case. The plaintiffs seek to persuade me to answer that question in the negative by reasoning backwards from a description of the position in which they now find themselves. I reject that mode of reasoning. I am not persuaded that the plaintiffs cannot prepare written submissions. Rather, the conclusion I would reach is that for causes which are inadequately explained by the plaintiffs, the plaintiffs find themselves in the position of not being able to provide written submissions which their counsel would regard to be satisfactory by the current deadline. But that conclusion does not provide an adequate foundation for a conclusion that the plaintiffs have not been provided a fair and sufficient opportunity to present their case.

[37] The defendants submit, and I find, that adherence to the current timetable could not be regarded as denying the plaintiffs a fair and sufficient opportunity to present their case. In reaching that conclusion I have taken account of the evidence to which I have referred above. I have also had regard to the following factors –

(a) the level of resources available to the plaintiffs;

(b) the knowledge I have gained as the trial judge of the issues which are in dispute in this case and which arise consequent upon the manner in which evidence has been adduced and cross-examination has occurred;

(c) the knowledge that I have gained as the trial judge as to the blocks of time (these are identified in the affidavit of the defendants' solicitor) which became available during the course of this case and which were available to be devoted to the preparation of written submissions;

(d) before the August 2019 trial plan was produced, the plaintiffs had already developed in writing a sophisticated analysis of many of the issues concerning liability, causation and damages, and assessment of expert opinion as identified by –

  (i) the plaintiffs' 178 page written opening (which focussed mostly on liability and not on causation and damages), which was produced in March 2019 before the trial started; and

  (ii) the plaintiffs' 133 page written opening on causation and damages, which was produced in July 2019 after the expert conclaves had been completed and which was supplemented by an 81 page guide to the contents of their expert reports;

(e) before the August 2019 trial plan was produced, the plaintiffs also had the benefit of a sophisticated summary of the defendants' countervailing arguments as identified by –

  (i) the defendants' 175 page written opening produced in April 2019 before the trial started; and

  (ii) the defendants' 81 page written opening on causation and damages, which was also produced in July 2019 after the expert conclaves had been completed and supplemented by a developed guide to the expert opinion evidence and the issues which arose out of each of the expert conclaves;

(f) the fact that the plaintiffs by their legal advisers had, after due consideration and on a number of occasions formed the view (and impliedly conveyed to me and to their opponents) that the time allocated to them by the various iterations of the trial plan did provide them with a fair opportunity to present their case; and

(g) the fact that the defendants' solicitor has deposed to the fact that the defendants are able to meet the current timetable.

[38] In my judgment although – given the complexity of the trial – the time allowed between close of evidence and delivering written submissions has always been tight, the parties have always known those limitations and should have been capable of managing their resources accordingly. No satisfactory explanation has been put before me as to why the plaintiffs have not been able to do so, but I reject the proposition that it is because the timetable has not afforded them sufficient opportunity to do so.

[39] Against that background and the findings I have made, what are the considerations which should inform my exercise of discretion in response to the plaintiffs' application?

[40] I was taken to a number of cases by the written submissions of the parties. Time does not permit a detailed analysis of them. They suggest that the principal considerations are the following:

(a) I should have regard to the overarching philosophy specified in *Uniform Civil Procedure Rules* 1999 (Qld) r 5.

(b) I should have regard to the prejudice which might be suffered by the plaintiffs if I do not give them the relief they seek.

(c) I should have regard to the prejudice which might be suffered by the defendants if I grant the plaintiffs the relief they seek.

(d) I am entitled to have regard to the effect of the directions on the administration of justice generally by considering their effect on court resources, the competing claims by litigants in other cases awaiting hearing in the court, as well as interests of other parties.

(e) I am entitled to have regard to the effect of the directions sought on the administration of justice in this particular case.

(f) The paramount consideration is that I must ensure that the trial is fair, such that that each party has been provided with a fair and sufficient opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it.

[41] The present balance seems to me to be between –

(a) on the one hand –

(i) the prejudice to the plaintiffs of not being able to present written submissions which their counsel regard to be satisfactory (even though they have been given a fair and sufficient opportunity so to do); and

(ii) the potential adverse impact on my capacity to resolve the case in accordance with my duty if the plaintiffs present me with inadequate written or oral submissions; and

(b) on the other hand, taking the course the plaintiffs propose would be unfair to the defendants, would apparently treat the plaintiffs preferentially at their expense for no adequate reason, and would necessarily adversely affect the administration of justice generally and in the particular, for reasons I have explained.

[42] I think the balance favours dismissing the plaintiffs' application. This is still adversarial litigation. The fact that – despite having been provided with a fair and sufficient opportunity to present their case – the plaintiffs find themselves in the disadvantageous position they have described is not a sufficient reason to visit on their opponents the

consequences which would attend allowing the application. Nor is it a sufficient reason to cause the adverse impact on the administration of justice generally.

[43] Although I would reject the substance of the plaintiffs' application, I would be minded to give them at least the possibility of the further time which the Court calendar would permit in this year, if they choose to avail themselves of that opportunity. Given the fact that I had earlier been told the plaintiffs may have some counsel availability problems after 18 December 2020, I will hear the parties on that possibility.

[44] The orders I make are as follows:

(a) I dismiss the plaintiffs' application.

(b) I will hear from the parties on the question whether I should modify the current trial plan by making the following directions:

(i) the plaintiffs file and serve their written closing submissions by 4:00pm on 27 November 2019;

(ii) the defendants file and serve their written closing submissions by 4:00pm on 4 December 2019;

(iii) the parties make oral closing submissions commencing on 9 December 2019 and concluding on 20 December 2019 (although the time available on 17 December 2019 will be limited to half a day);

(iv) the period for oral closing submissions is to be divided between the parties in a manner agreed between them or, in default of agreement, as ruled on by me.