SUPREME COURT OF QUEENSLAND

CITATION:	*Menegazzo v PricewaterhouseCoopers & Ors* [2019] QSC 296
PARTIES:	**MARK JOHN MENEGAZZO** (plaintiff) **v** **PRICEWATERHOUSECOOPERS (A FIRM)** ABN 52 780 433 757 (first defendant) **BRENDAN PETER MENEGAZZO** (second defendant) **DEBRA LOUISE MENEGAZZO** (third defendant) **DAVID ANGELO MENEGAZZO** (fourth defendant) **MCCULLOUGH ROBERTSON LAWYERS (A FIRM)** ABN 42 721 345 951 (seventh defendant) **JUTLAND PTY LIMITED** ACN 010 813 322 (third party)
FILE NO/S:	BS No 10502 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2019, 22 March 2019, written submissions received on various dates up to 12 April 2019
JUDGE:	Davis J
ORDERS:	**1. The plaintiff's application to appoint Geoffrey Eales, Richard Cameron and James Cudmore as experts pursuant to r 429N(3) of the *Uniform Civil Procedure Rules* 1999 is dismissed.**

2. **The plaintiff has leave pursuant to r 429N(2) of the *Uniform Civil Procedure Rules* 1999 to lead at trial evidence of experts Geoffrey Eales, Richard Cameron and James Cudmore.**

3. **Geoffrey Eales is authorised to enter upon and inspect the properties which he valued by his report dated 15 October 2018, but such authorisation to be subject to further directions and conditions.**

4. **The question of the directions and conditions upon which Mr Eales is authorised to enter and inspect the properties is adjourned to a date to be fixed.**

5. **The parties shall be heard on the question of costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – EXPERT REPORTS AND EXPERT EVIDENCE – OTHER MATTERS – where the plaintiff and each of the second, third and fourth defendants are siblings – where upon the death of the siblings' parents, the siblings became directors of the corporate trustees and effectively controlled all of the trusts which had been controlled by their father – where it was agreed in 2007 to restructure the trusts to separate out certain assets and pass them to the plaintiff – where in the course of reaching the agreement, valuations of various assets were prepared by the third party including valuations of cattle stations – where the plaintiff alleges that the second, third and fourth defendants have acquired his interests below value and in breach of trust – where the court appointed experts to value the assets – where the plaintiff wishes to challenge the valuations – where the plaintiff has obtained further valuation evidence – whether the plaintiff's valuers ought to be appointed as experts by the court – whether leave should be given to the plaintiff to rely upon his experts

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – where the plaintiff seeks an order that one of its experts inspect the properties – where that application is opposed on grounds including safety, undue interference with the defendant's business and risk of contamination of the properties – whether authorisation to inspect should be granted subject to conditions to allay the defendant's concerns

Law Reform Act 1995 (Qld), s 6
Uniform Civil Procedure Rules 1999, r 5, r 171, r 250, r 293, r 423, r 426, r 427, r 428, r 429, r 429A, r 429B, r 429C, r 429G, r 429I, r 429N

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175, cited
Beale v Trinkler [2008] NSWSC 347, cited

Clay v Clay (2001) 202 CLR 410, cited
Conias Hotels Pty Ltd v Murphy & Anor [2012] QSC 297, followed
Cosgrove v Pattison [2000] All ER (D) 2007, cited
Coyne v Calabro [2009] NSWSC 1023, not followed
D v S [2009] QSC 446, cited
Daniels v Walker [2000] 1 WLR 1382, cited
Davron v Teys [2009] NSWSC 1004, not followed
Evans Deakin Pty Ltd v Orekinetics Pty Ltd [2002] 2 Qd R 345, cited
Expense Reduction Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303, cited
FGT Custodians Pty Ltd v Fagenblat [2003] VSCA 33, cited
Fricke & Anor v WH Frier Building Contractors Pty Ltd & Ors [2019] QSC 6, followed
Hunter v Atkins [1834] EngR 548, cited
In the matter of Optimisation Australia Pty Ltd [2015] NSWSC 2072, not followed
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited
Stolfa v Owners of Strata Plan 4366 (No 2) [2008] NSWSC 531, not followed
Tito v Waddell (No. 2) [1977] Ch 106, cited
Tomko v Tomko [2007] NSWSC 1486, not followed
Trinkler v Beale (2009) 72 NSWLR 365, cited
UBS AG v Tyne (2018) 360 ALR 184, followed
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] NSWLEC 282, cited
Wilcox v Wilcox (No 2) [2014] NSWSC 88, cited
Williams v Scott [1900] AC 499, cited
Wu v Statewide Developments Pty Ltd [2009] NSWSC 587, not followed

COUNSEL: G A Thompson QC-SG with A G Psaltis for the Plaintiff
E J F Goodwin for the First Defendant
L F Kelly QC with S J Webster for the Second and Third Defendants
S R Eggins for the Fourth Defendant
No appearance for the Seventh Defendant or the Third Party

SOLICITORS: Clayton Utz for the Plaintiff
King & Wood Mallesons for the First Defendant
Allens for the Second and Third Defendants
Minter Ellison for the Fourth Defendant
No appearance for the Seventh Defendant or the Third Party

[1] In this case, the court appointed experts pursuant to r 429G of the *Uniform Civil Procedure Rules* 1999 (UCPR) to value property the subject of the proceedings.

[2] The experts duly delivered reports but the opinions are challenged by the plaintiff who applies for orders under r 429N of the UCPR that:

(i) experts from whom he has obtained reports be appointed as experts by the court;[1] alternatively

(ii) the plaintiff have leave to rely on the evidence of other experts from whom he has obtained reports;[2] and

(iii) one of the experts now proposed by the plaintiff have access to the properties to inspect them for the purposes of him giving evidence.[3]

Background

[3] The plaintiff and each of the second, third and fourth defendants are siblings. When referring to them collectively, I will call them "the siblings" and when referring to the second, third and fourth defendants collectively, I will call them "the defendant siblings". Their father (Mr Menegazzo Senior) was a successful grazier but he and the siblings' mother were both killed in a light plane crash on 2 December 2005. A large and valuable estate was left.

[4] Pastoral and other properties controlled by Mr Menegazzo Senior were held through a number of trusts. Some of the trusts had corporate trustees which were in turn controlled by Mr Menegazzo Senior. It is unnecessary to analyse all of those arrangements.

[5] Upon the death of Mr Menegazzo Senior and his wife, the siblings became directors of the corporate trustees and together effectively controlled all of the trusts. Each of them were beneficiaries of the trusts.

[6] By 2007, disagreement had arisen between the siblings but in November of that year, an agreement was struck to restructure the trusts to separate out certain assets and pass them to the plaintiff. A resolution was passed at a meeting of 7 November 2007, and on 31 December 2007 a deed (the deed) was executed between the siblings, the estate of Mr Menegazzo Senior and the various companies and trusts which held the assets. The deed put the resolution into effect.

[7] By the terms of the deed, the plaintiff received benefits being:

(i) transfer to him of a pastoral station called "Vanrook Station";

(ii) transfer to him of a herd of cattle grazing on "Vanrook Station";

(iii) transfer to him of a property in Ballina; and

(iv) forgiveness of a debt of $18,500.000 owed by him to various of the trusts.

[8] By the deed, the plaintiff gave up any interests in, or claim to, the trusts and other entities and the assets held by or through them. Those assets included various cattle stations, the cattle grazing thereon, a feedlot and a meatworks at Grantham in the Lockyer Valley.

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1 *Uniform Civil Procedure Rules* 1999 r 429N(3).

2 *Uniform Civil Procedure Rules* 1999 r 429N(2).

3 *Uniform Civil Procedure Rules* 1999 r 250.

[9] In reaching the bargain, the plaintiff says that he relied upon valuations of various assets prepared by the third party, and documents referred to in his Amended Statement of Claim[4] as "valuation spreadsheets". The valuation spreadsheets were prepared by the first defendant.

[10] The valuation spreadsheets contained estimates of the value of various assets held by the family interests together with estimates of tax liabilities in the event of realisation of the assets.

[11] In the Statement of Claim, the plaintiff criticises both the valuation prepared by the third party and the valuation spreadsheets prepared by the first defendant.[5] The plaintiff alleges that he relied upon the third party's valuation and the valuation spreadsheets and had he known they undervalued the assets that remained under the control of the defendant siblings, he would not have entered into the deed.

[12] As against the third party, the first defendant seeks contribution under s 6 of the *Law Reform Act* 1995 (Qld).

[13] The seventh defendant is a firm of solicitors who acted for the plaintiff in the negotiations which culminated in the deed. He alleges against them that they did not properly advise him and are liable both in contract and tort.

[14] The plaintiff alleges against the defendant siblings that they acquired the plaintiff's interests in the trusts at undervalue. Therefore, so says the plaintiff, the defendant siblings have breached the "fair dealing rule", the effect of which[6] was summarised by Megarry V-C in *Tito v Waddell (No 2)*[7] as follows:

> "The self-dealing rule is (to put it very shortly) that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction. The fair-dealing rule is (again putting it very shortly) that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitiae, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his potion and has made full disclosure to the beneficiary, and the transaction is fair and honest."[8]

[15] In his submissions on the present applications, Mr Kelly QC for the second and third defendants,[9] submitted that the plaintiff was himself a co-trustee, co-director and co-beneficiary. Mr Kelly QC categorised the transactions as ones where the siblings were dealing with each other at arm's length, rather than the defendant siblings dealing as trustees with the plaintiff as

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4 Filed on 22 June 2016; which I will call "the Statement of Claim".

5 The plaintiff sued the third party, who was the fifth defendant. The plaintiff discontinued the proceedings against the fifth defendant on 18 June 2016.

6 And it's distinction from the self-dealing rule.

7 [1977] Ch 106.

8 At 241.

9 Supported by the other defendants.

beneficiary. In these circumstances, Mr Kelly QC submitted, the fair dealing rule has no application.[10]

[16] Whether the fair dealing rule does or does not impact upon the transactions is not a relevant consideration on the present applications. No application has been made by any of the defendant siblings to strike out those parts of the Statement of Claim which are reliant upon the fair dealing rule.[11] No application has been made by any of the defendants for summary judgment.[12]

[17] Mr Kelly QC also submitted that the fair dealing rule did not require proof of full value of the assets acquired. He relied in particular upon *Williams v Scott*,[13] *Hunter v Atkins*,[14] *Clay v Clay*,[15] and *Beale v Trinkler*.[16] It might ultimately be held that even if the true value of the various properties is more than the price effectively paid by the defendant siblings, the transactions are not impeachable where there has been fair, arm's-length dealing between the siblings (if that in fact occurred). However, it is not appropriate to consider that now.

[18] In the absence of any challenge to the Statement of Claim, the present applications should be determined by reference to the issues raised on the pleadings as they presently stand.

[19] A central issue in the case as presently pleaded is the value of the various properties as of 31 December 2007.[17]

[20] The plaintiff engaged a valuer, Mr Geoffrey Eales, to value the properties and on 16 May 2017, the plaintiff made application under r 250 of the UCPR for an order permitting Mr Eales to enter upon and inspect the properties.

[21] On 29 May 2017, the defendant siblings made application under r 429G of the UCPR for the appointment of experts to perform valuations of the trust assets.

[22] Negotiations then led to consent orders being made by the Chief Justice on 3 August 2017 relevantly in these terms:

> "(a) Mr Ross Copland (Integrated Valuation Services) to prepare a report on the values of the following properties as at 31 December 2007
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> [A list of properties including Vanrook Station appears in the order]

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[10] Reliance was made upon *Trinkler v Beale* (2009) 72 NSWLR 365 at 376, *Clay v Clay* (2001) 202 CLR 410 at [46]-[49] and other authorities.

[11] *Uniform Civil Procedure Rules* 1999 r 171.

[12] *Uniform Civil Procedure Rules* 1999 r 293.

[13] [1900] AC 499 at 508.

[14] [1834] EngR 548, 40 ER 43 at 67.

[15] (2001) 202 CLR 410; mistakenly referred to in the Second and Third Respondent's outline as "*Lane v Lane*".

[16] [2008] NSWSC 347.

[17] Amended Statement of Claim paragraphs [35], [65]-[67], [78], [81A] and [83].

(b) Mr Tim Bartholomew (Rural Property Advisors) to prepare a report on the values of the 'Bottletree / Fairymeadow' aggregation and feedlot complex as at 31 December 2007; and

(c) Mr Brendan Wade (Landmark Operations Pty Ltd) to prepare a report on the value of the cattle depastured on the properties referred to in subparagraphs (a) and (b) above as at 31 December 2007."

[23] Her Honour otherwise adjourned the application to enable directions to be either agreed or given as to the provision of the expert evidence.

[24] Argument broke out as to what instructions and materials ought be provided to the experts. Douglas J made orders about that on 31 August 2017 and documents and information were provided to the experts pursuant to those orders.

[25] Grazing properties are income producing. The income is produced by raising cattle for beef production. The value of a grazing property is measured in large part by its income producing potential which in turn is measured by the number of cattle that can be successfully grazed on it. This is referred to as the property's "carrying capacity".

[26] On 5 October 2017, while he was preparing the valuations, Mr Copland sent an email to the parties which included:

> "In the absence of the provision of any carrying capacity data to date, I have approached Dr Steve Petty to provide a desktop assessment as to the relevant potential carrying capacities and associated land system mapping for each of the properties and will forward that for approval when received. Can you please confirm the data requested will be available by 13 October, an electronic copy will suffice in the initial instance."

[27] That email sparked further dispute between the parties. It is unnecessary to analyse all of that evidence.

[28] On 10 April 2018, Mr Copland wrote to the parties' solicitors and advised that he had completed draft valuations. As to the issue of carrying capacity, he said this:

> "**Carrying capacity**
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> Given I have not yet been provided with an agreed carrying capacity which is a pivotal component of my valuations, I have considered the evidence in relation to the cattle numbers provided and after consideration of that evidence, in conjunction with my personal experience in relation to carrying capacities, the carrying capacities achieved by the sales and other properties of a similar nature, I propose the following carrying capacities for each of the stations for consideration:-
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> [A list of properties and carrying capacities of each appears in the valuation].
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> I comment that my assessment of the carrying capacities as at December 2007 reflects what I consider to be a sustainable level of intensity providing the most likely average effect level of stocking rate, year in year out. The rate has been assessed on a relative basis between the properties and does not necessarily reflect a maximum stocking rate but is reflective of what I consider to be the

> optimum average efficient carrying capacity for each property. Carrying capacity is influenced greatly by management, the level of improvements (particularly pasture and water), country type and climate. It also varies depending on the type of enterprise with both relative production and total herd numbers reliant on the level of supplement provided."

[29] On 24 April 2018, Brown J made orders for the delivery of further instructions and material to Mr Copland. That occurred and Mr Copland, Mr Bartholomew and Mr Wade then delivered their reports.

[30] The final opinions expressed in the reports suit the defendant siblings. The plaintiff challenges both the results and the methodology adopted in the reports.

[31] The reports do not suit the plaintiff's case and he is therefore placed in a difficult position as he cannot lead other expert evidence at the trial, except by leave.

[32] On 27 July 2018, Brown J made orders including:

> "Any application pursuant to rule 429N(3) of the UCPR or otherwise in respect of the issues dealt with in the reports of Mr Copland, Mr Wade and Mr Bartholomew, together with any affidavit material be filed and served by 12 October 2018, with a return date for directions on 26 October 2018."

[33] An application was filed seeking the relief mentioned specifically in the order of Brown J, namely that further experts be appointed by the court pursuant to r 429N(3). Experts Messrs Geoffrey Eales, Richard Cameron and James Cudmore are proposed to be appointed.

[34] Before me, the plaintiff added further claims for relief, namely:

(i) in the alternative to an order that Messrs Eales, Cameron and Cudmore will be appointed as experts, that leave be given to the plaintiff to rely on their evidence at trial; and

(ii) that Mr Eales be given access to the properties to inspect them.

[35] The plaintiff has reports from Mr Eales, Mr Cameron and Mr Cudmore. Mr Eales values the properties, Mr Cameron has given an opinion as to the value of cattle on the properties (but not those on the feedlot) and Mr Cudmore has valued the cattle on the feedlot. Mr Eales has a more optimistic view of the carrying capacity of the properties and their value than does Mr Copland.

[36] The application came before me on 5 March 2019. I heard full argument on the application brought under r 250, although the determination of that application will be influenced by whether or not the plaintiff is permitted to lead opinion evidence at trial from Mr Eales. I was persuaded by Mr Kelly QC that I should order the delivery of questions to the experts, Copland and Wade, before determining whether other expert evidence should be permitted at trial.

[37] On 5 March 2019 I ordered, relevantly:

> "1. By 18 March 2019, the plaintiff and the second to fourth defendants file and serve a list of questions for each of the court appointed experts (other than Mr Bartholomew) together with any documents to be provided to the expert.

2. By 21 March 2019, any objection by a party to a question or document proposed to be given to an expert pursuant to order no. 1 be filed and served together with an outline of submissions in support of the objection.

3. Any objection raised pursuant to order no. 2 be determined at a hearing on 22 March 2019.

4. The applications otherwise be adjourned to 22 March 2019."

[38] Questions were delivered by both the plaintiff and the defendant siblings. When the matter came before me on 22 March 2019, Mr Thompson QC-SG for the plaintiff submitted that the questions which had been delivered by the defendant siblings were more extensive than he understood the orders permitted. He sought leave to deliver further questions on behalf of the plaintiff.

[39] On 22 March 2019, I ordered:

"1. By 4pm on 29 March 2019, the plaintiff file and serve a list of supplementary questions for the court appointed experts, Mr Copland and Mr Wade.

2. By 4pm on 5 April 2019, any objection by the second to fourth defendants to a question proposed to be given to an expert pursuant to order no. 1 be filed and served together with an outline of submissions in support of the objection.

3. By 4pm on 12 April 2019, the plaintiff file and serve any reply submissions to any objection raised pursuant to order no. 2.

4. The applications are adjourned to a date to be fixed."

[40] Although the orders do not expressly say so, the applications are to be determined without further oral argument.[18]

[41] A list of supplementary questions was in due course delivered by the plaintiff and objections to some of those questions by the defendant siblings were filed together with submissions. The plaintiff filed reply submissions.

Legal principles concerning the introduction of new experts

[42] Part 5 of the UCPR concerns expert evidence.

[43] Rule 423 expresses the purposes of Part 5. It provides:

"**423 Purposes of pt 5**

The main purposes of this part are to—

(a) declare the duty of an expert witness in relation to the court and the parties; and

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[18] Transcript 22 March 2019 1-56 to 1-58.

(b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and

(c) avoid unnecessary costs associated with the parties retaining different experts; and

(d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding."

[44] No examination of the purposes of the UCPR can overlook r 5. It is in these terms:

"**5 Philosophy—overriding obligations of parties and court**

(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Example—

The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[45] Various rules govern how an expert's evidence is prepared and adduced.[19]

[46] There is nothing in the UCPR preventing parties from seeking their own expert evidence which they then lead at trial. However, consistently with r 423(b), there are procedures prescribed for the appointment of a single expert. Rules 429G and 429I provide:

"**429G Appointment of experts**

(1) If, after a proceeding has started, 2 or more parties agree that expert evidence may help in resolving a substantial issue in the proceeding, subject to rule 429H, those parties may in writing jointly appoint an expert to prepare a report on the issue.

(2) If parties to a proceeding are not able to agree on the appointment of an expert, subject to rules 429I and 429K, any party who considers that expert evidence may help in resolving a substantial issue in the proceeding may apply to the court for the appointment of an expert to prepare a report on the issue.

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[19] Rules 426 - 429C.

(3) Subject to rules 429J and 429K, the court may, on its own initiative and at any stage of a proceeding, if it considers that expert evidence may help in resolving a substantial issue in the proceeding, appoint an expert to prepare a report on the issue.

429I Expert appointed by court on application

(1) A party applying to the court for appointment of an expert under rule 429G(2) must serve a copy of the application and the supporting material on each other party to the proceeding.

(2) The supporting material must—

(a) state the issue in the proceeding that expert evidence may help resolve; and

(b) name at least 3 experts who—

(i) are qualified to give expert evidence on the issue; and

(ii) have been made aware of the content of this part and consent to being appointed; and

(c) state any connection known to the applicant between an expert named and a party to the proceeding.

(3) When hearing the application, the court may receive other material and make other enquiries to help decide which expert to appoint.

(4) The court may appoint an expert other than an expert named in the supporting material.

(5) The court may appoint an expert only if the expert has been made aware of the content of this part and consents to the appointment."

[47] Here, the appointment was made pursuant to r 429G(2). Rule 429N then provides:

"**429N Consequences of court appointment**

(1) This rule applies if the court appoints an expert in relation to an issue in a proceeding.

(2) Unless the court otherwise orders, the expert is to be the only expert to give evidence in the proceeding on the issue.

(3) However, the court may, on its own initiative or on application by a party, appoint another expert (the ***other expert***) to prepare a report in relation to the issue if—

(a) after receiving a report from the expert originally appointed (the ***first expert***), the court is satisfied—

(i) there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the issue; or

(ii) the other expert knows of matters, not known by the first expert, that are or may be material to deciding the issue; or

(b) there are other special circumstances."

[48] Rules 429N(2) and 429N(3) provide for distinctly different relief. Rule 429N(3) provides for the appointment by the court of a further expert. This is the relief originally sought by the plaintiff in his application.

[49] By r 429N(3), there is a discretion given by the words "the court may … appoint another expert". That discretion only arises though when one of the pre-conditions in r 429N(3)(a) or (b) are satisfied.

[50] Rule 429N(3)(a)(i) assumes that:

(i) the "other expert" has been identified;

(ii) the "other expert" has prepared an opinion;

(iii) the opinion of the "other expert" is different from that of the "first expert"; and

(iv) the difference in opinion is material to the outcome of an "issue".

[51] Rule 429N(3)(a)(ii) also assumes that the "other expert" has been identified. It does not though assume that the other expert has expressed an opinion. It operates where material facts are known by the "other expert" but not by the "first expert".

[52] Rule 429N(3)(a)(ii) may envisage a situation where because of a change in circumstances, it is more preferable to engage the "other expert" than to have the "first expert" reconsider his opinion based on the new material. Rule 429N(3)(a)(ii) may lead to the second expert effectively replacing the first expert.

[53] The limits of r 429N(3)(a)(ii) need not be considered and neither need the limits of the expression "other special circumstances" in r 429N(3)(b). Here, the application depends on r 429N(3)(a)(i) as the "other expert(s)" have been identified and their opinions have been obtained. The evidence of the three proposed experts is "material to deciding the issue". The "issue" is the value of the assets. The defendants do not contend otherwise even though for the reasons already explained[20] they say the issue itself is irrelevant.

[54] If Messrs Eales, Cameron and Cudmore were appointed as experts under r 429N(3), then subject to any further orders, the parties would be bound by r 429N(2) so that the only experts to be called are Copland, Bartholomew and Wade, who generally support the defendant siblings, and Eales, Cameron and Cudmore, who generally support the plaintiff. That would be an outcome which would be manifestly unfair to the defendant siblings.

[55] The unfairness is caused by the following factors:

(i) the defendant siblings chose to support the appointment of experts by the court;

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[20] See paragraphs [15]-[19] of these reasons.

(ii) in doing so, they forwent the luxury of retaining their own experts to whom they could give instructions and with whom they could deal (subject of course to ethical constraints) as they saw fit;

(iii) as I shall later explain, the defendant siblings have some concerns as to the way Mr Copland (at least) came to the conclusions he did, but are not at liberty to call additional evidence to clarify or strengthen their position without leave;

(iv) Messrs Eales, Cameron and Cudmore were retained by the plaintiff and were instructed by the plaintiff, and supplied with material which the plaintiff's lawyers determined were appropriate; and

(v) the plaintiff and his lawyers have had no restrictions upon them as to their access to Messrs Eales, Cameron and Cudmore. [21]

[56] If Messrs Eales, Cameron and Cudmore were appointed as experts by the court, there would be a severe imbalance against the defendant siblings. For the reasons I have identified, the body of expert evidence to be considered would consist of court appointed experts (Copland, Bartholomew and Wade) and experts retained by the plaintiff (Eales, Cameron and Cudmore), but not experts retained and instructed by the defendant siblings. If further expert evidence is to be admitted in the trial, then the defendant siblings should be given an opportunity to seek leave to lead further expert evidence pursuant to r 429N(2).

[57] For those reasons, the application under r 429N(3) ought to be dismissed and consideration restricted to the alternative application brought under r 429N(2).

[58] The discretion under r 429N(2) is not restricted in the way the discretion in r 429N(3) is restricted. There is an unfettered discretion but one which must be exercised judicially and which must be exercised consistently with the purposes of the rules.[22]

[59] Both parties referred me to the decision of Applegarth J in *Conias Hotel Pty Ltd v Murphy & Anor*.[23] There, his Honour considered an application for appointment of a further expert pursuant to the power under r 429N(3),[24] rather than r 429N(2). His Honour though generally considered the principles applicable in identifying considerations relevant to the exercise of the discretion to allow further expert evidence to be adduced, even though a court appointed expert had provided a report. The reasons are therefore helpful here. I will refer to his Honour's judgment after considering some of the decisions to which his Honour referred.

[60] In *Daniels v Walker*,[25] Lord Woolf observed:

> "[27] Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact

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[21] See generally *Wilcox v Wilcox (No 2)* [2014] NSWSC 88 at [10]; *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 at [12].

[22] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40, 44.

[23] [2012] QSC 297.

[24] Paragraph [4].

[25] [2000] 1 WLR 1382.

that party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert, or, if appropriate, to rely on the evidence of another expert.

[28] In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.

[29] In the majority of cases, the sensible approach will not be to ask the court straight away to allow the dissatisfied party to call a second expert. In many cases, it would be wrong to make a decision until one is in a position to consider the situation in the round. You cannot make generalisations, but in a case where there is a modest sum involved, a court may take a more rigorous approach. It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report.

[30] However, in this case a substantial sum of money depended on the issue as to whether full-time or part-time care was required. In those circumstances it was perfectly reasonable for the defendant, if the matter had been properly explained, to say that he would like to have the claimant examined by Miss Grindley…"

[61] *Daniels v Walker* was followed in *Cosgrove v Pattison*[26] where this was said:

"In my judgment, although it would be wrong to pretend that this is an exhaustive list, the factors to be taken into account when considering an application to permit a further expert to be called are these. First, the nature of the issue or issues; secondly, the number of issues between the parties; thirdly, the reason the new expert is wanted; fourthly, the amount at stake and, if it is not purely money, the nature of the issues at stake and their importance; fifthly, the effect of permitting one party to call further expert evidence on the conduct of the trial; sixthly, the delay, if any, in making the application; seventhly, any delay that the instructing and calling of the new expert will cause; eighthly, any special features of the case; and finally, and in a sense all embracing, the overall justice to the parties in the context of the litigation."

And later:

"Standing back and looking at the justice between the parties, I ask myself two questions, do not represent a decisive test but they may be of some help. First, if the appellants are not entitled to call Mr McIntosh and they lose the case, will

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[26] [2000] All ER (D) 2007.

> they have an understandable sense of grievance judged objectively? To my mind they would – an understandable, if not overwhelming, feeling. Secondly, if the appellants are entitled to call Mr McIntosh and won, would the respondents have an understandable sense of grievance, judged objectively? I think it is inevitable that they would have a sense of grievance, because that is in the nature of litigation. But I do not think that to most people be a particularly understandable sense of grievance…"

[62] In *Tomko v Tomko*,[27] in a passage followed in various New South Wales decisions,[28] Brereton J said this:

> "[9] In my view, the court should be relatively ready to grant leave to adduce evidence from a separate expert, lest trial by single expert otherwise become substituted for trial by judge. Where some arguable basis is shown for challenging the report of a single expert, the court should be disposed to grant such leave."

[63] Applegarth J in *Conias* and Crow J in *Fricke & Anor v WH Frier Building Contractors Pty Ltd & Ors*,[29] rejected what can be described as the liberal approach expressed by Brereton J that the courts "… should be relatively ready to grant leave to adduce evidence from a separate expert …"

[64] In *Conias*, Applegarth J identified the following considerations which I respectfully agree are relevant:

(i) "The mere existence of a different opinion would ordinarily not be sufficient, particularly in the area of valuation";[30]

(ii) "case management and the need for expeditious resolution of disputes"[31] are relevant;

(iii) a fair trial must be ensured;

(iv) the nature of the issue the subject of the proposed new evidence is relevant;

(v) the sum of money at stake is relevant; and

(vi) delay is relevant.

[65] Case management considerations should clearly be taken into account in the exercise of discretion under r 429N(2). At least since *Aon Risk Services Australia Limited v Australian*

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[27] [2007] NSWSC 1486.

[28] *Stolfa v Owners of Strata Plan 4366 (No 2)* [2008] NSWSC 531; *Wu v Statewide Developments Pty Ltd* [2009] NSWSC 587; *Davron v Teys* [2009] NSWSC 1004; *Coyne v Calabro* [2009] NSWSC 1023; *In the matter of Optimisation Australia Pty Ltd* [2015] NSWSC 2072.

[29] [2019] QSC 6.

[30] *Conias Hotels Pty Ltd v Murphy & Anor* [2012] QSC 297 at paragraph [4], and see *D v S* [2009] QSC 446 and *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] NSWLEC 282.

[31] *Conias Hotels Pty Ltd v Murphy & Anor* [2012] QSC 297 at paragraph [7].

National University,[32] the High Court has emphasised the importance of principles such as those encapsulated by r 5 of the UCPR. In *UBS AG v Tyne*[33] Gordon J observed:

> "This appeal raises important issues about the way in which litigation is conducted in the 21st century. Over the last 20 years, there has been a 'cultural shift' in the conduct of civil litigation. The legal system has faced, and continues to face, great challenges in providing appropriate mechanisms for the resolution of civil disputes. Cost and delay are long-standing challenges. The courts and the wider legal profession have an obligation to face and meet these and other challenges. Failure to respond creates (or at least exacerbates) hardship for litigants and potentially results in long-term risks to the development, if not the maintenance, of the rule of law."[34] (Citations omitted)

[66] The ultimate aim is to do justice in the case.[35] In determining where the justice of the case lies, case management considerations are relevant. In *Conias*, Applegarth J said:

> "[9] In considering where the interests of justice lie, one has to consider the sense of legitimate grievance that a party may have if, on the one hand, an order of the present kind is refused and, on the other hand, the sense of grievance a party may have if an order of the current kind is allowed. Obviously, there are other considerations, including the costs implications for parties, separately and collectively, and whether ordering a further expert will delay the trial."

The exercise of discretion here

[67] There is no submission by any of the defendants that the evidence proposed to be led from Messrs Eales, Cameron and Cudmore is not credible in the sense of being evidence that could legitimately be considered in the disposal of the case if leave to adduce it was given. The defendants may disagree with the opinions expressed, but:

(i) the proposed witnesses are qualified as experts in the fields in which they express their opinions;

(ii) the methodologies adopted are recognised in the respective fields of expertise;

(iii) the opinions expressed are relevant to the matters in issue in the case; and

(iv) the opinion evidence is admissible, subject to the question of leave.

[68] Messrs Copland, Bartholomew and Wade value the assets at $308,399,789.00.[36] Messrs Eales, Cameron and Cudmore value the assets at $426,640,627.00. The plaintiff is therefore in

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[32] (2009) 239 CLR 175.

[33] (2018) 360 ALR 184.

[34] At [125], and see also *Expense Reduction Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [51].

[35] Rule 423(d).

[36] Including the cattle.

possession of admissible opinion evidence valuing the assets $118,240,838.00 (or almost 40 percent) more than the court appointed experts.

[69] There is argument between the parties as to whether the experts have adopted different methodologies or just applied the same methodologies in different ways and reached different conclusions. It is unnecessary to analyse those submissions. The final value reached by the court appointed experts is very different to that settled upon by the proposed experts. That might be because the prospective experts have adopted different methodologies or it might be that the experts have applied the methodologies in different ways. Both the selection of methodology and the application of methodology are exercises in expert judgment. There are clearly therefore serious differences between the experts on matters of expert assessment of the evidence available to them.

[70] Mr Copland's request for assistance in determining carrying capacity and then proceeding to complete the valuation without that assistance is cause to question the conclusions he reached.

[71] Pursuant to the orders made on 5 March 2019, questions were delivered to Mr Copland, in particular by the defendant siblings. Some of the questions concern apparent inadequacies in the explanation of methodology and calculations.[37] Mr Copland is, by these questions, only being asked to better explain his report.

[72] However, some of the questions asked by the defendant siblings are of a nature of cross-examination. For example:

> "The questions under this heading are directed to understanding the reasons for the difference between your valuations of the Subject Properties produced by application of the Adult Equivalent Value Improved (***AEVI***) method and your valuations of the Subject Properties produced by application of the rate per hectare (***RPH***) method.
>
> 2 At section 8.5 of the Reports you state that 'given the attributes of the subject property, equal weight have been given to both methods of assessment'. Could you please explain the attributes of the Subject Properties that you are referring to and why those attributes mean that it is appropriate to give equal weight to both methods?
>
> 3 Do you agree that:
>
> (a) the reason for using both the AEVI and RPH methods together is so that the methods operate as checks on each other and to assist in identifying errors either in calculation, fact or judgment where there is a substantial discrepancy between the two values produced?
>
> (b) in the absence of an error in either calculation, fact or judgment, the AEVI method should produce a value that is reasonably close to the RPH method?

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[37] Question 9 about mixed herd numbers, question 11 about conversion of mixed herd carrying capacity to Adult Equivalent carrying capacity, question 19 about reliance about country type in assessing carrying capacity and questions 30 to 42 about comparable sales.

4 The figures produced by application of the AEVI method in your Reports was higher than the figures produced by application of the RPH method by the approximate percentage set out in the following table:

[Various figures are included in a table]

By reference to the values in the table, is it possible that there may be an error either in calculation, fact or judgment in your assessment of either the RPH values or the AEVI values?

5 If so, after you have considered questions 6 to 18 below, could you please explain the nature of any possible error of calculation, fact or judgment and how you would revise your valuation to take account of such an error?

6 You have attributed the following RPH and Adult Equivalent carrying capacities to each of Augustus Downs, Donors Hill, McAllister, Warren Vale and Kamilaroi (the ***Southern Gulf Properties***):

[Various figures are included in a table]

In light of the similar RPH but divergent Adult Equivalent carrying capacities for the Southern Gulf Properties, please advise whether you consider you may have overestimated the Adult Equivalent carrying capacities for one or more of those properties due to:

(a) a possible error in overstating the appropriate mixed herd average stock numbers by not having regard to stock numbers over a longer period of time; or

(b) a possible error in converting mixed herd average stock numbers to Adult Equivalent carrying capacity by adopting a conversion factor which is too high.

7 If so, after you have considered questions 8 to 18 below, could you please explain the nature of any possible error and how you would revise your valuation opinion to take account of such an error."

[73] A large number of questions were also asked by the plaintiff of Mr Copland in particular.

[74] The questions delivered, especially to Mr Copland, showed that no party unreservedly accepts the opinions expressed by him and the reasons given by him to support the opinion.

[75] Mr Kelly QC for the defendant siblings made various submissions including:

(i) the dispute concerns a deed signed now over 12 years ago;

(ii) the present proceedings were commenced in 2013, some six years ago;

(iii) there have been various interlocutory applications;

(iv) in February 2017, now almost three years ago, Applegarth J expressed the view that this was an obvious case for a court appointed valuer, or a joint valuer, rather than competing valuers;

(v) the parties all agreed as to the process for the appointment of valuers; and

(vi) the process of appointment of valuers was fair.

[76] All those submissions can be accepted as factually accurate and as relevant to the exercise of discretion. I do not though accept that the just, expeditious and economical resolution of this dispute is best served by denying the present application.

[77] While on 5 March 2019 I was attracted to Mr Kelly QC's submission that the experts ought to be asked questions about their opinions before considering the plaintiff's application further, the draft questions which have been prepared show that that process is unlikely to be fruitful. There are a large number of questions. It is obvious that both parties have doubts about the way in which the final opinions have been reached. Some of the questions highlight aspects where it is not apparent at all from the reports as to how some of the opinions have been arrived at. Further, there is dispute between the parties as to what questions ought to be allowed to be asked of the experts.

[78] It will be a substantial forensic exercise just to identify the allowable questions. There will then be further work for the court experts to answer the questions. Even if all of that occurs, the fact remains that there is a credible body of opinion evidence valuing the assets at 40 percent more than the valuations achieved by the court appointed valuers. I have no confidence that the current process will obviate the necessity for leave to be given to the plaintiff to call further expert evidence.

[79] The refusal of the application will deny the plaintiff the opportunity to adduce credible evidence which, if accepted, will have significant impact upon the determination of what, on the pleadings as they presently stand, is a fundamental issue. In all the circumstances, the plaintiff's application should succeed in that he should have leave to adduce the evidence of Mr Eales, Mr Cameron and Mr Cudmore.

Should Mr Eales be allowed to inspect the properties

[80] Rule 250 of the UCPR provides:

> "**250 Inspection, detention, custody and preservation of property**
>
> (1) The court may make an order for the inspection, detention, custody or preservation of property if—
>
> (a) the property is the subject of a proceeding or is property about which a question may arise in a proceeding; or
>
> (b) inspection of the property is necessary for deciding an issue in a proceeding.
>
> *Note—*
>
> Under the *Acts Interpretation Act 1954*, schedule 1—
>
> ***property*** means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.
>
> (2) Subrule (1) applies whether or not the property is in the possession, custody or power of a party.

(3) The order may authorise a person to do any of the following—

(a) enter a place or do another thing to obtain access to the property;

(b) take samples of the property;

(c) make observations and take photographs of the property;

(d) conduct an experiment on or with the property;

(e) observe a process;

(f) observe or read images or information contained in the property including, for example, by playing or screening a tape, film or disk;

(g) photograph or otherwise copy the property or information contained in the property.

(4) In the order, the court may impose the conditions it considers appropriate, including, for example, a condition about—

(a) payment of the costs of a person who is not a party and who must comply with the order; or

(b) giving security for the costs of a person or party who must comply with the order.

(5) The court may set aside or vary the order."

[81] Mr Eales says that inspection of the properties would enable him to reach a more reliable conclusion on their value. Mr Thompson QC-SG submitted that without inspection, Mr Eales' opinion will be open to the criticism that he has not physically inspected the properties. That criticism has already been levelled at Mr Eales' valuation reports. The defendant siblings point out that the properties can be traversed by helicopter at a height above 150 metres without court order or other consent being given. They submit that should be sufficient.

[82] In argument, Mr Kelly QC put to me that dangers exist on the properties rendering the inspections undesirable.[38] Mr Kelly QC, quite rightly in my respectful view, retreated somewhat from that submission. His client's real objection to the inspections was expressed by Mr Kelly QC in these terms; that "… it is a privately run business by the plaintiff[39] and one of the things they don't like is a number of experts coming onto the property and interfering with important work that is going on …".[40]

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[38] Explained in detail in the affidavit of Geoffrey Neil Rankin filed on 19 June 2017 at [12].

[39] He meant the defendant siblings.

[40] Transcript 5 March 2019 1-23.

[83] There is no doubt that the interference with private rights, which is caused by an inspection of property the subject of proceedings, is a valid consideration, as are the risks of the introduction of disease, weeds and contaminants[41] to the properties.

[84] However, the value of the property is clearly a question in the case as presently pleaded. It is a major question. Inspection by Mr Eales is likely to promote the more efficient and economical conduct of the proceedings.[42] If all experts called have inspected the properties and have a proper opportunity to consider the properties' relevant features, there is less likelihood that the trial court will have to inspect the properties. If all experts have inspected the properties, there is more likelihood that more common ground will be reached between the experts. The general body of evidence (from all experts) will be stronger, and less open to controversy if all experts have inspected the properties and are therefore on the same footing.

[85] It is appropriate to order inspections pursuant to r 250 of the UCPR, but reserve the question of what directions ought to be made in relation to the conduct of those inspections. The directions will accommodate the legitimate concerns raised by Mr Kelly QC on behalf of the defendant siblings and will be designed to minimise the impact of the inspections upon the conduct of the defendant siblings' business. The only practical way to travel around the properties will be by helicopter. I have in mind that Mr Eales and a small number of assistants (if any are required) attend upon the properties on a specified day or days, and before the inspection, they would provide a flight plan, details of the sites where they would land and how long they would be on the ground, etcetera.

Conclusions and orders

[86] It is appropriate to order that the plaintiff have leave at the trial to rely upon the evidence of Messrs Eales, Cameron and Cudmore. The defendants have not made application to lead evidence from their own experts. However, the structure of the trial has now changed from one where there are court appointed experts, to one where the plaintiff is leading a body of expert evidence which, no doubt, will have to be met by the defendants with their own expert evidence. Leave being given to the defendants under r 429N is virtually inevitable. I assume that a sensible approach will be taken by the plaintiff to any application brought by the defendants.

[87] I will make an order for inspection under r 250 but subject to directions being given as to the conduct of that inspection. I will set a date to hear that argument.

[88] I will hear the parties on the question of costs.

[89] I make the following orders:

1. The plaintiff's application to appoint Geoffrey Eales, Richard Cameron and James Cudmore as experts pursuant to r 429N(3) of the *Uniform Civil Procedure Rules* 1999 is dismissed.

2. The plaintiff has leave pursuant to r 429N(2) of the *Uniform Civil Procedure Rules* 1999 to lead at trial evidence of experts Geoffrey Eales, Richard Cameron and James Cudmore.

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[41] Mr Rankin's affidavit; paragraph 12 (i) and (j).

[42] *Evans Deakin Pty Ltd v Orekinetics Pty Ltd* [2002] 2 Qd R 345 at [19]-[20].

3. Geoffrey Eales is authorised to enter upon and inspect the properties which he valued by his report dated 15 October 2018, but such authorisation to be subject to further directions and conditions.

4. The question of the directions and conditions upon which Mr Eales is authorised to enter and inspect the properties is adjourned to a date to be fixed.

5. The parties shall be heard on the question of costs.