SUPREME COURT OF QUEENSLAND

CITATION:	*Birla Mt Gordon Pty Ltd v Miccon Hire Pty Ltd* [2013] QCA 363
PARTIES:	**BIRLA MT GORDON PTY LTD** ACN 106 396 801 (appellant) **v** **MICCON HIRE PTY LTD** ACN 084 520 230 (respondent)
FILE NO/S:	Appeal No 5870 of 2013 SC No 554 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	6 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2013
JUDGES:	Holmes and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the judgment given on 31 May 2013 and substitute in lieu thereof, judgment for the Plaintiff against the Defendant for the sum of $322,622.82.** **3. Set aside the orders made by the primary judge on 19 June 2013.** **4. Remit the proceedings to the trial division for a retrial limited to the question of what amount (if any) is owing to the respondent under the Surface Mining Service Contract.** **5. Reserve the question of the costs of the proceedings on 27 and 28 May 2013, the interest payable on the judgment for $322,622.82, and the costs arising from order 2 made on 31 May 2013, to the judge hearing the trial.** **6. The respondent is to pay the appellant's costs of the appeal, to be assessed on the standard basis.**

CATCHWORDS: APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – WHEN A NEW TRIAL GRANTED – where the appellant (mine site owner and operator) was the defendant in proceedings instituted against it by the respondent (contractor in liquidation) for monies due under a haulage contract on a mine site – where, inter alia, the tonnage of material hauled was in dispute – where the learned trial judge ruled inadmissible an expert report produced by the appellant the day before the trial commenced – where in a pre-trial review both parties gave assurances that they did not intend to produce any more expert reports – where the respondent obtained material from the appellant's expert by subpoena – where that material had previously been in the possession of each party, but its significance had been missed, or it had been forgotten or misplaced – where the subpoenaed material caused the appellant to seek the further report – where the expert report, arguably, accurately calculated the tonnage of material hauled – where if the expert report was accurate the appellant might owe the respondent in the order of $20,000, as opposed to $2 million – where, at trial, judgment was given against the appellant for $1,927,622.82 plus interest and indemnity costs – whether the learned primary judge erred in not allowing the appellant to rely upon the expert report, not adjourning the proceedings for the respondent to consider it, and not ordering that the appellant pay costs thrown away – whether the primary judge erred in giving greater weight to the disadvantage that might be suffered by the respondent should the expert report be admitted, than that which might be suffered by the appellant should the expert report not be admitted

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 427

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, applied
Cropper v Smith (1884) 26 Ch D 700, cited
State of Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146; [1997] HCA 1, cited
The Commonwealth v Verwayen (1990) 170 CLR 394; [1990] HCA 39, cited

COUNSEL: R G Bain QC, with P J McCafferty, for the appellant
D A Savage QC, with A J Neon, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Connolly Suthers Solicitors for the respondent

[1] **HOLMES JA:** I have read the judgment of Morrison JA and gratefully adopt his setting out of the facts in this appeal. I agree with his conclusion that the appellant should have been permitted to adduce the DSO report, with the respondent's being granted an adjournment to obtain any evidence that it required to respond.

[2] The primary judge's view that the appellant was attempting with the DSO survey to "change the expert landscape of the case" misapprehended, in my respectful view, the course of events. Before the respondent made its last-minute use of the 2010 survey as the basis for the calculation which became Exhibit 2, the only figure to which Mr Bowler's estimate of density could be applied was Mr Atkinson's assessment of the total volume of material removed from the original stockpile. The only evidence as to the destinations of the material (whether it was taken to the 500 Waste Dump or the DSO Waste Dump) came from Ms Cochrane. She said that she and Ms Tyrell had used the information on load sheets (no longer available) as to the length of time taken to deliver the waste to determine destination: a 10 minute turnaround meant that it had been taken to the 500 Waste Dump and a 20-25 minute turnaround indicated that it was the DSO Waste Dump.

[3] The information as to the volume of the 500 Waste Dump enabled the respondent to give some substance to that evidence. Ms Cochrane's account of an educated guess made on information in documents not in evidence could now be supplemented by a figure for the tonnage of material at the 500 Waste Dump, produced by applying Mr Bowler's density estimate to the 2010 survey figure for volume. The tonnage for the DSO Waste Dump could be calculated by subtracting the 500 Waste Dump figure from the figure for the original stockpile. Establishing tonnage at the respective dumps was critical in proving at which rate the respondent was entitled to be paid.

[4] That introduction of a new means of proof of the respondent's claim did effect a change in the landscape of the case, but not one for which the appellant was responsible. The proper course, in my view, was to permit the appellant to adduce further evidence from Mr Atkinson in the form of the DSO report in an endeavour to meet this new strand of the respondent's case.

[5] I agree with the orders proposed by Morrison JA.

[6] **MORRISON JA:** This appeal is brought by Birla Mt Gordon Pty Ltd, the defendant in proceedings instituted against it by Miccon Hire Pty Ltd for monies due under a haulage contract on a mine site.

[7] The principal claim was for unpaid haulage claims under the haulage contract, entitled Surface Mining Services Agreement ("**SMSA**").[1] There were also some other subsidiary claims for additional works requested under that contract, some undisputed miscellaneous claims, and a claim for variations to the work under a separate contract (the Esperanza Creek contract). The claim for unpaid haulage under the SMSA was by far the largest, totalling just over $2 million.

[8] Judgment was given against the appellant for $2,249,912.08 plus interest and costs. The costs were ordered to be assessed on the indemnity basis because the judgment sum exceeded an offer made pre-trial.

Contract and issues

[9] The appellant owned and operated the Mt Gordon Copper Mine west of Mt Isa. It required waste material to be removed from a stockpile in the south of the mine site so that the ore beneath could be reached. The waste (overburden and untreatable ore) was to be taken to two different locations, the 500 Waste Dump[2], and the DSO

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1 Not included in Appeal Record Book; handed up by appellant at the hearing of the appeal.

2 Also referred to as the South Esperanza Portal site.

Waste Dump[3]. The distance required to cart material to them was about 500 metres and 1,600 metres respectively.

[10] Whilst the SMSA, was executed on 4 May 2010, the provision of services under it commenced on 29 January 2010. The haulage cost per tonne varied with the distance. Hence, the respondent was entitled to charge $1.30 per tonne to the 500 Waste Dump, and $3.51 to the DSO Waste Dump.[4] The treatable ore itself was taken to a third location, called the ROM[5] pad. The price to do so was $3.89 per tonne, plus GST.

[11] The major issue at the trial concerned two invoices rendered for cartage in May and June 2010. The May invoice as rendered was for $2,444,516.10, and the unpaid balance was $1,743,097.22. The June invoice was for $1,359,702.04, and the unpaid balance was $371,372.48. Thus on the invoices alone the claim was for $2,114,469.70.

[12] Under the contract the respondent was obliged to invoice monthly, providing sufficient detail to allow the appellant to calculate the amount owing, and include all supporting documentation.[6] The respondent also had to deliver a "shift report" for each shift (to include a summary of the activities undertaken and chargeable time, with detail), and to provide that daily to the appellant.[7]

[13] The appellant raised various technical defences to the claim (that the invoices were not rendered in proper form required under the contract, or with appropriate supporting documents), but principally challenged that the invoices accurately recorded the actual tonnages carted to the waste dumps.[8]

[14] There was no issue at trial concerning the tonnage of ore taken to the ROM pad, nor the price for that component. That was because the ore had been weighed at the ROM pad. However, no such weighing was done for the material taken to the 500 Waste Dump or DSO Waste Dump. Proof of the cartage to those locations was complicated by the fact that records had gone missing, notably the daily load sheets done for each truck load of material. Those sheets were used to calculate the totals for the invoices. The relevant witnesses (Ms Tyrrell, Ms Cochrane and Mr McDonnell) lost control of the documents once the respondent went into liquidation, and they could not be found notwithstanding searches by all concerned.

[15] Thus the proof of the tonnages taken to the waste dumps depended on the evidence of those who calculated it at the time, based on estimates of the volume carted in each truck,[9] the number of trucks, and the method of using the daily load sheets to create the invoices.

[16] As to that, the learned primary judge's findings reveal:[10]

(a) Mr McDonnell was on site during the work;

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3 So named because it was the Direct Shipping Ore site.
4 In each case, plus GST.
5 Which stands for Run of Mine pad.
6 SMSA, Sch 1, Item 6.
7 SMSA, Sch 2, Item 2, Heading F.
8 Third Further Amended Defence, filed 21 May 2013, paras 3, 7A, 8B and 9.
9 In cubic metres.
10 Reasons [8]-[11].

(b) the trucks had a carrying capacity of 60 cubic metres, expanded (after expiration of the warranty on the truck) by the use of "hungry boards";[11]

(c) at the conclusion of each shift the truck drivers would hand a load sheet to Ms Cochrane, the respondent's office assistant on site at Mt Gordon;

(d) Mr McDonnell checked the load sheets and took them to a daily 7.00 am meeting with the appellant's representatives;

(e) as a result the appellant was informed of the tonnages which had been transported from the stockpile;

(f) Ms Cochrane sent the details she was given at Mt Gordon to the respondent's Mt Isa office manager, Ms Tyrrell; and

(g) Ms Tyrrell used that information to prepare the invoices.

[17] Those findings were based on the primary judge's acceptance of the evidence of Mr McDonnell, Ms Cochrane and Ms Tyrrell. The findings were made easier as none of the appellant's representatives who attended the 7.00 am meetings was called to give evidence. As the primary judge said:

> "There was consequently no evidence contrary to the contentions of the [respondent's] representatives that the [appellant's] representatives were through those meetings kept reliably and comprehensively informed".[12]

[18] Ultimately on appeal there was no challenge to the factual findings made by the primary judge.

[19] The central point on the appeal concerns the primary judge's ruling preventing the appellant from relying on a new expert report, produced on the Sunday before the trial commenced on the following Monday. The new report took the form of a survey plan of the stockpile at the DSO Waste Dump, and associated documents, which, for the first time in the history of the legal proceedings, arguably calculated the tonnage of material taken to the DSO Waste Dump. For ease of understanding I will refer to the new report as the DSO Report.

[20] The appellant accepted that the DSO Report was an expert report for the purposes of r 427 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("***UCPR***"). That rule provides:

> "**427 Expert evidence**
>
> (1) Subject to subrule (4), an expert may give evidence-in-chief in a proceeding only by a report.
>
> (2) The report may be tendered as evidence only if –
>
> (a) the report has been disclosed as required under rule 429; or

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[11] The "hungry boards" were said to increase the capacity to 92 cubic meters: AB 26, 168-169.

[12] Reasons [14].

(b) the court gives leave.

(3) Any party to the proceeding may tender as evidence at the trial any expert's report disclosed by any party, subject to producing the expert for cross-examination if required.

(4) Oral evidence-in-chief may be given by an expert only –

(a) in response to the report of another expert; or

(b) if directed to issues that first emerged in the course of the trial; or

(c) if the court gives leave."

Proceedings pre-trial

[21] Case management orders were made for the delivery of expert reports, and also other pre-trial steps, including pleadings and particulars.

[22] The respondent delivered a report by a geotechnical engineer, Mr Bowler, which included a density assessment of the material at 2.194 t/m^3.[13] He did not do any surveys of the original stockpile or waste dumps. The appellant delivered a report by Mr Atkinson, who had surveyed the stockpile from which all material had to be moved.[14] His report did not measure the 500 Waste Dump, nor the DSO Waste Dump. His figure was used to calculate the appellant's asserted tonnages by applying a density figure of 1.56 t/m^3 based on a report from a Mr Bullen.

[23] On 9 April 2013, North J reviewed the proceedings. Of particular concern that day was the question whether it was intended that there be any further reports to those which had been produced to that time. Assurances were given to the contrary by the appellant.[15] Further, the appellant said it no longer intended to rely on the report of Mr Bullen.[16]

[24] Thus, as things then stood, the respondent was the only party calling an expert as to density of the material, and the only expert report to be used by the appellant was that of Mr Atkinson.

Proceedings at the trial

[25] Mr Atkinson had been retained by the appellant, from some time before April 2013, as an expert to give evidence at the trial. He had produced his report, which had been disclosed under the *UCPR*.

[26] Prior to the trial commencing the respondent issued a subpoena to Mr Atkinson, to produce documents and to give evidence.[17] As a result, on the Friday before the trial started Mr Atkinson produced at least one document. It was a survey, done in 2010, of the 500 Waste Dump ("**the 2010 survey**"), which recorded the volume of

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13 AB 227-238; Mr Bowler's Report, dated 18 August 2010. Using volume of material in cubic metres and applying the density figure of tonnes per cubic metre one could arrive at tonnages transported.

14 AB 584-613; Mr Atkinson's Report, dated April 2013.

15 AB 191, 197.

16 AB 196, 198.

17 AB 20.

the waste material at that location. Mr Atkinson voluntarily sent a copy to the respondent on the Friday before trial.

[27] The respondent then disclosed its copy of that document to the appellant, on the Friday before the trial. So far as the record reveals nothing was said by the respondent about its intentions with regard to the 2010 survey.

[28] The appellant appreciated that the 2010 survey, if introduced into evidence, would add a component to proving the tonnages of the waste which had hitherto been absent. The tonnage of ore at the ROM pad was known; that was based on actual weight records. The daily load sheets had been misplaced, so there was no remaining record of the actual tonnages taken to each of the 500 Waste Dump and DSO Waste Dump. To that point, the respondent had been forced to prove the tonnages moved by reference to the number of truck loads, multiplied by the estimated tonnes per truck. The split between the two stockpiles was important because of the price differential – $1.30 per tonne to the 500 Waste Dump and $3.51 to the DSO Waste Dump.

[29] The appellant asked Mr Atkinson to do another survey, using historical data, of the stockpile at the DSO Waste Dump. That would enable the three totals (500 Waste Dump, DSO Waste Dump and ROM pad) to be added, establishing a total for all material carted.

[30] That new survey took the form of a topographic survey map of the DSO Waste Dump, with supporting documents (the DSO Report). It was not classically in the form of an expert report, and could only be properly explained, and understood, with the addition of oral evidence by Mr Atkinson. That evidence would have explained the source of the data, how the results were obtained, the method used to calculate the total, and the accuracy of the data, method and results.

[31] The DSO Report was provided on the Sunday afternoon before the trial. All that was said about it was that they were further documents from Mr Atkinson, provided by way of disclosure.

[32] The late provision of the DSO Report meant that the respondent was unable to assess its import, or take instructions in relation to it, before the trial started.

[33] The trial commenced on Monday morning in Townsville. The respondent (the plaintiff below) opened its case. At that point four relevant things occurred.

[34] First, counsel for the respondent told the primary judge that the respondent was prepared to adopt the total figure for volume of material transported as set out in Mr Atkinson's report, namely 799,210 cubic metres.[18] The sole purpose of that report was to establish that figure.

[35] Secondly, the primary judge was told about the 2010 survey, and that a figure from that was used for a calculation by Mr Bowler.[19] The document which became Exhibit 2 was handed up.[20] It was a calculation done by Mr Bowler who had arrived in Townsville that morning, and who was due to be an early witness. That calculation was only done that morning by Mr Bowler, as that was when he was

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18 AB 20-21, 22.

19 AB 22-23, 24.

20 AB 22.

first told of the figure in the 2010 survey.[21] The calculation adopted the figure for the 500 Waste Dump from the 2010 survey produced the previous Friday. That enabled Mr Bowler to calculate the total tonnage for the DSO Waste Dump (the tonnage at the ROM pad being known) by applying his integer for density, and, as a consequence, the total tonnages, which then enabled the total cost to be derived.

[36] This was said by the respondent's counsel to be the "easy way" to calculate the loss, as opposed to the "hard way" which was based on the evidence about truck numbers and average tonnes per truck, and the evidence of witnesses who originally produced and used the (now missing) load sheets.[22]

[37] Thirdly, the respondent made it clear in the opening, that when Mr Atkinson was called by the appellant, as was anticipated because Mr Atkinson was the appellant's only announced expert witness, the respondent intended to put the 2010 survey to him to establish the figure for the 500 Waste Dump. This was made clear from the fact that Mr Bowler's calculation[23] used the figure from the 2010 survey,[24] a figure which was not produced by him.

[38] Fourthly, the respondent told the primary judge that there still seemed to be a suggestion in the particulars of the appellant's defence that a different density figure might be suggested even though no expert was being called on that topic apart from Mr Bowler.[25] The respondent's approach was to call Mr Bowler and "see what really the attack on him was going to do".[26]

[39] No objection was raised by the appellant to the proposed use of the 2010 survey. Of course nothing had to be said at that point. If that course was to be the subject of objection (at least on the basis raised on appeal, namely that it would be an attempt to tender a report by an expert without leave under r 427 of the *UCPR*) then that objection could be made at the time the document was put to Mr Atkinson.

[40] Nothing was said in the opening about the DSO Report by either side.

[41] Mr Bowler was called. He gave evidence about his calculation, and verified its accuracy on the basis that he had assumed the accuracy of two figures, namely the total volume from Mr Atkinson's report (799,210 cubic metres), and the figure for the 500 Waste Dump from the 2010 survey.[27] It was tendered as Exhibit 2 without objection. Of course, since it had only been tendered on the express basis of the assumed accuracy of the 2010 survey figure, if that figure was not later proved through Mr Atkinson then that part of the calculation would fall away. On that basis it was not surprising that no objection was made to the tender.

[42] To that point in the trial the primary judge knew nothing of the DSO Report; nothing had been said by either side about it.

[43] In cross-examination of Mr Bowler the DSO Report was produced to him, on the express basis that it was a document that he would not have seen before, which

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21 AB 42. In fact even when under cross-examination he had not actually seen the 2010 survey, but had merely been given a figure from it.

22 AB 21, 27.

23 Exhibit 2.

24 AB 23-24.

25 AB 25-26.

26 AB 26.

27 AB 32.

Mr Bowler confirmed.[28] When the primary judge asked if he himself had seen it he was told he would not have seen it.[29]

[44] Then the appellant's counsel asked Mr Bowler whether the figure in the DSO Report would affect his density figure. Objection was taken on the basis that it was an expert opinion that was not the subject of any expert report.[30] Counsel for the appellant responded that it had been prompted by the revelation of the 2010 survey, and "disclosed last night".[31] The appellant's counsel made it clear he wished to ask Mr Atkinson about the DSO Report when he gave evidence and that it impacted on Mr Bowler's density figure.[32]

[45] The matter was then debated. The respondent's points included: it was outside the regime imposed by North J and the assurances that no other expert evidence was to be called; it was non-compliant with the rules; the respondent did not have a survey expert; and there was no opportunity to investigate it.[33]

[46] The appellant's points were: it had been prompted by the revelation of the 2010 survey and, though produced recently, it was from data available two years ago; counsel wished to ask Mr Atkinson about the DSO Report when he gave evidence; it impacted on Mr Bowler's density figure; and without it "it creates a wholly misleading impression for your Honour of the landscape of this case".[34]

[47] After argument the primary judge ruled that Mr Bowler could not be questioned "on the assumption advanced in this document"[35], namely the total tonnage at the DSO stockpile. The reasons for that, as expressed at that time were that: if it was to be relied upon that should have been foreshadowed some time before; it was a further document by an existing expert to change the expert landscape of the case; disclosure was late; and the appellant had an uphill battle in respect of its admission "in the context of the way the case has developed and the expert evidence regime".[36]

[48] The ruling was that that Mr Bowler could not be questioned "on the assumption advanced in this document"[37], namely the total tonnage at the DSO stockpile. There was no suggestion on the appeal that the appellant's counsel understood the ruling to go further than that. The ruling did not prevent questions being asked about Mr Bowler's density calculation, nor his method of establishing the density figure.

[49] Indeed, Mr Bowler was cross-examined about the methods used to measure the density, and the accuracy of that method, and that Mr Bowler had never seen the stockpiles or been to the site.[38] No contrary density figure was put. That was not surprising given that the appellant had previously intended to call Mr Bullen, an expert who had given a report as to the proper density measurement, but then prior to the trial announced that he would not be called. Thus the appellant had no expert to counter Mr Bowler on density.

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28 AB 36.
29 AB 36.
30 AB 36-37.
31 AB 37 line 39.
32 AB 37.
33 AB 40.
34 AB 39, 40-41.
35 AB 42, referring to the DSO Report.
36 AB 39-42.
37 AB 42, referring to the DSO Report.
38 AB 33-36.

[50] The 2010 survey was tendered by the appellant through Ms Tyrrell,[39] though only on the basis that it went to credit. Ms Tyrrell's receipt of it by email from Mr Atkinson could not, of itself, be proof of the truth of the 2010 survey.

[51] The rest of the respondent's witnesses were called, taking the trial into the second day. At that point the appellant's counsel opened its case. In the course of that opening the question again arose of the use of the DSO Report. Objection was taken as to its use, on the same grounds that had been articulated the previous day. The appellant applied for leave to put the report into evidence through Mr Atkinson.

Nature of the new evidence in the DSO Report

[52] It became apparent during the trial that the respondent had received a copy of the 2010 survey by email in 2010.[40] On appeal the appellant accepted that it too had received a copy, and probably in 2010.[41]

[53] It seems that it was not given much attention until the Friday before the trial. Neither party disclosed their copy of the 2010 survey, notwithstanding its relevance to the issue of the tonnages moved to the 500 Waste Dump.

[54] Mr Atkinson was retained by the appellant as its expert for the purposes of providing a report, and giving evidence. Notwithstanding that, the appellant had not asked Mr Atkinson to say what might be said about the waste dump levels until the Friday before the trial. There is reason to think that had Mr Atkinson been asked he would have been able to point to the 2010 survey, and provide the evidence contained in the DSO Report, both at a much earlier time than occurred.

[55] His report, (Exhibit 17), measured the tonnage of material at the original stockpile at two different dates, the difference being the tonnage moved. The original stockpile was called the LGOS (Low Grade Ore Stockpile). The report revealed he had been to the mine site on at least 40 occasions, to do survey work. It also revealed that in April and July 2010 he had surveyed "**the stockpiles on the Site** (as well as the LGOS)".[42] That clearly referred to the other stockpiles being surveyed, with the obvious possibility that they included the 500 Waste Dump and the DSO Waste Dump.

[56] Notwithstanding that, the appellant had not raised those surveys, or other results, with Mr Atkinson until after receipt of the 2010 survey. The respondent could not do so in any practical sense, but no doubt the reference to surveying other stockpiles was a reason for their subpoena.

[57] In that sense the DSO Report did not contain evidence that could not have been obtained earlier than it was. In fact the appellant did not advance that below or on appeal. What was said was that the receipt of the 2010 survey had prompted the enquiry of Mr Atkinson that led to the production of the DSO Report.

Appellant's contentions on the question of leave

[58] The central points made were that: without the DSO Report the appellant's defence was seriously prejudiced; the court should form a view based on all the survey

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39 AB 102. The 2010 survey was tendered as exhibit 9.

40 See cross-examination of Ms Tyrrell at AB 101-102 and Exhibit 9 at AB 494-495. Ms Tyrrell received it. Exhibit 9 was tendered as going only to credit.

41 Appeal transcript.

42 AB 588, 589; paras 3.2.8 and 3.4.1 (emphasis added).

evidence; the appellant wished to put the DSO Report in through Mr Atkinson and that way mount an attack on Exhibit 2; Exhibit 2 created a misleading impression without the DSO report.[43]

[59] Further: the importance of the DSO Report was that, if true, the density figure of Mr Bowler could not be correct; just because the appellant did not have their own density expert did not mean that Mr Bowler's figure could not be attacked, nor did it have to be accepted; but things changed when the 2010 survey was produced.[44]

[60] Finally the appellant submitted that to permit the respondent to rely upon the 2010 survey in Exhibit 2 but deny the appellant the right to tender the DSO Report was to adopt a double standard.[45]

Respondent's contentions on the question of leave

[61] At trial, the respondent's points included: even if the 2010 survey had been received by Ms Tyrrell in 2010, that document had not come into the possession of the liquidators; the underlying data for the DSO Report had not been disclosed, so that the source documents were not available; the respondent was prejudiced in the ways identified in an affidavit of Mr Humphries; it did not have an expert surveyor and the DSO Report could only be properly countered by a surveyor's report; it hadn't been able to investigate the issues raised by the DSO Report; without expert help the DSO Report was incomprehensible; the DSO Report was produced contrary to r 427 of the *UCPR*, and contrary to the regime imposed by North J, who had thought the matter serious enough to give short reasons for the limits on the expert evidence.[46]

[62] Further: the 2010 survey could be put to Mr Atkinson in cross-examination under r 427(3) of the *UCPR*; if Mr Atkinson was not called then there was no basis for that part of Exhibit 2 that was assumed from the 2010 survey.[47]

Adjournment of the trial

[63] During the course of the argument the question of adjournment of the trial was addressed. The appellant's counsel submitted that the trial should be adjourned so that the respondent could deal with the DSO Report. That was opposed by the respondent, on the basis of prejudice as set out in the affidavit of Mr Humphries. It was evident that the adjournment was addressed on the basis of the DSO Report being admitted into evidence. The appellant did not urge an adjournment if the status of the DSO Report remained unresolved. Further there was no offer by the appellant to pay the costs thrown away by an adjournment.

Reasons for refusing leave

[64] In summary, the reasons the learned primary judge gave for refusing leave to adduce the DSO report were:[48]

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43 AB 135-136.
44 AB 142-145.
45 AB 146. Of course that submission ignored the basis of the tender of Exhibit 2, which was that it **assumed** the accuracy of the figures from the 2010 survey.
46 AB 137-142.
47 AB 148.
48 AB 149-150; T 2-31 to 2-32.

(a) Exhibit 2 having been tendered without objection, the respondent was entitled to seek to rely upon the 2010 survey in cross-examination of Mr Atkinson as that did not infringe the regime put in place by North J; it was dealing with an issue that first arose at trial under r 427(4)(b) of the *UCPR*; and

(b) the regime ordered by North J ought to be adhered to; to grant leave would depart from that regime and unduly prejudice the respondent, for the reasons in the affidavit of Mr Humphries.

Continuation of the trial

[65] At that point the situation was:

(a) Exhibit 2 had been tendered on the express basis that those parts derived from the 2010 survey were included on an assumed basis, namely that the figure in the 2010 survey was accurate;

(b) the respondent's counsel had made it clear that if Mr Atkinson was not called, then those parts of Exhibit 2 that relied on the 2010 survey would fall away;

(c) it was clear that if Mr Atkinson did not give the evidence, either at all or otherwise as to the accuracy of the figure in the 2010 survey, then Exhibit 2 would not survive; and

(d) the respondent's case had closed and Mr Atkinson had not yet been called.

[66] That meant that the only party who could adduce the evidence as to the accuracy of the 2010 survey was the appellant, or the respondent in cross-examination of Mr Atkinson.

[67] The trial continued, with evidence being adduced by the appellant. Mr Atkinson was called and his principal report was tendered. Then the appellant's counsel led the evidence from him as to the figure in the 2010 survey, and that it was accurate. The passage is as follows:[49]

> "MR McCAFFERTY: Might Mr Atkinson be shown exhibit 2, please. Don't worry too much about that document, Mr Atkinson, but I want to take you to the third entry under known variables?--- Known variables, the third entry. Volume of waste in - - -
>
> In 500 metre stockpile?---Yep.
>
> And there's a figure there. Can you just repeat the figure for me?--- 127,403 cubic metres.
>
> And am I right in saying that that's a figure you'd arrived at?---Yeah, that comes from my plan of the 23rd of July, 10 0 1 8 24. It's a volume calculation."

[68] Shortly thereafter, just before Mr Atkinson's evidence-in-chief concluded, the 2010 report was referred to, in these terms:[50]

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49 AB 152 lines 18-28.

50 AB 153 lines 8-21.

> "Can Mr Atkinson be shown exhibit 9, please. It should be the email with the attached survey plan. I hope it's 9. Thank you. Is that a copy of the email – sorry, I'll withdraw that. Is that a copy of the 500 metre survey plan that you undertook?---The email isn't; the attachment is.
>
> Sorry, the attachment. I beg your pardon?---The attachment is a – yeah, it is a copy of my – my survey plan.
>
> Right. And the cubic metreage on that document is 127,403?---Yep. That's the same. Yep.
>
> That's it? Your Honour, I probably don't need to re-tender that. It's been given in evidence through Mr Atkinson, or been confirmed in evidence that it's actually his report – survey. That's the evidence-in-chief, your Honour."

[69] So, the appellant itself led the evidence from the 2010 survey, the truth of which had only been assumed prior to that.

Reasons for judgment

[70] It is evident from the learned primary judge's reasons that he accepted the respondent's witnesses as honest and truthful in their evidence.[51] That meant that he accepted these aspects of their evidence:[52]

(a) the daily load sheets were done, and accurately;

(b) the capacity of the trucks, allowing for the extra volume with the "hungry boards";

(c) the number of trucks suggested by the respondent, to each of the 500 Waste Dump and the DSO Waste Dump;

(d) the density figure calculated by Mr Bowler;

(e) the daily load sheets were provided to the appellant each morning during the job, so that it was fully informed of the cartage details;

(f) the prices were correctly applied to the accurate tonnages; and

(g) the amounts hauled and their destinations were as invoiced.

[71] Consequently his Honour found that the invoices were accurate. It was on this basis that he gave judgment for the respondent.

[72] However, his Honour also accepted the basis of the calculation in Exhibit 2, which with some small adjustments became Exhibit 20. Counsel for the respondent tendered Exhibit 20 as setting out the judgment amount for which it contended. As it happens the figure in Exhibit 20 is less than that reached on the basis of the "hard case", namely using the invoice figures. However, counsel for the respondent indicated by the tender of Exhibit 20 that the respondent would be content with

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51 Reasons [19], [24].

52 Reasons [19]-[24].

judgment for the lower figure. This would have meant that the primary judge did not need to engage in the exercise of examining the "hard case". However, his Honour did so in any event.

Discussion

[73] The appellant contended that it was unfair of the primary judge to permit the tender of the figure in the 2010 survey, but deny the opportunity to tender the DSO Report. It was said that his Honour then assessed the outstanding amount payable to the respondent on an improper basis. Further, the magnitude of the error was said to be that instead of owing about $2 million, the sum would be more like $20,000.

[74] It may be true that one could produce a mathematical result showing $20,000 as the figure derived from the application of the DSO Report. However, there is reason to be cautious about that. First, whatever the DSO Report said would be subject to testing by an alternative expert view, and cross-examination. It is difficult to predict how that might end. Secondly, the DSO Report on its face records the position of the stockpile in June 2011.[53] All relevant cartage ceased in 2010. Therefore, evidence would need to establish that there had been no relevant alteration in the stockpile in the intervening year. Thirdly, on its face it is based on LiDAR data from 2011. It is not possible to know how accurate or relevant that data is.

[75] Of course they are all matters that might have been explored at a trial, where the DSO report could have been tested. However, that does not answer the question whether there was error on the part of the primary judge in refusing leave to adduce the DSO Report.

[76] One must bear in mind that the trial was an adversarial process, the result of close case management, which included orders as to expert reports. This court is not conducting an inquiry as to whether the trial could have been run differently by the parties. The trial was conducted by opposing parties, in each case represented by experienced lawyers, both counsel and solicitors. Choices were made as to how to conduct the trial, and steps were taken for forensic advantage. The only question for this court is whether, given the steps the parties took, the primary judge erred.

[77] The appellant's contention is that the error was to permit the respondent to use the 2010 survey figure, and then for the Court to act upon it, but at the same time refuse the tender of the DSO Report.

Should leave have been granted to lead the DSO Report?

[78] Central to the appellant's case at trial was that the tonnages reflected in the invoices had not, in fact, been transported. It had sought to defend on the basis of the technical defences, and putting the respondent to strict proof, but nonetheless alleging that the appellant was unable to calculate the tonnages taken to each of the waste dumps.

[79] That was the case until the receipt of the 2010 survey, and then the DSO Report. Even though no application was made to amend the defence it was clear that the appellant wished to adduce the two pieces of evidence from Mr Atkinson in order to do at least two things. The first was to directly attack the veracity of the evidence

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53 AB 843.

relating to truck numbers, tonnages, and cost. The second was to attack the density figure adopted by Mr Bowler. The density figure had been the subject of the Mr Bullen's report, which was abandoned, but it assumed new relevance, on the approach the appellant sought to advance, when the DSO Report, combined with the 2010 survey, was properly understood. The contention was that Mr Atkinson's evidence, if accurate, revealed that the tonnages claimed could not be correct, nor could Mr Bowler's density figure be accurate.

[80] Thus even though it was not precisely advanced this way, the appellant was seeking at trial to rely on both the 2010 survey and the DSO Report, even at the cost of an adjournment. The question before the primary judge was whether that should be permitted, as a matter of fairness to the parties.

[81] Relevant to that question was the prejudice that the respondent might suffer. That was said to be shown in the affidavit of Mr Humphries. Close examination of what Mr Humphries said reveals the following:[54]

(a) he exhibited the transcript before North J;

(b) the first time a further document (other than the 2010 survey) was received from the appellant was late on Sunday afternoon, but it was not seen until early the following morning; it was not the DSO Report:

(i) he was not familiar with the terms in it;

(ii) no expert report accompanied it, nor referred to it;

(iii) no source documentation was disclosed;

(c) another document, not the DSO Report, was emailed to him at 6.09 pm on the Monday of the trial;

(d) he had not retained a surveying expert because surveying evidence was not in dispute; nor had he identified such an expert; and

(e) he did not know what other documents there might be apart from the 2010 survey and what formed the DSO Report.

[82] It is evident that Mr Humphries only referred to the inability to deal with the DSO Report on short notice. There was nothing advanced to say that it could not be adequately met if given an appropriate period of time to secure an expert to respond to the new evidence.

[83] The respondent was a company in liquidation. The claim is a money claim brought by the liquidators of the respondent, seeking a return for the creditors of the respondent. There was, in truth, no prejudice suggested that could not have been remedied by an appropriate adjournment of the trial, and an order that the appellant pay the costs thrown away. Albeit that the claim was ultimately to benefit the creditors of a failed company, there was nothing urgent about the claim that would compel the view that it had to be finalised in the period allocated for the trial.

[84] The contentions for the appellant reveal the substantial impact the evidence, if accurate, might have on the claim. The appellant argues it would reduce the claim

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54 AB 181-183.

to something of the order of $20,000, rather than $2 million. That may or may not be the outcome, depending on whether the evidence is accepted and whether it is accurate. However, the appellant's right to a fair trial was reflected in its desire to advance a case based on the two pieces of evidence from Mr Atkinson.

[85] There can be little doubt that once the 2010 survey and the DSO Report surfaced, and the respondent and appellant wished to rely on one or other of them, the real issues in controversy in the proceedings changed. True it is that the appellant did not seek to amend its pleading to reflect the new points which flowed from the DSO Report; however, courts should not take an unduly narrow approach to ascertaining the real issues in controversy, even if they are not sufficiently expressed in the pleading.[55]

[86] Insofar as the proceedings before the primary judge reflected the product of orders made by North J, as part of case management, such a regime is normally imposed in an effort to obtain the objectives of the *UCPR*, namely timely disposal of proceedings at an affordable cost. However, the paramount purpose must still be a just resolution of the controversy between the parties. Speed and efficiency, in the sense of minimum delay and expense, are tools in order to achieve that end.[56]

[87] Whilst there has been some modification to the previously held view that an order for costs occasioned by, for example, late amendment resulting in an adjournment, would overcome injustice to the opponent,[57] that has mostly been expressed in relation to the strain that litigation imposes on litigants, and in particular, litigants who are individuals.[58]

[88] In *Aon Risk Services*[59] the court was considering a rule applicable to civil proceedings, which was the equivalent of r 5 in the *UCPR*.[60] Albeit in the context of a late amendment, the court referred to the competing considerations where a case changes late in the pre-trial process, or at trial:[61]

> The objectives stated in r 21 do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will. Factors such as the nature and importance of the amendment to the party applying cannot be overlooked. Whilst r 21 assumes some ill-effects will flow from the fact of a delay, that will not prevent the parties dealing with its particular effects in their case in more detail. It is the extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to follow and that which is shown, which are to be weighed against the grant of permission to a party to alter its case. Much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their

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55 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, at [83].

56 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, at [98].

57 See, for example, *Cropper v Smith* (1884) 26 Ch D 700, at 711.

58 *The Commonwealth v Verwayen* (1990) 170 CLR 394, at 464-465; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, at [100]-[101].

59 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.

60 Rule 21, the subject of consideration in *Aon*, appears at paragraph [60] of that decision.

61 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, at [102]-[103].

> case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates. Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court's discretion. Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment.
>
> The fact that an explanation has been offered for the delay in raising the defence was regarded as a relevant consideration in *JL Holdings*.[62] Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules."

[89] In this case, an explanation was given for the change in the appellant's case. Notwithstanding that closer attention to Mr Atkinson's report would have earlier revealed the fact that he had surveyed other stockpiles, it became apparent when the 2010 survey was produced on the eve of trial. Clearly each side had previously had a copy at some time in 2010, but it had passed from the respondent's collective memory (particularly as it had gone into liquidation), and the appellant did not realise its significance. That significance only dawned directly on the eve of trial.

[90] It was therefore at the last possible minute that anyone signified an intention to rely upon the 2010 survey. Since that added certainty to the figure for the 500 Waste Dump, one can well understand it triggering the request to ascertain if certainty could be given to the DSO Waste Dump. In that sense both issues arose for the first time on the eve of trial.

[91] In terms of the factors in *Aon Risk Services*, there can be little doubt about the importance to the appellant of the DSO Report. On its case, the impact in dollar terms was very substantial. When seen against it, the costs of any adjournment paled into insignificance.

[92] In terms of whether costs of an adjournment would not be an adequate panacea for the inconvenience to the respondent, I have already mentioned the fact that the claim was brought by the liquidators of the respondent, seeking a return for creditors. The respondent was hardly the sort of litigant reflected in those cases where costs were held to be inadequate.

[93] In my respectful opinion, the primary judge allowed himself to be swayed too much by the question whether the new evidence was contrary to the pre-trial regime, or contrary to r 427 of the *UCPR*. A more fundamental question was whether the unfairness to the appellant in refusing it the chance to go to trial with that evidence, was outweighed by the unfairness to the respondent in allowing it in with an appropriate adjournment, protected by an order for costs.

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62 *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, at 152.

[94] Given that the legitimate interests of the respondent could have been protected by an adjournment for a period sufficient for it to respond properly to the new evidence, and a costs order, it was, in my respectful opinion, an error to insist on the trial proceeding on the basis of the appellant's being prevented from adducing the evidence it wished, albeit produce late and in the face of the pre-trial orders.

Conclusion and disposition

[95] For the reasons above I would allow the appeal.

[96] The judgment was for $2,249,912.08, which was the total of four components of the overall claim.[63] That part which related to the amount owing under the SMSA (the subject matter of the appeal) was $1,927,622.82. The remaining three components, totalling $322,289.26, were not the subject of challenge on appeal. They were:

1. the Esperanza Creek Contract variations, $72,020.31;

2. additional work (claims 1 to 6), $197,088.35;

3. miscellaneous work (paragraphs 17 to 19 of the statement of claim, not challenged), $53,180.60.

[97] Therefore, only that part of the judgment which relates to the amount owing under the SMSA should be set aside. The question of the impact of the unchallenged part of the judgment on the costs of the trial should be reserved to the judge who hears the balance of the trial.

[98] The orders I propose are:

1. Appeal allowed.

2. Set aside the judgment given on 31 May 2013 and substitute in lieu thereof, judgment for the Plaintiff against the Defendant for the sum of $322,622.82.

3. Set aside the orders made by the primary judge on 19 June 2013.

4. Remit the proceedings to the trial division for a retrial limited to the question of what amount (if any) is owing to the respondent under the Surface Mining Service Contract.

5. Reserve the question of the costs of the proceedings on 27 and 28 May 2013, the interest payable on the judgment for $322,622.82, and the costs arising from order 2 made on 31 May 2013, to the judge hearing the trial.

6. The respondent is to pay the appellant's costs of the appeal, to be assessed on the standard basis.

[99] **BODDICE J:** I have read the reasons for judgment of Holmes JA and Morrison JA. I agree, for the reasons given by Holmes JA, the appellant should have been permitted to adduce the further report, with the respondent being given an adjournment to obtain any further evidence in response to that report.

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63 Reasons [41].

[100] Whilst the 2010 survey had, at some point in time, been in the possession of both the appellant and the respondent, it only assumed significance on the eve of the trial when it was produced in response to a subpoena issued by the respondent to an expert witness whose report was relied upon by the appellant. It was against that background the primary judge had to determine what was, in substance, an application for leave to adduce further expert evidence.

[101] In determining that application, it was relevant for the primary judge to consider all of the circumstances. Those circumstances included the significance of the evidence, as well as the pre-trial regime for the exchange of expert evidence. The contents of the 2010 survey were very relevant to the determination of the central issue in dispute between the parties. Depending on whether it was accepted as accurate, it may have been the difference between a substantial judgment in favour of the respondent, and a judgment which resulted in little being awarded to the respondent.

[102] Against that background, the interests of justice favoured allowing the appellant the opportunity to lead that further expert evidence. Whilst the consequence of such an outcome, in practical terms, was an adjournment of the trial, the unfairness to the appellant in refusing it the opportunity to lead that evidence far outweighed any prejudice to the respondent by any adjournment.

[103] I agree with the orders proposed by Morrison JA.