SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd and Ors v Monto Coal 2 Pty Ltd and Ors* [2014] QSC 282
PARTIES:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST** ACN 097 049 315 (First Plaintiff) **EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST** ACN 010 309 529 (Second Plaintiff) **H & J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H & J TRUST** ACN 077 333 736 (Third Plaintiff) **v** **MONTO COAL 2 PTY LTD** ACN 098 919 414 (First Defendant) **MONTO COAL PTY LTD** ACN 098 393 072 (Second Defendant) **MACARTHUR COAL LIMITED** ACN 096 001 955 (Third Defendant)
FILE NO/S:	8609 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2014, 4 September 2014
JUDGE:	Boddice J
ORDER:	**The Defendants' application is dismissed. I shall hear the Parties as to costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the

plaintiffs claimed damages for breach of contract arising from the defendants' alleged conduct in breach of a joint venture agreement – where the defendants make application for orders striking out nominated paragraphs of the plaintiffs' amended consolidated statement of claim – whether the only pleaded breach of contract occurred no later than 16 May 2005 – whether damages must be assessed as at the date of breach without regard to actual events post 16 May 2005 – whether the nominated paragraphs of the plaintiffs' amended consolidated statement of claim should be stuck out

Ailakis v Olivero (No 2) (2014) WASCA 127, cited
The Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, cited
Hadley v Baxendale (1854) 2 CLR 517, cited
Jamieson v Westpac Banking Corporation Limited [2014] QSC 32, cited
Kizbeau Pty Ltd v W G & B Pty Ltd (1995) 184 CLR 281, followed
Malec v JC Hutton (1990) 169 CLR 638, followed
Mio Art Pty Ltd v Macequest Pty Ltd, cited
Wenham v Ella (1972) 127 CLR 454, cited

COUNSEL: W Sofronoff QC with J Chapple for the plaintiffs
J Karkar QC with D Kelly QC for the defendants

SOLICITORS: Holding Redlich for the plaintiffs
Corrs Chambers Westgarth for the defendants

[1] **BODDICE J**: On 27 February 2014, an application by the Defendants for certain paragraphs of the Plaintiffs' proposed amended consolidated statement of claim to be struck out, and other associated relief, was dismissed. By amended application filed 4 September 2014, the Defendants now make application for orders striking out nominated paragraphs of the Plaintiffs' amended consolidated statement of claim. The application is brought pursuant to rules 162, 171 and 684 of the *Uniform Civil Procedure Rules* 1999 ("the *UCPR*") as well as the Court's inherent jurisdiction.

[2] The application relates to pleaded conduct of the Defendants post 16 May 2005, and the particulars of damages. At issue is whether, on a proper analysis of the pleading, the only pleaded breach of contract occurred no later than 16 May 2005, and whether damages must be assessed as at the date of breach without regard to actual events post 16 May 2005.

Background

[3] The proceeding arises out of agreements entered into for the development of a large coal deposit near Monto in the State of Queensland ("the Monto Coal deposit"). Prior to October 2001, an entity associated with the Plaintiffs held entitlements over the Monto Coal deposit. On 17 October 2001, that entity entered into a contract

with the First and Second Defendants. This contract, known as the Heads of Agreement, provided for the purchase of the Monto Coal deposit by the Plaintiffs and the First Defendant. The Heads of Agreement envisaged that on completion of that purchase, a further agreement, known as the Joint Venture Agreement, would be entered into for the purpose of exploring, developing and exploiting the Monto Coal deposit.

[4] On 16 May 2002, the Joint Venture Agreement was entered into by the Plaintiffs and the First Defendant. Relevantly, it provided for the exploration and development of mining operations at the Monto Coal deposit in two stages. Stage 1 involved the development of a mine producing between 1 million and 1.5 million tonnes of saleable coal per annum. Stage 2 involved the development of a mine with the expectation of producing 10 million tonnes or more of saleable coal per annum. Stage 1 was to be completed within three years from 16 May 2002. Whilst Stage 1 was being undertaken, a Stage 2 feasibility study was to be completed to determine whether or not to undertake Stage 2.

[5] The Joint Venture Agreement provided that each Party was to act in good faith towards the other Parties (including being just and faithful and behaving diligently), and must use all reasonable efforts, having regard to all relevant factors relating to the project and its economic viability, to develop Stage 1 by 16 May 2005. The Parties also agreed to undertake the Stage 2 feasibility study during the Stage 1 mine development (which was defined as "all work necessary in establishing a mine …").

[6] The Parties entered into further written agreements on 16 May 2002. One provided for the appointment of the Second Defendant as manager of the joint venture ("the Management Agreement"). Another provided for the payment of royalties to the Plaintiffs ("the Monto Coal Royalties Deed").

The Claim

[7] The Plaintiffs allege that on 4 July 2003, a Management Committee, made up of representatives of the Plaintiffs and the Defendants, met and a decision was taken to suspend all work on the Monto Coal project. That decision, proposed by the First Defendant and opposed by the Plaintiffs, was passed by reason of the First Defendant's majority holding. As a consequence of it, no progress has been made to achieve the development of Stage 1, notwithstanding the expiry of the three year period for its development, and the Stage 2 feasibility study has not been undertaken. The Plaintiffs allege this constituted a breach of the terms of the Joint Venture Agreement.

[8] The Plaintiffs further allege the Defendants have failed and continue to fail to take any reasonable steps to develop Stage 1, have refused requests by the Plaintiffs to proceed with the development of Stage 1, and have failed and continue to fail to undertake the Stage 2 feasibility study. In doing so, the Defendants have exercised their rights in bad faith, without regard to the best interests of the joint venture, and with regard to extraneous interests and matters which were peculiar or particular to

their own position and to that of the Third Defendant. It is alleged this conduct also constituted a breach of the terms of the Joint Venture Agreement.

[9] The Plaintiffs claim that by reason of the Defendants' breaches of their obligations pursuant to the Joint Venture Agreement, the Plaintiffs have lost the opportunity to earn a profit from the sale of coal from Stage 2, and to earn royalties under the Monto Coal Royalties Deed. Further, or alternatively, the Plaintiffs have lost the opportunity to sell their respective interests in the joint venture at a value which would reflect the stage at which the project would have advanced had the Defendants not breached their obligations under the agreements.

[10] In support of the claim for damages, the Plaintiffs rely on two expert reports. The first, ("the Hall Report") contains financial projections for both Stage 1 and Stage 2 of the project, based on 2002 estimates, with the income projections adjusted to take account of actual coal prices and foreign exchange rates post 2005. The second, ("the Xenith Report") contains forward looking financial projections using a different base date and different price and cost data. These reports form the basis for the particulars of damages delivered by the Plaintiffs.

Pleadings

[11] In order to consider the rival contentions, it is necessary to set out the relevant paragraphs of the pleading.

> "10. The material terms of the Joint Venture Agreement were as follows:
>
> (a) the Participants agree to establish and engage in an unincorporated joint venture on and from 16 May, 2002 known as the 'Monto Coal Joint Venture', for the purpose of carrying out the Monto Coal Project and to develop a mine and associated infrastructure capable of producing 10 million tonnes or more of saleable coal per annum (Clause 2.1);
>
> (b) the Participants agree that they own the joint venture assets as tenants in common in accordance with their respective interests (Clause 2.5); and
>
> (c) the respective interests of each of the parties is:-
>
> (i) Monto Coal 2 – 51%;
>
> (ii) Sanrus – 39.2%;
>
> (iii) H & J Enterprises – 4.9%; and
>
> (iv) Edge Developments – 4.9%;
>
> (Clause 2.2);
>
> (d) the Participants agree that:-
>
> (i) the initial primary purpose of the Joint Venture is to establish Stage 1 although it is acknowledged that it is intended that Stage 2 also be developed (Clause 4.1(b));

(ii) each of their rights, duties, obligations and liabilities were several (Clause 4.1(c)); and

(iii) each Participant was to act in good faith towards the other Participants including:-

A. being just and faithful in all activities and dealings with the other Participants in relation to the Joint Venture; and

B. attending diligently to the conduct of all activities in relation to the Joint Venture;

(Clause 4.1(f)(ii));

(e) the Participants must use all reasonable efforts:-

(i) to obtain the grant of a mining lease in respect of the Monto Coal deposit; and

(ii) to, having regard to all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project, develop Stage 1 within three years from 16 May, 2002;

(Clauses 1 and 5.1);

(f) the Participants agree to undertake the Stage 2 Feasibility Study during the Stage 1 Mine Development (Clause 6);

(g) Stage 1 meant Mining Operations producing between 1,000,000 and 1,500,000 tonnes of saleable coal per annum (Clause 1);

(h) Stage 2 meant Mine Development and Mining Operations beyond Stage 1 with the expectation of producing 10 million tonnes or more of saleable coal per annum (Clause 1);

(h)(i) Mine Development meant all the work necessary in establishing a Mine and associated infrastructure capable of undertaking Mining Operations (clause 1 Definitions);

(h)(ii) Mining Operations meant in respect of any area within a mining lease within the Project Area;

(i) The exploration and prospecting for Coal;

(ii) Clearing, prestripping and otherwise preparing any part of the Project Area including in a mining lease for mining and ancillary or associated operations;

(iii) Taking, examining, analysing and reporting on bulk samples of Coal; and

(iv) The mining, beneficiation and handling and transportation of Coal.

(Clause 1, Definitions)

(h)(iii) Stage 2 Feasibility Study meant a bankable feasibility study to determine whether or not to undertake Stage 2 which includes:

(i) Exploration for Stage 2 to the extent reasonably necessary to prove up the Stage 2 resource to the extent necessary for a potential participant to decide to become a Participant;

(ii) Mining studies required to define the method of mining and determine costs for the mining process for Stage 2;

(iii) The costing and conceptual design of the coal preparation plant for Stage 2;

(iv) The costing of the capital required for Stage 2;

(v) All reasonably necessary environmental studies; and

(vi) The study into transportation options for Stage 2 but excluding design costs.

(Clause 1, Definitions)

(i) Monto Coal 2 agrees to be solely liable for, and to meet all cash calls for joint venture expenditure, relating to (*inter alia*) the Mine Development for Stage 1, obtaining the mining lease for Stage 1, the Stage 2 Feasibility Study, and proving up the entire resource within the Tenements to a minimum aggregate amount of $5,700,000 (not including the costs incurred in proving up the entire resource within the Tenements) (Clause 5.2);

(j) subject to the preceding subclause, each Participant agreed to contribute by way of cash calls to the joint venture expenditure on a pro-rata basis in accordance with its respective Interest (Clause 2.4);

(k) Joint Venture Expenditure meant all capital and operating costs, charges, expenses, fees, taxes (other than income or capital gains taxes) and other payments and expenditure of and incidental to the conduct of the Monto Coal Project (Clause 1);

(l) each Participant will receive and take in kind its share of all coal at the time of its removal from the Project Area and will separately dispose of its share of coal for its own account (Clause 2.7);

(m) the Management Committee (comprised of one Representative of each Participant with more than 5% interest in the Joint Venture) was responsible for the management and control of the Joint Venture (Clauses 7.1 and 7.3);

(n) each Representative on the Management Committee had an equivalent voting entitlement in proportion to their interest in the Joint Venture (Clause 7.11);

(o) each Representative on the Management Committee was required to exercise its vote in the best interests of the Joint Venture (Clause 7.5);

(p) in determining what was in the best interests of the Joint Venture:

(i) the Representatives were not entitled to have regard to:-

A. interests which were extraneous to the Joint Venture; and

B. interests or matters which were peculiar or particular to that Participant (Clause 7.6(a));

C. each Representative must consider any matter or proposed resolution before the Management Committee for consideration at its meetings, from the perspective of a reasonable, direct or indirect equity investor in a coal mine in Australia;

D. regard must be had to the relationship and purpose of the Joint Venture as outlined in clause 4.1; and

E. it is acknowledged that an important purpose of Stage 1 is the obtaining of market acceptance for the Coal (Clause 7.6);

(q) the Participants agree to appoint Monto Coal as the Manager to manage the Monto Coal project in accordance with the Management Agreement (Clause 8);

(r) notwithstanding anything to the contrary in the Joint Venture Agreement, the Management Committee must always approve the expenditure of sufficient sums as will enable compliance with any contractual obligations of the Joint Venture and any minimum expenditure requirements imposed by any Approval or law in respect of the Tenements (clause 7.21);

(s) 'Approval' was defined to mean any approval, consent, authorisation and permission which may be necessary pursuant to any laws (including statutes), Government guidelines and other enactments having the force of law of the Commonwealth of Australia and the State of Queensland which may be necessary for the conduct of any part of the Monto Coal Project (Clause 1, Definitions);

(t) the Management Committee has full and complete power to give all approvals and make all decisions and determinations required or permitted to be given or made by the Participants pursuant to the Joint Venture Agreement with respect to the Monto Coal Project and the Joint Venture Assets, provided that the Management Committee in exercising any power or authority, must comply with all voting and other requirements set out in the Joint Venture Agreement relating to the Management Committee and its decision making process;

(u) approvals of the Management Committee were to be made by simple majority vote of the votes cast at the meeting at which a quorum is present except for certain matters which required a 75% majority vote of the Interests of the Participants whose Representatives attend that Meeting and were entitled to vote, which matters included whether Mine Development of Stage 2 should be undertaken;"

[Underlining omitted]

"11. On a proper construction of the Joint Venture Agreement, Monto Coal 2 was:-

(a) required to use all reasonable steps to develop Stage 1 of the mine by 16 May, 2005;

(b) required to pay for all expenditure associated with the Stage 1 Mine Development and all costs incurred in proving up the entire resource within the Tenements;

(c) required to undertake the State 2 Feasibility Study during the Stage 1 Mine Development;

(d) required to pay for the Stage 2 Feasibility Study; and

(e) required to exercise its right to vote on the Management Committee for the Monto Coal Joint Venture;

(i) in good faith and without regard to interests which were extraneous to the Joint Venture and interests which were peculiar to its own position or that of Macarthur Coal;

(ii) in good faith with regard to its requirement to attend diligently to meeting all expenditure associated with the development of Stage 1, the Stage 2 Feasibility Study, and in proving up the entire resource within the Tenements;

(iii) having regard to the initial primary purpose of the joint venture to establish Stage 1 and the intention to develop Stage 2;

(iv) having regard to the fact that an important purpose of Stage 1 was to obtain market acceptance of the Coal;

(v) to ensure the approval of the expenditure of sufficient sums to comply with its obligation to develop Stage 1 by 16 May 2005 and to enable the Stage 2 Feasibility Study to be undertaken;

(vi) to ensure Stage 1 was developed by 16 May 2005."

[Underlining omitted]

….

"17. On 4 July, 2003 at a Management Committee meeting of the Monto Coal Joint Venture:-

(a) Monto Coal 2 proposed a motion to suspend all work on the Monto Coal Project;

(b) Monto Coal 2 voted in favour of the motion to suspend;

(c) Edge, H & J Enterprises and Sanrus opposed the motion;

(d) the Management Committee passed the motion to suspend all work on the Monto Coal Project; and

(e) the motion was passed with 51% in favour being comprised of Monto Coal 2's vote, with 49% (being comprised of the votes of Edge, H & J Enterprises and Sanrus) declining to vote."

[Particulars omitted]

….

"19. Since the suspension decision:-

(a) no progress has been made to achieve the development of Stage 1;

(b) three years from the commencement date of the agreement has passed without achieving the development of Stage 1; and

(c) the Stage 2 Feasibility Study has not been undertaken."

[Underlining omitted]

"20. Monto Coal 2 has:-

(a) voted in favour of a resolution of the Management Committee to suspend all work on the Monto Coal Project and thereafter has used its majority interest in the Joint Venture to maintain a suspension;

(b) failed and continues to fail to take any reasonable steps to develop Stage 1 of the mine;

(c) ignored or refused requests by the Plaintiffs to proceed with the development of Stage 1 and to obtain the mining lease;

(d) failed and continues to fail to undertake the Stage 2 Feasibility Study; and

(e) exercised its right to vote on the Management Committee:

(i) in bad faith without regard to the best interests of the Joint Venture;

(ii) with regard to extraneous interests and to interests and matter which were peculiar or particular to its own position and to that of Macarthur Coal."

[Particulars and underlining omitted]

"21. At the time it voted to suspend all work on the Monto Coal Project and at all times thereafter in subsequently maintaining that suspension, Monto Coal 2 did so in order to:

(a) avoid Monto Coal 2 having to bear all of the cash calls for joint venture expenditure for the Mine Development for Stage 1 of the Monto Coal Project, and for undertaking the State 2 Feasibility Study to a minimum aggregate amount of $5,700,000;

(b) avoid Monto Coal 2's liability to meet all Cash Calls for Joint Venture Expenditure for all costs incurred in proving up the entire resource within the Tenements, which cost was in addition to its obligation to pay for minimum aggregate amount of $5,700,000;

(c) avoid issuing the Macarthur Coal shares pursuant to the Asset Sale Agreement;

(d) improve its position to renegotiate the Joint Venture Agreement and the Asset Sale Agreement, such that the other Participants shared the burden of the capital costs of developing Stage 1 of the Monto Coal Project, and the costs of undertaking the Stage 2 Feasibility Study and in proving up the entire resource and/or reduce or delay payment of the consideration payable under the Asset Sale Agreement for the Sale Interest; and

(e) delay the issue of the Macarthur Coal shares pursuant to the Asset Sale Agreement; and

(f) prevent the development of the Monto Coal Project unless and until:-

(i) the Plaintiffs agreed to amend the Joint Venture Agreement and the Asset Sale Agreement to terms more favourable to Monto Coal 2 and Macarthur Coal;

(ii) alternatively, Monto Coal 2 had disposed of a portion or all of its interest in the tenements and in the Monto Coal Project on terms acceptable to Monto Coal 2 and Macarthur Coal."

[Particulars and underlining omitted]

"22. The conduct of Monto 2 pleaded in paragraphs 17(a) and (b), 19, 20(a), 20(b), 20(c), 20(d), 20(e) and 21 was a breach of its obligations pleaded in paragraphs 10(d)(i) and (iii), 10(e), 10(f), 10(i), 10(o), 10(p), 10(r) and 11 herein in that Monto Coal 2 thereby:-

(a) frustrated the primary purpose of the Joint Venture;

(b) failed to act in good faith towards the Plaintiffs and, instead, acted in bad faith;

(c) failed to be just and faithful in its activities and dealings with the Plaintiffs;

(d) failed to attend diligently to the conduct of its activities in relation to the Joint Venture;

(e) failed to use all reasonable efforts to obtain the grant of a mining lease in respect of the Monto coal deposit;

(f) frustrated the undertaking of the Stage 2 feasibility study;

(g) caused its representative on the Management Committee to vote otherwise than in the best interests of the Joint Venture;

(h) prevented the Manager from using all reasonable efforts to obtain a mining lease;

(i) preferred its own interests and those of Macarthur Coal to the best interests of the Joint Venture;

(j) had regard to interests extraneous to the Joint Venture;

(k) caused its Representative on the Management Committee to have regard to interests which were peculiar to its Representative's own position;

(l) did not act in the best interests of the Joint Venture; and

(m) evinced an intention not to proceed with the development of the Monto Coal Project;

(n) failed to develop Stage 1;

(o) failed to have regard to the relationship and purpose of the Joint Venture to develop Stage 1 and the intention to develop Stage 2;

(p) in determining what was in the best interests of the Joint Venture for the purpose of exercising its vote, failed to acknowledge that an important purpose of Stage 1 was to obtain market acceptance for the Coal;

(q) failed to undertake the Stage 2 Feasibility Study;

(r) failed to pay for the Mine Development for Stage 1 and the costs of the Stage 2 Feasibility Study to a minimum aggregate of $5,700,000;

(s) failed to pay for all costs incurred in proving up the entire resource within the Tenements;

(t) prevented the development of Stage 2."

[Underlining omitted]

"23. By reason of Monto Coal 2's breaches of the Joint Venture Agreement:-

(a) the development of Stage 1 has not been achieved;

(b) the Stage 2 Feasibility Study has not been undertaken;

(c) the Plaintiffs have lost the opportunity to earn a profit from the sale of coal from Stage 2 and to earn Royalties under the Monto Coal Royalty Deed;

(d) further or alternatively, the Plaintiffs have lost the opportunity to sell their respective Interests in the Joint Venture at a value which would reflect the stage to which the

Monto Coal Project would have advanced, had Monto Coal 2 not breached its obligations; and

(e) the Plaintiffs have thereby suffered loss."

[Particulars and underlining omitted]

….

"27. Since 16 May, 2005, Monto Coal 2:-

(a) has ignored and/or refused requests by the Plaintiffs to proceed with the development of Stage 1;

(b) has failed to progress the development of Stage 1;

(c) has continued to exercise its voting power on the Management Committee to maintain the suspension of all development of the mine;

(d) has failed to undertake the Stage 2 Feasibility Study;

(e) continues to exercise its right to vote on the Management Committee to prevent the development of the mine in bad faith and having regard to interests peculiar to its own position and to that of Macarthur Coal;

(f) has acted to frustrate the primary purpose of the Joint Venture;

(g) has failed to act in good faith towards the Plaintiffs and, instead, acted in bad faith;

(h) has failed to be just and faithful in its activities and dealings with the Plaintiffs;

(i) has failed to attend diligently to the conduct of its activities in relation to the Joint Venture;

(j) has failed to use all reasonable efforts to obtain the grant of a mining lease in respect of the Monto coal deposit (other than the Mining Lease for Stage 1);

(k) has caused its representative on the Management Committee to vote otherwise than in the best interests of the Joint Venture;

(l) has preferred its own interests and those of Macarthur Coal to the best interests of the Joint Venture;

(m) has had regard to interests extraneous to the Joint Venture;

(n) has caused its Representative on the Management Committee to have regard to interests which were peculiar to its Representative's own position;

(o) has not acted in the best interests of the Joint Venture; and

(p) has evinced an intention not to proceed with the development of the Monto Coal Project."

[Particulars omitted]

"28. The conduct of Monto Coal 2 referred to in paragraphs 20 and 27 was in breach of Clauses 2.1, 4.1(b), 4.1(f), 5.1, 5.2, 6, 7.5, 7.6, 7.21, 7.22, 8.2 and 9.3 of the Joint Venture Agreement."

[Underlining omitted]

[12] In response to a request for particulars of their loss, the Plaintiffs provided the following particulars:

" 'Further or alternative, the Plaintiffs have lost the opportunity to sell their respective interests in the Joint Venture at a value which would reflect the stage to which the Monto Coal Project would have advanced, had Monto Coal 2 not breached its obligations'

Particulars

1. The Plaintiffs repeat and rely upon paragraphs (a) to (f) of the particulars to paragraph 23(c) hereof;

2. The Participants would have diligently attended to the development of Stage 2, by:

   a) Commencing the development of Stage 2 between May and July 2005;

   b) Obtaining necessary mining approvals and leases to enable Stage 2 mining to proceed;

   c) Completing constructions of the rail upgrade within 3 years of commencing development of Stage 2;

   d) Completing construction of the Coal Handling and Processing Plant within 3 years of commencing development of Stage 2;

   e) Ramping up the production of coal from 875,000 tonnes in May 2006 to 5 million tonnes in June 2009;

   f) Further ramping up production from 5 million tonnes in June 2009 to 10 million tonnes from 2011 onwards;

3. The Plaintiffs would have refrained from selling their interest in the project until between July 2009 and July 2011 to maximise the value of that interest;

4. The value of the Plaintiffs' interest in the project as at July 2009 was $1,301,761,000 calculated as further particularised in schedule 1 hereof;

5. The value of the Plaintiffs' interest in the project as at July 2010 was $1,641,371,000 calculated as further particularised in schedule 2 hereof;

6. The value of the Plaintiffs' interest in the project as at July 2011 was $1,698,745,000 calculated as further particularised in schedule 3 hereof;

7. Further or in the alternative to paragraphs 4, 5 and 6 hereof the Plaintiffs would have sold their interest in the royalty payable under the royalty deed:

   a) As at July 2009, for the sum of $39,908,000 as further particularised in schedule 1;

   b) As at July 2010, for the sum of $46,994,000 as further particularised in schedule 2;

   c) As at July 2011, for the sum of $51,170,000 as further particularised in schedule 3.

8. Alternatively to paragraphs 3, 4, 5 and 6 hereof, the Plaintiffs would have sold their interest in the project:

   a) In July 2005, at a value of $101,615,000, as further particularised in schedule 4 hereof;

   b) In July 2006, at a value of $138,762,000, as further particularised in schedule 5 hereof;

   c) In July 2007, at a value of $250,346,000 as further particularised in schedule 6 hereof;

   d) In July 2008, at a value of $1,249,715,000 as further particularised in schedule 7 hereof.

9. Alternatively to paragraph 7 hereof and further or in the alternative to paragraph 8 hereof, the Plaintiffs would have sold their interest in the royalty payable under the royalty deed:

   a) As at July 2005, for the sum of $15,564,000 as further particularised in schedule 4 hereof;

   b) As at July 2006, for the sum of $18,168,000 as further particularised in schedule 5 hereof;

   c) As at July 2007, for the sum of $21,701,000 as further particularised in schedule 6 hereof;

   d) As at July 2008, for the sum of $37,875,000 as further particularised in schedule 7 hereof.

10. In the alternative to paragraphs 1-9 hereof, after May 2005, had the Defendants:

   a) performed their contractual obligations in paragraphs 9, 10(a), 10(d), 10(e)(i), 10(m), 10(n), 10(o), 10(p), 10(r), 10(t), 10(u), 11(b), 11(e); and

   b) not acted in the manner pleaded in paragraphs 17, 19(a), 20(a), 20(b), 20(c), 20(e), 21, 22(a), 22(b), 22(c), 22(d), 22(e), 22(g), 22(h), 22(i), 22(j), 22(k), 22(l), 22(m), 22(n), 22(o), 22(p), 22(t), and 27(a), 27(b), 27(c), 27(e), 27(f), 27(g), 27(h), 27(i), 27(j), 27(k), 27(l), 27(m), 27(n), 27(o), 27(p), and (in respect of Macarthur Coal) 30;

the Plaintiffs would have sold their interest in the Monto Coal Project in its undeveloped state, but with the prospect of it being developed;

c) in July 2005, for $88,957,000;

d) in July 2006 for $88,957,000;

e) in July 2007 for $63,541,000;

f) in July 2008 for $152,498,000;

g) in July 2009 for $254,163,000;

h) in July 2010 for $193,099,000;

i) in July 2011 for $160,916,000;

as further particularised in schedule 8 hereof."

Defendants' submissions

[13] The Defendants contend the core of the Plaintiffs' case is the allegation in paragraph 11 of the pleading. This allegation, that on the proper construction of the Joint Venture Agreement, the first defendant was required to use all reasonable steps to develop Stage 1 of the mine, and to undertake the Stage 2 feasibility study, by 16 May 2005, amounts to a positive allegation the terms of the Joint Venture Agreement were breached by no later than 16 May 2005, as Stage 1 had not been developed by that date, and the Stage 2 feasibility study had not been undertaken, contrary to the absolute obligation under the Joint Venture Agreement.

[14] The Defendants submit the Plaintiffs have not pleaded any continuing obligation post 16 May 2005 and the pleaded conduct by the Defendants post 16 May 2005 cannot be relevant to the breach of contract by 16 May 2005. The inclusion of this irrelevant pleaded conduct is embarrassing and prejudicial to the proper determination of the Plaintiffs' claim. Those paragraphs ought to be struck out.

[15] The Defendants further submit the Plaintiffs' damages are properly to be assessed at the date of breach, having regard to the circumstances in existence or contemplation at 16 May 2005.[1] No special circumstances have been pleaded by the Plaintiffs to make events subsequent to that date relevant to that assessment. It is therefore irrelevant for any assessment of damages to include calculations based on actual prices of coal or exchange rates in the years after 2005. The Plaintiffs' purported reliance on variations in coal prices, exchange rates and associated matters when quantifying the loss is not in accordance with established principles and is properly to be struck out.

[16] The Defendants further submit the particulars of damage ought to be struck out because the expert reports are based on "a hybrid of integers", with future projections sometimes made as at May 2005, sometimes made as at 2002, sometimes made after 2005, and sometime based on actual results. Costs, however,

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1 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 161-162.

use future projections based on the 2002 financial models in Stage 1 and Stage 2. Such methods are illogical and contrary to principle, and ought to be struck out as they will prejudice a fair trial of the proceeding.

[17] Finally, the Defendants submit the Plaintiffs' particulars of damage seek to "slip in" a claim for a new head of damages not the subject of the Plaintiffs' claim. That head of damage is the loss of opportunity to sell "their interest in the Monto Coal project in its undeveloped state, but with the prospect of it being developed". This plea suffers from an internal inconsistency. If the Defendants had performed their obligations to complete Stage 1, and undertake the feasibility study by 16 May 2005, the mine would not have remained in an undeveloped state, which is the basis for this claimed head of damages.

Plaintiffs' submissions

[18] The Plaintiffs submit the pleaded conduct post May 2005 is relevant. The Plaintiffs plead the Defendants breached two obligations. First, they failed to meet their positive obligation to develop Stage 1, and undertake the Stage 2 feasibility study, by 16 May 2005. Second, they acted in bad faith after May 2005 by preferring their own interests to that of the Joint Venture participants, and have continued to act in bad faith by conduct which has prevented Stage 1 being developed, and prevented the undertaking of the Stage 2 feasibility study. The Defendants had continuing obligations under the Joint Venture Agreement to act in good faith to develop Stage 1, and undertake the Stage 2 feasibility study. The failure to do so constitutes a breach of the Joint Venture Agreement.

[19] The Plaintiffs further submit the particulars of damage, and the expert reports relied upon to support them, properly have regard to actual events since May 2005. In assessing damages for the loss of an opportunity to make a profit the Court may, in an appropriate case, have regard to objective evidence of what actually happened after the date of the breach in assessing that loss.[2] Actual events subsequent to the breach are relevant to any assessment of that loss of opportunity. The expert reports quantify the Plaintiffs' damages by reference to historical coal prices and exchange rates. Those reports properly use projections when determining costs.

[20] The Plaintiffs submit they are entitled to recover all damages which arise naturally from the breach, or which were reasonably in the contemplation of the Parties as a probable result of the breach at the time they made the contract.[3] In undertaking that assessment, a plaintiff is not entitled to be placed in a superior position to that the Plaintiff would have been in had there been performance in accordance with the contract. A calculation of loss made in ignorance of what actually occurred has the potential to either over compensate, or under compensate, a plaintiff.[4]

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2 *Wenham v Ella* (1972) 127 CLR 454 at 464, 473-474.

3 *Hadley v Baxendale* (1854) 2 CLR 517.

4 *Yam Seng Pte Ltd v International Trade Corporation* [2013] EWHC 111 (QB) at [177]-[184]; cited with approval in *Jamieson v Westpac Banking Corporation Limited* [2014] QSC 32 at [242].

Discussion

Post 2005 conduct

[21] The Plaintiffs plead the Joint Venture Agreement imposed an absolute obligation on the Parties to develop Stage 1, and to undertake the Stage 2 feasibility study, by 16 May 2005, and that the Defendants breached that agreement by not developing Stage 1, and by not undertaking the Stage 2 feasibility study, by that date. Such a breach is final, and the failure to remedy does not constitute a continuing breach.[5]

[22] However, the pleaded breaches of contract relied upon by the Plaintiffs extend beyond a breach of that absolute obligation. They include allegations the Defendants failed to act in accordance with their obligations of good faith, and to take reasonable steps to develop Stage 1 and to undertake the Stage 2 feasibility study. A plea the Defendants have failed to act in good faith and to take reasonable steps to develop Stage 1, and to complete the Stage 2 feasibility study, is not inconsistent with a plea the Defendants had a positive allegation to complete those steps by 16 May 2005. It amounts to a separate breach of contract.

[23] The Joint Venture Agreement contains specific provisions requiring the Parties to act in good faith, and in the best interests of the joint venture. The Plaintiffs plead the Defendants had those obligations under the Joint Venture Agreement,[6] and the conduct of the Defendants (including the post 2005 conduct) was a breach of the Defendants' obligations under the Joint Venture Agreement, including the obligation pleaded in paragraph 10(d)(iii) of the pleading.[7]

[24] The Plaintiffs also plead the Defendants' motion to suspend the project was actuated by bad faith, took extraneous matters into account, and was a breach of the terms of the Joint Venture Agreement. Allegations the Defendants have acted in bad faith and contrary to their obligations could support a claim the Defendants have breached the terms of the Joint Venture Agreement. Such allegations are not irrelevant to the claim the Plaintiffs seek to advance against the Defendants. Whether the Plaintiffs succeed in those claims is properly a matter for trial.

[25] The post May 2005 conduct is relied upon to support pleaded further breaches of the Joint Venture Agreement. The Plaintiffs, in accordance with the *UCPR*, are required to plead the material facts relied upon to support those breaches.[8] Those paragraphs are not irrelevant to the Plaintiffs' claim. They will not prejudice a fair trial, and would not unduly delay any trial of the proceeding. The Defendants have ample time to meet any defence to those allegations.

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5 *Larking v Great Western (Nepean) Gravel Ltd* (1940) 64 CLR 221 at 236-237; *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 at 349.

6 Amended consolidated statement of claim, paragraph 10(d)(iii).

7 Amended consolidated statement of claim, paragraph 22.

8 *Mio Art Pty Ltd v Macequest Pty Ltd* [2013] QSC 211 at [60]-[64].

[26] Whilst there is power for this Court to strike out irrelevant allegations from a pleading or any other matter in the pleading which would tend to prejudice or delay the fair trial of the proceeding,[9] the Defendants have not established the complained of paragraphs contain irrelevant allegations, or would prejudice or delay the fair trial of the proceedings. The allegations are also not so tenuous that they are properly to be struck out, either pursuant to the *UCPR*, or the Court's inherent jurisdiction. I decline, in the exercise of my discretion to strike out those paragraphs.

Damages

[27] Absent special circumstances, damages for breach of contract are assessed by reference to the circumstances which existed at the date of the breach.[10] In the case of damages involving a loss of opportunity, an assessment involves "an evaluation of possibilities, not establishing a fact as a matter of history".[11] However, in some circumstances, the value of the lost opportunity is appropriately to be assessed on the facts available, even though those facts occurred after the date at which the value or damages of the lost opportunity will be assessed.[12]

[28] Where, as here, the claim for damages for lost opportunity concerns an asset which, at the time of entering into the contract, was contemplated by the Parties to be income producing in the future, the assessment of the loss of opportunity can include the lost income from that asset.[13] In such circumstances, evidence as to the damage that had in fact flowed from the breach is admissible and relevant,[14] if those events shed light on the value of the loss. Care must be taken to exclude evidence of events which are independent, extrinsic or supervening.[15]

[29] It is clear from the terms of the Heads of Agreement, and the Joint Venture Agreement, that at the time of entering into those agreements, the Parties envisaged that an income producing mine would be developed, with the Plaintiffs to receive royalties from the sale of coal from that mine. As the mine was to be an income producing asset in the future, the claim for damages for loss of opportunity can include a claim for the loss of future royalties. Events relevant to the determination of what that loss is include actual coal prices and foreign exchange rates. There is no basis to strike out reliance upon these events. They are relevant to the assessment of the loss, as claimed by the Plaintiffs.

[30] The Defendants' further contention the reports relied upon to support the Plaintiffs' particulars of damage are inconsistent with each other, having regard to the basis for the calculation of such loss, and contain within them a hybrid of integers which are themselves illogical, also does not constitute a proper basis upon which to exercise

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9 See, generally, *Coe v The Commonwealth of Australia* (1979) 24 ALR 118 at 127; *Robert Bax v Cavenham* [2011] QCA 53 at [16].

10 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 161-162.

11 *Malec v JC Hutton* (1990) 169 CLR 638 at 639.

12 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 293.

13 *Wenham v Ella* (1972) 127 CLR 454.

14 Ibid per Gibbs J at 473-474.

15 *Ailakis v Olivero (No 2)* (2014) WASCA 127 per Martin CJ (with whom Buss JA and Murphy JA agreed) at [133]-[134].

the power to strike out the particulars of damage. If, as the Defendants contend, the reports relied on do contain such matters, cross-examination may render those reports an insufficient basis for the Plaintiffs to succeed in establishing those losses. That, however, is a different proposition to exercising a summary power to strike out, thereby depriving the Plaintiffs of the opportunity to present its case at trial.

[31] Similarly, the Defendants' assertion the particulars of claim include a "new" head of damages is not supported by a consideration of the pleading. The Plaintiffs' claim of damage, on the basis of the loss of opportunity to sell the mine at various stages of development, is open if the Plaintiffs succeed in their claim the Defendants have breached the Joint Venture Agreement by not taking steps since 16 May 2005 to develop Stage 1 and undertake the feasibility study for Stage 2. The taking of such steps would have led to the mine being at different levels of development. There is no basis to strike out this claim.

Orders

[32] The Defendants' application is dismissed. I shall hear the Parties as to costs.