SUPREME COURT OF QUEENSLAND

CITATION:	*Atkinson v Habermann* [2015] QSC 262
PARTIES:	**GREGORY JOHN ATKINSON** (Plaintiff/Applicant) **v** **EDWARD FREDERICK HABERMANN** (Defendant/Respondent)
FILE NO/S:	S 1/2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Bundaberg
DELIVERED ON:	8 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2015
JUDGE:	McMeekin J
ORDERS:	**In the event that no submissions are received by 4pm on 11 September 2015 the orders will be as follows:** **1. That Sean Ryan be appointed as the only expert to give evidence on the following issues in the proceeding:** **a. The quantity of millable timber of each of the species described in paragraph 1(b) of the Statement of Claim standing on the defendant's land as at the date of his inspection;** **b. The quantity of millable timber of each the species described in paragraph 1(b) of the Statement of Claim estimated to have been standing on the defendant's land as at 3rd April 2011; and** **c. The market value of each species of the timber identified pursuant to paragraphs (a) and (b) and, if that value has varied from time to time or over time, the range of values that have applied.** **2. That the defendant grant Sean Ryan, and such other persons as he might reasonably require, such access to the land identified in paragraph 1(a) of the Statement of Claim as is necessary to enable him to**

carry out such inspections as he deems necessary to perform the assessments required by paragraphs 1(a) (b) and (c) of this order.

3. **That the parties jointly provide to Sean Ryan an agreed statement of facts sufficient to enable him to perform his task.**
4. **That there be no communication by a party with Sean Ryan save with the prior agreement of the other party.**
5. **That any communication by one party to Sean Ryan be in writing and a copy of that writing be supplied to the other party forthwith.**
6. **That the parties share equally the cost of obtaining Sean Ryan's opinion as required in paragraph 1 of this order.**
7. **That Sean Ryan provide his report on the matters identified in paragraph 1 of this order to the Registrar of this court.**
8. **That the registrar provide a copy of the report of Sean Ryan to the parties forthwith upon it being received, the parties to meet any cost incurred by the registrar in the provision of that report.**
9. **The parties have liberty to apply on the giving of three days' notice to the other.**
10. **The costs of the application be each respective party's costs in the proceedings.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – EVIDENCE – EXPERT EVIDENCE – whether an expert should be appointed by the court – where Application by plaintiff for the appointment of a single expert pursuant to *Uniform Civil Procedure Rules 1999* r 429I – where Application opposed by defendant

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 155, r 423(c), r 423(d), r 429D, r 429G(1), r 429G(2), r 429H(6), r 429I, r 429K(1), r 429N(2)

COUNSEL: McMillian WT for the applicant

Messenger M (solr) for the respondent

SOLICITORS: Bedford & Associates Solicitors for the applicant

Messenger Legal for the respondent

[1] **McMeekin J:** This is an application by the plaintiff for the appointment of a single expert pursuant to r 429I of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). The application seeks an order that the expert prepare a report "on the issue of millable timber".

[2] The proceedings were commenced in 2012. The plaintiff claims specific performance of a contract or in the alternative damages for its breach. The contract alleged concerns the taking of millable timber by the plaintiff from the land of the defendant. On the plaintiff's case the contract was partly oral and partly written. The plaintiff alleges that the contract was entered into on 3 April 2011 and was to run for four years "wet weather compounding". On the plaintiff's case the contract specified that only certain species of timber be taken.

[3] It is common ground that subsequent to the plaintiff entering onto the defendant's land pursuant to an agreement to take timber (there being a dispute as to the precise terms) he was excluded from the defendant's land albeit on a date not specified in the pleadings. I was told that the exclusion occurred within weeks of the commencement of the agreement.

[4] The damages claimed exceed $1,000,000. I was told that the amount claimed is only an estimate the plaintiff having had no opportunity to go onto the defendant's land since his exclusion and the parties not having being able to agree on whether an independent expert ought to be appointed to assess the value of the millable timber.

[5] Rule 429I provides:

> (1) A party applying to the court for appointment of an expert under rule 429G(2) must serve a copy of the application and the supporting material on each other party to the proceeding.
>
> (2) The supporting material must—
>
> (a) state the issue in the proceeding that expert evidence may help resolve; and
>
> (b) name at least 3 experts who—
>
> (i) are qualified to give expert evidence on the issue; and
>
> (ii) have been made aware of the content of this part and consent to being appointed; and

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

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

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

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

[6] Rule 429G(2) provides:

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

[7] Rule 429K(1) is relevant and provides:

> (1) In deciding whether to appoint an expert under rule 429G(2) or (3) in relation to an issue in a proceeding, the court may consider—
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> (a) the complexity of the issue; and
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> (b) the impact of the appointment on the costs of the proceeding; and
>
> (c) the likelihood of the appointment expediting or delaying the trial of the proceeding; and
>
> (d) the interests of justice; and
>
> (e) any other relevant consideration.

[8] The plaintiff advances two people who claim expertise in the assessment of the market value of standing millable timber. The plaintiff's solicitor deposes to difficulty in locating even those two experts and has not found a third despite reasonable efforts. There is no complaint made about the failure to comply with r 429I(2)(c).

[9] The defendant opposes the appointment of an expert on four grounds:

(a) The application is not specific as to the expert evidence to be called;

(b) The claim for damages does not comply with r 155 UCPR as it does not show the method of calculating damages;

(c) There is no need for a single expert as the claim is for specific performance thus the evidence will not resolve a "substantial issue in the proceedings";

(d) The defendant paying for a single expert which goes to proving the plaintiff's case would not ensure a fair trial of the proceeding.

[10] There is no merit in the arguments in (b), (c) and (d).

[11] It is convenient to deal with the point in (c) first – it is simply wrong. The plaintiff brings his claim in the alternative. The time for election between remedies has not yet arrived. As well, damages will probably need to be assessed whatever view the trial judge takes of the merits of the plaintiff's case or of the appropriate remedy. Thus, the amount of damages remains a live issue. It is certainly a substantial one within the meaning of r 429G(2).

[12] In fact it seems to me that this is a case which would be particularly suited to a single expert being appointed. The assessment of damages necessarily requires that the quantity and value of the millable timber of the relevant species standing on the defendant's land be determined. It is not suggested that this exercise will not require expertise. The interests of justice all seem to point to a need for an expert: the issue of the assessment of damages is not straight forward; the appointment of a single expert will probably assist in limiting the costs; and the receipt of a report from such an expert will probably expedite the trial of the matter, if it is necessary to have a trial. Each of the factors mentioned in r 429K(1) favour the appointment.

[13] As well the defendant's case raises issues that will probably need the assistance of an expert. I note that the defendant's solicitors recognised this in their correspondence to the plaintiff's solicitor of 9 August 2013: "…we are seeking our client's instructions in respect of getting an expert report done in respect of the alleged timber cut and indeed the damage caused by your client". However, neither side has asked that these issues raised in the defendant's counterclaim be addressed by an expert.

[14] As to the argument in (b) above[1] - while the pleading of the method by which the damages are calculated could be more precise there has been no point taken until now – more than three years after the receipt of the pleading – that the defendant has any difficulty with the claim as framed. It is obvious that the plaintiff claims the loss of the profit that he would have received had he been permitted to remove the millable timber standing on the defendant's land of the species identified in the pleading. No particulars have been sought of the claim. Presumably the defendant understands it well enough.

[15] The point in (d) above,[2] is not really directed at the issue of ensuring a fair trial but rather, at the issue of who is to pay. The plaintiff proposes that the cost be shared. That, I think, would be the usual order. The price the plaintiff pays for the advantage of halving the cost is that the plaintiff, like the defendant, will not be permitted, as of right, to call any other expert on the issues.

[16] The way the argument is framed suggests an appeal to r 423(d) UCPR and the ability of a court to permit more than one expert to give evidence on an issue. There is no express argument raised that to ensure fairness more than one expert is needed. And I cannot see why that would be so.

[17] The argument that the expert only goes to assist the plaintiff is not quite accurate. In truth the report should assist both sides. The argument ignores the point that it is in the defendant's interests to limit the damages to a reasonable sum and a fair, unbiased and expert opinion should do that. In any case it is very common for only one side to seek damages and so the argument would be the same in nearly every case. There is no indication in the rules that so universal an argument is relevant to the exercise of the discretion.

[18] The cost of obtaining an expert opinion is high – at least $20,000. I can well understand that the defendant does not want to be saddled with such a cost. However, who pays for the expert is not relevant, so far as I can see, to the fairness or otherwise of the trial.

[19] As well the argument ignores the point that the expectation is that the appointment of the one expert will in fact reduce the costs: r 423(c) UCPR. The hope is that the

[1] See paragraph [9] above.

parties will share the cost of the one expert – here $11,000 each – and not incur the cost of two with the potential for the losing side to be saddled with that double cost.

[20] Finally, it is quite apparent from the rules (particularly see r 429N(2)) and the relevant practice direction (2 of 2005) that the usual order will be the appointment of a single expert unless good reason is shown – see paragraphs (2), (3) and (4) of that practice direction:

> "2. In any proceeding, or intended proceeding, where expert evidence will or may be called, early consideration must be given to the requirements of the Rules, particularly as to the appointment of an expert to be the only expert witness on a particular substantial issue in the proceeding.
>
> 3. Costs sanctions may follow where multiple experts are needlessly retained in relation to an issue (r 429D)
>
> 4. Either before commencement of any such proceeding, or soon afterwards, a party intending to call expert evidence on a substantial issue should raise with all other parties the prospect of their jointly appointing an expert, who would become the only expert to give evidence on that issue (unless the court otherwise ordered) (rr 429G(1), 429H(6))."

[21] Absent some good reason to protect the defendant from the expense I think it should in fairness be shared. That it would not have to be incurred but for the fact that the plaintiff has brought the proceedings is not sufficient reason to depart from what I perceive to be the usual order.

[22] I turn then to the first point argued - that the issue to which the expert's report is to be directed is not sufficiently particularised. There is merit in the point – the phrase the "issue of millable timber" does not identify any issue at all let alone with sufficient precision. It is an essential pre-condition that the supporting material state the relevant issue to be addressed. It is arguable as to whether that has been done here. However, it would waste both time and money to send the parties away on that ground. Rule 5 UCPR discourages such an approach. In discussion with the representatives it seemed to me that the framing of an appropriate issue would not be difficult.

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[2] See paragraph [9] above.

[23] The plaintiff advanced Mr Sean Ryan as an appropriate person to be appointed. He appears to have the relevant expertise and he offers to perform the task required of him for a fixed sum of $22,000 including GST. The only other expert discovered estimates the likely cost at some $12,000 more. The defendant did not suggest any reason to object to the appointment of Mr Ryan, assuming an expert was to be appointed. The various requirements of the rules have otherwise been met.

[24] I indicated to the parties in the course of argument that I was prepared to hear further submissions on the appropriate orders. I presently propose these orders:

1. That Sean Ryan be appointed as the only expert to give evidence on the following issues in the proceeding:
    a. the quantity of millable timber of each of the species described in paragraph 1(b) of the Statement of Claim standing on the defendant's land as at the date of his inspection;
    b. the quantity of millable timber of each the species described in paragraph 1(b) of the Statement of Claim estimated to have been standing on the defendant's land as at 3rd April 2011; and
    c. the market value of each species of the timber identified pursuant to paragraphs (a) and (b) and, if that value has varied from time to time or over time, the range of values that have applied.

2. That the defendant grant Sean Ryan, and such other persons as he might reasonably require, such access to the land identified in paragraph 1(a) of the Statement of Claim as is necessary to enable him to carry out such inspections as he deems necessary to perform the assessments required by paragraphs 1(a) (b) and (c) of this order.

3. That the parties jointly provide to Sean Ryan an agreed statement of facts sufficient to enable him to perform his task.

4. That there be no communication by a party with Sean Ryan save with the prior agreement of the other party.

5. That any communication by one party to Sean Ryan be in writing and a copy of that writing be supplied to the other party forthwith.

6. That the parties share equally the cost of obtaining Sean Ryan's opinion as required in paragraph 1 of this order.

7. That Sean Ryan provide his report on the matters identified in paragraph 1 of this order to the Registrar of this court.

8. That the registrar provide a copy of the report of Sean Ryan to the parties forthwith upon it being received, the parties to meet any cost incurred by the registrar in the provision of that report.

9. The parties have liberty to apply on the giving of three days' notice to the other.

10. The costs of the application be each respective party's costs in the proceedings.

[25] I will allow the parties four days in which to make submissions on the appropriateness of the orders that I have proposed. Should no submissions be received those will be the orders of the Court.