SUPREME COURT OF QUEENSLAND

CITATION:	*Atkinson v Habermann (No 2)* [2016] QSC 294
PARTIES:	**GREGORY JOHN ATKINSON** (Plaintiff) **v** **EDWARD FREDERICK HABERMANN** (Defendant)
FILE NO:	S1 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 December 2016
DELIVERED AT:	Rockhampton
HEARING DATE:	9 December 2016
JUDGE:	McMeekin J
ORDER:	**1. On or before 5pm on 15 December 2016 the parties should confer in an endeavour to agree on the appropriate orders to give effect to the relevant findings and conclusions in these reasons;** **2. In the event that the parties reach agreement in relation to the orders to give effect to these reasons, short minutes of those orders are to be provided to the Associate to McMeekin J by 12pm on 16 December 2016;** **3. In the event that the parties are unable to agree in relation to the orders to give effect to these reasons, the application is adjourned to 10am on 16 December 2016.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS BEFORE TRIAL – where a sole expert has been appointed – where the defendant applies for another expert to be appointed – where there is another expert with a different opinion – where the sole expert was not asked the relevant question – whether another expert should be appointed

Uniform Civil Procedure Rules 1999 (Qld), r 429N

COUNSEL: R Ivessa for the plaintiff
G Allan for the defendant

SOLICITORS: Bedford & Associates for the plaintiff
Messenger Legal for the defendant

[1] **MCMEEKIN J**: The defendant applies for an order pursuant to r 429N(3) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") that Leslie Hawkes, a forestry expert, be appointed an expert to prepare a report in relation to five identified issues, each of the issues relating in one way or another to the "millable timber" on the defendant's land.

[2] I have previously appointed a Mr Sean Ryan as a sole expert under r 429I UCPR to examine three issues. He was appointed over the objection of the defendant but not on grounds of any lack of expertise or that he was for some other reason an inappropriate choice. The concern then was expense. The three issues he was asked to report on were:

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 of 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 values 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.

[3] The proceedings concern a claim by the plaintiff for a declaration that pursuant to a written agreement between the parties dated 3 April 2011 the plaintiff is the holder of a *profit à prendre* over the defendant's land for the removal of timber on those lands and for specific performance of that agreement and alternatively for damages for breach of contract.

[4] Rule 429N provides:

> (1) This rule applies if the court appoints an expert in relation to an issue in a proceeding.
>
> (2) Unless the court otherwise orders, the expert is to be the only expert to give evidence in the proceeding on the issue.
>
> (3) However, the court may, on its own initiative or on application by a party, appoint another expert (the other expert) to prepare a report in relation to the issue if—
>
> > (a) after receiving a report from the expert originally appointed (the first expert), the court is satisfied—

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

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

(b) there are other special circumstances.

[5] The plaintiff concedes that the defendant has satisfied the threshold requirement to enliven the discretion under the rule namely that there is another expert, Mr Hawkes, who has a different opinion to the sole expert already appointed.

[6] Mr Ryan assessed the "final processed value at point of sale" of the relevant timber standing on the land as $774,529.

[7] Mr Hawkes has provided a preliminary opinion only and based on the instructions that he has received from the defendant's side. He has arrived at a value of nil.

[8] Mr Hawkes is critical of Mr Ryan's opinion in several ways. One is that he says that Mr Ryan has not restricted himself to the task that he was asked to perform – namely to assess the various matters in relation to "millable timer" of the species identified. Of the total value of the timber that Mr Ryan has assessed Mr Hawkes claims that $741,969 (ie 95%) relates to timber that is not "millable timber" - the timber is not a milled product but fencing material.

[9] This highlights a critical issue.

[10] The questions that Mr Ryan was asked to address were all premised on the basis that the damages that were in issue related to "millable timber". Counsel for the plaintiff now tells me that the claim is not so restricted. The submission is that the written agreement between the parties did not restrict the plaintiff to taking only millable timber. As pleaded that is so. As pleaded the agreement was that the plaintiff was given "the cutting rights to the specified timbers".

[11] My reasons[1] show that when the matter was first before me the question that the expert was asked to address was referred to by the plaintiff as the "issue of millable timber". The defendant objected that so put the precise issue to be addressed by the expert was not identified. I agreed. It seems that the formula that I eventually settled on did not address the correct issue either.

[12] What seems to have happened is that when the matter was first before me an assumption was made by the lawyers, probably on each side as I received no submissions to the contrary, that to be saleable the timber taken would need to be millable. Counsel for the defendant points out that there is reference in paragraph 1 of the Statement of Claim to "millable timbers" standing on the plaintiff's land, that adding to the confusion and leading the defendant to assume that the claim was so restricted.

[13] Counsel for the plaintiff, who was not counsel previously, now tells me that he is content to strike out the word "millable" in paragraph 1, that the claim as drafted never was so restricted, and that Mr Ryan's report, while it may have addressed a

[1] [2015] QSC 262 at [22].

subject that he was not asked to address, has, as it happens, addressed the crucial issue. The plaintiff through his counsel has intimated an intention to amend the pleading.

[14] It is not yet clear whether Mr Ryan would accept that the timber that he has assessed is not in fact within the terms "millable timber" as it is defined by those in the forestry industry but whether it is or not, it is patently clear now that is not the relevant question. What is in issue is the value of "the cutting rights to the specified timbers" set out in paragraph 2 of the Statement of Claim.

[15] In my view it is premature to consider appointing another expert. What should happen is that the expert appointed needs to be asked the correct question. It may be that his opinion will be the same. Perhaps not.

[16] In addition to the point I have discussed Mr Hawkes says that several of Mr Ryan's critical assumptions are unreliable. He claims that the areas sampled are unrepresentative, that no allowance has been made for inaccessible areas, or areas with demonstrably limited resources, that the report does not refer to the product proposed to be produced or what the market for that product was, nor to the method of calculating log volumes, that the grading system adopted does not meet accepted standards, that the recovery rates assumed are unlikely to be realistically achieved, that the extraction costs assumed are unrealistically low, and that the assumed market prices are generous.

[17] Mr Ryan has not yet had a chance to respond to these criticisms. In my view he should be given that chance before appointing a second expert. It may be that what is in issue is not as fundamental as seems presently to be the case. For the moment I assume that Mr Ryan is able and willing to assist.

[18] There is a further issue as to the date at which the assessment needs to be carried out. As I perceive matters it is not essential that there be any agreement as to what is the correct date only that each date that is contended for is covered by the report.

[19] It is my intention that Mr Ryan be given the opportunity to address not only the millable timber issue but each of the issues presently raised by Mr Hawkes.

[20] I direct:

1. That the plaintiff file any amended Statement of Claim as he might be advised;
2. That the parties confer and settle on a draft letter to Mr Ryan identifying the questions that he should address;
3. That Mr Ryan be briefed with that draft letter along with the preliminary report of Mr Hawkes;
4. That Mr Ryan proceed to prepare his report and when ready that he file a copy of the report with the Supreme Court at Bundaberg and provide a copy to each party;
5. That the present application be adjourned to a date to be fixed to be brought on on the giving of 7 days' notice.

[21] I am hopeful that the parties can agree on a timetable for the completion of the foregoing steps. If so a draft order setting out the timetable is to be provided to my

associate and orders will be made accordingly. If not I adjourn the application to 10am on Friday 16 December 2016.

[22] The defendant should have his costs of the application. While not yet successful it would seem to be unfair that the defendant not be protected given what has occurred.

[23] For the present the parties should bear equally the costs of any additional report from Mr Ryan. If it transpires that while he was asked to address the wrong issue but as it happens has dealt with the question that the parties really need to have addressed then there should be no great increase in costs attributable to the plaintiff's misleading characterisation of his case. To the extent that he has addressed the wrong issue then it would be appropriate that the plaintiff bear the costs. But whether he has done so is not yet obvious. The issue can be revisited in due course when the picture is clearer.