

COLLEGE OF LAW LECTURE: EXPERT EVIDENCE

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1. **MAKITA v SPROWLES**

1.1 Taking an expert's statement is a technical exercise that must be done by reference to the practice notes of the various Courts and Tribunals; the rules of evidence; and the common law as articulated by Heydon JA (as HH then was) in the New South Wales Court of Appeal in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at 743-744 especially at [85] where HH held that an expert statement, at least one in complex matters, must distinguish between the following, so that the basis on which opinions are expressed are "clearly and fully proved":

- (i) instructions received by the expert: these ought be gathered in one place, and listed;
- (ii) assumptions made by the expert: these ought be gathered in one place and listed;
- (iii) observations by the expert and tests performed by him/her; again, these ought be gathered in one place, and listed;
- (iv) the application of the above instructions, assumptions and observations to the question which the expert is asked to consider.

1.2 In other words, the reasoning of the expert must appear clearly and be separated out from the above; and failure to adhere to these requirements may render a report inadmissible.

1.3 The debate still continues as to the precise force of Heydon JA's observations, and particularly as to whether they set too high a standard.¹

1.4 A contrary line of authorities in the Federal Court holds that the *Makita* criteria are "counsels of perfection" going but to weight and to the discretion under Sec 135 of the *Evidence Act* to exclude the evidence: *Sydneywide Distributors Pty Ltd v Red Bull (Australia) Pty Ltd* [2002] FCAFC 157; (2002) 55 IPR 354, where Branson J in discussing the *Makita* principle stated that:

¹ *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42, per McColl JA at [80], [84] and [85]; *Vrahnos v Ozbrand* [2007] NSWSC 791 para [14] Harrison As. J.

“the requirement that an expert opinion be wholly or substantially based on the witness's specialised knowledge is not, in my view, intended to require a trial judge to give meticulous consideration, before ruling on the admissibility of the evidence of the opinion, to whether the facts on which the opinion is based form a proper (in the sense of logically or scientifically or intellectually proper) base for the opinion. Were the position otherwise the smooth running of trials involving expert evidence could be expected to be interrupted by the need to explore in detail, in the context of admissibility, matters more properly considered at the end of the trial in the context of the weight to be attributed to the evidence. It is sufficient for admissibility, in my view, that the trial judge is satisfied on the balance of probabilities on the evidence and other material then before the judge that the expert has drawn his or her opinion from known or assumed facts by reference wholly or substantially to his or her specialised knowledge.”

- 1.5 It may be that the almost statutory force of Heydon JA's observations in *Makita* have been somewhat watered down by the decision of the Court of Appeal in *ASIC v Rich* (2005) NSWCA 152 (especially at 92-135). As Spigelman CJ said at [94]:

"Matters concerning the process by which an opinion was actually formed go to weight, not admissibility."

- 1.6 ***How involved should lawyers become in drafting expert's reports ?***

In *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, Lindgren J said:

“Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s 82(1) of the [*Native Title Act 1992* (Cth)], the requirements of s 79 (and of s [55] as to relevance) of the *Evidence Act* are determinative in relation to the admissibility of expert opinion evidence.”

2. NSW EVIDENCE ACT 1995 PROVISIONS

- 2.1 Sections 55 and 56 stipulate that only relevant evidence is admissible.
- 2.2 Section 76(1) deals with the "The opinion rule" and provides:
- “(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.”
- 2.3 Section 79 provides for an exception to the opinion rule as follows:
- “If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”
- 2.4 The Court can exclude evidence under section 135 of the *Evidence Act*, on the discretionary ground that its probative value is substantially outweighed by the danger that the evidence might cause or result in undue waste of time.

3. PROVISIONS OF THE UNIFORM CIVIL PROCEDURE RULES

- 3.1.1 Part 31 of the UCPR deals with procedures for giving evidence in interlocutory proceedings and at trials. It includes provisions relating to witness statements, Evidence Act Notices, the use of foreign material, plans and models, evidence given on other occasions and production of proof of court documents.²
- 3.1.2 Almost the entirety of Division 2 of Part 31 relates to expert evidence, for example, the admissibility of expert reports, code of conduct for expert witnesses, conferences between expert witnesses, the content and format of expert reports: the list goes on and there is no point reciting what is well set out in the quick index to Part 31, Division 2.
- 3.1.3 Part 31 rule 19 provides that unless directions have been made for the exchange of expert reports, such reports cannot be used at the hearing without the leave of the court.

So for example, the standard Equity List form of Directions makes specific provision for the exchange of expert evidence.

- 3.1.4 Part 31.20 provides wide-ranging powers to give directions relating to expert reports, for example, what issues they should and should not address; and requiring experts to confer either before or after preparing reports.
- 3.1.5 Part 31.22 requires experts to disclose whether they are acting upon a contingency/deferred fee basis.

² This commentary is taken almost verbatim from that in Ritchie’s Uniform Civil Procedure NSW.

- 3.1.6 Part 31.23 requires expert witnesses to comply with the code of conduct set out in Schedule 7.
- 3.1.7 Part 31.24 again gives powers to direct expert witnesses to confer either generally or in relation to specified matters; to endeavour to reach agreement on any matter in issue; and to prepare joint reports specifying matters which are agreed and not agreed and to provide reasons for any disagreement.
- 3.1.8 An interesting twist is the power in Rule 31.24(3) which permits an expert to apply to the court for directions. Normally, it is only a party who is entitled to seek directions.
- 3.1.9 This rule seems to be modeled on the rule which allows liquidators and trustees to apply to the court for directions.
- 3.2 The Commercial and Construction Lists are exempt from the provisions of Part 31, r 19. In other words, when direction are made for the service of evidence, that means both lay and expert evidence; without any need to seek the Expert List judge's permission.
- 3.3 Practice Notes SC Gen 10 is relevant to common law matters. The clear policy for there to be a single expert, chose and paid for by the parties, in relation to each head of damage.
- 3.4 Practice Note SC Gen 10 of 17th August 2005 applies to all "civil appeal and proceedings before the Court".
- 3.5 SC Gen 11 "Joint Conferences of Expert Witnesses", whose object is to facilitate compliance with any direction pursuant to Div 2, Pt 31 UCPR.

In short, experts must meet prior to hearing to define and narrow the issues. Questions can be agreed by the parties or specified by the court. If possible, they should be able to be answered Yes or No. There must a conference between the experts, and a report produced as per Section 28.

- 3.6 It effects a drastic change to the approach to expert evidence, marshaled to the just, cheap and quick finalization of proceedings and an interventionist court to achieve same by actively utilizing powers to make appropriate directions consistent with Section 56 of the *Civil Procedure Act NSW* (2005).
- 3.7 Supreme Court Practice Note No. SC Eq 3: paragraph [43] directs parties to confer as early as possible with a view to reaching agreement as to whether there should be a single expert or a Court Appointed Expert and/or the exchange, concurrently, of experts' reports.
- 3.8 SC Eq 5: "Expert Evidence in the Equity Division."

4. EXPERT WITNESS CODE OF CONDUCT

- 4.1 In *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485 Campbell J doubted at [11] in relation to Code as it formerly was in the Supreme Court Rules whether the definition of “expert witness” is able to catch the situation “where an officer of a party, not engaged for any particular purpose, has, at a time before court proceedings were contemplated, expressed an expert opinion in a report, and that report is tendered in later proceedings.”
- 4.2 In *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2006] NSWSC 1251, Barrett J held admissible an affidavit of the corporate plaintiff’s chief executive, who had experience in corporate finance transactions in the equity capital markets.

Objection had been taken on two bases, one of which was non compliance with the provisions for admissibility of expert evidence ; Holding that he was qualified within the meaning of Sec 79 of the *Evidence Act (1995)*, Barrett J continued :

“10 The fact that Mr Wookey is the plaintiff's main witness and a principal of the plaintiff does not affect the admissibility of his opinion evidence on matters within his expertise. It might well, however, affect the weight that his evidence is ultimately found to deserve. Self-interest may eventually be seen to have compromised objectivity. That is a judgment for the future.

11 It is objected that Mr Wookey 's evidence on the matter at hand does not conform to the requirements in Division 2 of [Part 31](#) of the [Uniform Civil Procedure Rules 2005](#) and that, for that reason, the court must not receive his opinion evidence. The answer to that is that Division 2 of [Part 31](#) is concerned with the evidence of "expert witnesses" as defined by [rule 31.17](#) and situations where experts are retained to provide reports. That is not the case here. Mr Wookey is a witness in the ordinary course who happens to have experience which causes his opinion on the relevant matter to be admissible.”

This is consistent with *Mulkearns v Chandos Developments Pty Ltd*, [2003] NSWSC 1084. in which a party (a licensed real estate agent) sought to give expert evidence under s 79 of the *Evidence Act 1995* (NSW) as to the market value of a property.

Young CJ in Eq noted at para [14] that while the UK position is that the expert evidence a party, or a close friend of a party, ought not be received, expert evidence is admissible in New South Wales from a party or close

associate where the criteria of admissibility (particularly s 79) in the *Evidence Act 1995* (NSW) are made out.

However, HH noted at para [15] that:

“when one gets the situation where a party, without even paying lip service to [the expert witness code of conduct], gets into the box and tries to give expert evidence, when there is no reason why the availability of first class expert evidence has not been presented, then that party starts behind scratch.”

See also para [334] of *ASIC v Rich* [2005] NSWSC 149, where the same opinion was expressed by Austin J by reference to numerous authorities.

5. APPLICATION OF SECTION 79 OF THE EVIDENCE ACT TO REPORTS OF EXPERTS

- 5.1 In *Pan Pharmaceuticals Limited (In Liquidation) v Selim* [2008] FCA 416, Emmett J summarized the relevant principles paras [25] ff:

“25 Four separate functions have been identified as being performed by so called expert witnesses, as follows:

- generalising from experience,
- acting as librarian,
- acting as statistician, and
- acting as advocate.

(See *Arnotts Limited v Trade Practices Commission* [\(1990\) 24 FCR 313](#) at 350-352).

26 A person experienced in a particular discipline may, in the course of a lifetime, accumulate a mass of material about the subject of the person’s expertise, from his or her own practice, from journals, from newspaper reports and from discussion with fellow practitioners, much of which the person may not be able to recall but which enables him or her to express an opinion more accurately than one who has examined only the facts regarding particular instances. Such a witness may base an opinion on his or her experience, without having to prove by admissible evidence all the facts on which the opinion is based. Such witnesses regularly generalise from experience, calling in aid all their training and professional experience in expressing an opinion upon a matter within their field (see *Arnotts* at 350-1).

27 In many instances, a witness who has experience in a particular discipline may not himself or herself know the answer to a particular problem from his or her own study or experience. However, being trained in the relevant discipline, the witness may be able to refer to works of authority in which the answer is given. In that sense, the witness may be said to be acting as a librarian. In that function, the witness is not giving evidence of his or her own opinion, except to say that, in his or her opinion, the books to which reference is made are of sufficient standing to be accepted by the Court (see *Arnotts* at 351.).

28 The third function of such a witness can be to apply statistical methods to material available from various sources in order to draw relevant conclusions. The statistical expertise and experience of the witness may be brought to bear on material otherwise in evidence (see *Arnotts* at 351-2).

29 However, it is not permissible for such a witness to take over the role of advocate, although a witness having expertise in a particular discipline may have a legitimate role of advocacy in that the evidence given by the witness may include arguments as to the conclusions that can be drawn, and perhaps should be drawn, from the facts that the witness is asked to assume. Nevertheless, the extent to which opinion evidence, if so given, will have greater or less weight will depend upon the extent to which the witness furnishes specific detail as to the actual experience of the witness. Even if the witness is not required to prove by admissible evidence all the facts on which an opinion is based, those facts ought to be stated with sufficient specificity to enable them to be tested by cross examination (see *Arnotts* at 352).

30 Before opinion evidence will be admissible pursuant to [s 79](#), two prerequisites must be satisfied as follows:

- Specialised knowledge derived from training, study or experience must be identified.
- The opinion sought to be relied upon must be shown to be wholly or substantially based on that specialised knowledge.

...

31 The prerequisites contained in [s 79](#) may well have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge, which is in turn based on training, study or experience, the section will not be satisfied unless the opinion is "presented in the form that makes it possible to answer that question" (*HG v The Queen* [\[1999\] HCA 2; \(1999\) 197 CLR 414](#) at 427). The Court must be furnished with the

necessary scientific criteria for testing the accuracy of the conclusion.

32 Opinion evidence must go beyond a bare *ipse dixit* (*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 745 and *R v Tang* at 715). Before opinion evidence will be admissible under [s 79](#), the witness must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience and on which the opinion is wholly or substantially based applies to the facts assumed or observed so as to produce the opinion given. Unless those two prerequisites are satisfied, the opinion evidence will be of no value to the Court, in the sense that it would be accorded no weight. It should not be left to the cross-examiner to attempt to illicit the facts or assumptions upon which opinions are based. The evidence must demonstrate an identifiable reasoning process against which the conclusions can be tested ...

33 In considering the weight of so-called expert evidence, it is necessary to consider two aspects of the evidence. The first aspect is the expertise or experience of the expert. In considering the expertise or knowledge of the expert, it is easy enough to identify disciplines such as the following:

- hard science, such as pathology, chemistry, physics and the like;
- technical or applied science, such as engineering, medicine and the like;
- social sciences, such as economics, anthropology and the like;

In addition, an expert witness may have expertise or special knowledge resulting from particular education or learning, such as in the case of lawyers, medical practitioners and the like, where some technical study or education has been undertaken.

34 Alternatively, such special knowledge or expertise might be the result of experience, where no particular technical study or education has been undertaken by the witness, such as in the case of managers and the like. Such evidence will often have less weight afforded to it. While it may be admissible as opinion evidence, because of the provisions of [ss 79](#) and [80](#), the Court may often be in as good a position as the so-called expert to assess such matters if it simply goes to ordinary experience.

35 The second aspect to be considered in assessing the weight of expert evidence is the nature of the evidence that the expert is to give. An expert witness might give evidence in the following categories, which are non exhaustive:

- opinion evidence as to what actually happened in particular

circumstances, on the basis of assumptions that the expert is asked to make, as when a pathologist expresses an opinion about cause of death;

- opinion evidence as to what might be likely to happen in the future, on the basis of assumptions that the expert is asked to make, as when an economist might predict the effect of identified phenomena on a market;
- evidence of what is normally done in particular circumstances experienced by the expert, as when a legal practitioner says what is normally done in a conveyancing transaction;
- evidence as to what can be done in particular circumstances that the expert is asked to assume, and which the expert has not experienced, as when an engineer says what could have been done to avoid a failure of a particular structure;
- evidence concerning special usage of language or terms in the field of the expert's expertise, as when a chemist explains special usage of terms that have a different meaning in everyday speech;
- opinion evidence about what should or ought to have been done in particular circumstances that the expert is asked to assume, as when a legal practitioner says what enquiries ought to have been undertaken in a particular transaction, as distinct from what enquiries are ordinarily undertaken;
- opinion evidence as to whether particular conduct that the expert is asked to assume satisfies or falls short of some legal standard, as when a medical practitioner says that a particular procedure was conducted negligently.

36 Very little, if any weight, should ever be accorded the last category of opinion evidence. It may be admissible by reason of the operation of [s 80](#), however, in so far as it is an opinion by reference to a legal standard, it will be essential, before it can be admissible and certainly before any weight can be afforded to it, that the expert's understanding of the relevant legal standard be established and be shown to be in accordance with the law.

37 Thus, an opinion as to whether conduct satisfies or falls short of a particular standard, such as whether particular conduct was in breach of a duty of care entails an examination as to what the expert's understanding is of the duty of care. ..."

- 5.2 Austin J in *ASIC v Vines* [2003] NSWSC 1095 summarised the principles relating to expert evidence in a number of 'propositions'/guidelines. Much of what follows sets out verbatim what HH said; much is paraphrased and where HH has quoted from other cases, eg from *Makita v Sprowles*, I have not retained the quotation marks, so as to allow HH's propositions to be more readily followed in a lecture of this format.

- 5.3 I emphasise however, that the vast bulk of what follows are HH's words, almost word for word, sans the depth of authorities which HH gathered in support of each proposition.

Whilst certain of HH's orders as to penalty were not upheld on appeal, that does not detract from the, with respect, learned summary of the law below.

5.4 **Specialised knowledge based on training, study or experience**

1. *The broad scope of "specialised knowledge"*

"Specialised knowledge" may be acquired by a course of training or study, and also by experience, if it is sufficiently "specialised". An example provided by HH was the *Adler* case,³ where it was decided that the witness, "who had embarked on a career of public and other company directorships from 1985 until the hearing in 2002, after a career as a chartered accountant, had precisely the kind of experience that would give him specialised knowledge of what a reasonably careful and diligent director of a company would do in particular circumstances."

2. *Knowledge from observation*

"Specialised experience" connotes something beyond the product of the observation of a non-participating onlooker, at any rate where the knowledge is about a standard of competence in doing a job that requires the exercise of judgment. Thus, Barrett J⁴ did not permit an accountant to give evidence of what an experienced and competent company director would do, on the basis of his dealings with and observation of company directors over a period of 40 years.

3. *Specialised knowledge and professional standards*

Proper professional conduct in the sense of due care and obedience to customary practices and ethical rules is a field of specialised knowledge. The ordinary training and experience of a professional may not be sufficient to justify admission of that person's opinion as to what a competent and careful professional would do in hypothetical circumstances that are out of the ordinary, and for that kind of opinion some additional and special qualification would be needed.

4. *The test of "specialised knowledge"*

A witness has "specialised knowledge" where the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of

³ *ASIC v Adler (No 1)* (2002) 20 ACLC 222, 224-5 [13]. The Court of Appeal agreed: 46 ACSR at 636 [632], per Giles JA.

⁴ *Australian Cement Holdings Pty Ltd v Adelaide Brighton Ltd* [2001] NSWSC 645 (27 July 2001), a decision cited without disapproval by Giles JA in *Adler* (at 635-6 [630]).

forming a correct judgment upon it without such assistance, in other words, when there is a sufficiently organised or recognised body of knowledge or experience which is accepted as reliable.

5. *Expert evidence of professional standards where the office is unique*

Where the Court must make a judgment on questions of care and diligence and competence of a professional person, evidence is admissible of what the acceptable practice is for persons in the position of the defendant, if there is any identifiable professional standard or industry practice that can be brought to bear.

This assumes that there is a field of professional endeavour shared by the defendant and the witness.

However, where the office is unique, eg if a company invented a special position of "financial troubleshooter" with defined responsibilities which were entirely novel and bore no similarity to the normal responsibilities of any established category of financial executive (such as the categories of chief financial officer or reinsurance manager), it is hard to see how any expert evidence could be tendered as to what a reasonably competent person in that position would be expected to do.

This is because there is no general standard of professional diligence or competence to be applied because of the uniqueness of the office, and therefore no field of specialised knowledge is available to assist the Court to make its judgment.

6. **EVIDENCE OF OPINION WHOLLY OR SUBSTANTIALLY BASED ON SPECIALISED KNOWLEDGE - LEGAL PROPOSITIONS**

6.1 *Expert evidence of general professional practices*

Section 79 permits a professional expert such as a doctor or solicitor or accountant to give evidence about the content of general practices of professionals in his or her field, ie evidence about what professionals *generally* do in stated circumstances: *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] 1 Ch 384,402.

This may be no more than evidence of fact about professional practices or professional standards laid down by a professional institute or sanctioned by common usage, but frequently such evidence involves the expression of opinions. Outside the field of professional practices, an expert may give similar evidence about the content of industry practices.

6.2 *Expert evidence of professional standards in recurring or typical circumstances*

Section 79 permits a professional to go beyond evidence of the content of general practices, by expressing an opinion about the practice of competent and careful professionals in specified circumstances which are recurring or typical.

Thus, a conveyancer may give evidence as to the practice of a competent and careful conveyancer, at a specified stage in the completion of a conveyancing transaction, in responding to specified conduct of the other party which puts the case into a typical or recurring category, such that it can be said that a practice for dealing with it has emerged.

6.3 *Expert evidence of professional standards in specially defined circumstances*

Evidence is admissible where it goes to what, in stated circumstances which are out of the ordinary and not amenable to observations about a developed practice, a competent and careful professional *would be expected to do*.

6.4 *Expert evidence and the "ultimate issue"*

Although there is no bar, as such, to the expert giving evidence about the ultimate issue having regard to section 80 of the *Evidence Act*, expert evidence directed to answering a question of law or fact that is directly before the Court for decision is inadmissible because it will not be wholly or substantially based on the expert's specialised knowledge, or it will be irrelevant, eg the expert may not give evidence of the content and application of a legal standard, for these are matters for the judge. On the other hand, expert evidence about professional standards laid down by a professional institute or regularly practised is admissible, because such evidence leaves it open to the Court to say that the standard is either too low or more exacting than reasonable skill and care requires.

The other aspect of the "ultimate issue" proposition is that expert evidence will be inadmissible if it usurps the function of the trier of fact.

6.5 *Evidence about what the expert would do*

Evidence of an expert as to what he or she would do in the stated circumstances (as opposed to what a reasonably competent and careful professional would do) is inadmissible.

In the *Midland Bank Trust* case ([1979] 1 Ch at 402), Oliver J explained that "evidence which really amounts to no more than an expression of

opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants" would be of little assistance to the court. This may be because it is not evidence based upon the expert's specialised knowledge."

In some cases there will be a fine line between evidence by a professional of what a reasonably competent and careful professional would do in specified circumstances, and evidence of what the witness would do in those circumstances. But there is a significant conceptual difference, because evidence of what a reasonably competent and careful professional would do requires the witness to take an objective view, in circumstances where his or her own standards might be higher or lower than the objective standard.

6.6 *The requisite link between facts and specialised knowledge*

The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded."

For example, a solicitor shown to have specialised knowledge of conveyancing may give opinion evidence of general conveyancing practice without needing to say more to connect the evidence with that field of knowledge, because the linkage is apparent from the nature of the specialised knowledge. However, a witness purporting to give expert evidence about investor behaviour or the behaviour of prison escapees may need to say substantially more in order to establish the linkage.

6.7 *The evidentiary status of the facts upon which the expert relies*

So far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly approved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way."

For example, a valuer can base his or her opinion on knowledge of comparable sales of property accumulated from experience, newspaper reports and the like. If, however, the expert wishes to refer to a particular fact as a basis for his or her opinion (for example, where a valuer wishes to refer to the recent sale of the adjoining property), evidence of that fact must be given by someone who can depose to it. The expert may be in the position to give such factual evidence - if, for example, the fact relates to the rental value of premises assessed at an annual rental per square metre, a valuer may be able to give evidence of the area of the demised

premises based on the measurements he has taken in the course of preparing the valuation report.

An expert witness may have regard to matters of common knowledge in formulating his or her opinion.

6.8 *The standard of proof for establishing the ingredients of section 79*

The expert's evidence is inadmissible if the Court "cannot be sure" that the opinion is wholly or substantially based on the expert's specialised knowledge. The test is whether the Court is satisfied *on the balance of probabilities* that the opinion is based wholly or substantially on the expert's knowledge.

6.9 *Expert evidence and submissions*

The opinion of an expert is not admissible if it amounts to nothing more than a submission.

7. **SHOULD A CONCLAVE OF EXPERTS BE ORDERED?**

7.1 Factors which are relevant to the exercise of the court's discretion to order a conclave of experts include the utility of so ordering: *Spasovic v Sydney Adventist Hospital* [2002] NSWSC 164 where because of the divergent medical opinion, and the contentious history of the patient, the order was refused.

7.2 In the CTTT (which hears most of the State's building disputes), there are currently three Members whose usual duties include holding conclaves ie getting all the experts together, conducting a site inspection, working out areas of agreement and disagreement, and reporting back to the Tribunal so that all remaining issues, especially what legal consequences flow from the facts as found, can be determined.

Parties often agree to hold "informal conclaves" where their experts get together and seek to agree on issues such as whether there has been a relevant breach of contract/ Building Code; and if so, what the costs of rectification might be.

These matters are generally recorded in Scott Schedule.

Matters which militate in favour of a conclave, formal or otherwise, include the number and complexity of technical issues. One factor militating against is the extra time.

The conclave, in experienced hands, can be a potent weapon. And vice versa.

8. EXAMPLES OF COMMERCIAL LITIGATION WHERE EXPERT EVIDENCE IS DESIRABLE

- 8.1 **Building and construction cases:** the experts will address issues such as whether there has been a deviation from any relevant Australian standard; or a deviation from the contract specification; or a breach of any one or more of the warranties implied by section 18 of the *Home Building Act* (i.e. the warranties as to fitness for purpose and reasonable standard of construction etc.); whether there has been delay (i.e. critical path programming reports); the amount of head office or off-site overheads that are properly apportionable to the relevant contract which has been breached; and a myriad of other issues.

The legal representatives can and should assist the expert by directing his or her mind to address only deviations from the relevant architectural or engineering drawing and Australian standard. One often sees experts addressing the most recent Australian standard, on the assumption that that is applicable. However, many building contracts arise from tenders years before disputes arise and reports are prepared; and often incorporate previous versions of Australian standards.

In many cases, especially in the ADT, one sees report after report where the “expert” does not stoop to addressing the contractual plans and specification; but pauses only long enough to address either Australian Standards, the Building Code, or perhaps even trade standards.

- 8.2 **Valuation cases:** the range of items litigated over have been almost limitless and thus there have been numerous cases where the value of land, shares, machinery, yachts, cars and numerous other items have been in issue.

The value of land is often in issue in resumption cases – see Marcus Jacobs, *The Law of Resumption and Compensation in Australia*, Law Book Co., 1998.

Where eg the RTA resumes land for a public purpose (generally road widening) it serves a formal notice inviting the resumer to submit a report as to value based on the “highest and best” use principle; and such reports are invariably procured from registered valuers who are experienced in the principles in the relevant legislation such as the *Land Acquisition (Just Terms Compensation) Act* 1991 and the relevant planning instruments pertaining to the resumed land such as LEPs and SEPs.

- 8.3 **Security for costs:** an underutilized area where expert evidence may well be of assistance is where a defendant/respondent seeks security for costs. Sometimes accounting evidence is necessary to demonstrate the real risk that a plaintiff may be unable to meet an order for costs at the end of the day and far less utilized than it should be is evidence from expert costs assessors as to likely quantum of costs. The service of such properly drafted reports very often leads the plaintiff/applicant with the understanding that the ordering of some amount of security is inevitable and then becomes a matter for sensible lawyers to negotiate an appropriate amount in cash or by guarantee with liberty to “top up” if appropriate.
- 8.4 **Damages for loss of bargain upon repudiation of a lease or termination for breach of a fundamental or essential term:** Upon a lessee repudiating a lease and upon the lessor’s acceptance of same, the lessor becomes entitled to “loss of bargain” damages as and from the date of acceptance of the repudiation. Broadly speaking such damages are quantified in accordance with the following formula: the rent reserved under the lease less the net present value of the amounts which the lessor is likely to receive by renting the property out again after a reasonable marketing period; together with any reasonable costs spent in mitigating loss eg rectifying defects in the premises caused by a de-camping lessee. See generally *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209 and *Gumland Property Holdings Pty Ltd v Duffy Bros. Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10.
- 8.5 The above formula positively bristles with opportunities for appropriate expert evidence for example:
- (a) Tradespersons such as plumbers, gyprockers, electricians and the like to depose to the costs of rectification which as the cases show can be substantial;
 - (b) An estate agent knowledgeable of the local area or other appropriate person to say what the likely rental return will be for the property for the remaining period of the lease; and also to say what a reasonable marketing period is for the property;
 - (c) An accountant to bring all the evidence together and depose to an appropriate capitalization rate to bring the likely returns to a net present value, discounted for early payment;
 - (d) If the lease is for a term of more than say ten years, it may even be appropriate to obtain evidence from an economist to depose to the likely state of the relevant sector of the economy for the notional remaining term of the lease, such that the relevant valuer or estate agent might have a more scientific and accurate basis on which to project rental returns.

- 8.6 **State of knowledge regarding risks associated with particular products:** Some product liability cases involve allegations that particular products were well known to have risks associated with them at a given point in time and that such risks were not disclosed. Expert evidence may well then be desirable by someone with the appropriate scientific or engineering background to say that he or she has surveyed the mainstream literature for the relevant period and can say from that survey that there either was or was not the relevant body of opinion relating to risk.
- 8.7 **Evidence of lost profits:** One of the greatest forensic battlegrounds between expert witnesses is the quantification of loss of profits, trading losses, damage to the goodwill of trading concerns and the like. This is because many causes of action, including breach of contract, negligence, contravention of the *Trade Practices Act* and *Fair Trading Act* and the like all have as their tactical goal the obtaining of a money sum by way of damages or compensation. This is even so where the cause of action is for breach of some fiduciary duty or other obligation owed in equity.
- 8.8 One well established head of loss is the lost value of a chance to make a profit.

Where land has been damaged by negligent conduct. In these circumstances, the plaintiff can either claim the costs of rectification, alternatively diminution in value, whatever is reasonable on the particular facts.

Sometimes complex issues arise in relation to the valuation of shares: and hence expert evidence is often admitted on this issue.

9. EVIDENCE OF ACCOUNTANTS / INSOLVENCY PRACTITIONERS

- 9.1 *Cadwallader v Bajco* [2001] NSWSC 1193 (revised - 5/03/2002) (2001) 189 ALR 370 considered whether the opinion of an expert accountant and insolvency practitioner about the solvency of a company is wholly or substantially based on that person's specialised knowledge. Austin J rejected the various reports, in effect holding that the issue was not complex, was in a narrow factual compass and the financial records spoke for themselves.

“145 That issue was considered by the Full Federal Court in *Quick v Stoland Pty Ltd* [\(1998\) 29 ACSR 130](#). In that case Branson J (at 134) raised the question whether the statement that a company

was insolvent at a particular time is a statement of opinion or a statement of fact. Her Honour held that "in other than obvious cases, a statement of a qualified accountant and insolvency practitioner, made on the basis of an examination of financial accounts and other company records, that a particular company is, or is not, insolvent is an expression of opinion". She drew attention to the complexity of corporate accounts and accounting practices. Noting that the opinions of the expert (Mr Madden) concerning the company's insolvency were heavily based on matters of fact and, in some cases, arguably unsubstantiated factual inferences, she nevertheless concluded (at 134) that "Mr Madden's specialised knowledge does qualify him to form views and make judgments as to insolvency based on financial statements and other material of the kind to which he refers in his report", and therefore that his opinion evidence was admissible under [s 79](#) of the equivalent Commonwealth Act.

146 Emmett J took a somewhat narrower view. Having drawn attention to what is involved in deciding whether a company is solvent at a particular time, he said (138):
"It may be that, in carrying out such an exercise, a person having Mr Madden's qualifications would be able to give admissible opinion evidence. For example, such an expert could bring his or her specialised knowledge to bear on the analysis of accounting records, expected cash flows, liquid and realisable assets such as debtors and the like."

Later he added (at 139-140):

"It may be that Mr Madden's specialised knowledge would enable him to say that where a company has a deficiency of current liabilities over current assets and a deficiency of total liabilities over total assets, the company will normally be insolvent. Such an opinion would be admissible if based on his specialised knowledge. For example, it may be that, in the absence of primary accounting records and other secondary documentation, working capital and net assets are the best indicators available. ... [T]he excess of current liabilities over current assets and the excess of total liabilities over total assets would need to be proven as facts. If there is a question of accounting practice involved in the determination of any of those amounts, the opinion of Mr Madden on such a question, based on his specialised knowledge, would be relevant and admissible. However, absent any such questions, there would normally be no need for expert opinion to determine whether one figure is greater than another. Where the amounts are derived from balance sheets, that can be determined by the Court upon examination of the balance sheets in evidence."

147 Finkelstein J noted (at 141) that it was not unusual for an accountant to give evidence about the financial condition of a company based on its books and records. He continued (at 141-2): "However, if the accountant seeks to do no more than state what is otherwise obvious from such records his evidence is not receivable. The position is different where some analysis of the books and records is required in order to draw the inferences that are sought to be made or if an analysis of those books and records might prove to be a difficult task for the judge or jury. It may be doubted whether Mr Madden did give the evidence of an expert. Much of what he said would have been apparent to the trial judge from his own examination of the books of account. However, the reasons for decision showed that the trial judge did receive some assistance from the opinions expressed by Mr Madden and this is a sufficient basis for holding that his evidence was admissible."

148 The present case is a very unusual one, quite different from the complex financial circumstances that their Honours had in mind in *Quick v Stoland*. Here the question is solvency depends upon a factual analysis in a very narrow compass. The principal questions relate to the realisability of the company's land, the quantum and reliability of its rental income, and the status and currency of six alleged debts. The questions that I have to decide do not depend on any matters upon which the expertise of an accountant would be relevant or helpful. None of the kinds of circumstances identified by Emmett J as circumstances where expert accounting evidence would be admissible arise for consideration here. Therefore the opinions expressed by Mr Watson and Mr Love cannot be regarded as based on their specialised knowledge as accountants."

- 9.2 A case which demonstrated, fairly colourfully, the impact of expert evidence, was that of the Full Court of the South Australian Supreme Court in *Glenmont Investments Pty Ltd v O'Loughlin*.⁵
- 9.3.1 The case went on appeal: *Glenmont Investments Pty Ltd v O'Loughlin & Ors*.⁶ The case involved a large electro-mechanical tyrranosaurus rex. It had been constructed out of flammable materials and whilst being dismantled after display at the Royal Adelaide Show, was destroyed through the negligent use of an oxy-acetylene torch. T-Rex had stood 12 metres high and had been 30 metres long.
- 9.3.2 The Court of Appeal at para [5] described it as follows:

⁵ (2000) 79 SASR 185; [2000] SASC 429.

⁶ [2002] SASC 429 (20 December 2000) Doyle CJ, Nyland and Martin JJ.

“The Judge described the dinosaur as made up of ‘thousands of parts, activated by hydraulics and controlled by many mini computers.’ His Honour said it was a ‘wonderful representation’ of a dinosaur, capable of ‘breathing, growling and moving.’ Particular attention had been paid to the skin in order to ensure that it was life-like. The Court has seen video films of the dinosaur during construction and in operation which well demonstrate its capabilities. It stood on a motorised platform which moved slowly and from which the various functions were activated and controlled. The dinosaur was able to make a variety of sounds including breathing sounds, the eyes were capable of moving and the eyelids could close independently or together. Movement could be obtained from the neck, head, jaw and tongue. Walking-like movements were provided through the legs and hips. There was also movement in the tail and arms...”

- 9.4 It was intended to earn money from displays at fairs, being used in dinosaur movies and ancillary marketing; and its creation had been the “consuming passion” of the plaintiff’s director.⁷
- 9.5 The cause of action in contract rose out of breach of an implied term in the contract for the dismantling of the enclosure in which T-Rex had been displayed, that Mr. O’Loughlin would exercise reasonable care and skill when dismantling and removing the enclosure (Court of Appeal para [164]).
- 9.6 In a judgment delivered 25 November, 1999, the primary judge awarded damages and interest of \$31.25m to Glenmont, including:
- (a) replacement cost for T-Rex: \$3.25m;
 - (b) losses for being deprived of the opportunity of attending trade fairs and the like.
- 9.7 In this regard, the trial judge said:
- “I come now to the second head, the loss of a chance to make millions out of exhibiting T-Rex. This is far more speculative than the cost of replacement. Limb’s plans were vague and none had yet come to fruition. There are so many imponderables.”
- 9.8.1 At the trial the defendants launched a “vigorous attack” on the plaintiff’s evidence about attendance at fairs. They argued that, at the time of the fire, Glenmont lacked the financial resources to take the dinosaur on tour in America and would not have overcome various other obstacles; and that the likelihood was that the dinosaur would have been seized by a creditor or that Glenmont would have collapsed under its debts.
- 9.8.2 The Judge rejected this argument. He said:

⁷ (ibid).

“All that may be plausible if one looks at the trees and misses the wood. There would have been formidable hurdles for Limb to jump. That is why I must discount heavily the chances of a profit in the United States. But I do not accept the argument entirely. It ignores several things. T-Rex was a marvellous contraption and had plenty of public appeal. The creditors stood a much better chance of a return if the dinosaur continued to be displayed. Limb had in the past negotiated deals with his creditors to avoid repossession. He was so determined to succeed that I believe the money would have been found. All Limb needed to do was to get a financial backer. I believe he would have done that. So I shall work on the dinosaur having a chance of going to the United States and being a success.”

- 9.9 The trial judge awarded \$7,735,000.00 on this account.
- (c) losses for being deprived of the opportunity of utilising T-Rex for lucrative movies in the USA, sequels, videos and the like.
- 9.10 The trial judge accepted that there were negotiations that were well advanced for movie involving T-Rex with a budget of between \$2m and \$3m. The script was tendered into evidence; and there was evidence that if the movie eventuated, Glenmont would receive a fee of about \$100,000.00 plus 7 ½ per cent of the profits and all being well, the film would be released in cinemas between two and three years after the fire.
- 9.11 Glenmont’s expert estimated the total receipts to Glenmont from the film, the sequel, videos and television rights would be \$40 million.
- “He adhered to that view even though he accepted that, overall, only a tiny percentage of films make a substantial profit, and even though he accepted that very few Australian films make large profits. It is worth mentioning that, on his figures, Mr. Gerlach must have been expecting a total profit from the film, the sequel, videos and television rights of about \$520 million. As a point of comparison, his evidence was that ‘Crocodile Dundee’ and its sequel, the most profitable Australian film of which he was aware, had together grossed about \$570 million at the box office (which we take to mean entrance fees paid at cinemas).” (per the Court of Appeal, para [411])
- 9.12 The trial judge brought together all the evidence on damages as follows:
- “There was potential, which I readily accept from what I have heard about T-Rex, what I have seen in photographs and on video, for the dinosaur to make many millions, maybe hundreds of millions, of dollars. I shall work on it being quite possible for T-Rex to have earned at least \$100,000,000 from films, merchandising, fair circuits and other appearances. On the other hand there’s many a slip

twixt cup and lip. The whole thing may have come to nothing. For that reason I shall discount by eighty percent the figure of \$100,000,000 which is a conservative estimate of what T-Rex could have earned up to now. T-Rex was said to have at least a twenty-year life span so it would still have been going strongly today if all had gone right. That brings me to a figure of \$20,000,000 for the loss of the chance to have been a successful earner on the United States Fair Circuit and in film and on exhibition, either here or in America.”

- 9.13 It will be seen that the evidence as to the projected income from movies bordered on the impressionistic, having regard to the magnitude of the claim. There was apparently not even certainty as to whether the figures of \$520m were gross revenues or profits.
- 9.14 The defendants appealed.
- 9.15 The Court of Appeal cited *The Liesboch Dredger* case⁸ as authority for the proposition that the prima facie measure of damages for the destruction of a profit earning chattel, *whether the claim is in contract or tort*, was its value “as a going concern” to its owners; and since there was no market to purchase a replacement, the starting point of quantum was the cost of making a replacement plus the profits that could have been derived absent the destruction of T-Rex.
- 9.16 The Court said that whilst the usual time for quantifying damages was date of breach, where the substantial cause of the plaintiff’s inability to afford a replacement was the defendant’s wrong, then the plaintiff was entitled to have its damages assessed at a later date, even if that measure was higher.
- 9.17 Damages for lost profits were assessed on the basis of damages for loss of a chance to derive income from fairs, movies and the like. In this regard, the Court of Appeal rejected the defendant’s submission that trial Judge should have determined first the most probable course of events but for the fire; and he should then have determined the likely earnings from that course of events and then made an allowance for the possibility of greater earnings.
- 9.18 One interesting feature was that Glenmont was faced with “substantial problems” when the fire occurred. There was a question mark as to its financial viability; only a small number of films ever make a profit, let alone large ones; and so on. But, said the trial Judge, “many successful ventures emerge from an unpromising start”.
- 9.19 Whilst damages were reduced on appeal, they were still substantial.⁹

⁸ *Liesbosch Dredger v SS Edison* [1933] AC 449.

⁹ A special leave application by *Glenmont* to the High Court on a matter unrelated to quantum was dismissed 16 August, 2001 (A5/2001); and a special leave application by O’Loughlin in matter A15/2001 was also dismissed.

10. PROFESSIONAL NEGLIGENCE CASES

- 10.1 The cases indicate that different judges have different views on the admissibility of expert evidence regarding the duty of care in the context of proceedings against a lawyer.
- 10.2 In *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] 1 Ch 384 at 402 it was said:

"I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a profession institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."

These dicta continue to be cited in Australian decisions eg *A I McLean Pty Ltd v Hayson* [2008] NSWSC 927, which clearly delineated between:

- (i) the scope of the duty of care eg to exercise reasonable skill and care;
- (ii) the standard of conduct called for on the particular facts of the case to discharge the duty;
- (iii) whether the conduct in question, in the factual matrix of the case, fell below the relevant standard.

It seems to have been held that expert evidence may possibly be admissible on each of the above limbs of the inquiry. For example, if the scope of the duty of care is clear, no evidence is required; that is for the court alone; but whether the duty has been discharged may be covered by expert evidence.

See also *Adam v Perpetual Trustees v Australia Ltd* [2006] SADC 62.

10.3 In *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64; (2000) 74 ALJR 209 at [45], Gleeson CJ (with whom Gaudron and Gummow JJ agreed) noted that in proceedings before Branson J in the Federal Court the defendants gave evidence and, in addition, there was further evidence from expert valuers, and from senior counsel experienced in valuation law and practice, noting that:

"Her Honour relied upon that evidence, and upon her own opinions and judgment, in reaching her conclusions."

10.4 Further at [47] the Chief Justice noted that Branson J had referred to evidence by senior counsel who had been retained by both parties to give evidence as to whether the views which had formed the presentation and conduct of the primary litigation by Mr Simos and Mr Webster were views which could reasonably have been held by competent senior counsel at the time of the proceedings.

10.5 In *Heydon v NRMA* [2000] NSWCA 374, the litigation at first instance arose out of the NRMA's first attempt at demutualisation.¹⁰

10.5.1 The key issue relating to the demutualisation was whether it should proceed by way of special resolution passed in general meeting of the members or by way of scheme of arrangement. In December 1993 Mr Heydon (as HH then was) was briefed to advise on that question and the brief referred repeatedly to the decision of the Supreme Court of New South Wales in *Gambotto*, which dealt with oppression in the context of appropriation by special resolution.

10.5.2 The matter was discussed at a conference and counsel was aware that *Gambotto* was on appeal. The report in the New South Wales Law Reports had indicated that an application for special leave to appeal to this Court had been filed and special leave had been granted.

10.5.3 The trial judge found that *Gambotto* being perceived by all relevant parties among the lawyers to be directly relevant to the issue of general meeting or scheme of arrangement and being known to be on appeal, there was a duty to follow up and contemplate and give a warning as to the prospect that the decision of this Court, were leave granted, might, putting it crudely, throw a spanner in the works of the general meeting route.

10.5.4 The Court of Appeal reversed his Honour's finding in favour of the applicants.

¹⁰ I have taken the summary of facts mostly word for word from McDougall QC's (as HH then was) address to the High Court on an application for special leave, refused S26/2001 (14 September 2001)

- 10.5.5 Hayne J (on the application for special leave) asked “Now, what are counsel to make of trawling through the entrails of a special leave transcript?”
- 10.5.6 Special leave was refused.
- 10.5.7 NRMA decided not to call evidence before Giles J on the basis of the comments of Oliver J in the *Midland Bank* case (above).
- 10.6 In *Heydon*, Malcolm AJA, in the Court of Appeal from paragraphs [143] ff, considered in detail whether the issue of deviation from the relevant standard of care was one for an expert, or one for the Court, and held that expert evidence would have been admissible, but it remained for the Court to determine what the appropriate standard of care was and whether, on the facts, the relevant advice was in breach of that standard.

11. DIRECTORS DUTIES/CIVIL PROCEEDINGS BY ASIC UNDER THE CORPORATIONS ACT

- 11.1 In the litany of litigation between ASIC and Mr. Rich, ASIC was required to prove the financial position of relevant companies and in particular a substantial reduction in cash balance such that it was critical to the survival of the company that predictions made as to the turnaround in earnings and cash flow be achieved. ASIC’s case was that the directors were required to exercise “the utmost vigilance” in relation to the financial affairs of the OneTel group of companies. To seek to prove their case they tended the report of a very senior accountant, which report was ultimately rejected after a line by line analysis as not complying with *Makita v Sprowles* principles. See *ASIC v Rich* [2005] NSWSC 149 (general admissibility of experts statements); [2005] NSWCA 152 (ibid) [2005] NSWSC 417 (interaction of business records rule and opinion rule).

12. PSYCHIATRIC/ PSYCHOLOGICAL EVIDENCE

R (Cth) v Petroulias (No. 36) [2008] NSWSC 626

"164 A number of psychologists gave oral evidence. In approaching their evidence, I keep in mind that it is important that psychologists do not cross the barrier of their expertise. It is appropriate for persons trained in the field of psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter into the field of psychiatry: *R v Peisley* (1990) 54 A Crim R 42 at 52.

165 Mr Watson-Munro referred to the diagnoses made by psychiatrists of bipolar mood disorder and Aspergers syndrome. With respect to

Aspergers syndrome, Mr Watson-Munro suggested that the Offender had exhibited a range of eccentric behaviour including the development of a fixation on peculiar topics, such as American presidents. The foundation for this appeared to be part of the statement of the Offender's mother who said the Offender "*knew all there was about American presidents*". In evidence, Mr Watson-Munro (understandably) stepped back from his reliance upon an interest in American presidents as being indicative of Aspergers syndrome (ST172). With respect, this was drawing a long bow ...

...

174 I accept the Crown submissions concerning Ms Smith's evidence of 28 May 2008 and her supplementary report. In my view, she overstepped the boundary of proper expert evidence by a significant degree. I make due allowance for the fact that Ms Smith had not prepared a report for court proceedings for 24 years. Her first report did not advert to the Expert Code of Conduct, despite the necessity for such a reference under Part 75 r 3J *Supreme Court Rules*. It is not the function of an expert witness to express opinions favourable to the party calling the witness, irrespective of the existence or otherwise of an objective foundation for the opinion. In my view, no weight whatsoever should be attached to the evidence of Ms Smith in these proceedings, except insofar as she speaks of her academic knowledge of the nature of bipolar mood disorder. In my view, Ms Smith has over-interpreted factual material in a gross fashion in this case, so that the Court can attach no real weight to her evidence which, under the Expert Code of Conduct, is intended to serve the primary function of assisting the Court in discharge of the expert's duty to the Court.

175 I summarise my findings with respect to the psychiatric and psychological evidence in the following way. I am satisfied that the Offender suffers from depression, and has done so for some time. I accept that this has been contributed to by the protracted proceedings against him, culminating in the verdicts of the jury convicting him of two serious offences.

176 I am not satisfied that the Offender suffers, or has suffered, from Aspergers syndrome. The factual foundation underlying this opinion is, in my view, tenuous. There is very little, if any, sworn evidence of factual matters which would provide a proper evidentiary foundation for such a diagnosis. If, however, the Offender does suffer from Aspergers syndrome, then it is a very mild form of the disorder at most ...

181 I am certainly not satisfied, if the Offender has suffered from bipolar mood disorder, that it played any part in the commission of the offences for which he is to be sentenced."

13. COURT APPOINTED EXPERTS

13.1 Rule 15.09 of the Federal Magistrates Court Rules ('the Rules') provides:

"15.09

(1) The Court may, at the request of a party or of its own motion:

(a) appoint an expert as court expert to inquire into and report on a question arising in the proceeding; and

(b) ...

(c) give ... directions, including to extend or supplement the inquiry or report.

(2) If possible, the court expert should be a person agreed upon between the parties."

13.2 Rules 15.10, 15.11 and 15.12 of the Rules provide:

"15.10

(1) The court expert must give the report to the Registrar together with the number of copies the Registrar directs.

(2) The Registrar must send a copy of the report to each party.

(3) The Court may:

(a) receive the report in evidence; or

(b) allow the examination of the court expert ; or

(c) give other directions as to the use of the report.

(4) A party wishing to cross-examine the court expert :

(a) must arrange for the attendance of the court expert ; and

(b) may issue a subpoena requiring his or her attendance; and

(c) unless the Court otherwise directs, must pay the reasonable expenses of the attendance.

15.11 Unless the Court otherwise directs, the parties are jointly liable to pay the reasonable remuneration and expenses of the court expert for preparing a report.

15.12 If a court expert has made a report on a question, a party may adduce evidence of another expert on the question with the leave of the court."

13.3 In *Tyler v Thomas* [2006] FCAFC 6 Branson J¹¹ noted that these rules are in substantially the same form as O 34 of the Federal Court Rules ('the FCRs') and thus and thus guidance on the proper approach to appoint a court expert pursuant to r 15.09 of the Rules can thus be obtained from authorities concerning O 34 and comparable rules of other courts. Her Honour held that, notwithstanding the limited case law on the topic, certain "broad principles" could be deduced, as follows:

- (1) the power to appoint a court expert is part of the armoury made available to courts for the purpose of ensuring the just, efficient and cost-effective management of litigation;
- (2) the power to appoint a court expert is to be broadly understood and is not available to be exercised only where litigation calls for expert evidence of a scientific or technical kind;
- (3) a court expert may be appointed to express an opinion on the major issue to be decided in the litigation;
- (4) generally speaking, the correct approach will be to regard the appointment of a court expert as the first step, but not necessarily the only step, in the obtaining of expert evidence on a particular issue;
- (5) ordinarily the appropriate time for the exercise of the power is well before trial so that the parties have adequate time to give consideration to the report of the court expert and to make decisions on whether they wish to challenge any part of that report;
- (6) the power to appoint a court expert is not ordinarily to be exercised for the purpose of assisting an impecunious party to gather evidence – although the appointment of a court expert may in fact provide such assistance."

13.4 Her Honour stated that it was not of the question for a report to be commissioned in circumstances which were "novel, even bold and innovatory".

13.5 The paramount consideration is what the interests of justice require.

13.6 The Federal Magistrate determined to appoint a court expert to consider the value of the properties and to adjourn the hearing accordingly. Neither party had applied for an order that the hearing be adjourned although counsel for the respondent had on the first day identified the

¹¹ Application for special leave refused [2006] HCATrans 477.

seeking of an adjournment as an option available to his client. Additionally the later support of counsel for the respondent for the appointment of a court expert presumably carried with it support for an adjournment of the hearing to allow a court expert to be appointed and to provide his or her report.

13.7 The Federal Magistrate’s published reasons for appointing a court expert record that his Honour *‘would have been disinclined’* to receive in evidence the reports prepared by Mr Potter. The reasons also record that his Honour was *‘faced with a very lengthy argument as to admissibility of documents prior to some more lengthy cross-examination of a valuer’*. After observing that there was a public interest in the outcome of the bankruptcy proceedings, ie the interests of creditors, his Honour expressed the view that he was *‘required to balance all the interests when coming to a decision such as the one that I have proposed’*.

13.8 Her Honour said that if it could be established that the Federal Magistrate exercised the power in r 15.09 of the Rules for the principal purpose of curing deficiencies in the evidence of the respondent, or merely to avoid ruling on lengthy objections , or was motivated by a desire to avoid difficulties in assessing conflicting expert evidence, that would have called for intervention.

13.9 Her Honour concluded that the FM exercised the power to appoint a court expert because he was satisfied that the appointment would, or might, facilitate settlement of the proceeding or alternatively shorten the hearing time necessary for the just judicial determination of the proceeding. “The other benefits that his Honour identified as flowing from the appointment of a court expert do not, in my view, detract from the propriety of the course adopted by his Honour.”

Her Honour concluded by saying that it would “be a rare case in which it is appropriate for a court expert to be appointed after the commencement of a hearing. As mentioned above, the late appointment of a court expert is likely to lead to delays and may additionally disrupt the orderly and cost-effective preparation of the proceeding for hearing.”

14. **CRIMINAL MATTERS**

14.1 *James v Keogh* [2008] SASC 156

“67. As will be apparent from the examination that follows, the duties of an expert witness are the same in criminal and in civil trials. The question whether the expert witness has discharged those duties will be determined by reference to the context of the forensic issues at the trial as well as by reference to the obligation

of the expert to disclose all relevant material. I will now examine the relevant principles and then consider whether, by reference to those principles, James failed to comply with them.

68. The duties and responsibilities of an expert witness in civil trials were identified by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82. He said:

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...).
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion ([*Re J*]).
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ([*Re J*]). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report ([*Derby & Co Ltd v Weldon (No 9)*] (1990) Times, 9 November per Staughton LJ).
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

.....the expert witness will know that he must give evidence honestly and in good faith and must not deliberately mislead the court. He will not expect to receive protection if he is dishonest or malicious or deliberately misleading.

69. ...

70. In *Meadow* at [17] and at [201], it was stressed that it is of the utmost importance that an expert should only give evidence of an opinion which is within the expert's particular expertise and, if the expressed opinion is outside his expertise, the expert should expressly say so. That principle was of particular importance in that case. It has no application in the circumstances of this appeal.

71. The Court of Appeal also held that, when reviewing an expert's conduct, it is not appropriate to judge an experienced and eminent expert more harshly because of that experience and eminence: *Meadow* at [72], [213] and [275].

72. ...

The Approach in Disciplinary Proceedings

73. When a professional disciplinary body is considering whether the expert has properly discharged his duties as an expert, regard must be had to the forensic context in which the expert provided his report or gave his evidence: *Meadow* at [89] and [205]. Due regard must be had to the adversarial nature of the trial and the overall forensic context. However, while the expert's conduct is to be judged in the context of the particular circumstances in which he is placed, that context does not absolve the expert from professional or forensic impropriety in the presentation and form of his evidence. Auld LJ expressed those principles in these terms at [205] to [207]:

205. Where the conduct of an expert alleged to amount to a professional offence under scrutiny by his professional disciplinary body arises out of evidence he has given to a court or other tribunal, it is, therefore, important that that body should fully understand, and assess his conduct in the forensic context in which it arose. Of great importance are the circumstances in which he came to give the evidence, the way in which he gave it, and the potential effect, if any, it had on the proceedings and their outcome. If the disciplinary body lacks information to the proceedings and their outcome. If the disciplinary body lacks information to enable it properly to assess the expert's conduct in that forensic context, or fails properly to take it into account, a court reviewing its determination is likely to bring important insights of its own to the matter. Not least among those should be an appreciation of the isolation of an expert witness, however seasoned in that role, in the alien confines of the witness box in an adversarial contest over which the judge and the lawyers hold away.

206. In criminal or civil proceedings, it is for the parties' legal representatives and ultimately the judge, to identify before and at trial what evidence, lay or expert, is admissible and what is not. In the case of expert evidence, involving, as it often does, opinion evidence as to causation, it is critical that the legal representatives of the party proposing to rely on such evidence should ensure that the witness's written and oral evidence is confined to his expertise and is relevant and admissible to the important issues in the case on which he has been asked to assist. Equally, it is incumbent on the legal representatives on the other side not to encourage, in the form of cross-examination or otherwise, an expert to give opinion evidence which is irrelevant to those issues and/or outside his expertise, and, therefore, inadmissible. And, throughout, it is for the judge, as the final arbiter of relevance and admissibility, to ensure that an expert is assisted or encouraged to keep within the limits of his expertise and does so relevantly to the issues in the case on which he is there to assist.

207. All of this is not to absolve the expert of responsibility from professional or forensic impropriety in the presentation and form of his evidence. As a medical expert, he should know his limits. In most instances, his knowledge and instincts in his particular field should alert him to confining his evidence to those limits and the true issues identified for the court by the legal representatives of the parties. However, the forensic process, in preparation and in action at trial, is not always as ordered and considered as it should be.In that, sometimes, fevered process, mistakes can be made, ill-considered assertions volunteered or analogies drawn by the most seasoned court performers, whatever their role.

Sir Anthony Clarke MR expressed his agreement with Auld LJ in these terms at [89] and [90]:

89. It is important to have in mind that the way a case is developed at and before trial is essentially a matter for the parties and their lawyers and that an expert must not be blamed for the shortcomings of the lawyers or indeed the judge. Equally, proper account must be taken of what Auld LJ describes as the alien confines of the witness box, where the witness is giving evidence in an adversarial contest in which the judge and the lawyers hold sway. ...

90. On the other hand, I agree with Auld LJ that none of this absolves the expert from what he calls (at [207], below) professional or forensic impropriety in the presentation and form of his evidence, although his conduct must be judged in the context of the particular circumstances in which he or she is placed.

...I respectfully agree with the Master of Rolls that, while it is necessary to have regard to the potential effect of the evidence on the outcome, the actual outcome is not a relevant fact. Plainly, if a medical practitioner gives expert evidence incompetently or dishonestly but, in the result, the evidence does not affect the outcome, he will not necessarily be absolved from a charge of unprofessional conduct.

74. When considering whether **James** had properly discharged his duties as an expert, the Board was, therefore, obliged to consider his conduct in the forensic context in which it was given. The Board had to consider the circumstances in which **James** came to give evidence, the way in which he gave it, and the potential effect of that evidence on the outcome. It had to consider also the forensic process and the circumstances in which **James** was placed at the trial. The question whether **James** failed to disclose relevant information to the court at the second trial of **Keogh** must, therefore, be considered, among other things, in the light of the issues at that trial. If the Board failed to have regard to the forensic context, this court is at liberty to bring its own insights to the matter. ...

75. I will examine the forensic context in which **James** gave his evidence in a moment. Before doing so, it is necessary to consider also some aspects of the duty of disclosure since in the circumstance of this case they are germane to the duty not to mislead the court.

The Duty of Disclosure

76. It is axiomatic that the duty of an expert to make full disclosure is related to the duty of an expert not to mislead the court. Full disclosure will reduce the likelihood that the expert will mislead the court. In a criminal trial the expert's duty of disclosure is akin to the duty of prosecuting counsel to present the case for the prosecution fairly to the jury. One aspect of the prosecution's duty is to disclose to the accused and to the legal advisors of the accused at a reasonable time before the trial the admissible evidence which it proposes to lead: ...

77. There are, therefore, two routes which lead to the principle that an expert instructed by the prosecution is subject to an obligation to act fairly and in the course of justice. ...

78. In *R v Harris* the Court of Appeal not only held that the principles identified by Cresswell J in *The Ikarian Reefer* applied to

criminal proceedings but also adopted with approval remarks made by Wall J in *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181 at 192.

Where that occurs, the *jury* will have to resolve the issue which is raised. Two points must be made. In my view, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and placed before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum.

The Court of Appeal had substituted the word “jury” for “judge” in that passage. While those remarks were made in the context of forensic issues concerning children, they apply with equal force to all kinds of expert evidence.

79. Shortly after in *R v B (T)* [2006] 2 Crim App R 3 at [174], the Court of Appeal re-affirmed the principles in *R v Harris*, stating that they applied with equal force to both the prosecution and the defence. At [176] and [177] the court added other duties to be observed by an expert, emphasising that they are duties to the court that override any obligation to the person from whom the expert has received instructions or by whom the expert is paid. The court added the following as matters to be included in an expert’s report:

1. Details of the expert’s academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.
2. A statement setting out the substance of all the instructions received (with written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.
3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert’s supervision.

4. Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.

5. Relevant extracts of literature or any other material which might assist the court.

6. A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgment that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.

7. Where on an exchange of experts' reports matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.

The clear instruction in these decisions is that an expert should provide the court with an objective and unbiased opinion uninfluenced by the interests of the client or the exigencies of the litigation. The expert is also under an obligation to disclose the facts or assumptions on which his evidence is based including material facts that could detract from his concluded opinion. “

15. FURTHER READING AND RESOURCES

- 15.1 After Objectivity: Expert Evidence and Procedural reform, Gary Edmond, [2003] Syd LR 8; available on Austlii.
- 15.2 ALRC Discussion Paper 69; NSWLRC Discussion Paper 47; VLRC Discussion Paper:
http://www.austlii.edu.au/au/other/alrc/publications/dp/69/_1.html
- 15.3 QLRC A Review of the Uniform Evidence Acts September 2005
[http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/alrc/publications/dp/69/08.html?query=makita%20and%20sprowles;](http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/alrc/publications/dp/69/08.html?query=makita%20and%20sprowles)
- 15.4 NSWLRC Report 109
<http://www.austlii.edu.au/au/other/nswlrc/reports/109/output/index.html>
(viewed August 2008)