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Expert Evidence

Complex commercial litigation and personal injury cases are alike in one respect: they both require help from the experts. This presentation examines the lawyer's role in expert evidence from start to end, including:

- Determining the role expert evidence will play in your case
- Commissioning experts:
    - Determining who to ask
    - Determining the issues for the expert
    - What to ask them – specific questions or "do a report"
- Single experts – when will they ordered
- Expert conclaves –
    - When they are required
    - How to run one
- Hot tubbing
- Managing experts in the court room
- Communications with experts: are they privileged?

DETERMINING THE ROLE EXPERT EVIDENCE WILL PLAY IN YOUR CASE

There are various prisms through which to view the role of experts. I will first peer through the established prism, which provides a four fold classification of the functions of experts. I will then peer through the looking glass from another perspective.

Peering through the established prism : *the role of the expert is to generalize from experience, act as librarian , act as statistician and act as advocate.*

Are you in a recognised field e.g. accountancy or an experienced mechanic ?

The general principles relating to the role or functions of experts, was summarized in *JTMJ and Australian Securities and Investments Commission* [2010] AATA 350 (11 May 2010) , as follows [1]:

"49 Opinion evidence is evidence of '*a belief or judgment which seems likely to be true, but which is not based on proof ...*'.[18] It has been described in a legal context as '*a conclusion, usually judgmental or debatable, reasoned from facts*' [19] and as '*an inference from observed and communicable data*'.[20] It is the subject of Part 3.3 of the *Evidence Act 1995*, which provides that such evidence is not admissible to prove the existence of the fact about the existence of which the opinion was expressed.[21] The general inadmissibility of such evidence is subject to certain exceptions. One of those exceptions is found in s 79(1) which provides:

'*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.*'

50. Opinion evidence that is given by a person who has specialised knowledge based on the person's training, study or experience and that is wholly or substantially based on that specialised knowledge is in a different category. It is admissible in the courts as an exception to the opinion rule[22] and is taken into evidence in the Tribunal. As Gaudron J expressed the principle in *HG v The Queen*:[23]

'*The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience".*'[24]

[1] See also *Pan Pharmaceuticals Limited (In Liquidation) v Selim* **[2008] FCA 416**

51. It is clear from the authorities that the '*... categories of expert evidence are unlimited ...*'[25] and that they are not limited to areas in which a person's special knowledge or skill is derived from scholastic studies. As Thomas JA, with whom McPherson JA and Chesterman J agreed, said in *R v Lam*:[26]

'*There are many fields in which an expert's skill does not derive from scholastic studies. Examples include the practical experience of an Aboriginal tracker ..., a mechanic with much practical experience of engines ... and even the capacity of a heroin addict to identify a substance as heroin ...*'.[27]

Of some relevance in this case is the fact that the courts have recognised accountancy and auditing as fields of expertise. Speaking of forensic accountants, Austin J said in *Australian Securities and Investment Commission v Rich* (*Rich*):[28]

' *This broader field of expertise, generally relating to understanding the financial health of a business enterprise, is the realm of forensic accountants. It has been said that "their role is really to assist the court to understand the financial information, using their skills to organise, display and communicate financial information" ... or to "help explain complex financial and accounting issues raised in criminal and civil proceedings" .... Thus, in modern litigation forensic accounting evidence is admitted to assist, not only in determining the state of insolvency of the company at the particular time as in* Quick v Stoland,[[29]] *but in a variety of other broadly similar financial tasks, exemplified from Australian cases decided in the recent past ...*' [30]

……..

55. This passage highlights the triple requirements that an expert witness be sufficiently independent, have specialised knowledge and base his or her expert opinion on both that specialised knowledge and a relevant factual basis. ……..

56. The way in which a court or tribunal satisfies itself that the opinion is based on specialised knowledge:

'*... would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge. ……*'[40]

57. The expert report must:

'*...be presented in such a way that the court can readily assess whether the requisite correlation between opinions and specialised knowledge is present.*'

……

58. …….. The expert witness may observe facts that do not depend upon specialist knowledge and that evidence is admissible even under the Evidence Act as opinion based on evidence of what the person saw, heard or otherwise perceived about the matter.[43]

59. The consequences of failing to identify and articulate the assumed, accepted and observed facts were said by Austin J in *Rich* in a court and I respectfully suggest that the consequence is no different in this Tribunal:

'*Thus, if the expert fails to identify and articulate the assumed, accepted and observed facts upon which he or she proceeded, the court may well be unable to identify those facts, with consequences of several kinds. First, if the court is uncertain about the factual basis used by the expert, it may be unable to comprehend the opinion so as to decide how much weight or probative value to give it. Second, if the factual basis is not articulated, the court may be unable to determine whether the facts assumed or accepted by the expert correspond to the facts proved or admitted at the hearing .... This difficulty goes to the weight or value of the evidence, on any view, and may go to strict admissibility, if the 'basis rule' discussed at 6.7 is correct. Thirdly, in extreme cases the consequence of failure to articulate the factual basis may even be inadmissibility for irrelevancy. ……s 56(2).*'[44]

60. This is consistent with the earlier case of *Arnotts Ltd v Trade Practices Commission*,[45] in which the Full Court of the Federal Court specifically approved passages from the work of Sir Richard Eggleston, *Evidence, Proof and Probability*[46] regarding four functions of expert witnesses: '*generalising from experience, acting as librarian , acting as statistician and acting as advocate.*'[47] The generalisation engaged in by expert witnesses when expressing an opinion in their field of expertise is based on their experience and calls in aid all their training and professional experience. In doing so, Sir Richard said:

'*... It is often said that an expert cannot give an opinion as to the ultimate fact that the court has to decide. This is inaccurate, as experts, especially valuers, often give evidence as to the ultimate fact, and in many cases the question whether that fact exists can be answered only by experts ... What the rule really means is that an expert must not express an opinion if to do so would involve unstated assumptions as to either to either disputed facts or propositions of law. ...*'[48]

61. He went on to give examples, as did the Full Court when it concluded that:

'*... What does matter – the point emphasised by Sir Richard – is that the assumptions upon which the opinion is based are identified and articulated. Of course, if the assumptions made by the witness turned out to be different to those ultimately found by the Court, the opinion might have little relevance. ...*'[49]

62. Although the Full Court in *Arnotts* contemplated an expert's making assumptions about propositions of law, it is clear from the judgment of French J in *Woodside Energy Ltd v Commissioner of Taxation*[50] and the cases to which he referred that:

'*generally, it is not for an expert to give evidence as to the application of a legislative provision, as opposed to furnishing evidence from the view point of an economist with respect to what factors can or should be taken into consideration or ignored.*' [51]

63. Whether there is sufficient parity between the assumptions and the findings of fact made by the trier of fact is ultimately a question of fact as explained by the High Court in *Paric v John Holland (Constructions) Pty Ltd*:[52]

' *It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence ... But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages from* Wigmore on Evidence *cited by Samuels JA in the Court of Appeal ... to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense.*

As Wigmore states ..., 'the failure which justifies rejection must be a failure in some one or more important data, not merely in a trifling respect'. ...'[53]

……

65. If evidence given as expert evidence should transgress one or more of these boundaries from time to time, those transgressions do not necessarily render the whole of the evidence inadmissible in a court. That which does not transgress may properly be regarded as admissible.[55]

66. The issue is illustrated by reference to an accountant's evidence where it is:

'*... understood to be merely a summary of books and records which have been produced or identified, elaborate reasoning will be unnecessary and there will be no practical issue as to the identification of the assumed facts, because it* [sic] *books and records will be identified. It is therefore not surprising that the older cases assert, without qualification, that the accountant's summary of the books and records is admissible. That is not to say that accountants' reports are exempt from the general principles as to admissible expert opinion evidence. Rather, the point is that compliance with the general principles will be obvious or can be readily established. As Giles JA said in* Adler v ASIC [(2003) [2003] NSWCA 131; 179 FLR 1] *at [631], what is required by way of the explanation of which Heydon JA* [spoke] *in* Makita *will depend on the circumstances. Thus (at [632]):*

A solicitor shown to have specialised knowledge of conveyancing practice can give opinion evidence of general conveyancing practice without spelling out links between his training, study and experience and his opinion. The links are apparent from the nature of the specialised knowledge.

Similarly an accountant can give evidence summarising books and records of a business enterprise without having to spell out the link between his or her opinions and specialised knowledge.

The question of compliance with the general Makita *requirements will come to prominence where the accountant's evidence is more than a mere summary and where the subject matter extends beyond a contained set of books and records. ...*'[56]."

Peering through the looking glass, as to the roles of experts, from another perspective

There are at least four roles experts can play:

(i) to prove *liability* (as in professional negligence cases e.g. what should a competent conveyancer/ engineer/ architect have done / advised when faced with Situation X?
Or in product liability cases e.g. did the Hoo Boy Mk IV machine produce widgets at the warranted rate of 1000/hr?)
(ii) to prove *quantum* (eg what was the value of the lost commercial opportunity to development Blackacre, caused by the failure of the Conveyancer X's negligence to lodge a caveat post exchange , which in turn led to the purchaser not securing the property?);
(iii) to support applications for interlocutory relief e.g. *security for costs* (solicitor –costs assessor –what costs likely to be obtained upon taxation/ assessment); or for *discovery* (including pre trial discovery) (any expert who can say that documents in the nature of PQR could be expected to exist. For example, an accountant who can say that the opposing party is likely to have maintained financial records on MYOB ; or an ex police officer who can say in a case for malicious prosecution, that the Police were likely to have maintained certain types of records); *Anton Piller / search orders* (usually a computer expert who can say e.g. that emails can be retrieved from the server);
(iv) to assist anonymously in the background to e.g. select the experts who might actually draft reports ; to assist with framing questions for the "front end" expert and opposing expert to address ; or for the conclave ; or to assist with working up cross examination.

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 NSW 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 NSW ADT, one sees report after report where the "expert" does not stoop to address the contractual plans and specification; but pauses only long enough to address either Australian Standards, the Building Code, or perhaps even trade standards.

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 e.g. the RTA resumes land for a public purpose (generally road widening) it serves a formal notice inviting the resumee 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.

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.

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 e.g. rectifying defects in the premises

caused by a de-camping lessee. See generally *Luxer Holdings Pty Ltd v Glentham Pty Ltd* [2007] WASCA 209 and Gumland Property Holdings Pty Ltd v Duffy Bros. Fruit Market (Campbelltown) Pty Ltd [2008] HCA 10.

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.

State of knowledge regarding risks associated with particular products: Some product liability case 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.

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* / *CCL* 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.

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.

Commissioning experts:

- Determining who to ask
- Determining the issues for the expert
- What to ask them – specific questions or "do a report"

Factors relevant to who to ask include

(i) is there likely to be a conclave ? Is there likely to be a site inspection / view with the Judge? If so, who is most likely to be an effective representative for the client ? Dry technical skills in may not be sufficient.

An expert with an engaging manner may in that circumstance be very useful, as the expert will have the chance to talk informally to the Judge to point out eg where he or she thinks the stormwater pipe should go.

(ii) Is there only one leading expert in Australia in the relevant filed? If so, pay a premium to secure that person, because the opponents then needs to find someone overseas.

(iii) how has this person fared under cross examination before ? What is their trial form? Are they good under pressure of do they just fall apart? Are they in a stable phase of their lives—because what you are after is support, not having yet another person to support.

Issues for the expert

Issues for experts ought generally be articulated by the pleadings and particulars.

However, where cases are initiated by Summons, there will be large scope for articulating the questions for the experts eg easements of necessity under legislation such as Sec 88K *Conveyancing Act* (NSW). The Summons will merely seek an order for easement; and the questions will be left to the legal representatives (or perhaps even the experts) to articulate.

What to ask: specific questions or simply to report on the issues ?

In *Stepping Stones* (edited by Dennis O'Driscoll, *faber and faber*, 2008) the Nobel Laureate Seamus Heaney in discussing the influence of *Beowulf* on English literature noted the

apocryphal story of the Irishman who, when asked by an Englishman in Magherafelt (which lies between Derry and Belfast), *"How do you get to Dublin?"*, gave the reply, *"If you're going to Dublin, I wouldn't be starting from here"* which Heaney says is an accurate way of saying that if you don't start in the right place you won't end up in the right place.[2]

The right place with experts , is to engage in dialogue with them to identify the correct question; not fling the file at their feet and seek a report ; nor to impose the question from a survey of the folder on your desk.

In my view, it borders upon professional negligence and professional misconduct for the lawyers not to articulate the question for the experts. I have never met an expert who got the questions correct, unaided.

Exceptions might be experienced valuers of shares or property, who write reports according to a formula and are often well versed in the legal principles pertaining to valuation. However, the more complex the issue, the more likely the expert will benefit from dialogue with the lawyer e.g. valuation for the purposes of resumption of land, where a myriad of methodologies vie for acceptance.

It is also generally a good idea to shape up the question to be answered, in conjunction with one's expert, rather than impose it from on high. The wrong question sometimes leads to an unfortunate result.

Take for example a question in the context of a building case. Assume the ceiling or a large warehouse was constructed with knotty pine, instead A grade pine, as called for in the specification.

If one asks the question: was the ceiling built with the materials required by the specification? The answer would be: No.

However, if one asked the questions: Is the ceiling fit for purpose? Are any knots in the pine visible to the naked eye from floor level? , the answers may well be more advantageous to the builder.

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. …."

[2] As quoted by Greenwood, Justice Andrew in "Recent developments in market definition" (FCA) [2010] Fed J Schol 15

EXPERT CONCLAVES

- When they are required
- How to run one

Should a conclave be ordered ?

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.

In the CTTT (which hears most of NWS's building disputes), there are certain Members whose usual duties include holding conclaves i.e. 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.

How to run one

This is determined by the relevant rules of court. The UCPR in NSW have fulsome provisions regarding same, including the limited circumstances in which the legal representatives can communicate with their experts once a conclave is on foot.

Generally speaking, once the questions have been fixed for the experts (by agreement or by the Court), it's up to the experts to bunker down and meet, without the lawyers present. The lawyers can facilitate the meeting (e.g. provide a board room and typing facilities) and in very limited circumstances, respond to questions.

SINGLE EXPERTS

COURT APPOINTED EXPERTS
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."

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."

In *Tyler v Thomas* [2006] FCAFC 6 Branson J [3] 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 exercise for the purpose of assisting an impecunious party to gather evidence – although the appointment of a court expert may in fact provide such assistance."

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

The paramount consideration is what the interests of justice require.

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 seeking of an adjournment as an option available to his client. Additionally the

[3] Application for special leave refused [2006] HCATrans 477, with Callinan J asking, perhaps rhetorically "Mr Douglas, did the Full Court really purport to lay down a very general rule which would open the door, as it were, to the appointment, indiscriminately, as it were, of court appointed ?"

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.

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"*.

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.

Her Honour concuded 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."

PROVISIONS OF THE NSW UNIFORM CIVIL PROCEDURE RULES ("UCPR")

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. [4]

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:

[4] This commentary is taken almost verbatim from that in Ritchie's *Uniform Civil Procedure NSW*.

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.

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, chosen 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."

COMMUNICATIOSN WITH EXPERTS: ARE THEY PRIVILEGED?

New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd [2007] NSWSC 258, White J

"15 The defendant submitted that the provisions of the *Evidence Act* 1995 (NSW) do not apply to the determination of this application. I do not agree. The questions of whether the documents are privileged, and if so, whether privilege has been waived, are to be resolved by the provisions of the *Evidence Act*, not by the common law. That is not because the Act has modified the common law, or applies by its own force to pre-trial procedures (*Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67; (1999) 201 CLR 49; *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1). Rather, it is a consequence of the rules. Rule 21.3 of the *Uniform Civil Procedure Rules* 2005 (NSW) requires that a list of documents must identify any document that is claimed to be a "*privileged document*" and must specify the circumstances under which the privilege is claimed to arise. Rule 21.5 provides in substance that a party is not required to make available "*privileged documents*" for inspection. Rule 1.2 provides that words and expressions defined in the Dictionary have the meaning set out in the Dictionary. In the Dictionary, the expression "*privileged document*" is defined as meaning a document that contains privileged information. "*Privileged information*" is defined as meaning, relevantly, any information of which evidence could not by virtue of the operation of Div 1 of Pt 3.10 of the *Evidence Act* be adduced in the proceedings over the objection of any person. Hence, the provisions of the *Evidence Act* are made applicable by the definitions contained in the *Uniform Civil Procedure Rules*.

16 The relevant section in Div 1 of Pt 3.10 of the *Evidence Act* is s 119. It provides:

'***119 Litigation***

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
(b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.'

17 The expressions "*confidential communication*" and "*confidential document*" are defined in s 117 as follows:

*'**confidential communication** means a communication made in such circumstances that, when it was made:*

(a) the person who made it, or

(b) the person to whom it was made,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

confidential document *means a document prepared in such circumstances that, when it was prepared:*

(a) the person who prepared it, or

(b) the person for whom it was prepared,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.'

18 Paragraph 119(b) is important. It has been held that common law legal professional privilege does not attach to an expert's own documents, prepared by him for the purpose of expressing an expert opinion in litigation but which were not communicated to the client or the lawyer of the client, and do not reveal communications between the expert and the client, or between the expert and the lawyer for the client (*Interchase Corporations Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 1)* [1999] 1 Qd R 141 at 150-151, 153, 162; *Australian Securities and Investments Commission v Southcorp Limited* [2003] FCA 804; (2003) 46 ACSR 438 at [21]).

19 This view is based upon the fact that:

'*Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se.*' (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 529, 543, 552, 568, 580-581, 585).

20 Section 119 of the *Evidence Act* expressly applies both to confidential communications between the client and a third party, or between a lawyer acting for the client and a third party, for the dominant purpose of the client being provided with professional legal services relating to legal proceedings, and to the contents of a confidential document prepared with that dominant purpose, whether the document is delivered or not (*Re Southland Coal Pty Ltd (recs and mgrs apptd) (in liq)* [2006] NSWSC 899; (2006) 59 ACSR 87 at [16]- [19]; *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at [8], [15])."

"Associated material waiver" was explained as follows in *Matthews v SPI Electricity Pty Ltd &*

Ors and SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd) [2013] VSC 33 (13 February 2013):

"31 It is common ground that the issues raised by the plaintiff's application are governed by the provisions of the Evidence Act 2008 (Vic) ("Evidence Act"), in particular Part 3.10, Division 1, which applies to interlocutory proceedings.[34]

32 The application is made on the assumption that the documents identified in the Summons are properly the subject of privilege.

33 The plaintiff claims that SPI has lost the privilege in the Summons documents by the operation of s 122, or by a combination of that section and s 126, of the Evidence Act. For present purposes, only sub-section 122(2) need be considered. It provides:

Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in sections 118, 119 or 120.

34 The origin of this sub-section is the provision in the same terms introduced into the Commonwealth and New South Wales Uniform Evidence Acts following the Australian Law Reform Commission Report 102, prepared with the New South Wales and Victorian Law Reform Commissions.[35] Because the Victorian Act post-dated those amendments, the sub-section appeared in the Victorian legislation from enactment.

35 The object of the sub-section was to adopt the approach of the High Court in Mann v Carnell, in which case Gleeson CJ, Gaudron, Gummow and Callinan JJ stated:[36]

What brings about the waiver is inconsistency, which the courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large.

36 Although sub-section 122(2) is formulated a little differently from the formulation of the common law principle by the High Court in Mann v Carnell, in that it works on inconsistency between the conduct of the party and a claim of legal entitlement to confidentiality, whilst the High Court formulation works on inconsistency between the conduct of the party and the maintenance of confidentiality,[37] for present purposes nothing turns on this difference. The relevance, however, of the origin of the formulation is that the common law cases on the question of waiver of privilege continue to be relevant to the question arising under s 122 of the Evidence Act.[38]

37 So, under the test propounded in Mann v Carnell it is inconsistency between the conduct of the client and the maintenance of the confidentiality that the privilege is intended to protect which effects a waiver of the privilege. The test for imputed waiver had previously been expressed in terms of fairness: see Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 ('Maurice') at 481 per Gibbs CJ, 487–8 per Mason and Brennan JJ, 492–3

per Deane J, and 497–8 per Dawson J. Fairness has become a subsidiary consideration; it may be relevant to the court's assessment of inconsistency in some contexts but not in others.[39]

38 In any application of Mann v Carnell, the starting point must be an analysis of the disclosures or other acts or omissions of the party claiming privilege that are said to be inconsistent with the maintenance of confidentiality in the privileged material.[40]

39 It is well established that a voluntary disclosure of privileged documents can result in a waiver of privilege over those documents and associated material. The test applied to determine the scope of any waiver of 'associated material' is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter: Maurice at 482 and 484 per Gibbs CJ, 488 per Mason and Brennan JJ, and 498–9 per Dawson J.

40 Associated material waiver brings into play s 126 of the Evidence Act, the related communications and documents provision. That section provides:

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

41 Sections 4(1)(b) and 131A of the Evidence Act have the effect of applying s 126 to the interlocutory questions raised by the plaintiff's Summons.

42 In Towney v Minister for Land & Water Conservation (NSW),[41] Sackville J made a number of pertinent observations about this section. First, that the test set out is an objective test; secondly, that its operation must be assessed according to its terms and not on the basis that it in some way reflects the pre-existing common law; and thirdly that it was clear in his view that a mere reference in a subject document to another communication or document, of itself, does not necessarily result in a loss of privilege attaching to the subject document. The application of s 126 ultimately depends on the degree and manner in which the subject document assists in a proper understanding of the other communication or document. In relation to the meaning of 'proper understanding', Sackville J said:

The dictionary definition of 'proper' includes 'complete or thorough'; the definition of 'understand' includes 'to apprehend clearly the character or nature of' and 'to grasp the significance, implications or importance of': *Macquarie Dictionary*.

43 Sackville J's views were essentially accepted as correct by the NSW Court of Appeal in Sugden v Sugden.[42]

44 A common application of associated material waiver is where an expert report has been prepared in reliance on other documents."

In *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438; [2003] FCA 804, Lindgren J helpfully summarised the following principles derived from his analysis of the case law, in relation to the waiver of privilege in connection with expert evidence, in the following terms:

1. Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege: cf Wheeler v Le Marchant (1881) 17 Ch D 675; Trade Practices Commission v Sterling [1979] FCA 33; (1979) 36 FLR 244 at 246; Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1) [1999] 1 Qd R 141 (Interchase) at 151 per Pincus JA, at 160 per Thomas J.

2. Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege: Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 ; 141 ALR 545 ; 91 A Crim R 451 (Propend); Interchase, per Pincus JA; Spassked Pty Ltd v Cmr of Taxation (No 4) [2002] FCA 491; (2002) 50 ATR 70 at [17].

3. Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications: cf Interchase at 161-2 per Thomas J.

4. Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents; cf Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 at 481 ; [1986] HCA 80; 69 ALR 31 at 34 per Gibbs CJ, CLR 487-8; ALR 38-9 per Mason and Brennan JJ, CLR 492-3; ALR 42-3 per Deane J, CLR 497-8; ALR 46-7 per Dawson J; Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83 at 98 ; [1995] HCA 39; 132 ALR 57 at 66 per Deane, Dawson and Gaudron JJ, CLR 109; ALR 75 per Toohey J; Instant Colour Pty Ltd v Canon Australia Pty Ltd [1995] FCA 870; BC9506842; Australian Competition and Consumer Commission v Lux Pty Ltd [2003] FCA 89; BC200300344 (ACCC v Lux) at [46].

5. Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents; Interchase at 148-50 per Pincus JA, at 161 per Thomas J.

6. It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report: cf Dingwall v Commonwealth [1992] FCA 627; (1992) 39 FCR 521;

Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2) (1998) 83 FCR 397 at 400; 156 ALR 364 at 366; ACCC v Lux at [46].

In *Traderight (NSW) Pty Ltd (ACN 108 880 968) & Ors v Bank of Queensland Limited (ACN 009 656 740) (No 14) and 13 related matters* [2013] NSWSC 211, the Bank of Queensland applied for access to a number of documents produced by an expert in response to a subpoena served on her by the bank. The expert had prepared the report on instructions from the OMB parties (OMB).

It was held that a claim for privilege in respect of communications between a party's legal advisors and an expert retained by the party, and draft reports prepared by the expert, was not waived by service of the expert's report.

OMB claimed client legal privilege in respect of:

- draft reports of the expert containing comments, requests or advice made by the OMB legal advisors and communicated to the expert
- draft reports of the expert created for the dominant purpose or with the expectation that those draft reports would be provided to the OMB legal advisors for the purpose of those advisors considering or providing comment or advice
- documents recording communications between the expert and the OMB legal advisors

The issue before the Court was whether, pursuant to section 122 of the *Evidence Act*, it would be inconsistent for OMB to rely on the expert's report and at the same time maintain a claim for privilege.

Justice Ball set out the history of section 122 and noted that the meaning of "inconsistency" is informed by considerations of fairness between the conduct of the client and maintenance of the confidentiality.

His Honour observed that the fact that legal advisors have communicated with an expert and provided comments on drafts of a report does not mean the expert has not reached her own conclusions or relied on material that has not been disclosed in the report. In fact, it is of general assistance to the court when parties' legal advisors help experts to narrow the issues and present their opinions in an admissible and understandable form.

The court held that the privileged materials had not influenced the content of the expert's report in such a way that the service of the report was inconsistent with maintaining the privilege in those materials. Accordingly, OMB was entitled to maintain its claim for privilege.

The lesson :

Legal advisors briefing an expert and wanting to maintain privilege over their

communications, ought ensure that the assistance and commentary provided does not influence the expert's conclusions. It is permissible for the legal advisors to test the expert's findings by raising factual or hypothetical issues which may cause the expert to alter their conclusions.

As long as the expert continues to form his or her own conclusions, all working drafts and communications passing between the expert and the legal advisors will continue to attract privilege.

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