ADVANCED STRATEGIES FOR ADMISSIBLE AND PERSUASIVE EXPERT EVIDENCE

SEMINAR PAPER FOR LEGALWISE 8TH ANNUAL ADVANCED EVIDENCE AND ADVOCACY PRACTICUM

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INTRODUCTION

1 Objections to experts reports (notified by way of pre trial Tables of Objections) usually fall into the following categories:

i *Relevance*;

ii *Reasoning* not shown adequately or at all (i.e. *Makita*) and associated with this, *Form* e.g. assumptions not collected in one place; mumbo jumbo jargon used; mere *ipse dixit* on the *ultimate issue;*

iii *Lacks expertise*;

iv *Unfair prejudice etc Secs 135 and 136 Evidence Act;*

v *Hearsay*

2 To be persuasive, the report must be admissible. It is disheartening to clients to sit in the back of courts and hear arguments over admissibility – these can be costly and are almost always distracting. It is sure-fire way of signalling to your client that you are not on top of their case.

3 Equally, one loses the first opportunity to *persuade* the person that really counts at the sharp end: the judge hearing your case. Judges are hard working and will generally try to read papers presented in the court book pre trial.

Why not take the first opportunity to impress and persuade?

My approach in this paper will be to refer to the general principles, then look at some decided cases I've been in.

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RELEVANCE

4 To be admissible, an opinion must be relevant; that is, 'if it were accepted, [the opinion] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. *Uniform Evidence Legislation,* Secs 55 and 56. Parts of reports that are relevant are admissible; and *vice versa.*

5 An opinion in a report based on factual assumptions that are not established by evidence, opens up that report to objections that the opinion is irrelevant to assess the existence of a fact in issue.

OPINION EVIDENCE

Expert opinion

6 Section 76(1) of the *Evidence Act* (Cth) provides that "*evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed*".

7 Sec 79 (1) provides an exception, that "*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*".

8 An additional rule at common law, called the "*basis rule*", has developed "…..*by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence.*" *Dasreef Pty Limited v Hawchar* [2011] HCA 21 (22 June 2011) at [41].[1]

9 The "*basis rule*" is associated with the judgment of Heydon JA in (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 the effect of what HH held is that an expert statement, *at least in complex matters*, must separate out and make explicit the following, so that the <u>*basis*</u> on which opinions are expressed are "clearly and fully proved":

[1] In *Hawchar v Dasreef Pty Ltd* [2009] NSWDDT 12 (22 May 2009), Dasreef took more than 70 objections to the expert evidence, on the ground that the opinions were not based on specialised knowledge and that they fell short of the rules in *Makita. See para [59].*

[2] *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. For an application of these rules to a case of negligence of a truck driver, where an expert created computer modelling based on various assumptions to illustrate

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.

10 If you wish further granularity as to what is an assumption, what is accepted fact; and how these differ to opinions, see the exposition in *ASIC v Rich*, paras [260] ff. That case had to consider the true categorisation of intermediate assumptions; or evidentiary bridges, between primary facts and ultimate conclusions: see para [262] ff.

11 If these strands of reasoning are not separated out, that may render a report inadmissible.

What HH said was as follows:

> "[...] so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and 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. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is *strictly speaking not admissible*, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (at CLR 428 [41]), on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise."

12 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 Weinberg and Dowsett JJ said at [87], that Heydon JA's phrase "strictly speaking", in *Makita*:

> "should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA. However many of those qualities involve questions of degree, requiring the exercise of judgment. For this reason it would be very rare indeed for a court at first

instance to reach a decision as to whether tendered expert evidence satisfied all of his Honour's requirements before receiving it as evidence in the proceedings. More commonly, once the witness's claim to expertise is made out and the relevance and admissibility of opinion evidence demonstrated, such evidence is received. The various qualities described by Heydon JA are then assessed in the course of determining the weight to be given to the evidence."

13 Branson J in *Sydneywide Distributors*, discussing the *Makita* principle said much the same as the other judges, as follows:

"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."

14 For application to car accident / repair loss adjustors, see *Sharkawy v Toman* [2007] NSWSC 621.

15 The Law Reform Commission said there was no common law "basis rule", and it was later omitted from the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW).

Since then, views have been sharply divided between NSW State courts and the Federal Court, as noted in *McIllroy* [2011] FamCA 506 para [92] (a property settlement matter).

16 It may be that the once canonical force of Heydon JA's observations in *Makita* have been further diluted by the decision of the Court of Appeal in *ASIC v Rich* (2005) NSWCA 152 (especially at 92-135) where Spigelman CJ said at [94]:

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

17 Even the Full Court of the Federal Court has said that in complex matters, opinion evidence of experts should have the factual basis and assumptions clearly identified; and it would be unfair to leave those matters to the cross examiner: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2007] FCAFC 70; (2007) 159 FCR 397, the court at [108] – [109].

18 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. [2] The Federal and Family Courts emphasise more issues of the relevance of the evidence to the issue in dispute, the specialized skill and knowledge of the expert and whether the report is based on such skill and knowledge.

FORM

19 In *HG v The Queen* [1999] HCA 2; (1999) 197 CLR 414, at [39], Gleeson CJ pointed out that compliance with s 79 entails attention to the requirements of form, since "by directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question".

20 On the other hand, there is a risk that in laying emphasis on formal matters, the court might concentrate on technical formal compliance without proper regard to the purpose of the formal rules. The fundamental question to be addressed is whether the trier of fact (the court, where there is no jury) has been supplied with criteria enabling it to evaluate the validity of the expert's opinions: *Makita* at [59] per Heydon JA (as summarised in ASIC v Rich (2005) Para [259].

UNFAIR PREJUDICE / PROBATIVE VALUE

21 Even if expert opinion meets the “relevance” criterion, it can be nevertheless be excluded in the trial judge’s discretion if its ‘probative value’ is outweighed by the danger that the evidence is ‘unfairly prejudicial’, ‘misleading or confusing’, or might ‘cause or result in undue waste of time’.

22 Uniform Evidence Legislation s 135, applicable in all proceedings, and s 137, which is applicable in criminal proceedings.

23 Sec 136 *Evidence Act* provides:

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

[2] *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. For an application of these rules to a case of negligence of a truck driver, where an expert created computer modelling based on various assumptions to illustrate the accident , see *Beswick v Tamarack Pty Ltd* [2009] TASSC 109.

(b) be misleading or confusing.

RULES OF COURT AND PRACTICE NOTES AND THE EXPERT WITNESS CODE OF CONDUCT

24 These contain many rules regarding expert evidence. E.g. UCPR 31.27 as to what an expert's report must include e.g. qualifications as an expert *on the issue* in the report; the facts and assumptions on which it is based; reasons and so forth.

25 UCPR 31.23 requires experts to acknowledge the EWCoC.

26 There are also procedural rules e.g. that due notice must be given that expert evidence is intended to be relied on; or at an even more basal level, that leave of the Court is required before one can adduce expert evidence.

It would be an embarrassing mistake to make e.g. in the Real Property List to simply serve an expert's report on say valuation, without first seeking leave.

27 As to the EWCoC, see the comments in *ASIC v Rich* paras 253 ff as follows:

"253 The Expert Witness Code of Conduct, like similar codes adopted in the rules of other courts, appears to be intended as a code of conduct for experts ("expressions of the ideal manner in which expert witnesses should go about their tasks", according to Ormiston JA in *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33, at [15]), prescribed in order to enhance the quality of their work, rather than to add to the rules of admissibility (*Collins Thomson Pty Ltd (in liq) v Clayton* [2002] NSWSC 366, at [23]). Indeed, it was presumably because the rules for admissibility of expert evidence were thought not to go far enough towards having only unbiased opinions put before the court, that Part 36 rule 13 C and Schedule K were inserted into the Supreme Court Rules in January 2000: *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485, at [14] per Campbell J.

254 The Code appears to have been strongly influenced by some observations of Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* [1993] 2 Lloyd's Rep 68, at 81-2, which are in part moral exhortations rather than legal requirements, and when taken together, they reinforce the need for the trier of facts to be fully informed of the expert's reasoning process: *Makita*, at [79] per Heydon JA……."

SUMMARY OF THE CRITERIA FOR ADMISIBILITY OF EXPERT EVIDENCE

28 (I) Identify why the evidence is relevant i.e. how can it rationally affect (directly or indirectly) the probability of the assessment of a fact in issue in the proceedings.

(ii) "*…by directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training study or experience, [s 79] requires that the opinion is presented in a form which makes it possible to answer that question……* "*[t]he point which is now made is a point about connecting the opinion expressed by a witness with the witness' specialised knowledge based on training, study or experience"*

(iii) a failure to demonstrate that an opinion expressed by a witness is based on the witness' specialised knowledge based on training, study or experience *"…is a matter that goes to the admissibility of the evidence, not its weight."*

Summary of what the HC held, in paras [30] ff of *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited* [2014] FCA 1412.

THE ROLE OF AN EXPERT

29 Experts have historically fulfilled one of four functions: *generalising from experience, acting as librarian, acting as statistician and acting as advocate. : Trade Practices Commission v Arnotts Limited (No.5)* (1990) 21 FCR 324.

It would be a brave expert who descended too much into advocacy in an age of the Expert Witness Code of Conduct.

The "*... categories of expert evidence are unlimited ...*" and that they are not limited to areas in which a person's special knowledge or skill is derived from scholastic studies: see *JTMJ and Australian Securities and Investments Commission* [2010] AATA 350 (11 May 2010), which contains a useful summary of *Makita* principles.

HOW INVOLVED SHOULD LAWYERS BE IN DRAFTING EXPERTS REPORTS?

30 A number of factors are involved here:

(i) The form of the report - is it admissible? E.g. does it set out the instructions; does it separate them from assumptions (in fact, does it even reveal that the expert knows the difference between an assumption and an instruction); does it contain a statement of expert's suppose expertise on the very point in controversy, and like

matters going to admissibility;

(ii) If admissible - is it persuasive and logical? Is it written so that a judge who studies contracts, torts and Shakespeare can understand it? Or is it written in Delphic jargon so that another expert, with a Ph. D in molecular science, can understand it?

(iii) Is privilege being waived in the communications between lawyer/expert or between client/expert?

31 In *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, was a claim for native title, with the issue thus being whether groups or individual had rights and interests of Aboriginal peoples in relation to land or waters. The authors of reports professed expertise as follows:

historians (2)
anthropologists (8)
linguists (2)
an archaeologist (1)
an ethno-botanist (1)
a person who has made a study of legislation and government practices and policies which have had an impact on the indigenous people of Australia (1).

32 There were 1426 objections, but none on the basis of relevance. Many were that expressions of opinion were outside the established 'specialised knowledge based on the author's training, study and experience'.

33 Lindgren J said as follows:

"[18] Unfortunately, in the case of many of the experts' reports, little or no attempt seems to have been made to address in a systematic way the requirements for the admissibility of evidence of expert opinion. Counsel protested that, in order to ensure that the requirements of admissibility are met, lawyers would have to become involved in the writing of the reports of expert witnesses. In the same vein, counsel said, in supporting the admission of certain parts of a report, that they were written in the way in which those qualified in the particular discipline are accustomed to write.

[19] 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. …."

34 HH noted that in many instances, the reports did not clearly expose the reasoning leading to the opinion arrived at; nor distinguish between the assumed facts on

which the opinion is based, and the opinion itself.

35 HH noted at [24] that that the *Evidence Act* does not, in terms, require, as a condition of admissibility, that an expert witness state distinctly and fully the facts assumed as the basis of his or her opinion. (*However, note that the NSW UCPR 31.27 requires this*).

HH then continued at [25]:

"But expert opinion will not be relevant if there is an insufficient correspondence between **all** the facts assumed by the expert as the basis for his or her opinion, and those proved or admitted…"

At para [27], HH relevantly observed:

"Unfortunately, however, in the case of many of the present reports, it is difficult to avoid the impression that no attempt at all has been made to address the criteria of admissibility of expert opinion evidence. The difficulty of my task is increased as a result. My impression is that in some cases, beyond the writing of an initial letter of instructions to the expert, lawyers have left the task of writing the reports entirely to the expert, even though he or she cannot reasonably be expected to understand the applicable evidentiary requirements. Such a course may have been followed because of a commendable desire to avoid any possibility of suggestion of improper influence on the author. But I suggest that the distinction between permissible guidance as to form and as to the requirements of s 56 and 79 of the Evidence Act, on the one hand, and impermissible influence as to the content of a report on the other hand, is not too difficult to observe. It does not serve the interests of anyone, including those of the expert witness, to deny him or her the benefit of guidance of the kind mentioned."

And para [28] is an observation as to *form* that one would seek to avoid having made in one's cases:

"While the present reports may have a table of contents and be divided into sections with headings and sub-headings, substantial parts of them can be described as undifferentiated combinations of speculation, summary description of facts, opinion (including opinion beyond the witness' field of specialised knowledge), hearsay, unsourced assertion and sweeping generalisation. Marker symbols, such as 'In my opinion' or 'It is my view', are rarely, if ever, used."

36 These observations were regarded by Perry J in *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited* [2014] FCA 1412, para [37] as being completely consistent with what the HC said in *Dasreefs*; and to like effect Akiba on behalf of the Torres Strait Islanders of the *Regional Seas Claim Group v State of Queensland* (No 2) [2010] FCA 643.

37 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; building cases where experts are wont to make pronouncements *ex cathedra* as to buildings being not in accordance with this or that Code, but without referring to the exact provision of the relevant Code or Australian Standard, let alone saying why that provision or Standard is called up by the contract being litigated.

Waiver of privilege in documents of and communications with, experts*: *a minefield

38 There are three steps in the process of complying with a subpoena:

Firstly, the production of the document to the Court in answer to the subpoena; *secondly*, the interim use which might be made of the document, such as the granting of access for the purposes of inspection, at which stage typically any questions of privilege are agitated and, *thirdly*, the tender of the document into evidence: *National Employers' Mutual General Association v Waind and Hill* [1978] 1 NSWLR 372.

39 The first stage of producing the documents on subpoena is governed by r 1.9 of the UCPR, which authorises an objection on the ground of a claim for privilege to production of a document.

Stage 2: claim for privilege and objection to inspection are governed by the common law: *Carbotech – Australia Pty Ltd v Yates* at [11] and *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002 at [10].

Stage 3 is governed by the *Evidence Act*

See generally *EPA v Grafil Pty Ltd & Mackenzie* [2017] NSWLEC 88

This area is a minefield.

40 In *New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258, it was held at [18] that pursuant to Sec119(b) *Evidence Act*, 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.

41 In *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438; [2003] FCA 804, Lindgren J summarised the principles in relation to the waiver of privilege in connection with expert evidence, in the following terms (*copious*

authorities excised):

i 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.

ii 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.

iii 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.

iv 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.

v 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.

vi 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.

42 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 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.

43 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.

44 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 referred to the authorities above, regarding "inconsistency".

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.

45 The lesson:

Legal advisors briefing an expert and wanting to maintain privilege over their communications, ought ensure they do not stray too far, and thereby 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 ought arguably continue to attract privilege.

Associated material waiver*: *how it extends to expert evidence

46 *"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 at paras [31] ff:

It was accepted that the Evidence Act 2008 (Vic) ("Evidence Act"), in particular Part 3.10, Division 1, applied to interlocutory proceedings. The argument was that SPI lost the

privilege in certain documents by the operation of s 122, or by a combination of that section and s 126, of the Evidence Act.

47 Sub-section 122(2) 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.

The New South Wales Uniform Evidence Act is to the same effect.

> [35] ……..
>
> 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 …….. 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.
>
> 37 ……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: …….. Fairness has become a subsidiary consideration; it may be relevant to the court's assessment of inconsistency in some contexts but not in others.
>
> 38 …….. 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 …… ……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.

……

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

48 Practice tips: how should the lawyer tip toe through this minefield?

i avoid drafts going back and forth;

ii avoid issuing letters of instruction crafting questions , especially at an early stage;

iii counsel against the client communicating with the expert; and control and vet communications between the expert and third parties e.g. inquiries of council officers;

iv let the expert know that field notes etc can be subpoenad;

v let there be no more than one soft copy in existence.

IN HOUSE COUNSEL AND OTHER IN HOUSE OFFICERS & EMPLOYEES

49 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."

Where a loss adjustor does a report, he / she is not an expert at that time, if no proceedings are on the cards; but if they need to do a report for court, they then become experts and thus have to e.g. comply with the Expert Witness Code of Conduct: paras 20 and 21 of *Sharkawy v Toman* [2007] NSWSC 621.

50 In *Equity 8 Pty Ltd v Shaw Stockbrocking 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."

51 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 of 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.

52 *Practice tip:* where an in- house expert is providing a report, then provide them the EWCoC, take them through it, & get them to acknowledge it to the extent that it applies to them.

LEADING WITH A GLASS CHIN

53 The cardinal sin: "Man in shed" syndrome, will lead to all the below issues:

"The property was inspected and it was observed ……."

"We think that ……"

"It is our opinion that ……." Form: Who is the author of the report? Is there a hidden co-author?

Letters of instruction that specify precise questions at an early stage of the litigation.

Jargon and mumbo jumbo: if it does not make sense to your teenage child, discard it. Sec 135 Evidence Act - unfair prejudice.

Failing to attach extracts from the Australian Standards, National Building Code etc , when referring to them.

CASE STUDIES

Makita

54 The plaintiff had an accident at work—she was injured when she fell down a flight of stairs; and she sued her employer in negligence, alleging the tread was slippery. She prevailed at trial and was awarded significant damages, persuading the judge that the reason for the fall was that the stairs were slippery. There was evidence of the use of those very stairs by her and others for many years, without any incident, all-pointing to the fact that they were not dangerous.

Her case stood or fell (so to speak) on her expert, who had conducted tests on the slipperiness of the stairs and the plaintiff's shoes; and concluded that the smooth concrete stairs had inadequate frictional grip; and was below that needed for a reliable margin of safety.

His report was admitted without objection at the trial.

55 On the successful appeal by the employer, it was put that the evidence ought not have been accepted, in light of the other evidence of years of use by others with no incident.

The employer could submit on the appeal that the report ought not have been admitted at trial (because there had not been any objection to it). The court held that the report (though properly admitted), ought not have been accepted in light of the weight of the contrary evidence.

56 Heydon JA concluded:

> "The conclusions in Professor Morton's report ought not to be accepted uncritically. On examination it is difficult to be convinced by them. The lay history of incident-free use of the stairs suggests that they were not slippery. That inference from that history is preferable to Professor Moreton's conclusions. If the stairs were not slippery, the defendant was not in breach of its duty of care as occupier and employer. The appeal should be allowed on that ground."

57 *Eric Preston Pty Ltd v Euroz Securities Ltd* (2011) 274 ALR 705, 724 [171]: the assumptions on which the opinions were based were not proved and the opinions were held to be irrelevant.

Sydneywide Distributors

58 The respondents had sued the appellants alleging that the packaging of a product distributed by the appellants was substantially identical with, and deceptively similar to the respondent's product (which the appellants also distributed) and that the appellant was guilty of the tort of passing off; and also misleading or deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth) the respondent had relied on.

At trial, the respondents prevailed.

59 On appeal, the appellant challenged both the admission of the expert evidence of Dr Beaton, and the trial judge's use of that evidence. Although Dr Beaton's evidence had been received at the trial without objection, it was argued by the appellants on appeal that his evidence was inadmissible or ought not to have been accorded weight. In support of that ground, the appellant invoked *Makita*. The full court rejected the challenge to the admissibility of Dr Beaton's report; and likewise rejected the challenge to the trial judge's use of that evidence.

60 It was in this context that Branson J observed in *Sydneywide* that what was said in Makita was a "counsel of perfection" and practically speaking, matters might be able to be approached in such a manner at trial.

As to Dr Beatson's report being admitted without objection, Her Honour observed that:

> "Rarely, if ever, would a trial judge be expected to interfere with the basis upon which represented parties had chosen to conduct their litigation by challenging the basis of an implicit concession concerning admissibility."

65. The second reason why Branson JA thought Makita was a counsel of perfection, was because any ruling on the admissibility of evidence is ordinarily required to be made by the trial judge during the course of the trial rather than at its conclusion, with the result that:

> "The trial judge's rulings will be based on the evidence and other relevant material, which may include assurance given by counsel, which are before the judge at the time that the ruling is required to be made. ... For this reason, it may prove to be the case that evidence ruled admissible as expert opinion will later be found by the trial judge to be without weight for reasons that, strictly speaking, might be thought to go to the issue of admissibility (e.g. that the witness's opinion is expressed with respect to a matter outside his or her area of expertise or is not wholly or substantially based on that expertise)."

Then Branson J addressed the "basis rule" in *Makita*.

Conclusion

66 (i) In NSW courts, you ought comply with the Makita rules, as these probably control whether a report will be admissible;

(ii) even if you don't comply, and even if the report is held admissible, by leaving unaddressed important matters, you are really offering up your expert as a sacrifice on the altar of your opponent's cross examination; or perhaps some probing question by the judge. If that questioning exposes the lack of foundation for an opinion, your expert looks silly, and could be so rattled that they lose focus.

(ii) even if admitted, the report by be held to be gravitationally challenged.

So who are you doing a favour by not being rigorous?

ASIC v Rich* [2005] NSWSC 149: *Intermediate conclusions/ evidentiary bridges

67 Arising out of the failure of One.Tel Ltd at the end of May 2001, ASIC brought civil proceedings under the Corporations Act against four defendants.

ASIC alleged that the defendants:

· failed to take reasonable steps to ensure that the board of directors was aware of various financial circumstances affecting the One.Tel Group;

· withheld information from the board as to those financial circumstances;

· to the extent that they were unaware of the financial circumstances, failed to take reasonable steps to apprise themselves of them;

· failed to recommend the appointment of an administrator at appropriate times;

· failed in a number of respects relating to the supervision of the company's operations - failure to monitor management, assess the financial position and performance of the company, ensure that appropriate systems were established, and see that the cash reserves of the company were appropriately maintained.

68 The Carter accounting report was a central plank of ASIC's case against the defendants. In it, ASIC sought to demonstrate that the cash balance had been reduced by a third, and that it there was a real risk that the company would run out of cash . The Carter report was to be used to show that group accounts did not take into account various

factors eg unpresented cheques and amounts overdue to creditors in the sum of $132m, that brought the cashflow into negative territory; and as such, there was no reasonable basis for Mr Rich and the Board to participate in a certain announcement to the market. The report was replete with *intermediate conclusions* reached from analysing the primary records, eg whether there was a cash flow crisis; which formed bridges to the ultimate issues of whether the Directors knew certain matters/ ought have known certain matters/ should ever have made a certain public announcement.

69 Para 47 ff summarise what opinions Mr Carter expressed eg that over a certain period, the financial position of the Group progressively deteriorated ; that there were serious liquidity problems ; and that there was insufficient information provided by management to the Board to enable it to do its job.

70 The Defendants *successfully attacked the intermediate expressions of opinion* / evidentiary bridges . They showed that many primary sources supposedly referenced by Mr Carter did not support the intermediate conclusion ; and having hacked these away, the final / ultimate conclusions could not stand.

71 This attack was on *Makita* grounds alternatively Section 135 *EA* to the admissibility of the report ; eg that the Report fails to differentiate between facts, assumptions and opinions; and also that Mr Carter had failed to disclose that he had previously been involved in assisting ASIC to investigate; in that process he was privy to significant information and came to the task of being an expert with pre conceived views that weren't humanly possible to erase. As such, his report did not truly reveal his reasoning process for arriving at critical conclusions:

> "221 As in the case of other specific challenges to the Report, Mr Carter suggested in cross-examination that there might be working papers that would support and explain the way the documents had been used (T 2522.11-2523.10). He also said there was other work done that "gave me comfort as to the use was making of the document, but the document itself was, in my view, a sufficient reference to explain the basis upon which I'd formed my opinion" (T 2523.5-10). His evidence seemed to be a combination of two limbs that were not entirely consistent with one another: namely, that he had not relied on anything other than the documents, but (as he said he will at T 2524.10), behind the documents "there will working papers and other procedures that we carried out to assess the reasonableness of having relied on those documents". *The latter evidence implies, of course, that there was a reasoning process not disclosed in the Report*."
>
> 242 In my opinion the Report, judged objectively, created the misleading impression that PwC had had no other involvement with ASIC or One.Tel, other than as disclosed in the Report, and in particular, no access to documents other than as identified at paragraph 9, except the limited kind of involvement that it would be usual for an expert witness to undertake before preparing his or her report. Looking back at the Carter Report now, with the benefit of hindsight, it seems to me regrettable that neither Mr Carter nor ASIC nor any of their advisers initiated an amendment to the draft Report to reverse the misleading impression, in

combination, of the various provisions to which I have referred*. I hope this case will provide a lesson for forensic accountants generally, to make sure that such a misleading impression is not created again.*

243 However, I do not regard the conduct of Mr Carter or ASIC with respect to the drafting of the Report as intentionally misleading. As ASIC pointed out in submissions, it is commonplace for an expert to express his or her views prior to the preparation of a formal report for use in court. One would not expect that kind of limited involvement to be disclosed in the expert's report. There does not seem to be any practice of disclosing, in an expert's report, that the expert has had access to documents that he or she has then been told to disregard for the purposes of the report (T 2455.9). Moreover, as demonstrated below, the preponderance of case law in Australia is to the effect that a lack of independence on the part of an expert does not render the expert's opinion evidence inadmissible or deprive the expert of testimonial capacity…….

Stepanovski v Chen [2011] NSWSC 1573: easement matter – Sec 88K Conveyancing Act – objection to evidence of the impact of the feng shui of the land, based on relevance. Competing experts reports on engineering issues

72 Sec 88 K allows a plaintiff to apply to the SC if they have tried to obtain an easement from the neighbour eg for stormwater or access, and been unsuccessful; and it is reasonably necessary for the use or development of the applicant's land.

Very often, Councils grant deferred commencement development consents, making it a condition to first obtain a neighbour's consent to a specified easement. This was the case for Tony Stepanoski, my former client, who had bought a site in West Chatswood, and wanted to build a duplex so he could look after his mother or father.

73 The main issue, as the matter shaped up through rounds of expert's reports, was whether the route for the pipe I contended for (down the side boundary within a corridor of about 900mm which could ever be built on), was the most logical, and inexpensive, and least invasive; or whether the defendant course should be adopted, viz go through two other neighbours. And diagonally bisect one of them, thus seriously crimping its future development potential.

74 A few weeks prior to trial, the defendant served a huge affidavit saying that the feng shui of her land would be negatively impacted on, if the easement were allowed. There was a voire dire on whether this evidence was admissible, and I submitted that having regard to the policy foundations of Sec 88 K (public interest in effective land use), evidence of such a subjective nature is simply not relevant.

75 In the event my objection were overruled, I had on stand by a man who was property developer by day and a feng shui master by night, to give evidence in refutation.

76 Bryson AJ upheld my objection , concluding that some subjective could be relevant, but ought have been served well prior to hearing , and thus was excluded. HH's reasoning is shown in these paras:

> "14 The terms and subject matter of section 88K show that its primary purpose relates to the public interest in effective land use. The purpose of section 88K is illustrated by the nature of an easement as a right annexed to land irrespective of who may from time to time own it, a right which touches and concerns that land, and to which another piece of land is servient, again irrespective of who from time to time may own it. The advantages for the proposed dominant land, and the disadvantages for the proposed servient land are the most prominent considerations……..."

77 In paras [36] – [38], the hon Mr Justice Bryson concluded that the view of the defendant's experts:

> "…is remarkably clumsy and presents no advantages in terms of land use or engineering work over the plaintiffs' proposal. The potential adverse effect on further development on No. 57A of the diagonal bisection is in my judgment prohibitive, and the potential adverse effect of an easement taken round the boundaries of No. 57A is significant. The proposal would be more expensive. It involves intervention in the rights of the owners of two parcels of land not of one. It depends on Council approvals which are uncertain. It has nothing to commend it from any point of view except the point of view of an owner of the defendant's land who very strongly wishes to resist an easement over her land. It is not beyond the feasible to run drainage through No 57 and No. 57A, but it would be a far less satisfactory solution than the plaintiffs' proposal.
>
> ……
>
> The plaintiffs' proposal is the shortest and simplest and involves the least engineering work and it is unlikely to involve significant long-term expense. It will function through gravity and will not require significant use of machinery or maintenance. It will have no adverse aesthetic impact. It will have markedly less impact on the utility of the defendant's land than an easement through the land of No. 57A would have on that land."

78 *Moral: work up with your experts a common sense strategy , having regard to the nature of the case. Do not deny the obvious nor contend for the ridiculous.*

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Wang v Kaymet **[2015] NSWSC 1058 : Sale of contracts "off the plan"; developer wishes to rescind contracts because not complete by sunset date**

79 The ultimate matter for determination in these proceedings is whether the defendants used reasonable endeavours to finish the project by the critical date.

80 Report by supposed building expert –whether opinion shown to be based on expert's specialised knowledge –whether reasoning process revealed –whether mere *ipse dixit* –whether report unfairly prejudicial.

Bruno Pisano v Georgia Dandris **(2104) 17 BPR 33,583; [2014] NSWSC 1070**

81 Sale of a home in Dover Heights. Defendants were the couple who previously owned the home and who had done extensive work to prepare it for sale for a significant amount (the wife, Ms Dandris, obtained an owner builder's licence for this purpose). The plaintiffs alleged that the home was riddled with defects, from leaks causing mould, to water ingress through bespoke sliding windows/ doors, to a wall being out of plumb, to a kitchen island benchtop being not 100% square, and many other matters, too.

82 Claims were made on various cases of action, including negligent answers to requisitions, negligent mis-statement etc, but these all fell away and the only cause of action left by closing submissions was breach of the ACL.

83 I represented the husband, the first defendant, at the trial and submitted to the trial judge that though the advertisement for the home may have been (colourlessly and unintentionally) misleading or deceptive, it was not within trade or commerce. Whilst the learned trial judge rejected this argument, it nevertheless found favour with the Court of Appeal, which reversed the judgment.

84 There were various building –type experts for the plaintiffs and one for the first defendant. My client was dependant on the first defendant's expert evidence.

It is instructive to read how the learned trial judge dealt with each of these experts.

85 He observed that one of them was far too wedded the clients' case. He observed that one expert had conducted water testing to see where a roof leak came from, whereas the other had not: not too difficult to see who was preferred.

One of the experts was considered not to have experience as regards the sliding

window / door issue: a $300K issue.

86 One expert incorrectly measured the height of stair risers: at the view, HH personally measured these, and there was some direct comment about this.

~ THANK YOU FOR READING ~

Comments and criticism welcomed to:

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