EXPERT EVIDENCE IN BUILDING AND CONSTRUCTION

INTRODUCTION

This paper considers the use of experts and expert evidence in construction disputes and litigation. The paper is intended to canvas some practical issues which need to be considered by practitioners representing a client in what might start out as a building dispute, and eventually end up in a contested hearing.

The first part of this paper briefly considers the way expert evidence is typically approached by the Courts, with reference to the *Uniform Civil Procedure Act* and some established case law. The second part examines some typical objections and challenges to admissibility. The third part considers some of the practical difficulties which can and should be avoided in the engagement and use of a building or construction expert.

THE ROLE OF THE EXPERT

Experts in the building and construction industry are often used in attempts to resolve building and construction disputes. They can be used as specialist mediators and/or conciliators, arbitrators, expert determiners or as experts for the purpose of giving expert evidence in legal proceedings.

If a dispute cannot be sensibly resolved informally at an early stage it almost inevitably ends up being made the subject of various claims and cross claims in a legal forum. It is therefore essential that the possibility of eventual litigation be considered from the very outset and at the time when the expert is first engaged.

The admissibility of expert opinion evidence is subject to a number of limiting criteria. These are found, for example, in *the Evidence Act* 1995, the *Uniform Civil Procedure Rules* 2005 and the rules and practice notes of the various courts.

The Evidence Act

Section 76 of the *Evidence Act NSW* 1995 ("the Act") is in the following terms:

> **The Opinion Rule**
>
> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Section 79 however is in the following terms:

> **Exception: opinions based on specialist knowledge**
>
> If a person has specialised knowledge based on the persons training, study or experience, the opinion rule does not apply to evidence of the opinion of that person that is wholly or substantially based on that knowledge.

It is important to note that for expert opinion not to be caught by the opinion rule it can only be given by a person who has "specialist knowledge" and must be "wholly or substantially based on that knowledge".

The requirements for the admissibility of an expert report were dealt with by Heydon JA in the case of *Makita (Australia) Pty Ltd v Sprowles*.[1] An essential requirement is that the expert must disclose the reasoning process which shows that the experts specialised knowledge was applied to the relevant factual assumptions (and where applicable the provided reference documents), in order to arrive at the opinions which have been expressed.

The six steps to the admissibility of Expert Evidence identified by Heydon JA in *Makita*[2] can be summarised as follows[3]

1) A field of "specialised knowledge" must be agreed or proven to exist.
2) The witness must demonstrate that he/she is an expert in that area of specialised knowledge by virtue of either his or her
   a) training
   b) study or
   c) experience.
3) The opinion expressed by the witness must be based on his/her expert knowledge.

[1] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705
[2] Supra
[3] Acknowledgement: Minter Ellison "On Site" March 2003.

4) The facts on which the opinion is based must be established either by the witness or by other admissible evidence.
5) The established facts must form a proper foundation for the expert opinion and
6) The expert must clearly explain the logical basis of his/her opinion and how it relates to the established evidence and his/her expert knowledge.

If objection is made to the admissibility of an expert report the court may exercise its discretion to either exclude or limit the use of the proposed evidence as provided for in sections 135 and 136 of the *Act*.[4]

The Uniform Civil Procedure Rules

Rule 31.23 of the *Uniform Civil Procedure Rules* is in the following terms:

> (1) An expert witness must comply with the code of conduct set out in Schedule 7.
>
> (2) As soon as practicable after an expert witness is engaged or appointed:
>
> (a) in the case of an expert witness engaged by one or more parties, the engaging parties, or one of them as they may agree, or
> (b) in the case of an expert witness appointed by the court, such of the affected parties as the court may direct
>
> must provide the expert witness with a copy of the code of conduct.
>
> (3) Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgement by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.
>
> (4) Unless the court otherwise orders, oral evidence may not be received from an expert witness unless the court is satisfied that he expert witnessed has acknowledged whether in an expert report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

A copy of the expert code of conduct is attached at "Annexure A". The general import of the code is to ensure that evidence admitted as "expert evidence" pursuant to the operation of section 79 of the *Evidence Act NSW* 1995 has been impartially prepared and with the overriding obligation of the experts duty to the court in mind.[5] It is intended to ensure that the evidence is not that of the proverbial "gun for hire" attempting to act as an advocate for his/her employer and does properly constitute "expert evidence".[6]

[4] *The Evidence Act* 1995.
[5] See section 2(1) and 2(2) of the Expert Code of Conduct – Schedule 7 of the *Uniform Civil Procedure Rules* 2005.
[6] See section 2(3) of the Expert Code of Conduct – Schedule 7 of the *Uniform Civil Procedure Rules* 2005.

TYPICAL CHALLENGES TO ADMISSIBILITY

Objection is often taken to the proposed admission of an expert report at the time of tender. Objections typically assert a lack of specialist knowledge (so as to qualify the author as an expert" for the purposes of section 79 of the *Evidence Act*[7]*),* a failure to acknowledge the Expert Code of Conduct[8] or takes issue with the form and contents of the report itself.

Specialist Knowledge

Section 79 of the *Act*[9] requires the deponent of an expert report to have "specialist knowledge" and for his/her opinion to be based on that knowledge. It is important to appreciate that the "specialist knowledge" of an "expert" in the building and construction industry is normally directly related to their particular professional discipline and/or the functions in which they typically perform. Just because someone has worked in the construction industry for 30 years does not necessary qualify them to give expert evidence in respect to all aspects of building and construction. This can best be seen from the following examples:

- Architects and other designers have particular specialised knowledge in conceptual design but rely on other professional disciplines for design of the structure and services required to construct their designs;
- Geotechnical engineers have particular expertise in soil conditions which is necessary for the efficient design of the footings and related structures;
- Structural engineers have specialist knowledge and expertise in assessing the loads to which the design will be exposed both by natural forces and by virtue of the proposed use of the building;
- Mechanical engineers have specialist knowledge about the design of air-conditioning and ventilation systems (and the various types of plant and equipment required for the operation of the proposed facility);
- Electrical engineers have specialist knowledge with respect to the design of lighting, power distribution and data;
- Hydraulic engineers are specialists in the design of fire fighting, water supply sewer and stormwater disposal services.

[7] *Evidence Act* 1995
[8] Rule 31.23 (3) of the Uniform Civil Procedure Rules
[9] *Evidence Act* 1995

All the professional disciplines work together collaboratively towards a common purpose but have their own particular interest, expertise and involvement in the establishment of a building project.

Co-ordination of the work of the various professional disciplines is normally undertaken by a project manager. Over recent years project managers have become an identifiable profession in their own right. They are usually supported and assisted by specialist programmers and cost consultants ("quantity surveyors") who provide advice on issues such as cost, variation and delay claims, and cash flow.

On the production side the work required for a building project is normally divided along trade lines. Heavy reliance and use is made by builders of trade subcontractors all of whom normally have a particular area of specialist knowledge and expertise. The different trades are normally completely dependant on the skills and foresight of a foreman, supervisor or construction manager who is able to see the "big picture" and who can co-ordinate their work with those of the other trades.

From the above it can be seen that a sufficiently detailed enquiry needs to be made in order to determine whether a proposed "building expert" actually has the necessary "specialist knowledge" required by section 79 of the *Evidence Act.* Failure to do so will almost inevitably result in the tender of that person's evidence being objected to and potentially ruled inadmissible.

Apprehension of Partiality

The apprehended impartiality of an expert who is otherwise suitably experienced or qualified to give expert evidence does not, without more render their evidence inadmissible[10]. The nature of the relationship between an expert and the party who engaged him may however be relevant to the weight which a Court should give to that expert's opinion.[11]

Proof of Assumption Rule

It is essential that the assumptions on which the expert's opinion is based be supported by the necessary evidence in the proceedings. If this is not done an expert report may

[10] *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485; bc200203021; *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454;BC200107393.
[11] *Li v R* [2003] NSWCA 290; BC200306243.

be ruled inadmissible to the considerable detriment of the party for whose intended benefit it was produced.[12]

In *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 Heydon J said: -

> "There is ... no doubt that the proof of assumption rule exists at common law. An expert opinion is not admissible unless evidence has been, or will be, admitted, whether from the expert or from some other source, which is capable of supporting findings of fact which are sufficiently similar to the factual assumptions on which the opinion is stated to be based to render to the opinion of value...(at [66]).
>
> The function of the proof of assumption rule is to highlight the irrelevance of expert opinion evidence resting on assumptions not backed by primary materials. It is irrelevant because it stands in a void, unconnected with the issues thrown up by the evidence and the reasoning processes which the trier fact may employ to resolve them. If the expert's conclusion does not have some rational relationship with the facts proved, it is irrelevant. That is because in not tending to establish the conclusion asserted, it lacks probative capacity. Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene..." ([at 90] citations omitted.)

Opinions Based on Inadmissible Evidence

It is also important to ensure that no part of the essential factual evidence on which an expert report is based is inadmissible for any reason. If this is the case it may result in the entire report being ruled inadmissible.[13]

In *Pownall v Conlan Management Pty Limited* (1995) 12 WAR 370 Ipp J made the following observation:

> "In my opinion, expert opinion based *entirely* on inadmissible evidence is itself inadmissible and there is no discretion to admit it. I form this view as to admit such an opinion would be to admit, indirectly, the inadmissible evidence itself. If an opinion, based solely on evidence that the Court by law is required to exclude, is itself admitted, the inadmissible evidence would have some influence over the Court's decision. Such a result would defeat the purpose of the law that excludes the inadmissible evidence. If the primary facts on which the evidence is based are not admissible, the opinion is valueless and irrelevant and, in my opinion, it should be excluded".

It is not uncommon for experts to rely on reports or opinions of other "experts" as a basis for some of their own expert opinions. It is important to fully appreciate that unless the evidence of those persons would also be accepted by the Court as expert evidence in its own right, and those persons are also available for cross examination (so that their opinions can be tested), reliance by the expert on such external opinion may result in the expert's own report being ruled inadmissible.

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[12] *Land Enviro Corp Pty Ltd & Ors v HTT Huntley Heritage Pty Limited and Ors* [2012] NSWSC 177 at 40
[13] *Land Enviro Corp Pty Ltd & Ors v HTT Huntley Heritage Pty Limited and Ors* [2012] NSWSC 177 at 48 and following

If the third party opinions on which the experts opinion is based amounts to hearsay this normally cannot be circumvented even if it can be established that that opinion is a "business record" for the purposes of s.69 of the *Evidence Act* 1995.

Section 69 of the *Act* contains the following provisions:

> "(1) This section applies to a document that:
>
> (a) either:
>
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or
>
> (ii) at any time was or formed part of such a record, and
>
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
>
> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
>
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or
>
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact...
>
> (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact)."

The High Court recently pointed out in *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 281 ALR 223:

> "... s 69 does not render business records as such admissible. It concerns representations in a document which is or forms part of a business record within the meaning of s 69(1). The representations are admissible if s 69(2) is satisfied".

From the above it would be foolhardy just to assume that because something appears to be a "business record" that it will make what is otherwise hearsay evidence admissible. This argument was rejected in the *Land Enviro Corp*[14] case.

Joint Expert Reports

The *Uniform Civil Procedure Rules* provide, inter alia, that the Court may direct that the experts meet in conclave and produce a "joint report" which may be admitted into evidence.

[14] *Land Enviro Corp Pty Ltd & Ors v HTT Huntley Heritage Pty Limited and Ors* [2012] NSWSC 177 at 91

Rule 31.24 of the *Uniform Civil Procedure Rules* is as follows:

> **31.24 Conference between expert witnesses**
> (cf SCR Part 36, rule 13CA; DCR Part 28, rule 9D; LCR Part 23, rule 1E)
> (1) The court may direct expert witnesses:
> (a) to confer, either generally or in relation to specified matters, and
> (b) to endeavour to reach agreement on any matters in issue, and
> (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and
> (d) to base any joint report on specified facts or assumptions of fact,
> and may do so at any time, whether before or after the expert witnesses have furnished their experts' reports.
> (2) The court may direct that a conference be held:
> (a) with or without the attendance of the parties affected or their legal representatives, or
> (b) with or without the attendance of the parties affected or their legal representatives, at the option of the parties, or
> (c) with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue).
> (3) An expert witness so directed may apply to the court for further directions to assist the expert witness in the performance of his or her functions in any respect.
> (4) Any such application must be made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought.
> (5) An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties affected.
> (6) Unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing

It is worth noting the provisions of subsection (6) of the above rule. It is not uncommon for experts to report back to the legal representatives as to what occurred at an expert conclave directed by the Court. It is also not uncommon for experts to sometimes make reference in their subsequent reports to what it is claimed was agreed/not agreed between the experts at an expert conclave, particularly where this is subsequently disputed or denied by an expert for an opposing party.

Other than what is perhaps disclosed in a subsequent Court ordered joint report the intent of subsection (6) appears to be that the preceding discussions between the experts in conclave cannot be made the subject of cross examination. Objection can also be taken to reference in expert reports which appear to have been made in breach of this prohibition in the rules.

Rule 31.26 of the *Universal Civil Procedure Rules* sets out requirements for the preparation of joint expert reports prepared pursuant to rule 31.24(1)c). It is in the following terms:

> **31.26 Joint report arising from conference between expert witnesses**
> (cf SCR Part 36, rule 13CA; DCR Part 28, rule 9D; LCR Part 23, rule 1E)
>
> (1) This rule applies if expert witnesses prepare a joint report as referred to in rule 31.24 (1) (c).
> (2) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.
> (3) The joint report may be tendered at the trial as evidence of any matters agreed.
> (4) In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
> (5) Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.

In *X v Sydney Children's Hospitals Speciality Network & Anor* (No 5) [2011] NSWSC 1351 an application was made to exclude a joint report from evidence. Adamson J summarised the arguments put forward in support of exclusion as follows:[15]

> a UCPR 31.26(3) and (4) are invalid and accordingly the tender of the Second Joint Report is not authorised by the Rules (the **Invalidity Argument**).
>
> b Although UCPR 31.26(3) provides that a joint report may be tendered at the trial as evidence of any matters agreed, it does not follow that it is admissible in evidence (the **Tender Argument**).
>
> c The Second Joint Report is inadmissible because it fails to comply with s 79 of the Evidence Act 1995 (NSW), in that the experts did not give reasons for their answers where the questions were answered unanimously and does not comply with the principles articulated by Heydon J in *Dasreef Pty Ltd v Hawcher* [2011] HCA 21 *(Dasreef*) and *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 (*Makita*), reflected in UCPR 31.27 and the Expert Witness Code of Conduct (**the *Makita* Argument**).
>
> d There are unexplained inconsistent answers for various questions throughout the Second Joint Report (the **Inconsistency Argument**).
>
> e Even if the UCPR do not require reasons to be given where matters are agreed, the Court directed that the experts provide reasons and accordingly the Second Joint Report ought be rejected since it failed to comply with the Court's directions (**the Directions Argument**).
>
> f To the extent that it is admissible, the Second Joint Report ought be rejected pursuant to s 135 of the Evidence Act because its probative value is substantially outweighed by the danger that it

[15] at paragraph 15 and 16.

might be prejudicial to the Plaintiff, misleading or confusing and a cause or result in undue waste of time (**the Unfairness Argument**).

g. The report did not comply with the requirements of UCPR 31.28 since it contained matters which were outside the content of reports which had been served in accordance with UCPR 31.28 (the **Report Argument**).

In the above case the relevant joint expert report was admitted into evidence despite the strident submissions to have it excluded (because it was generally unfavourable to the Plaintiff's case). The reasons of Adamson J disclose that the prejudice which was complained of could largely be cured by the giving of concurrent expert evidence and/ or cross examination on the joint report.

In *X v Sydney Hospitals Specialty Network* Adamson J found accepted that it would be unfair to refuse admission of the joint report in circumstances where the individual reports of the experts were admitted. His Honour held that "*it would be potentially misleading to admit evidence which reflected an experts historical view, which had changed in the light of discussion which had been not only authorised and agreed to by the parties, but also mandated by the Court."*[16]

It is clear that the Courts will generally be reluctant to exclude joint reports which have been prepared in accordance with the directions of the Court and at considerable cost to the parties. Those costs which often include the costs of multiple experts participating in expert conclaves in order to narrow the issues and to reach agreement on the very issues disclosed in the joint reports. Accordingly the preparation of a joint expert report which is adverse to a client's case should prompt a review of the client's prospects rather than reliance on submissions later which seek to have it excluded.

Non-Compliance and Discretion

It is important to note that non-compliance by an expert with issues relating to the Expert Code of Conduct will not automatically result in exclusion. The decision as to whether a report should be admitted is still a matter for the exercise of discretion by the presiding judicial officer[17]. This is because an expert report without the acknowledgement of the code of conduct is not admissible "unless the court otherwise orders".

[16] At paragraph 65.
[17] UCPR rule 31.23(3) and (4).

A court will not normally "otherwise order" unless it is satisfied that there are good reasons to admit the evidence. It is not necessary however to show that there are "exceptional circumstances".[18]

The discretion to admit a report in the absence of the required acknowledgement may also still be exercised where the court is satisfied that the non-compliance was "technical"[19] in the sense that the report was in fact prepared in compliance with the code. (In some instances an expert report has been admitted where the expert has "sufficiently confirmed the report after being appraised of the contents of the code"[20]).

An important consideration in the exercise of discretion appears to be whether the court is satisfied of the impartiality of the expert in the opinions which have been expressed in the report.[21] The discretion to admit a report in the absence of the required acknowledgement will not usually be exercised where an expert has subsequently been provided with a copy of the code (which he/she has read, and then agreed to be bound by), if it is still clearly apparent that the witness does not understand the code, or has not complied with it.[22]

Admissibility versus Weight

Expert evidence relating to issues such as defects, variations and loss of profit or damages is often essential to the proving or defence of a building claim. The absence of such evidence can usually not be overcome by lay evidence usually given by persons who are themselves also parties to the proceedings.

Given the consequences of excluding an expert report from evidence Courts and Tribunals are often reluctant to rule that an expert report is so defective in form or substance that it is ruled inadmissible. A more common approach is to admit the report on the basis that the expert can be cross examined on it and that submissions can be made as to the weight which should be placed on it. This is not a satisfactory response because it leaves the parties unsure as to whether the report will be accorded the weight contended for or will be treated as having no weight whatsoever.[23] It also is of little assistance to the parties who by that stage should be making a sober assessment of the merits of their respective cases so as to enable them to agitate for an early informal settlement.

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[18] *Hodder Rook and Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011} NSWCA 279.
[19] *Barak Pty Ltd v WTH Pty Ltd* (t/a Avis Australia)[2002] NSWSC 649.
[20] *Langbourne v State Rail Authority* [2003] NSWSC 537
[21] *United Rural Enterpriese Pty Ltd v Lopmund Pty Ltd* [2003] NSWSC 870.
[22] *Re Idylic Solutions Pty Ltd* [2012] NSWSC 731; *Welker v Rinehart* (No 6) [2012] NSWSC 160.
[23] As occurred in *Chand v Azurra Pty Ltd (in liquidation)* [2001] NSWCA 227.

PRACTICAL CONSIDERATIONS

There are a number potential obstacles which can and should be avoided in the selection, engagement and use of experts (whether from the building or construction industry or otherwise). Due consideration of these issues can avoid significant difficulties and/or professional embarrassment.

Directions regarding Expert Evidence

It is important to that directions specifically dealing with expert evidence are promptly obtained from the Court during pre-trial case management. If this is overlooked the Court may later reject the tender of such evidence during the trial.

The requirement for directions and the relevant sanction for failing to do so are found in the *Uniform Civil Procedure Rules* 2005. Rule 31.19 is in the following terms:

> **31.19 Parties to seek directions before calling expert witnesses**
> (1) Any party:
> (a) intending to adduce expert evidence at trial, or
> (b) to whom it becomes apparent that he or she, or any other party, may adduce expert evidence at trial,
> must promptly seek directions from the court in that regard.
> (2) Directions under this rule may be sought at any directions hearing or case management conference or, if no such hearing or conference has been fixed or is imminent, by notice of motion or pursuant to liberty to restore.
> (3) Unless the court otherwise orders, expert evidence may not be adduced at trial:
> (a) unless directions have been sought in accordance with this rule, and
> (b) if any such directions have been given by the court, otherwise than in accordance with those directions.
> (4) This rule does not apply to proceedings with respect to a professional negligence claim.

It is worth noting that the Court may decline to make directions permitting the use of expert evidence if it is not satisfied that the proposed evidence is reasonably required to resolve the issues in the proceedings[24] or the evidence does not appear to the Court to relate to a real issue in the proceedings[25].

It is therefore important that when seeking leave to adduce expert evidence that the attending legal practitioner is sufficiently prepared and/or has to necessary instructions to enable him/her to address the Court on these matters. (Particularly in circumstances

[24] *Chapman v Chapman* [2007] NSWSC 1109
[25] *Bizzanelli v Bizzanelli* [2007] NSWSC 1085

where an agent or junior counsel is briefed to appear at a directions hearing but who otherwise has no detailed understanding of the issues which will subsequently be litigated.

Selection of The Expert

From the brief outline in the first part of this paper it should already be apparent that care should be taken to ensure that the expert being engaged has the necessary "specialised knowledge" to qualify that person as an expert for the purposes of the *Evidence Act*.[26] This will require a clear idea as to the type of opinion evidence which may be required so as to correctly identify a suitable expert with the necessary "specialist knowledge".

If the dispute involves programming, delay and/or prolongation cost claims a programming specialist may best suited to provide appropriate advice. Building defects may only require a well experienced building consultant with appropriate qualifications and experience. Care should however be taken if the defects involve building services or structural defects as these are normally outside the "specialised knowledge" of a generalist building consultant. Such defects normally require the engagement of the appropriate services and/or structural engineer. If this is not done objection may successfully be taken to those parts of the expert's report which are found to be outside his/her area of expertise. Alternatively the weight given to the expert report may be substantially diminished by effective cross examination where these deficiencies are often easily exposed.

Typically an expert is engaged (often initially directly by an Owner) for the purposes of finding out the extent of some identified problem (such as a building defect). At that stage little thought is normally given to issues such as impartiality, expertise or suitability as an expert for the purposes of any possible future litigation. As a result the expert's investigations, initial reports and/or opinions are often conducted or prepared without reference to the standards expected of experts for the admissibility of their reports. If this is established in cross examination the credit of the expert may be attacked on the basis that they were later unable to bring an open and independent mind to their later enquiries and evidence because their views had already been tainted by virtue of prior informal involvement and instruction by their client.

It is not uncommon for clients (and particularly builders or contractors working in the industry) to suggest the use of one or other "expert". More often than not this stems from

[26] See section 79 of the *Evidence Act NSW* 1995

some type of professional or business association which has led the client to believe that this particular person will be "more likely to help them win the case". Typical examples are requests for the engagement of structural engineers who have previously overseen work which was successfully undertaken by a defendant builder or contractor. The problem with these "suggestions" (which can sometimes be very forcefully conveyed as instructions") is at least twofold. Firstly an application may later be made in proceedings that the expert be disqualified due to having had too close a working relationship with his/her client[27]. Secondly the nominated person, while perhaps admirably technically qualified and experienced may have little or no knowledge or experience in acting as an expert in legal proceedings.

Instructions

The importance of providing a proposed expert with adequate instructions cannot be overstated. The instructions should be accompanied by a suitably drafted letter of instruction from the solicitor prepared in the knowledge that it will probably be called for production to the Court in the event the dispute does not settle informally.

A well prepared, objective letter of instruction can do much to inspire confidence in the court that the opinion solicited from the expert by the instructing solicitor was the result of a completely independent and impartial investigation and/or enquiry. A badly drafted letter of instruction may convey the impression that the expert was sent out on a "fishing exercise" in the hope the expert might be able to offer an opinion which could be helpful to the client's case. Worse still it may provide evidence that relevant facts and documents were not provided to the expert in circumstances where it is apparent that they should have been in order to obtain an unbiased, independent and objective opinion.

It is not uncommon to find out (usually too late, and often only during the expert's cross examination) that the expert has been given inadequate instructions. It should be appreciated that the expert's opinion is formed at least partly on the basis of what he/she is instructed has occurred prior to his/her involvement. There are few things that more powerfully undermine the evidence of an expert in court than when he/or she admits during cross examination that he was never told certain facts and then agrees that had he been aware of them they may have altered his opinions as expressed in his reports.

[27] See comments in *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454 BC200107393

It is most unwise to allow the client to orally brief the expert direct or in the absence of a proper letter of instruction. Inevitably the expert is provided a selective version of events designed to colour the experts view about the other party to the dispute and the relevant facts. Few clients properly understand the role of an expert in litigation and often take the view that as they are paying for his/her services he should be an advocate for the merits of their case. This perception is not easily shifted.

Awareness of the Expert Code of Conduct

It is essential that the expert is expressly asked to acquaint him/herself with the "expert code of conduct" appropriate to the relevant jurisdiction where the dispute may eventually end up being litigated. In Tribunals such as the Civil and Administrative Tribunal NSW this should include reference to any expert code of conduct issued in accordance with the Chairpersons directions. In disputes where courts are likely to have jurisdiction reference should be made to rule 31.23 and the expert witness code of conduct set out in Schedule 7 of the *Uniform Civil Procedure Rules* 2005.

It is not sufficient for experts to prepare reports without instructions to have regard to the expert code of conduct and then to simply swear an attaching affidavit in the solicitor's office referring to the code five minutes before the affidavit and report are sent to the registry for filing. Careful cross examination can uncover this practice with an unaccomplished "expert witness". In *Commonwealth Bank v Cassegrain*[28] the court held that knowledge of the requirements of the code of conduct was required before an expert report was prepared in order for it to be admissible.

A finding by the court that an expert's assessment and report was prepared without regard to the code can result in an expert report being given little or no weight even if it is admitted. Such reports might also be excluded by virtue of the exercise of a s135 or 136 discretion where the court forms the view that there is a real danger that the court might be mislead, or the opposing party unfairly prejudiced, because the expert is expressing an opinion "*which is infected by failure to understand (the experts) responsibilities as an expert*."[29]

[28] *Commonwealth Development Bank of Australia Pty Ltd & Anor v Claude George Rene Cassegrain; Gerald Cassegrain & Co Pty Limited and Ors v Commonwealth Development Bank of Australia Pthy Limited and Ors* [2002] NSWSC 980 (10 October 2002) – per Einstein J.

[29] *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870 at 15 -19 per Campbell J.

Deficiencies in Form

On the basis of *Makita* and the cases which followed it is clear that diligence and thoroughness is required to ensure that expert reports will be deemed admissible should this be required. It can no longer be assumed that “the expert will know what to do” and that the experts report once filed and served will, without scrutiny be admissible and importantly, relevant, probative and useful.

As many building and construction disputes involve monetary claims, and most of those claims are resolved largely on the basis of expert evidence it is imperative that any obvious deficiencies in form and content are addressed before the expert report is filed and served. The report should include the attachment of suitable curriculum vitae of the expert which is directly relevant to the evidence being given and also an acknowledgement that the expert is familiar with the expert code of conduct and agrees to be bound by it.

Issues which should be separately identified in the report under suitable major headings for ease of reference include

- a list of documents provided to the expert;
- the experts instructions;
- the expert’s assumptions;
- a description of the experts methodology (any inspections and/or enquiries made together with times and dates as applicable);
- a summary of the experts findings together with his reasons for those findings
- the experts conclusions

An executive summary and index at the front of the report is invaluable and is of great assistance to the court to enable the bench to quickly grasp the “crux” of the expert’s opinion and his/her main conclusions (without having to wade through the entire report in order to find it).

Insufficient Enquiry

It is not uncommon to see expert reports in which the expert has based his/her on the advice and instructions of the party for whom the expert report has been given. Typically such advice is accepted “at face value” and without further enquiry or verification. This is a dangerous trap. If the credit of the client is later impugned in cross examination the

weight given to the experts report which is substantially based on that persons advice or instruction can be effectively attacked and undermined.

Notwithstanding the obligations set out in the expert code of conduct[30] it is also not uncommon to see professional reports where the expert makes use of inflammatory language, ignores the obvious difficulties in either his instructions and/or his/her clients case, embarks on unwarranted speculation and/or confuses the requirement for "expert opinion" with submissions.

While an overenthusiastic gullible expert usually gets enthusiastic praise and commendation from the client the same response will not be forthcoming from the bench.[31]

Evidence in Reply

It is common for experts to be directed to put on reports "in reply" to those prepared by experts for the other side. Such evidence is typically also reduced to a completed "Scott Schedule" intended to provide the court with a simple working document which sets out the expert's opinions on both sides on an item by item basis, describes where they agree, where they differ and any differences between them on quantum.

From experience it is common for experts to be "dismissive" and sometimes "condescending" about their colleagues reports in which contrary opinions are expressed. Such comments serve only to diminish the impact of an expert's evidence before the court and should be discouraged wherever possible. An expert simply saying "I strongly disagree" or "I completely disagree" is unhelpful unless persuasive reasons are given for the disagreement and the expert is able to objectively demonstrate why the other expert's opinion is wrong.

Availability

If building disputes are not promptly and efficiently settled they can result in years of contested litigation at huge unforseen cost to all parties involved. It is important to ensure at the time of engagement that the proposed expert is not just available to prepare the required report, but will be available to prepare reports in reply, to participate in conclaves and to be available for cross examination when this is eventually required.

[30] Schedule 7 of the *Uniform Civil Procedure Rules* 2005
[31] See for example the comments of Byrne J in *Premier Building and Consulting Pty Ltd v Spotless Group Ltd* [2007] VSC 377

I mention this because many of the more established and well known experts in the industry are closing in on retirement age. It is becoming increasingly common to find that an expert is simply not available for months at a time due either to court commitments in other disputes or, more commonly, extended overseas trips for recreational purposes. As it is usually virtually impossible to replace an expert familiar with the history of a dispute at a late stage, the importance of ensuring the long term availability of a proposed expert at the time of engagement cannot be overstated.

CONCLUSION

Success in building and construction proceedings almost always depends on the necessary expert evidence being available. It is therefore essential that considerable attention be given to ensuring that the proposed evidence is both admissible and can be given sufficient weight by the Court.

Given the importance of expert evidence to a client's prospects it is essential that a suitable expert with the required "specialised knowledge" be engaged with the possibility of litigation in mind. The importance of giving the expert suitable instructions from the outset and the checking of expert reports for any potential objection to admissibility before filing and service also cannot be overstated.

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Annexure A

SCHEDULE 7 - EXPERT WITNESS CODE OF CONDUCT

(Rule 31.23)

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:
(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
(b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
(3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:
(a) must exercise his or her independent, professional judgment in relation to that issue, and
(b) must endeavour to reach agreement with the other expert witness on that issue, and
(c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

5 Experts' reports

(1) An expert's report must (in the body of the report or in an annexure to it) include the following:
  (a) the expert's qualifications as an expert on the issue the subject of the report,
  (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
  (c) the expert's reasons for each opinion expressed,
  (d) if applicable, that a particular issue falls outside the expert's field of expertise,
  (e) any literature or other materials utilised in support of the opinions,
  (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,

(g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

(2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.

(3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

(4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:

(a) to confer with any other expert witness, or

(b) to endeavour to reach agreement on any matters in issue, or

(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or

(d) to base any joint report on specified facts or assumptions of fact.

(2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.