

When admissibility objections mean the Hot Tub is getting cold

Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd & ORS., Supreme Court of Victoria (No 3) [2012] VSC 99

Introduction

In this edition of Expert Matters, Sally Davitt, a Director in our Sydney office, considers a recent case where both parties objected to the admissibility of the evidence of 12 different experts part way through the trial and just as they were about to enter the 'hot tub' to give concurrent evidence.

Background

Dura and Hue entered into an agreement to build a block of units in Richmond, NSW. After a period, Hue was concerned about the rate of progress and the quality of the workmanship. In late 2006, Hue took the remainder of the contract away from Dura, and completed the remaining work with a different contractor. Both parties subsequently claimed damages for breach of the contract by the other party.

The involvement of experts

There were a large number of experts involved in this case, primarily relating to building, programming and quantity surveying¹. In several case management sessions prior to the start of the trial, His Honour had ordered that the parties hold expert conclaves and prepare joint reports, and that any issues regarding objections to expert evidence be raised. There were several delays in the process. By the time the trial started, no expert conclaves had taken place. Moreover, neither party had foreshadowed any of the objections to admissibility that were subsequently raised during the trial.

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The trial commenced, with lay evidence being heard. Separately, several expert conclaves were held, with joint reports being prepared. However, on day 17 of the trial, Hue objected to the evidence of eight of Dura's experts. Dura then also objected to the admissibility of the evidence of four of Hue's experts.

At this stage of the trial, all that remained was the experts' concurrent evidence (the 'hot tub'), followed by final submissions. Considerable time had already been spent on discussing the admissibility of just a few of the experts, and to consider all objections to admissibility would have taken several further days of the Court's time.

His Honour considered the general rule, identified by the High Court, that inadmissible evidence should be immediately rejected, but noted that a trial court is empowered to order and direct the procedures for and conduct of a trial, including those in relation to evidence². Noting that the parties had not raised the issue of admissibility at an earlier date despite his directions to do so if needed, His Honour concluded that, on balance, it was preferable to complete the trial in the agreed time:

"Had that not been achieved, the negative effects of delay and waste of court resources would have been considerable."

His Honour was also concerned that striking out parts of reports due to inadmissibility would lead to parties wishing to put on additional evidence in chief, bring in further witnesses, or even adjourn the trial. He noted that the deferral of his ruling on admissibility was not likely to lead to an unsatisfactory result, but to the extent the outcome was unsatisfactory (as was evident in *Dasreef*³), it was the choice of the parties to wait until the trial to raise admissibility issues.

The concurrent expert evidence then proceeded (on the temporary assumption that the expert evidence was all admissible), with the objections to admissibility to be discussed afterwards in the parties' final submissions. The trial was then able to conclude within the scheduled timeframe, with His Honour then making his determinations as to admissibility in a separate judgement.

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In that judgement, His Honour considered the admissibility of 12 of the experts in turn, finding the evidence of several of the experts to be inadmissible on the grounds of relevance and expertise⁴. He ultimately dismissed Dura's claim, and found for Hue, awarding damages of \$4.45 million to be paid by Dura.

Significance

This case shows that, while the general principle is that inadmissible expert evidence should be rejected as soon as possible, the Court will sometimes need to balance the application of this principle against the efficiency of achieving an outcome for the parties in a sensible timeframe.

However, the early resolution of any issues regarding admissibility of expert evidence is clearly advantageous from a cost perspective. In this case, His Honour was able to manage time spent on the issue by only determining admissibility of each expert in his judgement, thus ensuring that the hearing was able to stay within its timetable (and presumably avoiding further costs). However, we assume that costs could have been much reduced (particularly in cases such as this which involve such a large number of experts) had the admissibility issues been dealt with before commencement of the trial, as had been directed by His Honour.

Endnotes

1. We count at least 15 named experts in different fields.
2. s49(3)(j) *Civil Procedure Act 2010*, other relevant matters are also set out in the section.
3. In *Dasreef*, the Court found it was unsatisfactory that the trial judge did not rule on admissibility when challenged, as the litigants then did not know what evidence in support of a claim was admissible. Dixon J found that in this matter that the circumstances differed from those in *Dasreef*.
4. It is unclear whether these admissibility issues could have been identified by the parties prior to the hearing, however we note that considering this issue required 39 pages of the judgement.

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