

Expert overkill?

Platinum Investment Management Limited v Chief Commissioner of State Revenue [2009] NSWSC 988 (17 September 2009);
Lucantonio v Kleinert [2009] NSWSC 929 (5 August 2009)

Summary

Joint expert conferences are becoming increasingly common when Courts are confronted with conflicting expert views. In this issue of Expert Matters, Therese Poh (Executive Analyst) of KordaMentha, examines some of the implications for an expert "report in reply" in situations involving multiple experts, including that:

- Matters involving multiple experts may not always lead to reports in reply being admissible.
- The complexity of the issue, the relevance of the report and the timing of its submission are all factors considered by Courts in determining whether to accept the report.
- Courts are willing to reject reports in reply where they consider a joint expert conference would be more useful to the Court.
- Where a joint expert's conference has taken place, additional expert evidence on the same issue is likely to be rejected.

These cases reinforce that, ultimately, the presiding judge determines the admissibility and relevance of expert evidence. It is worth seeking the Court's approval, in principle at least, prior to commissioning a report from an expert.

"The suggestion that a further report... should be served today with liberty to the plaintiff to serve any reports in reply... seems to me to be a matter of overkill."

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Platinum Investment Management Limited v Chief Commissioner of State Revenue [2009] NSWSC 988 (17 September 2009)

The judgement in this case relates to procedural matters and specifically to the question of whether leave will be given to serve a further expert report in response to a particular issue.

Background

The defendant was required to serve an expert witness report relating to the issue of a valuation of shares on alternative bases. The defendant sought an extension of time. Subsequently the defendant sought a further extension and leave to serve a supplementary report. The plaintiff gave its consent for this extension, and later served its expert evidence in reply.

The defendant sought leave to serve a further expert report (with the liberty to the plaintiff to serve any reports in reply) as:

- The further report explains the extent to which the expert's opinions in his first report are qualified as a result of the plaintiff's expert's report in reply. The report has been completed and is ready for service.

Judgement

Justice Gzell rejected the application that the defendant be given leave to serve a further report.

In doing so, Justice Gzell commented that the issue considered by the experts was limited to the question of the value of shares on alternative bases and:

- That seems to me to be an issue that can be dealt with to the satisfaction of the parties and the court by the witnesses dealing with the matters contained in the existing reports.
- Three reports have already been served in regards to the issue.

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- The suggestion that a further report...should be served today with liberty to the plaintiff to serve any reports in reply...seems to me to be a matter of overkill. The suggested five reports would all be with respect to the limited issue.

It was also noted by Justice Gzell that the application was made "late in the day", namely five months after the defendant had received the plaintiff's report in reply.

To assist the Court, Justice Gzell subsequently ordered the experts to meet prior to the trial and produce a joint statement as to the extent of their agreement, or disagreement.

Conclusion

Justice Gzell's comments indicate limited patience with parties that seek to adduce evidence that is excessively incommensurate to the issue in dispute. Rather, the Court may reject repeated reports in reply and resort to joint expert conferences as a solution.

In addition, the repeated extensions and late application for leave to adduce further evidence were also given little regard.

Lucantonio v Kleinert [2009] NSWSC 929 (5 August 2009)

This case identifies that, at least in some cases, leave to file and serve a further expert report, prepared after a joint report has already been produced, may be rejected.

Background

The plaintiff alleged that Kleinert was guilty of negligence in respect of advice given by him to the plaintiff as to the "buildability" of a development application. The plaintiff and at least two of the defendants called on experts in order to establish whether the advice was indeed incorrect. The Court gave directions for those experts to confer and prepare a joint report setting out their areas of agreement, and reasons for any areas of disagreement.

The plaintiff then sought to tender reports of another expert architect, Mr P.

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Judgement

Although Mr P was qualified and his evidence was relevant to the issue, Justice Brereton rejected his reports that the plaintiff sought to tender, for a number of reasons.

Firstly, Mr P had prepared the plans in the DA referred to in the contract for sale, and as such his perspective was of one who drew the plans which "would prima facie reduce the objectivity and value of [his] evidence".

More importantly, although the existence of Mr P's reports had been known for some considerable time:

- [Notice] of intention to rely on those reports...was given but belatedly, after the expert conclave had taken place and their joint report was prepared. Mr [P] was not involved in that process.

Permitting the evidence of a further expert witness that gives a contrary opinion to at least some of those agreed to by the joint experts, after the conclave and after the joint report had been prepared would "entirely defeat the purpose of the expert conclave process".

Justice Brereton further commented that:

- *"The court manages closely the use of expert evidence...the purpose of the course of management adopted would be entirely frustrated if the plaintiff were now permitted to call a further expert witness who had not been involved in the conclave and the preparation of the joint report."*

Conclusion

Justice Brereton's comments reinforce that the Court has discretion in relation to the admissibility of expert evidence, and the Court will use this discretion to uphold the role it sees for a joint expert conferences, which is the identification, and where possible narrowing, of issues on which experts disagree.

In addition, similar to the Platinum case discussed above, it shows that the Court sometimes has little regard for parties that attempt to adduce evidence at a late stage of a case, especially if it is apparent that the evidence could have been available at an earlier time.

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