

Instructions matter

Welker & Ors v Rinehart & Anor., Supreme Court of NSW (No 6) [2012] NSWSC 160

Background

The plaintiffs in these proceedings were seeking to be appointed as trustees of the Hope Margaret Hancock Trust of which one of the defendants is currently the Trustee. The defendants opposed the application.

The first defendant filed a motion seeking a non-publication order in respect of any pleading, evidence or argument, filed on the grounds that such order was necessary “to protect the safety of any person”. Prior to this decision a temporary suppression order was in place.

The defendants relied on three expert reports prepared by persons claiming to be experts in the field of personal safety and security to support their argument. One of the issues raised in the proceedings concerned the admissibility of these reports.

Key issues

Two objections were raised in relation to the expert reports:

- That the reports did not comply with Uniform Civil Procedure Rules (“UCPR”) r 31.23¹.
- That the reports did not comply with Schedule 7² of the UCPR nor with the principles summarised in *Makita (Australia) Pty Ltd v Sprowles (2001)*.

We discuss these objections in turn.

Process of engagement of experts

The first objection related to the process the experts engaged in to prepare their reports.

The experts were not provided with a copy of Schedule 7 until after they had finalised their reports. The first defendant then attempted to remedy this issue by providing

each expert with a copy of the Schedule 7 and having them swear an affidavit stating that they had read it and that they continued to hold the opinions expressed in their reports.

His Honour referred to a number of cases dealing with similar situations and put forward that it is necessary to consider the individual circumstances in each case and “*whether the objectives sought to be secured by UCPR r 31.23 have been affected by the non-compliance*”. His Honour stated that the circumstances to consider include:

- The nature of the instructions given to the expert.
- The expert’s prior familiarity with the Code.
- The extent to which the report appears to comply with the Code.
- The evidence given by the expert as to whether they complied with the Code at the time of preparing the report.
- The evidence given by the expert as to whether the non-compliance affected the expert’s opinion.

His Honour then considered the circumstances of this case and concluded that he should not make an order dispensing with the need for compliance with UCPR 31.23 for the following reasons:

- None of the experts stated that they had complied with the Code at the time they prepared their reports.
- None of the experts stated that they had any familiarity with the obligations of an expert witness at the time they prepared their report.
- The letters of instruction received by each expert were phrased in a way which did not suggest to the experts that they were to act independently. Instead they were phrased in a way suggesting that the expert’s assistance was sought to demonstrate a particular line of argument to the court.

His Honour concluded that the expert reports indicated that the experts saw themselves as advocates for the party.

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Report content

The second objection related to the content of the expert reports.

The experts' expressed opinions that if certain materials were publically available, this would result in disclosure of additional information concerning Mrs Rinehart and her family that would increase the risk of them being targeted by kidnappers or extortionists. However, two of the reports did not specify what additional information this would be.

It appeared that the experts were not provided with the material the non-publication of which was being sought through the suppression order. The result was that two of the experts expressed opinions based on facts of which they had no knowledge. That is, they did not know what the information was which they said, if published, would endanger Mrs Rinehart and her family.

His Honour stated that two of the experts did not put forward any reasoning process on which they reached their conclusions; nor did they apply any of the expert knowledge they had to the facts they had been given.

Therefore His Honour concluded that the reports failed to satisfy criteria identified in *Makita*³. Those were as follows⁴:

- *It must be agreed or demonstrated that there is a field of "specialised knowledge".*
- *There must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert.*
- *The opinion proffered must be "wholly or substantially based on the witness's expert knowledge".*
- *So far as the opinion is based on facts "observed" by the expert they must be identified and admissibly proved by the expert, and 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.*
- *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.*

As a result, all three of the expert reports were rejected. Since the first defendant largely relied on these reports to support their application His Honour found that for this reason alone the application should fail. For this and other reasons the temporary suppression order was revoked.

Significance

It is not clear why three experts were required by a single party to opine on the same issue. However, as this case illustrates, the quality of expert evidence is far more important than quantity.

The key issues affecting the expert reports filed in this case were:

- Instructions provided to the experts were inappropriate as they appeared to encourage the experts to be advocates for the engaging party.
- The reports did not comply with the relevant codes for expert witnesses.
- The reports failed to satisfy the criteria set out in *Makita*.

The court quite sensibly found that rather than a blanket rejection of technically non-complying expert reports, the individual circumstances of each report should be considered. Unfortunately in this case, insufficient steps were taken to remedy the situation and the opportunity to have the reports admitted was lost.

Whilst clearly it is preferable for an expert report to comply with the applicable codes or guidelines whilst preparing the report, the case shows how an expert report can be "rescued" (provided certain criteria are met) if for some reason non-compliance with the relevant codes or guidelines occurs, but that an apparent lack of independence can be fatal to the admissibility of an expert report.

Endnotes

1. http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/s31.23.html
2. http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/sch7.html
3. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2001/305.html>
4. Paragraph 85 of the judgement.

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