expert matters

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An unfortunate consequence

Coyne v Calabro [2009] NSWSC 1023 (18 September 2009)

Coal Management Operations & Processing Pty Limited v Resource Pacific Limited [2009] NSWSC 796 (31 July 2009)

Summary

The use of experts is, quite rightly, a process that should be closely managed by the Courts, who decide the process, scope and admissibility of expert evidence. In this issue of *Expert Matters*, Therese Poh examines two separate cases which demonstrate the dynamic nature of the Court's management of expert evidence.

These cases deal with the admissibility of further expert evidence in proceedings after the Court had already admitted expert evidence on a similar topic. They show that the Court will adapt its processes as the need arises during the course of proceedings, with the Court having:

- Accepted additional evidence where a party has potentially, and unwittingly, tarnished the independence of a single expert; and
- Accepted additional evidence where a party has provided instructions to an expert that were not those specified by the Court.

The common thread of these two cases is the interest the Court has in upholding judicial fairness towards both parties. At the early stages of proceedings, intentional or unintentional mishaps relating to expert evidence can often be accommodated by allowing further evidence, even if this has the "unfortunate consequence" of incurring additional costs.

"Consideration and determination of what expert evidence will, ultimately, be permitted at the hearing, particularly in the context of a large and complex case ... is an ongoing process"

Coyne v Calabro *[2009] NSWSC 1023 (18 September 2009)*

Background

In *Coyne v Calabro*, the Court ordered that a single expert be engaged to provide a land valuation for both parties. All parties (excluding the legal representatives for each side) were directed not to communicate directly or indirectly with the expert, Mr S, without prior consent from the Court.

A Director of one of the cross-defendants had been advised by his solicitor not to communicate with the expert. Nevertheless, Mr S communicated directly with the cross-defendant and met with him to clarify his understanding of the events leading to the sale of the property. Justice White stated that the communication between the expert and the cross-defendant should not have occurred.

The defendants submitted that the communications had undermined Mr S' position as a single expert and that his views could not be considered to be independent or impartial.

They further submitted that the role of a single expert had become untenable in this matter and sought leave to rely on a valuation prepared by another expert valuer, Mr F, which had been prepared on instructions from a Bank and not specifically for the purposes of the proceedings.

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Requirements of open justice

In his judgement, Justice White stated that:

> *For justice to be done it is important that there be no unauthorised private communications between a party and a single expert jointly retained by all parties. A party adversely affected by the single expert's opinion (which might be determinative of the issue) may justly complain that he does not know of all that passed between the expert and the other party.*

Justice White noted that although it may be that nothing had passed between the plaintiff and Mr S beyond that which was admitted by both parties, it was not possible to be sure of the full extent of the communications between them, nor assess what effect, if any, such communications might have had upon the formation of Mr S's opinion as to value.

> *In those circumstances, the defendants would have a legitimate grievance if they were refused leave to adduce other expert evidence on the same issue.*
>
> *Allowing the parties to adduce further expert evidence means that expense will be incurred which it was hoped might be avoided by Mr S's appointment. That is an unfortunate consequence. But it does not outweigh the requirements of open justice.*

Significant differences between opinions

Another reason for allowing the defendants to rely on another expert's opinion was that there was a substantial difference between the opinions of Mr F and Mr S. Due to the difference in each expert's opinion on the value of the land, they also differed in their opinions as to what sales should be considered as directly comparable.

Justice White stated that this was "another significant factor" in favour of permitting further expert evidence[1].

This case has potentially far reaching implications for the use of single experts and the potential for further experts to be admitted, which may reduce the often cited presumption that single experts can reduce the costs of using experts.

Coal Management Operations & Processing Pty Limited v Resource Pacific Limited [2009] NSWSC 796 (31 July 2009)

In this matter, the defendants sought leave to submit evidence from an expert, Mr G, possessing "expertise in management in the coal mining industry".

In a previous judgement in the same matter[2], Justice Brereton indicated that he had "wavered as to whether [the Court] should afford the cross-claimant an opportunity to identify an appropriate expert and the precise questions that would be asked". In that judgement, Justice Brereton provided directions for the defendant to obtain the report from their proposed expert, Mr G, in relation to a number of questions. These questions were "settled with some care" following submissions from both parties.

The expert report from Mr G that was served did not answer the questions in terms settled by the Court. This was a result of the defendants providing different instructions to those directed by the Court. Despite this, Justice Brereton did not dismiss the evidence, indicating that he believed it could be relevant to resolving issues likely to arise during the proceedings.

By reference to his decision in *Wu v Statewide Developments Pty Ltd*[3], largely by reference to what was said by Lord Woolf in *Daniels v Walker*[4], Justice Brereton emphasised that:

> *Consideration and determination of what expert evidence will, ultimately, be permitted at the hearing, particularly in the context of a large and complex case (and having regard to the many millions of dollars in issue here, this is plainly such a case), is an ongoing process. Sometimes, it will involve obtaining a single expert's report merely as a first step, and then permitting parties to obtain reports from their own separate experts.*

It was deemed appropriate to permit the parties to obtain and serve other relevant expert reports. Justice Brereton indicated this would likely be followed by a joint report which would help determine what expert evidence ought to be permitted to be adduced at the hearing.

Significance

These cases deal with a common theme which is the admissibility of further expert evidence after the Court has admitted evidence from another expert on a similar topic.

They show that the appointment of a single expert, or initial admittance of evidence from an expert from a single side of the proceedings, does not preclude additional expert evidence being accepted5. It is only the first step in the process.

The situations where the Court may permit the admission of further reports, subject to upholding its interest in judicial fairness towards both parties, include when:

- Open justice requires it;
- There is a significant difference in the opinions between the single expert and the additional expert;
- The case is sufficiently complex; or
- The single expert has not answered the questions in terms settled by the Court.

Endnotes

1. Ultimately in these proceedings there were three experts who had submitted evidence to the Court; Mr S, Mr F and a Mr B. Justice White considered Mr B to be preferred in respect to his experience, impartiality and reliability and that his evidence was the most reliable. See *Coyne v Calabro* (No. 5) [2010] NSWSC 694.
2. *Coal Management Operations & Processing Pty Limited v Resource Pacific Limited* [2009] NSWSC 573 (22 May 2009
3. *Wu v Statewide Developments Pty Ltd* [2009] NSWSC 587
4. Daniels v Walker [2000] EWCA Civ 508; [2000] 1 WLR 1382
5. Indeed, in a subsequent judgment in this matter, his Honour found that the evidence of the single expert was not to be preferred.

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