

expert update

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Too much, too late

Pan Pharmaceuticals Limited (In Liquidation) v

Selim [2008] FCA 416

Pan was a manufacturer of therapeutic goods. In order to do so, Pan required a licence under the Therapeutic Goods Act 1989 (Cth).

On 5 February 2003, the Therapeutic Goods Administration (TGA) identified a number of alleged critical deficiencies in Pan's compliance with 1990 Australian Code of Good Manufacturing Practice for Therapeutic Goods – Medicinal Products (the Code). The TGA then conducted a broader audit of Pan's operations, which identified additional alleged critical deficiencies in Pan's compliance with the Code. As a result of those reports, Pan's licence was suspended on 28 April 2003.

Shortly thereafter, Pan was placed into liquidation. In 2004, the Liquidators commenced action against James Selim, the former chief executive officer of Pan. The Liquidators claimed damages against Mr Selim on the basis that he breached the duties that he owed to Pan as its chief executive officer in that he failed to ensure that Pan adopted and applied good manufacturing principles (GMP).

The initial Court timetable required that the Liquidators serve their expert evidence by 1 December 2006. After failing to meet that timetable, along with a subsequently extended timetable of 31 May 2007, the Liquidators indicated in September 2007 that they wished to rely on three expert reports (the Disputed Reports):

- **The Good Manufacturing Principles Report** ("GMP"), prepared by Mr W, which provided "counterfactual evidence" of the recommendations that would have been made to Pan had Mr Selim engaged a quality assurance consultant to prepare a corrective action plan and conduct a full GMP audit of Pan. This report also provided expert opinion evidence of Pan's non-compliance with the conditions of the license.
- **The Remediation Costs Report**, also prepared by Mr W, which provided estimates of the likely costs of implementing the corrective action plan described in the GMP Report.

The repeated failure to comply with Court timetables in relation to expert evidence may result in the Court looking dimly on the evidence produced



- **The C Report**, prepared by Dr C, which provided expert opinion evidence as to what a reasonable CEO in the position of Mr Selim would have done in relation to certain areas of operation of Pan and the practicable steps that someone in Mr Selim's position should have taken in relation to improving Pan's GMP compliance, quality assurance and control.

On the issue of the Liquidator's non-compliance with the Court timetable, Justice Emmett said:

The Liquidators failed to comply with the directions of 12 March 2007 so far as they concern expert opinion evidence. No satisfactory explanation has been provided for the failure, other than that the task was more complex and the identification of appropriate experts was more difficult than had been anticipated.

Justice Emmett explained Mr Selim's position as follows:

Reliance upon the material is vehemently opposed by Mr Selim. Mr Selim, for reasons related to his health, is anxious that the proceeding be heard as soon as reasonably practicable and contends that he would be placed under unfair pressure and stress by having to respond, at this stage, to the material on which the Liquidators now seek to rely. Apart from the failure of the Liquidators to comply with the Court's directions, Mr Selim also opposes the admission of the Disputed Reports on the bases that much of their contents is irrelevant or of little weight, that they do not satisfy the requirements of s 79 of the Evidence Act for the admission of opinion evidence and that, even if some of the material is otherwise admissible, it should be rejected under s 135 of the Evidence Act.

Justice Emmett also summarised the Liquidator's arguments as follows:

The Liquidators say that the rejection of the Disputed Reports would be highly prejudicial to their case and that the interests of justice dictate that they be permitted to rely upon them, notwithstanding the very significant and almost contumelious failure to comply with the Court's orders.



However, Justice Emmett also observed that:

Neither Mr Selim nor the Court should be required to spend time extracting admissible evidence in the GMP Report in circumstances where it was produced four months after the date fixed by the Court, without any approach on behalf of the Liquidators to the Court for an extension of time or explanation for the blatant failure to comply with the Court's direction. In fact, the GMP Report was produced some 15 months after the Court first gave directions about its filing. On the earlier occasions when it was apparent that the Liquidators were unable to comply with the Court's directions, the time for compliance was extended. It is now apparent that Mr W had not even been instructed until well after the expiry of the time originally fixed.

After a detailed analysis of the three reports, Justice Emmett rejected them all. In relation to the GMP Report, he said:

The GMP Report is cast in highly prejudicial terms from Mr Selim's point of view, apart from the prejudice arising from its late provision. Any admissible opinion evidence in the GMP Report is of such equivocal weight and would generate such further hearing time that I do not consider that any inconvenience or detriment from its rejection outweighs the inconvenience and unfairness involved for Mr Selim in preparing to answer the GMP Report at this stage. In the circumstances, to the extent that there is admissible evidence in the GMP Report, I would reject it under s 135 of the Evidence Act.

Nevertheless, the GMP Report appears to represent a substantial part of the case that the Liquidators seek to mount against Mr Selim, albeit not in an admissible form as evidence. Accordingly, while I would reject the GMP Report as evidence, it could possibly constitute a substantial submission on behalf of the Liquidators.

The Remediation Costs Report was also rejected as it was produced in response to the GMP Report.



The Liquidator sought to limit the extent to which reliance would be placed on the C Report. However, Justice Emmett concluded that:

The C Report does not purport to be evidence of the matters upon which the Liquidators now seek to have it admitted. That is to say, before the substance of the C Report could be admitted for the limited purpose for which the Liquidators now seek to rely on it, it would have to be completely recast. It should not be admitted as evidence of something that it does not say.

Justice Emmett summarised his own findings as follows:

To the extent that the Disputed Reports contain admissible evidence, they should be accorded very little, if any, weight. On the other hand, the admission of the Disputed Reports at this stage would be unfairly prejudicial to Mr Selim. In addition, substantial judicial and court time, involving substantial cost, would be occupied by the examination of the content of the Disputed Reports. Accordingly, in circumstances where the Liquidators failed to comply with the Court's explicit directions, I do not propose to admit the Disputed Reports, although I may, at an appropriate time, to a limited extent, admit them as submissions.



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Significance:

The preparation of expert evidence is frequently a time-consuming exercise, requiring considerable care and skill on the part of both lawyers and experts. However, as the soon to be Lord Frances Bacon said on his ascension to the bench in 1614, "Justice is sweetest when it is freshest." With the increasing focus of the Courts on case management, lawyers and experts will need to balance the need for precision and completeness in the preparation of expert evidence with the requirement of the Court's timetables.

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