

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Who gets the last word?

Wu v Statewide Developments Pty Ltd [2009] NSWSC 120 (27 February 2009)

Wu v Statewide Developments Pty Ltd [2009] NSWSC 587 (26 May 2009)

These two related judgments considered the permissibility for one party to have a conference with a single expert in the absence, and without prior written consent of, the other party as well as the ability of a party to obtain a second expert's report where a report of the single expert has already been obtained.

Background

Mr Wu rescinded a contract to purchase a unit from the defendant as a restriction on use had been registered on the unit which "detrimentally affected the property to a substantial extent." The substance of Mr Wu's claim was for the return of the deposit.

Mr H, a property valuer, was appointed as the single expert to opine on the value of the unit in the absence of the relevant restriction as well as its value as affected by that restriction. After receiving Mr H's report, the plaintiffs' representatives approached Mr H, without the knowledge of the defendant, and put to him information which he had not been aware of, namely the plaintiffs' contention that 99 out of the 274 off-the-plan buyers in the property were refusing to settle because of the restrictive covenant. This then led Mr H to write to the defendant's solicitors indicating that because of the new information, the assumption in his original report was in doubt. Mr H indicated he was willing to review the original valuation so long as "he received the joint instruction of the parties and a written outline that proposes the arrangements".

The plaintiffs sought an order for the defendant to provide the new information via answers to certain interrogatories. Justice Brereton granted the order for interrogatories, which were subsequently administered and answered. These interrogatories were put to Mr H, who stated that the information contained within them did not affect the conclusions in his report.

The plaintiffs then sought leave to rely upon evidence of an expert valuer in addition to the evidence of the parties' single expert.

An order for a single expert is a first step, not necessarily the last word.

Was it appropriate for one party to have a conference with the single expert unilaterally?

Justice Brereton relied on *Peet v Mid-Kent Healthcare NHS Trust* [2002] 3 All ER 688 to answer this question. In that case, the judge stated:

...the idea of having an experts' conference including lawyers without there being a representative of the defendant present... in my judgment is inconsistent with the whole concept of the single expert. The framework... is designed to ensure an open process so that both sides know exactly what information is placed before the single expert. It would be totally inconsistent with the whole of that structure to allow one party to conduct a conference where the evidence of the experts is in effect tested in the course of discussions which take place with that expert.

The approaches made on behalf of the plaintiffs to Mr H were not considered appropriate by Justice Brereton. The conversation held between Mr H and the counsel for the plaintiffs was that of counsel setting about “a course of inquiry” as to Mr H’s report and the basis of his opinions. The appropriate course was for directions to be sought from the court for written questions to be asked of the expert by way of clarification, as is provided for in the Uniform Civil Procedure Rules.

It was noted that whilst preparing his report, Mr H inspected the property subject to the dispute in the company of a principal of the defendant. However, Justice Brereton commented that in that circumstance, the single expert was interviewing a party for the purposes of preparing his report, which does not seem to have been “inappropriate or inconsistent with the intent of the single expert rules”. Further, this was different to the conference between the plaintiffs’ representatives and the single expert.

Leave to rely on a second expert

The plaintiffs had put into evidence another valuation report by a second expert which suggested that the detrimental effect of the restrictive covenant was “substantial”, in contrary to Mr H’s opinion.

Justice Brereton, in deciding whether or not to grant leave to the plaintiffs to obtain this separate report, summarised the findings in *Daniels v Walker* [2000] EWCA Civ 508; [2000] 1 WLR 1382, *Cosgrove v Pattison* [2001] CP Rep 68, [2000] All ER (D) 2007 and *Tomko v Tomko* [2007] NSWSC 1486 as follows:

- *An order for a single expert is a first step, not necessarily the last word on the topic. While the magnitude of the case will influence the court's willingness to permit further reports, having regard to considerations of proportionality, the process was not intended to substitute trial by expert for trial by court.*
- *It will be a significant factor in favour of permitting further expert evidence if the existence of a competing respective expert opinion can be shown.*
- *It will be a significant factor in favour of permitting further expert evidence if otherwise the party affected would have a legitimate sense of grievance that it had not been permitted to advance its case at trial.*

In the present case, permission was given to the plaintiff (and to the defendant) to obtain and serve a separate expert's report because, although the sum being disputed in the case was small, the issue being discussed:

...is a central one, and in my view the plaintiffs would have a legitimate sense of grievance if that central issue were, in effect, decided by a single expert, when there was evidence that a competing expert view is likely to be available.

Furthermore, Justice Brereton suggested that even if Mr H's evidence was destroyed upon cross-examination, the lack of a separate expert report "would leave the Court and the plaintiff without critical evidence on a critical question".

Indeed, it would be very much to the defendant's advantage that in a case where the plaintiff bears the onus of proving that the restriction had a substantial adverse effect, the choice might be between an expert who gave evidence to the effect that the adverse effect was not substantial, or (if that witness' testimony were destroyed successfully by cross-examination), there would be no evidence on the topic at all, so that the plaintiff would still fail.

Significance

These judgments reaffirm what is permissible and not permissible when parties communicate with a single expert. The holding of conferences between a party and the single expert, without the knowledge or permission of the other party, are inconsistent with the open process which pertains to the single expert framework.



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Therese Poh
Senior Analyst, Sydney
phone: 02 9286 9831
email: therese.poh@fh.com.au

These judgments also show that although a single expert has already been engaged for both parties, this does not mean that separate expert reports will not be allowed to be relied upon. Furthermore, the sum being disputed need not be substantial in order for the Court to admit separate evidence. As long as justice requires it, leave should be granted for a report to be obtained from a separate expert.

The lesson here, for an expert acting in the capacity of single expert, is perhaps the need to be conscious of the rules of engagement relating to meetings or communications with either party.



John Temple-Cole
Partner, Sydney
phone: 02 9286 9919
email: john.temple-cole@fh.com.au

For more information about our forensic services, please contact:

Sydney: Andrew Ross
+61 2 9286 9906
andrew.ross@fh.com.au

George Kompos
+61 3 9604 5150
george.kompos@fh.com.au

Brisbane: Tim Michael
+61 7 3831 4833
tmichael@qld.fh.com.au

John Temple-Cole
+61 2 9286 9919
john.temple-cole@fh.com.au

Adelaide: Peter Holmes
+61 8 8100 7600
pholmes@sa.fh.com.au

Hong Kong: John Tudorovic
+852 2820 5610
jtudorovic@fh.com.hk

Melbourne: Greg Meredith
+61 3 9604 5118
greg.meredith@fh.com.au

Jean-Pierre du Plessis
+61 8 8100 7600
jduplessis@sa.fh.com.au

Singapore: Tim Reid
+65 6416 1400
tim.reid@fh.com.sg

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