

expert update

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Running out of time

Theodorelos v Nexus Projects Pty Limited [2009] ACTSC 149
Chameleon Mining NL v Murchison Metals Ltd [2009] FCA 137
Fletcher & Maloney [2008] FamCA 864

Three recent cases highlight the importance of experts respecting Court-imposed deadlines when preparing their reports and outline the circumstances in which an application may be granted for leave to file an expert report after a deadline.

In the Theodorelos case, the Plaintiff's husband died as a result of injuries sustained from an accident at his workplace. On 12 June 2007, Mrs Theodorelos commenced two proceedings for damages. Both proceedings were listed for hearing before a Master on 21 September 2009. On 2 September 2009, Mrs Theodorelos made an application in the Supreme Court under Australian Capital Territory Rule 1241(4)(a) for leave to tender and admit three expert reports, as these reports were to be served on the Defendant after the deadline imposed by the Court. At the hearing, the Master granted leave for the three reports.

The first expert's report was prepared by the Plaintiff's General Practitioner (GP). The Plaintiff's solicitor deposed that on 22 April 2008, he requested the report from the GP, but it was not received until 30 June 2009, despite numerous letters and telephone calls from the Plaintiff's solicitor. As a result, the report was served upon the Defendant's solicitors after the Court-imposed deadline.

The second expert's report was an updated report by an occupational therapist. Of note was a new section of the report, concerning an "option to modify the current dwelling" as the Plaintiff could no longer live alone. In response to this issue, a new expert's report by an architect was prepared outlining the cost of renovations to the Plaintiff's house to accommodate her son and his new wife.

The Defendant sought to appeal the Master's decision to allow two of the expert reports to be served out of time, and also challenged the new section of the Occupational Therapist's updated report.

The first report appealed by the Defendant was the GP's, which the Court deemed admissible. In doing so, the Court held that "exceptional circumstances" justified the granting of leave after having regard to Rule 21. Justice Refshauge found that there were exceptional circumstances due to the prolonged failure by the expert to provide the report, despite repeated enquires.

Experts need to recognise the consequences of not providing a report on time

The Master commented:

...that the General Practitioner notwithstanding what might be seen as an obligation on her part to provide a report when requested to do so, ignored correspondence from the Plaintiff's solicitors and only prepared the report on 30 June 2009.

The second appeal by the Defendants related to the new section of the occupational therapist's report, and the subsequent architect's report.

The Court found both reports to be inadmissible. In doing so, reliance was placed on Rule 1241(5) (b) which provides a report is admissible only if it "updates" an earlier version of an expert report. Justice Refshauge said:

Although the report, and the challenged section, responded to a change in circumstances, it raised a whole new issue which required, as it happens, Mrs Theodorelos to retain the architect, Ms Knight, a new expert.

As the reports raised an entirely new issue, they could not be said to have updated a previous expert report.

In contrast, in the Chameleon Mining case, the Plaintiff sought leave to file an expert's report concerning valuation evidence with no explanation given for the failure to submit the report earlier. If leave was granted, this would have the effect of vacating the trial date. The Defendants opposed leave being granted.

The Court refused to grant leave for two principal reasons. First, the Plaintiff had filed his statement of claim nearly 15 months prior with no valuation produced during this time, and no explanation for the failure to adduce evidence.

Second, the Court found that any further delay would severely prejudice the Defendant, which could not be compensated by an order for costs. The report was therefore inadmissible at trial, a decision consistent with the Sulan J finding in *Landmark Operation Ltd v J Tiver Nominees Pty Ltd & Ors* [2008] SASC 133¹. In both cases the reports were inadmissible at trial, seemingly due to the lack of respect for Court-imposed deadlines. *McCormack v Major*² further emphasised "the importance of ensuring compliance with court orders as to the delivery of reports".

The case of *Fletcher*, which concerned a property settlement, also highlights the respect needed to be shown for deadlines by experts, and the delays to proceedings that can be caused by late expert reports.

In *Fletcher*, one expert report was filed by an accountant, Ms DB, on 29 March 2007 regarding a Trust valuation. This valuation was incomplete, leading to significant

¹ Refer to *Expert Update*, Issue 12, May 2009 for a detailed summary of the case.

² Unreported, Supreme Court of South Australia, Full Court, White ACJ, Cox and Mohr JJ, 12 October 1992



delays in the continuation of proceedings and the need for a further report dated 19 June 2007. This report had further difficulties and another report was filed on 4 July 2007.

Strickland J highlighted the importance of serving expert reports on a timely basis. He said:

At the time that she [Ms DB] accepted and received her instructions the date for the commencement of the trial in this matter was known... It seems to me that having accepted the instructions there was an obligation to complete the report in the time available, or if she was unable to then she should have declined to accept the instructions.

Significance

These cases highlight the importance of respecting court deadlines when experts are engaged. Often experts are not informed of court deadlines, but they should ensure their engagement letters address the issue and seek regular enquiry.

Experts failing to meet deadlines will cause their client to seek leave from the Courts to tender the expert report out of time. In our experience Courts are reluctant to grant such leave unless there are exceptional circumstances, such as those surrounding the GP's report in *Theodorelos*, since this may severely prejudice the Defendant. This is most obvious in cases where a report goes beyond an "update" such as in *Theodorelos*. In the case of delays, the instructing solicitor should ensure that the expert is followed up to improve their prospect to claim "exceptional circumstances". *Chameleon Mining* clearly demonstrates that in circumstances where no explanation is provided and therefore the report is not accepted, it can have a significant impact on both the outcome and the costs.



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