

expert update

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Treading a fine line...

Assafiri v The Shell Company of Australia Limited [2010] NSWSC 1058

These proceedings concerned a parcel of land which for many years, until late 1998, had operated as a service station. Shell owned and operated the site for most of that time. In 1996 Shell sold the land to Wenzhou Pty Ltd and leased it back for a period of 10 years, with renewable options. At the expiration of the lease, Shell was required to “remediate” the land so that it could be put to its highest and best use without the need for further environmental remediation. Shell was required to provide the proprietor with a certificate from an independent expert to the effect that it had remediated the land appropriately. Mr Assafiri later purchased the land from Wenzhou Pty Ltd. Mr Assafiri claimed Shell breached those remediation obligations.

Over the course of the proceedings, both parties called experts in the fields of environmental science and remediation, town planning and valuation. There were two interesting aspects in this matter surrounding the independence of experts.

Firstly, in relation to the environmental remediation experts, Justice McDougall heavily criticised the expert called by Shell, Mr H, for failing to be independent and labelled him as “not impressive”.

McDougall J stated:

Mr H did not seem to me to be someone who sought to give independent expert evidence, or who was prepared to act on his professional acceptance of the fact that his primary duty was to the Court. On the contrary, both listening to Mr H’s evidence as he was cross-examined and reading the transcript of it, he appeared to be very much an advocate for the party by whom he was called. His evidence was replete with evasive and non-responsive answers...I do not accept Mr H as an expert witness on whose evidence I can rely.

In contrast, Justice McDougall made the following comments in relation to Mr K, the expert called by Mr Assafiri:

I note at this point that I consider Mr K to be an expert on whose evidence I can place reliance. He made concessions where it was appropriate to do so, did not seek to maintain points that were clearly unsustainable, and did not appear in any way to be an advocate for Mr Assafiri’s case.

The second issue concerned the requirement under the lease for Shell to provide an independent expert’s certificate in relation to the remediation of the land. Shell in

*Independence must
be more than skin
deep.*

fact carried out some remediation work on the site between April and August 2007. Shell received two reports from two companies dealing with those works, Co. C and Co. U. The parties argued whether the report from Co. U could be seen to comply with the lease requirement to provide an independent expert certificate.

One of the issues raised by the Plaintiff was whether the report from Co. U could be seen to be independent given the level of communication that occurred between Ms H (the author of the Co. U report) and Shell representatives.

In his judgment, Justice McDougall stated:

Again, it is clear that Shell, through Ms H, made a substantial contribution to the final form of that report. It does not follow, merely because this happened, that the report should not be regarded as a report from an independent expert.

It is instructive to look at reports furnished by experts to the Court. In those circumstances, UCPR r 31.23 applies, and the experts are required to, and usually do, acknowledge their obligations to the Court as set out in UCPR Schedule 7. It may be the case that the expert will submit a draft report to the lawyers by whom, on behalf of the party intending to rely on the report, he or she was retained. It may happen that the expert discusses the draft report in conference with those lawyers, or counsel retained by them. There is nothing wrong with this, at least at the level of principle. On the contrary, if the result of the discussion is to focus the expert's attention on the issues to which his or her evidence is relevant, and to dissuade the expert from discussing matters on which his or her opinion is of no relevance, then such intervention is valid. What is not acceptable is that the lawyers dictate the content of the opinion. So long as the report that results from this process represents the views of the expert, held in good faith on the basis of the facts known to or assumed by the expert, the final version of the report may well be something on which the Court can rely. It is not necessarily corrupted by the process of analysis and discussion that may have led to the shaping of its form.

Justice McDougall went on to draw an analogy between the above and the report prepared by Co. U. He determined that a certificate from an independent expert would not be corrupted, or unreliable, purely because the content had been the subject of discussion or negotiation between the expert and Shell. Provided the views expressed in the certificate were genuine and independently held by the expert, it did not matter that the formulation of those views may have evolved from discussions with Shell.



For reasons unrelated to independence, the Court found that the report prepared by Co. U. did not satisfy the requirement of the lease.

Significance

As experts we are aware that maintaining independence is critical. Should an expert cross the line and appear to the Court to be more of an advocate, the consequences to both expert (by way of damage to professional reputation) and client (expert evidence is dismissed by Court) is severe. Experts and instructing lawyers alike should be mindful of these consequences when organising conferences between experts, instructing solicitors, clients and/or counsel to discuss draft expert reports. There is a fine line to tread between the acceptable level of association of these parties as detailed by Justice McDougall and the expert being perceived to have had their independence compromised.



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