

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Keeping an eye on the expert

Godden & Anor v MTS Pacific Pty Ltd [2010] SASC 63

The defendant, MTS Pacific, owned a vineyard which was leased to the plaintiffs, Godden, but managed by MTS Pacific. The plaintiffs alleged that MTS Pacific did not employ the best practice in its management of the vineyard and this resulted in long-term loss of productivity of the vines. The lease required the defendant to make a continuing supply of water available to the plaintiffs. The dispute was about the amount of water which had been supplied.

The defendant's experts, two viticulturists, required access to the vineyard for the purposes of inspecting the property and assessing vine productivity, water supplied to the vines and completion of their reports. The plaintiffs' viticulturist expert, Dr D, had already delivered a report. The defendant brought an application for their experts to inspect the vineyard which included the following conditions:

2. *That the plaintiffs give to the defendant's experts, whether alone or in the company of the defendant's manager and/or legal advisors, unconditional access to the plaintiff's vineyard to enable them to attend upon and inspect the plaintiffs' vineyard on reasonable notice for the purpose of preparation of experts reports for use in the proceedings....*
4. *That the plaintiff, whether by themselves or by their agents or representatives, be restrained from interfering with the inspection of the plaintiff's vineyard by the defendant's experts whether by:*
 - a) *seeking to participate in the process of inspection.*
 - b) *seeking to hear the discussions which occur during the course of the inspection.*
 - c) *seeking to observe the process of inspection.*

The plaintiffs were prepared to give undertakings as to 4a and 4b above. The point which was argued was whether the access should be unconditional in that the plaintiffs should not be permitted to observe the process of inspection by the defendant's experts. The defendant's solicitor tendered affidavit material raising possible difficulties which might be encountered if the plaintiffs' agents observed the process of inspection. However, Lunn J dismissed the objections as mere speculation. Interestingly, there was no affidavit from the defendant's experts about any perceived difficulties.

Putting aside the basis of the application under the Court Rules and the ability to gather samples and other evidence, Lunn J deemed it inappropriate and impractical

An expert's life is hard enough: identifying and accessing relevant information, but when it comes to obstructing an expert, watch out!



to impose a limitation as per paragraph 4c above, particularly if an observation was made inadvertently, and thus the plaintiff would have to vacate the vineyard entirely to avoid a breach. Neither could his Honor see how such an observation could obstruct the defendants' experts. Counsel for the defendant, however, expressed a concern over a "forensic advantage", but his Honor could not identify any impediment or prejudice.

Clearly, the experts, in complying with the relevant guidelines and rules, would have to ensure that whatever they actually did and actually observed would have to be detailed in their report, and would be the subject of evidence at trial. Further, it would be open to the plaintiff to call witness evidence as to what the experts did. Therefore there was no basis to conclude allowing such observation was unfair or gave the plaintiffs any improper forensic advantage, albeit, the defendants had not been afforded the same opportunity in respect to the inspection by the plaintiffs expert. As Lunn J said

That may go to the weight which would be given to Dr D's evidence, but it is not in itself a basis to exclude any evidence about what the plaintiffs' agents observed of the defendant's (experts) inspection.

Significance

The above case indicates that there is no right to preclude observation of an expert's work unless it amounts to obstruction, and the apprehension of obstruction can be substantiated to the Court.

In the context of guidelines for experts, the increasing frequency of joint expert's reports and moves towards concurrent evidence, experts should be open to observation. However, we can see some practical difficulties where technical experts are trying to go about their duties and functions as an independent expert, and others interfere either deliberately or unintentionally, and because of their lack of technical understanding, assume or imply certain things were done or not done by experts. The experts, mindful of their duty to the Court, should be able to go about those duties unhindered.



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