

expert update

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Expert reports and incomplete pleadings

Solder-Tech Pty Ltd and Anor v Willmay Pty Ltd and Ors (No 2) [2011] SASC 74

This judgment relates to an application by the Defendants seeking various Orders for the production of documents, including those provided by the Plaintiffs to their expert, in the Supreme Court of South Australia.

In September 2006 the First Plaintiff bought a business from the First Defendant. The Plaintiffs allege that before the sale of the business, the parties entered into two restraint-of-trade agreements which had the effect of preventing the Defendants competing with the First Plaintiff's business. It was further alleged that the Third Defendant, without authority to do so, copied confidential business records of the First Plaintiff before he left its employment and those records had been used by the Second Defendant in the furtherance of its business.

A Search Order was executed on the Defendants in December 2010. A computer expert, Mr G, was retained by the Plaintiffs. He produced a report dated 8 February 2011 about his investigations into the computer records of the Second Defendant, comparing them with the records of the First Plaintiff.

On 29 March 2011, the Defendants took out an application seeking various orders for the production of documents, including the documents provided by the Plaintiffs to Mr G, being six specified classes of documents that were referred to in his report.

The Defendants relied upon Rule 160 of the Supreme Court of South Australia Rules, the relevant parts of which are as follows:

160 - pre-trial disclosure of expert reports

(1) A party must, before the relevant time limit -

- (a) Obtain all expert reports the party intends to obtain for the purposes of the trial of the action; and*
- (b) Serve on every other party to the action a copy of each expert report in the party's possession relevant to the subject matter of an action (whether the party intends to rely upon it at the trial or not).*

(2) The relevant time limit is the end of a period of 60 days after the time limit for making an initial disclosure of documents.

*On what grounds
can a party refuse
to produce
documentation
provided to its
experts?*

- (5) *The party who has disclosed an expert report and proposes to rely on evidence from the expert at trial, must, at the request of another party, provide the party making the request with -*
- (a) *A copy of documentary material (including material in the form of computer data) on which an expert has relied for making a report; and*
 - (c) *Details of any communications relevant to preparation of this report -*
 - (i) *Between the party, or any representative of the party, and the expert; and*
 - (ii) *Between the expert and another expert.*

Although the report of Mr G was obtained in relation to the Search Order and before there had been any pleadings in the action, it was one to which Rule 160(1) applied but subject to the relevant time limit in Rule 160(2). Lunn J determined that the Defendants could not rely upon Rule 160(5) as it only applied if it was shown that the Plaintiffs proposed to rely upon evidence from the expert at trial. The Plaintiffs could only rely on the report if it was relevant to issues raised by the pleadings. As the pleadings had not yet closed it was impossible to say that the Plaintiffs would so use it at trial.

Lunn J determined that Rule 160(5) must be viewed at the time of the request and can only operate if at that time the addressee of the request has a positive intention to rely on the evidence from the expert at trial. That party can only have that positive intention if there was at that point in time an issue defined by the pleadings on which the evidence of the expert would be admissible. This was not yet the case in this matter.

The Plaintiffs conceded that production would probably occur later in the action if the prerequisites of Rule 160(5) were then satisfied.

Lunn J ultimately made the Order sought, but noted that if it subsequently transpired that such production was not necessary for the proper preparation of the defence case, and the Plaintiffs were put to expense in complying, the Plaintiffs would have a good argument to be awarded costs in relation to the production.



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Comments

The point at which an expert is engaged in a matter will vary in accordance with the perceived requirement for such expertise as a part of case management.

Whilst the rules governing disclosure of experts' reports and the documents which underpin them vary between jurisdictions, in our experience, there are often significant benefits from involving an expert early in proceedings.

Such benefits may include the identification of key information/documents, the identification of critical issues in the expert's area of expertise, assistance with the management of client expectations and complementing case strategy development.

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