

# expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

## Balancing on a cliff top

*Gunnensen & Anor v Henwood & Anor [2011] VSC 440*

On 1 January 2011, the *Civil Procedure Act 2010* took effect in Victoria. The major purpose of the Act was to reform and modernise the laws, practice, procedures and processes relating to civil proceedings in the Supreme Court, the County Court and the Magistrates' Court and to "facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute."

This proceeding concerned a dispute between neighbours of adjoining properties. The properties had cliff top frontages above the bay in the Mornington Peninsula. The cliff top was prone to natural landslips. A landslip occurred in February 2005. The Plaintiffs alleged the Defendants took insufficient steps to prevent, detect or repair a leaking irrigation pipe which weakened the cliff making it more prone to collapse, and hence, caused or contributed to the landslip. The Plaintiffs claimed as a result of the landslip, their land developed cracks, moved, and showed signs of instability indicating the possibility of a further cliff face collapse, resulting in a decline in the value of their property.

Many of the significant issues in dispute between the parties required expert geotechnical opinion. Both parties engaged consultant geotechnical engineers who provided advice throughout the course of events. The geotechnical engineer experts had multiple roles; investigating the cause of the landslip, designing and implementing remediation projects and negotiating with each other on behalf of their instructing party.

In this matter Justice Dixon was mindful of the *Civil Procedure Act* and critical of the way the parties provided their geotechnical evidence to the Court. He stated:

*Of a large and under-used court book, prepared presumably at significant expense, perhaps as much as one third of it was comprised of documentary material generated by, or for, the geotechnical experts. The Court Book comprised much source material as well as significant duplication, the purpose of which, like much non-expert material, was never revealed. More than one third of the hearing time in Court was consumed by the geotechnical experts. The Court was treated to traditional cross-examination of specialist experts. Each of these matters unreasonably increased, in my view, not only the legal expenses of the parties involved in the dispute but also the resources, in terms of judicial time, needed to resolve the dispute.*

*"Concurrent expert evidence is now the preferred process for taking expert evidence in civil cases. Its advantages will ensure its continued use. Enhanced judicial control over privately retained experts is achieved."*

Justice Dixon noted that the overarching obligations set out under the *Civil Procedure Act* apply to the parties, the legal practitioners and to expert witnesses (with some exceptions) “in addition to, rather than in derogation of, existing duties applying to experts, for example, the Expert Code of Conduct.”

In summary, the overarching obligations imposed under the Act include the obligations to:

- Act honestly
- Only take steps to resolve or determine dispute
- Cooperate in the conduct of civil proceeding
- Not mislead or deceive
- Use reasonable endeavours to resolve dispute
- Narrow the issues in dispute
- Ensure costs are reasonable and proportionate
- Minimise delay
- Disclose existence of documents

Justice Dixon had previously ordered (pursuant to r 44.06) that the geotechnical expert witnesses for the parties confer in the absence of lawyers and file a joint report setting out the matters on which they agreed, the matters on which they disagreed and the reasons for such disagreement. In openings at trial, the parties informed his Honour that whilst the experts had met in conference, no joint expert report was prepared. The experts revealed the want of a facilitator as the primary reason for non-compliance with the order. Justice Dixon cited the reason as a ‘lame excuse’.

At trial the geotechnical expert evidence was not heard concurrently and was provided in the traditional way. Justice Dixon commented:

*I have no doubt that concurrent evidence, or “hot-tubbing”, could have saved two days of hearing time. The attendant savings in reduced written material before the Court and in the processes of decision-making are not easily estimated...the resultant inefficiencies will be borne by the parties and competing users of the resources of the civil justice system.*



Justice Dixon stated:

*To enjoy the benefit of experts giving evidence concurrently, and in aid of that process, courts direct that experts confer and prepare a joint report prior to trial. Concurrent expert evidence is now the preferred process for taking expert evidence in civil cases. Its advantages will ensure its continued use. Enhanced judicial control over privately retained experts is achieved. The experience of the courts, mostly reported through extra-judicial comment in journal articles, conferences and seminars, is greater efficiency and expedition, achieved by refocussing emphasis to professional dialogue rather than cross-examination. The process allows the critical areas of disagreement between experts to be more efficiently identified and processed, both on the taking of evidence and in judicial decision making.*

#### Comments/Significance

Expert witnesses and legal practitioners (particularly from a case management perspective) need to be mindful of the purpose of the Civil Procedures Act and the overarching obligations it imposes. There are sanctions which the Court can impose for contravention of the overarching obligations, by making any order it considers appropriate in the interests of justice.

Whilst the *Civil Procedures Act* commentary above is specific to Victoria, based on Justice Dixon's comments, experts in all jurisdictions should be prepared in future to be involved in a greater number of joint expert conferences with the requirement to prepare joint experts reports and provide evidence in Court concurrently.



**Melinda Bowman**  
Executive Manager, Melbourne  
phone: 03 9604 5650  
email: [melinda.bowman@fh.com.au](mailto:melinda.bowman@fh.com.au)

For more information about our forensic services, please contact:

Melbourne: Greg Meredith  
+61 3 9604 5118  
[greg.meredith@fh.com.au](mailto:greg.meredith@fh.com.au)

George Kompos  
+61 3 9604 5150  
[george.kompos@fh.com.au](mailto:george.kompos@fh.com.au)

Sydney: Michael Khoury  
+61 2 9286 9864  
[michael.khoury@fh.com.au](mailto:michael.khoury@fh.com.au)

Adelaide: Peter Holmes  
+61 8 8100 7600  
[peter.holmes@fh.com.au](mailto:peter.holmes@fh.com.au)

Jean-Pierre du Plessis  
+61 8 8100 7600  
[jean-pierre.duplessis@fh.com.au](mailto:jean-pierre.duplessis@fh.com.au)

Brisbane: Tim Michael  
+61 7 3831 4833  
[tim.michael@fh.com.au](mailto:tim.michael@fh.com.au)

Singapore: Tim Reid  
+65 6416 1400  
[tim.reid@fh.com.sg](mailto:tim.reid@fh.com.sg)

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