Environmental Planning Law Association Conference

Newcastle 28-29 November 2003

Presentation by the Honourable Justice RN Talbot

Pre-hearing Procedures in the Land and Environment Court

Almost since its inception, now over 20 years ago, the Land and Environment Court ("the LEC") has laboured under the burden of a system that has not, in my view, managed to master the vagaries of litigation, which depends to a significant extent on the diligence and co-operation of the parties to present expert evidence in an efficient and cost effective manner. It is disappointing for this to be the case where a court such as the LEC is exercising specialist jurisdiction that demands the resolution of a dispute between experts in almost every case.

However, very often the so-called expertise calls up little, if any, specialised knowledge. Many aspects of town planning require an objective consideration based on a subjective judgment. How else can a Commissioner or Judge adjudicate an issue in respect of such matters as visual impact, partial view loss or aesthetic appearance? It is doubtful that any amount of expert opinion can assist with the resolution of an argument that depends on the application of common sense or aesthetic taste. As Lord Denning said in *Winchester City Council v Secretary of State for the Environment and Another* (1989) 39 P&CR 1 when considering whether a determination by an inspector on appeal against refusal of consent should be upheld where it was claimed the inspector introduced new evidence without giving the parties an opportunity to call an expert:-

> *Now, the city council say that the inspector was there introducing new evidence. It was new matter on which they would have wished to call an architect; they were not given an opportunity of doing so, or they were misled into not doing so, and they say that there was, therefore, a breach of natural justice in the matter.*

> *I am afraid that I cannot agree with this contention. This was not a scientific or technical point on which evidence from both sides was necessary or even desirable. It was a matter of aesthetic taste – or common sense, if you like. Anyone with reasonable intelligence going to see this house could tell for himself whether it was suitable to be extended and made into a bigger house, or not, or whether it would spoil it to try to add to it. It did not need skilled architects to give evidence about it. It was a matter that the inspector could judge perfectly well for himself. That is what he meant when he said that it was "not necessary" to call evidence on it. I may add that neither side had gone to the hearing with any architects. If an architect had been called for the city council, Mr Eccles would have wanted to call an architect on his side. The inquiry would have been lengthened and made more expensive. In the inspector's view – also in the view of Forbes J. – this was a matter of ordinary common sense or aesthetic taste that the inspector could perfectly well handle himself without the need for any expert evidence. There was no want of natural justice at all.*

Assuming, nevertheless, that the expert evidence does meet the test set by Heydon JA as he then was in *Makita*, namely that

> *In short, if evidence tendered as expert opinion evidence is to be admissible,*
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> - *it must be agreed or demonstrated that there is a field of 'specialised knowledge';*
> - *there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;*
> - *the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge';*

- *so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert;*
- *and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way;*
- *it must be established that the facts on which the opinion is based form a proper foundation for it;*
- *and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the filed of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly and substantially based', applies to the facts assumed or observed so as to produce the opinion propounded.*

then the Court has been relentlessly progressing toward enforcing a more rigorous regime for the presentation of expert evidence and resolution of disputes between experts. The ultimate ideal result has not yet been achieved and may even be unachievable.

The following précis of the recent history of procedures introduced by the Court assists with an understanding of the problems

Evolution of the Expert Witness Practice Direction

The expert witness practice direction process is designed to facilitate the giving of evidence in a meaningful way, not just for the benefit of the Court but also with the prospect that lawyers may be more circumspect in the use of a client's money by refraining from obtaining reports which have virtually no evidentiary value.

The original Practice Direction No. 16 made in August 1999 was, what is now appropriately regarded as, the short version. The significant provisions, at least for present purposes, were:-

2. An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party.

3. A report made on or after 1 September 1999 by an expert witness should (in the body of the report or in an annexure):

(a) include the person's qualifications and experience as an expert;
(b) specify the assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
(c) specify any examinations, tests or other investigations on which he or she has relied; and
(d) specify any literature or other materials utilised in support of the opinions.

…

5. The court may direct the parties and their expert witnesses to:

(a) confer on a "without prejudice" basis;
(b) endeavour to agree; and
(c) make a joint statement in writing to the Court specifying matters agreed and matters not agreed together with the reasons for any such disagreement.

6. It is expected that an expert witness will exercise his or her independent, professional judgment in relation to such a conference and joint statement, and that an expert witness will not be instructed or requested to withhold or avoid agreement.

Notwithstanding its sporadic use, from the Court's perspective the first Practice Direction appeared to work satisfactorily in the initial stages. However, before the system had a reasonable opportunity to adapt to the new regime the decision was made to follow other jurisdictions and expand the direction. Practice Direction No. 20 in the form of the Consolidated Expert Witness Practice Direction commenced on 1 October 2002.

The then Registrar of the Court responded to the consolidated version by publishing and making Expert Witness Standard Directions in January 2003.

From the point of view of practice in the LEC, that is when unexpected trouble started. Difficulties were created by cl 6 of the consolidated practice direction and the standard directions that followed. Clause 6 provides as follows:-

> *6. Unless otherwise directed by the Court where a direction is given pursuant to paragraph 5(1), the parties shall agree on the following matters:*
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> *(a) the experts to attend.*
>
> *(b) the questions to be answered.*
>
> *(c) The materials to be placed before the experts.*

Both cl 6 and the standard directions made provision for settling a list of questions to be answered by the experts in conference. It soon became apparent that a consensual approach to the settlement of agreed questions was often a task beyond the wit and even interest of some legal practitioners. On some occasions the questions were more like a set of interrogatories. In one example, in respect of what was a straightforward development application, the applicant drafted 54 separate questions over 5 issues. It is my opinion that none of the questions, even if capable of a direct answer, could have produced any meaningful result. Maybe that was the idea.

The Court became concerned that the failure to resolve the questions issue, if allowed to continue unchecked, would cause such disruption with consequent delay and additional cost that the viability of the whole process may be lost. Rather than re-address the terms of the Practice Direction itself it was decided that the problem could be overcome by formulating new standard directions. This has been done as from July 2003 in a way that effectively amounts to a direction that is in conflict with cl 6 of the Practice Direction and hence the parties are thereby directed *"otherwise"* in the context of that clause. Accordingly, once the standard directions are made an

application must now be made for a special direction if it is considered that the parties are entitled to formulate specific questions in the circumstances of the particular case.

However, it cannot be expected that the matter will be allowed to rest there. The Court is currently in the process of re-drafting the Expert Witness Practice Direction so that its effect will be identical to Pt 36 of the Supreme Court Rules, including r 13C and r 13CA. The view is now taken that any distinction between the practice in the Supreme Court with the practice in the LEC is not justified.

One of the primary objectives of the proposed change is that unless an expert witness's report contains an acknowledgement that the witness has read the code and agrees to be bound by it, the report cannot be validly served or used in evidence.

The LEC proposes to persist with a standard direction that requires the expert witnesses to confer in accordance with the Expert Practice Witness Direction and identify:-

(1) the matters within their expertise;
(2) the matters upon which they agree;
(3) the matters upon which they disagree; and
(4) the reasons for any disagreement.

They will then be required to file a joint statement specifying the matters agreed and issues not agreed and the reasons for any non-agreement.

The Ongoing Problem

I propose to address the issue which arises more specifically in class 1 and class 2 appeals, although the remarks will have general application in most cases.

The underlying difficulty appears to be twofold.

Firstly, a significant number of members of the legal profession continue to assume a supervisory role over the conferencing process, either as a filter or arbiter presumably to ensure that the expert does not act contrary to the perceived interest of the client.

Secondly, many of the experts still experience difficulty with the concepts that they have an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise, that there is a paramount duty to the Court and not to the person retaining the expert and that they are not an advocate for the party's cause. This, I understand, is often manifest in a reluctance to confirm an agreement or understanding reached at the conference after the joint report is prepared or diffidence towards reaching an agreement without some further instructions from the legal representative or the client.

The experience in the LEC is that, notwithstanding the making of specific directions to that effect, the joint statement is not filed by the due date with the consequence that the Judge or Commissioner hearing the matter has to re-enliven the process in the course of the hearing.

The parties, their legal representatives and the retained experts need to appreciate the nature of the process. Failure to strictly comply exposes the defaulter to disciplinary action ranging from personal penalty for contempt and cost orders to rejection of the evidence. It needs to be firmly understood that the joint statement is generated at the direction of the Court for the benefit of the Court as a document to be filed in the Court. It is not to be submitted to any other person for vetting or settling.

The legal representative has a duty to ensure that the document is filed in the form generated by the experts without revisions. Ultimately, the report can be tendered by agreement or in accordance with the rules of evidence and the practice of the Court. There is no capacity to withhold it from filing. The witness cannot resile from any agreement and the party cannot adduce expert evidence inconsistent with the matters agreed without leave.

The legal representatives are not to attend the conference unless a direction is made that they may be present.

One of the difficulties that can be faced is whether the conferencing should take place before or after statements of evidence have been prepared. In the latter case it may be necessary to order or agree that the statements of evidence be filed and served at a time earlier than the 14 days before the hearing prescribed by the rules. Many cases could benefit from a conference process immediately after the statement of issues has been presented.

I understand anecdotally that there is still a widespread practice whereby respondent consent authorities in merit appeals file a Statement of Issues containing ambit claims on any conceivable subject. Unless this practice is curtailed there is no realistic prospect that the expert witnesses can confer in a meaningful way before the statements of evidence are available.

The pre-trial procedures in the Court are under review. It can be expected there will be some novel provisions in a revamped pre-trial practice direction that will include such things as direction for preparation of a Statement of Facts by the respondent to class 1 or class 2 proceedings and the commencement of a hearing on-site before the evidence is presented in Court. It is expected the pre-trial practice direction will be made by the end of the year. The drawing of a proper and supportable Statement of Issues will be a key component in ensuring the efficient management of expert evidence. Practitioners must expect that the Court will be adopting a more strident approach to this aspect of the preparation for trial.

RN Talbot