## Preparation and presentation of Expert Evidence

Hon Chief Judge Brian Preston of The Land & Environment Court defines an expert as:
"Expert opinion evidence is today fundamental to judicial decision making. However in order for the expert opinion evidence to achieve the desired goal of assisting the trier of fact, the expert opinion must be reliable. Expert opinions must be based on a body of evidence that's itself reliable. The body of knowledge must be generally accepted in the field of expertise in which it is found. The person expressing the expert opinion must be qualified by training, study or experience in the field of expertise and posses the specialised knowledge. The person must not be a quack, a charlatan or an enthusiastic amateur. The expert opinion must also be based on the specialised knowledge and expose its factual basis and reasoning. Only if these criteria are met will expert opinion evidence be reliable and assist the trier of fact. Both the law and science have developed methods for ensuring reliability of scientific opinion...."

**AMP Capital Investors Limited v Transport Infrastructure Development Corporation [2008] NSWCA 325 (27 November 2008)**

40 I accept Mr Craig's submission that there must be material capable of rationally supporting a conclusion (Edmonds), that the absence of probative evidence is equivalent to no evidence (Bruce), and that an error of valuation principle is or may be an error of law (Maurici).

Mr 'x' did not back this up with any discussion of valuation principle or other reasoning, and this impacts on the weight and cogency of his evidence: Makita (Australia) Pty Limited v Sprowles [2001 NSWCA 305]

**Makita v Sprowles**
Heydon JA summarised the applicable law in relation to the admissibility of expert evidence as an exception to the opinion rule. In summary, if evidence tendered as expert opinion evidence is to be admissible:

1. it must be agreed or demonstrated that there is a field of "specialised knowledge";

2. 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;

3. the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";

4. so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert;

5. so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;

6. it must be established that the facts on which the opinion is based form a proper foundation for it; and the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert, and on which the opinion is "wholly or substantially based" applies to the facts assumed or observed so as to produce the opinion propounded.

**EXPERT EVIDENCE - Robert McDougall (Supreme Court of NSW)**
15. At first instance an employee recovered damages from her employer after slipping and falling down stairs at her workplace. The trial judge accepted expert evidence that the stairs were slippery. The trial judge's acceptance of the expert evidence was essential to the finding of liability

given that the evidence of the plaintiff was "brief and uninformative" (see Priestley JA at 707). The Court of Appeal (Priestley, Powell, and Heydon JJA) held that the trial judge erred in accepting the expert evidence. Priestley and Powell JJA rejected the evidence of the expert as "wrong" and "of no real value" respectively. Heydon JA discussed extensively the authorities concerning the duties of expert witnesses in civil cases. In this discussion Heydon JA at 729 focused upon:
***... the prime duty of experts in giving opinion evidence: to furnish the trier of facts with criteria enabling the evaluation of the validity of the expert's conclusions.***

16. His Honour said at 744 that the basis for the principle is that if:
***... these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.***

17. Furthermore, as his Honour had said at 733, the requirement of transparency is essential given that the:
***... trier of fact must arrive at an independent assessment of the opinions and their value, and this cannot be done unless their basis is explained.***

In this context it is necessary to bear in mind, as Kirby P pointed out in *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625, 636, that the court does not forfeit its function and duty to experts. The recondite exception (if such it be) in *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, 573 (Sheller JA), relating to findings about foreign law where there is unchallenged evidence from a qualified expert, may be put to one side for present purposes.

18. On the facts, the prime deficiency that Heydon JA identified in the expert's report was that it did not furnish the trial judge with the necessary scientific criteria for testing the accuracy of his conclusions, thus disabling the trial judge from forming his own independent judgment by applying the criteria to the facts proved.

19. Heydon JA took as the starting point for his analysis, the line of authority flowing from the Scottish decision in *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* (1953) SC 34 at 39-40 where Lord President Cooper stated of expert witnesses that:
***Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.***

20. Heydon JA noted the existence of an opposing view to that expressed in *Davie* whereby all the expert need do is establish that there is a relevant field of specialised knowledge, that they have expertise in a relevant aspect of it; and that they hold an opinion relevant to establishing a fact in issue in the litigation. In rejecting this view, Heydon JA stated at 731 that:
*... it is clear that the practice of giving only the conclusion in chief is not only not customary, but is opposed by a line of authority which, while not citing Davie's case, has arrived at conclusions consistent with and supportive of it.*

21. In relation to trial practice, Heydon JA cited the decision of Lawton LJ in *R v Turner* [1975] QB 834 at 840 that:
***... counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave it to the other side to elicit the facts by cross-examination.***

22. In addition, the facts or assumptions that underlie the expert's opinion must be proved by

admissible evidence: see *Ramsay v Watson* (1961) 108 CLR 642. Such evidence may be led from the expert, or identified or proved in some other way: see *Trade Practices Commission v Arnotts Ltd (No 5)* (1990) 21 FCR 324. This may be a particular problem where the facts assumed are themselves of a hearsay nature (ie, in the hands of the expert, second hand hearsay or worse). Prima facie, statements of assumptions are admissible in an expert report (assuming that the relevant criteria for admissibility of expert evidence have been met) to prove the assumed facts upon which the opinion expressed is based. Thus, by s 66 of the Act, the assumptions would become evidence of the asserted facts. Section 136 provides the obvious remedy to what might otherwise be a problem where the asserted facts are really in dispute.

*Bromley Investments Pty Ltd v Elkington* (2002) 43 ACSR 584

***36. Muir J reiterated the principle that the assumptions of fact that underlie an expert's opinion must be proved by admissible evidence. In failing to do so Muir J noted that the expert's report was initially deficient, and that subsequent attempts at rectification were not satisfactory.***

It should be noted, however, that the Full Court of the Federal Court has held that many of these matters go to weight. The High Court has stated that expert evidence is inadmissible - see Dasreef.

**Tyneside Property Management Pty Ltd & Ors v Hammersmith Management Pty Ltd & Ors**
**Decision Date: 08 February 2011**

Decision:Affidavit of witness admissible, subject to matters of form, insofar as it describes how the contract would have been performed.

Affidavit of witness inadmissible insofar as it relates to costs of completing contract and assumptions on which costs of completing contract are based.

Catchwords:

EVIDENCE - opinion evidence - whether property developer can give expert evidence of prospective lot yield - held: not within specialised knowledge of a property developer.

EVIDENCE - opinion evidence - evidence of costs of performing contract had contract not been repudiated - evidence of property developer as to costs of performance - held: evidence from customers of people with specialised knowledge in trades or professions not specialised knowledge.

EVIDENCE - opinion evidence - evidence of costs of performing contract had contract not been repudiated computed by extrapolating from costs previously incurred - held: not specialised knowledge as within the province of any reasonably intelligent person.

3 In any event, it would be necessary for the plaintiffs to prove: (1) what would probably have happened had the contract been performed; (2) what revenue would have been generated by the project; and (3) what costs would have been incurred - in order to enable the net profits, of which they would have been entitled to a share, to be projected.

4 In order to do so, the plaintiffs tender the evidence of Mr Roy Frederick Haggis and for present purposes, in particular, his affidavit sworn 16 July 2010. Mr Haggis is, and at all material times has been, a director of the plaintiffs and was, until the purported termination of the contract by the defendants, a director of the defendant Hammersmith Management Pty Ltd. He claims quite substantial experience as a property developer and a consultant in property development, and some experience as a planning officer and an urban designer. However, his experience as an urban designer and a planning officer was in South Australia, and at least the first decade of his experience as a property development consultant until 1980 was also in South Australia.

5 His evidence contained in the subject affidavit appears to be directed primarily to three topics. The first is the course that the project would have taken but for the alleged repudiation, that is to say had the plaintiffs remained project managers and the contract been performed according

to its terms. The second is to demonstrate the lot yield that would have been generated by the project. That lot yield, in due course, informs the evidence of land value that will ultimately inform the assessment of the projected revenues to be generated by the project. The third broad topic addressed by the affidavit is the projected costs of completing the development.

6 As to the first of those topics, it seems to me that a director of the plaintiffs -probably even one without project development experience and skills - would be entitled to give evidence of the plaintiffs' intention and plans, and how the plaintiffs would have performed the contract had they been permitted to do so. Accordingly, in so far as the affidavit describes in substance how the plaintiffs would have managed and implemented the project had the contract remained on foot, its contents are relevant and, subject to any questions of form, therefore admissible.

7 As to the second topic - that is, the lot yield which the development would have generated - that is a matter not necessarily within the expertise of a property developer. No doubt, property developers form broad assessments of the yield that might be derived from a development site, but that is a different thing from having the expertise to plan and calculate with relative precision how a development might be planned to yield its highest and best use. Assessments of lot yield necessarily require knowledge of relevant planning considerations and constraints. That expertise, it seems to me, resides with land economists and planners, rather than with project developers. Mr Haggis' experience as an urban designer did involve the design of urban and rural subdivision projects for private developers and the South Australian Housing Trust in South Australia, but many decades ago. There is nothing to establish that that experience is transportable in locality and in time to the Hunter Valley and its particular planning considerations and constraints nearly fifty years later.

9 I turn then to the third and probably crucial topic so far as this affidavit is concerned, namely, the evidence of the costs associated with completion of the development. That evidence is patently opinion evidence. Being the principal of a party, Mr Haggis is unable to comply with the expert witness code. However, in my view that does not disqualify a party - or a person interested in a party - from giving opinion evidence where otherwise qualified to do so, and where that evidence is otherwise admissible, although obviously such evidence will often, though not invariably, be of less weight than that given by independent experts.

10 Mr Haggis' opinions as to the costs of completing the development appear to be derived in two ways. One - typically introduced by the words "based on my experience" - seems to be founded on his experience as a property developer of what various contractors, consultants and tradespersons are likely to charge. The other is founded on what has been charged so far or what has been quoted by such consultants, contractors or tradespersons, which he then extrapolates having regard to time, area or size to the remainder of the development.

11 As to the first of those approaches, generally speaking **I do not think that a customer who receives and is charged for services by a professional or tradesperson is qualified as an expert to give opinion evidence as to what are the reasonable costs of that professional or trade service. For example, the costs of medical services are not to be proved by calling patients to say what in their experience a doctor charges. The costs of legal services are not to be proved by calling clients to say what in their experience a lawyer charges. They are proved by calling persons qualified in the relevant profession or trade, to give evidence of the practices of that profession or trade.** Accordingly, I do not think that a property developer, however experienced, is appropriately qualified to give evidence of what developers are charged by consultants, contractors and the like in providing services to a developer. Evidence of the first category is therefore not admissible.

12 As to the second category, extrapolations according to area, time, size and the like do not involve the application of any specialised body of knowledge in which a property developer is qualified by study, training or experience to give expert evidence. It is a mathematical, logical

process of which any intelligent person is capable. It is not the specialised province of a property developer to do so. It may well be that the type of process described by Mr Haggis in his affidavit is undertaken by him and other property developers in preparing a budget for a project, but the assessment of damages is concerned not with budgets but with the reasonable costs and reasonable projections of profit, which should be informed by experts in the relevant fields rather than by the projections of a property developer based on quotes obtained from the relevant experts and deduced from them.

13 I have given some consideration as to whether - since costs obviously reduce damages - Mr Haggis' evidence in this respect should be received effectively as an admitted minimum position. However, I do not think that the plaintiffs wish to tender it on that basis. It would, of course, be open to the defendants to tender relevant parts as admissions if they were minded to do so, and it does not appear to date to be seeking to do so.

14 As it follows that the evidence of costs given by Mr Haggis will be rejected, his evidence as to lot yield - which I would otherwise have limited to being a statement of the assumptions that he made - does not found any relevant opinion and should also therefore be excluded.

15 It follows that, insofar as Mr Haggis' affidavit describes how the plaintiffs could and would have performed the contract, it is, subject to any questions of form, admissible; but insofar as attempts to give evidence of the costs of completing the contract, it is not and insofar as it sets out assumptions on which those costs are based, those assumptions are irrelevant.

**Dasreef (High Court)**

The witness had some training, study or experience which led him to have some specialised knowledge. He did not, however, explain what elements of his training, study or experience led him to possess specialised knowledge of a kind which enabled him to reach the conclusion that a cloud of silica dust liberated when cutting or grinding stone contained 200mg/m3 of respirable silica, or even as much as 1g/m3. He gave evidence of only one casual observation of an angle grinder in operation. He gave no evidence of ever having measured respirable silica dust. He gave no evidence of having measured dust concentrations, or the respirable fractions of those concentrations, arising from the type of work the respondent was doing. He did not explain how he had reasoned from his specialised knowledge, on the basis of lay descriptions of how the respondent worked and photographic records of how that type of work was done, to his estimate of the dust concentrations inhaled by the respondent. Accordingly the evidence was inadmissible.

**Welker v Reinhart (Supreme Court NSW)**

EVIDENCE - expert evidence - security and safety experts - UCPR expert witness code of conduct - failure to provide code to witness before preparing report - whether cured by later affidavit asserting compliance with code. EVIDENCE - expert evidence - compliance with experts code of conduct and Makita requirements - failure to comply - failure to identify material relied upon in expert report - failure to disclose reasoning process - no demonstration of application of specialised knowledge

41 Secondly, neither Mr x nor Mr y exposes any reasoning process for the conclusions that each reaches. Their evidence boils down to the proposition that unidentified details concerning the trust and the beneficiaries will assist kidnappers and extortionists. But neither seeks to explain how they would be assisted. Neither, for example, suggests that kidnappers of wealthy individuals are known to target individuals of particular qualities and to adopt particular methods in kidnapping those persons, so that it might be possible to tie those qualities and methodologies with the information that would be revealed.

42 Thirdly, and following on from the earlier points, Mr x and Mr y have not applied any expert knowledge they have to the facts that they have been given. The evidence they give simply consists of assertions about the risks associated with the disclosure of the relevant information.

43 Fourthly, although Mr z report does not suffer from a number of the flaws suffered by those of Mr x and Mr y, in my view, his opinion does not involve the application of any expert knowledge and certainly not any expert knowledge he has. The opinion he expresses is that, if the suppression order is not continued, media attention on Mrs Rinehart and her family will increase and that will make them larger targets. The first limb of this opinion concerns what the media will do. The second limb of the opinion does not seem to involve any real expertise at all.

44 Fifthly, Mr z starts with the assumption that the Rinehart family has relatively low public and media profiles. On the evidence before me that assumption was false at the time of his report and is certainly false now.

45 It follows that the three reports should be rejected.

**Trust Company v Minister - Crown Lands Act - LEC NSW)**
VALUATION - whether valuation evidence complied with obligation on expert to identify reasoning and assumptions

100 In relation to the hotel (dry land lease), Mr x identified six sales in table 18.8.3 (exhibit 1) used by him to derive a rate per room of $25,000. Such an approach to valuation should be rejected as this approach requires even greater adjustments than were required in the dry land comparable sales exercise. The hotel comparable sales identified in table 18.7.2 of Mr x report required 16 different adjustments, 8 being identified in his report and a further 8 identified in cross-examination. Without making an adjustment for each sale the range of comparability cannot be determined. Secondly, a large number of adjustments for each sale were necessary, also unsatisfactory in such a valuation approach. Thirdly, Mr x reasoning process was unclear. These comparable sales were submitted to be unreliable for these reasons.

**Holcim (Australia) Pty Ltd v Valuer-General [2009] NSWLEC 225 at [31]:**
Accepted valuation practice permits sale adjustments for differences, such as in location, area and time to enable valuers to have comparable values which, following adjustment, account for the various differences with the subject property. Such adjustments are generally based on a reasoning process drawing on the skill and experience of the valuer and are undertaken to derive an opinion of value through a deductive process. Because properties are rarely identical, [explicit and/or implicit] adjustments for differences are obviously necessary but caution is required through making as few adjustments as possible, in a consistent manner, to ensure the reliability of the comparable sale when related to the subject property. Too many adjustments potentially render the comparable sale unsafe to rely upon. Caution is therefore required where large adjustments are to be made.

**Pepper J in Tomago stated at [45]:**
... it is necessary to make explicit adjustments for differences so that the adjustment process is sufficiently logical. An implicit process comprising a single adjustment, rather than separately itemised and reasoned adjustments, risks rejection for want of transparency.

The importance of identifying assumptions and facts relied on by experts was identified in the Court of Appeal in the context of s 56 and s 79 of the Evidence Act 1995 (providing for the tender of expert opinion evidence) by Heydon JA (as he then was) in Makita (Australia) Pty Ltd v Sprowles [2001]

NSWCA 305; (2001) 52 NSWLR 705 at [85] confirmed recently in the High Court in Dasreef Pty Ltd v Hawchar [2011] HCA 21; states:

In short, if evidence tendered as expert opinion evidence is to be admissible, 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 field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. ...

[59] Finally, and very importantly, there is increasing concern about the risk of injustice that may flow from unsatisfactory expert evidence. The stricter the admissibility requirements for s 79 tenders, the greater the chance that evidence carrying that danger will be excluded. (footnotes omitted)

I consider these remarks are equally relevant to the integrity of the court process in Class 3 proceedings where expert evidence is of high importance, is often complex, and when not in conformity with the Code is rendered less useful and in this case of no utility.

119 I consider the absence of an explicit process of analysis by Mr x exposing the reasoning and logic adopted significantly limits the usefulness of his expressed opinion of value of the hotel. The Appellant's counsel's cross-examination highlighted the large number of necessary adjustments and the failure to identify these in Mr x report. Applying the obligations of expert witnesses referred to in par 116 - 117 above, as the facts and assumptions made by Mr x in his report are not explicit nor were they sufficiently elucidated in oral evidence, I consider this part of his report and conclusions therein should not be given any weight.

122 A clearly articulated logical reasoning process which affords transparency and demonstrates an appropriate level of support for each of the key assumptions made was lacking in Mr x report and was not cured in oral evidence. It was difficult to get a handle on the approach to the marina valuation Mr x ultimately adopted.

**Owners Corporation SP 58146 v Community Association DP 27017**

1. At the hearing, I had the valuation evidence from Messrs x, y, and Dobrow. The reports of all were admitted, subject to weight. Only the report of Mr Dobrow made any reference to the heritage listing of the building on lot 5, and the effect that that had on the valuation. While the land is to be valued as vacant land (a matter to which I shall return later), it is to be valued as if the only building which can be constructed is a heritage building. This limitation must clearly be a factor in the assessment of value, and it is primarily for this reason I prefer the evidence of Mr Dobrow. A further reason for not accepting the evidence of Mr x is that he adopted a blanket value of $2,500.00 per square metre throughout the development. He had no real basis to do so. Mr y said in cross-examination that he had based his conclusions on the Valuer General's valuations and not carried out any independent assessment of values. I can place no weight on his (y) conclusions. For the reasons given beforehand, I place no weight upon the evidence given by Mr x.