

COMMERCIAL COURT SEMINAR
27 OCTOBER 2010

PRESENTATION BY JUSTICE KIM HARGRAVE

EXPERT WITNESSES/'HOT-TUBBING'

My task is to speak on the benefits of concurrent evidence by experts, for both the Bar and the Bench.

The seminar flyer refers also to the topic of 'hot-tubbing techniques – the good and the bad', and contains the statement that 'hot-tubbing has changed the landscape of expert evidence in commercial trials'. I will start with that statement.

The landscape has well and truly changed. Over recent years, commercial judges of the Supreme Court, and Federal Court judges before that, have routinely insisted on experts giving their evidence concurrently, usually preceded by a joint experts' report or, if the case has not been judicially managed, at least a conference of experts before they give evidence.

This is not a passing fad. Practitioners and experts should be in no doubt that courts will continue to adopt this approach in the future, and not just in commercial cases. The landscape will also change for common law cases, and even criminal cases subject to appropriate safeguards.

There are many papers and other references in the bibliography which has been distributed. You should all read the excellent paper presented by Justice Rares in August this year: 'Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues'. You should also obtain and view a copy of the DVD 'Concurrent Evidence – New Methods with Experts'; jointly prepared by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration. They are the essential starting point for solicitors, counsel, experts and even clients who are about to participate in a trial involving concurrent evidence.

I turn to consider the topic of hot-tubbing techniques.

The term 'hot-tubbing' has gained general acceptance. However, the term is sometimes misunderstood, as referring only to the joint report or expert conferencing process on the one hand; or to concurrent evidence by experts on the other. It is important to stress that successful hot-tubbing technique involves the use of both processes. Although concurrent evidence by experts will, in the absence of a joint report or expert conference, still be useful – especially if the experts have read and understood their rival reports before giving evidence - the benefits will always be far less than concurrent evidence preceded by a joint report or expert conference. Of course, a joint report will necessarily involve a conference or conferences between experts as part of its preparation.

The added benefits of the experts having met and discussed their rival opinions before giving evidence, and of hopefully preparing a joint report, are obvious. Before the experts are sworn, they will have agreed the common ground between them, identified the issues on which they disagree and articulated why they disagree. This is at the heart of the benefits to be gained from the hot-tubbing process.

Take a simple case involving rival valuation evidence.

- (1) Each expert has prepared a long and detailed report concerning the value of the relevant business.
- (2) One expert has valued the business on a net assets basis; the other has valued it on capitalisation of future maintainable earnings. Each has a reason for preferring their method.
- (3) Although each expert has considered the alternative method, they have reached different values on each of the methods.
- (4) The rival reports are based upon different assumptions, for example as to asset values and future maintainable earnings.
- (5) The experts have differing views as to the appropriate capitalisation rate...

And so on.

In such a case, experience tells me that the experts will, if afforded the opportunity to prepare a joint report, agree on much common ground and reduce the issues to a handful of identified issues at most. The agreed matters can be shortly stated in a joint report, as can the issues which remain and the reasons for disagreement. This then forms the structure for concurrent evidence to be managed at trial.

At trial, judicial practices vary. I adopt a mix of interventionist or controlling approach; combined with full participation by counsel. I begin by questioning the experts with a view to identifying and confirming the matters of agreement and the matters of disagreement. The issues are then arranged in a logical order, following discussion with counsel and the experts. This includes matters of both agreement and disagreement.

I then take each issue in turn. Where there is agreement, I ask the experts to confirm the agreement and I then summarise it for the transcript. I then move to the next issue. Assume it is an issue where there is disagreement. I give each expert an opportunity to explain their position and their perception of the rival opinion. I give the experts an opportunity to ask questions of each other. Counsel are then given an opportunity to examine their own witness or cross-examine the rival witness. The evidence proceeds as a discussion, in an informal manner, with experts being able to ask permission to question the other expert or seek clarification at any time.

At the end of this process, it sometimes happens that agreement is reached, or at least the disagreement on the relevant issue is narrowed. At the conclusion of counsels' questioning, I then summarise any matters agreed and the substance of the disagreements which remain and move on to the next issue.

Of course, experts and counsel have ability to comment on the Court's summary of each issue, and the summary may be refined following that discussion.

At the end of this process, counsel are afforded an opportunity to cross-examine generally or on issues of credit which may arise. Credit issues may, of course, be raised on an issue by issue basis where appropriate. However, it is in any event my practice to allow counsel a further opportunity, once all issues are worked through, to engage in some general cross-examination. This ensures fairness in the process, and compensates for the interventionist approach by the Court.

In my experience, cross-examination as to credit is rare. But even when it is engaged in, the expert evidence is considerably shortened by adopting the approach which I prefer.

Before concluding the concurrent evidence session, the experts should be given a final opportunity to comment.

A further and obvious benefit is that all of the evidence concerning each issue is dealt with in a logical progression and is to be found in one place in the transcript; together with a summary statement encapsulating the areas of agreement or disagreement.

By this process, the transcript and the joint report will often overtake the earlier reports prepared by the experts. This is a real efficiency for all concerned, especially where the earlier reports are, as all too often happens, voluminous and/or written in impenetrable language or concern foreign concepts.

Where a case is judicially managed in the Commercial Court, or in a Federal Court docket, it is overwhelmingly likely that joint reports will be prepared in advance of trial. In the Supreme Court, there are pro forma orders to be used. For example, Schedule 8 in the current Commercial Court Practice Note. There are two things about that order which I will emphasise. First, care needs to be taken in formulating the questions for the joint report. The formulation of the questions involves considerable work and co-operation between the experts, lawyers and the Court. This is necessary to ensure that the joint report achieves its aim. Second, it is essential that the process of preparing the joint report, and the conferences to that end, are controlled by the experts without any participation by the parties or their lawyers.

There will be many cases in the general lists of the Supreme Court and lower courts and tribunals where a joint expert report may not be ordered. This is where clients, solicitors, barristers and experts have a duty to further the interests of justice by themselves taking charge of the process and endeavouring to reach agreement upon the questions to be framed for a joint report in advance of trial, and in anticipation of concurrent evidence being given. In that regard, I refer to the Civil Procedure Act 2010, which comes into force next year. It will impose overarching obligations on parties, lawyers and experts.

Notwithstanding this, it will often transpire that, for whatever reason, a case will be listed for trial without the experts conferring or preparing a joint report. This may be because the practitioners have not thought of it, or because the expert issues arise late in the trial preparation – or even during the course of the trial. That does not mean that the old inefficient practices should apply by default. Depending on the length of the case, it is the duty of the judge and the lawyers to see whether there is still scope to order the experts to confer and, if possible, produce a joint report before giving evidence. Whilst they are doing this, the trial can proceed on all other issues and the expert evidence can be given concurrently at the end of it. Of course, in short cases this may not be possible.

I conclude with a summary of the benefits for the Bar and the Bench. They can be simply stated. Counsels' job is made easier and less time-consuming, in preparation, in conducting cross-examination of experts and preparing final submissions. For the judge, there is an increased burden prior to trial if the judge is involved in managing the joint report process and in formulating the questions for the joint report; and during the trial the judge must master the material so as to be in a position to control the concurrent evidence in the manner I have described. However, once the trial is over,

the real benefits accrue to the judge. The issues are simplified and the relevant evidence is easy to find. The joint report and the self-contained transcript for each issue make the judgment writing process much easier and assist in decision-making.

Other litigants with cases waiting to be heard also benefit by the reduced Court time and judgment writing time.

Further, in my experience, the experts benefit. They feel that they have had a full opportunity to express their opinions and to explain them in simple terms. The risk of their opinions being distorted or misunderstood in submissions or, worse still, in the final judgment, is reduced.

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