Delivering Expert Evidence is Becoming Harder

Delivering effective Expert Evidence is becoming harder, at least in the UK, Australia and most likely other Commonwealth jurisdictions. Traditionally the role of a Judge was to apply the law to the evidence presented by the parties to a dispute. As well as evidence of factual occurrences, in the case of expert evidence, this could include expert opinion, and where experts disagree, the Judge could choose one expert's views over another, or combine the expert's views. This approach seems to be changing with significant implications for the experts when preparing their reports and evidence.

The situation for Arbitrators and Adjudicators is somewhat different, they are appointed based on their expertise and may choose to use it. However, if the appointed Tribunal decides to use his/her expertise instead of the information contained in an expert report prepared by one (or both) of the parties, this fact has to be made known to the parties and Natural Justice requires they have an opportunity to consider the matter and make submissions that have to be considered by the Tribunal[1].

Most evidence in a hearing is provided by witnesses to fact, these witnesses are restricted to providing evidence about things they personally saw, did, heard, etc., witnesses to fact are precluded from expressing their opinion. Expert opinion is an exception to this usual rule that allows a person who has specialised knowledge based on that person's training, study, or experience to give opinion evidence in Court proceedings that is based wholly or substantially on that person's expert knowledge. However, there are some rules about when and how this will be allowed. The expert, and his/her evidence are required to pass four basic tests:

1. **Relevance or helpfulness test**. This is fundamental – evidence in any court proceedings is only admissible if it is relevant. Unless the expert evidence is relevant and will help the Court make its decision, the evidence will not be allowed.

2. **Specialised knowledge test**. This has two elements:

   The first is that the expert opinion must lie within a field of knowledge that the law recognises as one on which expert evidence can be called; so expert evidence will not be allowed on a topic if an ordinary person is just as capable of forming a view about it without expert assistance. For example, an ordinary person would be able to form an opinion on the colour of a building.

   The second is that the subject must form a part of a body of knowledge which is sufficiently organised or recognised to be accepted as a reliable body of knowledge such as scheduling, cost planning, or engineering.

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[1] Some early cases dealing with this include: *Balfour Beatty Construction Limited v The Mayor and Burgess of the London Borough of Lambeth [2002] EWHC 597 (TCC)s*, and *St Hilliers Contracting Pty Limited v Dualcorp Civil Pty Ltd [2010] NSWSC 1468 6th December 2010*.
See: https://mosaicprojects.com.au/PDF_Papers/P035_Assessing_Delays.pdf (pages 3 & 4)

3. **Qualifications test**[2]. The witness must be an expert in their field and must have acquired specialised knowledge on the topic based on their training, study, or experience. Academic qualifications and experience usually go together. However, sometimes people are recognised as experts if they have significant practical experience even though they do not have the relevant academic qualifications.

4. **Basis test**. There are two aspects to this test:

   First, the expert opinion must have its basis in the expert's specialised knowledge, evidence by an expert that strays beyond the area of his or her expertise is, self-evidently, no longer expert opinion.

   Second, the facts on which the expert opinion is based must be disclosed in the expert's report, an opinion based on incorrect assumptions will not assist the Court, so it is important to know what facts were found or assumed in arriving at the expert's opinion.

Courts are not required to follow expert opinion

The judgements discussed below and their consequences are directly relevant to court cases in the UK and Australia, but have implications for both arbitrations and adjudications, and are likely to be influential in other jurisdictions.

The analysis should be sound from a common-sense perspective:

The latest indication of change is a decision by the English and Wales High Court in ***Thomas Barnes & Sons PLC v Blackburn With Darwen Borough Council [2022] EWHC 2598 (TCC)***, as part of the judgement, His Honour Judge Stephen Davies stated that *'irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common-sense perspective'*. He also affirmed the decision of Akenhead J in ***Walter Lilly & Company Ltd v Mckay [2012] EWHC 1773 (TCC)*** that *'the court is not compelled to choose only between the rival*

[2] Expert testimony rules in the USA are based on the Daubert* judgement which requires:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if
(1) the testimony is based upon sufficient facts or data,
(2) the testimony is the result of reliable principles and methods, and
(3) the witness has applied the principles and methods reliably to the facts of the case.

*Daubert v Merrell Dow Pharmaceuticals Inc., 549 US 579 (1993)

approaches and analyses of the experts. Ultimately it must be for the court to decide as a matter of fact what delayed the works and for how long'. Noting that *'it is not necessarily the last item of work which causes delay'*.

The claim needs to be proved by the expert evidence:

An earlier decision of the England and Wales High Court in ***Costain Limited v Charles Haswell & Partners Limited [2009] EWHC B25 (TCC)*** the court rejected both experts' findings[3]. While the Court found that Haswell was in breach of its contract and the breach caused delay to the foundations of two buildings that were on the critical path. The Court noted that *'Both experts have agreed that, during this period, those works i.e. foundations to the RGF and IW were delayed, albeit to differing extents. They have also agreed that, at that time, those works were on the critical path of the project so that, all other things being equal, and if no later mitigation measures were taken, those delays would ultimately delay the completion of the project as a whole'*. The Court also found ***'no evidence has been called to establish that the delaying events in question in fact caused delay to any activities on site apart from the RGF and IW buildings***. *That being so, it follows, in my judgment, that the prolongation claim advanced by Costain based on recovery of the whole of the site costs of the Lostock site, fails for want of proof'*. Both of the expert's used a 'window' analysis to reach their conclusion that a critical delay had occurred, but the Court rejected these opinions because the assumed flow-on of the delay to the overall completion of the works was not demonstrated: *200 (ii)* ***I find that it has not been shown by Costain that the critical delay caused to the project by the late provision of piled foundations to the RGF and IW buildings necessarily pushed out the contract completion date by that period or at all***. *Nor has Costain established that all activities on the Lostock site were delayed between October 2002-January 2003 by the delaying events. No investigation has been carried out by the experts to establish that one way or the other so, as matters presently stand, it is simply a matter of speculation[4].*

The Court can make up its own mind:

The Australian courts have possibly gone one step further. In ***White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166*** concerning an alleged delay in the construction of a 100-lot subdivision on the NSW South Coast resulting from delays in approving the sewer design.

Delay experts were engaged by the parties, but the evidence of the experts was mutually contradictory. The presiding Judge, Justice Hammerschlag noted:

[18] Plainly, both experts [Mr Shahady and Mr Senogles] are adept at their art. But both cannot be right. It is not inevitable that one of them is right.

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[3] For more analysis of the Costain v Haswell judgement see ***Costain vs Haswell Revisited***: https://mosaicprojects.wordpress.com/2023/03/25/costain-vs-haswell-revisited/

[4] **Note**: The 'Costain' project involved a number of independent structures distributed across the site. There was no particular requirement to build them in any specific order. For more on the challenges of dealing with this type of distributed project see: https://mosaicprojects.com.au/PMKI-SCH-010.php#Issues-A+D

[22] The expert reports are complex. To the unschooled, they are impenetrable. It was apparent to me that I would need significant assistance to be put in a position to critically evaluate their opinions and conclusions.

As a consequence, the Court used its powers to appoint Mr Ian McIntyre as its expert. Based on his report to the Court the Judgement finds:

[191] Mr McIntyre's opinion, upon which I propose to act, is that for the purpose of any particular case, the fact that a method appears in the Protocol[4] does not give it any standing, and the fact that a method, which is otherwise logical or rational, but does not appear in the Protocol, does not deny it standing.

[195] Mr McIntyre's opinion, upon which I propose to act, is that neither method [used by the parties experts] is appropriate to be adopted in this case. This view is consistent with me accepting Shahady's view of Senogles and Senogles' view of Shahady.

[196] Mr McIntyre's opinion, upon which I propose to act, is that close consideration and examination of the actual evidence of what was happening on the ground will reveal if the delay in approving the sewerage design actually played a role in delaying the project and, if so, how and by how much. In effect, he advised that the Court should apply the common law common sense approach to causation referred to by the High Court in ***March v E & MH Stramare Pty Ltd (1991) 171 CLR 506****.*

Ultimately, Justice Hammerschlag held in favour of PBS, finding that White had not been able to prove that delays in other aspects of development could be attributed to the delay in sewer design approval. In arriving at this decision, Justice Hammerschlag considered the construction company's site diary. Noting, this comprehensive record of events 'on the ground' did not reference any 'particular consequences' of the sewer approval delay. Whilst it contained evidence that approval of sewer designs was suspended for a period during construction, it lacked details concerning how this suspension actively affected the progress of other aspects of construction.

Takeaways

1. Expert reports need to be written in a clear and concise way that the tribunal can understand, minimizing jargon and assumed knowledge.
2. The expert report needs to join all of the 'dots' to prove what is claimed, this is particularly important in a 'window' analysis, you cannot assume anything after the 'window'.
3. The report needs to be based on fact, and embed common-sense. An abstract analysis that achieves a 'desirable' answer for one of the parties is unlikely to be accepted. The Courts do not need to accept any of the reports.
4. Methods used to analyse delay need to be appropriate for the situation. The fact that a method appears in the *Society of Construction Law Delay and Disruption Protocol* (2nd edition)[5] and/or the

[5] For more on the SCL methods, see ***Assessing Delay – the SCL Options***: https://mosaicprojects.com.au/PDF_Papers/P216_Assessing_Delay_The_SCL_Options.pdf

AACE® International Recommended Practice No. 29R-03 Forensic Schedule Analysis[6] does not give it any legal standing. Conversely, the fact that a method, which is otherwise logical or rational, does not appear in the Protocol or R.P. 29R-03, does not deny it standing.

Conclusions

Writing a good expert report is a skilled art. The judgements above are likely to be highly influential in the UK, Australia, and most Commonwealth jurisdictions, and may be persuasive in the USA.

To download copies of the three main judgements discussed above, see:
https://mosaicprojects.com.au/PMKI-ITC-020.php#Cases

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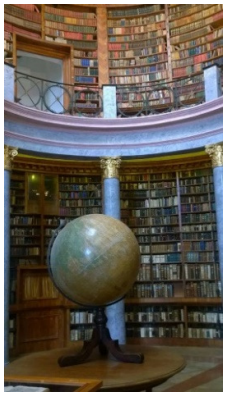

For more on delay analysis see: https://mosaicprojects.com.au/PMKI-ITC-020.php#ADD

[6] For more on methods to calculate the effect of a delay based on the AACEi® Recommended Practice No. 29R-03 see ***Assessing Delay and Disruption – Tribunals Beware***:
https://mosaicprojects.com.au/PDF_Papers/P035_Assessing_Delays.pdf