Australian Property Institute

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The Honourable Justice D H Lloyd

Generally - there are certain exceptions - witnesses in court are only allowed to state facts - they are not allowed to state opinions.

One exception - recognised by the Evidence Act 1995 s 80, is that witnesses are permitted to express an opinion about a matter of common knowledge or understanding which does not require specialist or expert knowledge. For example, "The weather is hot".

Another exception is expert evidence. The general rule of evidence is that the law will generally exclude evidence of the opinion of a non-expert upon a matter calling for special skill or knowledge ("the opinion rule"). The exception to the rule, that opinion evidence may be given by an expert, is found in s 79 of the Evidence Act.

Expert witnesses, because they are allowed to express opinions, thus enjoy a privileged position in our court system.

That privileged position imposes in turn certain obligations or duties on expert witnesses.

The law requires, and has always required, the expert to be non-partisan. An expert's report tendered in court must have the essential character of an independent report, unaffected as to form and content by the exigencies of the litigation.

Expert witnesses are the witnesses of the court, as well as of the parties calling them; and will therefore be expected, both in preparing reports and in answering questions, to assist the court wherever possible - even if it involves answers which are not of assistance to the parties calling them.

I quote what is said by the authors of the Australian Edition of *Cross on Evidence* at [29080]:

> "An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within that person's expertise. An expert witness should never assume the role of an advocate."

Let me give an example of what the court expects of expert witnesses. *Whitehouse v Jordan* (1981) 1 WLR 246, (1981) All ER 267 was a case involving a claim for medical negligence. The House of Lords directed criticism to the preparation of the experts' reports in that case. Lord Wilberforce said (at 256-257):

> "One final word, I have to say that I feel some concern as to the manner in which part of the expert evidence called for the plaintiff came to be organised. This matter was discussed in the Court of Appeal and commented on by Lord Denning MR. While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating."

When the same case was in the Court of Appeal Lord Denning MR said (1980) 1 All ER 650 at 655:

> "[Their] joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settle' a document, we know how it goes. 'We had better put this in', 'we had better leave this out' and so forth. A striking instance is the way in which Professor Tizard's report was 'doctored'. The lawyers blocked out a couple of lines in which he agreed with Professor Strand that there was no negligence."

Over the years the objectivity of the hired expert has been regularly questioned. Accordingly, on 25 May 1998 the Australian Council of Professions decided to adopt a statement defining the role and duties of an expert witness in litigation. In essence, the statement adopts a statement of ethical practice which includes a hierarchy of duties: *first* to the court; *secondly* to the body of knowledge and understanding from which the person's expertise is drawn; and *thirdly*, to the parties who have sought the expert's advice.

Experts who give evidence on a regular basis also have their own reputations to consider. Their reputations as reliable experts is one that is often hard won and can be easily lost. Experts who tend to be partisan toward their client's cause can be caught out.

For example, some years ago I was appearing in a case which involved some scientific evidence. It was decided that we would call evidence from an eminent biophysicist, being a professor of biophysics at a United States university. His evidence in chief was supportive of the client's case. The other side, however, had obtained transcripts of all the evidence that the witness had given in other cases. After answering, in cross-examination, a particular question, the cross-examiner would then ask: "Professor, when you are asked that very same question in the case of *Brown v The State of New York*, your answer was ...." (which was clearly a different answer to that which had just been given); "Was your answer wrong then, or wrong now?" It was clear that the witness's evidence varied depending upon the interest of his client. After a series of such questions, the expert's credibility was lost.

Again, drawing on my experience in practice, it was often the case that a particular case was one which required the support of some expert evidence. It was not uncommon for the client to say to me: "Who do you recommend?" I always gave the client the names of at least three reputable experts. It was also not uncommon for the client to get back to me a week or so later and say: "None of those experts you recommended will support us". That is the mark of a good expert: one who is not prepared to support a case if, in his or her professional opinion, it is not supportable.

In the case of valuers, it must be remembered that a valuation for use as expert evidence of opinion is not an ambit claim. A valuer's report must represent as accurately as possible the valuer's professional opinion as to the value of the property in question. This, I think, is where the valuers for the applicant in *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1990) 70 LGRA 187 fell down. Their values were so out of touch with reality that they were virtually ignored.

I return to the exception to the opinion rule with which we are concerned; that is to say to the rule that opinion evidence may be given by an expert. It is set out in the Evidence Act, s 79:

> "79. Exception: opinions based on specialised knowledge
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> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

The first question relating to the admissibility of the evidence is whether the witness is an expert qualified by training, or study, or experience in an organised branch of knowledge. That is to say, the section requires a 'yes'

answer to two questions: *first*, is the field one in which there is specialised knowledge? *secondly*, does the witness have it?

Registered valuers who are members of the Australian Property Institute are regularly recognised by my court as appropriately qualified experts and thus within the exception to the opinion rule set out in s 79.

What of the evidence itself? I cannot do better than quote what is said by the authors of the Australian Edition of *Cross On Evidence*, (at paragraph [29080]:

> "An expert should state the facts or assumptions upon which the opinion is based, and should not omit to consider material facts which detract from it. An expert witness should make it clear when a particular question or issue falls outside the witness' expertise. If an expert's opinion is not properly researched because the expert considered that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. If, after exchange of reports, an expert witness changes view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court. ...
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> The opinion of an expert should differentiate between the assumed fact on which the opinion is based and the opinion itself, so that the assumed facts can be measured against the evidence. A lack of complete consistency between the assumed facts and the proved facts may affect weight, but not admissibility."

The facts upon which an expert opinion is based must be available for scrutiny by the court. This means that the factual basis of the opinion must be identified and proved.

Thus, a valuer may express an opinion concerning the appropriate rent or value of a particular property. The valuer may explain that the valuation is based on comparable properties of which he or she has personal knowledge. He may *not* give evidence about comparable rents or values of which the valuer has *not* got personal knowledge, unless that evidence is to be proved by calling witnesses with such knowledge *or* by tendering admissible documentary evidence thereof.

For example, in two High Court cases - *McDonald v Deputy Commissioner of Land Tax (NSW)* (1915) 20 CLR 231 at 239-240 and *Gregory v Federal Commissioner of Taxation* (1971) 123 CLR 547 - it was held that evidence, not of sales, but of offers made for the purchase of a property, is not admissible in support of its valuation.

A blanket ban on offers, however, has been rejected in two Federal Court judgments. (*Goold v The Commonwealth* (1993) 42 FCR 57 at 57-60, *Henderson v Amadio Pty Ltd (No 1)* (1995) 62 FCR 1 at 122). Unlike judgments of the High Court, however, judgments of the Federal Court are not binding on the Land & Environment Court.

I should add that evidence of market perceptions about the present conditions and future prospects of the relevant market is admissible in questions of value.

On the other side of the coin, experts can, of course, expect their opinions to be tested. The importance of thorough preparation of a plan of cross-examination and pre-trial conferences with one's own lawyers cannot be over-emphasised. By this means it may be possible to show that the factual basis of the expert's opinion is unfounded by showing (a) that it was formed in ignorance of significant facts or information; or (b) that it failed to consider a viable alternative explanation.

I now turn to the expert witness practice direction adopted by the court on 1 September 1999. A similar practice direction has been adopted in the Supreme Court and a generally similar practice direction has been adopted in the Federal Court.

Clause 2 of the Practice Direction does not change the law.

Clause 5 is designed to facilitate a more realistic appraisal of the prospects of success in litigation and to facilitate the possibility of settlement.

Finally, I draw attention to Pt 13 r 16 of the Land & Environment Court Rules as they apply in Classes 1, 2 and 3 of the court's jurisdiction, which relate (*inter alia*) to merit planning appeals, appeals against objections to the valuation of land and compensation for resumption cases:

> "16. Requirements for hearing. Where proceedings are not referred to mediation or conciliation or where the proceedings remain unresolved following mediation or conciliation, they will be fixed for hearing. Where proceedings have been fixed for hearing the following requirements apply:
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> (a) all expert reports (including plans, diagrams and photographs) to be relied upon at the hearing must be served at least 14 days prior to the date fixed for hearing;
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> (b) except with the leave of the court the expert's report is not admissible unless it has been served in accordance with any relevant Practice Direction and Rule of the Court;
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> (c) a party must give notice in writing to the court and to the other party or parties of his or desire to cross-examine any expert whose report is to be relied upon at least 7 days prior to the hearing;
>
> (d) oral expert evidence of any expert shall only be allowed by leave of the presiding judge or commissioner;
>
> .... "

The latter requirement makes it particularly important to get the report right. It is the general practice in the court to only allow further evidence in chief by way of explanation or amplification of matters already included in the expert's report. Cross-examination is only generally allowed to test the expert's qualifications or experience, to test the factual bases upon which the opinion is based, and is otherwise limited to areas where there may be conflict between experts.
