

TWENTY-SECOND AIJA ANNUAL CONFERENCE

THE VALUE OF CIVIL CLAIMS - HOW SHOULD COURTS AND TRIBUNALS ALLOCATE RESOURCES?

THE RECENT EXPERIENCE OF THE LAND & ENVIRONMENT COURT

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The Land and Environment Court was created by the New South Wales Parliament with two primary functions. It has jurisdiction to declare and enforce environmental law. It also has jurisdiction to review the merits of the decisions of various bodies. By far the greatest volume of cases undertaken by the Court relate to merits review of development applications made to local councils.

When exercising its merit review function, the Court is given all the functions and discretions of the body whose decision is the subject of the appeal (Land & Environment Court Act s 39(2)).

The Court is also required by the legislation to conduct its proceedings with “as little formality and technicality as possible” (s 38(1)). The Court is not bound by the rules of evidence and “may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the court permits” (s 38(2)). Of course, the process must be fair.

The Court is also provided with an express capacity to obtain the assistance of any person “having professional or other qualifications relevant to any issue arising for determination in the proceedings” (s 38(3)).

Commissioners of the Court must have special qualifications which are listed in s 12 of the Act. The matters in that list relate to the types of problems which they must commonly resolve: planning, engineering, architecture and the like.

The intention of the legislature is clear. When providing an administrative review function within the structure of the Land & Environment Court it was intended that by the appointment of persons with expertise in relevant areas, decisions in merit matters would be made, if possible, without the conventional trappings of adversary litigation. The Court was provided with authority to make its own enquiries and obtain information, subject of course to the right of the parties to respond to any information which is obtained in this manner.

In recent years it became increasingly apparent that the expectations of the Parliament have not always been fulfilled. In large part this is the fault of the legal profession. It comes from our inability to contemplate the resolution of any dispute without the conventional adversarial processes. This has meant that merit review is often an intense forensic contest in which there are “winners and losers”, when the legislation intended instead that public and private resources would be applied to achieving the “best community outcome.”

Because merits review has come to be seen as an adversarial contest, there has been an investment of significant political and intellectual capital in achieving a “win”, very often irrespective of the cost in terms of time, money and other resources. Solutions to problems are secondary, the primary object being to beat the opposition. One consequence is that many cases are visited with a plethora of experts, sometimes each party calling more than one expert on the same issue. The purpose of this evidence is, in some cases, to influence the Court by providing a weight of opinion, without recognising that the Court is more likely to be influenced by the intrinsic quality of the opinion. The purpose for which expert evidence is admissible in proceedings is often lost. Rather than the evidence being tendered to inform the Court about an area of special learning, where the Court may need assistance, it is designed to found a submission which says that the number or weight of opinions in one direction should determine the outcome of the case.

The Land and Environment Court has existed during a time when pre-trial processes, often referred to as case management, have become commonplace in many courts. As Chief Justice Spigelman pointed out in his recent paper “Forensic Accounting in an Adversary System” (2003) 41(9) LSJ 60:

“Over the past two decades or so, the degree of involvement by judges and other court officers in the preparation for, and the conduct of, trials has been transformed. In many respects the changes have constituted the modification of the pure form of the adversarial system. Judges accept greater responsibility for the management of cases. This process may not have run its course.

Two distinct considerations have been driving this transformation. The first is the change in public expectations with respect to accountability for public funds that has affected all government institutions. The second is the traditional, albeit enhanced, concern for access to justice.”

Chief Justice Spigelman went on to identify the significance which our community attaches to the freedom of the individual and the influence it has had on the community's attachment to the adversarial system. He emphasised the need to continually review the operation of the system if it is to meet the needs of contemporary society.

The Chief Justice said;

“For those of us who believe in the value of this historical tradition, it is incumbent upon us to continue to improve the effective operation of the adversary system. That improvement may require limitations on the freedom of action of the legal profession and on other professions who appear as witnesses to give expert evidence. There are limits on the public resources which are appropriate to be devoted to resolution of private disputes. There are difficulties in ensuring that the costs of the process are proportionate to what is at stake.”

Within the Land & Environment Court, case management techniques were not employed until recently in relation to many disputes. The consequence is that legal practitioners have had exclusive control of the pre-trial processes, the issues to be litigated and the evidence to be collected. This has led to problems which include:

- the identification of numerous issues many of which play no part in the ultimate resolution of the dispute;
- multiplication of expert evidence about the same matters, often being nothing other than multiple opinions in favour or against a proposal without adding to the knowledge necessary to determine the appeal;
- the failure to comply with pre-hearing time-tables with consequential prejudice to the efficient resolution of the proceedings;
- unnecessary cross examination of experts at hearings;

- unnecessary formality in the presentation of evidence, particularly the evidence of objectors;
- the identification of legal questions, sometimes for the purpose of delaying the resolution of the merits of the matter and thereby frustrating the development;
- the failure of experts to understand that their fundamental duty is to assist the Court;
- a culture of "win and loss" rather than a culture of solving the problem for the particular site.

In recent months the Court has introduced a number of significant changes. Some of them are familiar to most litigators but others are relatively novel. They are all designed to expedite proceedings, shorten the hearing time, and, provided the integrity of the decision is not compromised, reduce the costs to the litigating parties.

Case Management

Provision has now been made for the case management of complex merit appeal proceedings. The practice directions have been changed so that the parties are required to inform the Registrar on the first return date, or as soon thereafter as appropriate, whether the matter is suitable for case management. The Court also considers each matter from this perspective and may refer the matter for case management even if the parties do not agree. Case management is normally carried out by a judge, the senior commissioner, or another commissioner of the Court. The greatest burden is carried by the Senior Commissioner.

As with other courts, the primary object of case management is to identify the real issues in dispute and lay out a blue print for the hearing which ensures that those issues are resolved as efficiently as possible. It is too early for statistics to be available but significant savings of time, and accordingly costs, to the parties are already evident from early clarification of the true issues.

The Hearing Process

There were previously many merit appeals in the Court which extended over two days. Such appeals usually involve domestic or other modest development, where the issues are readily defined and the evidence adequately revealed by written statements. The former traditional hearing process required the parties to come to Court at the beginning of each case and for objector evidence to be led in Court. This had the consequence in many cases that the view of the site, essential in most cases, could not take place on the same day as the hearing. Many cases were adjourned early in the afternoon of the first day, a view being held the following morning, followed by final submissions. This was obviously not efficient.

The change which has been made is to require every merit appeal to commence with a view on site at 9.30 am on the first day fixed for the hearing, unless otherwise directed. The cases which commence on site are conducted by a judge or commissioner who has had an opportunity to read the material previously filed by the parties. The opening of the case effectively occurs as the view is taking place. On most occasions objectors are present and are content to put their point of view in an informal manner on site. Previously, this evidence would have been given in the courtroom.

This change has met with complete support. Objectors feel comfortable with the process where they can explain their point of view without being confined to giving their evidence in a formal court setting. As a result, the hearing time of many cases has been halved and some cases are now concluded in one day instead of three. This has meant that well in excess of half of the merit review hearings (approximately 1200 in any year) are concluded in one day or less.

Expert Evidence

Expert evidence has caused difficulties in recent years throughout the common law world. In part this is a reflection of the increasing complexity of issues which require resolution. It is also a product of the increasing sophistication of the enterprises which make available assistance in contested litigation. In many cases, the true purpose of expert evidence, which is to inform the court about an area of special learning, is lost. Instead, a contest takes place between the experts, which extends to both objective matters and experts' respective subjective opinions. Because there are only winners and losers in conventional forensic contests, the pressure on experts to assist the client rather than the court is intense.

Some years ago I was asked to address a seminar about expert evidence. I was the first speaker and an engineer, much respected for giving expert evidence in litigation, was the other. There was the usual discussion period.

I gave an account of the conventional principles which bind an expert who is giving evidence. In particular, I emphasised the fact that experts were required to give

objective evidence to assist the court in understanding matters falling within the expert's area of "special learning." The expert's overriding obligation to the court was emphasised.

To my surprise the engineer who spoke after me, having explained how he conventionally approached his task of gathering evidence, preparing his report and handling the dangers of oral evidence, finished with a flourish saying "and of course at the end of the day your fundamental obligation is to do the best you can for your client." Although the discussion which followed was lively, I doubt whether the engineer understood, much less accepted, the error in his approach.

There has recently been a good deal of discussion about court processes for the gathering of evidence and the making of decisions. The difficulties of identifying who is telling the truth when there are conflicting accounts of events have not diminished. The demeanour of the witness, which is often the formula by which credibility is tested, may be an unreliable guide. Science has not been able to give us any objective tests universally accepted as useful in separating the liar from the truthful witness (see the discussion by Kirby J in **State Rail Authority of NSW v Earthline Constructions Pty Ltd** (1999) 160 ALR 588 at 617).

Whatever may be the problems of evidence as to the truth of a matter, it is in the area of expert evidence where there has been the most intense discussion and debate and where, notwithstanding the expressed opposition of some and the uncertainty of others, real change is happening. For my part, I believe significant change is inevitable. It comes both as a response to the rapid expansion of our

knowledge in all fields of learning together with an increasing community expectation that courts will more effectively manage the litigation process. The public investment in the administration of justice is such that the community is no longer tolerant of dispute resolution conducted by rules which are perceived to favour the clever, articulate or wealthy but may not ascertain the truth. It is not acceptable for cases to be decided in favour of the party with the best expert witness rather the best expert evidence.

In the Land and Environment Court, as in other courts, the initial response to these problems was to articulate through Practice Directions the expectations which the Court had of the objective and impartial exposition of the issues requiring special expertise. As my experience at the seminar to which I referred makes plain, it must be doubted whether that message has been received, at least by some who give evidence.

The Court has also moved to require experts to confer before the hearing with a view to identifying the matters upon which they agree and those in respect of which they disagree. By this means it was intended that issues could be narrowed and the views of the experts objectively defined, thereby enhancing the quality of the ultimate decision and reducing the time for the hearing.

Although in some cases the pre-hearing conferencing can be demonstrated to have worked efficiently, in others it is apparent that it has not. Two problems have emerged. One is the tendency of some experts to meet but not agree even the straightforward matters. This causes unnecessary and sometimes significant costs.

Often those matters are agreed on the first day of the hearing after the judge or commissioner has spoken with the experts.

The second problem which occurs with sufficient frequency to be of real concern is where the agreement of an expert given in joint meetings is withdrawn or modified when the expert has had "further discussions" with the lawyer engaged for the expert's client. The joint report required of the experts becomes not so much the expert's opinion, but that opinion filtered by the lawyers.

The expert who sees his or her task as being to help the client, whether it be consciously acknowledged or subconsciously assumed, has been observed by every experienced advocate. Upon the assumption that our civil litigation processes are designed to elicit the truth, we have assumed that the adversarial system, with its emphasis on rigorous debate, is the most appropriate structure within which to achieve this outcome. For my own part, I have considerable doubt about that assumption in relation to the evidence of experts.

As Davies J points out in his paper "The Reality of Civil Justice Reform: why we must abandon the essential elements of our system" delivered at the 20th Australian Institute of Judicial Administration Annual conference in Brisbane in July 2002, when the adversarial system is employed to resolve civil disputes and parties are allowed to call evidence from their "own" experts, it is inevitable that the evidence will be infected by adversarial bias. It could hardly be otherwise. Only the most extraordinary person who has been engaged to prepare and give evidence for a client would, when cross-examined, readily confess error, accept their view was

wrong and that the client's money wasted. It would be even harder to do this if the client is a regular litigator or the solicitor for the client is commonly looking for experts to help in forensic contests.

Many of the merit appeals in the Land and Environment Court involve the same or similar issues. A project may be criticised as too large, too dense, providing unreasonable impacts on views, sunshine or raising a variety of other problems. Because the adversarial system encourages the expectation that each issue will be addressed by an expert, there are a significant number of persons holding professional qualifications, for whom the majority of their professional work is the giving of expert evidence in court. Many experts depend for their incomes upon being retained to give evidence on behalf of particular clients or upon a steady stream of work from a few solicitors. In courts such as the Land and Environment Court where expert evidence is common place, this can give rise to problems (see Sperling J, "Letter to the Editor" (2003) 6 The Judicial Review 223).

Whereas ordinary civil litigation involves a dispute between private corporations or individuals where the rules of the contest are known and accepted, even if discovering the truth is not always the object or the outcome, litigation in the Land and Environment Court requires a decision which not only has regard to private interests but must incorporate the aspirations of the general community. Whether a high rise residential building should be approved will involve the interests of the developer who seeks to profit from the development, the immediate neighbours who may be impacted by it, the local community who may also experience negative impacts from traffic, a drain on community resources or a change in the built

environment, and the wider community which has an interest in ensuring that acceptable housing is provided for all who wish to live within the metropolitan area.

Given the overriding community interest in the outcome, there will be many cases where leaving the parties to call their own experts is obviously unsatisfactory. It can also serve to unnecessarily duplicate the primary research which must be undertaken and to increase the length and cost of hearings.

Recognising these problems the Land and Environment Court has moved to use its rules, which were already in place, to appoint court experts in appropriate cases.

The Court Expert

Commencing in March of this year, the Court has imposed a presumption that in relation to any issue requiring expert evidence, a court expert will be appointed. To date, in excess of 160 experts have been appointed and 56 cases involving court experts have been completed.

Although each case must be looked at individually, a court expert will be appointed where the Court is satisfied that there may be cost savings to the parties or where the issue involved is such that the integrity of the ultimate decision will benefit from the appointment of an expert by the Court. When a court expert has been appointed a party may, with the leave of the Court, seek to call an expert who that party has retained. Generally, provided the Court is satisfied that the additional expert will add useful information to the discussion, leave is granted. Experience has shown that the

court expert's opinion is not always accepted by the judge or commissioner but that in every case the integrity of the decision made has been significantly enhanced.

The number of cases which have been completed utilising court experts is not sufficient to obtain any statistically reliable information. However, I understand that in the 56 cases where a court expert has been appointed, 34 have settled without the need for a hearing and others have taken significantly less time for the hearing to be completed.

Although appointed by the Court, the parties are required to agree the person who is to carry out the task. The parties are jointly and severally liable for the expert's fees which can be fixed by the Court. To date the parties have always agreed on the identity of the expert and it has been unnecessary for the Court to intervene in the fee arrangements.

In recent weeks I have received reports from members of the Court, practitioners and experts themselves about their opinion of the quality of the evidence given by court appointed experts. The consistent comment from the judges, commissioners and legal practitioners is that the evidence from persons appointed as court experts reflects a more thorough and balanced consideration of the issues than was previously the case. This is not surprising when discussions with the experts confirm the pressure that they feel as the "court expert" is to ensure that the report they produce considers all relevant matters and, most importantly, provides a balanced analysis of the situation. Given our understanding of the problems with expert

evidence in the past, these comments are not surprising, but they are a significant confirmation of the need for change.

It was made plain to me at a seminar some days ago, where a number of experts spoke, that at least some experts are prepared to publicly acknowledge that when engaged by a particular party, their evidence has been structured to favour that party but, when appointed by the Court, objectivity and balance return. The preparedness to publicly confirm that which we have previously suspected is no doubt a result of the pressure which experts now feel to put forward their credentials for appointment as an expert capable of unbiased assessment of a particular problem. When we made the changes, I anticipated that the appointment of court experts would raise the quality of all expert evidence. This expectation is being confirmed.

It is apparent that some individuals are being more commonly appointed as experts than others. The pool will, I am sure, grow, but it will be the pressure to perform to a high standard which will ensure that the pool maintains its quality.

Not all issues are suitable for the appointment of a court expert and not all matters are amenable to the process. However, typically matters such as noise, traffic, parking, overshadowing, engineering, hydrology, contamination issues, among others, appear suitable for a court expert. Increasingly matters of heritage, urban design and general planning are also being dealt with by court experts, often at the request of both parties and commonly after a request from the council. The court expert has the responsibility to prepare a report after consultation with the parties. In some cases this may mean consultation with experts which the parties have retained

to advise them, but very often the court expert will be the only expert who looks at a particular problem.

The advantages of this approach to expert evidence are many. Because the costs are shared, the parties being jointly and severally liable, in many cases the costs of expert evidence to both parties are significantly reduced, probably halved. Although, a saving in costs cannot always be achieved, there is no doubt that the integrity of the expert evidence is enhanced and this must be reflected in the quality of the ultimate decision.

Although the move to appoint court experts initially met significant resistance from the legal profession, I believe that resistance is now diminishing. With the change has come a clearer understanding of the deficiencies of the old approach and the benefits which change can bring. For the experts, it is about giving back to them the opportunity to use their expertise without obligation to a client and the ability to express their views without the distortions that can come from the adversarial process.

Another significant advantage of a court expert in merit appeals is that the parties have an opportunity to discuss with an expert, who has no brief for either side, and who both sides have confidence in, the merits and problems of the particular proposal. This may lead to a recognition by a Council that the project is satisfactory, or, with modest amendments or the imposition of suitable conditions, can be made to be appropriate. It may also lead to the applicant recognising problems and either modifying the application or withdrawing it altogether. Both situations have already

arisen in a number of cases. In the language of Alternative Dispute Resolution this process is, of course, referred to as "Neutral Evaluation."

Concurrent Evidence

At the same time as the Court has moved to appoint experts, we have also changed the process by which expert evidence is given in Court. This is now done concurrently and all experts in relation to a particular topic are sworn to give evidence at the same time. What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.

This change in procedure has met with overwhelming support from the experts. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. There is no risk that their expertise will be distorted by the advocate's skill.

Cultural Change

Because the merit review process was included within the jurisdiction of the Court, there was an expectation that conventional adversarial processes would be applied. The measures I have already mentioned are some of the steps which have been

taken to try and remould the traditional culture so that an appeal to the Court is seen as an opportunity to address and resolve, in the most efficient manner possible, the appropriate development for a site. In almost every case the form of development applied for is prima facie permissible. The question will be whether the intensity of the proposal and its design are acceptable on the particular site. Apart from the matters I have already mentioned, the Court has limited cross-examination. With the introduction of concurrent evidence, cross-examination in a conventional form now rarely occurs. Instead the parties, any experts and the advocates engage in a discussion with the Court, which is managed to crystallise the matters which require resolution. This process builds upon the joint conferencing procedures and means that the Court has available in writing the matters which have been agreed between the experts, leaving to the court hearing discussion of any matters about which there is disagreement.

Until the recent reforms, the Court did not generally express its reasoning in relation to a particular case in a manner which defined principles capable of general application. The prevailing culture accepted the view that each case was unique and the resolution of that case was of no value in resolving other planning problems. The result was that the Court was not giving guidance to councils and others involved in the planning process which could be considered and utilised to minimise the necessity for merit appeals. Predicting the outcome of any appeal was a difficult task.

To overcome this problem the Court now seeks, where ever possible, to provide reasons for its decision, which include principles capable of general application. This

is being done in order to guide prospective litigants and provide a resource for local government and others who must make primary planning decisions.

Costs

Before the recent changes, Practice Direction 1993 of the Court provided that an order for costs in merit appeals would only be made where the "exceptional" circumstances are exception (para 10A). The predecessor to the Land & Environment Court was the Local Government Appeals Tribunal which did not make orders for costs. However, the predecessor to the Tribunal was the Land & Valuation Court which did make cost orders in merit appeals.

When the Land & Environment Court commenced operation, it adopted the approach of the Local Government Appeals Tribunal and it is apparent that this was done without appreciating that the Land & Valuation Court took a different view (**Gee v Port Stephens Council** [2003] NSWLEC 260). The consequence has been that on some occasions, developers prosecuted ambit claims and councils unreasonably opposed appeals. Ambit claims were pursued for the purpose of seeking advice from the Court as to an appropriate form of development. Councils sometimes opposed applications without bringing forward any substantive merit issues. Without a costs remedy, the Court had no capacity to discourage this behaviour.

The Court has amended its rules to provide that an order for costs will be made in proceedings where it is "fair and reasonable" (r 16(4) Land and Environment Court Rules 1996). Although it is not anticipated that many costs orders will be made, and if there is a genuine contest as to the merit of the proposal an order would not be

made, the Court now has the means to discourage parties from adopting unreasonable positions in appeals.

In Summary

The Land and Environment Court has recently taken a number of steps designed to provide for the cheaper and more efficient resolution of planning appeals. Rather than encourage an adversarial contest, the Court is modifying its processes so that a structured enquiry can take place in which the participants agree on the relevant information, achieve a common position in relation to as many issues as possible, and provide, in a cooperative way, the information necessary for the Court to decide the matters which need resolution.

Many appeals now commence onsite, and an increasing number are resolved without a courtroom hearing. The Court has introduced the use of court experts and concurrent expert evidence. Because the Court is looking for solutions to problems rather than "winners or losers", an increasing number of matters are resolved by modest amendment to the plans which are acceptable to all parties.
