



GREENWAY CHAMBERS

Expert Evidence – the good, the bad and the ugly

Presented by Anthony Thomas and Julie Wright

Expert Evidence - the good, the bad and the ugly

Agenda

1. Expert Evidence – what’s it all about?
2. Emerging trends
3. Good – *Secretary v Auen*
4. Bad – *ACCC v Productivity Partners, Menz v Wagga Wagga Show*
5. Ugly – *Blackmores Ltd v Jestins Enterprises*
6. Horse / Apocalypse



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What's it all about?

A reminder of why it matters...

Evidence Act 1995 (NSW)

s76 – evidence of an opinion is not admissible

S79 – 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.



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What's it all about?

A reminder of why it matters...

UCPR schedule 7

2(1) overriding duty to assist the court impartially

2(3) not an advocate for any party

4 must work co-operatively with other expert witnesses

5(1) report must set out qualifications, facts and assumptions, reasoning



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Emerging trends in 2021

1. The use of demonstratives.

- Demonstrative evidence that offers a physical illustration of a contention (instead of a verbal description) is admissible. It must have probative value. It can be used to clarify, explain and offer a visual guide to the subject-matter of the expert opinion.
- Its acceptance highlights a separate trend: the adoption of American methodologies.

2. Rigour, candour and professionalism are not optional. See: *The Good, The Bad, The Ugly*

3. Firms of professional experts have trouble ahead

- The days of acting in a series of related arbitrations / disputes for multiple parties may be over.
- *Secretariat* [2021] EWCA Civ 6. (UK Court of Appeal, 2021).

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The Good

Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd [2020] NSWLEC 126

- Experience in interpretation and manner of interpretation by use of specialised equipment = persuasive
- Process and methodology explained at each stage
- Detail indicated “rigour, precision and comprises specialised knowledge”



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The Bad

ACCC v Productivity Partners Pty Ltd (t/as Captain Cook College) [2020] FCA 845

- Five questions answered in expert report
- Each rejected on a range of grounds including relevance, lack of reasoning and lack of specialised knowledge
- Whole report inadmissible



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The Bad

Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65

- No relevant expertise
- No reasoning
- No specialised knowledge



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The Ugly

Blackmores Ltd v Jestins Enterprises Pty Ltd

- Blackmores supplied Jestins with vitamins and other products.
- Jestins failed to pay.
- Blackmores sued and Jestins cross-claimed for breach of the ACL.
- Jestins relied on expert report of Mr Shulman.



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The Ugly

Blackmores Ltd v Jestins Enterprises Pty Ltd

- Shulman’s valuation included Pharmadeal – no weight [93]
- Shulman used figures not in evidence and failed to explain them [94]
- Shulman failed to explain adjustments [95]
- Shulman’s costs of sale figures made no sense [96]
- Shulman’s profit margin was in excess of the sector and inconsistent with Jestins’ case [96]

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The Ugly

Blackmores Ltd v Jestins Enterprises Pty Ltd

- Wearing a sweatshirt
- Texting and emailing
- Not expected conduct
- Question whether appropriate to charge



Expert Evidence – the good, the bad and the ugly

A novel case with a sting in its tail.

(1) *Secretariat Consulting Pte Ltd*, (2) *Secretariat International UK Ltd*, (3) *Secretariat Advisors LLC v A Company* [2021] EWCA Civ 6.

“One of the features of this case was that, although plenty of authorities were cited to the court, very few of them were – as Leading Counsel frankly conceded – of any real assistance”

- Two nine-figure arbitrations.
- Expert evidence practice accepted appointments from different parties in related arbitrations.
- Expert M: quantum expert. Expert K: delay expert.

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A novel case with a sting in its tail.

(1) *SCL* (2) *SIUL* (3) *Secretariat Advisors LLC v A Company* [2021] EWCA Civ 6.

- The Secretariat Group provides experts through various corporate entities. (Corporate veil, anyone?)
- In March 2019, the respondent's solicitors approached SCL to provide arbitration support and expert services in Arbitration 1, in connection with the causes of delay and disruption.
- In October 2019 SIUL was approached by the third party to provide arbitration support and expert services in respect of quantum in Arbitration 2.
- K was a delay expert. M was a quantum expert.

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A novel case with a sting in its tail.

(1) *SCL* (2) *SIUL* (3) *Secretariat Advisors LLC v A Company* [2021]
EWCA Civ 6.

- *SIUL* ran a conflict check which involved all the entities in the *Secretariat* group. It revealed the engagement of *SCL* by the respondent. The respondent grumbled.
- *Secretariat* persisted:
 - Since[the third party's] contract with [the respondent] is for EPCM works for the full complex, and our engagement is in relation to the evaluation of delays on the construction sub-contract for non-process buildings, our view is that working on the two matters (in different offices) would not constitute a 'strict' legal conflict. Our firm also has the ability to set the engagements up in a manner that there is the required physical and electronic separation between the teams.

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A novel case with a sting in its tail.

(1) *SCL* (2) *SIUL* (3) *Secretariat Advisors LLC v A Company* [2021]
EWCA Civ 6.

- Did SCL owe a fiduciary duty of loyalty to the respondent? **N/A**
- If not, did SCL owe a contractual duty to the respondent to avoid conflicts of interest? **Yes**
- If so, was that duty also owed to the respondent by other Secretariat entities? **Yes**
- If so, was there a conflict of interest as a result of SCL's engagement in Arbitration 1 and SIUL's subsequent engagement in Arbitration 2? **Yes**

Upshot: Practice breached a contractual duty to avoid conflicts





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Questions?

