



GREENWAY CHAMBERS

Welcome to the jungle! The latest cases on expert evidence.

Presented by Anthony Thomas and Julie Wright 8 March 2023

Welcome to the jungle

Agenda

1. Evidence Act 1995 s79, Expert Witness Code of Conduct, PN SC Gen 11
2. Ali v R
3. Anderson v Canaccord
4. Mt Pleasant Stud Farm v McCormick
5. R v Bowie
6. The UK, where truth meets consequences.



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Why is expert evidence important?

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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UCPR schedule 7 – Expert Witness Code of Conduct

2(1) overriding duty to assist the court impartially

2(3) not an advocate for any party

Practice Note SC Gen 11

Objectives of joint conference of experts include identification and narrowing of issues in the proceedings, apprising the Court of the issues for determination

The joint report may be tendered to identify and limit the issues on which contested expert evidence will be called



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Ali v R [2022] NSWSCCA 199

- Voice recognition evidence
- No formal qualifications in relevant field
- Greater understanding than someone without the relevant skills



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Anderson v Canaccord Genuity Financial Ltd

[2002] NSWSC 58

- Conclaves and code of conduct
- “makes a mockery of the expert witness process” [1475]
- Underlying assumptions not made out



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Mt Pleasant Stud Farm Pty Ltd v

McCormick [2022] NSWCA 191

- Evidence on a horse's brain and DNA
- “Eccentric” but based on experience
- Not necessary to draw a precise line



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R v Bowie (No 1) [2022] NSWSC 1502

- Humans, pigs and kangaroos
- Pioneering field of knowledge
- “rigorous assessment”



Lord of the Flies: Chapter 1 "The Concession"

Patricia Andrew v Kronospan [2022] EWHC 479 (QB)

Claimants have now acknowledged, by Ms Eedy's witness statement and through Leading Counsel, that:

- i) it was inappropriate for the Claimants' solicitors to have provided comment solely to Dr Gibson, and that Dr Gibson should not have responded to those comments;*
- i) it is wrong for an expert to solicit input from their instructing solicitors during the process of drawing up a joint statement, just as it is wrong for those solicitors to provide that input;*
- iii) there was a serious transgression of the rules by the Claimants, by reference to the terminology in the case of *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915(TCC);*
- iv) the court has power to revoke permission to rely on an expert.*

Lord of the Flies: Chapter 2 "The Solicitors"

Patricia Andrew v Kronospan [2022] EWHC 479 (QB)

Ms Andrews from the Claimant's solicitors responded to [Dr Gibson]....She then states:

"Presumably this document will be updated again following your discussion today, so I haven't considered HD's comments at length save to note the following:1. Need to address his statement that there is no direct correspondence between location of complaint and of claimant2. Dust criteria/thresholds section, is this missing the point that the vallack and shilto [sic: Vallack and Shillito] data is also out of date, air quality has improved since then....3. Need to respond to what he says in the dust monitoring section" [1/57]

Lord of the Flies: Chapter 3 "The Senior Registrar"

Patricia Andrew v Kronospan [2022] EWHC 479 (QB)

In my judgment the primary concern, having seen the communications between the Claimants' solicitors and Dr Gibson, is that Dr Gibson's approach strongly suggest that he regards himself as an advocate for the Claimants, rather than as an independent expert whose primary obligation is to the court. This is demonstrated by the following:

- i) Dr Gibson having sent the first draft of the joint statement to the Claimants' solicitors unsolicited, which could only be because he sought their views. He sent further drafts to them where he sought their input.
- ii) Dr Gibson's view that it was appropriate to attempt to include in the joint statement the evidence note that he had prepared for a conference with Counsel: when this was clearly inappropriate and further had not been discussed with Dr Datson.
- lii) Dr Gibson providing information to the Claimants' solicitors about the joint discussions without at any time informing Dr Datson of this.
- iv) Dr Gibson's comments to the Claimants' solicitors...which make it clear that he was looking for ways in which he could support the Claimants' case.

Lord of the Flies: Chapter 4. "Consequences"

Patricia Andrew v Kronospan [2022] EWHC 479 (QB)

I have concluded that the serious transgressions by the Claimants' solicitors and Dr Gibson are such that the court has no confidence in Dr Gibson's ability to act in accordance with his obligations as an expert witness. The basis upon which the Claimants received permission to rely upon Dr Gibson as an expert witness, namely his duties under CPR... has been undermined.

Accordingly I consider that it is appropriate, and not disproportionate, to revoke the Claimants' permission to rely on his evidence. I consider that it must follow that permission to rely on Dr Gibson as a dust modelling expert is also revoked.



If you liked Lord of the Flies.....

Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1413 (TCC).

- Conduct so serious as to justify refusal of the court to allow the defendant to rely on its technical experts

BDW Trading Ltd v Integral Geotechnique (Wales) Ltd [2018] EWHC 1915

- Expert was genuinely unaware that his conduct in this respect was inappropriate, and that there was no basis for considering that he had modified in any significant way the substance of his opinion as discussed with the other party's expert



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Questions?

