SOME OBSERVATIONS ON THE USE OF EXPERTS[1]

David Levin QC and Ian Percy[2]

Experts' obligation to the Court

In the State of Victoria s.79 of the Uniform Evidence Act 2008 and O.44 of the *Supreme Court (General Civil Procedure) Rules* 2005 deal with matters of expert evidence.

The rules require[3] the expert to acknowledge the obligations by which he or she is bound by confirming adherence to the Expert Witness Code of Conduct (**Code**) (Form 44A).

Adherence to the Code is not a last minute acknowledgement at the door of the court. A party engaging an expert must provide the expert with a copy of the Code as soon as practicable after their engagement; 44.03(1) and the expert report must be prepared in accordance with the requirements of rule 44.03(2). Rule 44.03(2)(b) requires the expert to acknowledge that they have read the Code and agreed to be bound by it.

[1] From a presentation delivered at the Society of Construction Law of Australia, Annual Conference, Brisbane 5-7 August 2011
[2] Members of The Victorian Bar and Melbourne TEC Chambers
[3] Rule 44.03(1)(a)

In the recent case of *BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd & Ors,* Davies J said this about the role and engagement of the expert:

> *"It is ... vital that the lawyers engaging the expert fully explain to the expert about the expert's role and duty to assist the court impartially on matters relevant to their area of expertise and that the expert is cautioned that he or she is not to act as an advocate for a party. Lawyers seeking to rely on an expert's report have a responsibility to ensure that the report produced is the independent product of the expert uninfluenced as to its content by the exigencies of litigation."*[4]

Rule 44.06 gives the Court power to direct that the expert witnesses confer and provide a joint report *specifying matters agreed and matters not agreed and the reasons for their not agreeing.* The Court may specify the matters on which the experts are to confer; 44.06(2). In our experience courts have been reluctant to specify the matters for expert consideration preferring the parties to agree such matters. Frequently, the parties are *unable* to agree.

A suggested approach in major litigation

Based on our experience, we favour the following approach to expert evidence in major litigation:

- Early involvement of the Court to assist the parties determine or to specify the matters to be the subject of expert evidence
- Experts of like discipline being instructed to provide an opinion on the agreed or specified matters (in addition to any other matter the party engaging them wants an opinion on)

[4] BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd & Ors [2011] VSC 255 per Davies J at [142]

- After exchange of reports, experts meeting in conference and producing a joint report a reasonable time prior to trial
- In appropriate cases an independent facilitator being engaged to chair the joint conference of experts and produce the report
- In appropriate cases, experts being involved in the mediation5
- Experts giving their evidence concurrently on an issue by issue basis

Traditionally parties have been free to determine the matters upon which they want their expert to provide an opinion. Those matters are informed by the issues in dispute as determined by the pleadings. In most cases experts are engaged before witness statements are received. Even when pleadings are "closed" it is sometimes difficult to determine the relevant matters upon which expert opinion is required. Experience suggests that parties frequently differ over what matters should be put to experts for opinion. Where parties are free from direction by the Court about the matters on which expert opinion may be obtained it is not surprising that reports obtained (usually at considerable expense) frequently do not grapple with relevant or like matters. This can lead to delay - so that one expert can consider and respond to an issue raised by some other expert - or in the worst case, mean that the report is of little or no assistance to the Court.

Expert not a *hired gun*

[5] In *Wheelahan v City of Casey* [2011] VSC 62 (see footnote 16 below) a direction was made that a joint report be produced prior to the mediation with the intention of fully informing the parties of all issues so as to give the mediation the best prospects of success.

An expert must not be seen to act as an advocate for a party or to compromise his or her objectivity by attempting to tailor the views expressed to the advantage of the party by whom he or she is called. These issues have been stressed in many authorities and have been highlighted recently in *BOSI Security Services*:[6]

> *"The courts repeatedly emphasise that the role of an expert witnesses is to provide independent assistance to the court on matters within the area of expertise of the witness, not for the expert to act as an advocate for a party. The reason is clear. On matters calling for special knowledge, the court relies on expert evidence to furnish the judge with the knowledge that the judge requires in order to determine the case. Independence and objectivity are therefore critical facets of the expert's retainer as a witness in litigation, as an expert's evidence is admitted for the purpose of assisting the judge to decide the case impartially, presented with all the matters that may bear upon the outcome. The court will not be assisted by an expert's evidence unless the court has confidence that the expert's opinion on the specialist topic is an unbiased opinion, objectively formed, as the probative value of an expert's evidence is in the expression of objective and unbiased specialist knowledge. If expert evidence is to be useful for the court, the expert must exercise independent judgment, uninfluenced by the expert's retainer. The integrity of expert evidence depends on the expert bringing to bear his or her independent and objective consideration. A lack of impartiality by an expert impacts upon the reliability of that evidence and the ability of the judge to take that evidence into consideration in forming his or her own impartial determination. The importance of experts giving independent and objective consideration to the question or issue on which their specialist knowledge is sought is epitomised by the fact that this is a duty that experts owe to the courts, in the same way that legal practitioners have the duty to the court to exercise independent judgment in the conduct and management of a case.[7]"*

A consequence of the expert having a paramount duty to the Court and not acting as an advocate for the party calling him/her is that

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6 Supra, (footnote 2) at [141]

7 Arnotts Ltd v Trade Practices Commission (1990) 24 FCR 313 at 350 (Eggleston J)

commonly all documents passing between the client/client's solicitors and the expert are liable to be produced for inspection by any opponents.[8] It has been held that calling the expert is inconsistent with the maintenance of privilege over communications between the party and the expert: *Roads Corporation v Love* [2010] VSC 253. The independence of the expert can also be compromised by the attendance of the expert at conferences with other experts/lawyers/clients. Parties and lawyers should be wary of involvement in the drafting of the expert report. Useful guidance as to the appropriate boundaries are set out by Heydon JA (as he then was) in *Makita*.[9]

Yet on occasions the very nature of the dispute raises issues of such complexity that the representatives of the client have to explain the events to an expert in order to identify the precise ambit of the expertise on which the opinion is sought and to then brief the expert adequately. This has led to the expensive practice developing in heavy litigation of a party having to engage a 'clean' expert and a 'dirty' expert: the former will give evidence, is subject to the Expert Code and is instructed in a manner which will cause no embarrassment should any communication in course of retainer be revealed; the latter is available to attend working conferences with clients/client lawyers/employees/witnesses, he/she can explain the technical aspects of the events and assist in the drawing up of the

[8] See Cobram Laundry Services Pty Ltd v Murray Goulburn Co-operative Co Ltd [2000] VSC 353
[9] Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 at 743-4

instructions to the 'clean' expert which will avoid possible pitfalls. The 'dirty' expert can also advise counsel of the strengths/weaknesses in their case, dangerous areas of cross-examination and make suggestions as to how opposing experts might be approached in the event that they are called to give evidence.

Experts are not permitted to stray outside their field of expertise. If they do, their evidence will be disregarded altogether.[10]

Agreed questions or opinions at large?

There are competing views on the desirability of having experts provide an opinion on an agreed or specified number of matters or whether a party should be free to ask for an opinion on any matter. Opponents of the process of obtaining opinions on agreed or specified matters from the outset say that the traditional process (where each party determines the questions on which opinion is sought) is more productive of fleshing out all of the relevant competing expert views. Once all experts' views are known (through the exchange of reports) those matters agreed or disagreed can readily be determined. At that point, a list of residual matters can be produced to inform a joint meeting of experts. The criticism of this approach is that it prolongs the process (thus adding to the

[10] See Fina Research SA v Halliburton Energy Services Inc [2003] FCA 55 at [3] per Moore J, referred to with approval in VIP Plastic Packaging Pty Ltd v BMW Plastics Pty Ltd [2011] FCA 660 per Kenny J at [59]

cost). In our view, through good case management, at least the relevant matters for expert opinion can and should be agreed in the broad at the earliest opportunity - if not with some specificity - so as to better direct the efforts of the independent experts.

The Commercial List of the Supreme Court of Victoria encourages parties to avoid obtaining individual expert's report and to adopt a process where agreed questions are addressed by the experts in conference and a joint report provided to the Court. The standard form of joint expert order (Schedule 8) as contemplated by paragraph 13.23 of the Commercial Court Practice Note No.1 of 2010[11]. This approach has also been adopted recently by the Court's Technology, Engineering and Construction List (TEC List). Parties to a case entered in the TEC List[12] are required to provide the following information for the use of the Court at the Resources Conference:

4.	**Experts**	
	(a) Do you wish to call expert evidence at the trial or final hearing?	□ Yes □ No
	(b) Have you provided any experts' reports(s) to the other party or parties?	□ Yes □ No □ None yet obtained
	(c) Do you consider the case suitable for a single joint expert in any field?	□ Yes □ No □ Yes □ No
	(d) Please list the experts you propose to call. Identifying any proposed single joint experts	

[11] "13.23. Where contentious expert evidence is to be adduced, the Commercial Court will almost invariably direct pursuant to RSC Ch I Rule 44.06 that experts confer before trial. Typical directions appear in Schedule 8."

[12] TEC Practice Note No. 2 of 2009 (Paragraph 28b)

with the initials "SJE" after their name(s). (e) Is any aspect of the case suitable for the appointment of an expert assessor pursuant to s. 77 Supreme Court Act 1986 and this Practice Note? If so, specify the field of expertise.	□ Yes □ No
Expert's name Field of expertise *e.g. telecommunications engineer, circuit designer, metallurgist, industrial chemist, construction programmer etc.*	

Use of a facilitator

In at least two sizeable cases in which we have been involved (collectively or individually), the process of the parties attempting to agree on the matters upon which the experts are to confer (after experts reports had been exchanged in the traditional way) has proved elusive - even with the assistance of the Court. This led to the appointment of independent facilitators to help guide the parties and experts through the joint conclave process. At this point, it should be noted that it is usual to order that during the joint experts' conference there be no communication between the experts and the lawyers. The purpose of this is to promote candid and uninfluenced communication between independent experts whose primary obligation is to assist the Court.

In construction disputes it is usual for there to be experts of different disciplines. For example, there may be geotechnical experts and

engineering- civil and/or structural - experts. There may be no bright line between matters requiring their opinion on the issues in dispute. In formulating questions or matters for consideration by experts it is important not to restrict the experts' freedom to identify other relevant issues requiring their consideration. Indeed, the Code requires an expert to declare, amongst other things, *that no matters of significance which the expert regards as relevant, have, to the knowledge of the expert, been withheld from the Court;* Code 3(h).[13]

Aquatec Maxcon Pty Ltd v Barwon Region Water Authority (No 2) [2006] VSC 117[14] concerned the failure of concrete tanks at two separate sewage treatment plants. The proprietor, Barwon sued the head contractor, Aquatec-Maxcon who sued (by counterclaim) the subcontractor Minson Nacap, the lead designer MWH, the structural engineer WSA and the geotechnical technical engineer JJP.[15] Each party put on expert reports; in most cases from both engineering and geotechnical experts. Expert reports were obtained without guidance from the Court on the matters to be dealt with by the experts. After the reports were exchanged the parties agreed that there should be a meeting of experts of each discipline and a joint report produced. As part of the case management process, the Court attempted to have the parties agree on the issues to be dealt with at the experts'

[13] Commercial Court practice note 2010 provides that the parties and practitioners should not seek to restrict the freedom of the experts at the conference to identify and acknowledge matters upon which they agree; 13.24.2

[14] Levin QC and Percy were counsel for MWH Australia Pty Ltd, the lead designer. [WSA was refused special leave on 8 June 2011]

[15] Other parties were brought into the proceeding, but it is not necessary to mention them in the context of this paper

conference. The parties exchanged lists of expert issues and attempts were made to reach agreement without success. Due primarily to the fact that there was a looming trial date, the parties - with the Courts approval - agreed to engage an independent person to act as facilitator. The facilitator (Mr Geoffrey Markham) was an experienced engineer from New South Wales with experience in similar scenarios.[16]

At short notice, the facilitator was able to produce a workable list of issues from those proposed by the parties. The conferences went ahead and two separate joint reports were produced (one from the geotechnical experts and the other from the structural experts). These reports were prepared by the facilitator in the course of the conference. The joint reports were put in evidence. Agreement could not be reached for the experts to give concurrent evidence and each expert was subsequently cross examined in the usual way in the course of the trial. The parties contributed equally to the payment of Mr Markham's fees.

Advantages and disadvantages of a facilitator

One advantage of an independent facilitator is that it promotes the joint report being produced in an even handed and objective manner. The facilitator can act as the scribe thus assisting the production of a

[16] Mr Markham has produced a very useful paper entitled *Expert Evidence in Arbitrations and Court References with Specific Reference to Experts' Conferences, Conclaves and Natural Justice*, 5 May 2004

balanced, well written report. The use of this facilitator to assist the joint conference process is not uncommon where there are a number of experts involved and the issues complex. Facilitators have been used in this way in several large arbitration proceedings.[17] Those experienced in construction disputes will also be familiar with the process which occurs routinely in large projects where an independent expert is engaged to assist consultants of different disciplines engaged in the project in perfecting the design. The facilitator's role in this scenario is to ensure that the component parts of the design exercise seamlessly come together - in short, ensuring that the left hand knows what the right hand is doing. The facilitator in this scenario is not engaged as a check engineer. That is an entirely separate function. Not surprisingly, many judges are not familiar with this process and accordingly there has been some resistance to engage in a facilitator for an experts' conference. One undesirable aspect of the non-facilitated joint expert report process can be that a domineering expert influences the writing of the report. Anecdotal reports suggest that this sometimes happens.

Some other cases

[17] Facilitators were used to assist the expert process in three large arbitrations: Anaconda and Fluor - Murrin Murrin JV (2002), Luzon Hydro and Transfield Phillipines - tunnel and power station (ICC Arbitration 2005) and BassGas and Clough (2007, John Uff QC Arbitrator)

Recently, all parties in a complicated multi-party class-action concerning a landfill dispute, *Wheelahan v City of Casey*[18] agreed that as part of the expert conclave process an Associate Justice of the Court might act as facilitator. The judge appointed to case manage and hear the case declined to make that order, initially at least, ruling: *"I do not propose to direct that the joint experts conference should be facilitated by an Associate Justice initially. There is no basis to doubt that the experts will be capable of proceeding independently.* His Honour has left open the possibility of a further application for appointment of a facilitator.

BHP v Steuler [2009] VSC 322[19] was another case involving the effective use of an independent facilitator of the joint experts' conference. That case concerned the failure of plastic (HDPE) tank linings forming part of the process train for the extraction of copper and uranium. The critical issue was whether the manufacturer and supplier of the lining material, knew or ought to have known, that it was incompatible with the process solutions to be used in the tanks which comprised mainly kerosene. Each party relied on several expert witnesses. Following traditional interlocutory processes the parties obtained their expert reports without any attempt to agree the issues upon which experts were to provide their opinion. When the reports were exchanged this provoked reports in response. There

[18] *Wheelahan v City of Casey & Ors*, [2011] VSC 62 at [8] per Osborn J. There are 14 parties represented by 30 barristers. Percy is junior counsel with S Anderson SC for the sixth defendant/third party

[19] Judgement on liability and was given on 7 August 2009. The trial on quantum was conducted in 2010 and judgement is reserved. Percy is junior counsel with P Riordan SC for BHP. Levin QC was briefed for the opposing party in the case at one point

was disagreement about the appropriate testing to be conducted in order to inform expert opinion. Attempt was made to agree the issues in conference. Whilst generally agreement was reached with the assistance of the Court, it was recognised that the experts should be given freedom to identify and consider other relevant matters.

In part because the defendant's experts were German-speaking and English was a second language and also because the conference was to be conducted in Australia it was considered desirable that an independent facilitator be engaged to ensure fairness of process and objective expression of the written report. A member of the Victorian Bar, Dr Donald Charrett, who also has an engineering background, was appointed by the parties. Dr Charrett produced the written report recording each expert's opinion on the matters agreed and disagreed and the reasons for any disagreement. The joint report (February 2006) was put in evidence. The experts were cross-examined in the usual way.

With the benefit of hindsight, considerable time and cost might have been saved if more time had been spent in defining the questions for consideration by the experts. This in turn would have highlighted the differences in tests and standards upon which opinions might be (and in fact were) based. We stress however that, in our opinion, even if questions are agreed or determined by the court, an expert should be free to express his/her opinion on other questions - either

by being asked by the party engaging them to do so or of their own volition.

Wheelahan v City of Casey has recently been the subject of a three-day case management conference at which the trial judge and counsel for the 14 parties involved debated the process by which expert evidence might be obtained. The case involves allegations of landfill gas migration from an old tip site which was first established in 1996. Orders were made entitling each party to provide an expert report answering broard questions as settled by the Judge. The parties had considerable input into defining the questions but no agreement was reached and hence they were settled by the Judge. Parties will be free to have their expert consider other matters. Once reports have been exchanged, the experts will meet in joint conference to produce a joint report.[20] As stated above, although the Judge declined to make a proposed (agreed) order, the experts' conference *may* be facilitated by an Associate Justice.

In the *Wheelahan* landfill case, the events in question (from the approval process through to when the landfill ceased to accept waste) cover a period of over 15 years. In order to effectively manage the trial an order has been made (which was supported by most of the 14 parties) that lay and expert evidence be heard

[20] Since these orders were made the plaintiffs' class action case has settled but the contribution and remediation costs claims (as between defendants) estimated at $100m is continuing. Directions have been made for expert reports and a joint report before a mediation scheduled for November 2011

generally in accordance with agreed chronological phrases.[21] Although no orders have been made at this stage, it is likely that expert evidence will be given concurrently at the trial which has been fixed the hearing in July 2011.

Concurrent evidence

The TEC Practice Note No.2 of 2009 provides that directions may be given for expert or other witnesses to give concurrent evidence; 43(f). Commercial Court Practice Note No.1 of 2010 at 13.22.2, is to similar effect.

On reflection, *Aquatec* was a suitable case for the experts to give concurrent evidence however in 2005 when the case was heard it was seen as a novel approach and counsel for the parties could not agree on its adoption. The process was also not used in the *BHP* case (heard in 2008) in part because of the perceived language disadvantages between the plaintiff's English-speaking experts and the defendant's German-speaking experts. It is fair to say that the giving of concurrent evidence is still not widely used in the Supreme Court of Victoria although the Court is actively encouraging its adoption in appropriate cases.[22] By contrast, the Federal Court of Australia regularly adopts the process of

[21] Although routine in arbitrations , inquiries and commissions the giving of evidence by a party in stages does not accord with the general trial practice of a witness being called and cross examined on all issues at the one time. In *Wheelahan,* there has been discussion about how the giving of evidence in sequence and/or by topics will be managed at trial.

[22] A CPD seminar entitled Expert Witnesses: *On the Stand or in the Hot Tub - How, When and Why?* was conducted by the Commercial Court of the Supreme Court of Victoria in conjunction with Monash University Law School on 27 October 2010

concurrent evidence. Rares J of the Federal Court of Australia, writing extra judicially, had this to say about it:[23]

Initially, and my own experience is to this effect, uninitiated counsel are highly suspicious of concurrent evidence. That suspicion evaporates once they participate. Why is this so? It is because of the efficiency and discipline which the process brings to bear.

In *Miglas v SM Developments Pty Ltd* [2010] VCC 69[24] the plaintiffs sought specific performance of terms of settlement requiring the construction of a large engineered retaining wall between commercial properties owned respectively by the plaintiffs and the defendant. Both parties had exchanged expert engineering and geotechnical reports. No order had been made for the provision of a joint report. At the commencement of the trial the defendant obtained leave to rely on a further geotechnical expert report and the plaintiff obtained leave to respond to it. The trial judge agreed to allow the experts to meet in conference with a view to producing a joint report. All experts met together - including a hastily engaged new geotechnical expert for the plaintiff brought in to respond to the newly received defendant's report - in the jury room adjoining the courtroom and a joint report was produced. A concurrent evidence process ensued. The experts were sworn and sat at the bar table along with counsel. Each expert gave a brief statement of his

[23] Rares J, *Using the Hot Tub - How Concurrent Expert Evidence Aids Understanding Issues* a paper presented at the New South Wales Bar Association CPD seminar, Sydney, 25 August 2010 - http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_raresj12.rtf

[24] Percy was counsel for the plaintiffs with B Reid (for part)

opinion. The judge asked questions as did counsel. The questions asked by counsel were more in the nature of clarification than cross examination. The process was very successful in determining the adequacy of works already carried out and the scope of remedial works required. The matter went to judgement. Orders were made in part requiring specific performance guided by matters contained in the joint report as supplemented by the "hot tub" evidence. Considerable trial time was saved - even allowing for the day's adjournment to enable the experts to confer in the course of the trial.

The *Miglas* case highlights a number of things: the need for a case managed process to ensure all expert evidence is obtained in sufficient time prior to trial; the utility of the joint expert process (even coming during the course of the trial); and the workability of concurrent evidence.

The process of giving concurrent evidence will vary from tribunal to tribunal and will depend upon the experience and preferences of the judge and counsel involved. We do not venture any observations on the mechanics of the process. Rares J provides some useful guidelines based on his own experience, and that of others, in his paper to which we have referred; [25]ff. In *Strong Wise Ltd v Esso Australia Resources Ltd*[25], Rares J explains the way in which he took concurrent expert evidence from experts in different fields.

[25] (2010) 267 ALR 259 at 284-285 [92]-[97]; [2010] FCA 240

Neil Young QC, an experienced practising barrister and former Federal Court judge had this to say recently on these issues:[26]

> *Courts need to be astute to manage the process so that it adduces the relevant expert evidence in a way that is coherent and complete. Moreover, while courts must control and structure the discussion inherent in the new processes, they need to ensure that the parties are satisfied that they have a fair opportunity of presenting their case and of testing the expert evidence given by opposing witnesses. Cross-examination still has a valuable role to play in testing the critical evidence. These considerations mean at least two things: Counsel shall be provided with a fair and reasonable opportunity to question the experts about their evidence; and secondly the judge should at the end of the process make a general enquiry of the experts to ensure that each is satisfied that they have had an opportunity to fully explain their evidence.*

We respectfully agree with Mr Young's comments.

The new dawn?

The new *Civil Procedure Act* 2010 (Vic)[27] (**CPA**) has imposed further responsibilities on parties and their advisers in civil litigation which may complicate the expert process. The CPA has introduced *overarching obligations* for litigants, lawyers and insurers [28] to co-operate[29], not engage in conduct likely to mislead or deceive[30], to endeavour to narrow issues[31], to ensure costs are reasonable and

[26] *Formulating the Questions for Opinion and Cross Examining the Experts;* part of a CPD presentation for the Commercial Court of the Supreme Court of Victoria ; 27 October 2010
[27] The CPA came into operation on 1 January 2011
[28] CPA s10. These obligations do not derogate from existing obligations of professional ethics or those under the Supreme Court Witness Code of Conduct
[29] s.20 CPA
[30] s.21 CPA
[31] s.23 CPA

proportionate[32] and to minimise delay[33]. Subject to exceptions[34] an expert is within the definition of a *"person to whom the overarching obligations apply"* under the CPA. Sanctions (generally requiring payment of costs) could be imposed on an expert for breach.[35] How these statutory obligations will be applied is presently unknown but they may make experts reluctant to give evidence at all.

Parties should bear in mind that the adoption of an unreasonable response to proposals for a joint meeting of experts and the production of a joint report identifying points or agreement and/or difference may ultimately lead to costs orders being visited on the unreasonable party. In *Hydrocool*[36], *TEA* (the 2nd Respondent) invited the applicant *Hydrocool* on a number of occasions to have its expert make a detailed examination of a prototype of the relevant equipment. The invitation was never taken up. In his judgment, Siopis J found:

> *[649] Hydrocool's refusal to accept TEA's invitation to inspect the prototype typified Hydrocool's more general attitude opposing a cooperative approach by the respective experts to the assessment of whether TEA had made use of Hydrocool's technology in the development of its prototype. Hydrocool opposed TEA's application to the court that there be a meeting of experts for the purpose of producing, if possible, a joint report on this issue. On 12 December 2009, the court made orders over the opposition of Hydrocool that such a meeting of experts take place before 31 January 2010. As mentioned, as a consequence of the meeting of experts, a joint minute was signed by the experts to the effect*

[32] s.24 CPA
[33] s.25 CPA
[34] See s.10(3) CPA
[35] s.29 CPA
[36] *Hydrocool Pty Ltd v Hepburn (No 4)* [2011] FCA 495

that they were satisfied that Hydrocool's technology had not been used by TEA.

[650] The refusal of Hydrocool to join with TEA in a cooperative approach by their respective experts, to the question of whether Hydrocool's technology had been used by TEA until 12 December 2009, when Hydrocool was ordered by court order to do so, was unreasonable and contrary to the modern approach to the conduct of litigation.

[651] One of the recognised bases on which a court may award indemnity costs is where a party by its unreasonable conduct unduly prolongs the litigation. Hydrocool was on notice from 26 June 2008, that an application for indemnity costs may be made arising from the refusal to inspect the prototype.

[652] It is no answer to TEA's claim, as Hydrocool contended, that TEA engaged the same lawyers as did Mr Hepburn and Mr Clarke, and had, therefore, not incurred costs independently of Mr Hepburn and Mr Clarke. The extent of any overlap in costs between TEA and Mr Hepburn and Mr Clarke is a matter to be determined at taxation.

[653] A court will exercise caution in making supplemental orders, and in ordering indemnity costs. However, in my view, the circumstances of this case, warrant the making of such orders.

[654] I will, accordingly, order that all costs incurred by TEA from 26 June 2008, be paid by Hydrocool on an indemnity basis.

A salutary lesson, no doubt, for all of us who are instructed in cases

requiring experts.

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David Levin QC and Ian Percy

Owen Dixon Chambers West
Melbourne TEC Chambers
mtecc.com.au