

## CONCURRENT EXPERT EVIDENCE – A GIFT FROM AUSTRALIA (concurrent)

### LECTURE BY LORD JUSTICE JACKSON AT THE LONDON CONFERENCE OF THE COMMERCIAL BAR ASSOCIATION OF VICTORIA on 29<sup>th</sup> JUNE 2016

#### CONTENTS

1. Introduction
2. The Australian procedure
3. Introduction of the procedure in England and Wales
4. And how is it all going in practice?  
APPENDIX: Paper by HH Judge Waksman QC summarising the Manchester pilot

#### 1. INTRODUCTION

Australia since 1788. Modern Australian history begins with the arrival of Admiral Arthur Phillip and his establishment of a penal colony in New South Wales. However discreditable that policy may have been,<sup>1</sup> at the time it seemed like a good idea and it resolved a pressing problem for British criminal justice.<sup>2</sup> Since then, however, Australia's impact on the justice system has been very different. Australia has made major contributions to both civil and criminal justice across the common law world. The jurisprudence of Sir Owen Dixon is but one example. In particular (and this is the focus of the present conference session), Australia has always been innovative in the field of civil procedure.

My own visits to Australia in connection with civil justice reform. I have visited Australia twice in connection with civil justice reform. The first visit was in March/April 2009 during the course of the Review of Civil Litigation Costs. The second visit was in December 2011 during the course of the implementation of the reforms resulting from that review. Like many visitors, I was greatly impressed by your vibrant civil justice system and willingness to innovate. In many ways Britain now follows Australia's lead. For example, the Shorter and Flexible trials Pilot Scheme,<sup>3</sup> recently established in our Rolls Building jurisdictions, has echoes of a similar scheme devised by the Australian Federal Court about ten years ago.<sup>4</sup>

Why is Australia so innovative? That's not for me, as a mere foreigner, to say. Perhaps it's something in the air (like sixteenth century Florence producing tons of top artists). Perhaps also – dare I say this? – it is the beneficial influence of competition. Several different courts in Australia are 'competing' for the top commercial work. These include the Supreme Court of Victoria, the Federal Court of Australia based in Melbourne, the Supreme Court of New South Wales and the Federal Court of Australia based in Sydney.

This lecture.<sup>5</sup> In this lecture I shall concentrate on one particular Australian invention, which we are now copying in England and Wales. That is concurrent expert evidence. I shall not use the popular colloquial term 'hot tubbing', having been warned off such vernacular that by an Australian judge. To be on the safe side, I will use the abbreviation "CEE" for concurrent expert evidence.

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<sup>1</sup> Not least because of its total disregard for the rights of the indigenous population

<sup>2</sup> Following the loss of the North American colonies in 1776

<sup>3</sup> Under Practice Direction 51N

<sup>4</sup> See PR chapter 58, page 592.

<sup>5</sup> I am grateful to my judicial assistant, Stephen Clark, for his assistance in preparing this lecture and for carrying out the informal survey referred to in section 4.

Abbreviations. In this lecture I use the following abbreviations:

'CEE' means concurrent expert evidence.

'CJC' means Civil Justice Council.

'Costs Review' means the Review of civil Litigation Costs, conducted in 2009.

'FR' means the Final Report prepared at the end of that review.

'PR' means the Preliminary Report prepared during the course of that review.

## 2. THE AUSTRALIAN PROCEDURE

An apology. This section of the lecture is solely for the benefit of the English lawyers present. Our Australian visitors know far more about their own procedures than I do. They should therefore feel free to spend the next few minutes fiddling with their iphones.

A short history. The practice has been developed in Australia of hearing evidence from the experts in any particular discipline at the same time. Hence the practice is called concurrent expert evidence. The practice began in the Competition Tribunal and was subsequently adopted in the Supreme Court of New South Wales. The experts meet pre-trial in order to identify where they agree and where they disagree. At trial, experts in the same discipline are sworn in at the same time and the judge chairs a discussion between the experts. The pre-trial document recording the matters upon which the experts disagree serves as the agenda. Counsel join in the discussion. They can put questions to the experts, as and when permitted by the judge. In addition, the experts can put questions to each other. This procedure spread from Sydney to other courts and is now widely used across a range of courts and states in Australia.<sup>6</sup> It has been incorporated into the procedural rules of the Federal Court.

My own inquiries during the Costs Review.<sup>7</sup> The New South Wales judges told me (on 1<sup>st</sup> April 2009) that CEE was effective. It saved both time and costs. It gave back to experts their proper role of helping the court to resolve disputes. Also it did away with the "one on one" gladiatorial combat between cross-examining counsel and each expert. Practitioners in New South Wales confirmed that the procedure was effective, saving both time and costs. One practitioner commented that the procedure worked well in areas where there are no issues of credit and the experts knew and respected each other. Another practitioner said that time was saved, because instead of counsel turning round to take whispered instructions during cross-examination, he put his questions directly to the experts in the "hot tub". Both/all experts can then deal with the particular point. The procedure prevented experts from "getting away with" flawed evidence. A major litigation funder in Australia (i.e. a large scale court user) also commended the practice

The DVD. There is an excellent DVD available, which illustrates the operation of the procedure by re-enacting recent litigation in which four expert witnesses gave evidence concurrently. Justice Peter McLellan, who has extensive experience of the procedure, provides a commentary as the film proceeds.

My conclusion during the Costs Review. Having watched the DVD and talked to judges, practitioners and court users, I formed the provisional view that CEE was a cost saving procedure, which merited a pilot study in England and Wales. If the pilot was successful, then it should be introduced generally into our procedure.

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<sup>6</sup> For a fuller account of CEE in Australia, see *Case management and complex civil litigation* by Michael Legg, pages 115-120

<sup>7</sup> See PR chapter 58, page 593.

Subsequent developments in Australia. The use of CEE has continued to expand over last six years. At the same time, there have been other procedural innovations which increase the courts' case management powers in relation to expert evidence. No doubt the Australian speakers will enlarge on these matters.

Concerns of some practitioners. Some practitioners are unhappy about these developments, in particular Jim Delaney QC who has prepared a cogent paper for today's conference. As Mr Delaney observes, CEE means that advocates lose control over the presentation of an important part of their case. But even Mr Delaney concedes that "the hot tub can be very effective", provided everyone does their job properly (para 16 of his paper). He also concedes that the process can be of assistance to the judge "where there are complex scientific issues" (para 102).

Australian supporters of CEE. Many practitioners and judges take a more favourable view of CEE. Justice Peter Garling practised at the Bar for many years before his appointment to the Supreme Court of New South Wales in 2010. On 1<sup>st</sup> December 2015 he delivered a lecture to Oxford Law Faculty entitled 'Concurrent expert evidence – the New South Wales experience'.<sup>8</sup> In this lecture he drew on his experience of CEE both as a barrister and as a judge. He fairly set out both the advantages and the drawback of the procedure. At the end he concluded:

"86. Trials have been shorter and less expensive. The long-standing issues of judicial concern about pseudo-expert opinions, and experts who are merely advocates for the party which retained them, have largely, but not entirely, disappeared. Complex expert issues are able to be identified and dealt with more effectively and with a greater understanding of them.

87. From my perspective, in my current role, it is a most worthwhile process which has resulted in better decision making, with less cost and expense, than the traditional adversarial system of taking expert evidence."

Saving of hearing time. One benefit of CEE (when properly conducted) is that "without doubt" it saves hearing time (see Delaney, end of para 103). Bearing in mind that the trial is most expensive part of any litigation, this benefit is not insignificant.

### 3. INTRODUCTION OF THE PROCEDURE IN ENGLAND AND WALES

Recommendations made in the Costs Review Final Report. FR chapter 38 dealt with expert evidence. It made the following recommendations in respect of CEE:

Proposal for a pilot. A number of experts, practitioners and judges have expressed support for the use of concurrent evidence (known colloquially as "hot tubbing") in appropriate cases. It is said to be particularly effective in valuation and similar disputes. I recommend that concurrent evidence be piloted, but only in cases where the parties, the experts, the lawyers and the judge all consent to this procedure.

Possible future rule change. The results of any pilot study must be evaluated with care, in order to ascertain (a) the types of case in which concurrent evidence is successful, (b) what costs are saved and (c) whether the parties and their advisers perceive the process as enabling each side's case to be properly considered. If the results of this assessment are positive, then consideration should be given to amending Part 35, so that it expressly enables the judge to direct that the concurrent evidence procedure be used in appropriate cases."

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<sup>8</sup> [http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2015%20Speeches/Garling\\_20151201.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2015%20Speeches/Garling_20151201.pdf)

Establishment of a pilot in Manchester. A procedure for concurrent expert evidence was piloted in the Manchester specialist courts between 2010 and 2013. HH Judge David Waksman QC, the Manchester Mercantile Judge,<sup>9</sup> oversaw the pilot. The pilot was voluntary, but a number of practitioners and experts were willing to take part. Judge Waksman held meetings with practitioners (some of which I attended) in order to develop the procedures and gain feedback. He has kindly prepared a summary of his experience of the pilot for the purpose of today's conference. I attach this as an appendix.

Monitoring of the pilot. Professor Dame Hazel Genn of UCL monitored the pilot. She wrote up her findings in the *Civil Justice Quarterly*.<sup>10</sup>

Incorporation of concurrent evidence into the CPR. With effect from 1<sup>st</sup> April 2013, the following provision was added to Practice Direction 35:

“11.1 At any stage in the proceedings the court may direct that some or all of the experts from like disciplines shall give their evidence concurrently. The following procedure shall then apply.

11.2 The court may direct that the parties agree an agenda for the taking of concurrent evidence, based upon the areas of disagreement identified in the experts' joint statements made pursuant to rule 35.12.

11.3 At the appropriate time the relevant experts will each take the oath or affirm. Unless the court orders otherwise, the experts will then address the items on the agenda in the manner set out in paragraph 11.4.

11.4 In relation to each issue on the agenda, and subject to the judge's discretion to modify the procedure –

(1) the judge may initiate the discussion by asking the experts, in turn, for their views. Once an expert has expressed a view the judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the judge may invite the other expert to comment or to ask that expert's own questions of the first expert;

(2) after the process set out in (1) has been completed for all the experts, the parties' representatives may ask questions of them. While such questioning may be designed to test the correctness of an expert's view, or seek clarification of it, it should not cover ground which has been fully explored already. In general a full cross-examination or re-examination is neither necessary nor appropriate; and

(3) after the process set out in (2) has been completed, the judge may summarise the experts' different positions on the issue and ask them to confirm or correct that summary.”

#### 4. AND HOW IS IT ALL GOING IN PRACTICE?

Results of a recent informal survey. In May 2016 my judicial assistant carried out a short and informal survey of practitioners and judges, mainly in the TCC field. Of those who responded, there was a diverse range of responses. Some practitioners and judges had never received training, never had the chance to use the concurrent evidence procedure and did not expect to use it soon. Some

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<sup>9</sup> Now the London Mercantile Judge

<sup>10</sup> 'Getting to the truth: experts and judges in the "hot tub"' (2013) 32 CJQ 275-299. Professor Genn's Interim Report is available on the Internet:

<https://www.judiciary.gov.uk/publications/interim-report-manchester-concurrent-evidence-pilot/>.

found themselves in the middle ground of increasing exposure and were still getting to grips with the process. At the other end of the spectrum there was positively enthusiastic uptake.

Comments of a TCC circuit judge. One experienced circuit judge who hears TCC cases at a court centre away from the Rolls Building writes:

"I use hot tubbing regularly. Indeed it is the rule rather than the exception in my court. It is only where there are only one or two discreet issues for the experts (which is a rare case) that I adopt the 'standard procedure', and even then I make a point of having the experts back to back (which practitioners prefer and helps keep the costs of the experts' attendance to a minimum.)

My experience is that construction professionals engage very well with each other, and on occasion will debate a point constructively together leaving the lawyers as interested onlookers. ...

It helps, of course, that both in the fields of Party Wall Appeals and Tree Root damage cases many experts in the field know each other (and the judge). However my good experience with hot tubbing extends to construction cases where the experts have not met before and are previously unknown to me. I am a firm fan."

The experience of a Chancery Division judge. One Chancery Division judge, who was approached in the recent informal survey, has used CEE twice since the procedure was introduced. The first case involved a dispute about whether some 50 items of heavy equipment were fixtures. The second case involved a dispute between three parties about defects, breaches of the Building Regulations and remedial costs. The judge's experience in both cases was very positive. He believed that the procedure saved time and focused the expert evidence in a constructive manner.

Recent use in a recent competition case. Mr Justice Roth recently made use of CEE in the competition law case, *Streetmap.EU Ltd v. Google Inc.* [2016] EWHC 253 (Ch). He found it not only saved on time but helped highlight the differences between the experts: see [47] and the discussion at [132] onwards. This is the first time that concurrent expert evidence has been used in a competition law matter. Its use in this field may well expand in the future.

Does CEE mean more work for the judge? Yes. The judge needs to read the expert evidence thoroughly and get on top of the issues before the CEE process starts. On the other hand that is not a bad thing. The judge will have to master the expert evidence sooner or later anyway. If he/she does so before the experts enter the witness box and then adopts the CEE procedure, the process of judgment writing will be much easier.

How much costs does this procedure save? Difficult to say, because the judges and practitioners consulted did not usually descend to this level of detail. One judge in the recent survey did quantify the saving. He wrote:

"I have only hot tubbed in one 15 day TCC trial. The quantum and building surveying experts were hot tubbed (by discipline) and I felt that considerable time was saved -- 2 days were spent with each pair, and I thought that at least double that time might have been spent if each had given evidence separately."

A straw poll of chambers. During May 2016 one major set of construction chambers asked members for their experience of CEE. There were fifteen responses. Seven respondents spoke favourably (or very favourably) of the process. Three were hostile. Four talked generally about CEE without commenting on its utility or drawbacks. One (who gets the prize for candour) said he had forgotten that the procedure exists.

Will concurrent expert evidence ever catch on more widely in England and Wales? Yes, it probably will. It is striking that the majority of those who are hostile to the procedure are judges or practitioners who have never used it. Most (but certainly not all) judges and practitioners who have used the procedure are supportive.

A means of saving costs. Although views differ on the question of costs saving, most English judges and practitioners agree that CEE leads to a saving of time at trial. Since trial time is the most expensive component of litigation, this is a valuable saving. Solicitors who are striving to bring the actual costs of litigation closer to the approved budget should give serious consideration to proposing the use of CEE.

Incidental points. It became clear from recent responses that some judges stick fairly closely to the procedure set out in section 11 of PD 35, whereas other judges develop that procedure in ways that suit their particular cases. As noted above, in any litigation where CEE is received, the judge must prepare more thoroughly than for an adversarial trial. This is because the judge has a more inquisitorial role. If there is a live transcript (as in *Streetmap*), this is of considerable assistance.

Civil Justice Council review. A CJC working group (chaired by Professor Rachael Mulheron) is currently reviewing the use of CEE in the light of experience to date. It is quite likely that following that review the CJC will propose improvements to the procedure.

Conclusion. It is hoped that the use of concurrent evidence will increase as the benefits become more widely appreciated. As legal systems go, England and Wales are not that different from Australia.

Rupert Jackson

29<sup>th</sup> June 2016

**APPENDIX - A PAPER BY HH JUDGE WAKSMAN QC SUMMARISING HIS  
EXPERIENCE OF THE MANCHESTER PILOT**

**HHJ Waksman QC, Judge in Charge, London Mercantile Court**

1. In 2010 a two-year pilot scheme commenced in the Manchester Mercantile and Technology and Construction Courts to test the usefulness and efficiency – or otherwise – of the taking of expert evidence concurrently. The scheme had the support of local practitioners and experts and was the result of an initiative of Lord Justice Jackson having considered in particular the experience of the Australian Courts.
2. The rules of the scheme were later embodied in paragraph 11 of Practice Direction 35 of the Civil Procedure Rules, as from April 2013.
3. At the pilot stage, both parties had to consent to the procedure. This is not a requirement of paragraph 11 of PD35 but experience shows that it is wise to ensure (perhaps after some judicial prompting or explanation) that there is consent.
4. Because of the novelty of the scheme (except to many experts who had come across it in other dispute resolution contexts, for example arbitration) at the beginning, it was very much up to the judge to suggest that the case might be suitable for it, prior to trial. Some practitioners were sceptical but were won round when they realised that their own experts actually preferred it for at least some cases. It had the benefit of avoiding problems such as (a) Apples and oranges - or where the experts pass like ships in the night, (b) Scope creep: “would you mind also looking at and commenting on these matters..?” (c) “I don’t think the Judge really understands this issue, or why we disagree.” or (d) “I feel like I’m on a battlefield, being shot at by hostile advocates.”
5. Concurrent expert evidence orders were made in a wide range of cases, although most later settled. The experts involved included valuers, surveyors, accountants, engineers and handwriting experts. The issues addressed included valuation of land, shares in private companies, pension rights and property developments, tax, defects in and/or value of building works, dilapidations, defectively made or designed products or equipment and disputed signatures. Parties were not put off where the evidence was especially technical. There was no case where the issues were so complex or cutting

edge that the judge or parties rejected the procedure for that reason only. Accordingly it can be used in many more situations than the classic quantum “how much is this worth on a sliding scale?” type issue. We found that it particularly apt where the case just missed being one where only a single joint expert was needed.

6. As predicted at the outset, the areas where parties felt uncomfortable was where a serious challenge to the competence, independence or credibility of the expert was in prospect. Here a traditional cross-examination was still necessary.
7. In those cases which went to trial, practitioners usually agreed that the procedure had saved time and costs without affecting the fairness of the trial. The length of cross-examination was much reduced. And because the judges heard evidence on each point from the experts concurrently, at worst we had a crisp note of the real differences between them, while at best those differences narrowed in the course of their testimony. The evidence tended to be more constructive and less adversarial. In some cases, where new issues arose at trial, the procedure was especially useful to get the experts to “crunch through” them in real time. In one building case, it settled shortly after the experts gave their evidence.
8. But we also agree that the judge has to be completely on top of the expert issues before trial, otherwise this process of a structured dialogue – which is judge-led – will not work. Sufficient reading time must therefore be provided.
9. During the pilot the legal profession (and other judges) were “educated” by a series of seminars and mock trials where the procedure compared with the traditional way of hearing expert evidence. That process continues and on 6 December 2016 specialist judges will attend a session on hot-tubbing as part of their formal training provided by the Judicial College. The legal profession is now generally up to speed with the concept and it is the parties who will usually suggest it, not the judge.
10. No-one pretends that the procedure is suitable for all or even perhaps most cases. But its increasing use has made it a very real option to be at least considered in those cases where a single joint expert is not ordered.