

CONCURRENT CROSS-EXAMINATION OF EXPERT WITNESSES IN THE ENVIRONMENT COURT

Principal Environment Judge
His Hon Judge R J Bollard

This biennial intensive of the New Zealand Law Society on topical Resource Management issues provides a good opportunity to explore and obtain feedback upon the prospect of having expert witnesses questioned in what is colloquially termed a “hot-tubbing” context in order to focus upon the experts’ differences within their discipline, and also focus the minds of counsel in ensuring that questioning is well-directed and efficient. My purpose is to note some salient points that have become apparent, both from having considered the DVD on concurrent evidence of experts produced by the Land and Environment Court of New South Wales, but also from a number of branch meetings of the Resource Management Law Association where the topic has been discussed.

First of all it is necessary for the court to digest the evidence in chief of all the witnesses in the particular field who are to be questioned concurrently before that questioning occurs. Either the court might read the evidence concerned in advance (as generally arranged via pre-hearing conference) or time might be set aside for the purpose within the fixture period itself by arrangement with the parties. Alternatively, the witnesses’ evidence might be heard as a group at a convenient point of the hearing – that is to say, with each reading his or her brief one after the other before being cross-examined concurrently.

The second issue is this. How many witnesses may comfortably be managed on a concurrent footing? On this score I have no firm view, although tentatively I would think a number exceeding four or possibly five would be undesirable.

Another issue commonly raised has been the “equality factor” – that is to say, the possibility that a well experienced witness familiar with giving evidence in court may “hold the floor” or leave another witness (whose evidence-in-chief may be very well prepared) rather overawed in the concurrent questioning situation.

Plainly for the process to work effectively it would be desirable that a reasonably clear procedure be established which could perhaps be incorporated in the Court’s Practice Note, but I have no firm view on that. One would think that all parties’ representatives should be invited to cross-examine the witness or witnesses whose view does not assist his or her party’s case, and then ask the witness or witnesses who are supportive to clarify their positions in the light of the preceding answers (without leading). Members of the court would then follow – although some questioning by the court might well occur before counsel are invited to put their questions for purposes of initial clarification – as illustrated by the DVD presentation above-mentioned. It would, of course, be important for a fresh witness’s name to be stated when questioning of that witness occurs at various points of the process, so that the transcript is readily understandable later on.

Another important issue is whether the witnesses should be given the opportunity to question one another. This appears to be the practice in the Land and Environment Court in New South Wales. But the question arises whether that practice runs the risk of experts “descending into the arena” and becoming advocates of their own positions in relation to their peers who they are invited to question. This is an aspect on which I would welcome as much feedback as possible to determine whether we should follow the Land and Environment Court’s practice in this respect or not. Unfortunately, the DVD which that court has issued fails to illustrate how questioning by witnesses *inter se* successfully works in New South Wales.

Another aspect on which feedback is important is the types of expert evidence where the concurrent approach is likely to be most helpful and successful. Tentatively, it seems to me that evidence of a more technical nature would be more suited to the practice; likewise in situations where experts’ positions have narrowed (possibly through pre-hearing caucusing) so that clearly defined residual matters outstanding can be focussed on.

To conclude, the basic purpose of this session is to stimulate discussion on concurrent evidence by experts as described, with the objective of determining how it may best be introduced and employed as a means of getting to the heart of matters and obviating the unnecessary amount of cross-examination that commonly occurs when experts are questioned under the traditional form of procedure. It would, of course, be a matter for the individual judge presiding in a case to determine whether the cross-examination of a particular group of witnesses should be on a concurrent basis. If counsel should propose that the approach be adopted, the matter would be expected to be raised in reasonable time before the hearing date, either at a pre-hearing judicial conference, or by written request to the court - with an indication in the latter instance whether all parties are agreed, and if not, the basis and extent of the disagreement.