Faucett v St George Bank Ltd - [2003] NSWCA 43

Reported Decision : (2003) Aust Tors Reports 81-699

Court of Appeal

CITATION:	**FAUCETT v ST GEORGE BANK LTD [2003] NSWCA 43**
HEARING DATE(S):	3 March 2003
JUDGMENT DATE:	11 April 2003
JUDGMENT OF:	Mason P at 1; Meagher JA at 2; Sheller JA at 3
DECISION:	1 Appeal allowed; 2 Set aside the verdict and judgment for the defendant; 3 In lieu thereof, verdict and judgment for the plaintiff in the amount of $104,305 to take effect from 5 October 2001; 4 The respondent to pay the costs of this appeal and of the hearing at first instance.
CATCHWORDS:	Negligence - Duty of Care - Bank - Duty to employee - System of delivery of cash - Security within bank - Level of protection required - Evidence - Expert opinion - Whether outside specialist knowledge - Ultimate issue
LEGISLATION CITED:	Evidence Act 1995
CASES CITED:	State of New South Wales v Seedsman (2000) NSWCA 119 Mannall v The State of New South Wales (2001) NSWCA 327 Chomentowski v Red Garter Restaurant Pty Ltd (1970) 92 WN (NSW) 1070 Maloney v Commissioner of Railways (1978) 52 ALJR 292

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254
Tame v New South Wales (2002) 76 ALJR 1348
Greenland v Chaplin (1850) 5 Ex 243; 155 ER 104
R v GK (2001) 53 NSWLR 317
Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6) (Court's 'Allstate' Judgment No 33) (1996) 64 FCR 79
Naxakis v West General Hospital (1999) 197 CLR 269
O'Brien v Gillespie (1997) 41 NSWLR 549
Idoport Pty Ltd v National Australia Bank Ltd (2000) 50 NSWLR 640
H G v The Queen (1999) 197 CLR 414
March v E & MH Stramare Pty Ltd (1991) 171 CLR 506

PARTIES :	Peta Faucett - Appellant St George Bank Ltd - Respondent
FILE NUMBER (S):	CA 40316/02
COUNSEL:	J P Gormly SC/B G McManamey - Appellant CRR Hoeben SC/S Flannigan - Respondent
SOLICITORS:	Turner Freeman - Appellant P W Turk & Associates - Respondent

LOWER COURTJURISDICTION:	District Court
LOWER COURT FILE NUMBER(S):	1252/00 (Parramatta)
LOWER COURT JUDICIAL OFFICER :	Delaney DCJ

CA 40316/02

DC 1252/00 (Parram

MASON P

MEAGHER JA

S
HELLER JA

FAUCETT v ST GEORGE BANK LIMITED

Following an armed robbery at the bank where she worked as a teller, the appellant suffered a severe psychological reaction that affected her everyday life and her capacity to obtain and retain employment. The bank had security screens but not anti-jump screens and, during the robbery, the robber had jumped over the counter where he had held a gun to the appellant's head. The bank had recently changed its system of cash delivery so that guards no longer escorted tellers to the strong room when they delivered money to the bank.

HELD (per Sheller JA, Mason P and Meagher JA agreeing):

1. That an employer bank owes a duty to take reasonable care of its employees and should reasonably expect that armed robberies in its premises may be attempted. The scope of the bank's duty extends to taking reasonable care to protect its employees when that happens as well as taking certain steps to minimise likely harm: *Maloney v Commissioner of Railways* (1978) 52 ALJR 292 cons; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 foll; *Tame v New South Wales* (2002) 76 ALJR 1348 foll.

2. That evidence of an expert security adviser that the defendant had failed in their duty to provide a safe system of work should not have been admitted: *R v GK* (2001) 53 NSWLR 317 cons; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6) (Court's 'Allstate' Judgment No 33)* (1996) 64 FCR 79 appr; *Naxakis v West General Hospital* (1999) 197 CLR 269 cited; *O'Brien v Gillespie* (1997) 41 NSWLR 549 cited; *Idoport Pty Ltd v National Australia Bank Limited* (2000) 50 NSWLR 640 cited. The opinions he expressed could not be described as being wholly or substantially based on specialised knowledge: *HG v The Queen* (1999) 197 CLR 414 foll.

3. That the respondent's duty to its employees did not extend to installing anti-jump screens but did require, at least, that they had the protection of a guard while in possession of the cash in the bags until they could be placed in the strong room or vault.

4. That the cause of the appellant's injury was a question of fact that must be determined by applying commonsense to the facts of the case: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 foll. The respondent's system of delivery of large sums of money in cash by placing the appellant in possession of it was an attractive target for an armed robber and materially contributed to her being attacked and injured as she was.

Legislation cited:

Evidence Act

1995

(2000) NSWCA 119

(2001) NSWCA 327

(1970) 92 WN (NSW) 1070

(1978) 52 ALJR 292

(2000) 205 CLR 254

(2002) 76 ALJR 1348

(1850) 5 Ex 243; 155 ER 104

(2001) 53 NSWLR 317

(1996) 64 FCR 79

(1999) 197 CLR 269

(1997) 41 NSWLR 549

(2000) 50 NSWLR 640

(1999) 197 CLR 414

(1991) 171 CLR 506

ORDERS

1. Appeal allowed;

2. Set aside the verdict and judgment for the defendant;

3. In lieu thereof, verdict and judgment for the plaintiff in the amount of $104,305 to take effect from 5 October 2001;

4. The respondent to pay the costs of this appeal and of the hearing at first instance.

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CA 40316/02

DC 1252/00
(Parramatta)

MASON P
MEAGHER JA
SHELLER JA

Friday, 11 April 2003

FAUCETT v ST GEORGE BANK LIMITED

Judgment

1 **MASON P:** I agree with Sheller JA.

2 **MEAGHER JA:** I agree with Sheller JA.

3 **SHELLER JA**:

Introduction

The appellant, Peta Faucett, sued the respondent, St George Bank Limited, to recover damages for injuries she claimed to have suffered as the result of an incident which took place at about 9.05 am on 3 June 1998. The appellant was carrying out her duties in the employment of the respondent at its bank premises at 166 Waldron Road, Chester Hill when an armed robbery occurred in the bank premises. During the robbery the appellant was threatened with a gun. She claimed that the incident and the injuries she suffered in consequence were caused by the respondent's negligence.

4 His Honour Judge Delaney sitting at Parramatta heard the proceedings on 4 and 5 September 2001. On 5 October 2001 his Honour entered a verdict for the respondent and ordered the appellant to pay the respondent's costs. From that decision the appellant now appeals to this Court.

Reasons for judgment in the District Court

5 The respondent's utilisation of lax security methods was the gravamen of the appellant's claim that the respondent was negligent. As a result the appellant said the bank was robbed and she was put at risk. The appellant was a teller at the bank. Judge Delaney found that on 3 June 1998 the Chester Hill branch was robbed while or shortly after Brambles Security had made a cash delivery to the bank. A robber threatened the appellant with a gun to her head. She was traumatised as a consequence. She claimed that since that time she had had severe psychological reactions. This not only affected her everyday social life but also interfered with her capacity to obtain and retain employment.

6 Judge Delaney accepted that the incident had significant and serious psychological and psychiatric consequences for the appellant in the form of a depression that disabled her. He also found it more likely than not that the effects of this incident led to her being dismissed from her employment.

7 The particulars of negligence included failing to install counter-to-ceiling Perspex security screens, failing to provide a security guard for the premises and failing to heed the warning created by robberies of other financial institutions in the Chester Hill area. The appellant alleged that the security devices installed were inadequate and that the system for delivery of cash to the bank involved bags of money in cash being delivered in full view of the public to an unprotected place behind the counter and security personnel leaving the premises before the cash was secured. It was common ground that the system of delivery of money to the bank was one agreed upon by the security company and the "unions".

8 The appellant, who was born on 1 March 1964, left school at the age of 15 in 1979. After leaving school she had various forms of employment. She first married in 1986. She re-married in 1989 and for a time owned and operated a newsagency. On 17 May 1990 her first child was born. She was diagnosed with stage 3 cervical cancer and post-natal depression and referred to a psychiatrist for therapy. She was prescribed anti-depressant medication. She continued to be employed until her second child was born on 21 October 1992. She again suffered from post-natal depression and was prescribed an anti-depressant. She began work with the Advance Bank in June 1997. In February 1998, following the respondent's acquisition of the Advance Bank, the appellant's employment was transferred to the respondent.

9 The appellant gave evidence that when the branch was owned and run by Advance Bank the money in cash was delivered by Armaguard. Guards would escort the tellers with the cash into the vault and would remain until the money was locked into the vault and the vault was closed. They would then go out and get the next bag and the operation would be repeated until all the cash was delivered in the vault. After the branch was taken over by the respondent in early 1998 the system was changed. The guards from Brambles, which replaced Armaguard, handed the bags of money to the first available teller by passing it over the counter. On a couple of occasions when the new system first started the appellant said, presumably to a Brambles guard or guards, "can you take it up to the vault with us?" and they said "no, it's not part of the job".

10 On 3 June 1998 Brambles delivered three bags of money. The appellant gave the following account of what happened.

> "… I was booting the Advance Bank system up, so I come in a bit early and I got a coffee and I went downstairs, and tried to bring the computer up, and the system crashed and one of the St George girls said 'Brambles is here', it was 5 to 9. So she went and let them in, and I was on the phone, and the girl next to me was counting her money into her drawer, mine was already in, counted and done, so I was on the phone to head office to get them to help me bring the system up, and Brambles handed one bag over, so I took that and put it down on the floor, and they went out again and got another bag. And they did it a second time, and I put that on the floor, and then the third time the bank was open, 9 o'clock, and all the customers were coming in, and Brambles came in, and they gave me another bag, and I was still trying to get the system up. So they left and the money was on the floor in between my legs, and then everyone sort of started serving, and the system was still down, and we were still on hold.
> Then the girl next to me screamed and I've looked down at the end where she was looking, and there was a man up on the counter. So I just automatic – I dropped the phone and hit all the buttons, I didn't know if it was camera or pop ups, and the screens went up. We couldn't hear any – we didn't know if he was on our side or their side, because it was an L-shaped branch, and we couldn't see, we were cut off. And then he came around with one of the girls, Gail, and the gun and balaclava and started screaming 'Which one of you bitches set the screens off?' and it was just mad panic. The girl that was next to me on my right had fainted, and the girl on my left was tapping me on the shoulder, saying 'Don't tell him it was you, don't tell him it was you'. Then he told us to get on the floor, and we were on the floor pushed up against the wall, then he started screaming, 'Get up, get up, get up', but we didn't know who he was talking to. So I turned my head and he had the gun at my head and he was telling me to get up. And when I stood up, he just started waving the gun around and saying 'Put them in this bag', and he just dropped this gigantic bag out from – I don't know where it came from, out of his jacket, out of his hand, and I put the money into the big bag. Then he told me 'Get back on the floor', and then it went quiet, but we didn't hear any doors or anything, so I didn't know if he was still in the bank. And the phone rang and I was under the impression that once the pop up screens went up, it was like a back to back security, but it wasn't, it was just a customer asking for a balance on an account. I hung up from her and realised I had the phone with me, so I dialled 000 and rang the police."

11 It became apparent to the appellant that the robber had escaped up the back stairs and out the back door of the branch.

12 From February 1999 the appellant consulted Dr Ben Teoh, a psychiatrist, at Parramatta. Judge Delaney said that when Dr Teoh saw the appellant he thought her in an agitated state. She was tearful, restless, and had a depressive effect. However, Dr Teoh found that she was reactive during the interview and that her cognitive functions were intact. He prescribed anti-depressant medication. Her progress was slow. There was a marked fluctuation of mood. The appellant told the trial Judge

that she became irritable at work and lost her temper and assaulted another colleague. Because of this behaviour she was eventually dismissed. Dr Teoh thought the appellant was suffering from a major depression. He said:

> "Although she has a pre-existing history of depression, it is my opinion that the robbery has substantially contributed to the precipitation of her depression and the perpetuation of her condition over the last few months. She remains anxious and depressed. Attempts were made to return her to work through a rehabilitation program. Despite working a few days a week, she found it difficult to deal with the situation at work. Unfortunately, she became more irritable and following an argument at work, she lost her temper. She has been dismissed as a result of her behaviour – she was accused of attacking a colleague. I feel that this behaviour is related to her irritability as a result of the robbery. I do not think that Mrs Faucett is exaggerating her symptoms or making any attempt to perpetuate her condition. She comes across as being genuine and reliable in her complaints and expression of her distress.

13 In another report of 26 April 2001 Dr Teoh said that the appellant had suffered considerable psychological distress with severe depression after the robbery and that her family had to suffer disruption and emotional distress as a result of her condition. She had gradually improved to the point where he thought that she was nearly in complete remission of her depressive symptoms, although she remained fragile. Judge Delaney accepted this opinion.

14 Judge Delaney held that the appellant's claim was one permissible in accordance with what this Court has said about an employer's liability for an employee's injury in the form of mental illness in *State of New South Wales v Seedsman* (2000) NSWCA 119 and *Mannall v The State of New South Wales* (2001) NSWCA 327. He thought there was no doubt that the respondent had a non-delegable duty to institute, maintain and enforce a safe system of work to avoid the foreseeable risk of injury. *C homentowski v Red Garter Restaurant Pty Limited* (1970) 92 WN (NSW) 1070 was referred to. In that case, the Court said that, even though the risk of assault could not be eliminated altogether, it was within the duty of the defendant in that case to take any steps that were reasonably available to reduce it. When such steps were not taken there was a causal connection between that failure and the injury suffered. A proposition that the actions of a third party were a *novus actus interveniens* was rejected (1075, 1083 and 1086). If a risk is reasonably foreseeable, immunity in the past holds no promise of immunity from foreseeable risk in the future; 1073.

15 The appellant relied on the evidence of Mr Jennings, a licensed security consultant. Mr Jennings prepared a report dated 11 April 2001. Under the heading "Trends in Recorded Crime", Mr Jennings quoted published data said to show trends in robbery classifications over the calendar years 1995 to 1999. In 4.2, part of this data was described as "Total Armed Robberies" and based on it Mr Jennings expressed the opinion that clearly there had been over a given period a significant increased in armed robberies in New South Wales. Further, he said that the Bankstown local area, which included Chester Hill, had the seventh highest robbery rate of the 197 areas examined. "Chester Hill branch was in 1998 … in a very high risk area indeed for robberies".

16 Under the heading "Opinion", Mr Jennings said, amongst other things:

> "10.1 The Defendant was, in my opinion, failing in their duty to provide a safe system of work when they permitted a publicly observable cash delivery system to be instituted, which had large cash deposits from armoured cars deposited on the teller's counter. This place of deposit is at the extreme opposite end of the bank to the strong room where that cash has to be secured placed an enormous additional risk upon the tellers at that end of the counter. The deposits increased the personal injury risk factors upon this Plaintiff and any other staff so designated, to a level wholly incompatible to reasonably acceptable security and safety system, by 1998 standards.
> 10.2 Failing to provide a security system that was commensurate to the obvious risks of robbery in such a high risk area, in that providing a pop-up screen without the provision of anti-jump screens, is an open invitation for criminals to jump the counter before the screen is activated. If they could do so, as a great many did in the 90's, then the effect was having a very dangerous armed person effectively sealed behind the pop-up screen with the staff. Even though the offender could still escape via the staff door, this theoretically gave the offender a 'closed target' where all staff were under his control, the psychological effect of which upon those staff, is far greater than if the staff can at least see the public area and what is happening out there. In such a high risk area a full length fixed screen (in addition to the pop-up screen), was absolutely essential to achieve any reasonably acceptable level of security for the staff."

After the hold up, anti-jump screens were fitted to the respondent's Chester Hill branch.

17 Mr Jennings was cross-examined about an earlier report of 17 March 1999 that he had prepared for the respondent and evidence he had given in the case of *Nosti v St George Bank Limited*.

18 In that earlier report Mr Jennings had said:

> "8e These 'anti-jump' screens are the most obtrusive piece of security equipment in common use at banks, as it is seen as a screening of the communications across the counter and removes any aura of friendly services that the bank may be promoting, in its public relations/marketing programmes. Its sole use in a security context is to prevent offenders from vaulting the counter into the teller area and as such has a very important role to play in bank security. However, it is a measure which is commonly only recommended where the full threat assessment has indicated a level of risk which demands such precautions."

19 Judge Delaney accepted the respondent's counsel's submission that Mr Jennings had not established that anti-jump screens were required for the respondent's Chester Hill branch before the robbery on 3 June 1998. His Honour said that cross-examination demonstrated that Mr Jennings had inappropriately used statistics to come to this conclusion. When asked about the basis on which he compiled his data, his reliance on trends of recorded crime in data outlined in para 4.2 of his report was held to be erroneous. He had included figures for all robberies and did not confine himself to

the specifically relevant category of robbery with firearms. The breakdown figures for Bankstown were not included. Shown up-to-date figures that indicated a decrease in certain categories, Mr Jennings had to concede, so his Honour said, that he had not accurately and adequately explained his reasons for his conclusions. The trial Judge found that Mr Jennings's assertion in para 4.4 of his report that it was quite reasonable to assume that by any assessment that the area of the respondent's Chester Hill branch was in 1998, as then, in a very high-risk area indeed for robberies was unsupported. His Honour rejected the contention that on any analysis of his evidence the subject branch was in a high-risk area. According to the trial Judge much of Mr Jennings's expert evidence was unsubstantiated.

20 Judge Delaney said that the documentation tendered showed that the delivery of money to the branch was not within the control of the respondent. It was the subject of an agreement between the Reserve Bank and Brambles. The system of work was imposed upon the respondent.

21 Judge Delaney accepted the appellant's evidence that it was the action of the robber with the firearm that caused her to be particularly distressed and concerned. It was the gun and the threat of immediate death that was the theme in her nightmares. The respondent's counsel submitted that the installation of anti-jump screens would not have altered the outcome of the robbery. According to the trial Judge the real question in the case was whether or not it was reasonable in the circumstances to provide anti-jump screens and the additional security Mr Jennings suggested when anti-robbery measures existed. His Honour observed that to say in those circumstances that these measures were inappropriate or insufficient was all very well with hindsight. His Honour found that in all the circumstances it was not "appropriate" for the screens to be installed, although they were available. It was not required that the respondent should install them. Judge Delaney concluded there was no breach by the respondent of its duty of care. The respondent was not, in all the circumstances, required to undertake the additional course of action suggested by the appellant.

22 In case he was wrong the trial Judge assessed damages as follows:

Non-economic loss, 30% of a most extreme case $68,505

Past economic loss to the date of trial
as a loss of opportunity $10,000

For the future $25,000

Past medical treatment $800

Total $104,305

Appellant's submissions

23 At trial the appellant contended that the respondent was in breach of its duty of care in two respects. The first arose from the system by which the bags of money were delivered to a teller in the public area of the bank. The appellant contended that if the monies had been delivered to the vault there would have been a decreased likelihood that a robbery would have occurred. The appellant submitted that his Honour's conclusion that the delivery of the money was not within the control of the respondent was not supported by the evidence and was in fact contrary to the evidence before him. Section 4.1.4 of the document issued by the Reserve Bank of Australia and called

“Centralised Cash System Facilities for Banks”, the only evidence of any arrangement between the respondent and the Reserve Bank, provided that cash would be handed over to two tellers, one of whom was the authorised officer to sign for it. The document did not stipulate the place within the bank where the money was to be handed over. Mark Hunt, the Executive Manager Security and Investigation of the respondent, conceded that the respondent determined where within the bank the handover of the money occurred and that it would be a simple matter for the respondent to require the handover to take place within the vault as had previously been the case when Armaguard was responsible for the delivery of money. As the result of this erroneous finding of fact, Judge Delaney did not determine whether the system adopted for delivery of money constituted a relevant breach of the respondent’s duty of care to the appellant.

24 Mr Jennings gave an opinion (para 10.1 of his report) that the system of handing over cash delivery was incompatible with reasonable acceptable security and safety systems by 1998 standards. For reasons that will appear, this evidence was inadmissible and of no weight though not challenged in cross-examination. No evidence was called to the contrary. In any event the appellant submitted that it was commonsense that the placement of large sums of money in an unsecured area by means that were clearly visible to the public was likely to tempt any would-be robber and thereby increase the prospect of a hold-up occurring. It was no co-incidence that the robbery occurred in the time and manner that it did. On this basis alone, it was said there should have been a verdict for the appellant.

25 As to the second respect in which the appellant alleged negligence, her case was based upon the absence of anti-jump screens. The appellant acknowledged Mr Jennings’s concession that the armed robbery figures in para 4.2 of his report were in fact the figures for all robberies. Also the comparative statistics for other areas were based on total robberies. This was explained by the necessity to do the comparison by reference to total robberies as the figures for armed robberies alone were not available.

26 According to the appellant the figures that were available for armed robberies in the Bankstown area showed that robberies with a firearm for 1995 and 1996 had totalled 39 and 38 respectively. In 1997, the year immediately before the hold up, that number had increased to 76, a 100 per cent increase on the previous year. It was submitted that if the respondent had carried out a proper risk assessment in the months immediately before the hold up one of the things it would have had to consider was that the Chester Hill branch was located in an area in which armed robberies were increasing dramatically. It was commonsense that consideration of that alone would have demanded the installation of higher security measures to protect staff. Those measures would have included anti-jump screens. It was also pointed out that the respondent had taken over the bank only in early 1998 and should have carried out a risk assessment at that time. It was not suggested that the figures quoted by Mr Jennings for all robberies were incorrect. When that data was considered together with the figure showing a rapid increase in armed robberies in the Bankstown area it was clear that Judge Delaney’s conclusion that Mr Jennings’s assertion at para 4.4 of the report was unsupported by examination of the relevant data was incorrect.

27 In any event, Mr Jennings’s conclusion was that the Chester Hill branch was in 1998 a very high-risk area indeed for robberies. This was based on the data for total robberies and not the more limited category of armed robberies. Mr Jennings did not express an opinion limited by relying on the armed robbery figures.

28 Quite separately the trial Judge was required to consider whether the respondent was in breach of its duty of care in failing to install anti-jump screens. It was submitted that Judge Delaney failed to consider whether the risk of injury was foreseeable. The risk of a hold up including the possibility of an armed robber jumping the counter was something that was foreseeable. Its foreseeability was recognised by the respondent in its installation of pop up screens. The trial Judge, it was said, did not make any analysis of the data involving robberies in the area. He did not consider the fact that anti-jump screens were subsequently installed presumably after an appropriate risk assessment. Although the respondent called Mr Hunt, no attempt was made to suggest that there had been any change of circumstances that had caused a change in risk assessment. Nor was any suggestion made of any form of risk assessment being carried out before June 1998. Mr Hunt conceded that the installation of anti-jump screens would have acted as a deterrent and reduced the risk to those inside. There was no physical impediment to their installation or any suggestion that they involved a prohibitive cost.

29 In the circumstances Judge Delaney should have considered each of these matters to determine whether there had been a relevant breach of its duty of care. If they had been properly considered it was submitted that the trial Judge would have concluded there was such a breach and the appellant was entitled to a verdict.

Written submissions ordered at trial

30 When the evidence finished, the trial Judge ordered the parties to provide written submissions. Both parties were to provide them by 14 September 2001. The Judge specifically ruled out a process by which one party filed written submissions and the other party had an opportunity to respond. No order was made for service. By making such orders it was said that the appellant was denied the opportunity available during oral submissions to hear the defendant's case and to be able to respond to any matters that took the appellant by surprise. In the respondent's written submissions the assertion was made that Mr Jennings's conclusions were inconsistent with the recorded crime data. Because of the trial Judge's order the appellant was denied the opportunity of showing that the respondent's submissions were inconsistent with the evidence. It was submitted that the impact of this error was shown by the fact that the trial Judge adopted the respondent's submissions. On any proper examination of the evidence, his Honour should have concluded that there had been a relevant breach of duty of care by the respondent.

31 During the hearing of the appeal the appellant emphasised that neither party was ordered to serve its written submissions on the other. The appellant took no steps to obtain the respondent's submissions and was unaware of what they contained until after Judge Delaney gave judgment. It is unusual if written submissions are ordered for the parties not, of their own volition, to exchange them. Certainly it is unusual for a party not to approach the solicitors and ask for the other party's submissions to be made available. While it is better practice that a judge formally order that the submissions not only be filed but exchanged by a particular date, I am not impressed by the argument of unfairness by a party who did not complain when not served with the other's submissions but does complain after judgment is given. As will be seen, nothing in this appeal turns upon the fact that the written submissions were not exchanged.

32 The appellant claimed that a verdict should be entered for it in the amount of damages assessed by the trial Judge.

Respondent's submissions

33 The respondent accepted the appellant's assertion that the agreement dealing with the procedure for the handover of money by Brambles to the respondent did not provide for the location within the bank where the money was to be handed over.

34 The respondent submitted that the appellant had not established that the respondent could have altered the delivery of money. Her evidence was that the delivery could occur at any time of the day and that requests to have delivery of money put into the vault were refused as being "not part of the job" of Brambles.

35 The appellant relied upon Mr Jennings's report to establish that the installation of anti-jump screens in June 1998 was a reasonable step for the respondent to have undertaken in the Chester Hill branch. The respondent relied upon the earlier report in the proceedings of *Nosti v St George Bank Limited* particularly where Mr Jennings said anti-jump screens were only fitted "where a threat assessment shows a level of risk which necessitates them".

36 The trial Judge accepted that Mr Jennings had not established that anti-jump screens were required in the respondent's Chester Hill branch before the robbery of 3 June 1998. The branch was equipped with a multitude of security devices appropriate to its level of risk. Mr Jennings failed to establish that the installation of anti-jump screens was a reasonable step for the following reasons:

> (a) He did not conduct a full threat assessment (required in order to establish the security measures to be implemented) in his report.
>
> (b) He did not provide acceptable evidence that the subject branch attracted a high level of risk that would necessitate a higher level of security than that already provided.
>
> (c) His reliance on trends and recorded crime data was erroneous. It included figures for all robberies and did not confine itself to the specific relevant category of "robbery with a firearm". The break down for figures was not included. It was apparent from such break downs that rather than indicating an increase of 88.6 per cent there was a decrease in instances of robbery with a firearm. Consequently his assertion at para 4.4 of his report that "from this data it is quite reasonable to assume that by any assessment the area of the respondent's Chester Hill branch was in 1998 as now in a very high risk area indeed for a robbery" was unsupported by an examination of the relevant evidence. His speculation was unsubstantiated by corroborative evidence. It was submitted that the appellant's reliance upon this evidence resulted in her failure to establish that the installation of anti-jump screens was a step reasonably required by the location of the Chester Hill branch in an area where the level of risk warranted such a step.

37 As to the provision of written submissions, the respondent pointed out that no objections were raised to his Honour about what was proposed.

Conclusion

38 To recover against the respondent for negligence, the appellant needed to demonstrate that the respondent owed her a duty of care and that the respondent's breach of that duty of care caused the injury the appellant complained of.

39 The respondent accepted that as the appellant's employer it owed the appellant a duty of care. It is necessary to determine the scope of that duty. The respondent's duty was to take reasonable care. In *Maloney v Commissioner of Railways* (1978) 52 ALJR 292 Barwick CJ said:

> "It is easy to overlook the all important emphasis upon the word 'reasonable' in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect."

40 In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, a case about the responsibility of a shopping centre owner for injury to the employee of a tenant as the result of an attack in a car park on the tenant at night while walking to his car, Hayne J said at 292 [110]:

> "Some emphasis was given in oral argument to the proposition that an employer may owe an employee a duty to take reasonable care to prevent the employee being robbed. If that is so, however, it is because the employer can prevent the employee going in harm's way; compare *Chomentowski v Red Garter Restaurant Pty Ltd* . The employer has the capacity to control the situation by controlling the employee and the system of work that is followed. The duty which the employer breaks in such a case is not a duty to control the conduct of others. It is a duty to provide a safe system of work and ensure that reasonable care is taken *Kondis v State Transport Authority* (1984) 154 CLR 672."

41 Reasonable foreseeability may be relevant to questions of the existence and scope of a duty of care, breach of duty, or remoteness of damage; see per Gleeson CJ in *Tame v New South Wales* (2002) 76 ALJR 1348 at 1352 [12] . The Chief Justice referred to what Pollock CB said in *Greenland v Chaplin* (1850) 5 Ex 243 at 248; 155 ER 104 at 106. A person "is not … expected to anticipate and guard against that which no reasonable man would expect to occur."

42 I have no difficulty in concluding that an employer bank owes a duty to take reasonable care of its employees and should reasonably expect, unfortunately, that armed bank robberies in its premises may, from time to time, be attempted. The scope of the bank's duty extends to taking reasonable care to protect its employees when that happens. The respondent's business of banking in its Chester Hill branch involved the free entry and egress from the bank chamber of members of the public during business hours and across the counter service to members of the public.

43 In *Tame* at 1364 McHugh J said that many of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability. But courts have exacerbated the impact of this weakening of the foreseeability standard by treating foreseeability and preventability as independent elements. Courts tend to ask whether the risk of damage was reasonably foreseeable and, if so, whether it was reasonably preventable. His Honour pointed out that, if this is done in applying what Mason J said in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48 :

> "An affirmative answer to the question whether damage was reasonably foreseeable is usually a near certainty. And a plaintiff usually has little trouble in showing that the risk was reasonably preventable and receiving an affirmative answer to the second question. …
> Once these two questions are answered favourably to the plaintiff, there is a slide – virtually automatic – into a finding of negligence." (at 1365 [99])

44 The ultimate issue remains of what, in the circumstances of the relationship of employer and employee between the respondent and the appellant, the respondent's duty of care to the appellant required it to do. In this case did the respondent's failure to reduce the risk of injury in an armed robbery show a want of reasonable care for the safety of the appellant?

Non-installation of jump screens

45 The difficulty with the appellant's case stemmed from its reliance upon the evidence of Mr Jennings. As a security adviser Mr Jennings was competent to advise a bank upon ways of securing a bank branch and its contents. He could no doubt advise from his experience upon the protection provided by particular security devices. He could advise upon the capacity of the counter-to-ceiling screens to prevent robbers vaulting the counters, even though that might be thought to be a matter of common sense. There may be other relevant matters that he could give evidence about though he did not in the present case. One would be the cost of installing the screens and the disadvantages, if any, in terms of convenience, safety, and customer relations of doing so. His evidence on such matters should be taken into account when the Court considers whether the respondent provided a safe system of work and took reasonable care for the appellant. But Mr Jennings cannot assume the task of the Court by opining upon whether what was done was less than that required to satisfy the test of what is reasonable care for the respondent's employees and in particular the appellant.

46 This distinction can be illustrated by a simple example. If there was stored in a building a priceless work of art coveted by determined and dishonest people throughout the world, no doubt even more elaborate security arrangements than those suggested here could be provided. Their installation would make access to the place of storage far more difficult and therefore the chances of unlawful intrusion lower. But the respondent was conducting a banking business and Mr Jennings's evidence in *Nosti v St George Bank Limited* was that the relationship between the respondent and its customers can be affected by the installation of counter-to-ceiling screens.

47 The appellant called no evidence about the practice or experience of banks in installing counter-to-ceiling screens and whether their installation, when weighed against their cost and inconvenience, could be regarded as something essential or necessary for the safety of the bank's employees. Mr Hunt gave evidence but was not cross-examined about this.

Following paragraph cited by:

Harding v Sutton (No 2) (29 November 2021) (Richards J)

> 60. Third, it is axiomatic that an expert witness is not an advocate for a party. [36] They may give evidence of opinion that is probative of a fact in issue, where the opinion is based on the witness's specialised knowledge. [37] Their role is not to argue the case of the party who has retained them to give evidence in the

proceeding. Phrasing questions for expert witnesses in a way that seeks an opinion on the ultimate legal issue for decision may invite tendentious opinion that is both unhelpful and irrelevant. [38]

via

[38] *Allstate* , 83 ; see also *Faucett v St George Bank Ltd* [2003] NSWCA 43, [48] .

Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20) (11 February 2019) (Elliott J)

50. The Cargill Parties have made 34 specific objections in respect of the French Report. Of these objections, 4 have been conceded or partially conceded by the Viterra Parties.[61] The remaining specific objections are:

(1) Objection to the second sentence of paragraph 10 on the ground that no basis for the opinion is identified. Paragraph 10 relevantly reads:

> [B]ased on my experience in the malting industry the industry recognises that the contribution to brewery performance of a particular barley variety in a malt shipment is of less importance than the malt analytical analysis.

The Viterra Parties argued that this opinion is identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. This paragraph contains direct observations based on the professional experience and understanding gained by French as a result of his employment history.

(2) Objection to the final sentence of paragraph 14(b) on the basis that it constitutes speculation, as opposed to an opinion based on specialised knowledge. Paragraph 13 states that it was not industry practice to use non-malting varieties such as Hindmarsh barley, subject to certain exceptions. Paragraph 14(b) then states:

> I have not viewed all of the [Joe White] customer specifications during the relevant period, but it is possible that there are malt sales contracts in place at [Joe White] that would allow a small inclusion of nonmalting approved malting varieties …

The Viterra Parties argued that French provides this opinion, on the types of contractual terms sometimes agreed between malthouses and brewers, based on his professional experience.

This objection is upheld. The opinion is not a general observation as to contractual terms commonly agreed between maltsters and brewers. Rather, this sentence constitutes a specific hypothesis concerning Joe White's customer contracts and is entirely speculative.

(3) Objection to paragraph 16 on the basis that it constitutes speculation as opposed to an opinion based on specialised knowledge.[62] The second

sentence of this paragraph was conceded by the Viterra Parties. The remainder of paragraph 16 reads:

> It is noted that in the [Joe White] barley purchasing contracts 2012/13 … there are two contracts for 9,000 [metric tonnes] and 1,500 [metric tonnes] of Hindmarsh and two contracts for 13,000 and 4,500 [metric tonnes] of Malt 1 + [Hindmarsh] … Barley purchases referenced in the contracts totalled 502,356 [metric tonnes] of barley. The total Hindmarsh contracted for 2012/2013 would represent between 2.0 [percent] to 5.8 [percent] of the total barley purchased. This represents a low percentage of the total purchase, which suggests that it could have been purchased for use and/or blending in a compliant manner.

The Viterra Parties argued that this paragraph does not contain opinion evidence, but rather evidence to which French has had regard when providing his opinions.

This objection is upheld. The proposed evidence consists of comments and inferences able to be drawn readily from particular documents, rather than opinions based on specialised knowledge. In respect of the final sentence from the words "which suggests", that part of the sentence lacks sufficient reasoning for the basis of the opinion expressed to be properly understood and is speculative. Further, the evidence is not supportive of, or materially relevant to, the opinion ultimately expressed,[63] namely that, subject to any agreement to the contrary, the use of Hindmarsh barley would not be consistent with industry practice.

(4) Objection to the first sentence of paragraph 21 on the basis that French does not have specialised knowledge in respect of "the industry worldwide" and that the opinion is not wholly or substantially based on specialised knowledge. The first sentence of paragraph 21 reads:

> I was aware [gibberellic acid] is at times used in the industry worldwide on some customer contracts that stipulate that [gibberellic acid] not be used.

The Viterra Parties argued that this sentence does not contain opinion evidence, but rather direct evidence of French based on his professional experience and observations. Further, the Viterra Parties contended that the term "worldwide" should be given its natural meaning.

This objection is rejected. The French Report demonstrates that French possesses specialised knowledge which extends to an awareness of practices within the malting industry generally, including the use of gibberellic acid.

(5) Objection to paragraph 28 on the basis that it constitutes a comment on a factual matter rather than an opinion based wholly or substantially on specialised knowledge. Paragraph 28 reads:

> [Joe White] personnel appear to have been well aware of [certain blending factors] and it was addressed in the Malt Blend procedure [at Joe White], which directed Production managers that: "attention should be paid to the impact of individual batch quality and all blend parameters".

The Viterra Parties explained that this paragraph contains the reasoning for some of the opinions expressed in the French Report and was not sought to be tendered as proof of the underlying facts.

Based on this clarification by the Viterra Parties, the objection is rejected but the evidence will be the subject of a ruling under s 136 that it will not be admitted to prove the truth of the asserted fact and its use will be limited accordingly.

(6) Objection to paragraph 29 on the ground that no basis for the opinion is identified. Paragraph 29 reads:

> Based on my experience in the malting industry I believe [Joe White] followed practices and used judgment based on factors I would expect an experienced competent person in the industry would follow.

The Viterra Parties argued that this opinion is identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. The opinion is based on the professional experience and understanding gained by French as a result of his employment history. Further, this opinion is preceded in the French Report by details of the practices alleged to have been adopted by Joe White and factors considered relevant in the industry generally when developing a malt blend.[64]

(7) Objection to the first sentence of paragraph 30 on the basis that it constitutes a comment on a factual matter rather than an opinion based wholly or substantially on specialised knowledge. The first sentence of paragraph 30 relevantly reads:

> Consistent with the above, formal procedures were incorporated into the Malt Blend Parameters Procedures [at Joe White] … to provide that more senior personnel *who were aware of [the factors considered by participants in the commercial malting industry when developing a malt blend within specification]* were part of the decision making process.[65]
>
> (Emphasis added.)

The Viterra Parties argued that this paragraph contains the reasoning for some of the opinions expressed in the French Report and was not sought to be tendered as proof of the underlying facts.

This objection is rejected. This sentence contains background information in respect of the procedures reviewed by French for the purpose of expressing his

opinions. However, it will be the subject of a limitation ruling under s 136 as set out in subparagraph (5) above, so that it cannot be used as proof of the knowledge of the "more senior personnel" or evidence of what in fact comprised Joe White's "procedures".

(8) Objection to paragraph 31 on the basis that no path of reasoning is demonstrated by which the conclusion expressed follows from observed or assumed facts so as to establish that the opinion is wholly or substantially based on specialised knowledge. Paragraph 31 reads:

> Based on my experience in the malting industry … I am of the opinion that the blending procedures used by [Joe White], *including* those documented in the Malt Blend Parameters procedure [at Joe White] are similar to *practices adopted by most malthouses in the industry* prior to August 4, 2013.
>
> (Emphasis added.)

The Viterra Parties argued that this paragraph contains the reasoning for the opinion expressed.

The objection is largely rejected. French is able to say, based on his specialised knowledge, whether the procedures used by Joe White as documented are similar to practices adopted by most participants in the commercial malting industry at the relevant times. However, insofar as the paragraph refers to blending procedures other than those documented, it is entirely unclear as to what it is that the evidence is encompassing. Accordingly, to that extent the evidence is not admissible under s 79 and, even if it were, I would exclude it under s 135 . The French Report will need to be amended accordingly to confine this evidence to Joe White's written practices and policies considered by French.

(9) Objection to the first sentence of paragraph 38 on the ground that no basis is stated for the expression of an opinion as to "industry practice" and no path of reasoning is expressed so as to establish that the opinion is wholly or substantially based on specialised knowledge. The first sentence of paragraph 38 reads:

> It is also industry practice to adjust results based on the variability of testing and sampling.

The Viterra Parties argued that, to the extent it contains opinion, this sentence is based on French's specialised experience.

This objection is rejected. French has specialised knowledge of practices within the commercial malting industry generally. The evidence given in this sentence purports to be based on that knowledge.

(10) Objection to the remainder of paragraph 38 on the basis that it constitutes a comment on factual matters rather than an opinion based wholly or substantially on specialised knowledge. Paragraph 38 relevantly reads:

[Joe White] staff appear aware of [factors that must be taken into consideration when making adjustments to malt analysis], some of which were partly documented in the Viterra Malt Certificate of Analysis Generation Procedure … This was explained in detail by [Douglas Stewart][66] in his witness statement … There were formal procedures which provided that qualified personnel who were aware of all the relevant factors could make appropriate decisions on adjusting certificates of analysis [reference was made to evidence of Stewart and another witness who has given evidence at trial] …. This is also documented in the Viterra Malt Analysis Generation Procedure where it states for [the] International Customers section:

> results that appear out of specification on the [certificate of analysis] may be adjusted by the Technical Services Manager (or their nominated proxy). This adjustment must be based on the associated analytical error for that test parameter as defined in the [Malt Analytes Proficiency Testing Scheme] program and may be made up to two Standard Deviations, where required. These changes will be approved by the Technical Services Manager and General Manager Technical when signing off the Certificates of Analysis

and further states in the Domestic Customer[s] section:

> These changes will be approved by the Plant Manager when signing off the Certificates of Analysis …
>
> - The final shipment results must be within two standard deviations of the pre-shipment result, highlighting the importance of accurate pre-shipment data. Pre-shipment data should be based on actual blend data wherever possible.
>
> - Results that still remain out of specification after a maximum two standard deviations adjustment can only be altered further and signed off for progressing of the shipment by the consensus of two or more General Managers, or the shipment may be recalled.

If the investigation indicated the malt did not meet customer requirements and would cause a brewing problem, a decision would be made on recall. This is documented in the Viterra Malt Certificate of Analysis procedure …

The Viterra Parties argued that the inclusion of these comments was appropriate as they contain the reasoning for some of the opinions expressed by French.

This objection is rejected. This passage contains background information and inferences he has drawn in respect of the procedures reviewed by French for the purpose of expressing his opinions. That said, to the extent French purports to express a view of the awareness of Joe White staff and the proper construction of the procedure referred to, that evidence will be the subject of a ruling under s 136 , limiting its use as set out in subparagraph (7) above.

(11) Objection to paragraph 40 on the ground that no basis is stated for the expression of an opinion as to the behaviour of “the malting industry” or “many companies” in the industry in relation to the “adjustment” of analytical

results. Further, it was argued that no path of reasoning is expressed so as to establish that the opinion is wholly or substantially based on specialised knowledge. Paragraph 40 reads:

> Based on my experience in *the malting industry* I believe it would be more common to adjust analytical results based on two standard deviations based on the plant laboratory of the company laboratory shipping the malt. In my experience there are occasions when results are adjusted that were outside the two standard deviations after appropriate consideration of the [factors that must be taken into consideration when making adjustments to malt analysis]. *Many companies* would utilise a similar practice either based on an objective measure or based on experience.
>
> (Emphasis added.)

The Viterra Parties argued that this opinion is identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. French has specialised knowledge of practices within the malting industry generally, including the adjustment of the results of laboratory testing of malt. To the extent opinions are expressed in this passage, they are based on that knowledge. Despite the word "many" lacking precision, it is distinguishable from "other",[67] which is completely unclear as to prevalence. Although this lack of precision affects the weight which might be given to the evidence in the last sentence, in my view "many" is sufficiently descriptive of the industry to be admissible.

(12) Objection to the fifth sentence of paragraph 43 on the basis that French is purporting to give evidence about facts that are not identified and cannot be tested. The Cargill Parties also argued that the relevance of the sentence was not apparent. Paragraph 43 refers to a review undertaken by French of data referred to in the witness statement of Liam Ryan.[68] The fifth sentence relevantly reads:

> For the purpose of my review I sorted the data for one customer, Sumitomo Asahi, because I am familiar with the customer and am aware of what specifications to which their brewery process is sensitive.

The Viterra Parties argued that French has direct knowledge as to the sensitivities of Asahi's brewery in respect of malt specifications. It was submitted that this sentence provides the basis for French deciding to review Asahi's data, rather than that of another customer.

Further, the Viterra Parties generally disputed the contention that several of the opinions in the French Report could not be tested. The Viterra Parties pointed to the fact that a joint expert report had been prepared by French and Hertrich on 7 June 2018 ("the Joint Report"), and that the experts had been able to explore and test the reasoning behind their respective opinions without any apparent difficulty.

This objection is rejected. Although the manner in which the data was "sorted" is not clear on the face of the French Report and the specifications to which the specific customer is apparently sensitive are not disclosed, the evidence appears to do no more than explain why French chose to focus on a particular set of data in the large spreadsheet he reviewed. Further, this rejection of the objection is in the context where there was no specific objection to the remainder of paragraph 43, which appears to set out the information upon which French has relied.

(13) Objection to paragraphs 44, 45 and 46 on the basis that no path of reasoning is expressed so as to establish that the opinions are wholly or substantially based on specialised knowledge. Further, in respect of paragraph 44, it was argued that French has not demonstrated relevant specialised knowledge in respect of "the reporting methodologies" of "other participants in the malt industry". Furthermore, it was argued that French failed to state the basis for the expression of an opinion as to the practices adopted by such participants or the conclusion that such practices are similar to those adopted by Joe White. Paragraph 44 reads:

> Based on my *preliminary review*, of *a part of the data* obtained from the [certificate of analysis] spreadsheet and based on my experience in the malting industry, reviewing *malt analytical data* and *shipment malt analytical trend data*, I am of the opinion that *the reporting methodology* used by [Joe White] was similar to the practice of *other participants* in the malt industry.
>
> (Emphasis added.)

The objection to this paragraph is upheld. The path of reasoning is not disclosed in a number of respects. Precisely what the "preliminary review" entailed is not disclosed. Further, which "part of the data" was considered is unclear. Even if it is assumed those phrases relate to what is contained in paragraph 43 of the French Report (which is far from clear), precisely what malt analytical data and shipment malt analytical trend data was reviewed is not apparent.[69] Finally, the reference to "other participants" is too vague. There is no indication as to whether such participants represent a significant or insignificant sector of the malt industry. Also for these reasons, if the evidence were admissible by reason of the exception in s 79 , I would have excluded it under s 135 .

(14) In respect of paragraphs 45 and 46 it was further argued by the Cargill Parties that French has not demonstrated relevant specialised knowledge in respect of the practices followed or adopted "by most malthouses". Paragraphs 45 and 46 read:

> I am *therefore* of the opinion that the policies, procedures and practices in place at [Joe White] with respect to Certificate of Analysis generation were similar to practices followed *by most malthouses* prior to August 4, 2013.[70]

> *Therefore*, based on the information I have reviewed, I am of the opinion that the Viterra Policies and Practices were similar overall to practices adopted *by most malthouses* prior to August 4, 2013.
>
> (Emphasis added.)

The Viterra Parties argued that the opinions expressed in these paragraphs are identified as being based on what French has directly experienced and observed while working in the malting industry.

The objections to each of these paragraphs are upheld. Although I do not accept the Cargill Parties' submission concerning French's professional experience and understanding, there is no proper statement of reasoning for the opinions expressed. Further, and in any event, both paragraphs are premised on what was stated in paragraph 44.[71] The disallowance of paragraph 44 necessarily has the cascading effect of undermining the admissibility of paragraphs 45 and 46.

(15) Objection to paragraphs 47 to 61 on the basis that the opinions contained in those paragraphs are addressed to the state of knowledge of "participants in the malt industry". It was argued that French has not demonstrated specialised knowledge of the behaviour, practices or knowledge of participants in the malting industry generally. Further, it was submitted the question of what maltsters knew or understood was a factual matter, and not evidence that could be admissible under s 79 as an opinion based on specialised knowledge. Furthermore, it was argued that no path of reasoning is expressed so as to establish that any opinion is wholly or substantially based on specialised knowledge.

The Viterra Parties argued that the opinions expressed in these paragraphs are identified as being based on what French has directly experienced and observed while working in the malting industry.

It is not necessary to set out these paragraphs for the purpose of this general objection. For reasons stated,[72] I reject the submission that French does not have the necessary experience to give evidence about the commercial malting industry. Further, insofar as these paragraphs contain statements as to common practice or knowledge in the industry, I agree with the Cargill Parties' submission that such statements are factual evidence and not opinions that fall for consideration under s 79 .[73] Accordingly, this general objection is rejected insofar as it relates to the factual evidence. As to the opinion evidence, this will be dealt with based on the specific objections addressed below.

To the extent these paragraphs are concerned with "Cargill's" position, there is significant overlap between this objection and the further specific objections addressed below.[74] As to French's opinions as to Cargill, Inc's likely awareness of the Industry Practices, the objection is upheld. Such assertions are not opinions based on specialised knowledge, but are bald conclusions

about the state of mind of a specific corporation. To be clear, a suitably qualified expert could properly give evidence concerning the nature and extent of an industry practice or industry practices from which the court might draw an inference about the knowledge of a particular participant in the industry. Further, an opinion as to the likelihood of knowledge in the industry generally *may* be based, wholly or substantially, on the specialised knowledge as to the prevalence of a particular practice or particular practices.[75] However, putting aside cases where an expert is able to give direct evidence of a party having actual knowledge of the practice in question, it is no part of an industry expert's role to make assertions based on general specialised knowledge concerning the likelihood or otherwise of the actual knowledge of a party to the proceeding of the practice or practices in question.[76]

(16) Objection to paragraph 48(a) on the basis that it seeks to prove the facts asserted and thereby contravenes the prohibition on hearsay evidence. It was argued that the exception for evidence that is relevant for a nonhearsay purpose does not apply because the opinion expressed is not wholly or substantially based on specialised knowledge. Paragraph 48 relevantly reads:

> Based on my experience in the malting industry, most participants in the industry would likely be aware of [the practice of using nonapproved malting varieties to produce malt]. For example:
>
> (a) Asahi Breweries of Japan in about 2010/2011, initiated the testing of lots of malt shipped to them by their suppliers for varietal purity inclusion rates. They take in malt from a significant number of maltsters around the world from Australia, Europe and Canada. They take in malt from more than one supplier from each region. This allows them to objectively compare suppliers' analysis and malt brewery performance from each supplier from a given geography and investigate differences which might arise after taking into account known differences of malthouse or barley supply within a region. Laura McIntyre's witness statement at [79] references that Asahi analysed and determined that Gairdner [which is a variety of barley] had not been used on the blend …

The Viterra Parties argued that any hearsay evidence contained in this paragraph was relevant for a non-hearsay purpose, being part of the reasoning upon which French has based his opinions.

The objection is rejected. On the face of his report, French is providing an example based on his direct observations and knowledge. Even if that conclusion is incorrect, the hearsay rule does not operate to exclude the evidence by reason of s 60 and the relevance of a purpose other than the asserted fact. However, the last sentence does not fall into this category, it being a comment on evidence given by a witness at trial. That sentence will be subject to a ruling under s 136 limiting its use so that the comment is not proof of the asserted fact.

(17) Objection to paragraph 48(b) on the same basis as paragraph 48(a). It was further argued that the second sentence constitutes speculation as to the reasons for the actions of a major importer. Paragraph 48(b) reads:

> A major importer of a significant quantity of malt into Africa, mostly from the [European Union], for brewing has variety specifications and performs variety analysis based on random analysis of third party samples using [polymerase chain reaction] to determine the varieties on a malt shipment. This was part of their specifications prior to August 4, 2013. I am aware this was put in place due to noncompliance issues with variety integrity.

This objection is rejected for the same reasons as stated with respect to paragraph 48(a).

(18) Objection to paragraph 48(c) on the same basis as paragraph 48(a) and (b). Paragraph 48(c) reads:

> IFBM, in Nancy, France had made available a [polymerase chain reaction] testing service to test for varietal integrity. I am aware that other maltsters had discussed the use of this service with them.

This objection is rejected for the same reasons. The use of the word "other" in this passage is not problematic because the point being made is the establishment of the testing service, which, of itself, suggests the issue of varietal integrity was not insignificant.

(19) Objection to paragraphs 49 and 50 on the basis that they express an opinion about the factual matter of what most maltsters knew or understood, which is not a matter for opinion based on specialised knowledge. Further, it was argued French has not demonstrated specialised knowledge in respect of the subject matter. Furthermore, it was argued that no path of reasoning is expressed so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraphs 49 and 50 read:

> Based on my experience in the malting industry, each of the [examples contained in paragraphs 48(a)–(c)] was likely to have been known to most participants in the export malting industry.
>
> Therefore, I am of the opinion that it is likely most participants in the industry were aware that this practice was engaged in by a number of malthouses.

The Viterra Parties argued that the opinions expressed in these paragraphs did not pertain to the knowledge or understanding of particular maltsters but was concerned with the industry generally. Further, they contended that the opinions expressed in these paragraphs are identified as being based on what French has directly experienced and observed while working in the malting industry.

The authorities demonstrate an expert may give evidence about common industry practices or customs.[77] If, in fact, a practice or custom is engaged in throughout an industry, ordinarily it would follow that it would be likely to be known by industry participants. This is an inference that, again ordinarily, it would be expected would be drawn from evidence concerning the common practice or custom in question. However, in some cases it may be a matter for expert evidence as to whether a particular practice or custom is well known or "notorious" in an industry. [78] In this case, the court is concerned with a practice that is alleged to be, in part, covert. In these circumstances, an industry expert may possess specialised knowledge which enables her or him to give evidence concerning knowledge of a particular industry practice.

Proceeding on this premise, the objection to paragraph 49 is rejected on the basis that French has confined his opinion to the awareness of most participants in the "export malting industry". The objection to paragraph 50 is also rejected. Although the shift from "export malting industry"[79] to "the industry" may, on its face, appear to make the evidence less probative, this is a matter of weight rather than admissibility.

(20) Objection to paragraph 51 on the basis that it expresses an opinion of what most maltsters knew or understood, which is a factual matter and not a matter for opinion based on specialised knowledge. Further, it was argued French has not demonstrated specialised knowledge in respect of the malting industry "on a worldwide basis". Furthermore, it was argued that no path of reasoning is expressed so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Additional objections were made to the final sentence of paragraph 51(c) and the second, third and fourth sentences of paragraph 51(d) on the basis that they constitute hearsay and speculation. Paragraph 51 reads:

> In my experience … [gibberellic acid] was used throughout the industry as required, in a non-compliant manner on a worldwide basis prior to [the execution of the Acquisition Agreement]. Further:
>
> (a) Based on my experience in the malting industry I believe it was well known by malting participants in North America prior to [the execution of the Acquisition Agreement] that six row barley was at times difficult to malt without the use of [gibberellic acid]. The use of [gibberellic acid] was also well known among the maltsters on the malt barley quality evaluating (approval) committees; [American Malting Barley Association], Malt quality evaluation committee, and [Prairie Regional Recommending Committee for Grain], Malt and Oat approval committee and the Malt barley evaluation subcommittee. Participants in the industry *likely would have known* it was used in a non-compliant manner.
>
> (b) Based on my experience in the malting industry *it would likely have been known* in Europe by most participants in the malting industry that [gibberellic acid] was at times required to produce malt to specification and *s*

ometimes this use would be in a manner not compliant with customer contracts.

(c) [Campden BRI], an independent malt testing laboratory in the [United Kingdom] was offering a service to analyse for exogenous applied [gibberellic acid] in malt prior to [the execution of the Acquisition Agreement]. Based on my communications with [Campden BRI] I understood this service was being offered as a result of demand from the industry to test for the use of [gibberellic acid] because its use was common.

(d) A major Japanese brewer who did not allow the use of [gibberellic acid] was conducting random testing for [gibberellic acid] prior to [the execution of the Acquisition Agreement]. This was initiated because the brewer likely suspected of noncompliant [gibberellic acid] usage in the industry. To my knowledge at that time [gibberellic acid] was detected in [a] number of maltster's shipments. This testing was industry knowledge.

(Emphasis added.)

The Viterra Parties repeated their response to the objections to paragraphs 49 and 50 above.

For reasons stated above, the Cargill Parties' submission concerning specialised knowledge is rejected. Accordingly, subject to the specific objections, the evidence will be allowed. Although I accept much of paragraph 51 is not opinion evidence that attracts s 79 , such evidence is admissible on the basis that French is an industry expert. To the extent it consists of opinion evidence, the specialised knowledge has been established for those opinions to be given.[80]

As to the specific objections, the final sentence in paragraph 51(c) is hearsay evidence. However, the exception in s 60 for evidence that is relevant for a purpose other than proof of an asserted fact is engaged because this sentence contains an observed fact upon which French has based some of his opinions. The objection as to admissibility is rejected. However, given the conclusory form of the sentence, a ruling under s 136 will be made limiting its use to being the basis of French's understanding rather than the truth of the underlying facts.

As to paragraph 51(d), the second sentence is plainly speculation. The use of the word "likely" in respect to a specific matter demonstrates this. It is disallowed. However, the third and fourth sentences are admissible on the basis that they are put forward as being from French's own knowledge.

(21) Objection to paragraph 52 on the basis that no path of reasoning is shown so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraph 52 reads:

> Therefore I am of the opinion that the use of [gibberellic acid] similar to the Viterra practice was sufficiently engaged in by some malthouses prior to [the execution of the Acquisition Agreement] such that participants in the industry would likely have been aware of these practices.

The Viterra Parties argued that the opinions expressed in this paragraph are identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. French has observed the use or knowledge of the use of gibberellic acid during his career in the malting industry. The opinion expressed is based on the professional experience and understanding gained by French as a result of his employment history. Although the use of "some" is quite vague, the evidence concerning knowledge goes to the awareness of the participants in the industry more generally.

(22) Objection to the first sentence of paragraph 53 on the basis that French has not demonstrated specialised knowledge in relation to the practices of "most malthouses". Further, it was argued that no path of reasoning is demonstrated so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended there is no basis stated for the opinion expressed[81] and it therefore cannot be tested. The first sentence of paragraph 53 reads:

> Causes of variation in blending, sampling and malt testing would require that most malthouses have practices in place which are similar to the [certificate of analysis] practices prior to [the execution of the Acquisition Agreement].

The Viterra Parties argued that the opinion expressed in this sentence is identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. The opinion is based, or at least substantially based, on French's knowledge of the various matters identified with respect to producing and testing malt. Further, preceding sections of French's Report discuss why it is said that such a requirement for the practices referred to would exist.

(23) Objection to the second and third sentences of paragraph 53 on the basis that they contain comments on a factual matter rather than an opinion based on specialised knowledge. Those sentences read:

> Additionally, these could not have been isolated practices within the [Joe White] malthouse. Based on my experience in the industry I believe a number of employees at a malthouse must have been aware of these issues and worked together as a team to effectively produce, ship and report malt within customer's specifications and expectations.

The Viterra Parties contended that these sentences contain the reasoning for some of the opinions expressed in the French Report and were not sought to be tendered as proof of the underlying facts.

Based on this position, the evidence will be permitted subject to a ruling under s 136 limiting the use of the evidence to French's understanding of industry practice rather than what occurred specifically at Joe White (noting that, immediately following, French refers to evidence on this issue already before the court from other witnesses).

(24) Objection to paragraph 57 on the basis that the witness has not demonstrated specialised knowledge in relation to "the industry" globally. Further, it was argued that there is no path of reasoning so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended there is no basis stated for the opinion expressed[82] and it therefore cannot be tested. Paragraph 57 reads:

> In my experience practices similar to [solutions proposed in a Cargill Australia document dated 17 January 2014 to address the gap between capability and customer expectations, including engaging the customer to either go to a theoretical blend, allow a variation of 2 standard deviations of the analytical method on either side of customer specifications or widen their specifications] were utilised within the industry. As an example:
>
> (a) Where analysis was required before lab results would be available in instances such as direct truck deliveries from malthouse to brewery customer approval would be gained to report the theoretical blend followed by laboratory testing on samples representing each blend; and
>
> (b) Some customers were open to discussion about analytical capability and would adjust and/or widen specifications to allow for analytical variability.

The Viterra Parties argued that the opinions expressed in this paragraph are identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. French is suitably qualified to state, as a matter of fact, whether what was (according to the particular document) being proposed by Cargill Australia aligned with practices engaged in within the industry.

(25) Objection to paragraph 59 on the basis that the witness has not demonstrated knowledge in relation to "most participants in the industry". Further, it was argued that there was no path of reasoning to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended that no basis is stated for the opinion expressed[83] and it therefore cannot be tested. Paragraph 59 reads:

> Based on my experience in the malting industry I believe the practice of most participants in the industry was to adjust [certificate of analysis] results, based on 2 standard deviations or by experience.

The Viterra Parties argued that the opinions expressed in this paragraph are identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. French is giving factual evidence based on specialised knowledge derived from his industry experience.

(26) Objection to paragraphs 60 and 61 on the basis that they contain comments on the factual matter of the state of mind of "Cargill" and other industry participants. Further, it was argued that no path of reasoning existed to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraphs 60 and 61 read:

> Therefore, in my opinion, Cargill would likely have been aware of industry practices similar to [Joe White] practices with respect to blending and customer reporting prior to the [A]quisition.
>
> I am therefore of the opinion that most participants in the industry would be aware of practices similar to the [certificate of analysis] practices.

The Viterra Parties argued that the opinion expressed in these paragraphs is identified as being based on what French has directly experienced and observed while working in the malting industry.

With respect to paragraph 60, the objection is upheld. The evidence given in paragraph 60 purports to give specific opinion evidence as to the likelihood of the actual knowledge of Cargill, Inc (and probably also Cargill Australia, though this is not clear). Despite s 80(a) of the *Evidence Act* , it is not the role of an expert to seek to usurp the role of the court with respect to specific factual findings regarding the parties to the proceeding. [84] Further, the French Report provides no statement of reasons as to why Cargill, Inc in particular would have been likely to have the knowledge alleged. On that basis alone it is not admissible. Even if it were admissible, I would exclude the evidence under s 135 . French's view about an issue for determination by the court without the benefit of the evidence at trial is of little probative value, and any such value is substantially outweighed by the real potential for an undue waste of time if the evidence were admitted.

In contrast, paragraph 61 is concerned with knowledge in the industry generally. This is factual evidence that French is able to give by reason of his specialised knowledge, and the basis of this evidence is clear from what precedes this paragraph. Accordingly, the objection is rejected.

(27) Objection to paragraphs 62 to 97 on the basis that the evidence is directed to the factual matter of what the Cargill Parties knew or understood as a result of the due diligence process preceding the Acquisition. It was argued

that this was not properly a matter for expert opinion and that French has not demonstrated specialised knowledge in respect of the subject matter. It is not necessary to set out all these paragraphs to address this general objection. It is sufficient to set out the 3 opinions in this section of the French Report:[85]

> Therefore, I am of the opinion, that there was evidence in the form of industry practices and lack of malt storage segregations of the use of barley in a non-compliant manner. I am also of the opinion that if Cargill had a policy of strict compliance with varietal requirements they should have investigated variety compliance as part of their due diligence process. As a result, they must have known they would be operating the plants significantly different (sic) from the practices employed by [Joe White].
>
> …
>
> Therefore, it is my opinion, that the presence of the [gibberellic acid] application systems and the purchase of [gibberellic acid] were discoverable during the due diligence process. It is also my opinion given that Cargill likely would have known about the non-compliant use of [gibberellic acid] in the industry, and their policy was to be compliant with brewery purchase contracts with respect to [gibberellic acid] use, I would have reasonably expected this would have triggered a review of [gibberellic acid] non-compliant use by [Joe White] to take place during the due diligence process.
>
> …
>
> I am therefore of the opinion, that it would have been apparent in the due diligence process that the [Joe White] plants did not have the required capability to meet the Cargill methods with respect to blending and [certificate of analysis] generation.

The Viterra Parties argued that the question of what was and should have been known to the Cargill Parties was properly a matter for expert opinion. Further, they argued that French has specialised knowledge in respect of what should have been known or investigated by an experienced maltster during due diligence based on his experience as an employee of, and consultant to, several malthouses. However, in oral submissions, the Viterra Parties' senior counsel properly acknowledged there was nothing in the French Report to suggest French had any expert knowledge concerning due diligence.

In circumstances where there is no evidence that French has any expertise with respect to the conduct of due diligence before the acquisition of a malt business, he does not have relevant specialised knowledge on this topic. Accordingly, there is no basis upon which he can properly express an opinion about what ought to have been done in the due diligence before the Acquisition, or what ought to have been apparent from that process. In addition, the observations made above with respect to upholding the objection to paragraph 60 are repeated.[86] Moreover, if I had been of the view that the evidence was admissible, I would have excluded it under s 135 of the *Evidence Act* . If the evidence were allowed to stand, it would open up for cross-

examination all of the issues pertaining to the due diligence process leading up to the Acquisition. This would be likely to cause or result in an undue waste of time.

Despite the general objection has been upheld, upon this ruling being given the Viterra Parties will be invited to consider whether any of the evidence contained in paragraphs 62 to 97 of the French Report is otherwise relied upon for purposes beyond French's opinions concerning due diligence (and is admissible consistent with the various rulings in these reasons).

In case I am incorrect in upholding the general objection to paragraphs 62 to 97, the specific objections will also be considered.

(28) Objection to the first sentence of paragraph 85 on the basis that French has not demonstrated specialised knowledge in relation to the "methods generally accepted by most participants in the industry". Further, it was argued that there was no path of reasoning to establish that the opinions expressed are wholly or substantially based on specialised knowledge. The first sentence of paragraph 85 reads:

> Contrary to the Cargill method, in spite of the inherent limitations in the industry standard analytical methods it is generally accepted by most participants in the industry that [certificate of analysis] malt analysis should be based on malt laboratory analysis.

The Viterra Parties argued that the opinion expressed in this sentence is identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. French has specialised knowledge with respect to the testing of malt in the industry. That said, the introductory words referring to Cargill's method will be limited in their use, pursuant to s 136 , to French's understanding of the method, and will not be proof of the asserted fact.

(29) Objection to paragraph 87 on the basis that French has not demonstrated specialised knowledge on the question of the approaches and requirements of "most participants in the industry".[87] Further, it was argued that no path of reasoning was shown to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraph 87 reads:

> [The Cargill standards constitute] a different approach than that adopted by most participants in the industry, who recognise that errors, equipment failures and variation do occur, when blending and loading malt resulting in the theoretical blend not matching the shipment analysis. Most participants in the industry, both maltsters and brewers, therefore require laboratory analysis on each shipment based on actual samples taken at the time of loading.

The Viterra Parties repeated their response to the objection to paragraph 85 above.

The objection is rejected. Again, French is in a position, based on his experience, to state what most participants in the industry do with respect to laboratory analysis. However, the evidence concerning Cargill's standards will be the subject of a like limitation to the limitation set out in the previous subparagraph.

(30) Objection to paragraph 99 on the basis that the witness had not demonstrated specialised knowledge on the question of "the practices" of "other malthouses". Further, it was argued that there was no path of reasoning to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended that no basis for the opinion has been identified. Finally, it was contended that no basis is stated for the opinion expressed[88] and it therefore cannot be tested. Paragraph 99 reads:

> Based on my experience in the malting industry, in my opinion, [Joe White] was operated with practices consistent with other malthouses which ensured customers were satisfied with the malt they were receiving.

The Viterra Parties argued that the opinion expressed in this paragraph is identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is upheld. The opinion is not concerned with industry practice generally, or even most of the participants in the industry, but only refers to "other" malthouses, unidentified in name or approximate number. Further, to the extent French asserts the satisfaction of Joe White customers, this is nothing but a bald assertion without any identified basis.

(31) Objection to paragraphs 100 to 103 on the basis that these paragraphs will fall away if the previous objections to the evidence on "industry practice" are upheld. Paragraphs 100 to 103 read:

> In my opinion, as the use of non-compliant malting barley varieties was consistent with industry accepted practice, therefore there were no changes required [to be made by the Cargill Parties following the Acquisition in order to operate the Joe White business in a manner that accorded with general industry practice].
>
> The exception would be the use of Hindmarsh as it was not an approved malting variety, but was classified as a "food grade" barley and was used for malting purposes in China. If it was being used for customers that did not specify "food" grade barley as the only standard for the malting barley, it would not be to industry standard.
>
> In my opinion the use of [gibberellic acid] in a non-compliant manner was consistent with accepted industry practice, therefore no changes were required [to be made by the Cargill Parties following the Acquisition in order to operate the Joe White business in a manner that accorded with general industry practice] to meet industry accepted practice.

> In my opinion, [certificate of analysis] practices relative to blending and customer reporting were consistent with accepted industry practice, therefore no changes were required [to be made by the Cargill Parties following the Acquisition in order to operate the Joe White business in a manner that accorded with general industry practice].

As the uncertainty concerning the use of the term "industry" has been resolved, [89] the specific objection to these paragraphs has dissipated. However, consistent with other rulings on this issue, to the extent the passages set out above refer specifically to the Cargill Parties' position and whether changes were required, that evidence is inadmissible under s 79 , alternatively excluded under s 135 for reasons stated elsewhere.[90]

(32) Objection to paragraphs 105 to 129 on the basis that the opinion is addressed to the factual matter of what action Cargill ought to have taken post-Acquisition and whether the actions taken were appropriate. It was argued that this was not properly a matter for expert opinion and that French has not demonstrated specialised knowledge in respect of the subject matter. Furthermore, it was argued that no path of reasoning was demonstrated to establish that the opinions expressed are wholly or substantially based on specialised knowledge. It is not necessary to set out the entirety of these paragraphs. Some relevant extracts follow:

> If the use of Hindmarsh was not permitted by any existing customers, the following steps should have been taken …
>
> In my opinion the steps taken by Cargill were not an appropriate means to implement their [certificate of analysis] policies. Implementation on day one of the [A]cquisition would be disruptive to the business and harm relations with existing customers. That would not be the way a prudent industry participant would go about it …
>
> A study should be conducted to determine if the existing malthouses, have the capability to produce the malt quality to meet the Cargill policies …
>
> Where cost effective, plant capability should be improved to meet the Cargill policies …
>
> The Cargill [certificate of analysis] policies should not be implemented at each plant, until each plant capability upgrades are completed …
>
> In my opinion the steps taken by Cargill were not an appropriate means to implement their varietal policies …
>
> It is not possible to implement the Cargill varietal policies until additional storage and segregation capacity had been constructed …
>
> In my opinion the steps taken by Cargill were not an appropriate means to implement their [gibberellic acid] policies …

The Viterra Parties argued that the question of what steps the Cargill Parties should have taken was properly a matter for expert opinion. Further, they argued that French has specialised knowledge in respect of this matter based on his professional experience .

The objection is upheld. Largely, the evidence is not concerned with industry practices or knowledge, but with the specific circumstances that Cargill faced after the Acquisition. The observations with respect to rejecting paragraph 60 of the French Report are repeated.[91] Further, much of this section of the French Report consists of bald assertions or conclusions, the basis of which is unclear, or substantially unclear. In any event, if I had been of the view that this evidence was otherwise admissible, I would have excluded it under s 135 . To allow evidence purporting to deal with the actual circumstances of Cargill Australia after the Acquisition would be to open up for cross-examination a vast range of topics and issues that would be highly likely to result in an undue waste of time, and would also be likely to be unfairly prejudicial given all lay witnesses have already given their evidence.

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[84] Cf *Australian Securities and Investments Commission v Vines* (2003) 48 ACSR 291, 299 [27] (Austin J); *Faucett v St George Bank Ltd* [2003] NSWCA 43, [48] (Shelle r JA, with whom Mason P and Meagher JA agreed), and the cases there cited; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79, 83D (Lindgren J). See also par 50(15) above.

The Owners - Strata Plan No 69312 v Rockdale City Council; Owners of SP 69312 v Allianz Aust Insurance (18 October 2012) (Lindsay J)

108. In terms of relevance, Mr Wynn-Jones' evidence is generally one step removed from the Guide insofar as it comprises statements of opinion. His opinion about the meaning of the BCA, or the application of the BCA to the facts of the case before the Court, has no evidentiary value, helpful though that "evidence" has been as an elaboration of the defendants' submissions. Ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty; although those processes are properly the subject of submission, evidence of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible: *Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No 6)* (1996) 64 FCR 79 at 83 per Lindgren J, approved by the Court of Appeal in *Faucett v St George Bank Limited* [2003] NSWCA 43 at [48] .

The Owners - Strata Plan No 69312 v Rockdale City Council; Owners of SP 69312 v Allianz Aust Insurance (18 October 2012) (Lindsay J)

Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No 6) (1996) 64 FCR 79 at 83 per Lindgren J Faucett v St George Bank Limited [2003] NSWCA 43 at [48] .

Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd (25 November 2008) (Barrett J)

13 A similar approach had been taken earlier in the same year by Sheller JA, with whom Mason P and Meagher JA agreed, in *Faucett v St George Bank Ltd* [2003] NSWCA 43 at paragraph [48] :

> "Mr Jennings should not have been asked nor permitted to give evidence such as that set out in paras 10.1 and 10.2 which I have quoted. It was not part of the function of this expert to state as his opinion that the respondent failed in its duty to provide a safe system of work or to provide a security system which was commensurate to the obvious risks of robbery. Section 80 of the *Evidence Act* 1995 provid es relevantly that evidence of an opinion is not inadmissible only because it is about (a) a fact in issue or an ultimate issue. But as Mason P pointed out in *R v GK* (2001) 53 NSWLR 317 at 326-7, "judges should exercise particular scrutiny when experts move close to the ultimate issue, lest they arrogate expertise outside their field or express views unsupported by disclosed and contestable assumptions." In *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6) (Court's 'Allstate' Judgment No 33)* (1996) 64 FCR 79 at 83 Lindgren J said:
>
> > "I find it convenient at the outset to state some principles of the general law against which, in my view, the effect of par 80(a) is to be determined. It is fundamental that the ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly the subject of submission, *evidence* of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible. The rationale underlying this fundamental principle may be expressed in various closely related ways: to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant."
>
> With his Honour's statement I entirely agree; see also *Naxak*

is v West General Hospital (1999) 197 CLR 269 at 306 [110] note 137; *Cross on Evidence* , Australian edition 29105; *Od gers Uniform Evidence Law* 1.3.4460; *O'Brien v Gillespie* (1997) 41 NSWLR 549 at 557 ; *Idoport Pty Ltd v National Australia Bank Limited* (2000) 50 NSWLR 640 at 655 [39] . "

48 Mr Jennings should not have been asked nor permitted to give evidence such as that set out in paras 10.1 and 10.2 which I have quoted. It was not part of the function of this expert to state as his opinion that the respondent failed in its duty to provide a safe system of work or to provide a security system which was commensurate to the obvious risks of robbery. Section 80 of the *Evidence Act* 1995 provides relevantly that evidence of an opinion is not inadmissible only because it is about (a) a fact in issue or an ultimate issue. But as Mason P pointed out in *R v GK* (2001) 53 NSWLR 317 at 326-7, "judges should exercise particular scrutiny when experts move close to the ultimate issue, lest they arrogate expertise outside their field or express views unsupported by disclosed and contestable assumptions." In *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6) (Court's 'Allstate' Judgment No 33)* (1996) 64 FCR 79 at 83 Lindgren J said:

> "I find it convenient at the outset to state some principles of the general law against which, in my view, the effect of par 80(a) is to be determined. It is fundamental that the ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly the subject of submission, *evidence* of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible. The rationale underlying this fundamental principle may be expressed in various closely related ways: to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant."

With his Honour's statement I entirely agree; see also *Naxakis v West General Hospital* (1999) 197 CLR 269 at 306 [110] note 137; *Cross on Evidence* , Australian edition 29105; *Odgers Uniform Evidence Law* 1.3.4460; *O'Brien v Gillespie* (1997) 41 NSWLR 549 at 557 ; *Idoport Pty Ltd v National Australia Bank Limited* (2000) 50 NSWLR 640 at 655 [39] .

49 That apart, the *Evidence Act* by s79 treats opinions based on specialised knowledge as an exception to the opinion rule. Its admission is conditioned upon the person having specialised knowledge based on the person's training, study, or experience and giving evidence of an opinion that is wholly or substantially based on that knowledge. So far as appears, Mr Jennings's specialised knowledge was that of a security adviser. The opinions he expressed in paras 10.1 and 10.2 could not be described as wholly or substantially based on that specialised knowledge: *HG v The Queen* (1 999) 197 CLR 414 at 427 [38] .

50 It was well open on the evidence, or the lack of it, and in my opinion correct for the trial Judge to reject the submission that the respondent was in breach of its duty of care to the appellant by not installing anti-jump screens.

Method of delivery of money

51 The method of delivering the money in cash as the appellant described it was obviously one putting the appellant at considerable risk. Anyone who is known to be carrying sums of money in cash in public is vulnerable to robbery, particularly if they have no visible protection. Banks are vulnerable to armed robbery. The movement into a bank branch of cash in bags presents an attractive temptation for any armed criminal. The system in place on 3 June 1998 involved a guard from an identified security company bringing three bags of cash into the branch premises, one at a time. It seems to be generally accepted that the amount of cash in the three bags was about $500,000. It was certainly a considerable amount. These bags were placed by the guard on the counter. By the time the third bag was being brought in the branch was open to the public. The bag was placed on the counter in full view of any member of the public who happened to be in the bank chamber. The bag was then lifted by the teller, in this case the appellant, onto the floor. It was agreed that a better system for moving the cash into the vault in the presence of a guard had previously been used and was available. In these circumstances to place the appellant in the situation of having in her possession bags containing a very large amount of money in cash and to leave her unprotected in that position, was very obviously a breach of the duty of care that the respondent, as employer, owed her as its employee. Reasonable care for her safety would have required, at least, that she had the protection of the guard while she had the care of the cash in the bags until such time as it could be placed in the strong room or vault. In my opinion, the evidence of the system for delivering the cash to the bank which led to its being in the unguarded and unprotected custody of the appellant and which resulted in her being held at gun point by a robber involved breach of the respondent's duty of care and negligence. In coming to a different conclusion Judge Delaney was diverted by his finding, which was erroneous, that the place and method of delivery was outside the respondent's control.

52 The cause of the appellant's injury is a question of fact which "must be determined by applying commonsense to the facts" of this case; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 particularly at 515-7 . The respondent's system of having large sums of money delivered in cash by placing the appellant in possession of it was an attractive target for an armed robber and materially contributed to her being attacked and injured as she was.

53 Accordingly, in my opinion, there should have been a verdict for the appellant in the amount of the damages assessed by the trial Judge, which have not been challenged.

Order

54 I propose the following orders:

1. Appeal allowed;

2. Set aside the verdict and judgment for the defendant;

3. In lieu thereof, verdict and judgment for the plaintiff in the amount of $104,305 to take effect from 5 October 2001;

4. The respondent to pay the costs of this appeal and of the hearing at first instance.

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Last Modified: 04/15/2003

Cited by:

Harding v Sutton (No 2) [2021] VSC 789 (29 November 2021) (Richards J)

> 60. Third, it is axiomatic that an expert witness is not an advocate for a party. [36] They may give evidence of opinion that is probative of a fact in issue, where the opinion is based on the witness's specialised knowledge. [37] Their role is not to argue the case of the party who has retained them to give evidence in the proceeding. Phrasing questions for expert witnesses in a way that seeks an opinion on the ultimate legal issue for decision may invite tendentious opinion that is both unhelpful and irrelevant. [38]
>
> *via*
>
> [38] *Allstate* , 83 ; see also *Faucett v St George Bank Ltd* [2003] NSWCA 43, [48] .

Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20) [2019] VSC 44 (11 February 2019) (Elliott J)

> 50. The Cargill Parties have made 34 specific objections in respect of the French Report. Of these objections, 4 have been conceded or partially conceded by the Viterra Parties.[61] The remaining specific objections are:
>
> > (1) Objection to the second sentence of paragraph 10 on the ground that no basis for the opinion is identified. Paragraph 10 relevantly reads:
> >
> > > [B]ased on my experience in the malting industry the industry recognises that the contribution to brewery performance of a particular barley variety in a malt shipment is of less importance than the malt analytical analysis.
> >
> > The Viterra Parties argued that this opinion is identified as being based on what French has directly experienced and observed while working in the malting industry.
> >
> > This objection is rejected. This paragraph contains direct observations based on the professional experience and understanding gained by French as a result of his employment history.
> >
> > (2) Objection to the final sentence of paragraph 14(b) on the basis that it constitutes speculation, as opposed to an opinion based on specialised knowledge. Paragraph 13 states

that it was not industry practice to use non-malting varieties such as Hindmarsh barley, subject to certain exceptions. Paragraph 14(b) then states:

> I have not viewed all of the [Joe White] customer specifications during the relevant period, but it is possible that there are malt sales contracts in place at [Joe White] that would allow a small inclusion of nonmalting approved malting varieties ...

The Viterra Parties argued that French provides this opinion, on the types of contractual terms sometimes agreed between malthouses and brewers, based on his professional experience.

This objection is upheld. The opinion is not a general observation as to contractual terms commonly agreed between maltsters and brewers. Rather, this sentence constitutes a specific hypothesis concerning Joe White's customer contracts and is entirely speculative.

(3) Objection to paragraph 16 on the basis that it constitutes speculation as opposed to an opinion based on specialised knowledge.[62] The second sentence of this paragraph was conceded by the Viterra Parties. The remainder of paragraph 16 reads:

> It is noted that in the [Joe White] barley purchasing contracts 2012/13 ... there are two contracts for 9,000 [metric tonnes] and 1,500 [metric tonnes] of Hindmarsh and two contracts for 13,000 and 4,500 [metric tonnes] of Malt 1 + [Hindmarsh] ... Barley purchases referenced in the contracts totalled 502,356 [metric tonnes] of barley. The total Hindmarsh contracted for 2012/2013 would represent between 2.0 [percent] to 5.8 [percent] of the total barley purchased. This represents a low percentage of the total purchase, which suggests that it could have been purchased for use and/or blending in a compliant manner.

The Viterra Parties argued that this paragraph does not contain opinion evidence, but rather evidence to which French has had regard when providing his opinions.

This objection is upheld. The proposed evidence consists of comments and inferences able to be drawn readily from particular documents, rather than opinions based on specialised knowledge. In respect of the final sentence from the words "which suggests", that part of the sentence lacks sufficient reasoning for the basis of the opinion expressed to be properly understood and is speculative. Further, the evidence is not supportive of, or materially relevant to, the opinion ultimately expressed,[63] namely that, subject to any agreement to the contrary, the use of Hindmarsh barley would not be consistent with industry practice.

(4) Objection to the first sentence of paragraph 21 on the basis that French does not have specialised knowledge in respect of "the industry worldwide" and that the opinion is not wholly or substantially based on specialised knowledge. The first sentence of paragraph 21 reads:

> I was aware [gibberellic acid] is at times used in the industry worldwide on some customer contracts that stipulate that [gibberellic acid] not be used.

The Viterra Parties argued that this sentence does not contain opinion evidence, but rather direct evidence of French based on his professional experience and observations. Further, the Viterra Parties contended that the term "worldwide" should be given its natural meaning.

This objection is rejected. The French Report demonstrates that French possesses specialised knowledge which extends to an awareness of practices within the malting industry generally, including the use of gibberellic acid.

(5) Objection to paragraph 28 on the basis that it constitutes a comment on a factual matter rather than an opinion based wholly or substantially on specialised knowledge. Paragraph 28 reads:

> [Joe White] personnel appear to have been well aware of [certain blending factors] and it was addressed in the Malt Blend procedure [at Joe White], which directed Production managers that: "attention should be paid to the impact of individual batch quality and all blend parameters".

The Viterra Parties explained that this paragraph contains the reasoning for some of the opinions expressed in the French Report and was not sought to be tendered as proof of the underlying facts.

Based on this clarification by the Viterra Parties, the objection is rejected but the evidence will be the subject of a ruling under s 136 that it will not be admitted to prove the truth of the asserted fact and its use will be limited accordingly.

(6) Objection to paragraph 29 on the ground that no basis for the opinion is identified. Paragraph 29 reads:

> Based on my experience in the malting industry I believe [Joe White] followed practices and used judgment based on factors I would expect an experienced competent person in the industry would follow.

The Viterra Parties argued that this opinion is identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. The opinion is based on the professional experience and understanding gained by French as a result of his employment history. Further, this opinion is preceded in the French Report by details of the practices alleged to have been adopted by Joe White and factors considered relevant in the industry generally when developing a malt blend.[64]

(7) Objection to the first sentence of paragraph 30 on the basis that it constitutes a comment on a factual matter rather than an opinion based wholly or substantially on specialised knowledge. The first sentence of paragraph 30 relevantly reads:

> Consistent with the above, formal procedures were incorporated into the Malt Blend Parameters Procedures [at Joe White] ... to provide that more senior personnel *who were aware of [the factors considered by participants in the commercial malting industry when developing a malt blend within specification]* were part of the decision making process.[65]
>
> (Emphasis added.)

The Viterra Parties argued that this paragraph contains the reasoning for some of the opinions expressed in the French Report and was not sought to be tendered as proof of the underlying facts.

This objection is rejected. This sentence contains background information in respect of the procedures reviewed by French for the purpose of expressing his opinions. However, it will be the subject of a limitation ruling under s 136 as set out in subparagraph (5) above, so that it cannot be used as proof of the knowledge of the "more senior personnel" or evidence of what in fact comprised Joe White's "procedures".

(8) Objection to paragraph 31 on the basis that no path of reasoning is demonstrated by which the conclusion expressed follows from observed or assumed facts so as to establish that the opinion is wholly or substantially based on specialised knowledge. Paragraph 31 reads:

> Based on my experience in the malting industry ... I am of the opinion that the blending procedures used by [Joe White], *including* those documented in the Malt Blend Parameters procedure [at Joe White] are similar to *practices adopted by most malthouses in the industry* prior to August 4, 2013.
>
> (Emphasis added.)

The Viterra Parties argued that this paragraph contains the reasoning for the opinion expressed.

The objection is largely rejected. French is able to say, based on his specialised knowledge, whether the procedures used by Joe White as documented are similar to practices adopted by most participants in the commercial malting industry at the relevant times. However, insofar as the paragraph refers to blending procedures other than those documented, it is entirely unclear as to what it is that the evidence is encompassing. Accordingly, to that extent the evidence is not admissible under s 79 and, even if it were, I would exclude it under s 135 . The French Report will need to be amended accordingly to confine this evidence to Joe White's written practices and policies considered by French.

(9) Objection to the first sentence of paragraph 38 on the ground that no basis is stated for the expression of an opinion as to "industry practice" and no path of reasoning is expressed so as to establish that the opinion is wholly or substantially based on specialised knowledge. The first sentence of paragraph 38 reads:

> It is also industry practice to adjust results based on the variability of testing and sampling.

The Viterra Parties argued that, to the extent it contains opinion, this sentence is based on French's specialised experience.

This objection is rejected. French has specialised knowledge of practices within the commercial malting industry generally. The evidence given in this sentence purports to be based on that knowledge.

(10) Objection to the remainder of paragraph 38 on the basis that it constitutes a comment on factual matters rather than an opinion based wholly or substantially on specialised knowledge. Paragraph 38 relevantly reads:

> [Joe White] staff appear aware of [factors that must be taken into consideration when making adjustments to malt analysis], some of which were partly documented in the Viterra Malt Certificate of Analysis Generation Procedure ... This was explained in detail by [Douglas Stewart] [66] in his witness statement ... There were formal procedures which provided that qualified personnel who were aware of all the relevant factors could make appropriate decisions on adjusting certificates of analysis [reference was made to evidence of Stewart and another witness who has given evidence at trial] .... This is also documented in the Viterra Malt Analysis Generation Procedure where it states for [the] International Customers section:
>
> > results that appear out of specification on the [certificate of analysis] may be adjusted by the

> Technical Services Manager (or their nominated proxy). This adjustment must be based on the associated analytical error for that test parameter as defined in the [Malt Analytes Proficiency Testing Scheme] program and may be made up to two Standard Deviations, where required. These changes will be approved by the Technical Services Manager and General Manager Technical when signing off the Certificates of Analysis

and further states in the Domestic Customer[s] section:

> These changes will be approved by the Plant Manager when signing off the Certificates of Analysis ...
>
> > o The final shipment results must be within two standard deviations of the pre-shipment result, highlighting the importance of accurate pre-shipment data. Pre-shipment data should be based on actual blend data wherever possible.
> >
> > o Results that still remain out of specification after a maximum two standard deviations adjustment can only be altered further and signed off for progressing of the shipment by the consensus of two or more General Managers, or the shipment may be recalled.
>
> If the investigation indicated the malt did not meet customer requirements and would cause a brewing problem, a decision would be made on recall. This is documented in the Viterra Malt Certificate of Analysis procedure ...

The Viterra Parties argued that the inclusion of these comments was appropriate as they contain the reasoning for some of the opinions expressed by French.

This objection is rejected. This passage contains background information and inferences he has drawn in respect of the procedures reviewed by French for the purpose of expressing his opinions. That said, to the extent French purports to express a view of the awareness of Joe White staff and the proper construction of the procedure referred to, that evidence will be the subject of a ruling under s 136 , limiting its use as set out in subparagraph (7) above.

(11) Objection to paragraph 40 on the ground that no basis is stated for the expression of an opinion as to the behaviour of "the malting industry" or "many companies" in the industry in relation to the "adjustment" of analytical results. Further,

it was argued that no path of reasoning is expressed so as to establish that the opinion is wholly or substantially based on specialised knowledge. Paragraph 40 reads:

> Based on my experience in *the malting industry* I believe it would be more common to adjust analytical results based on two standard deviations based on the plant laboratory of the company laboratory shipping the malt. In my experience there are occasions when results are adjusted that were outside the two standard deviations after appropriate consideration of the [factors that must be taken into consideration when making adjustments to malt analysis]. *Many companies* would utilise a similar practice either based on an objective measure or based on experience.
>
> (Emphasis added.)

The Viterra Parties argued that this opinion is identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. French has specialised knowledge of practices within the malting industry generally, including the adjustment of the results of laboratory testing of malt. To the extent opinions are expressed in this passage, they are based on that knowledge. Despite the word "many" lacking precision, it is distinguishable from "other",[67] which is completely unclear as to prevalence. Although this lack of precision affects the weight which might be given to the evidence in the last sentence, in my view "many" is sufficiently descriptive of the industry to be admissible.

(12) Objection to the fifth sentence of paragraph 43 on the basis that French is purporting to give evidence about facts that are not identified and cannot be tested. The Cargill Parties also argued that the relevance of the sentence was not apparent. Paragraph 43 refers to a review undertaken by French of data referred to in the witness statement of Liam Ryan.[68] The fifth sentence relevantly reads:

> For the purpose of my review I sorted the data for one customer, Sumitomo Asahi, because I am familiar with the customer and am aware of what specifications to which their brewery process is sensitive.

The Viterra Parties argued that French has direct knowledge as to the sensitivities of Asahi's brewery in respect of malt specifications. It was submitted that this sentence provides the basis for French deciding to review Asahi's data, rather than that of another customer.

Further, the Viterra Parties generally disputed the contention that several of the opinions in the French Report could not be tested. The Viterra Parties pointed to the fact that a joint expert report had been prepared by French and Hertrich on 7

June 2018 (“the Joint Report”), and that the experts had been able to explore and test the reasoning behind their respective opinions without any apparent difficulty.

This objection is rejected. Although the manner in which the data was “sorted” is not clear on the face of the French Report and the specifications to which the specific customer is apparently sensitive are not disclosed, the evidence appears to do no more than explain why French chose to focus on a particular set of data in the large spreadsheet he reviewed. Further, this rejection of the objection is in the context where there was no specific objection to the remainder of paragraph 43, which appears to set out the information upon which French has relied.

(13) Objection to paragraphs 44, 45 and 46 on the basis that no path of reasoning is expressed so as to establish that the opinions are wholly or substantially based on specialised knowledge. Further, in respect of paragraph 44, it was argued that French has not demonstrated relevant specialised knowledge in respect of “the reporting methodologies” of “other participants in the malt industry”. Furthermore, it was argued that French failed to state the basis for the expression of an opinion as to the practices adopted by such participants or the conclusion that such practices are similar to those adopted by Joe White. Paragraph 44 reads:

> Based on my *preliminary review*, of *a part of the data* obtained from the [certificate of analysis] spreadsheet and based on my experience in the malting industry, reviewing *malt analytical data* and *shipment malt analytical trend data*, I am of the opinion that *the reporting methodology* used by [Joe White] was similar to the practice of *other participants* in the malt industry.
>
> (Emphasis added.)

The objection to this paragraph is upheld. The path of reasoning is not disclosed in a number of respects. Precisely what the “preliminary review” entailed is not disclosed. Further, which “part of the data” was considered is unclear. Even if it is assumed those phrases relate to what is contained in paragraph 43 of the French Report (which is far from clear), precisely what malt analytical data and shipment malt analytical trend data was reviewed is not apparent.[69] Finally, the reference to “other participants” is too vague. There is no indication as to whether such participants represent a significant or insignificant sector of the malt industry. Also for these reasons, if the evidence were admissible by reason of the exception in s 79 , I would have excluded it under s 135 .

(14) In respect of paragraphs 45 and 46 it was further argued by the Cargill Parties that French has not demonstrated relevant specialised knowledge in respect of the practices followed or adopted “by most malthouses”. Paragraphs 45 and 46 read:

> I am *therefore* of the opinion that the policies, procedures and practices in place at [Joe White] with respect to Certificate of Analysis generation were similar to practices followed *by most malthouses* prior to August 4, 2013.[70]
>
> *Therefore*, based on the information I have reviewed, I am of the opinion that the Viterra Policies and Practices were similar overall to practices adopted *by most malthouses* prior to August 4, 2013.
>
> (Emphasis added.)

The Viterra Parties argued that the opinions expressed in these paragraphs are identified as being based on what French has directly experienced and observed while working in the malting industry.

The objections to each of these paragraphs are upheld. Although I do not accept the Cargill Parties' submission concerning French's professional experience and understanding, there is no proper statement of reasoning for the opinions expressed. Further, and in any event, both paragraphs are premised on what was stated in paragraph 44.[71] The disallowance of paragraph 44 necessarily has the cascading effect of undermining the admissibility of paragraphs 45 and 46.

(15) Objection to paragraphs 47 to 61 on the basis that the opinions contained in those paragraphs are addressed to the state of knowledge of "participants in the malt industry". It was argued that French has not demonstrated specialised knowledge of the behaviour, practices or knowledge of participants in the malting industry generally. Further, it was submitted the question of what maltsters knew or understood was a factual matter, and not evidence that could be admissible under s 79 as an opinion based on specialised knowledge. Furthermore, it was argued that no path of reasoning is expressed so as to establish that any opinion is wholly or substantially based on specialised knowledge.

The Viterra Parties argued that the opinions expressed in these paragraphs are identified as being based on what French has directly experienced and observed while working in the malting industry.

It is not necessary to set out these paragraphs for the purpose of this general objection. For reasons stated,[72] I reject the submission that French does not have the necessary experience to give evidence about the commercial malting industry. Further, insofar as these paragraphs contain statements as to common practice or knowledge in the industry, I agree with the Cargill Parties' submission that such statements are factual evidence and not opinions that fall for consideration under s 79 .[73] Accordingly, this general objection is rejected insofar as it relates to the factual

evidence. As to the opinion evidence, this will be dealt with based on the specific objections addressed below.

To the extent these paragraphs are concerned with "Cargill's" position, there is significant overlap between this objection and the further specific objections addressed below.[74] As to French's opinions as to Cargill, Inc's likely awareness of the Industry Practices, the objection is upheld. Such assertions are not opinions based on specialised knowledge, but are bald conclusions about the state of mind of a specific corporation. To be clear, a suitably qualified expert could properly give evidence concerning the nature and extent of an industry practice or industry practices from which the court might draw an inference about the knowledge of a particular participant in the industry. Further, an opinion as to the likelihood of knowledge in the industry generally *may* be based, wholly or substantially, on the specialised knowledge as to the prevalence of a particular practice or particular practices.[75] However, putting aside cases where an expert is able to give direct evidence of a party having actual knowledge of the practice in question, it is no part of an industry expert's role to make assertions based on general specialised knowledge concerning the likelihood or otherwise of the actual knowledge of a party to the proceeding of the practice or practices in question.[76]

(16) Objection to paragraph 48(a) on the basis that it seeks to prove the facts asserted and thereby contravenes the prohibition on hearsay evidence. It was argued that the exception for evidence that is relevant for a nonhearsay purpose does not apply because the opinion expressed is not wholly or substantially based on specialised knowledge. Paragraph 48 relevantly reads:

> Based on my experience in the malting industry, most participants in the industry would likely be aware of [the practice of using nonapproved malting varieties to produce malt]. For example:
>
> > (a) Asahi Breweries of Japan in about 2010/2011, initiated the testing of lots of malt shipped to them by their suppliers for varietal purity inclusion rates. They take in malt from a significant number of maltsters around the world from Australia, Europe and Canada. They take in malt from more than one supplier from each region. This allows them to objectively compare suppliers' analysis and malt brewery performance from each supplier from a given geography and investigate differences which might arise after taking into account known differences of malthouse or barley supply within a region. Laura McIntyre's witness statement at [79] references that Asahi analysed and determined that Gairdner [which is a

> variety of barley] had not been used on the blend ...

The Viterra Parties argued that any hearsay evidence contained in this paragraph was relevant for a non-hearsay purpose, being part of the reasoning upon which French has based his opinions.

The objection is rejected. On the face of his report, French is providing an example based on his direct observations and knowledge. Even if that conclusion is incorrect, the hearsay rule does not operate to exclude the evidence by reason of s 60 and the relevance of a purpose other than the asserted fact. However, the last sentence does not fall into this category, it being a comment on evidence given by a witness at trial. That sentence will be subject to a ruling under s 136 limiting its use so that the comment is not proof of the asserted fact.

(17) Objection to paragraph 48(b) on the same basis as paragraph 48(a). It was further argued that the second sentence constitutes speculation as to the reasons for the actions of a major importer. Paragraph 48(b) reads:

> A major importer of a significant quantity of malt into Africa, mostly from the [European Union], for brewing has variety specifications and performs variety analysis based on random analysis of third party samples using [polymerase chain reaction] to determine the varieties on a malt shipment. This was part of their specifications prior to August 4, 2013. I am aware this was put in place due to noncompliance issues with variety integrity.

This objection is rejected for the same reasons as stated with respect to paragraph 48(a).

(18) Objection to paragraph 48(c) on the same basis as paragraph 48(a) and (b). Paragraph 48(c) reads:

> IFBM, in Nancy, France had made available a [polymerase chain reaction] testing service to test for varietal integrity. I am aware that other maltsters had discussed the use of this service with them.

This objection is rejected for the same reasons. The use of the word "other" in this passage is not problematic because the point being made is the establishment of the testing service, which, of itself, suggests the issue of varietal integrity was not insignificant.

(19) Objection to paragraphs 49 and 50 on the basis that they express an opinion about the factual matter of what most maltsters knew or understood, which is not a matter for opinion based on specialised knowledge. Further, it was argued French has not demonstrated specialised knowledge in respect of the subject matter. Furthermore, it was argued

that no path of reasoning is expressed so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraphs 49 and 50 read:

> Based on my experience in the malting industry, each of the [examples contained in paragraphs 48(a)–(c)] was likely to have been known to most participants in the export malting industry.
>
> Therefore, I am of the opinion that it is likely most participants in the industry were aware that this practice was engaged in by a number of malthouses.

The Viterra Parties argued that the opinions expressed in these paragraphs did not pertain to the knowledge or understanding of particular maltsters but was concerned with the industry generally. Further, they contended that the opinions expressed in these paragraphs are identified as being based on what French has directly experienced and observed while working in the malting industry.

The authorities demonstrate an expert may give evidence about common industry practices or customs.[77] If, in fact, a practice or custom is engaged in throughout an industry, ordinarily it would follow that it would be likely to be known by industry participants. This is an inference that, again ordinarily, it would be expected would be drawn from evidence concerning the common practice or custom in question. However, in some cases it may be a matter for expert evidence as to whether a particular practice or custom is well known or "notorious" in an industry.[78] In this case, the court is concerned with a practice that is alleged to be, in part, covert. In these circumstances, an industry expert may possess specialised knowledge which enables her or him to give evidence concerning knowledge of a particular industry practice.

Proceeding on this premise, the objection to paragraph 49 is rejected on the basis that French has confined his opinion to the awareness of most participants in the "export malting industry". The objection to paragraph 50 is also rejected. Although the shift from "export malting industry"[79] to "the industry" may, on its face, appear to make the evidence less probative, this is a matter of weight rather than admissibility.

(20) Objection to paragraph 51 on the basis that it expresses an opinion of what most maltsters knew or understood, which is a factual matter and not a matter for opinion based on specialised knowledge. Further, it was argued French has not demonstrated specialised knowledge in respect of the malting industry "on a worldwide basis". Furthermore, it was argued that no path of reasoning is expressed so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Additional objections were made to the final sentence of paragraph 51(c)

and the second, third and fourth sentences of paragraph 51(d) on the basis that they constitute hearsay and speculation. Paragraph 51 reads:

> In my experience ... [gibberellic acid] was used throughout the industry as required, in a non-compliant manner on a worldwide basis prior to [the execution of the Acquisition Agreement]. Further:
>
> (a) Based on my experience in the malting industry I believe it was well known by malting participants in North America prior to [the execution of the Acquisition Agreement] that six row barley was at times difficult to malt without the use of [gibberellic acid]. The use of [gibberellic acid] was also well known among the maltsters on the malt barley quality evaluating (approval) committees; [American Malting Barley Association], Malt quality evaluation committee, and [Prairie Regional Recommending Committee for Grain], Malt and Oat approval committee and the Malt barley evaluation subcommittee. Participants in the industry *likely would have known* it was used in a non-compliant manner.
>
> (b) Based on my experience in the malting industry *it would likely have been known* in Europe by most participants in the malting industry that [gibberellic acid] was at times required to produce malt to specification and *sometimes* this use would be in a manner not compliant with customer contracts.
>
> (c) [Campden BRI], an independent malt testing laboratory in the [United Kingdom] was offering a service to analyse for exogenous applied [gibberellic acid] in malt prior to [the execution of the Acquisition Agreement]. Based on my communications with [Campden BRI] I understood this service was being offered as a result of demand from the industry to test for the use of [gibberellic acid] because its use was common.
>
> (d) A major Japanese brewer who did not allow the use of [gibberellic acid] was conducting random testing for [gibberellic acid] prior to [the execution of the Acquisition Agreement]. This was initiated

> because the brewer likely suspected of noncompliant [gibberellic acid] usage in the industry. To my knowledge at that time [gibberellic acid] was detected in [a] number of maltster's shipments. This testing was industry knowledge.

(Emphasis added.)

The Viterra Parties repeated their response to the objections to paragraphs 49 and 50 above.

For reasons stated above, the Cargill Parties' submission concerning specialised knowledge is rejected. Accordingly, subject to the specific objections, the evidence will be allowed. Although I accept much of paragraph 51 is not opinion evidence that attracts s 79 , such evidence is admissible on the basis that French is an industry expert. To the extent it consists of opinion evidence, the specialised knowledge has been established for those opinions to be given.[80]

As to the specific objections, the final sentence in paragraph 51 (c) is hearsay evidence. However, the exception in s 60 for evidence that is relevant for a purpose other than proof of an asserted fact is engaged because this sentence contains an observed fact upon which French has based some of his opinions. The objection as to admissibility is rejected. However, given the conclusory form of the sentence, a ruling under s 136 will be made limiting its use to being the basis of French's understanding rather than the truth of the underlying facts.

As to paragraph 51(d), the second sentence is plainly speculation. The use of the word "likely" in respect to a specific matter demonstrates this. It is disallowed. However, the third and fourth sentences are admissible on the basis that they are put forward as being from French's own knowledge.

(21) Objection to paragraph 52 on the basis that no path of reasoning is shown so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraph 52 reads:

> Therefore I am of the opinion that the use of [gibberellic acid] similar to the Viterra practice was sufficiently engaged in by some malthouses prior to [the execution of the Acquisition Agreement] such that participants in the industry would likely have been aware of these practices.

The Viterra Parties argued that the opinions expressed in this paragraph are identified as being based on what French has directly experienced and observed while working in the malting industry.

This objection is rejected. French has observed the use or knowledge of the use of gibberellic acid during his career in the malting industry. The opinion expressed is based on the professional experience and understanding gained by French as a result of his employment history. Although the use of "some" is quite vague, the evidence concerning knowledge goes to the awareness of the participants in the industry more generally.

(22) Objection to the first sentence of paragraph 53 on the basis that French has not demonstrated specialised knowledge in relation to the practices of "most malthouses". Further, it was argued that no path of reasoning is demonstrated so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended there is no basis stated for the opinion expressed[81] and it therefore cannot be tested. The first sentence of paragraph 53 reads:

> Causes of variation in blending, sampling and malt testing would require that most malthouses have practices in place which are similar to the [certificate of analysis] practices prior to [the execution of the Acquisition Agreement].

The Viterra Parties argued that the opinion expressed in this sentence is identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. The opinion is based, or at least substantially based, on French's knowledge of the various matters identified with respect to producing and testing malt. Further, preceding sections of French's Report discuss why it is said that such a requirement for the practices referred to would exist.

(23) Objection to the second and third sentences of paragraph 53 on the basis that they contain comments on a factual matter rather than an opinion based on specialised knowledge. Those sentences read:

> Additionally, these could not have been isolated practices within the [Joe White] malthouse. Based on my experience in the industry I believe a number of employees at a malthouse must have been aware of these issues and worked together as a team to effectively produce, ship and report malt within customer's specifications and expectations.

The Viterra Parties contended that these sentences contain the reasoning for some of the opinions expressed in the French Report and were not sought to be tendered as proof of the underlying facts.

Based on this position, the evidence will be permitted subject to a ruling under s 136 limiting the use of the evidence to French's understanding of industry practice rather than what

occurred specifically at Joe White (noting that, immediately following, French refers to evidence on this issue already before the court from other witnesses).

(24) Objection to paragraph 57 on the basis that the witness has not demonstrated specialised knowledge in relation to "the industry" globally. Further, it was argued that there is no path of reasoning so as to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended there is no basis stated for the opinion expressed[82] and it therefore cannot be tested. Paragraph 57 reads:

> In my experience practices similar to [solutions proposed in a Cargill Australia document dated 17 January 2014 to address the gap between capability and customer expectations, including engaging the customer to either go to a theoretical blend, allow a variation of 2 standard deviations of the analytical method on either side of customer specifications or widen their specifications] were utilised within the industry. As an example:
>
> > (a) Where analysis was required before lab results would be available in instances such as direct truck deliveries from malthouse to brewery customer approval would be gained to report the theoretical blend followed by laboratory testing on samples representing each blend; and
> >
> > (b) Some customers were open to discussion about analytical capability and would adjust and/or widen specifications to allow for analytical variability.

The Viterra Parties argued that the opinions expressed in this paragraph are identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. French is suitably qualified to state, as a matter of fact, whether what was (according to the particular document) being proposed by Cargill Australia aligned with practices engaged in within the industry.

(25) Objection to paragraph 59 on the basis that the witness has not demonstrated knowledge in relation to "most participants in the industry". Further, it was argued that there was no path of reasoning to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended that no basis is stated for the opinion expressed[83] and it therefore cannot be tested. Paragraph 59 reads:

> Based on my experience in the malting industry I believe the practice of most participants in the

> industry was to adjust [certificate of analysis] results, based on 2 standard deviations or by experience.

The Viterra Parties argued that the opinions expressed in this paragraph are identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. French is giving factual evidence based on specialised knowledge derived from his industry experience.

(26) Objection to paragraphs 60 and 61 on the basis that they contain comments on the factual matter of the state of mind of "Cargill" and other industry participants. Further, it was argued that no path of reasoning existed to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraphs 60 and 61 read:

> Therefore, in my opinion, Cargill would likely have been aware of industry practices similar to [Joe White] practices with respect to blending and customer reporting prior to the [A]quisition.
>
> I am therefore of the opinion that most participants in the industry would be aware of practices similar to the [certificate of analysis] practices.

The Viterra Parties argued that the opinion expressed in these paragraphs is identified as being based on what French has directly experienced and observed while working in the malting industry.

With respect to paragraph 60, the objection is upheld. The evidence given in paragraph 60 purports to give specific opinion evidence as to the likelihood of the actual knowledge of Cargill, Inc (and probably also Cargill Australia, though this is not clear). Despite s 80(a) of the *Evidence Act* , it is not the role of an expert to seek to usurp the role of the court with respect to specific factual findings regarding the parties to the proceeding. [84] Further, the French Report provides no statement of reasons as to why Cargill, Inc in particular would have been likely to have the knowledge alleged. On that basis alone it is not admissible. Even if it were admissible, I would exclude the evidence under s 135 . French's view about an issue for determination by the court without the benefit of the evidence at trial is of little probative value, and any such value is substantially outweighed by the real potential for an undue waste of time if the evidence were admitted.

In contrast, paragraph 61 is concerned with knowledge in the industry generally. This is factual evidence that French is able to give by reason of his specialised knowledge, and the basis of this evidence is clear from what precedes this paragraph. Accordingly, the objection is rejected.

(27) Objection to paragraphs 62 to 97 on the basis that the evidence is directed to the factual matter of what the Cargill

Parties knew or understood as a result of the due diligence process preceding the Acquisition. It was argued that this was not properly a matter for expert opinion and that French has not demonstrated specialised knowledge in respect of the subject matter. It is not necessary to set out all these paragraphs to address this general objection. It is sufficient to set out the 3 opinions in this section of the French Report:[85]

> Therefore, I am of the opinion, that there was evidence in the form of industry practices and lack of malt storage segregations of the use of barley in a non-compliant manner. I am also of the opinion that if Cargill had a policy of strict compliance with varietal requirements they should have investigated variety compliance as part of their due diligence process. As a result, they must have known they would be operating the plants significantly different (sic) from the practices employed by [Joe White].
>
> ...
>
> Therefore, it is my opinion, that the presence of the [gibberellic acid] application systems and the purchase of [gibberellic acid] were discoverable during the due diligence process. It is also my opinion given that Cargill likely would have known about the non-compliant use of [gibberellic acid] in the industry, and their policy was to be compliant with brewery purchase contracts with respect to [gibberellic acid] use, I would have reasonably expected this would have triggered a review of [gibberellic acid] non-compliant use by [Joe White] to take place during the due diligence process.
>
> ...
>
> I am therefore of the opinion, that it would have been apparent in the due diligence process that the [Joe White] plants did not have the required capability to meet the Cargill methods with respect to blending and [certificate of analysis] generation.

The Viterra Parties argued that the question of what was and should have been known to the Cargill Parties was properly a matter for expert opinion. Further, they argued that French has specialised knowledge in respect of what should have been known or investigated by an experienced maltster during due diligence based on his experience as an employee of, and consultant to, several malthouses. However, in oral submissions, the Viterra Parties' senior counsel properly acknowledged there was nothing in the French Report to suggest French had any expert knowledge concerning due diligence.

In circumstances where there is no evidence that French has any expertise with respect to the conduct of due diligence before the acquisition of a malt business, he does not have relevant specialised knowledge on this topic. Accordingly, there is no basis upon which he can properly express an

opinion about what ought to have been done in the due diligence before the Acquisition, or what ought to have been apparent from that process. In addition, the observations made above with respect to upholding the objection to paragraph 60 are repeated.[86] Moreover, if I had been of the view that the evidence was admissible, I would have excluded it under s 135 of the *Evidence Act* . If the evidence were allowed to stand, it would open up for cross-examination all of the issues pertaining to the due diligence process leading up to the Acquisition. This would be likely to cause or result in an undue waste of time.

Despite the general objection has been upheld, upon this ruling being given the Viterra Parties will be invited to consider whether any of the evidence contained in paragraphs 62 to 97 of the French Report is otherwise relied upon for purposes beyond French's opinions concerning due diligence (and is admissible consistent with the various rulings in these reasons).

In case I am incorrect in upholding the general objection to paragraphs 62 to 97, the specific objections will also be considered.

(28) Objection to the first sentence of paragraph 85 on the basis that French has not demonstrated specialised knowledge in relation to the "methods generally accepted by most participants in the industry". Further, it was argued that there was no path of reasoning to establish that the opinions expressed are wholly or substantially based on specialised knowledge. The first sentence of paragraph 85 reads:

> Contrary to the Cargill method, in spite of the inherent limitations in the industry standard analytical methods it is generally accepted by most participants in the industry that [certificate of analysis] malt analysis should be based on malt laboratory analysis.

The Viterra Parties argued that the opinion expressed in this sentence is identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is rejected. French has specialised knowledge with respect to the testing of malt in the industry. That said, the introductory words referring to Cargill's method will be limited in their use, pursuant to s 136 , to French's understanding of the method, and will not be proof of the asserted fact.

(29) Objection to paragraph 87 on the basis that French has not demonstrated specialised knowledge on the question of the approaches and requirements of "most participants in the industry".[87] Further, it was argued that no path of reasoning was shown to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Paragraph 87 reads:

> [The Cargill standards constitute] a different approach than that adopted by most participants in the industry, who recognise that errors, equipment failures and variation do occur, when blending and loading malt resulting in the theoretical blend not matching the shipment analysis. Most participants in the industry, both maltsters and brewers, therefore require laboratory analysis on each shipment based on actual samples taken at the time of loading.

The Viterra Parties repeated their response to the objection to paragraph 85 above.

The objection is rejected. Again, French is in a position, based on his experience, to state what most participants in the industry do with respect to laboratory analysis. However, the evidence concerning Cargill's standards will be the subject of a like limitation to the limitation set out in the previous subparagraph.

(30) Objection to paragraph 99 on the basis that the witness had not demonstrated specialised knowledge on the question of "the practices" of "other malthouses". Further, it was argued that there was no path of reasoning to establish that the opinions expressed are wholly or substantially based on specialised knowledge. Furthermore, it was contended that no basis for the opinion has been identified. Finally, it was contended that no basis is stated for the opinion expressed[88] and it therefore cannot be tested. Paragraph 99 reads:

> Based on my experience in the malting industry, in my opinion, [Joe White] was operated with practices consistent with other malthouses which ensured customers were satisfied with the malt they were receiving.

The Viterra Parties argued that the opinion expressed in this paragraph is identified as being based on what French has directly experienced and observed while working in the malting industry.

The objection is upheld. The opinion is not concerned with industry practice generally, or even most of the participants in the industry, but only refers to "other" malthouses, unidentified in name or approximate number. Further, to the extent French asserts the satisfaction of Joe White customers, this is nothing but a bald assertion without any identified basis.

(31) Objection to paragraphs 100 to 103 on the basis that these paragraphs will fall away if the previous objections to the evidence on "industry practice" are upheld. Paragraphs 100 to 103 read:

> In my opinion, as the use of non-compliant malting barley varieties was consistent with industry accepted practice, therefore there were no changes

> required [to be made by the Cargill Parties following the Acquisition in order to operate the Joe White business in a manner that accorded with general industry practice].
>
> The exception would be the use of Hindmarsh as it was not an approved malting variety, but was classified as a "food grade" barley and was used for malting purposes in China. If it was being used for customers that did not specify "food" grade barley as the only standard for the malting barley, it would not be to industry standard.
>
> In my opinion the use of [gibberellic acid] in a non-compliant manner was consistent with accepted industry practice, therefore no changes were required [to be made by the Cargill Parties following the Acquisition in order to operate the Joe White business in a manner that accorded with general industry practice] to meet industry accepted practice.
>
> In my opinion, [certificate of analysis] practices relative to blending and customer reporting were consistent with accepted industry practice, therefore no changes were required [to be made by the Cargill Parties following the Acquisition in order to operate the Joe White business in a manner that accorded with general industry practice].

As the uncertainty concerning the use of the term "industry" has been resolved,[89] the specific objection to these paragraphs has dissipated. However, consistent with other rulings on this issue, to the extent the passages set out above refer specifically to the Cargill Parties' position and whether changes were required, that evidence is inadmissible under s 79 , alternatively excluded under s 135 for reasons stated elsewhere.[90]

(32) Objection to paragraphs 105 to 129 on the basis that the opinion is addressed to the factual matter of what action Cargill ought to have taken post-Acquisition and whether the actions taken were appropriate. It was argued that this was not properly a matter for expert opinion and that French has not demonstrated specialised knowledge in respect of the subject matter. Furthermore, it was argued that no path of reasoning was demonstrated to establish that the opinions expressed are wholly or substantially based on specialised knowledge. It is not necessary to set out the entirety of these paragraphs. Some relevant extracts follow:

> If the use of Hindmarsh was not permitted by any existing customers, the following steps should have been taken ...
>
> In my opinion the steps taken by Cargill were not an appropriate means to implement their [certificate of analysis] policies. Implementation on day one of the [A]cquisition would be disruptive to the business and harm relations with existing customers. That

> would not be the way a prudent industry participant would go about it ...
>
> A study should be conducted to determine if the existing malthouses, have the capability to produce the malt quality to meet the Cargill policies ...
>
> Where cost effective, plant capability should be improved to meet the Cargill policies ...
>
> The Cargill [certificate of analysis] policies should not be implemented at each plant, until each plant capability upgrades are completed ...
>
> In my opinion the steps taken by Cargill were not an appropriate means to implement their varietal policies ...
>
> It is not possible to implement the Cargill varietal policies until additional storage and segregation capacity had been constructed ...
>
> In my opinion the steps taken by Cargill were not an appropriate means to implement their [gibberellic acid] policies ...

The Viterra Parties argued that the question of what steps the Cargill Parties should have taken was properly a matter for expert opinion. Further, they argued that French has specialised knowledge in respect of this matter based on his professional experience .

The objection is upheld. Largely, the evidence is not concerned with industry practices or knowledge, but with the specific circumstances that Cargill faced after the Acquisition. The observations with respect to rejecting paragraph 60 of the French Report are repeated.[91] Further, much of this section of the French Report consists of bald assertions or conclusions, the basis of which is unclear, or substantially unclear. In any event, if I had been of the view that this evidence was otherwise admissible, I would have excluded it under s 135 . To allow evidence purporting to deal with the actual circumstances of Cargill Australia after the Acquisition would be to open up for cross-examination a vast range of topics and issues that would be highly likely to result in an undue waste of time, and would also be likely to be unfairly prejudicial given all lay witnesses have already given their evidence.

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[84] Cf *Australian Securities and Investments Commission v Vines* (2003) 48 ACSR 291, 299 [27] (Austin J); *Faucett v St George Bank Ltd* [2003] NSWCA 43, [48] (Sheller JA, with whom Mason P and Meagher JA agreed), and the cases there cited; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79, 83D (Lindgren J). See also par 50(15) above.

The Owners - Strata Plan No 69312 v Rockdale City Council; Owners of SP 69312 v Allianz Aust Insurance [2012] NSWSC 1244 (18 October 2012) (Lindsay J)

108. In terms of relevance, Mr Wynn-Jones' evidence is generally one step removed from the Guide insofar as it comprises statements of opinion. His opinion about the meaning of the BCA, or the application of the BCA to the facts of the case before the Court, has no evidentiary value, helpful though that "evidence" has been as an elaboration of the defendants' submissions. Ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty; although those processes are properly the subject of submission, evidence of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible: *Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No 6)* (1996) 64 FCR 79 at 83 per Lindgren J, approved by the Court of Appeal in *Faucett v St George Bank Limited* [2003] NSWCA 43 at [48] .

The Owners - Strata Plan No 69312 v Rockdale City Council; Owners of SP 69312 v Allianz Aust Insurance [2012] NSWSC 1244 (18 October 2012) (Lindsay J)

Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No 6) (1996) 64 FCR 79 at 83 per Lindgren J Faucett v St George Bank Limited [2003] NSWCA 43 at [48] .

Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2008] NSWSC 1263 (25 November 2008) (Barrett J)

Faucett v St George Bank Ltd [2003] NSWCA 43

Forge v Australian Securities and Investments Commission

Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2008] NSWSC 1263 (25 November 2008) (Barrett J)

13 A similar approach had been taken earlier in the same year by Sheller JA, with whom Mason P and Meagher JA agreed, in *Faucett v St George Bank Ltd* [2003] NSWCA 43 at paragraph [48] :

> "Mr Jennings should not have been asked nor permitted to give evidence such as that set out in paras 10.1 and 10.2 which I have quoted. It was not part of the function of this expert to state as his opinion that the respondent failed in its duty to provide a safe system of work or to provide a security system which was commensurate to the obvious risks of robbery. Section 80 of the *Evidence Act* 1995 provides relevantly that evidence of an opinion is not inadmissible only because it is about (a) a fact in issue or an ultimate issue. But as Mason P pointed out in *R v GK* (20 01) 53 NSWLR 317 at 326-7, "judges should exercise particular scrutiny when experts move close to the ultimate issue, lest they arrogate expertise outside their field or express views unsupported by disclosed and contestable assumptions." In *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6) (Court's 'Allstate' Judgment No 33)* (1996) 64 FCR 79 at 83 Lindgren J said:
>
> > "I find it convenient at the outset to state some principles of the general law against which, in my view, the effect of par 80 (a) is to be determined. It is fundamental that the ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly the subject of submission, *evidence* of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible. The rationale underlying this fundamental principle may be expressed in various closely related ways: to admit such evidence would be to permit abdication of the judicial duty and usurpation of the

judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant."

With his Honour's statement I entirely agree; see also *Naxakis v West General Hospital* (1999) 197 CLR 269 at 306 [110] note 137; *Cross on Evidence* , Australian edition 29105; *Odgers Uniform Evidence Law* 1.3.4460; *O'Brien v Gillespie* (1997) 41 NSWLR 549 at 557 ; *Idoport Pty Ltd v National Australia Bank Limited* (2000) 50 NSWLR 640 at 655 [39] ."

Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2008] NSWSC 1263 (25 November 2008) (Barrett J)

15 I take this to be consistent with what was later said by Austin J in *ASIC v Vines* and by the Court of Appeal in *Faucett* , as outlined above. But, as both those cases show, there are other reasons why opinion evidence of the kind in question might be rejected: first, that a statement of opinion on the ultimate legal issue lies outside the province of the particular expert's specialised knowledge based on training, study or experience; or, second, that when it comes to deciding the ultimate legal issue, the evidence has no relevance because, in terms of s 55 , the decision of the court, whose task it is to decide that issue, could not rationally be affected by an opinion of the particular person on that question.