SQUIRE PATTON BOGGS

Relying on Expert Evidence in External Administrations

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External administrations often involve pre-appointment litigation that concerns either the company in question or its assets, commercial interests, directors or officers. In those contexts, the external administrators appointed to take charge of the relevant estates are required to make robust – and sometimes time sensitive – decisions on what approach to take with the ongoing litigation.

In particular, they must decide whether to continue with the path inherited or, whether to take a different approach, if circumstances permit. As part of their assessments, administrators must consider the extent to which they may need to rely on expert evidence in pursuing or defending a claim, what the nature and scope of that evidence is, and whether it is feasible to continue engaging experts who might have already been retained by the relevant company. Those decisions are regularly made more difficult by, inter alia, funding limitations, other financial imperatives insofar as preserving or realising assets is concerned, and conflicting views from stakeholders as to the approach that should be taken. Administrators might also be faced with the challenge of expert witnesses who might show reduced enthusiasm for continuing to assist where the financial terms of their engagements might be at risk.

This note covers some of the key considerations that administrators should bear in mind when determining what approach to take with expert evidence in pre-appointment litigation, particularly where they apprehend not being able to present an expert for cross-examination despite serving a report from them.

Pre-appointment Litigation

Although different rules apply in the various Australian courts, we consider below the position in New South Wales under the Uniform Civil Procedure Rules 2005 (UCPR), as it is the most populous state and has the highest number of civil proceedings, as well as raising similar issues to other jurisdictions.

Where administrators inherit a legal proceeding in which expert evidence has already been served, they will likely be confronted by the following procedural rules:

- Rule 31.29(2) of the UCPR provides that unless the court otherwise orders, a party may require the attendance for cross-examination of an expert, a report from whom has been served.
- Rule 31.29(5) of the UCPR stipulates that if an expert's attendance for cross-examination is required under r 31.29(2), the report may not be tendered under ss 63, 64 or 69 of the Evidence Act 1995 (NSW) (Evidence Act) or otherwise used unless the expert attends, or is dead, or the Court grants leave to use it.

It is the last limb of the proviso that is of potential relevance to external administrators.

Advance Ruling

The Evidence Act permits the court to make an advance ruling (i.e. a pre-trial ruling) about the admissibility of evidence. That power can be used to seek a pre-trial determination about whether the report of an expert who will not be cross-examined is admissible. In external administrations, that scenario might arise in several different ways, including where an expert report has already been served pre-appointment, and the external administrators seek to continue prosecuting (or defending) the claim but cannot present the witness due to financial, practical or other limitations. In such circumstances, the administrators can seek an advance ruling as to the admissibility of the relevant expert report where the expert is not called as a witness.

There is limited guidance from the authorities as to the application of UCPR r 31.29(5), although the Supreme Court is clearly prepared to exercise its discretion where the circumstances justify it. One of the few cases to consider the topic is the recent (1 September 2023) decision of Justice Stevenson of the Supreme Court of New South Wales in *Votraint No. 1019 Pty Ltd v Zauner Construction Pty Ltd* [2023] NSWSC 1055. In that case, the plaintiff had served an expert report about certain building defects in November 2019. In early 2023, the expert informed the plaintiff that his health was such that he could not give evidence about the report. The plaintiff sought an advance ruling that it was entitled to rely on the report without the expert being available for cross-examination.

The court's task is to weigh the matters in favour of granting leave against those in favour of refusing the application. In all likelihood, the court's decision will cause prejudice to at least one of the parties. Though each case will depend on its particular facts, the Civil Procedure Act 2005 (NSW) s 56 makes it clear that the question the court must determine is to what extent some degree of prejudice might be acceptable, having regard to the overall circumstances of the case, the position the parties find themselves in (particularly the recently appointed administrator), the interests those parties seek to serve, and the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings. Ultimately, Justice Stevenson gave the plaintiff the leave it sought, though noted that the unavailability of the expert for cross-examination will affect the weight to be given to the expert's evidence. The *Votraint* decision demonstrates that there may be circumstances where the usual position (i.e. that a party is entitled to cross-examine an expert on their report) may be departed from.

The Upside for Administrators

Although an application for an advance ruling that an expert's report is admissible, despite the expert not attending for cross-examination, is not straightforward, as it is a departure from the usual position, and it invokes discretionary court powers, there may still be a number of benefits derived by administrators from taking a proactive approach. By making an application for an advance ruling, an administrator will be better placed to:

- Determine how to approach the balance of the litigation and the extent to which it requires an investment of time and resources
- Determine which claims, or parts thereof, are worth prosecuting versus those components that are best withdrawn or perhaps repleaded (if permitted)
- Engage in settlement discussions
- Report to and engage with general body creditors or committees overseeing the administration

It is conceivable that administrators may face limitations around adducing expert evidence or presenting a witness for cross-examination, despite otherwise intending to pursue or defend a claim post-appointment. In such circumstances, and where administrators are also contending with the challenges of administering a complex estate, seeking an advance ruling may serve as a practical, and cost-effective, way of getting clarity for all stakeholders on the future and prospects of the overall litigation before one passes the point of no return.

Contact

Masi Zaki
Partner, Restructuring
E masi.zaki@squirepb.com

David Starkoff
Partner, Litigation
E david.starkoff@squirepb.com

Kate Spratt
Associate, Restructuring
E kate.spratt@squirepb.com