2019 WL 1424460

[2019] NZEnvC 46
Environment Court, Christchurch

Upper Clutha Environmental Society Inc v Queenstown Lakes District Council

ENV-2018-CHC-56
Decision: 20 March 2019
Judge Hassan

Classifications (2)

[1] **Civil procedure** To strike out

[2] **Evidence** Witness

Legislation Considered
Evidence Act 2006 (NZ) s 25(1)
Resource Management Act 1991 (NZ) s 274, s 276, s 276(1), s 276(2), s 279(1), Pt 2, Sch 1

Brookers Environmental Headnotes

Strike out — Evidence

This was a decision on an application by Dr J Cossens ("C"), a s 274 party to an appeal against decisions in stage 1 of the review of the Queenstown Lakes District Plan by Upper Clutha Environment Soc Inc ("UCESI"). C sought an order disqualifying an intended UCESI expert witness, J Haworth ("H"), from participating in expert witness conferencing or giving expert evidence in relation to the Queenstown Lakes Proposed District Plan. H had not participated in expert witness conferencing as he was overseas. The remainder of C's application pertained to the extent of H's capacity to give evidence in a forthcoming Topic 2 appeals hearing.

UCESI had filed two briefs of evidence from H on the Topic 2 hearing, which stated that H gave the evidence as an expert witness. C argued H's longstanding office-holding role within UCESI and his longstanding advocacy for the interests of UCESI rendered him incapable of being able to give independent, unbiased and impartial evidence as an expert is required to do, in accordance with the Environment Court's Code of Conduct for Expert Witnesses ("the Code"). C noted that H's formal qualifications were in accountancy and that he was not a member of relevant professional organisations for landscape architects or planning experts. UCESI stated that it accepted H's assurance that he gave his evidence in accordance with the Code and that the community would suffer were UCESl's case degraded by the striking out of H's evidence.

The Court examined the relevant legal principles under s 276 of the RMA which gave the Court a broad discretion to receive anything in evidence that it considered appropriate to receive and call before it a person to give evidence who, in its opinion, would assist it to make a decision. Related to that, the Court was not bound by the rules about evidence that apply to judicial proceedings. However, the Court stated the Evidence Act 2006 assisted the Court with consideration of principles of admissibility.

The Court stated that H's longstanding position as a senior officer holder in UCESI was an impediment to his capacity to adhere to the Code. A fundamental impediment to H's evidence being able to be received as expert evidence was that it was substantially a detailed argument on why the Court should prefer his view over competing viewpoints. The Court found H's evidence was in the nature of an advocacy statement on behalf of UCESI rather than impartial expert evidence in accordance with the Code.

The Court found that what H covered in his evidence in chief ("EIC") and rebuttal statements did not accord with the Code and was not properly characterised as expert evidence; but could be received from H in his capacity as president of the UCESI provided the statements of evidence were amended in accordance with directions made in the decision. The Court made directions that the EIC and rebuttal statements could be presented in evidence, subject to removal of relevant parts that asserted H had status as an expert witness. Those parts of the statements were struck out. Costs were reserved.

Party Names

Upper Clutha Environmental Society Inc *(Appellant)*, Queenstown Lakes District Council *(Respondent)*

Orders

Decision on Application to Strike out Evidence

A: The application is granted in part and parts of the evidence-in-chief and rebuttal evidence of Mr Haworth are struck out as specified at [45].

B: Leave is granted to Upper Clutha Environmental Society Incorporated to file and present evidence from Mr Haworth in accordance with the directions at [46].

C: Costs are reserved (but applications are not encouraged).

Judgment

REASONS

Judge J J M Hassan

Introduction

[1] Dr John Cossens is a s274 party to an appeal against decisions in Stage 1 of the review of the Queenstown Lakes District Plan by Upper Clutha Environmental Society Incorporated("UCESI"). [1] Dr Cossens seeks an order disqualifying an intended UCESI expert witness, Mr Julian Haworth, from participating in expert witness conferencing or giving expert evidence in the appeals in relation to the Queenstown Lakes District Proposed District Plan ("PDP"). [2]

[2] That part of the application concerning participation in expert conferencing has been largely overtaken by events. That is in the fact that Mr Haworth did not participate in expert witness conferencing (being overseas at the time) and is not a signatory to various joint witness statements that have since been filed. Nevertheless, I apologise to parties for the delay in getting this decision out, due to some heavy competing commitments largely pertaining to these appeals.

[3] The remainder of Dr Cossens' application remains current, however, in that it pertains to the extent of Mr Haworth's capacity to give evidence in the forthcoming "Topic 2" appeals' hearing to commence on 8 April 2019. Topic 2 is the only topic thus far in respect of which UCESI has filed evidence from Mr Haworth.

[4] According to directions made, this application is determined on the papers.

The evidence filed from Mr Haworth

[5] UCESI has filed two briefs from Mr Haworth for the Topic 2 hearing:

(a) a 9 November 2018 statement of evidence in chief ("EIC");

(b) a 4 December 2018 statement of rebuttal evidence ("rebuttal"), in which he responds to evidence from various planning witnesses (Mr Ferguson, Mr Brown, Mr Farrell, Mr McClennan and a landscape witness (Ms Pflüger).

[6] Both briefs state that Mr Haworth gives the evidence as an expert witness, in accordance with the Environment Court's Code of Conduct for Expert Witnesses (as set out in the court's 2014 Practice Note) ("Code" / "Code of Conduct").

Dr Cossens' submissions in support of his application

[7] Dr Cossens' application sets out his grounds for seeking Mr Haworth's disqualification as an expert and related submissions (over some 17 pages) (the "application"). No disrespect is intended to Dr Cossens' carefully considered submissions In the fact that I now present only a brief summary of those submissions. In essence, that is because the proper focus of what I must decide is also confined.

[8] Dr Cossens says that Mr Haworth's longstanding office-holding role within UCESI and his longstanding advocacy for the interests of UCESI renders him incapable of being able to give independent, unbiased and impartial evidence as an expert is required to do, in accordance with the Code. In support of that submission, he refers to relevant extracts from the Code. He also quotes some observations made by Principal Environment Judge Newhook in a paper he presented to an environmental workshop on the court's expectations of expert witnesses, [3] with reference to the section of the Practice Note on these matters. Specifically, those included observations that the court expected experts to be "independent, objective, and entirely professional" and "avoid being advocates, and to provide their own professional opinions, not that of the party who hires them" and that their "overriding duty" is to assist the court "impartially, free from direction from the client".

[9] Dr Cossens also refers to observations made concerning Mr Haworth's evidence in various Environment Court decisions in which he has given evidence. One of those cases, Scurr v Queenstown Lakes District Council, [4] is noted in Mr Haworth's EIC as accepting him as an expert witness. Dr Cossens criticises Mr Haworth for not going on to acknowledge that the court expressed views that his expertise "may be limited to a particular 'subject' within a particular 'field'." [5] Dr Cossens also refers to another case in which he says the court treated Mr Haworth's long standing membership and office holdings with UCESI as meaning that perhaps he was not completely independent. However, he did not provide a proper citation for that case and I have not been able to locate it. He also refers to *Upper Clutha Tracks Trust* [6] and commented that the court observed that Mr Haworth's evidence was "rather adversarial" given he was purporting to give evidence as an expert.

[10] In noting Dr Cossens' references to those cases, I do not endorse his submission that they significantly bear upon what I have to decide. Rather, insofar as each such case records findings concerning Mr Haworth's evidence, they are not authorities on how I should perceive Mr Haworth's evidence on this occasion. Rather, my approach to that task should be to consider the substance of the evidence before me according to relevant legal principles as to admissibility.

[11] Dr Cossens notes that Mr Haworth's formal qualifications are in accountancy and that he is not a member of relevant professional organisations for landscape architects or planning experts.

UCESI's submissions opposing the application

[12] UCESI responds to Dr Cossens' application in a one page memorandum, dated 10 February 2019 ("UCESI reply"), under the name of John Wellington (but unsigned). It records that UCESI accepts what Mr Haworth has assured them of, namely that he gives his evidence in accordance with the Code. It notes his twenty-four years' experience in planning matters in the district. It points out that this includes significant experience giving evidence as an expert before Council and court hearings. It describes UCESI as the only "disinterested community group" involved in the PDP. It submits that the community would suffer were UCESI's case degraded "by the striking out of Mr Haworth's evidence". It points out that no other party has either joined Dr Cossens' application or questioned Mr Haworth's status. It invites Dr Cossens to point out "parts of Mr Haworth's evidence exhibiting bias, partiality or advocacy" in his reply.

Dr Cossens' reply to UCESI's submissions

[13] In a twenty-three-page reply to UCESI's submissions, Dr Cossens further details the position he put in his application ("Dr Cossens' reply"). Along the way, Dr Cossens makes some pertinent observations, including that the admissibility of evidence and the weight apportioned to it "are still very much intertwined". [7] He suggests Mr Haworth's evidence is inevitably subject to "unintentional and subconscious bias" for the reasons he traverses. However, he strays beyond his original application (which was for an order disqualifying Mr Haworth as an expert) to submit that the court is left with "little option but to render Mr Haworth's evidence-in-chief inadmissible". That is on his analysis that nothing of the substance of Mr Haworth's EIC is capable of being admitted. That is a matter on which I take a significantly different view, as I come to explain.

Relevant legal principles

[14] Dr Cossens does not address relevant legal principles concerning disqualification of an expert witness. In one sense, that is understandable in that he is not legally qualified. Nevertheless, it is of course important that I find and apply those principles in determination of the application.

s 276 RMA

[15] A starting point for my consideration is s 276 RMA. This relevantly confers a broad discretion on the court to "receive anything in evidence that it considers appropriate to receive" and "call before it a person to give evidence who, in its opinion, will assist it to make a decision" (s 276(1)). Related to that, the court "is not bound by the rules about evidence that apply to judicial proceedings" (s 276(2)).

[16] That is not to say that the rules concerning admissibility are simply put to one side. The Evidence Act 2006 ("EA") can be applied and assists, as a starting point, in my consideration of principles of admissibility. That is subject to my overall consideration of the core matter in issue, namely whether Mr Haworth is in a position to give evidence as an expert in accordance with the Code.

[17] Returning to the EA, I find its definitions of "expert" and "expert evidence" of some assistance. While those definitions are for the purposes of the EA, nevertheless they reflect important elements of what would ordinarily be understood by those terms. The definitions are:

> "**expert** means a person who has specialised knowledge or skill based on training, study, or experience
>
> **expert evidence** means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion."

[18] One important dimension of the definition of "expert" is that does not exclude a person whose specialist knowledge or skill is solely experiential (rather than through formal qualification or membership of a professional body). Hence, insofar as Mr Haworth's formal qualifications are in accountancy, that is not necessarily fatal to his capacity to be considered as an expert. Rather, expertise ultimately pertains to whether the person concerned is able to offer "substantial help" in the area of specialist knowledge or skill that the person possesses.

[19] An important aspect of the EA's definition of "expert evidence" is that it must be based on "the specialised knowledge or skill" of the relevant expert. Where an expert offers opinions on matters going beyond that specialist knowledge or skill, those opinions do not meet the EA's definition of "expert evidence".

[20] Insofar an expert's opinion evidence is not within the EA's definition of "expert evidence", that favours ruling the evidence inadmissible.

[21] Section 25 EA concerns the admissibility of expert opinion evidence. I consider it cautiously because the nature of RMA plan appeal proceedings is significantly different from typical civil or criminal proceedings in which the EA applies. However, s 25(1) specifies:

> "An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding."

[22] Applying that to the context of RMA plan appeals, the proper frame of reference for considering whether expert opinion is of "substantial help" to the court is broader than for typical civil or criminal proceedings. For instance, RMA plan appeal proceedings involve a significant component of predictive judgment to be informed from a range of inputs. Those can extend to matters such as related objectives and policies of the instrument(s) in issue, the direction and guidance provided by higher order policy instruments, the competing rights and interests of a large number of parties to appeal proceedings, the related Council functions, and the purpose and principles in pt 2 RMA. As such, the "substantial help" that the court may receive from an expert witness could typically go significantly beyond the parameters of "understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding".

[23] However, it does not follow that the court should exercise generous license in allowing experts to offer opinions not based on their relevant specialist skill and knowledge. To do so risks elevating certain witnesses into a position of potential undue influence, with adverse due process consequences. That is reflected in the duties set out in the Code of Conduct.

The Code

[24] Part 7 of the Practice Note pertains to expert witnesses and specifies various duties that constitute the "Code of Conduct". Adherence to the Code is compulsory for all expert witnesses, including in preparing a brief of evidence and in giving oral evidence (cl 7.1(b)). Failure to comply with the Code can result in the evidence of the expert not being admitted (indeed, the evidence of any expert witness "who has not read, or does not agree to comply with, the Code of Conduct may be adduced only with leave of the Court") (cl 7.1(c)).

[25] The Code sets out various duties of experts pertaining to their giving of evidence. Typically, substantial non-adherence to the Code would be a factor going to how much weight is given to expert evidence (rather than necessarily its admissibility). For example, it can often be a matter of degree whether a witness has thoroughly set out their foundation data or literature or other information, or enunciated their reasons, or identified gaps or inaccuracies or concessions going to reliability. Similarly, advocacy by an expert can be a matter of degree such that it impacts upon the weight ascribed to their opinions (rather than necessarily rendering their opinion inadmissible).

[26] However, I accept Dr Cossens' observation that cl 7.2(a) expresses an overriding duty that, in this case, goes to admissibility. It states:

> "(a) An expert witness has an overriding duty to impartially assist the Court on matters within the expert's area of expertise."

[27] Related to that overriding duty is cl 7.3(a)(iii) which requires an expert witness to:

> " … describe the ambit of the evidence given and state either that the evidence is within her or his area of expertise, or that the witness is relying on some other (identified) evidence."

[28] The duty in 7.2(a) can be seen as relating to how the EA defines an "expert witness" and "expert evidence". One difficulty presented is when an expert strays into offering opinions the expert is not qualified to offer is unreliability. It can also be unfair for substantial unqualified opinion to be offered under colour of expertise. It can potentially give a party undue influence. That is particularly a risk where the opinion is in the nature of advocacy for a particular party's interests over another's.

Discussion

[29] For the following reasons, I find that what Mr Haworth covers in his EIC and rebuttal statements:

(a) does not accord with the Code of Conduct and is not properly characterised as expert evidence; but
(b) can be received from Mr Haworth in his capacity as president of the UCESI provided the statements of evidence are amended in accordance with directions I make later in this decision.

[30] Quite properly, Mr Haworth records in his EIC that he is currently president of UCESI. His long-standing position as a senior officer holder in UCESI is an impediment to his capacity to adhere to the Code of Conduct.

[31] Mr Haworth's EIC runs to some 352 paragraphs and covers a very broad range of resource management issues. That includes landscape, economics and planning. His EIC includes opinions on matters within each of those disciplines. That includes rebuttal of opinions offered by specialists in those fields. His rebuttal statement also responds to the opinions of several experts called by QLDC and other parties, in each such discipline.

[32] Mr Haworth asserts in his EIC that he has the following equally broad expertise: [8]

> " … I assert that I have resource management expert status in the specific field of matters that relate to rural subdivision and/or development in the Queenstown Lakes District, this being the subject of this evidence."

[33] With respect, a witness who is reliant on experience alone is unlikely to have a sufficient degree of skill and knowledge over such a wide field of disciplines as to offer substantive help as an expert.

[34] The EIC describes the broad scope of what it traverses as follows:

> "This evidence addresses the planning issue of subdivision and/or development in the rural landscapes of the Queenstown Lakes District and any Issues that in any way relate to this."

[35] That could be fairly characterised as encompassing much of what the court must address in determining those appeals concerning Topic 2. Consistent with that, the EIC essentially offers an overall opinion that fundamentally disagrees with the QLDC hearing panel's ultimate determination on the PDP rural landscape provisions.

[36] However, a more fundamental impediment to Mr Haworth's evidence being able to be received as expert evidence is that it is substantially a detailed argument on why the court should prefer his view (and, we understand, the view of UCESI) over competing viewpoints.

[37] That would appear to be acknowledged in the following statements in the EIC:

> "23. I am aware that the Court will hear evidence from multiple expert witnesses, and that the outcome I support in this evidence is just one of many to be considered. I am also aware that there is a spectrum of views, reflected in the many and varied submissions to the PDP, where some people think relatively unfettered subdivision and development in the Rural Zone is appropriate and will have little effect on landscape values. As a Queenstown Lakes District rural property owner myself for many years I can understand why people who own rural property seek to develop it in the way they prefer.
>
> 24. I have never been an advocate of trying to limit growth in the Queenstown Lakes District because, apart from the fact that this is impractical, there are huge benefits that come with growth. Queenstown and Wanaka have developed far better medical facilities, shopping opportunities, outdoor recreational activities, accommodation, cinemas, roading and so on in the 29 years that I have lived here. Because of this I have always supported growth in a manner that minimises effects on landscape values. However, I believe that this needs to be seen in the context that the RCL landscape in the two basins is a finite resource; the demand for rural living has to be balanced against the need to retain landscape values consistent with sustainable management."

[38] Given the considerable length of time Mr Haworth has lived in the Queenstown Lakes District, and engaged with resource management issues there, I am in no doubt that he has significant knowledge of such issues informed by that experience. However, a good part of that knowledge is on positions UCESI prefers to advance on resource management matters over competing viewpoints. While understanding the spectrum of different viewpoints of residents and community groups is important to a properly informed outcome in the appeals, it is not the role of an expert witness to advocate for a particular party's viewpoint.

[39] Hence, the Code explicitly records that the expert witness has an overriding duty of impartiality. Whilst I respect Mr Haworth's understanding that he is impartial, I find that incompatible with his senior office holding position within UCESI and longstanding advocacy for UCESI. Further, I find that in substance, his evidence is in the nature of an advocacy statement on behalf of UCESI rather than impartial expert evidence in accordance with the Code.

[40] The extract I quote at [37] is one example. Along with that, the evidence is replete with statements put in a strongly imperative way. Moreover, the opinions Mr Haworth expresses in his EIC in relation to various experts' opinions, and his rebuttal, typically reflect the overall strongly held viewpoint that he expresses in his EIC on matters the court must decide.

[41] I have considered the fact that neither QLDC nor any other party has joined Dr Cossens' application or questioned Mr Haworth's status. However, as the Code reflects, the court has a broader responsibility to ensure due process. I find it would not accord with due process to allow Mr Haworth to give evidence as an expert witness for the reasons I have given.

[42] Therefore, I find that Mr Haworth's evidence cannot be properly admitted as expert evidence.

[43] Under s 276, the court is able to receive and weigh opinion evidence from a non-expert including in that person's representative capacity for a party to the proceedings. UCESI is a long-standing community group. The RMA public participation model allows for and intends that people and community groups participate in plan-making processes. Ultimately, plans are instruments intended to operate for and on behalf of communities. With the several levels of value judgment involved in plan formulation, it is important that the process allows for true contestability of opinions and viewpoints on matters in issue, including as those matters pertain to people and communities and the environment. In essence, plan appeal outcomes are not the preserve of experts,

[44] While I find that the EIC and rebuttal statements are not able to be received as expert evidence, I am satisfied that all of the opinions Mr Haworth expressed in the two statements are on matters within the scope of UCESI's appeal. Provided that Mr Haworth gives evidence in his capacity as president of UCESI, rather than as expert evidence, I have no difficulty in finding that he is able to give opinion evidence of the nature and scope included in his EIC and rebuttal statements.

[45] On that basis, my directions below allow for the substance of both the EIC and rebuttal statements to be presented in evidence, subject to removal of relevant parts that assert Mr Haworth has status as an expert witness. Those parts of the statements are struck out.

Conclusion and directions

[46] The following parts of Mr Haworth's written statements of evidence are struck out:

(a) in the EIC:
  (i) all of paragraph [2];
  (ii) all of paragraph [8];
  (iii) the assertion in [9] that "I have resource management expert status" (with leave being granted to reword this "I have significant resource management knowledge and experience" (or to like effect));
  (iv) any other statement or assertion that Mr Haworth has status as an expert witness;
(b) in his rebuttal, all of paragraph [2].

[47] Mr Haworth is granted leave to file and present evidence on the following provisos:

(a) he does so only in his representative capacity for and on behalf of UCESI, as is described in his EIC at paragraph [1] and in his rebuttal also at paragraph [1];
(b) he confirms that he is authorised to present evidence for and on behalf of UCESI (such confirmation to be by addition of a sentence to that effect in his EIC and rebuttal);
(c) the replacement EIC and rebuttal statements must not substantially alter or expand upon his EIC and rebuttal statements (except by the deletion of those parts struck out i.e. at [45] above) and the addition (except insofar as leave is granted beyond that) of words to provide the confirmation of authority as is specified at [47](b);
(d) updated copies of the EIC and rebuttal statements to accord with the directions at [46] are filed within five working days of the date of this decision.

[48] Those directions must be complied with in order for Mr Haworth to present evidence at the Topic 2 hearing.

[49] Leave is granted for either party to seek amended or replacement directions, by memorandum of counsel filed within five working days of the date of this decision.

[50] Costs are reserved, but applications are not encouraged. In particular, I note that both parties were self-represented on this application and UCESI is a long-standing community group. Further, the application has been granted only in part and at an early stage of proceedings. Any application for costs must be filed (and served) within ten working days of the date of this decision. Any reply to any application must be filed (and served) within a further five working days.

All Citations

[2019] NZEnvC 46, 2019 WL 1424460

Footnotes

1 Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council ENV-2018-CHC-056.

2 Application for disqualification of expert witness and evidence, dated 9 January 2019.

3 *Newhook, L, Principal Environment Judge*, *Effective involvement in a case in the Environment Court*, a paper presented at workshop "Effective RMA Participation" by Environmental Defence Society Inc. 2013 [31] — [34].

4 Scurr v Queenstown Lakes District Council C060/2005.

5 *Scurr*, at [50].

6 Upper Clutha Tracks Trust v Queenstown Lakes District Council [2012] NZEnvC 43, [13] and [14].

7 The applicant's further memorandum, at [8].

8 Haworth EIC at para [9].