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Trial Advocacy: Planning and Environment Court

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The P&E Court is a highly specialised Court with specialised processes and judges whose skill and expertise enable it, based upon the expert evidence, to decide the merits of planning decisions and exercise planning discretion. It is unique and the envy of other jurisdictions nationally and internationally in its review of planning decisions, particularly with respect to five main features.

Those same features affect the advocacy of a barrister in the P&E Court.

The first feature is the de novo nature of hearings. The characteristic of a de novo hearing is that it is a hearing anew. The parties prepare fresh material in the hearing and the Court decides the matter afresh. As Williamson KC DCJ stated in *The Village Retirement Group Pty Ltd v Brisbane City Council*[1]:

> *"…In a hearing of this nature, the court hears the matter afresh on fresh material, and may overturn the decision appealed against regardless of error. In this context, an assessment manager is not bound by, or limited to its reasons for refusal. It is a fresh hearing, on fresh material where the correctness or otherwise of the original decision does not determine the outcome of the appeal."*

The consequence is cases are what I call 'clean'. By that I mean the focus is upon the merits of the evidence before the Court and parties are not distracted by the earlier decision-making process or fault to be attributed to either party.

The second feature is that the parties take the opportunity to engage new experts who are highly specialised and experienced in giving evidence. The result is P&E proceedings are heavily laden with expert evidence in numerous fields. It is not unusual for there to be five or six areas of expertise and no lay witnesses or, if there are any, for there to be no cross-examination of them.

The third feature is that both the P&E Court and Court of Appeal have examined the provisions of the *Planning Act* 2016 pursuant to which development applications are assessed[2] and decided[3]. They have identified that those provisions confer upon the Court a broad and flexible planning discretion. The discretion enables it to approve an application in

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[1] [2019] QPELR 980 at [33] (citing *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 per French CJ, Gummow, Hayne, Crennan, Keifel (as her Honour then was) and Bell JJ at [57]); Also *ADC Group Pty Ltd v Brisbane City Counci*l [2020] QPEC 44

[2] Section 45

[3] Sections 59 and 60

the face of non-compliance with the planning scheme and involves a balanced decision.[4] As the Court of Appeal in *YQ* stated "*The ultimate decision called for when making an impact assessment under s 45 and s 60 of the Planning Act is a broad, evaluative judgment"*.[5]

In *Ashvan Investments Unit Trust v Brisbane City Council*,[6] Williamson KC DCJ stated:

> *[54] In practical terms, … the statutory assessment and decision making framework may call for an assessment manager (or this Court on appeal) to reach a balanced decision in the public interest where two competing considerations are at play: (1) the need for the rigid application of planning documents on the one hand; as against (2) the adoption of a flexible approach to the application of planning documents to, inter alia, exercise the discretion in a manner that advances the purpose of the PA.*

The broad and flexible discretion focuses proceedings on more than just a compliance audit and upon the planning merits of a particular proposal. Trial advocacy, therefore, requires a barrister to identify, and more importantly, support by evidence, what former Chief Justice Barwick famously called "the merit point". As Danny Gore KC aptly put it in a QELA seminar,[7] the process asks lawyers, experts and decision-makers to ask "Why?". Why does any incompatibility or non-compliance with the planning scheme warrant or not warrant a refusal of the application?

The fourth feature is that, by its nature, P&E litigation is fundamentally public interest litigation. It is not *inter partes* in the sense of adjudicating upon the private rights of individual parties. The assessment is "*of the merits of the proposal based on established policy, and other relevant considerations to reach a balanced decision in the public interest*", where the reference to "established policy" is to assessment benchmarks such as the relevant planning scheme and the reference to the other relevant considerations are those which the decision-maker is permitted to consider under s 45(5)(b) of the Act.[8]

The fifth feature is proceedings in the P&E Court are closely case managed. The Court has implemented 11 Practice Directions (PDs) dealing with the conduct of the different kinds of matters before the Court. The result is that barristers are much more involved in reviews and interlocutory hearings than might otherwise be the case. More relevant to trial advocacy, a specific Practice Direction, PD 7, that sets out specific for the preparation of written submissions at trial.

How do these features affect advocacy practically?

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[4] *Abeleda v Brisbane City Council* [2020] QCA 257, per Mullins JA at [43], [53], [57] and [58]; *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253; *Wilhelm v Logan City Council & Anor* [2020] QCA 273 See also analysis in *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPELR 273; *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18 per Williamson QC DCJ; *Development Watch Inc & Anor v Sunshine Coast Regional Council & Anor*[2020] QPEC 25 per Kefford DCJ

[5] *YQ* supra at [59]

[6] Supra

[7] "Recent Court of Appeal decisions about development assessment under the *Planning Act 2016*" DR Gore QC and C Buckley Town Planner QELR Seminars

[8] *Abeleda* supra at [57]

The dominance of fresh expert evidence from experts who are well known to the Cout and who are seasoned at giving evidence affects the advocacy before the P&E Court in several ways:

(i) First, because the evidence is expert evidence dominated, barristers, in the main, are not directly involved in the preparation or even presentation of the evidence in chief. Rather, the evidence is prepared and written by the experts themselves in a joint expert meeting and reporting process. That process, which is stipulated by the P&E Court Rules and case managed by the Court, obliges the experts in the same field to meet with each other, to discuss the issues and to write a joint report that identifies the extent to which they agree or do not agree with each other. During that process, experts are prevented from communicating with or obtaining the assistance from the lawyers or clients, other than formally by joint written request to all parties. The intention is to promote cooperation between the experts and an environment that facilitates attempts to resolve or narrow. The result is that the joint expert reporting process largely sets or fixes your case. I say "in the main" because the opportunity remains after a joint expert report to prepare individual expert reports that can be settled by lawyers, but they limited in scope and cannot raise new matters without leave of the Court.

(ii) Secondly, and because the joint expert reporting process usually sets or fixes your case, it is vitally important that, as barristers, you are engaged and involved early in the proceedings before the preparation of joint expert reports. This is to exercise some judgement about the merits of the case, to engage the right experts to prove or promote your case and to properly confer with your experts. Conferences prior to the joint expert reporting process are critical to ensure that:
   a. they are aware of the issues in dispute, all relevant the provisions of the planning scheme and the relevant assessment benchmarks against which the development is to be assessed in their area of expertise,
   b. they are aware of any legal construction issues that are matters of law for the lawyers and Judge;
   c. they are aware of the division of issues between the various experts and where there might be some overlap and, therefore, some coordination or dependency upon the outcomes of other experts' opinion;
   d. they are comprehensively briefed with all the material they need to address the relevant issues in dispute or undertake their assessment;
   e. the opportunity exists to test your expert on their viewpoint and discuss with them other viewpoints, including maybe your own; and,
   f. if you are acting for the developer, and the expert has any problems with your development, they are identified so that any permissible minor changes can be made to the development or solutions identified to avoid unnecessary delay and costs thrown away by proceeding with a development with problems.

(iii) Thirdly, whilst it is generally regarded as inappropriate for Counsel to interview witness in each other's presence on contentious issues, this prohibition does not apply in respect of expert witnesses. It is not usual to confer with all or more than one expert at once.

Proper presentation is often a body of moving parts better dealt with collaboratively. As just mentioned, it also is necessary that experts are familiar with the inter-relationship between them and the potential impact or relevance which outcomes in their field may have on other fields. For example, a hydrologist needs to be aware that the solutions he or she proposes in relation to overland flow or the discharge of water might impact upon the ecology downstream.

(iv) Fourthly, there is a tension between the role of a barrister and the role of an expert. The role of a barrister is partisan. It is about persuasion. It is about presenting our clients case in the best way possible and in a way that makes it as appealing as it can be to the Court. The role, and indeed the duty, of an expert is different. Their duty (as they are obliged to confirm in each report) is to assist the Court. That duty overrides any obligation they may have to any parties or to any person who may be paying them. It requires that they make all enquiries considered appropriate, refer to all matters that the expert considers significant, state only the opinions in the report that are genuinely held and, if there is a range of opinion on matters dealt with, provide a summary of the range of opinions and the reason why the expert adopts a particular opinion. The tension is one that affects decisions and tactics made by a barrister about the case. For example, up front it affects your choice of an expert. It affects how the issues in dispute are framed. You must exercise judgement about the propositions or points you promote either in cross examination or in submission. Ultimately, you are only as persuasive as the strength of your expert and must step back from propositions or points which your expert may equivocate upon.

(v) Fifthly, although all the usual rules of evidence relating to the admissibility of an expert opinion apply and it is obviously essential that barristers are fully across those rules, in general, technical issues including about the admissibility of evidence are not prevalent. Several factors probably contribute to this but two of the main ones are:

a. Because the litigation is public interest litigation and not inter parties, there is a focus generally by lawyers and experts upon the merits rather than upon formality and technicality. The taking of cute technical and legal points do not work. The Court usually takes a more pragmatic and practical approach than might otherwise be the case in inter partes litigation.
b. Because most experts are well qualified and well known to the Court, they are usually trusted with their sources of information. Also experts usually exchange and rely upon the same information. A lot of that information also is often government or industry published, publicly available the same information and inherently reliable – eg. government statistics, industry articles, standards, photos, maps and the like, even though they may not be strictly admissible; and

(vi) Lastly and most obviously, because the jurisdiction is so heavily laden with expert evidence, you need to be proficient in the cross-examination of experts.

There is an obvious skill and art to the cross examination of experts - particularly of a highly specialised and well-regarded experts. That skill and art is not different to the cross examination of experts in other areas of law, and beyond this paper.

However, some principles briefly worth emphasising for the P&E Cout include:

(i) Being as brief and efficient as you can. The cross examination of a good expert needs to be like a special forces mission behind enemy lines. Get in and out of there as quickly and with as few casualties as you can. What all barristers learn, not just in the P&E jurisdiction, but cross examining any expert is that the good experts are not only good at resisting opposing opinions but will take on the opportunity to 'hit' you as frequently as they can by repeating or re-enforcing their own opinions. The less opportunity you give them to do so the more effective your cross examination will be.

(ii) Being well planned. The cross examination should not be haphazard. Every question you ask needs to be part of an overall strategy and focussed upon either exposing a weakness in your opposing expert's opinion or promoting your own expert's opinion.

(iii) Be prepared. Have your expert assist you in the preparation of your cross examination.

(iv) Use carefully crafted closed questions. It serves two purposes: one is to control the witness. The other is to inform the Judge of your case. Some barristers take the view that, because opposing experts have engaged with each other in a joint expert report process, the rule in *Browne v Dunn* does not strictly apply and that is unnecessary to put your own expert's case fully to the opposing expert. Regardless of whether that is strictly correct, because your evidence in chief is in written form and the Judge may not have fully comprehended it or yet heard from your expert, cross examination provides you with an opportunity inform the Judge of the merits and the logic or persuasiveness of your case. Even if the Judge has heard from your expert, by closed questions you can still persuasively put your case and, yet at the same time, remain in control of the witness and the information given by the witness. You may elicit concessions or qualifications. But even if you do not, the questioning can be influential. Of course, the rule is not universal rule and, depending upon the circumstances, you may (consistently with the first rule) want to leave topics well enough alone.

(v) Get into the detail. Because you are dealing with the competing views of two highly qualified and experienced opposing experts, effective cross examination must take on the challenge of testing the merits of the opposing opinions and scrutinising the bases of those opinions and the logic lying behind them. That is the assistance a judge requires. You rarely win a P&E case through an attack on credentials, honesty, or impartiality or by some devastating destruction. Rather, the case must be won in substance, on the strengths and weaknesses of the bases of the two competing opinions - eg by exposing some equivocation or concession or some overstatement by the opposing expert or some doubt about the foundation for that expert's opinion or some

misdirection or misconstruction by the expert about the right question or right assessment called upon by the particular assessment benchmark. You need to lay the groundwork for why your expert is more convincing and why the Judge ought to prefer, on balance, your side's position over the other.

Turning finally to the Practice Directions. As I have said. the Court has recently implemented 11 Practice Directions. They are specific to different types of proceedings and range in topic from PD02 Earlier Resolution or Determination of Appeals about Infrastructure Charges or Development Approval Conditions to PD11 Self Represented Litigants. Most relevant to trial advocacy is PD 7 which deals with Written Submissions. It sets out what the Court expects from written submissions including:

(i) in paragraph 4 the Format of written submissions;
(ii) in paragraphs 8 to 10 the requirements for written submissions on interlocutory applications;
(iii) in paragraphs 11 to 23 the requirements for written submissions on the different kinds of minor change applications; and
(iv) in paragraphs 24 to 32 the requirements for written submissions in relation to appeals where non-compliance with an assessment benchmark or draft planning document is in dispute.

In relation to that last category, paragraph 25 provides that:

> *25. In proceedings where non-compliance is alleged with adopted or draft planning instruments, written submissions prepared by, or on behalf of, a party must:*
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> *(a) identify the provisions, or part thereof, of the adopted or draft planning instruments in issue in the appeal;*
>
> *(b) identify those provisions, or parts thereof, of the adopted or draft planning instruments for which non-compliance or compliance (as the circumstance requires) is conceded, and, explain the weight to be attributed to the provision;*
>
> *(c) make submissions, where required, about the proper interpretation of each provision in issue, particularly where they contain compound propositions;*
>
> *(d) explain why non-compliance or compliance (as the circumstance requires) arises with each provision in issue;*
>
> *(e) identify the evidence relied upon to establish compliance or non-compliance with each provision in issue; and*
>
> *(f) provide an analysis of the evidence, and where relevant, explain why evidence relied upon should be preferred to other contrary evidence.*

Paragraph 26 provides that the requirements stated in paragraphs 25(b) to 25(f) will not be met by written submissions that assert compliance or non-compliance with a planning provision and seek to establish this by repeating the words of the provision in issue. An assertion of this kind, absent reference to, or analysis of, the evidence is of little assistance to the Court.

Also paragraphs 28 to 30 provide that, to assist the Court, written submissions prepared by, or behalf of, a party must be accompanied by Schedule of Assessment benchmarks and draft planning documents.

Paragraph 29 provides that a Schedule of assessment benchmarks and draft planning documents prepared by, or on behalf of, a party alleging non-compliance or contending for refusal of a development application must be in the form of Annexures 1, 2 and 3.

Similarly paragraph 30 provides that the Schedule of assessment benchmarks and draft planning documents prepared by, or on behalf of, a party alleging compliance or contending for approval of an application must be in the form of Annexures 4, 5 and 6.

The result of PD7 is that, like in many other areas of practice, written submissions have become very important. The duty of any barrister is to be familiar with and faithful to their requirements. Indeed, you need to excel at ensuring that the assistance sought by the Court through them is provided to it. Written submissions are a tool of lasting advocacy. They will be the point of reference for the judge in writing his or her reserved judgement. You want to ensure, as much as possible, that your written submissions leave the judge with a positive and persuasive impact about the merits of your case, rather than be a source of frustration for their lack of conformity with the requirements or assistance sought by the Court through them.

Ultimately, role of advocacy in the P&E Cout is no different to that in any other court. It is about persuasion and persuasion is about making your case attractive, and meritorious, to the Court.

1 March 2025

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