LAND COURT OF QUEENSLAND

CITATION:	*Citigold Corporation Limited v Chief Executive, Department of Environment & Heritage Protection (No 4)* [2016] QLC 57
PARTIES:	**Citigold Corporation Limited** (appellant) v **Chief Executive, Department of Environment & Heritage Protection** (respondent)
FILE NO/s:	EPA055-15
DIVISION:	General division
PROCEEDING:	Application to exclude evidence
DELIVERED ON:	12 September 2016 Ex tempore
DELIVERED AT:	Brisbane
HEARD ON:	12 September 2016
HEARD AT:	Brisbane
MEMBER:	PA Smith
ORDER/S:	**1. The application is dismissed.** **2. That costs be reserved.**
CATCHWORDS:	COURT PRACTICE AND PROCEDURE – application of *Land Court Rules 2000* relating to Joint Expert Reports – rule 24E COURT PRACTICE AND PROCEDURE – whether experts should have signed the Joint Expert Report in circumstances where one considered insufficient evidence provided by the other, and where the other expert prepared a statement going beyond areas of dispute in the Joint Expert Report *Land Court Rules 2000*, r 24E *Citigold Corporation v Chief Executive, Department of Environment and Heritage Protection* [2015] QLC 10
APPEARANCES:	Ms McIntyre of counsel for the appellant Mr Dillon of counsel for the respondent

SOLICITORS: Holding Redlich for the appellant
Litigation unit, Department of Environment and Heritage Protection for the respondent

[1] I will give some short reasons for a decision with respect to an application made by the appellant that certain paragraphs of a report filed by the respondent on 6 September 2016, being an expert witness statement of Tim Anderson of 6 September 2016, be excluded. The background facts of this matter are as set out in *Citigold Corporation Limited v Chief Executive*, *Department of Environment and Heritage Protection*.[1]

[2] Ms McIntyre, counsel for the appellant, has relied upon two overarching grounds for her reasons for the exclusion of parts of the report of Mr Anderson, they being that that matters of dispute but reasons not provided in the Joint Expert Report ("JER") and new matters. Her helpful submissions have set out all of the subareas – of which there are many, particularly with respect to new matters – that she seeks to have excluded. In her written submissions, Ms McIntyre also relies on an issue of prejudice, due to the late filing of the Anderson report and the inclusion of what she says to be insufficient reasons for areas of disagreement, and new items.

[3] The resolution of this matter troubles me greatly. Both parties have gone to great lengths to provide, by way of affidavit evidence of Mr Ambrose for the appellant and Ms Ireland for the respondent, the facts and circumstances surrounding the JER. Perhaps the most important way of resolving this matter is to refer directly to the Land Court Rules regarding meeting of experts. The rules relating to meetings of experts are set out in division 2, and division 3 deals with evidence given by experts. Although I have been taken to some elements of the various rules as set out on those divisions, I think it appropriate to make comments as to the manner in which I understand the rules are meant to work, and then to refer to some specific examples in the rules where I feel this matter may have fallen off the rails somewhat.

[4] There was a system previously applying in the Land Court, as in many other courts, where experts would prepare their reports first and then a meeting of experts would be held, and in many cases – including matters in which I was previously involved –

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1 [2015] QLC 10.

lengthy reports were prepared, essentially as a waste of time, as it appeared once each side had each other's reports, or a joint expert meeting was held, that the experts were in agreement about the matters to which lengthy reports had been made. It was as a result of approaches to this court by industry, from my recollection, representing the various fields of expertise considered by this court, and taking into account the procedures adopted by the Planning and Environment Court, that this court adopted the procedure of having a JER prepared first to work out the areas of agreement and disagreement as between the experts, followed by the preparation of single reports by the individual experts detailing the areas of disagreement.

[5] I now turn to r 24E which is critically important in this matter. It states in r 24E(1) that an expert must prepare a written statement of the expert's evidence for the hearing of a proceeding. Rule 24E(2) goes on to indicate in (2)(a) that if the expert has taken part in a joint meeting of experts and a JER, in relation to the meeting, it is taken to be the expert's statement of evidence in a proceeding. So in some matters where opposing experts in a field reach complete agreement, the only evidence that comes before the court is, in fact, the JER, which is relied upon as the agreed evidence of the experts, with there being no areas of disagreement. Where it gets interesting is when there is areas of disagreement, and that is taken care of in r 24E(2)(b) and it is conjoined to r 24(2)(a) by the word "and". A further statement of evidence in relation to any issue of disagreement recorded in the JER is to be prepared by the expert.

[6] Now, as I read matters in this case, Mr Thompson has not prepared an expert report following the JER relating to areas of disagreement, as he is required to by r 24E(2)(b). The reason he has not prepared a further report, as I understand it, is because the second JER does not disclose, on its face, fulsome reasons for the reasons for disagreement by Mr Anderson and, as a result, the appellant says that Mr Thompson could only respond upon seeing Mr Anderson's further report. That, however, has a major falsity involved in the reasoning. If Mr Thompson believed that he could not do his further expert report because Mr Anderson had not properly distilled information as to disagreement in the JER, then he should not have signed the JER.

[7] The shoe, though, equally applies to the other foot in this matter, because, having read the JER and the further report of Mr Anderson, it is apparent that Mr Anderson goes into detail in his further statement that could – dare I say, should – have been included in the JER, and, arguably, includes new evidence which was not included in the JER. This is a problem often encountered by this Court, where, in objection processes and appeals in relation to valuation matters or mining matters, parties are limited to their grounds of objection, but they are able to particularise those grounds of objection to great detail. The question then is: when does a particular in itself become a fresh ground of objection, or are you only dealing with a general ground raised in an objection. Or to put it into context of this matter, has Mr Anderson sufficiently set out his disagreement in the JER to allow him to be as expansive as he has been in his individual statement. I think not.

[8] In thinking not, I, in effect, am saying that Mr Anderson also should not have signed the JER in circumstances where he reasonably knew, on the basis of what is contained in his further statement, much detail as to the reasons of his disagreement with Mr Thompson, such reasoning being reasonably required by Mr Thompson to properly make his own further statement. It follows that, in my view, the process in this matter has broken down in the JER, and that, in my view, the evils that flow in this matter and have been debated to great extent throughout the course of this morning come as a result of, in my view, and without having heard from the experts themselves, I should stress, deficiencies with respect to both experts in the signing of the second JER at the time that they did, with the JER in the form that it is in.

[9] To be even more clear the second affidavit of Mr Ambrose today refers to a table which is an amended table to that contained within Exhibit 19, which, itself, was sourced as annexure 17 to an affidavit of Mark Lynch. There is some confusion, when one reads the JER, as to the status of Exhibit 19 MJL17 and the new document which is an amended MJL17, or in other words an amended exhibit 19. For the life of me I cannot see why the experts, aware as they were of the heavy reliance that had been placed on exhibit 19 at the previous hearings in this matter did not include the amended exhibit with Mr Thompson's assessment and with an extra column putting in Mr Anderson's assessment so that real assistance could be given to the Court as to the status of this matter on the best information available.

[10] That leaves the Court in a difficult situation. On the one hand, being unsatisfied as I am as to the JER and the difficulties which flow for both parties as a result of that JER process, I could simply abandon the balance of the hearing this week and order the experts to re-undertake a joint meeting and produce a JER properly addressing areas of disagreement, and then prepare statements setting out in full their areas of disagreement as envisaged by r 24E(2)(b). There is, however, the difficulty of the timelines in this matter. This is not an insignificant case. The parties are apart by a factor of approximately 24, being a sum of roughly half a million dollars as contended for by the appellant, and approximately $12 million as contended for by the respondent.

[11] This still remains, in my understanding, the first case to be fully litigated on the question of the manner in which the financial assurance legislation operates now in this state, and, also, the first matter that is considering the new guideline 3. There is an obvious benefit for the parties in having this matter resolved, and in having this matter resolved before the end of October this year for the reasons that have been previously enunciated, but for the purposes of this decision can be simply stated as a fact that by the end of October, a new plan of operations is to be filed by the appellant which will result in a fresh determination being made as to the financial assurance payable. If this matter is to be abandoned it will mean that the costs that have been incurred in so much hearing and so much evidence will effectively be thrown away by both sides and we will be back at the point of having to start again, without the parties or the public having any additional guidance as to the manner in which the financial assurance provisions are to be interpreted.

[12] At this point, I will hear from each counsel as to their views as to the manner in which the Court should proceed: should we move back to a JER process and individual report process, or should any matters of prejudice that flow to both sides as a result of the JER process be lived with for the purposes of having the matter dealt with before the end of October, and be cured by way of having both experts sworn concurrently, and allowing both Ms McIntyre and Mr Dillon full scope in the manner in which they may question their witnesses in the concurrent evidence of the two experts without any limitations being made as to the introduction of additional material which should otherwise have been dealt with in a report.

[13] Before I hear from both counsel I should go on to say that I am effectively agreeing with the submissions by both counsel because I see fault in both sides, and both counsel have made very good points as to why their side should be allowed to proceed in the manner in which they both put forward. As I have indicated the evil that has occurred, in my view, goes back to the JER itself and the experts signing a joint expert report; perhaps feeling under pressure because of time constraints; I do not know, but signing the JER in circumstances where in my view they certainly should not have done so.

[14] *[After hearing further from both counsel and allowing a short adjournment for them to obtain instructions both parties agreed, and the Court accepted, that the way forward was to continue the hearing without further delay by way of having both experts sworn concurrently, and allowing both Ms McIntyre and Mr Dillon full scope in the manner in which they may question their witnesses in the concurrent evidence of the two experts, and without any limitations being made as to the introduction of additional material which should otherwise have been dealt with in a report. Accordingly, the application was dismissed and the question of costs reopened.]*

Orders

1. The application is dismissed.

2. That costs be reserved.

PA SMITH

LAND COURT MEMEBER