SUPREME COURT OF QUEENSLAND

CITATION:	*Conias Hotels Pty Ltd v Murphy & Anor* [2012] QSC 297
PARTIES:	**CONIAS HOTELS PTY LTD ACN 120 319 283 AS TRUSTEE FOR THE CONIAS HOTEL TRUST NO. 2** (plaintiff) **v** **SHAUGHN MURPHY** (first defendant) and **REWUKE PTY LTD ACN 002 628 499** (second defendant)
FILE NO:	3771 of 2009
DIVISION:	Trial Division
PROCEEDING:	By way of application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED EX TEMPORE ON:	19 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2012
JUDGE:	Applegarth J
ORDERS:	**(1) Mr Gavin Duthie of G Duthie Consulting be appointed as a further expert valuer in the proceeding to prepare a report in relation to the value of the Transcontinental Hotel as at 12 May 2008.** **(2) The plaintiff serve a report from Mr Duthie valuing the Transcontinental Hotel as at 12 May 2008 by or on 19 October 2012 (the Duthie Report).** **(3) The parties provide a copy of the Duthie Report to Ian Skelsey by or on 22 October 2012.** **(4) Mr Skelsey prepare a report (if any) in response to the Duthie Report by 12 November 2012.** **(5) Messrs Duthie and Skelsey are directed to confer and produce a joint report by 4.00pm on 30 November 2012 in respect of:** **(a) those valuation issues, facts and matters upon which they agree;** **(b) those valuation issues, facts and matters not agreed, with short reasons as to why agreement has not been able to be reached; and** **(c) those further or other enquiries, instructions, documents or evidence which would assist in the**

resolution of the issues on which the experts disagree.

(6) The joint experts' conference be otherwise convened and held in accordance with the requirements of the Joint Conference Guidelines set out in Attachment 2 to Supervised Case List, Practice Direction No. 11 of 2012.

(7) The joint experts' report be produced, signed and provided to the parties' legal representatives and a copy filed in Court by the plaintiff by 4.00pm on 3 December 2012.

(8) Subject to Order 9(b), the plaintiff pay:

(a) the defendants' reasonable costs of considering and responding to the Duthie Report;

(b) the costs of any further report from Mr Skelsey prepared pursuant to paragraph (4); and

(c) the costs of the joint experts' conference and joint experts' report referred to in paragraph (5) above,

as agreed or, if agreement is not reached, to be fixed by the Court.

(9) The costs referred to in paragraph (8) are to be paid by the plaintiff:

(a) within 28 days of the quantum of costs being agreed or fixed by the Court; and

(b) on the basis that the ultimate liability for those costs be reserved.

(10) The costs of the application and of the appearance on 19 September 2012 are otherwise reserved.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – EVIDENCE – EXPERT EVIDENCE – where expert valuer has been appointed – where significant difference of opinion between valuers – where applicant relies on r 429N(3) of the *Uniform Civil Procedure Rules* 1999 – whether Court should allow party to call further expert evidence

Uniform Civil Procedure Rules 1999 (Qld), rr 423, 429

Cosgrove v Pattison [2000] All ER (D) 2007, followed
D v S [2009] QSC 446, followed
Daniels v Walker [2000] 1 WLR 1382, followed
Owners of Strata Plan 58577 v Banmor Development Finance Pty Ltd [2006] NSWCA 325, cited
Tomko v Tomko [2007] NSWSC 1486, cited
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] NSWLEC 282, cited
Wu v Statewide Developments [2009] NSWSC 587, cited

COUNSEL:	M R Bland for the plaintiff R A Perry SC with J P O'Regan for the defendants
SOLICITORS:	Plastiras Lawyers for the plaintiff Minter Ellison for the defendants

[1] This is the adjourned hearing of an application to appoint an expert in addition to the expert who has previously been appointed.

[2] The rules governing the appointment of such an individual start with the purposes of the relevant rules (Rule 423). These include that there should be, if practicable and without compromising the interests of justice, expert evidence on an issue by a single expert agreed to by the parties or appointed by the Court and that the rules are designed to avoid unnecessary costs associated with the parties retaining different experts.

[3] Another purpose is to allow, if necessary to ensure a fair trial of a proceeding, for more than one expert to give evidence on an issue in the proceeding. The importance of having a single expert, if possible, has been stated on many occasions and underlies the rules.

[4] Rule 429N(3) empowers the Court to appoint an additional expert in certain circumstances. One such ground is if the Court is satisfied that there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the issue. That, though, simply enlivens the discretion to appoint a further expert. The mere existence of a different opinion would ordinarily not be sufficient, particularly in the area of valuation.

[5] It almost may be taken for granted that experts adopting the same methodology applied to the same facts and applying the same assumptions might come to different opinions, simply as a matter of professional judgment. On valuation issues, the mere fact that different experts come to different opinions simply identifies that, in many cases, there is a range of opinion within which the actual value of real property, a business or other thing can be legitimately arrived at.

[6] The fact that differences of opinion are not enough is established in authorities which include *D v S* [2009] QSC 446. And, as has been earlier said by Biscoe J in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] NSWLEC 282 at [33], "Large differences of opinion between valuation experts are, unfortunately, a common occurrence in this court. The solution does not lie in permitting the parties to call more valuation experts to join the fray."

[7] The principles governing the exercise of discretion to appoint another expert have been considered in other jurisdictions in connection with rules that are similar to our rules. Some of the authorities have been helpfully set out in the written submissions of the plaintiff from the previous hearing on 13 August 2012. As Beazley JA observed in *Owners of Strata Plan 58577 v Banmor Development Finance Pty Ltd* [2006] NSWCA 325 at [2], there needs to be a balance. On the one hand, one has to consider principles of case management and the need for expeditious resolution of disputes. On the other hand, one has to ensure, so far as possible, that disputes are resolved so as to provide justice according to law to the parties to the dispute.

[8] I respectfully adopt what was said by Lord Woolf MR in *Daniels v Walker* [2000] 1 WLR 1382 at 1387, and also what was said by Neuberger J, as his Lordship then was, in *Cosgrove v Pattison* [2000] All ER (D) 2007. Lord Neuberger's discussion of the issues is, with respect, illuminating and compelling, and I take it into account in circumstances in which the rules have as one of their objectives ensuring that a fair trial is assured, and that it may be necessary for a fair trial to allow a party to call an additional expert.

[9] In considering where the interests of justice lie, one has to consider the sense of legitimate grievance that a party may have if, on the one hand, an order of the present kind is refused and, on the other hand, the sense of grievance a party may have if an order of the current kind is allowed. Obviously, there are other considerations, including the costs implications for parties, separately and collectively, and whether ordering a further expert will delay the trial.

[10] These principles have been considered by Brereton J in *Tomko v Tomko* [2007] NSWSC 1486 at [9] and *Wu v Statewide Developments* [2009] NSWSC 587 at [17]. I respect his Honour's approach although, at first sight, it would seem to be more liberal than I would adopt and differs from the approach taken by Wilson J in *D v S* [2009] QSC 446. I do not agree that the Court should be "relatively ready to grant leave to adduce evidence from a separate expert, lest trial by a single expert becomes substituted for trial by judge". The Court should only grant leave to adduce further evidence in the circumstances stated in the rule and if the interests of justice require it.

[11] Here, there is, for the reasons given in the defendants' written submissions from today, in some respects, no more than differences of opinion between Mr Skelsey and Mr Duthie on matters such as, for example, whether the EBITD of the Roma Street outlet should be assessed at $25,000 per week or $20,500 per week. Those sort of differences would not, on their own, justify an order of the kind sought.

[12] There is, however, a significant difference in approach. Mr Skelsey, for reasons that have been explained by him, approaches the matter on the basis of valuing the business as a whole and assigning a value to the rights to operate outlets. He has regard to the value of the Roma Street outlet. Mr Duthie, I might say, somewhat controversially takes the view that the Roma Street premises had no quantifiable value, and I hope I am not doing him any injustice here in quoting from the defendants' summary, seemingly because if the lease were terminated "there is no certainty that the hotel would be able to secure a replacement DBS as evidenced by the closure of the non-performing Indooroopilly DBS".

[13] In their submissions, the defendants advance substantial reasons as to why Mr Duthie is wrong in reaching that conclusion, and that the exercise required is not one of separately valuing the Roma Street DBS, but involves valuing the rights which exist to operate such an outlet.

[14] Ultimately, the issue comes down to this: if, contrary to the defendants' present submissions, Mr Duthie is right and the valuation of the business should be approached in the manner suggested by him, and if he is right that the bottle shop has no quantifiable value and that the proper approach to valuing the business therefore involves the valuation of the so-called balance of the hotel business, then

the plaintiff will be left without evidence as to what the value of the hotel business is and would fail to prove the quantum of its claim. That would leave the plaintiff with a legitimate sense of grievance in not being allowed to call expert evidence.

[15] As against that sense of grievance is the sense of grievance that the defendants have that there is a departure from the presumptive single expert rule by a further report, which is highly contentious and in some respects simply represents some differences of subjective opinion.

[16] I think that the defendants would have a legitimate sense of grievance if they were required to pay for the costs that arise, and will arise in the coming months, by permitting Mr Duthie to provide a further report and to have Mr Skelsey, if required, to consider it and respond to it.

[17] Overall, I consider that the interests of justice are served in circumstances where there is a material difference of opinion by allowing the plaintiff to have Mr Duthie provide a report, but making orders that protect the defendants' legitimate interests and serve the interests of justice by ensuring that that exercise is not at the defendants' immediate expense.

[18] What I have in mind, therefore, is that the plaintiff should have to, at least in the first instance, pay the defendants' reasonable costs of responding to Mr Duthie's report or further reports. That may be in the form of a further report by Mr Skelsey.

[19] As to other matters, ordinarily there is a lot to be said for experts being required to confer before they go to print. But in circumstances in which the substantial issues have already been joined and what remains is for Mr Duthie to, as it were, produce a report concerning the value of the balance of the business, I think the more efficient and cost-effective approach is to have Mr Duthie complete his report, as soon as reasonably possible.

[20] As I mentioned during the hearing, it may be a good idea to save costs and avoid delay if he speaks to Mr Skelsey so that he does not reinvent the wheel and that they are working, as it were, so far as possible, off the same information and data and making the same or similar assumptions, but I am not going to be prescriptive about that. I would encourage Mr Duthie and Mr Skelsey to approach the matter on the basis that each has an overriding duty to the Court and to cooperate with each other in the interests of avoiding costs and delay.

[21] After Mr Duthie's report becomes available, there should be scope for Mr Skelsey, if so instructed, to respond to any aspects. I would not expect him to respond to matters that he has already addressed but it may be convenient if he, in some short form, restates, if necessary, matters that have already been stated on points of methodology, including whether he thinks the Roma Street premises have no quantifiable value and matters that he has already addressed, and then responds to any matters that he considers require a professional response to the opinions expressed by Mr Duthie in the report which is to come.

[22] It is accepted by the plaintiff that it should pay Mr Duthie's costs. As I have said, I consider that instead of an order that the plaintiff and the defendants share Mr Skelsey's further costs, the appropriate order, and I will hear the parties as to its form, is that the plaintiff pay the defendants' reasonable costs of considering and responding, if so advised, to the further report or reports of Mr Duthie, including

any responsive report by Mr Skelsey, and that such costs be fixed by me, if not agreed. The parties can discuss a regime whereby they have a process whereby those costs are agreed and, if they cannot be agreed, fixed by me, and those costs should be paid by a certain date.

[23] I would then expect the parties to arrange for the experts to confer and then produce a short joint report, if possible, identifying the issues upon which they agree and matters about which agreement is unable to be reached. Otherwise, I will make the orders proposed in the plaintiff's draft orders, paragraphs 7 and 8, and I will program a review.

[24] The costs of the last hearing in this application have been dealt with. I am inclined to otherwise reserve the costs of the application, including the costs of today, to await further developments, including the further reports and the results of the experts conferring. But I should say that my provisional view is that the plaintiff has obtained something of an indulgence over legitimate grounds to resist the orders that I have made for the appointment of a further expert, and presently my view is that the defendants have a strong case for an order that the plaintiff should also pay the costs of today's hearing. But I propose to reserve those costs.