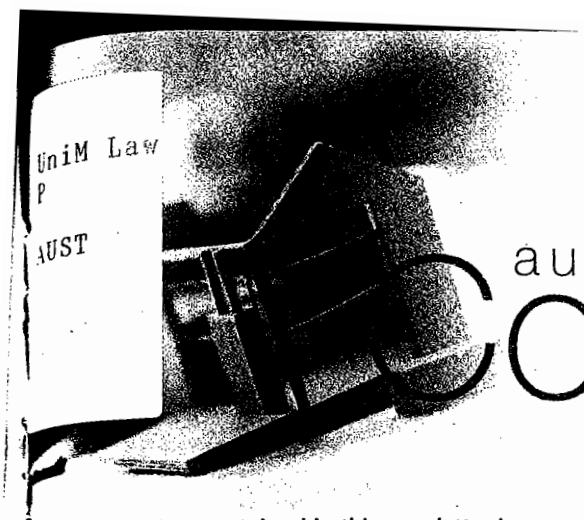

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Open book contracting/partnering arrangements — the need for honesty

Alistair Little

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A recent High Court decision emphasises the need for absolute honesty in contracting on an 'open book' basis. In *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, the High Court awarded substantial damages to a mine operator which had been overcharged by a contractor engaged to carry out the mining operations. The parties entered what they called a 'partnering' arrangement in which the operator and contractor would agree the costs for mining operations (using an 'open book' system) and then the operator would pay an agreed profit margin of 5 per cent to the contractor on top of those costs.

One term of the agreement provided that the successful operation of the contract required both parties to 'agree to act in good faith' in all matters relating to (among other things) the derivation of costs.

A dispute arose and the agreement was cancelled by the operator after three years. The contractor claimed damages for breach of contract and the operator claimed repayment of moneys it said it had overpaid to the contractor. The core of the operator's claim was that the contractor had deliberately overstated its cost estimates and that this was a breach of its contractual obligation to act in good faith regarding the derivation of cost rates. The contractor eventually admitted that the estimates provided to the operator exceeded its bona fide estimate of costs and the judge at first instance awarded substantial damages to the operator based on the information before him.

The Full Court of the Supreme Court of Western Australia overturned the judge's decision because it held that he was not entitled to do what he had done in the absence of certain information and that he had calculated damages in a way that was different from that contended for by the operator. The judge's original award of $4.853 million dollars was replaced with an award of nominal damages in the princely sum of $100!

The High Court disagreed with the Full Court and reinstated the initial decision. Once again the High Court emphasised that the mere fact that it is hard to precisely quantify damages does not relieve a court from its duty to calculate damages as best it can. Here the judge found that the contractor's bona fide estimates of costs closely approximated the real costs and thus the damages could be calculated with some precision.

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His Honour Mr Justice Callinan made some interesting observations about the assessment of damages in circumstances where there had been deceitful behaviour. His Honour held that because the contractor had deceived the operator as to its true costs and that this was the very subject of the claim, a court should not be too 'critical of imperfections in the proof of a claim' by the operator since it had been repeatedly deceived. The judge went on to say that the contractor's defence of the claim amounted to a 'deliberate and prolonged process of obfuscation' and that this allowed the trial judge more latitude than he would otherwise have had in his damages calculation. Indeed the judge took the view that the contractual obligation to act in good faith in all matters relating to the arrangement between the parties was not terminated once proceedings were commenced and continued on through the course of the proceedings.

The message for those who enter into partnering arrangements (and particularly for those who determine to contract on an 'open book' basis) is that there is a need to strictly comply with the obligation to deal in good faith and a need to keep genuinely open books for review by the other party. Those who breach these obligations (and in particular those who continue through the course of proceedings to hide the true position) can expect no judicial sympathy and leave themselves open to damages calculations which can legitimately err in favour of the wronged party. ●

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Expert evidence — treading carefully

David Goldstein and **Stuart Englund**

In the construction industry expert evidence is the backbone of litigation and having expert evidence ruled inadmissible can have disastrous consequence for any case. Principals and contractors engaged in litigation, consultants who may appear as experts and lawyers for these parties have a significant interest in ensuring that their expert evidence is admissible in court. Two decisions provide a useful insight as to how to how this can be achieved.

Relevance of the decision

In the case of *Makita (Aust) Pty Ltd v Sprowles*[1] Heydon JA formulated a six step assessment for the admissibility of expert evidence (see box on opposite page).

In formulating the six step assessment, he undertook a wide ranging review of current authority regarding this subject including recent Federal Court and English precedent. As Justice Heydon is the latest appointee to the High Court bench, his six step assessment may well influence the law relating to experts evidence across Australian jurisdictions.

He concluded that:

> If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking *not admissible*, and, so far as it is admissible, of *diminished weight* [emphasis added].[2]

Expert evidence codes of conduct

In addition to the requirements of the six step assessment outlined in *Makita*, the jurisdictions of NSW and South Australia require potential experts to be made aware of specific requirements in the preparation of their proposed evidence. These