

AUSTRALIA / JUDGMENT

Guy v Crown Melbourne Limited [2017] FCA 1104

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FEDERAL COURT OF AUSTRALIA

Guy v Crown Melbourne Limited [2017] FCA 1104

File number: VID 1274 of 2016

Judge: MORTIMER J

Date of ruling: 15 September 2017

Catchwords: EVIDENCE – application of opinion rule – application of s 79 of Evidence Act 1995 (Cth) – admissibility of evidence of lay witness in reliance on s 79 of Evidence Act in circumstances where lay witness has not complied with, and has no capacity to comply with, Part 23 of Evidence Act – not admissible as expert evidence

Legislation: Competition and Consumer Act 2010 (Cth), Sch 2, Australian Consumer Law, ss 18, 20, 21

Evidence Act 1995 (Cth), ss 66A, 76, 78, 79

Federal Court Rules 2011, r 23

Cases cited: Ananda Marga Pracaraka Samgha Ltd v Tomar (No 4) [2012] FCA 385; 202 FCR 564

Dasreef Pty Ltd v Hawchar [2011] HCA 21; (2011) 243 CLR 588

Lithgow City Council v Jackson [2011] HCA 36; 244 CLR 352

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Counsel for the Applicant: Mr R Merkel QC, with Mr P Gray QC, Ms Z Maud and Mr C Tran

Solicitor for the Applicant: Maurice Blackburn

Counsel for the First Respondent: Mr N Young QC with Mr N Hopkins QC and Ms G Coleman

Solicitor for the First Respondent: Minter Ellison

Counsel for the Second Respondent: Mr P Jopling QC with Mr P Wallis

Solicitor for the Second Respondent: King & Wood Malletsons

REASONS FOR RULING

VID 1274 of 2016

BETWEEN: SHONICA GUY

Applicant

AND: CROWN MELBOURNE LIMITED (ACN 006 973 262)

First Respondent

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD (ACN 001 660 715)

Second Respondent

MORTIMER J:

1 These are the reasons for the ruling I gave on Friday, 15 September 2017.

2 The applicant proposed to rely on an affidavit from Dr Charles Henry Livingstone.

3 Objection was taken by both respondents to Dr Livingstone's evidence. Both respondents objected to the whole of his affidavit. The second respondent (Aristocrat) also raised specific objections to identified parts of the affidavit. The first respondent (Crown) adopted Aristocrat's specific objections to identified parts if its primary submission was not accepted.

Background

4 Before considering the objections, it is necessary to briefly set out the background of this proceeding and the context to this ruling.

5 This proceeding concerns a claim against Crown and Aristocrat for breaches of the Australian Consumer Law, which is Sch 2 to the Competition and Consumer Act 2010 (Cth). Crown operates a casino in Melbourne pursuant to the Casino Control Act 1991 (Vic), and in doing so, makes available to the public a poker machine called the Dolphin Treasure electronic gaming machine (EGM). The Dolphin Treasure EGM is manufactured and supplied to Crown by the second respondent, Aristocrat.

6 The applicant alleges that in making the Dolphin Treasure EGM available to the public, and in manufacturing and supplying the EGM respectively, Crown and Aristocrat have contravened ss 18, 20 and 21 of the ACL. Her claims rely on a number of features of the Dolphin Treasure EGM, and, for the ss 20 and 21 claims, on what is alleged to be the way these features "take advantage" of a group of players described by the applicant as "vulnerable players".

7 In support of these claims, the applicant seeks to adduce evidence from Dr Livingstone in relation to, among other things, the design and configuration of the Dolphin Treasure EGM, features of the Dolphin Treasure EGM which, in his opinion, contribute to addiction to poker machines, and his observations of problem gamblers and the causes, in his opinion, of problem gambling. It is this evidence to which the respondents object.

Parties' submissions

The respondents' submissions

8 Crown submitted the whole of the affidavit is inadmissible opinion evidence because of non-compliance with r 23.11 of the Federal Court Rules 2011. It also submitted the opinions expressed by Dr Livingstone are not wholly or substantially based on his specialised knowledge, and that he has not identified the underlying bases (such as the facts, matters, assumptions or his reasoning process) for the opinions he expresses. Crown relied on the plurality reasons in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 at [35]-[37].

9 Aristocrat submitted Dr Livingstone's affidavit is "in substance an expert report on topics in respect of which he is not qualified and is prepared without him having complied with the relevant requirements of the Federal Court Rules".

10 In addition to these objections, and following discussions between the parties, the applicant agreed not to read into evidence [33]-[37] and [40]-[41] of Dr Livingstone's affidavit. This agreement was noted in the joint list of outstanding objections to evidence.

11 After those objections were filed and served, and as a result of discussions between counsel, the applicant informed the Court that the last sentence of [32] of Dr Livingstone's affidavit was also not pressed. This ruling does not consider those paragraphs.

The applicant's submissions

12 The applicant's principal answers are twofold: significant parts of Dr Livingstone's evidence concern matters of fact, not opinion; and where Dr Livingstone does give opinion evidence, the applicant relied on s 78 of the Evidence Act 1995 (Cth), read with s 66A to address the hearsay aspect of what people told Dr Livingstone during the research to which he refers.

13 If the s 78 submission is not accepted, then the applicant relied on s 79 of the Evidence Act as a gateway to admissibility, notwithstanding the admitted wholesale non-compliance with Part 23 of the Federal Court Rules. For the purposes of s 79, the applicant submitted Dr Livingstone's expertise is in the carrying out of interviews and surveys of people with gambling problems.

Initially the applicant submitted the Court should waive compliance with the Court's Expert Evidence Practice Note (GPN-EXPT). However, eventually counsel conceded compliance with r 23.11 of the Federal Court Rules would also be required to be waived. In substance, as I set out below, waiver of all of Part 23 would be required.

14 Further, relying on a decision of Dodds-Streeton J in *Ananda Marga Pracaraka Samgha Ltd v Tomar* (No 4) [2012] FCA 385; 202 FCR 564, the applicant submitted absence of independence is no bar to admissibility, but goes to the credibility or reliability the Court should attach to expert evidence from a person who is not independent in the way contemplated by the authorities, by the Harmonised Expert Witness Code of Conduct and by the Court's Practice Note.

Dr Livingstone's proposed evidence

15 Dr Livingstone is a Senior Lecturer in the Department of Epidemiology and Preventive Medicine at Monash University, and has occupied that position since 2006. Prior to that he was a Senior Research Fellow with the Australian Institute for Primary Care at La Trobe University. He describes his qualifications in the following way:

I have a Bachelor of Arts degree in History and have completed a Postgraduate Diploma in Economic History, a Graduate Certificate in Higher Education, a Masters of Economics degree by research and a Doctorate from the Department of History and Philosophy of Science at the University of Melbourne. My doctoral thesis explored the social and economic history of poker machine gambling in Victoria.

16 He states that he has "written more than 30 peer-reviewed articles, the majority focused on aspects of poker machine gambling including government policy, the operation and the characteristics of poker machines and the ways in which gamblers interact with poker machines". He also describes how, together with Dr Richard Woolley, he was commissioned by the "former Victorian Gambling Research Panel to conduct research in relation to the technological basis of the Victorian poker machine industry, and changes in that technological basis over time, for the purpose of understanding the relation between technology and consumption behaviour". This project culminated in a publicly available report entitled "The Changing Electronic Gaming Machine (EGM) Industry and Technology", published in March 2006.

17 Dr Livingstone deposes that:

I have conducted a number of studies in relation to the structural characteristics of poker machines including a recent review of evidence and information paper on structural characteristics. By structural characteristics, I mean the attributes of poker machines such as the configuration of the reels, the images and lights displayed and the sounds emitted, how the machines operate including the rate of spin of the reels, the amount of money inserted and game features such as free spins.

For the purpose of my research, and generally, I have conducted interviews, focus groups, or other discussions with hundreds of gamblers who have reported difficulty controlling their use of poker machines, and have also reviewed data in relation to hundreds of interviews or questionnaires conducted by others.

(Emphasis in original.)

18 He also outlines other aspects of his work, including his studies and interests in the neurobiology of gambling addiction. He states that:

I am reasonably familiar with the literature in relation to the neurobiology of gambling addiction, although I am not an expert in research techniques in neurobiology.

19 He describes his practice about attending gaming venues:

It is my practice to attend gaming venues in Victoria on a regular basis — an average of one per week — for the purpose of observing the gambling room in operation, whether there have been any major changes over a specific period of time, what the buzz is like, how many people are there, what they are playing, how much they are spending, what the crowd is like, whether they get interrupted and if they appear to be demonstrating signs of distress.

20 For the purposes of ruling on the objections, I am prepared to accept what is set out by Dr Livingstone as accurate. The respondents did not submit I should do otherwise.

21 Given the context, it is unsurprising that a significant portion of Dr Livingstone's evidence is occupied by setting out his studies and experience, as well as his connection to the conduct of the applicant's case.

22 His substantive evidence falls into the following categories.

A description of "probability accounting records" and their function in understanding how poker machines are programmed and configured.

An account of how and why he acquired a Dolphin Treasure EGM. Later in his evidence he then gives an account of how he and a colleague determined the reel configuration for the machine. The particular reel configuration of the Dolphin Treasure machine is a foundational aspect of the applicant's claims under the ACL.

A description of the features of the Dolphin Treasure machine which, in his opinion, contribute to addiction to poker machines. Included in this section of his evidence is a description of the concept of "volatility" in poker machines and the effect it has on the rewards provided to players through the machine.

The so-called "mini max" strategy Dr Livingstone claims is often employed by regular players of poker machines. In brief, this strategy involves betting the minimum amount of credits on the maximum number of betting lines. Thus, if it is a 10 cent credit machine, this would be one credit (10 cents) across the maximum number of betting lines, which might be 20 lines.

From [47] onwards Dr Livingstone expresses some opinions about problem gamblers, based on his observations and interactions with people who gamble. This includes some opinions about what causes people to gamble excessively, or gamble in a way which leads to addiction.

23 Dr Livingstone is candid in his affidavit about his connection to the applicant's case. He deposes to having assisted the applicant and her legal representatives before he was asked to produce an affidavit in the proceeding. He is the person who acquired the Dolphin Treasure machine which is an important foundation for the applicant's ACL allegations. His opposition to gambling as a lawful activity is made clear in his affidavit. His affidavit reveals clearly his belief in a connection between the structural characteristics of EGMs and the addiction of people to gambling, and/or gambling by people to a level which is harmful to them and to others.

Resolution

24 The matters to be resolved are:

- (1) Whether parts of Dr Livingstone's evidence are admissible because they constitute direct evidence of what he has seen, heard or perceived, and no special or additional admissibility requirements attend them.
- (2) Whether, in addition to those parts, any or all of the opinion evidence given by Dr Livingstone is admissible pursuant to s 78 of the Evidence Act.
- (3) Whether Dr Livingstone's opinion evidence (and any evidence disclosing the basis for that opinion evidence) is admissible pursuant to s 79(1) of the Evidence Act.
- (4) In relation to admissibility under s 79(1), what is the consequence of wholesale non-compliance by the applicant with Part 23 of the Federal Court Rules in relation to Dr Livingstone's evidence.
- (5) Should compliance with the requirements of Part 23 of the Rules and the Court's Practice Note be waived.

Direct or opinion evidence?

25 I consider the applicant is correct to characterise parts of Dr Livingstone's affidavit as direct evidence. This includes the parts where he sets out his qualifications, experience and fields of study, and matters he has come to know through his field of study. As I have outlined above, there are parts of his evidence that constitute a narrative of, for example, how he acquired a Dolphin Treasure machine and what he did to discover its configuration. I also consider that his description of "probability accounting records" fits into this category, in the sense it is a summary based on his observation of, and work with, these kinds of records, and his evidence involves statements based on his own knowledge. It is no different to having an accountant explain what a profit and loss account is. At this stage of the proceedings, I am not prepared to conclude the evidence about probability accounting records is irrelevant so as to make it inadmissible.

26 I also consider Dr Livingstone's explanation of how, in multiple line betting, a player can win on one or more lines but not recover the amount wagered, is admissible. It is a description of how the machine works and given his examination of the Dolphin Treasure machine, he is able to give this description from his own observations and investigations, and thus from his direct knowledge. I consider his explanation about why he uses the term "loss disguised as win" is admissible, if for no other purposes than to explain the possible origins of the term that is invoked by the applicant.

27 Accordingly, paragraphs 1-17, 19, 20, 21, 22-24, 26-27, 28-32, 38-39, 42-44 are admissible.

Reliance on s 78

28 As to paragraph 18, part of this paragraph contains an account of Dr Livingstone's history of visiting gaming venues – how often he does this, why he visits these venues, and what he does while he is there. Those parts are admissible. One sentence must be separately considered – namely, where Dr Livingstone deposes:

Behaviour that I have observed at gaming venues which I consider indicates signs of distress includes people being obviously agitated, spending money quickly and swearing at or stroking the poker machine.

29 I do not consider this evidence, being an opinion, is "necessary to obtain an adequate account or understanding of the person's perception of the matter or event" within the terms of s 78. Dr Livingstone is not giving evidence about a particular event, or his perception of it. There is no occasion to invoke s 78. See also *Lithgow City Council v Jackson* [2011] HCA 36; 244 CLR 352 at [44] ff (French CJ, Heydon, Bell JJ), which confirms s 78 provides a relatively narrow exception to the prohibition on opinion evidence in s 76. Nor, even if contrary to the conclusions I express below, s 79 was applicable, could this evidence be admitted as within Dr Livingstone's area of expertise, however it is described. That sentence is not admissible.

30 As to paragraph 25, at least part of that paragraph may be inadmissible because it deals with matters subject to parliamentary privilege. In any event, I do not consider the details of a particular incident where Dr Livingstone decided not to examine probability accounting records are relevant to the issues in this proceeding. Insofar as the applicant submits this paragraph is direct evidence rather than opinion, paragraph 25 is not admissible for those reasons.

31 As to paragraphs 45 and 46, these paragraphs contain opinion evidence that is outside the terms of s 78, again because Dr Livingstone is not describing his perception of any event. He is describing an asserted phenomenon, which he calls the "mini max strategy". These paragraphs can only be admissible under s 79(1). For the reasons I set out below, in the circumstances of this proceeding, s 79(1) cannot sustain the admission of opinion evidence by Dr Livingstone. Paragraphs 45 and 46 are not admissible.

32 Paragraphs 47-51 are opinion evidence. For the reasons I have set out, s 78 does not assist the applicant in having these paragraphs admitted. Further, any reliance on s 66A as a preliminary foundation is misconceived because s 66A deals with a particular representation from a particular individual, and Dr Livingstone's evidence in these paragraphs is expressed at a level of generality about "people" who have reported certain matters. Section 66A has no application.

33 These paragraphs could only be admissible pursuant to s 79(1). I turn to explain why s 79(1) cannot be invoked by the applicant in these circumstances.

Section 79 and Part 23 of the Federal Court Rules

34 In terms, it is not a requirement of s 79(1) that a witness be described as an "expert" for her or his evidence to be admissible. However in substance, that is precisely the matter to which the two preconditions in s 79(1) are directed. They are directed to the existence of a connection between a person's expertise (however obtained) and the opinion expressed. See, generally, *Dasreef* at [31]-[37].

35 It is also true that, in terms, s 79(1) does not impose a precondition that opinion evidence, as expert evidence, be given by a witness who is "independent" of the party calling her or him. In proceedings outside this Court and in the absence of provisions such as Part 23, there may be circumstances in which s 79(1) could render admissible opinion evidence where the two preconditions in s 79(1) were satisfied, even if the witness could not be said to be "independent" of the party calling her or him. In those (theoretical) circumstances, the issue of independence might well be only a matter going to the weight to be given to the evidence.

36 However, the scenario above cannot occur in a proceeding in this Court, where Part 23 of the Federal Court Rules applies, and there is wholesale non-compliance with Part 23. That is because Part 23 deliberately links its subject matter – "expert" evidence – with the terms of s 79(1). That is, for the purposes of proceedings in this Court, an express and deliberate link is made, and s 79(1) has no operation separately from Part 23 and therefore also the Court's Practice Note on Expert Evidence.

37 Part 23 of the Rules applies to evidence from an "expert", which is a term defined in the Dictionary in Sch 1 to the Rules. That definition is:

expert means a person who has specialised knowledge based on the person's training, study or experience.

38 "Expert evidence" is defined in the Dictionary as:

expert evidence means the evidence of an expert that is based wholly or substantially on the expert's specialised knowledge.

Note: For the admissibility of the evidence of the opinion of an expert, see section 79 of the Evidence Act.

39 This language is the language of s 79(1) of the Evidence Act. This is the express and deliberate link to which I referred.

40 Next, it is important to recall that the key provisions in Part 23 are expressed in mandatory terms. Rule 23.11 provides that a party may call an expert witness at trial "only if" the two preconditions in r 23.11 are met. The words "only if" must be given work to do: they indicate that the matters in paragraphs (a) and (b) are essential preconditions to a party being able to call an expert witness at trial. The party seeking to call expert evidence must have:

- (a) delivered an expert report that complies with rule 23.13 to all other parties; and
- (b) otherwise complied with this Division.

41 Insofar as the applicant relied upon s 79(1) of the Evidence Act, Dr Livingstone is an "expert" as defined in the Dictionary in the Federal Court Rules. That is because the applicant must, and does, rely on his training, study or experience as the matters which qualify him to express the opinions he does, which the applicant contended are within his expertise.

42 Insofar as the applicant relied upon s 79(1) of the Evidence Act, there is no conclusion available but that the applicant was required to comply with Part 23 and r 23.11 in particular.

43 A party "must" give a copy of the Court's Practice Note on Expert Evidence to the expert: r 23.12. Rule 23.13 then sets out what an expert report "must" contain. The expert report must acknowledge that the expert witness has "read, understood and complied with the Practice Note" (my emphasis). The report itself must comply with the Practice Note.

44 Thus, through the Court's Rules, the Practice Note (and its attachments, including the Harmonised Code of Conduct) is given legal force, at least to the extent the Rules impose requirements or obligations about the Practice Note.

45 The particular aspects of the Practice Note which should be emphasised are as follows. After setting out the Court's approach to expert evidence and what constitutes appropriate and inappropriate interaction between parties, legal representatives and their expert witnesses, the Practice Note then turns (in paragraph 4) to the role and duties of expert witnesses.

46 Paragraph 4.1 states:

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

47 The Harmonised Code attached to the Practice Note contains a similar statement:

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

48 Both the Practice Note and the Harmonised Code also impose specific requirements about the content of the expert report, along the same lines as r 23.13, but not in identical terms.

49 When the express and deliberate link between Part 23 and s 79(1) of the Evidence Act is understood, and seen in its context, it is apparent that a capacity for a witness whose evidence is said to fall within s 79(1) of the Evidence Act to identify herself or himself as a person who can "assist the Court impartially" and not to be an "advocate for the cause of" a party, are core preconditions to the calling of that witness by a party, and to the admission of that witness' evidence pursuant to s 79.

50 In my opinion this means, at a minimum, that there must be substantial, at least purportedly substantial, compliance with Part 23, or a capacity substantially to comply with Part 23, by both a party and that party's proposed witness, including a preparedness and capacity to acknowledge the necessity for an expert witness to be independent in the sense set out in the authorities, the Practice Note and the Harmonised Code.

51 For the reasons I set out at [56] below, neither the applicant nor Dr Livingstone have a capacity substantially to comply with Part 23. Dr Livingstone has no capacity because he has, candidly, disclosed that he is an advocate for the cause of the applicant, and has been assisting her and her legal representatives. The applicant has no capacity substantially to comply with the obligation imposed on her by Part 23 because she could not do, knowing Dr Livingstone's position. I infer that is why there was, in my opinion quite properly, no attempt to comply with Part 23 in the first place.

52 I do note that, in principle, two matters advanced by the applicant can be accepted. First, there may be situations where it is appropriate to waive compliance with the Court's Rules under r 1.34 in relation to Part 23 and an expert witness. If, for example, some of the requisite acknowledgments are missing from a report, compliance may be waived and the expert can be asked about those matters in the witness box. In some circumstances, omissions from a report of some of the matters set out in r 23.13 might be excused. Other examples might be given. However it is difficult to imagine a situation where it will be in the interests of the administration of justice to waive compliance with the entire regime in Part 23 and the Practice Note, so that a person can give expert evidence which purports to be admissible under s 79(1). I allow for the possibility of such a situation, but repeat it is difficult to imagine what it might be. That is because the requirements of Part 23 are expressly linked to s 79(1) and concern the basic premises for the reception of expert opinion evidence, as set out in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82, and endorsed by many Australian courts. The widespread acceptance of such a uniform approach is demonstrated by the Harmonised Code issued by the Australian Council of Chief Justices, which is Appendix A to this Court's Practice Note on Expert Evidence.

53 Second, I accept there may be situations, such as that dealt with by Dodds-Streeton J in the *Ananda Marga* case, where the question of an expert's independence will go to weight but not admissibility of her or his report. Those circumstances will generally be where there has been at

least purported or substantial compliance with Part 23, and a purported acknowledgment by an expert of the need for independence, and a purported assertion of her or his actual independence. That was the case before her Honour: see [30]. The primary objection to the two witnesses in the Ananda Marga case was lack of specialised knowledge, for the purposes of the first precondition in s 79 of the Evidence Act. Her Honour rejected that objection. Having done so, her Honour then considered a further submission from the defendants that the two witnesses were "disqualified" by a lack of independence. Her Honour's view that the two witness' opinion evidence was admissible is expressed at [35]:

In my opinion, relevant authority establishes that while (as reflected by the Federal Court Practice Note and like curial protocols) objectivity and independence are sought of expert witnesses, such qualities are not preconditions of competence, even in the case of expert witnesses. The sanction for failure to fulfil the obligations imposed by relevant authority and curial protocols is not the exclusion of the expert's evidence, but rather, the significant risk that it will fail to persuade.

54 At [35]-[54], her Honour discussed the authorities which supported that view. Her Honour saw the position at common law and under s 79 of the Evidence Act as the same: see [45]. At [47], her Honour noted a qualification to this proposition: namely, that a lack of objectivity may justify exclusion of expert evidence under s 135 of the Evidence Act. At [46], her Honour said:

Protocols or judicial statements requiring independence in expert witnesses thus do not constitute a precondition of competence, but rather, a preferred practice.

55 In Ananda Marga, her Honour was not faced with a proposed tender of opinion evidence under s 79(1) in circumstances where there had been no compliance at all with Part 23 of the Court's Rules. In the circumstances facing her Honour, it is unsurprising her Honour saw the question of independence as one going to weight rather than admissibility.

56 In the present situation, quite unlike the Ananda Marga case, and given what he has already deposed, I fail to see how Dr Livingstone could promise to comply with and recognise the matters required by the Part 23, the Practice Note and the Harmonised Code. He is plainly well aware, and prepared to state, that he is an advocate for the cause of the applicant. I add I have no reason to believe Dr Livingstone would even consider attempting to proffer the declarations of independence required, or the acknowledgments of the need for independence. His candidness in his affidavit suggests he would not. I should also make it clear that there is no inherent criticism to be made of Dr Livingstone in the position he has taken in support of the applicant's cause. The legal question is how that position affects his capacity to comply with Part 23 and the underlying core requirements for expert evidence.

57 Thus, Dr Livingstone is placed in a position of being incapable of complying with Part 23, insofar as his opinion evidence is concerned. Waiver of the entirety of Part 23 under r 1.34 might bypass his incapacity, but it does not change the fact of it.

58 In those circumstances, it would be inimical to the structure and purpose of Part 23 to waive the requirements of that Part entirely; or of r 23.11. This Court's Rules do not intend that there are two kinds of expert evidence admissible in proceedings in this Court – independent and non-independent; substantially compliant with Part 23 and wholly non-compliant. The purpose of Part 23 as a whole is to regulate the form and preconditions to admissibility of opinion evidence within the terms of s 79(1) of the Evidence Act. That is why substantial compliance (at least purported), or the capacity substantially to comply, with Part 23 must be, in this Court at least, a precondition to admissibility of evidence within s 79(1) of the Evidence Act.

59 Dr Livingstone's assistance to the applicant, and his belief in the underlying tenets of her case, may properly be the subject of cross-examination in relation to the evidence I have determined should be admitted. That is a matter for the respondents. On those limited matters, his assistance to the applicant does not, in the circumstances of this case, preclude any reliance by the applicant on his affidavit.

Conclusion

60 The respondents' objections are upheld in part, and disallowed in part.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Ruling herein of the Honourable Justice Mortimer.

Associate:

Dated: 18 September 2017

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