

expert update

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Playing cards or simply fishing?

ICAP Pty Ltd & Ors v Moebes & Anor [2009] NSWSC 306

The ongoing debates about the role of the expert have largely focussed on how the expert goes about the task of preparing a report and giving evidence. There has been little focus on the role of the expert during the discovery process - a process acknowledged as sometimes the most costly part of the dispute resolution process. However, in our experience, proper preparation during this phase can critically influence the outcome.

As a general rule in both issuing a subpoena and seeking discovery, there must be a "legitimate forensic purpose", namely production of documents relevant to the action. It cannot be a so-called "fishing expedition" where one party is endeavouring not so much to obtain evidence to support their case, but to discover whether they have a case at all, or to reveal the nature of the case of the defendant.

In *Attorney-General for New South Wales v Stuart*¹, it was stated:

The concept of legitimate forensic purpose...arises whenever a party seeks access to documents for which he has issued a subpoena; where objection is taken, a party who is unable to show that it is at least "on the cards" that such documents will assist his case is not entitled to have access to such documents simply to see whether they may do so: R v Saleam (1989) 16 NSWLR 14 p17-18. He is not entitled to conduct a fishing expedition.

In this article we examine the recent decision in *ICAP Pty Ltd & Ors v Moebes & Anor* [2009] NSWSC 306 ("the ICAP case") and the role of the expert in the discovery process.

Introduction

ICAP is a specialist broking provider in the Australian energy market and BGC is a direct competitor.

In this case, a subpoena was issued by ICAP to BGC, a non-party to the proceedings. BGC sought to have the subpoena set aside as it lacked a legitimate forensic purpose.

Experts should have some concrete grounds for discovery that take the request beyond a mere 'fishing' expedition'.

¹Attorney-General for New South Wales v Stuart (1994) 34 NSWLR 667 Hunt CJ at CL (p681)

ICAP claimed damages against former employees of ICAP who conducted non-exclusive trades with customers in the Australian energy market. Under their employment contracts there were, inter alia, individual non-compete time periods.

These employees subsequently resigned from ICAP and went to work at BGC. The plaintiffs claimed breach of contracts, breach of fiduciary duties and conspiracy.

It was alleged that BGC, through the defendants, caused or enticed clientele of ICAP to transfer their business to BGC, and hence ICAP lost trades, revenues and profits. Further, it was pleaded “in ICAP’s belief, an increase in the quantum and volume of trades effected by BGC....and an increase in BGC’s revenue as a result...”

The subpoena issued against BGC required production of documents concerning volumes, trades, revenues, customers and revenues by broker.

The issues

The parties agreed that production would not be required unless the legitimate forensic purpose test had been met.

In support of the subpoena application, ICAP had instructed an accounting expert, Mr P, who stated that the documents sought were “necessary for his analysis of the loss or preparation of his report using his methodology” (emphasis added).

Mr P’s methodology involved “the triangulation” of three methods of assessment of loss, one of which included a comparison of trades and brokerage revenue by customer before and after departure of the relevant employees, as compared to BGC’s Energy Desk. Further, the subpoena documents were critically required in order to perform two of the three methodologies outlined by Mr P.

Nicholas J commented that:

The application of the test requires consideration of the issues in the principal proceedings. These matters are usually those identified in the pleadings and the particulars of the facts and matters relied upon in support of the pleaded allegations... So too, is the scope of demand upon an opponent or third party under a subpoena.

The plaintiff claimed the documents sought by Mr P were to enable him to form a view about the loss suffered by it. These losses were characterised as:

- Lost market share
- Loss caused by loss of customers the plaintiff wished to prove had gone to BGC

- Loss suffered...because other business remaining was at a less profitable rate
- Loss experienced because the company had become generally less profitable

Further, it was submitted the documents sought “may throw light on whether there is a causal link between the plaintiffs’ loss and the defendants’ breach of contract” and thus there was a legitimate forensic purpose.

Nicholas J was not persuaded and set aside the subpoena, finding “the subpoena was drafted to meet Mr P’s concern”, and “was based on (the plaintiffs’) speculation”, “ie to see whether the documents might permit a case to be made”.

Conclusions

Whilst having some sympathy for the expert Mr P, who appeared to try to make a financial comparison of pre-departure customer revenue and profit as compared to post-arrival like-customer revenue and profit (in effect measuring BGC’s betterment albeit BGC was not a party to the proceedings), the essence of the subpoena was seen in that light, rather than dealing directly with the pleaded issue - ie: “whether the plaintiff suffered loss resulting from the defendants’ breach of contract which involved enticing customers away from the plaintiffs”.

In our experience, an expert must have regard to and consider the pleadings and issues that arise directly from it when framing requests for production of documents.



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