

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

What's a good expert worth?

Idoport Pty Limited v National Australia Bank Limited & Ors
[2007] NSWSC 23

BHP Billiton Iron Ore Pty Ltd v National Competition Council (No 2) [2007] FCA 557

The first of these judgments marked the end of one of Australia's largest pieces of commercial litigation. It must surely have also been one of Australia's most costly.

More than five years after he dismissed *Idoport's* claim for nearly \$30 billion against the National Australia Bank ("NAB"), Justice Einstein was asked to rule on NAB's claim for costs of more than \$61 million (before interest). Some \$22 million of these costs were incurred in relation to experts.

Justice Einstein observed that:

... the objective importance of the matter to the NAB Parties was very high. ... faced with such a claim, the Bank was plainly entitled to defend itself with all the energy and resources at its command.

And, indeed, Justice Einstein concluded that this is in fact what NAB had done:

In truth ... a 'Rolls Royce' approach was taken to every aspect of the preparation of the case.

But how much was too much? Justice Einstein observed that there was a limit:

Of course if there was evidence that by some "open cheque-book policy" put in place by the NAB Parties, the solicitors and experts were given carte blanche to travel around Sydney in stretch limousines and/or in interviewing overseas witnesses, to travel overseas in privately hired Lear Jets, this matter would be regarded as inappropriate.

However, he concluded that (emphasis in original):

I am satisfied that the work carried out by the NAB Parties represented a fair approach ... to a crucial issue ... The nature of the expert evidence being corralled was complex in the extreme. It had to be obtained at relatively short notice from a variety of experts across the globe. Faced with those

When is it OK to adopt a "Rolls Royce" approach to expert evidence? And when will the associated costs not be recoverable?

circumstances the legal advisers for the NAB Parties were perfectly entitled to proceed with extreme caution not only in and about the *selection* of appropriate experts but also in ensuring that the expert evidence was presented in a *proper form*.

Justice Einstein made a gross sum costs award of \$50 million (before deducting a further \$8 million already recovered by NAB from another party).

In *BHP*, Justice Middleton considered the question of costs following his decision in favour of the NCC and Fortescue in the main proceedings.

BHP argued that NCC's costs should be reduced by 50% on the basis that Justice Middleton had rejected the evidence of NCC's economist, Professor Rey. Justice Middleton set out what he considered were the relevant principles as follows:

1. A successful litigant is ordinarily entitled to its costs even if the losing party had good legal grounds for its position and conducted itself in the litigation reasonably and appropriately.
2. The successful litigant will be so entitled to its costs unless some good reason connected to the case is shown to the contrary.
3. Without limiting the general discretion available, a good reason to the contrary may arise:
 - 3.1 Where the conduct of the successful litigant in connection with the case was unreasonable or inappropriate
 - 3.2 Where no such unreasonable or inappropriate conduct of the successful litigant is found, but nevertheless there were clearly distinct and severable issues or inquiries that were lost by the successful litigant
4. If the conduct of a successful litigant was inappropriate or unreasonable in connection with the case, the successful litigant will usually be denied all or part of its costs.
5. Where the court is considering the question of costs in respect of a lost distinct or severable issue or inquiry, then to determine whether the successful party will lose some or all of its costs, it will be necessary to consider case management principles, the significance of the issue in proportion to the proceeding as a whole, and whether the issue had any merit.
6. The court has the discretion to apportion costs even if it cannot identify separate costs in respect of distinct issues on which the successful litigant failed. But the matters on which the party failed must be at least capable of separation from the matters on which the litigant was successful.



Applying these principles, Justice Middleton concluded that Fortescue should not be deprived of any of its costs in the proceedings. However, he reached a different conclusion in relation to NCC's costs. He said:

[The] NCC sought to introduce an economic test which could amount to nothing more than submission and argument. It seems to me that to adduce expert evidence going to the economic test introduced an element into the conduct of the proceedings which was of no utility and unnecessarily added to the time and expense of the proceedings including interlocutory steps in preparation for trial. Whilst [BHP] and Fortescue also sought to tender economic expert evidence, it was in response to the NCC's evidence, and I do not think this impacts upon the significance of the unnecessary introduction of the economic expert evidence by the NCC for the purposes of considering costs.

Not being provided with sufficient information to do the exercise himself, Justice Middleton ordered that NCC's costs be taxed on the basis that the costs associated with the economic expert be excluded.

Significance

Using an expert in litigation can be a costly proposition. However, as the *Idoport* matter reveals, in many cases expert evidence is crucial. Where that is the case, it is reasonable that a party should be confident that, if successful, they will recover the associated cost. Equally so, however, the risk that the cost of unnecessary expert evidence will not be recoverable provides a necessary brake on a party's desire to fight every issue with every resource. Of course, being able to identify the difference between critical and unnecessary expert evidence is not as simple as it sounds.



Andrew Ross
Partner, Sydney
phone: 02 9286 9906
email: andrew.ross@fh.com.au

For more information about our forensic services, please contact:

Sydney: Andrew Ross
+61 2 9286 9906
andrew.ross@fh.com.au

John Temple-Cole
+61 2 9286 9919
john.temple-cole@fh.com.au

Melbourne: Greg Meredith
+61 3 9600 5118
greg.meredith@fh.com.au

Adelaide: Peter Holmes
+61 8 8100 7600
pholmes@sa.fh.com.au

Brisbane: Tim Michael
+61 7 3831 4833
tmichael@qld.fh.com.au

Hong Kong: John Tudorovic
+852 2820 5610
jtudorovic@fh.com.hk

Singapore: Tim Reid
+65 6416 1400
timr@fh.com.sg

Or find out more at:
www.ferrierhodgson.com

FORENSIC ACCOUNTING
FINANCIAL INVESTIGATIONS & FRAUD
BUSINESS VALUATION
FORENSIC IT