

expert update

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The not-so-happy campers

*Tourism Holdings Australia Pty Ltd v Commissioner of Taxes
[2007] NTSC 22*

When the question given to the expert involves the application of an interpretation of legislation, trouble could be just around the bend

This case arose as an appeal by Tourism Holdings Australia (THA) against an assessment of \$773,376 in stamp duty by the Northern Territory Commissioner of Tax ("C of T").

This assessment arose in the context of a purchase by THA of the Australian component of the Britz International motor vehicle rental business. This purchase was part of a larger purchase by THA's parent of the global Britz business.

The total consideration paid for the Australian assets was \$102.97 million. Of this total, \$46.47 million was identified as goodwill. The C of T determined that, of this goodwill, \$14.03 million related to that part of the Australian business carried on in the Northern Territory. Thus, the principal issue for determination by the court was what was the correct value of the portion of Australian goodwill on which duty was payable under the Act?

The C of T calculated these figures by breaking down the Australian goodwill based on the share of Australian revenue derived through Britz outlets in Alice Springs and Darwin.

THA argued that this approach was wrong. Rather than focusing on the location at which rental charges were collected, THA argued, through its expert accountant, Mr C, that the goodwill originated at the location where the customer resided and initially transacted with Britz. Given that more than 80% of Britz customers came from outside Australia (and those customers contributed more than 90% of Britz Australia's revenue), this approach produced a significantly lower stamp duty amount.

Justice Southwood accepted the C of T's submissions that:

[Mr C] was not qualified to give the opinions contained in the reports that were sort [sic] to be tendered in evidence by the appellant. There is no reliable body of knowledge identified as the basis of [Mr C's] opinion. [Mr C's] opinions are the result of his application of what he was told were the relevant legal principles to assumed facts and "to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant"... .

As a result, Justice Southwood rejected the tender of Mr C's reports. While he said that he would take them into account as submissions, he also said that he had not given them a lot of weight.

However, Justice Southwood did accept (over the objections of THA) an expert statement from another forensic accountant, "Mr L". Justice Southwood said:

I accept [Mr L's] opinion that while it would be preferable to allocate goodwill based on the profits generated at each location rather than "out" revenue (due to the fact that the value of goodwill is largely dependent on the profitability of the underlying business), in this instance, because the profitability of the Australian business by branch location was not provided, "out" revenue statistics are likely to be the best estimate of the value of goodwill that is attributable to the Territory.

Justice Southwood also provided a detailed review of the case law on the identification of goodwill. Among the cases reviewed, he included the statement by Gaudron, McHugh, Gummow and Hayne JJ in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 611 that:

... "[g]oodwill" is notoriously difficult to define". One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business. Its existence depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business. ... Another reason is that courts have been called on to define and identify goodwill in greatly differing contexts. ... It is unsurprising that in these varied situations courts have defined goodwill in ways that, although appropriate enough in one situation, are inadequate in other situations.

He also cited Lord Macnaghten in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217:

What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade.



Finally, he observed that the accounting notion of goodwill differs from legal notions of goodwill. In this respect he again cited Gaudron, McHugh, Gummow and Hayne JJ in *Federal Commissioner of Taxation v Murry* (supra) where they said:

Goodwill is also an accounting and business term as well as a legal term. The understanding of accountants and business persons as to the meaning of the term differs from that of lawyers. That has added to the difficulty of achieving a uniform legal definition of the term, particularly since accounting and business notions of goodwill have proved influential in the valuation of goodwill for legal purposes. ... Australian accounting standards describe goodwill as comprising "the future benefits from unidentifiable assets which, because of their nature, are not normally individually brought to account." Some accounting theorists see goodwill as representing the difference between the present value of the future earnings of the business and the normal return on its identifiable assets. Business people see goodwill as concerned with the notion of excess value, a notion colourfully expressed in the statement of an American funds manager that "[i]f you pay \$450 million for a TV station worth \$2.5 million on the books, the accounts call the extra \$447.5 million 'goodwill'."

When a business is profitable and expected to continue to be profitable, its value may be measured by adopting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets. Admittedly this approach can cause problems in valuing goodwill for legal purposes because the identifiable assets need to be valued with precision. Particular assets, as shown in the books of the business, may be under or over valued and may require valuations of a number of assets and liabilities which may be difficult to value. However in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical.

Significance:

This case highlights the difficulties that arise when legal and commercial people use similar or identical terminology to describe related but different concepts. When this occurs, great care is required on the part of legal representatives in framing the appropriate question to put to an expert in order to minimise the likelihood the report will be rejected as inadmissible.



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 9604 5118
greg.meredith@fh.com.au

Adelaide: Peter Holmes
+61 8 8100 7600
p.holmes@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:
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