



expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Mr Expert, back in your box

R v Mill [2007] QCA 150

Experts should know and observe the boundaries of their expertise

A recent Queensland judgment criticised an expert's initial report for its potential to be inadmissible in evidence. It also criticised the same expert's second report for addressing matters of law which were outside the proper scope of the legitimate function of an expert.

Mr Mill, an accountant, was charged with fraud-related offences. At trial, the Crown called evidence from Mr B, a forensic accountant, who gave evidence of a paper trail relating to the subject transactions.

During the trial, Mr Mill conducted his own defence after the withdrawal of representation by senior counsel on the sixth day of what was to be 12-day trial. Although Mr Mill had obtained a report from another forensic accountant, Mr Z, that report was not tendered during his trial.

Mr Mill was convicted. He appealed, arguing that the trial had miscarried because he had failed to give evidence himself and to call evidence from Mr Z.

At the hearing of the appeal, an affidavit by Mr Z was tendered in support of Mr Mill's application to tender further evidence. The affidavit regarded a forensic accounting report Mr Z prepared for the appeal and an attached older report that had not been tendered during the original trial.

In his first report, Mr Z had recorded that he had been instructed to "provide an opinion on the accounting evidence grounding indictments (1) and (3)" and noted that he had "not been instructed to verify the information furnished to him".

Under cross examination of Mr Z during the appeal, it emerged that Mr Z's report was reliant upon:

- His use of an accounting system set up by the appellant to record relevant transactions
- His willingness to act upon information provided by the appellant

Justice Keane observed that because contemporaneous records were lacking as regards the relevant transactions, Mr Z's first report would have been quite useless to Mr Mills unless he gave acceptable evidence of primary facts to support the opinions expressed by Mr Z.

Justice Keane considered that there was real doubt as to whether Mr Z's first report would have been admissible in evidence at all insofar as it purported to express an opinion as to the reliability of Mr Mill's assertions.

Justice Keane considered that Mr Z's evidence that assertions made by Mr Mills to him were true or at least credible was beyond the scope of Mr Z's expertise as not being a legitimate subject of comment by him.

Justice Keane noted the following in Mr Z's report:

- Attributions of a statement to the Crown Prosecutor that he did not make. In effect, Mr Z set up a "straw man" and then proceeded to demolish it.
- Commentary on the Crown's trial conduct. Justice Keane considered this as being "a matter entirely outside the proper scope of Mr Z's legitimate function as an expert".

Justice Keane said of Mr Z:

That he would take it upon himself to state authoritatively what is clearly a matter of law for determination by the Court is something which does him little credit.

As is well known, the role of an expert witness is to give independent assistance to the Court by the provision of impartial opinion within the area of his or her expertise.

It is evident, both from the content of Mr Z's reports, and his evidence in cross-examination, that Mr Z exceeded his area of expertise to pursue a partisan role as an advocate for the appellant's cause.

Justice Keane referred to the decision of Lord Wilberforce in *Whitehouse v Jordan*:

While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

To the extent that it is not, the evidence is likely to be not only incorrect but self defeating.



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Significance:

The decision highlights that an expert's reliance on accounting records and information provided by a client, without proper vouching and verification to source documentation, could render the expert's report useless.

The decision also reinforces the maxim of the expert's duty to the Court. Any deviation from such duty could taint the expert's report, leading to the perception that the expert is being an advocate.

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