

expert update

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How close is too close?

Pan Pharmaceuticals Limited (In Liquidation) v Selim [2008] FCA 416

In recent editions of *Expert Update*, we have considered the following aspects of the Federal Court's judgment in this matter:

- The impact of non-compliance with the Court's timetable on the way in which the Court viewed expert evidence (Issue 9)
- The approach the Liquidator's lawyers adopted to deal with assumptions in briefing the experts (Issue 10)

In this *Expert Update*, we consider the role played by one of the Liquidator's experts in the preparation of the Liquidator's case and how the Court viewed that role.

As we described in Issue 9, Pan's Liquidators commenced action against James Selim, the former chief executive officer of Pan alleging that he failed to ensure that Pan adopted and applied good manufacturing principles (GMP).

In support of these claims, the Liquidators sought to rely on three expert reports (the Disputed Reports). One of these reports, the C Report, was prepared by Dr C. It was said to provide expert evidence as to what a reasonable CEO in the position of Mr Selim would have done in relation to certain areas of operation of Pan and the practicable steps that someone in Mr Selim's position should have taken in relation to improving Pan's GMP compliance, quality assurance and control.

Mr Selim objected to the admissibility of the C Report on the basis, inter alia, that Dr C did not possess the necessary and required degree of independence.

Justice Emmett addressed this claim in his judgment under the heading "Dr C's Lack of Objectivity". He commenced with an overview of Dr C's involvement in preparing the Liquidator's case:

Dr C has had a long involvement with the claims by the Liquidators. On 22 July 2003, well before the proceeding was commenced, the Liquidators' solicitors wrote to Dr C in connection with their investigation of a potential claim against Mr Selim.

An expert witness's paramount duty is to the Court. But how much can an expert help the client?



Dr C agreed to assess the conduct of Mr Selim and to provide a report to the Liquidator. Between August 2003 and November 2003 Dr C:

- reviewed or considered information concerning Pan, including an outline of assumed facts, provided to him by the Liquidators' solicitors;
- provided advice to the Liquidators' solicitors on the matters raised with him, including a draft opinion;
- suggested questions for investigation relevant to the potential claim against Mr Selim;
- provided the Liquidators' solicitors with the names of individuals with expertise in compliance with the Code.

Between November 2003 and May 2004, Dr C provided his views, as requested, in respect of sections of a draft statement of claim and in respect of the standards that he considered that a reasonable chief executive officer in the position of Mr Selim would adhere to. He was provided with additional documents for review throughout the period and considered those documents in formulating his opinions at the time.

The proceeding was commenced on 7 April 2004. Following service of the original statement of claim, the Liquidators' solicitors requested Dr C to commence work on the preparation of a report. In July 2004, they provided him with a copy of Mr Selim's request for particulars of the original statement of claim and asked him to review and discuss appropriate answers to certain of the requests. Dr C drafted a response. Between October 2004 and April 2005, Dr C worked on a draft report, which was to be used by the Liquidators' solicitors for the purposes of a mediation with Mr Selim that was to be conducted at the end of April 2005.

Between May 2005 and May 2007, Dr C had no involvement with the proceeding. However, on 3 May 2007, he was retained by the Liquidators' solicitors to provide a report for the purpose of tendering it in the proceeding.

Justice Emmett identified a number of difficulties with Dr C's position, including that:

- He originally said, in an affidavit affirmed on 18 October 2007, that, although there was some overlap between documents provided to him prior to May 2005 and the documents provided to him in May 2007, in preparing the C Report he relied only on the material in the Statement of Assumptions. However, in the course of cross-examination, Dr C accepted that he "cut-and-pasted" many paragraphs of the earlier reports into the C Report.



- In 1998 and 1999 Dr C was the executive general manager of the health care consumer division of FH Faulding Pty Limited. In about 1998, Dr C visited Pan and met Mr Selim and Mr John Brennan in that capacity. The purpose of his visit was to obtain an overview of Pan's capabilities. He asserted in his affidavit that he did not rely on any observations he had made in dealings that he had had with Pan during that visit.
- Dr C also visited Pan's premises in November 2003 in connection with the retainer he had from the Liquidators at that time. He asserted in the affidavit that, for the purposes of the C Report, he did not rely on any discussions he had during that visit.
- Between August 2003 and May 2005, Dr C played the role of advising the Liquidators' solicitors on matters relevant to the claim, suggesting questions for further investigation and assisting in the drafting of the original statement of claim and responses to requests for particulars of the statement of claim. The drafts prepared by Dr C have been the subject of a claim for privilege by the Liquidators, such that the extent of his involvement is not capable of being fully tested. That is significant in circumstances where Dr C accepted that he relied on earlier draft reports prepared by him in preparing the C Report, which the Liquidators now seek to tender.
- Dr C says that he recognises that his primary duty is to the Court and to provide independent evidence such that no matters of significance that he regards as relevant have been withheld from the Court. On the other hand, he declines to reveal in his affidavit or give evidence as to the substance of the numerous prior communications that he has had with the Liquidators' solicitors in helping them to formulate their case against Mr Selim. It is well nigh impossible to test his credibility or reliability in circumstances where his role in the formulation of the case against Mr Selim is substantially unknown.
- Dr C accepted that, by 13 August 2003, he had provided to the Liquidators a draft report that was critical of Mr Selim in respect of a number of the areas that appear in the C Report and six or seven areas in which Mr Selim is said to have failed in his duty. Dr C was also the author of detailed schedules to the original statement of claim making serious allegations against Mr Selim.



Justice Emmett concluded that:

The prior involvement of Dr C in the preparation of the Liquidators' case against Mr Selim is not necessarily fatal to the admissibility of the C Report. However, in the light of Dr C's lack of independence and the insistence on professional privilege on the part of the Liquidators, it would be unfair to Mr Selim for Dr C's evidence to be before the Court. It cannot be properly tested. It should be afforded so little weight that its exclusion would not prejudice the Liquidators' case.

Significance:

As indicated by Justice Emmett, a mere lack of independence on the part of an expert is not fatal to the admissibility of the expert's report. (In this context, see also *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA, which clarified that independence is not a requirement of an expert witness under Australian law).

Indeed, the Federal Court's Practice Direction on Expert Evidence was amended as recently as May 2008 to specifically include the statement that:

Nothing in the guidelines is intended to require the retention of more than one expert on the same subject matter – one to assist and one to give evidence. In most cases this would be wasteful. It is not required by the Guidelines. Expert assistance may be required in the early identification of the real issues in dispute.

However, experts who become involved in the "working up" of a case may find it difficult to maintain an appropriate degree of objectivity and may find their evidence being accorded less weight. In addition, as this judgment makes evident, taking on multiple roles in a case may lead to difficulties in relation to the materials upon which an expert has relied. (In this context, see also the judgment in *ASIC v Rich* [2005] NSWSC 149 which considered similar issues.)



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