

# expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

## Time out!

*Retaining an expert will frequently result in gaining valuable insights into the matters in dispute. But failure to engage an expert early enough may have significant adverse consequences for the outcome and costs of a case.*

[Landmark Operations Ltd v J Tiver Nominees Pty Ltd & Ors \[2008\] SASC 133](#)

[Graziano v Graziano \[2008\] SASC 142](#)

Two recent cases highlight the importance of adhering to court-imposed deadlines and the need to instruct experts early enough to provide them with sufficient time to prepare their reports.

In the *Landmark Operations* case, the Plaintiff was a specialist financier to the agricultural industry. The Defendants failed to repay amounts on loans and credit facilities to Landmark in accordance with the terms of the agreement. Landmark sought to recover damages associated with the default. The Defendants counterclaimed seeking, inter alia, damages for various breaches of duties said to be owed to them by Landmark.

During August 2007, Anderson J ordered that the Defendants file and serve any expert report by November 2007. The Defendants submitted a total of three reports from their expert, Mr A, a loss assessor. All three of these reports were filed after the deadline.

Mr A's third report was prepared after an instructing letter from the Defendants asking him to assume numerous factors. This report was filed in April 2008. The Defendants then applied for leave to amend their Defence and to rely on this report.

The Court found that there were several aspects of the third report which were "premised on an incorrect, misleading or unpleaded factual basis", in part due to the assumptions Mr A was provided with.

Given the different assumptions on which this report was based, and the lateness of its submission, Landmark submitted that admission of the report would be prejudicial as they would be "unable to commission an answering report unless the trial was aborted, in circumstances where it could not be compensated by an order for costs".

The final report was ultimately deemed inadmissible. In doing so, the Court relied on Rule 38.02(1)(b), which allows a Court to direct that evidence not be adduced from a witness.



The difficult pressures placed upon experts were also highlighted in the *Graziano* case. This case concerned two brothers in partnership. The Plaintiff sought dissolution of the partnership between the Plaintiff and the Defendant and payment of the proceeds of a certain disability insurance policy to which the Plaintiff claimed to be entitled.

Before pleadings commenced in January 2004, the Plaintiff engaged a handwriting expert to provide an opinion as to the genuineness of the signature of the Plaintiff on certain documents. In January 2006 the expert advised that he had retired and would be unable to provide a final report.

A new handwriting expert was engaged around May 2007; however work did not commence until July 2007. The new expert provided an interim report just prior to trial in late July, and referred to “a severe and possibly decisive restriction in the time available for examination and report”. He reported on two signatures only, and in each case he said there was “no clear indication that the questioned signature is a forgery”. The Judge commented later that it was clear that the expert’s work was far from complete.

The trial commenced as scheduled in July 2007 and the Plaintiff signed a certificate of readiness, notwithstanding the advice of the handwriting expert. There was no application for an adjournment of the trial. In August 2007, the Plaintiff’s application to amend the statement of claim was refused by the trial Judge.

The Plaintiff made no appeal against the rejection of the amendment application. The Plaintiff said this decision was made after extensive discussions with his solicitors and counsel and after deciding to defer any appeal until final judgment.

The Plaintiff’s handwriting expert verbally informed the Plaintiff’s solicitors on 4 September 2007 that his examination indicated a concealed forgery on at least some of the documents he had examined. That advice was produced in a letter received on 6 September 2007. The trial continued until 7 September 2007 when, all evidence having been completed, the trial was adjourned to a date for hearing the addresses of counsel.

The expert’s final report was not produced until early October 2007.

On 31 October 2007, having received the expert’s final report, the Plaintiff applied to re-open the trial based on the report. In December, the Plaintiff’s application was heard and dismissed. Had it been successful, the Plaintiff’s application would have introduced a new and very substantial issue into evidence.



After the trial Judge's decision on the re-opening application (but before his judgment), the Plaintiff commenced an appeal of the decision to disallow amendments to the pleadings ("the pleadings appeal") and the decision to disallow a re-opening of the trial ("the re-opening appeal") at the same time "as it would be economically beneficial and appropriate as both judgments are interconnected".

Bleby J found that there were no reasons to justify an extension of time in the pleadings appeal. He said:

*"... it is no excuse for inaction to await the final judgment and then to challenge an interlocutory judgment in order to have the final judgment set aside and a retrial on issues which were never properly the subject of the trial."*

Bleby J also found that the trial Judge's decision on the re-opening application was in the nature of a ruling made in the course of the trial, he said:

*"There are many factors known only to the trial Judge who has conducted the trial from the outset which may have impinged on his decision. He has not yet given reasons for the decision. He has properly decided that those reasons will be given in the course of his reasons for the final judgment. Because it is a discretionary decision it is important that those reasons be known before an appellate court embarks on a determination as to whether the decision was justified."*

Additionally, the Judge agreed with the Defendant that the Defendant had been subject to substantial prejudice in the conduct of his business by the uncertainty caused by delays in the proceedings. He found that such prejudice could not be compensated by an order for costs.

## **Significance**

The *Landmark Operations* case outlines the importance of compliance with court deadlines when seeking to file experts' reports, particularly where they can materially change the pleadings. The Defendants should have instructed the expert earlier so they could have an expert report supporting their case at trial. The failure to do so was detrimental to the Defendants and meant the report, and their new avenue of argument, was rejected.



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In *Graziano*, the second expert correctly qualified his interim report on the basis of insufficient time. The downfall, however, was the limited time available to the expert due to the delay in engaging him, which ultimately led to the evidence not being considered by the Judge.

Both of these cases highlight the requirements for clarification of key issues to be resolved and the evidence required to support these issues at an early stage of proceedings. An expert will be able to provide valuable insights at this early stage. Failure to engage experts early enough may also have a significant effect upon the outcome and costs of a case.

*With assistance from Michelle Price.*

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