

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Who are you: expert, valuer or employee?

The existence of a relationship between an expert and the party retaining them will not restrict the admissibility of an expert's evidence. However, the expert's testimony might.

Fortson Pty Ltd v Commonwealth Bank of Australia & Anor [2008] SASC 49

The issue

This article looks at the role of Mr B, a property valuer employed by agents acting on behalf of the Commonwealth Bank of Australia ("the Bank"). Mr B valued a hotel for the Bank and gave evidence about that in court. Later he became an employee of the Bank and questions were raised about when he became an employee and why he did not disclose that to the Court.

Case outline

In 1995, Fortson Pty Ltd ("Fortson") purchased a hotel property called the Plaza Hotel. The two directors and controlling shareholders of Fortson were Mr and Mrs J. Fortson, who borrowed \$750,000 from the Bank. The loan was secured, inter alia, by a mortgage over the hotel property.

By early 1997, Fortson had defaulted on repayments to the Bank, and thus the Bank exercised its powers as mortgagee and sold the hotel property.

In May 1997, on instructions from the Bank, Mr B, who was at that time a valuer employed by agents for the Bank, inspected the hotel and assessed its market value at \$660,000. The Bank later sold the property by a private tender for \$800,000. The hotel was not advertised in any public manner or placed on the open market.

Mr & Mrs J complained that the Bank had acted in breach of s420A of the Corporations Act 2001 in that it had failed to take reasonable care to sell the hotel property for the best price that was reasonably obtainable. They alleged the property should have been valued closer to \$1.5m.

After a hearing in the District Court, in which the judge found for the Bank, Mr & Mrs J appealed the decision. In March 2004, the Full Court agreed with the judge in the first instance that the Bank had a duty under s420A but held that the Bank had failed in that duty because it had sold the hotel property by a private tender. The Full Court remitted the matter back to the District Court for determination, and as a result, the three experts who gave evidence at the original trial were recalled.



In November 2006, the judge held that the best price obtainable (in 1997) for the hotel property was \$870,000 (compared to its actual sale price of \$800,000). Fortson and Mr & Mrs J appealed again on the basis they believed the market value should have been assessed at \$1.5m. The Bank cross-appealed.

The expert

Before the hearing of the appeal began, Fortson also applied for leave to appeal stating that there had been non-disclosure by the Bank of the fact that Mr B, the initial valuer for the Bank, had been employed by the Bank at the time of the initial hearing. No specific relief was sought however.

It was not until 2004, after Mr B had given evidence before the trial judge, that he became an employee of the Bank. Mr B was employed within various departments of the Bank. At the time of his evidence, he worked in the Wholesale Funds Management Unit which had no connection with the Bank's debt collection and recovery process.

In November 2005 Mr B was contacted to make arrangements to give evidence.

Mr L, the solicitor for the Bank, gave evidence that he advised Mr B that it was not necessary for him to disclose that he was currently employed by the Bank. In his affidavit, Mr L said that even though Mr B was called at trial as a valuer and not as an expert witness, Justice Lee was treating him as such. Mr L gave evidence that the other solicitor advised Mr B of the requirements of Practice Direction 46A and, specifically, that Mr B would have to disclose the identity of his then current employer if either 'he considered it was in any way relevant or significant to any opinions he would express or be asked about at the conference, or he was asked by another party or a judicial officer about his employment'. Mr B did not express any concern.

The recent Full Court judgment [2008] SASC 49 stated, at 114, that:

Neither Rule 38 nor Practice Direction 46A expressly state that an expert who has a relationship with a party, other than that of being retained as an expert, is required to disclose that fact. However, expert evidence should be entirely objective and dispassionate. The expert should not have an interest of any kind in the litigation. The expert should be independent, that is to say, the expert should not have any kind of relationship with the party by whom the expert is called. The expert's evidence should be prepared by that expert independently or uninfluenced by that party...

The Full Court found that the Bank's solicitor erred in advising Mr B that he was not giving evidence as an expert, and therefore erred in giving the advice above. He should have advised Mr B to disclose that he was employed by the Bank.

The judgment concluded that there was no principle that disqualified Mr B from giving evidence, and the fact that Mr B was employed by the Bank did not mean that he could not be called as an expert.

Other considerations

The issue of relationships between experts and parties is also considered in the Federal Court Practice Direction "Guidelines for expert witnesses" (May 2008), where it states:

An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed.

The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

The question of independence and objectivity is clearly at the heart of whether relationships have any bearing on the expert's evidence. In the *Armacel* case¹, the expert's evidence was accepted even though it was acknowledged the expert was not an independent expert. The judge commented on several reasons why he accepted the expert's evidence, stating, inter alia:

Mr S seemed to me to give his evidence honestly and fairly....and, A's expert, Mr W, did not ... dispute Mr S's opinions.

The significance of any relationship of an expert with a party involved in litigation was examined in *Lo Presti v Ford Motor Company of Australia Ltd* [2008] WASC 12. In that case, Ford's expert was questioned as to his independence. The judge noted (at 200-201) that the expert:

gave answers which were not responsive to the questions put and which appeared to be calculated to attempt to defend the opinion which he had expressed

¹ *Armacel Pty Limited v Smurfit Stone Container Corporation* [2008] FCA 592, at 105



Further, the expert had conducted research funded by Ford US and other US carmakers upon which he based his evidence:

Companies with which he is closely associated have received large sums of money.....Seventy per cent of his work involves litigation....he had given depositions in some 100 cases for motor vehicle manufacturers since 2001. None of these matters were mentioned in his expert report.

Perhaps the significance of the number of depositions may not have been so great if there had been a number deposed where he acted for parties against the carmakers as well!

The "lack of objectivity and detachment" was also identified in a case where the judge remarked that the expert "appeared keen to raise every conceivable argument in favour of the party which retained him"².

Summary

These cases highlight that there is no precedent prohibiting a relationship between an expert and their instructing party. Readers should be aware of the new Forensic Accounting Standard APES 215 (issued on 1 December 2008) and the requirement that a "Member who is providing an Expert Witness Service shall disclose matters in the Member's Report that will assist the Court to assess the degree of the Member's Independence". However, the above analysis does highlight the importance of an expert witness disclosing – and preferably disclosing early in the proceedings – any relationship with the instructing party, past or present. Where a relationship has existed or does exist, the overriding duty to the Court must be at the front of the expert's mind when preparing and giving evidence.

That sense of detachment, however, will clearly be tested in cross-examination.



Peter Holmes
Partner, Adelaide
phone: 08 8100 7600
email: pjholmes@sa.fh.com.au

*With assistance from
Michelle Price.*

² *Black & Decker Inc v GMCA Pty Ltd (No2)* [2008] FCA 504, at 78

For more information about our forensic services, please contact:

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

George Kompos
+61 3 9604 5150
george.kompos@fh.com.au

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

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

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

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

Melbourne: Greg Meredith
+61 3 9604 5118
greg.meredith@fh.com.au

Jean-Pierre du Plessis
+61 8 8100 7600
jduplessis@sa.fh.com.au

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

FORENSIC ACCOUNTING

FINANCIAL INVESTIGATIONS & FRAUD

BUSINESS VALUATION

FORENSIC IT