

# expert update

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## When is an expert's opinion not his own?

*What should a court do if it finds an author of a co-authored expert report does not have appropriate qualifications and expertise to give opinions?*

*Paino v Paino [2008] NSWCA 276 (29 October 2008)*

### Background

This judgment is an appeal against an earlier ruling in the NSW Supreme Court. Central to the appeal was the trial judge's decision to rule as inadmissible expert evidence submitted on behalf of the plaintiff.

In the original trial, the plaintiff wished to tender a report as to the value of certain properties belonging to the defendant on the Italian island of Filicudi. The report was an English translation of a joint report prepared in Italian by Mr N (a surveyor) and Mr F (a real estate agent). The joint report was attached to an affidavit of Mr N and only Mr N was called to give evidence.

The admission of expert evidence is governed by the following exemption to opinion evidence provided in Section 79 of the Evidence Act 1995:

*If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*

During the cross-examination of Mr N, counsel for the defendant made an application that the whole of the report be rejected. The application was that it had been shown that Mr F did not have relevant qualifications or expertise to give opinion evidence in this case and, as a result, only those opinions that were Mr N's sole opinions were admissible. As the report did not distinguish between the opinions of Mr N and Mr F, the submission was that it should be rejected as it failed to pass the Section 79 exemption.

### The original judgment

Justice Barrett stated that the situation was the same as *Cooke v Commissioner of Taxation* (2002) 51 ATR 233:<sup>1</sup>

*Her Honour there had before her a report prepared by two persons, but only one of them gave evidence. That is the position here. There was an objection to the whole of the evidence of the one expert who testified on the basis that the report was not prepared solely by that person and, as her*

<sup>1</sup> *Paino v Paino* [2005] NSWSC 1313 (13 December 2005)

*Honour found, it was not possible to tell from the report which parts of it, if any, were prepared solely by the person who gave evidence. The joint author was not called and there was no plan to call him.*

The evidence of Mr N was that effectively Mr F had been responsible for gathering factual data, whilst he had written the report. The judgment discussed that it was an accepted principle that some tasks can be delegated to another. However, it quotes Austin J in establishing that the expert's reasoning must be his own:

*There is nothing in the law to prevent such delegation from occurring. But it is necessary for the expert who is the author of a report to apply his or her mind to the analysis and reasoning processes that his or her subordinates have developed, so that when the report is finalised, the whole of the reasoning and conclusions that it contains have been adopted as the expert's own reasoning and conclusions. Were that not the case, the expert could not claim to be the author of the report<sup>2</sup>.*

As in the Cooke case, Justice Barrett offered the plaintiff the opportunity to examine Mr N in order to establish which opinions were his own. However, following this examination, he was not satisfied that the report was "based 'wholly' or even 'substantially' on Mr N's knowledge" and so rejected the report.

An attempt by the plaintiff to rely on a new report prepared overnight solely by Mr N was rejected, principally because Justice Barrett again concluded that the amended report was not "wholly or substantially" based on Mr N's specialised knowledge.

### **The appeal judgment**

The Court of Appeal considered the principles of expert evidence laid down in Makita<sup>3</sup> and how these were discussed in subsequent cases. Heydon JA stated:

*If the court cannot be sure of that [that the opinion is wholly based on an expert's training, study or experience], the evidence is strictly speaking not admissible and, so far as it is admissible, of diminished weight.*

In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157; (2002) 55 IPR 354, Weinberg and Dowsett JJ analysed this statement as follows:

*The use of the phrase "strictly speaking" ... should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA. However, many of those qualities involve questions of degree, requiring the exercise of judgment.*

<sup>2</sup> *Australian Securities & Investments Commission (ASIC) v Rich* [2005] NSWSC 149

<sup>3</sup> *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 205; (2001) 51 NSWLR 705



The Court of Appeal agreed with this analysis, stating:

*Branson J [in Sydneywide Distributors] (at [7]) observed that his Honour's [Heydon J in Makita] approach reflected a "counsel of perfection" ... Dealing with s79, her Honour said (at [14]) that the test of admissibility is whether the court is satisfied on the **balance of probabilities** that the opinion is based wholly or substantially on that knowledge, referring to s142 of the Evidence Act. [emphasis added]*

The Court of Appeal agreed that the test should be a 'balance of probabilities' and that Justice Barrett did not apply this test. The Court of Appeal allowed the report into evidence as it was satisfied that Mr N had established, on the balance of probabilities, that the valuation opinions were his own.

The Court of Appeal also considered what the trial judge should have done following his conclusion that the report was not admissible. The trial judge excluded the valuation evidence and effectively gave the properties a zero valuation, a result described by the Court of Appeal as "certainly wrong". Instead, the Court of Appeal said that he should have considered what benefit the report may bring to the case:

*There is a general principle in relation to damages that where a plaintiff has proved substantial loss but the evidence does not enable precise quantification of it, the court should "do its best".*

The Court of Appeal stated that, in applying a "do its best" approach, the judge should have considered what evidence in the report should have been left in evidence, specifically, "copies and translations of official records, describing the properties and giving various sale and purchase prices."

### Significance

This judgment is a reminder that, when providing evidence, experts need to be aware of both the requirements as to the form of their reports as well as the substance of the opinions in them. However, this judgment is also a reminder that, where a report does not comply with all requirements as to form, it may nonetheless be useful assisting a Court in "doing the best it can" to assess a plaintiff's damages.



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