

# expert update

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## Falling at the first hurdle – failure to gain admission

*Landmark Operations Ltd v J Tiver Nominees Pty Ltd & Ors [2008] SASC 322*

### Background

The plaintiff, Landmark (formerly Wesfarmers Dalgety), is a rural financier which lent money, by way of a Secured Loan Facilities Agreement (“Agreement”), to the defendants who previously operated a feedlot dairy business, but then changed to a crop farming business. Despite the defendants defaulting on their debt repayments in 2002, Landmark continued to provide support.

In 2004, Landmark offered to extend the facilities, but subject to the sale of a parcel of land to reduce the indebtedness of the defendants, who refused. In March 2005, Landmark gave notice that the defendants were required to refinance and in April 2005 issued notices of demand. Landmark sought repayment of the loan which amounted to more than \$10 million or enforcement of the guarantees contained in the Agreement.

The defendants denied enforceability of the Agreement and sought to offset the debt by counterclaim, claiming Landmark contributed to the failure of the crop farming business. The defendants claimed that as part of the Agreement, Landmark was to provide agronomic experts to advise them in the crop farming business, but that the advice they received was negligent or otherwise misleading, or in breach of contract.

### The agronomic expert

The counterclaim concerning agronomic advice covered yield and income estimates, crop plans, seeding times and application of a specific fertiliser.

The defendants’ case relied heavily upon the evidence of the defendants themselves and also Mr A, who was supposed to give expert agronomic opinions and opinions about loss and damages. No rebuttal experts were called, although two of Landmark’s own agronomists gave evidence about their roles and advice given to the defendants.

There were several attacks on the various reports of Mr A, but most concerned admissibility.

*The ability of parties to lead expert evidence in support or rebuttal of parts of their case relies upon that evidence meeting fundamental principles of admissibility – failure here is likely to be catastrophic to the rest of the case.*

Mr A prepared an economic loss report comparing the defendants' current financial position (the crop farming business), with the position had they remained as a feedlot dairy. Sulan J ruled any evidence given by Mr A on this topic as inadmissible, with reference to:

- The principles outlined by Heydon JA in *Makita v Sprowles*<sup>1</sup>,
  - There must be a field of specialised knowledge
  - Demonstrated expertise in an aspect of that field by the expert
  - Opinions must be based on the expert knowledge of the witness
  - Any facts or assumptions required in forming the opinions must be identified and proved
  - There must be a proper foundation for those facts and assumptions
- The five principles governing the admission of expert evidence as set out by Freckleton and Selby (2005)<sup>2</sup>
  - Expertise rule
  - Common knowledge rule
  - Area of expertise rule
  - Ultimate issue rule
  - Basis rule
- SASC Rule 38 concerning procedures for the provision of experts' reports. An application concerning amendments to pleadings and admission of Mr A's reports was heard just before trial, and it was ruled that that issue should be determined at trial, but Sulan J already indicated parts were inadmissible<sup>3</sup>.

His Honour noted the defendants' (who were self represented) constant failure to comply with the rules relevant to the provision of expert's reports, adding that the:

*expert's opinion must be relevant to the issues at trial*

Not surprisingly, Counsel for the plaintiff cited these as grounds for objecting to receipt of Mr A's reports, but significantly:

*A primary difficulty that the defendants confront is that [Mr A] is a loss assessor who has specialised in agricultural claims. He does not have*

<sup>1</sup> *Makita v Sprowles* [2001] 52 NSWLR 705

<sup>2</sup> I Freckleton and H Selby: "Expert Evidence: Law Practice, Procedures and Advocacy", (3<sup>rd</sup> ed 2005), 2-3

<sup>3</sup> See also *Landmark Operation Ltd v J Tiver Nominees Pty Ltd* [2008] SASC 133

*sufficient agronomic qualifications or experience in respect of the issues raised by the defendants.*

His Honour noted that Mr A had no specialised knowledge about cropping, having relied exclusively on his reading of a crop monitoring guide book, nor had Mr A expert knowledge about the advice given by Landmark's agronomists. His Honour also noted Mr A's lack of accounting qualifications.

Despite the above, his Honour proceeded to consider the economic loss claims. Again the defendants failed to appreciate that Mr A did not have the expertise to formulate such claims and had relied upon advice and assumptions given by the defendants. The assumptions were not proved at trial and thus the underlying basis for Mr A's opinions had not been established.

His Honour commented that Mr A "misconceived the role of the expert...I am not satisfied that [Mr A] was independent", noting that Mr A had known the defendants for many years.

#### **The valuation expert**

The defendants also counterclaimed that Landmark had breached its fiduciary duty by obtaining property valuations in August 2004 and April 2005 which were inflated. As a result, the defendants increased their indebtedness by continuing to draw on the facilities with Landmark. The defendants claimed that had they realised the values were overstated, they would have managed their finances differently and as a consequence, they had suffered economic losses.

In August 2004, a valuer, Mr C, employed by Landmark, performed valuations of the defendants' properties, but he was not called to give evidence. The defendants obtained other expert valuers' opinions for the purposes of trial, but predominantly from Mr B.

The plaintiff objected to his evidence because he employed a "comparable sales" methodology and because Mr B did not have direct personal knowledge of the comparable sales. The comparable sales data was obtained from the Valuer General's department in the local area where the defendants' cropping business was located.

His Honour noted that:

*...insofar as Mr B's report is based on documents obtained from the Lands Title Office, they are public documents and, therefore, admissible. Further, whilst Mr B's evidence of comparable sales is based on hearsay, I would not rule it inadmissible for that reason.*



His Honour however was more concerned about being satisfied about the comparability of properties sold compared to that of the defendants, finding that:

*...there is no evidence that they were, in fact, comparable.*

For these reasons, his Honour concluded that Mr B's valuations did not establish that Mr C's valuations were erroneous.

### Conclusions

Whilst having some sympathy for experts involved with parties in litigation who are self represented, in such situations it is possibly more important for the expert to have the appropriate experience and understand their role, the extent of their expertise, and assist parties articulate material assumptions that will be required to be proved at trial.

Other Expert Update articles have commented about the significance of any relationship between an expert and parties engaging them. However, this decision addressed the most fundamental requirement of admissibility. If you fail at this hurdle, you have no expert evidence at all.



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