

expert update

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On the road to failure...

GP Transport (SA) Pty Ltd v Cavill Power Products Pty Ltd & Anor [2009] SADC 77

Background

The plaintiff, GP Transport was incorporated in August 1994 for the purpose of commencing an interstate haulage business. Its principal assets were a Kenworth prime mover powered by a 400 hp 3406 Caterpillar engine and a double trailer, both of which it acquired at about that time. Its business plan was to conduct haulage activities in what it perceived was the relatively unexploited field of the carriage of heavy or dangerous goods in the Sydney-Perth road transport corridor.

Between September 1994 and March 1997, the plaintiff experienced problems with the operation of the truck, particularly the engine, which impacted upon its business.

The plaintiff contended that it was induced to purchase the truck on the basis of representations that the truck had recently been repaired, that it was not in fact in the condition represented, and that, in consequence, it was obliged to expend very significant monies on repairs, additional fuel and associated expenses.

Further, the plaintiff claimed the defendant and other repairers on its behalf, negligently and in breach of contract, carried out later remedial works to the vehicle which were inappropriate, inadequate or poorly performed and which had to be rectified at the plaintiff's own cost. In consequence of all these matters the plaintiff claimed it suffered trading losses, to the point where it was ultimately obliged to sell the truck and close its business.

Expert evidence

Expert evidence was obtained from professional engineers regarding repairs to and operations of the truck, and specifically, its engine.

Mr P, the engineer retained by the plaintiff, did not have an opportunity to inspect any of the configurations of the engine, and was limited to a review of bundles of repair accounts from interstate repairers and instructions provided to him. He identified problems of recurring cracking of the No. 1 cylinder liner, low power, high fuel consumption and difficulties with the Jacobs brake and Horton fan.

Opinions expressed by an expert are only as reliable as the information on which they are based.

He concluded that:

...the firms that serviced the engine have applied inappropriate technology to its maintenance and repair (and have)... repaired in a piecemeal fashion. They should have restored to pristine condition the engine and its components as a whole – in the spirit of the claims made in the document 'Reman Products for Caterpillar Engines'.

In the same report, he addressed potential causes for the various malfunctions but did not seek to isolate a particular cause. Mr P later theorised that a change to an “incorrect” and “inappropriate” engine setting (i.e. to a 5456 specification in order to speed limit the vehicle) was the cause of the failure of the engine.

The theory about an incorrect engine setting proved to be a false one and, ultimately, Mr P accepted that he had not fully apprised himself of the full range of available engine settings. That was significant and, in the context of his intervening concession that he had otherwise been unable to establish a causal connection or connections between the various engine malfunctions and either the state of the engine in August 1994 or any subsequent interventions by the defendants, left the plaintiff without firm support for its contentions as to causation.

Justice Herriman commented:

I had limited confidence in his evidence overall. He too readily identified himself with the plaintiff's cause and when one theory as to the cause of failure was discredited he sought to find another.

and

I became concerned during the course of his evidence at its discursive and emotive tone. He referred variously to being 'worried', 'astonished', 'pleased', feeling 'weak at the knees', he spoke about discoveries 'strik(ing) terror into my heart' and used many other similar expressions in discussing aspects of the engine's operation. I found them unhelpful.

On the issue of quantification of economic loss, evidence was obtained from two chartered accountants: Mr M retained by the plaintiff and Mr H retained by the defendant.

Based upon instructions provided to him, Mr M assessed the economic loss to the plaintiff as comprising reliance losses (i.e. additional costs incurred) and expectation losses (i.e. lost profits) arising from the matters complained of.

It became apparent that Mr M had not been given complete information regarding the operating costs of the business including, specifically, actual drivers' wages, a matter which was identified and commented upon in an earlier report of Mr H.

Justice Herriman found the evidence of Mr H and his approach to the calculation of losses more persuasive than those of Mr M, and accepted it for the following reasons:

(1) It appeared to me that Mr M's opinion had proceeded uncritically on the basis of several assumptions which were not proved. Of course, he had been asked to assume those matters, but he ought to have expressed stronger reservations about their reliability given:

a) His own acknowledged lack of expertise in the area.

b) The facts that none of them were supported by other evidence, all assumed a static business model and all flew in the face of the plaintiff's actual experience on the road. It oversimplified matters to simply attribute the latter factor to the performance of the truck engine.

(2) Mr M's original calculations took no account of the actual costs to the plaintiff of employed drivers and, indeed, no attempt was made to factor these costs in until well into the trial. It appeared that the financial details provided to him by the plaintiff had never contained that detail but even so I would have expected that, in the context of the disclosed operations of the truck, his attention would have been alerted to this inadequacy in the figures that were proffered. It was certainly a matter which struck Mr S [a transport expert called by the defendants], who raised it in his report and it had been commented upon in Mr H's earlier report.

The figures involved were significant, indeed, in reducing the scale of the asserted losses.

(3) Of course, Mr M was to a degree bound by his instructions, limited by the information provided to him and was otherwise obliged to assume that the so-called reliance losses would be established, but with minor exceptions they were not.

(4) I was further assisted by two analyses conducted by Mr H and which were not considered by Mr M, namely:

- a) *He carried out a careful analysis of 'lost days' and other downtime in the truck's operations which noted significant periods when it was not in use for reasons unconnected with repairs. Overall, those figures ranged between 34% and 55% and actually increased after 1997 when, on any account, all significant repair delays had ended.*
- b) *He further reviewed individual customer response following periods when the truck had not been available due to repairs and showed there was no evidence of lost custom attributable to any such delays. The plaintiff contended otherwise but adduced no evidence at all as to that.*
- (5) *I was mindful of the fact that, put at its highest, the plaintiff's claim was never for lost profits as such but rather for exacerbated losses, but I was not persuaded that it ever reached even those dimensions. Mr H's original opinion that any exploitation of the truck would likely exacerbate the plaintiff's losses rather than reduce them was prescient, it remained constant throughout, was strengthened by the introduction of the driver expenses and was ultimately reflected in the figures which he produced, and which I prefer and accept over that of Mr M.*

Further, Justice Herriman noted:

- (1) *The plaintiff's business model was doomed from the outset because it was ill informed and static and did not even reflect the existing market, let alone the need to adapt to the realities of a dynamic market.*
- (2) *Irrespective of the numerous problems experienced with the truck's operations, the plaintiff's business structure was destined always to operate at a loss, the level of which increased over time to the point where the business necessarily had to be abandoned. Indeed, Mr H's report amply demonstrated his conclusion that but for repair interruptions, the plaintiff's losses would in reality have been greater.*

Significance

This case highlights the need for experts to have a detailed understanding of the relevant background upon which their opinions are based. In this case, non-familiarity of the full range of available engine settings resulted in an incorrect opinion.

Secondly, it highlights the need for independence not only in arriving at an opinion, but also in the presentation of evidence before the Court.



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Thirdly, it highlights the problems of experts relying upon information provided to them without critically assessing its reasonableness. The cost structure of the business was not adequately considered and the modelling used did not reflect the realities of the market.

Finally, the case highlights the need for experts to be instructed with the benefit of (including access to) associated evidence and for them to be willing to acknowledge the impact that such associated evidence (or absence thereof) may have on their opinions. In this case, the omission of drivers' wages and dynamics of the market in which the business operated, which became apparent through other expert evidence, were material to the plaintiff's expected financial performance and ultimately the quantification of loss.

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