

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

If you stand straight, do not fear a crooked shadow

Falland & Ors v Symbion Health Limited & Anor [2010] SASC 119

The privilege that may attach to the workings of an alleged “shadow expert” was recently examined in the Falland case. In the South Australian Supreme Court Civil Rules 2006, r 161 sets out the process by which an expert can be retained as a “shadow expert”. Once retained, however, the Rules set out the protection afforded in relation to reports, communications or other products of the shadow expert.

Briefly, r 161(1) identifies a “shadow expert” as one who:

- (a) is engaged to assist with the preparation or presentation of a party's case but not on the basis that the expert will, or may, give evidence at the trial and*
- (b) has not previously been engaged in some other capacity to give advice or an opinion in relation to the party's case or any aspect of it.*

Further, at r 161(2):

an expert will not be regarded as a shadow expert unless, at or before the time the expert is engaged, the expert gives a certificate, in an approved form, certifying that

- (a) the expert understands that it is not his or her role to provide evidence at the trial and*
- (b) the expert has not been previously engaged in any other capacity to give advice or an opinion in relation to the party's case or any aspect of it.*

Significantly, the evidence of a shadow expert is not admissible at the trial unless the Court determines that there are special reasons to admit the evidence (r 161(3)).

In the Falland case, the plaintiff sought production for certain documents to be disclosed by the second defendant. The second defendant claimed the documents were subject to without prejudice privilege and legal-professional privilege.

The case concerned a claim for compensation for costs of reinstatement and repair of premises leased by Falland to the first defendant, and subsequently to the second defendant (Toll), undertaken by Falland at the end of the leases.

The words “without prejudice” in a communication cannot be used indiscriminately as a cloak over communications and documents where the privilege is not appropriate.

Various negotiations occurred between the parties in order to reach a settlement. However these ultimately failed to resolve the dispute, although partial resolution on some matters was obtained. During the course of these initial negotiations, and subsequent negotiations, Toll commissioned reports from two experts, A and N&B.

Toll contended that the documents made available to these experts were brought into existence for the purpose of negotiations and compromise, and therefore enjoy the protection now sought.

After the documents were made available, A and N&B produced reports. His Honour rejected Toll's argument that although the reports did not comply with the form prescribed by the Rules, they were expert reports. His Honour found that the reports and associated documents were required to be produced in accordance with the Rules (r 160), as under the Rules an "expert report" is defined as:

a report in written or electronic form by a medical or other expert on a question involved in an action...

Further, r 160 sets out pre-trial disclosure of expert reports, except the rule does not apply to reports obtained, or to be obtained, from a shadow expert (r 161(1)).

His Honour stated that those rules (in South Australia, r 160):

...in the interest of transparency in litigation and to avoid ambush at trial, abolished privilege from production of such reports and associated materials which would otherwise have come under the umbrella of legal professional privilege. The clear policy behind such rules is to require production of any such material, whether intended to be used at trial by the party responsible for its preparation or not, and whether helpful or harmful to that party's case... Where without prejudice privilege is relied on it must be quite clear that the express or implied agreement that documents should not be produced extend to the expert's report in question.

Further:

If production of an expert's report and associated material is to retain any privilege from production it can only be where there is clear agreement to that effect by the parties or where, under the 2006 Rules, a shadow expert report is engaged.

His Honour concluded that there was no evidence to show that the documents were subject to an express or tacit agreement that they should not be used to the prejudice of either party.

Further, there was no evidence to show that the documents were used in any without prejudice communications or offers of settlement, and that the documents were not subject to without prejudice privilege.

Counsel for Toll alternatively asked his Honour to entertain an extension of time in order to rely on the operation of r 161, which provides for the obtaining of shadow expert reports, which therefore need not be produced, ie: whether r 161 can be relied upon retrospectively.

His Honour concluded that it could not as r 161(2) stated an expert cannot be regarded as a shadow expert unless at or before the time the expert is engaged, the expert gives the relevant certificate confirming his engagement as a shadow expert. It was conceded that at the time N&B were engaged, r 161 did not exist, whereas r 160 did, and thus N&B's reports could not have been prepared as shadow expert reports.

Significance

Although this case dealt specifically with a local jurisdiction rule, it highlights the issues where experts are retained generally, and where documents are given to experts for consideration, whether that be for settlement or trial.

The use of shadow experts is perhaps more common in the Family Court arena, where permission of the Court to engage experts is often debated, and single experts are appointed ([related articles](#)). We are not aware of similar "shadow expert" rules provisions in other jurisdictions.

Our experience is that shadow (or consulting) experts¹ can be effectively used, usually where complex and technical matters require it, in order to assist legal teams and clients to properly understand the technical issues, and also as part of the discovery and negotiated settlement process. The shadow expert can also be effectively used so that the independent or trial expert is not tainted through the process of communications and in mediations, for example.



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¹ Refer APES 215 *Forensic Accounting Services* standard, issued by the Accounting Professional & Ethical Standards Board, which defines "Expert Witness" and "Consulting Expert Witness"

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