

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Beware of brevity

Pollard v Wilson [2010] NSWCA 68

In the recent case of *Pollard v Wilson*, an expert report was held to be inadmissible and rejected by the Court, despite the expert having the appropriate qualifications to write the report. What fundamental problems rendered this report inadmissible?

This case concerned neighbours, the Pollards and the Wilsons, who owned adjoining properties. The Pollards sought damages from Mrs Wilson for allegedly causing cracking to their house, which they claim resulted from the removal and disturbance of two trees close to the boundary between the two properties.

The Pollards sued Mrs Wilson and the Local District Council, claiming damages, being the cost of repairing their house. The Council was joined to the action because of its powers to control the development of land and the removal of trees.

The trial judge found for the defendants, stating that the Pollards had not established that the work done on the Wilson land was the cause of any relevant damage to the Pollard house. The Pollards then submitted an amended notice of appeal identifying seven grounds of appeal against the trial judge's decision. These included that the trial judge "erred in refusing...to admit the written reports and oral evidence of Mr B; in failing to afford the first and second appellants a proper hearing in respect of that application, including failing to read the written reports of the expert prior to determining the application".

On appeal, the trial judge's decision was upheld and the Pollards' claim was dismissed.

A deciding factor in dismissing the Pollard's claim was the rejection of an expert report prepared by Mr B for the Pollards. The Pollards had retained Mr B to give evidence of the impact of the removal of the trees on the Pollards' house. Mr B prepared a written report. Counsel for the Pollards sought to tender this report and called him to give oral evidence.

Objection to the report was taken for various reasons by the Wilsons, including that Mr B's report failed to expose the reasoning process that underpinned his conclusions. It was also submitted that it was unclear which aspects of the report were assumptions made by Mr B, which were facts perceived and which were opinions formed. In objecting to the report, Counsel noted the important principles

Diplomas and titles do not eliminate the need to provide detailed reasoning on how conclusions are reached in an expert report.

established in *Makita*¹, namely the need by all experts to explain the reasoning process behind conclusions reached, was not met.

The trial judge's reasons for rejecting the expert report were brief:

I won't allow the report. I don't find the report satisfies the requirements of Makita v Sprowle (sic) that the assumptions are clearly set out, that the intellectual process of the expert is available for me to either agree with his opinions or to disagree with them. I reject the report.

These comments highlight that the principles established in *Makita* must be adhered to, otherwise there is a risk that an expert's report will be deemed inadmissible.

Makita has long established that the expert, in the first instance, must have the relevant training, study or experience to be considered an expert. These principles were directly relevant to *Pollard v Wilson* in the appeal decision with his Honour Hughes DCJ commenting:

In my opinion, in the present case, the evidence was rightly rejected. I accept that Mr B does have specialised knowledge in relation to horticultural matters...but the document he prepared has more fundamental problems....Mr B purports to give an opinion about six separate matters. In my judgment Mr B does not provide in his report an appropriate basis for any of these opinions...there are virtually no facts identified which could provide a foundation for his opinions. To the extent that he seeks to explain the basis for his opinion it is confined to theory built upon assumptions.

Further the Pollards submitted procedural fairness was denied as they submitted the trial judge rejected Mr B's report without reading the document in its entirety. The Pollards' submitted that Mr B's opinions were clearly based on his training, study and experience and that his assumptions and reasoning process were sufficiently disclosed in the report.

The Appeal judge found that given the relative brevity of Mr B's expert report, procedural fairness was not affected. His Honour commented that a cursory reading of the report was sufficient to reach the conclusion that the opinions Mr B expressed could not be admitted. These comments indicate disclosure of an expert's relevant qualifications will not compensate for a lack of disclosure surrounding the basis of opinions formed.

¹ *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305



expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson



Jane Bekesi
Senior Forensic Analyst, Adelaide
Phone: 08 8100 7600
Email: jane.bekesi@fh.com.au

Significance

This case highlights the importance of ensuring the bases to all conclusions are clearly disclosed in the expert report. The expert must ensure facts and opinions relied upon in forming expert opinions are clearly disclosed. The expert cannot merely rely on the fact that he is deemed an “expert” and therefore his opinion is unquestioned. This case reiterates the importance of the principles established in Makita.

For more information about our forensic services, please contact:

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

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

Sydney: Peter Chapman
+61 2 9286 9933
peter.chapman@fh.com.au

Michael Khoury
+61 2 9286 9864
michael.khoury@fh.com.au

Adelaide: Peter Holmes
+61 8 8100 7600
peter.holmes@fh.com.au

Jean-Pierre du Plessis
+61 8 8100 7600
jean-pierre.duplessis@fh.com.au

Brisbane: Tim Michael
+61 7 3831 4833
tim.michael@fh.com.au

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

FORENSIC ACCOUNTING

FINANCIAL INVESTIGATIONS

BUSINESS VALUATION

FORENSIC IT



FERRIER HODGSON
FORENSICS