

expert update

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Watch out for exclusions!

Enviro Energy Australia Pty Ltd (In Liquidation) [2010] NSWSC 1217

This case discusses some of the exclusionary rules which may apply to evidence that an expert has been provided in order to assist them in forming their opinion.

An order was made to wind up Enviro Energy Australia Pty Ltd, an investment company owning land and buildings subject to leases, (the Company). The Applicant (the sole director of the Company) was attempting to obtain a stay or termination of the winding-up on the grounds that the Company was solvent.

The onus was on the Applicant to make out a positive case for a stay or termination of the winding-up. Relevant considerations to the Court included proof that the Company was solvent. The Applicant engaged an expert accountant, Mr C, to support his contention that the Company was solvent.

Mr C in his expert report, assumed a value of \$5,800,000 for the Company's real property. Mr C based his assumption on a document provided to him by a firm of real estate agents which placed a range of between \$5,500,000 and \$6,000,000 on the property. Mr C referred to the document in his expert's report as a valuation. The "valuation" document was Annexure A to Mr C's report.

The Liquidator of the Company objected to Annexure A in Mr C's report for a number of reasons. It was argued that the document was not expressed by the firm of real estate agents as a "valuation" but rather a market assessment. The principal of the real estate agent stated his opinion of the range of prices which the property could be expected to sell. There was no evidence of the principal's qualifications or evidence that he was a qualified valuer.

If the opinion rule applied to the document, then S76 of the *Evidence Act 1995 (NSW)* made the evidence of the principal's opinion not admissible.

S76 The opinion rule:

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

An exception to the opinion rule is of course an expert's opinion, refer S79 of the *Evidence Act 1995 (NSW)*.

S79 Exception: opinions based on specialised knowledge

(1) 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

Before relying on documents, experts should consider whether any exclusionary rules apply.

opinion of that person that is wholly or substantially based on that knowledge.

In this matter, there was no evidence at all of the principal's training, study or experience in relation to commercial properties of the kind in question. The process of reasoning was not exposed in the document and assumptions upon which the principal's opinion was based were not exposed.

Counsel for the Applicant also argued that the document was admissible as a business record and on that basis the opinion rule did not apply.

His Honour found:

In my view whether or not the Annexure A to Mr [C's] report is admissible as a business record, it is excluded by the opinion rule. In any event I would exclude it pursuant to S135 of the Evidence Act on the grounds that its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party and might be misleading. That is because, as I have said, [the real estate agent principal's] qualifications do not appear. The matters stated are not described as an expert's opinion. There is no reason to think that [the principal] expressed the opinion having regard to the requirements of the Expert Witness Code of Conduct. The assumptions upon which his opinion is based are not properly exposed.



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Significance

As experts we are often provided by our instructing solicitor with numerous documents upon which we are told we can rely on in forming our opinion. This matter highlights the importance for both instructing solicitors and experts to carefully consider whether any of the exclusionary rules apply to those documents which may adversely impact on the expert's opinion.

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