

expert update

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Expert assumptions need to be apparent

Banksia Mortgages v Croker and Others [2010] NSWSC1447

In 2008, Banksia Mortgages (“Banksia”) commenced proceedings against Mr and Mrs Croker (“the Crokers”) for defaulting on interest payments due on borrowings. Banksia also sought an order for possession of certain land securing the mortgage.

By way of cross-claim filed in October 2009, the Crokers alleged that the loan contracts made with Banksia were, inter alia, “unjust”.

The Crokers alleged, by cross-claim, that had the loan not been approved by Banksia, they would not have suffered any economic loss. The Crokers claimed that Banksia failed to make adequate enquiries to establish whether the high-risk investment which they invested in with the proceeds of the borrowings, would realistically generate the returns on which serviceability of the loan depended. Therefore, the Crokers alleged, Banksia should not have lent the funds to them. The Crokers further alleged that the loans were unjust, due to a material inequality of bargaining power between them and Banksia, and that the loan agreement contained terms which were difficult to comply with.

The expert

The defendants’ case was sought to be supported by evidence called from an expert, Mr W, albeit the nature of Mr W’s qualifications and expertise were not set out in the judgment.

The expert’s report apparently addressed three issues:

1. Would the loan in question have been given as a matter of responsible practice?
2. Consideration of the Crokers’ cash flow data.
3. Consideration of an alternative loan product and its availability.

In his report, Mr W expressed a number of opinions including, that in his view, an experienced and responsible lender exercising customary prudence should not have provided the loan as a matter of responsible practice.

It is crucial that experts clearly identify the assumptions and documents upon which their opinions are based.

Counsel for the plaintiffs had previously objected to the report's admissibility, given alleged serious deficiencies, which included:

- The failure to state assumptions on which the opinions were based.
- The absence of any indication of the factual material with which the expert was provided.
- The report departing from evidence given by Mrs Croker in her affidavits.

At the hearing, the plaintiff renewed its objection to the report. Schmidt J observed that the report was produced in an unhelpful form, but allowed evidence to be called from Mr W, so that he could identify the assumptions on which his report rested. However, Mr W's explanations provided little assistance.

Schmidt J noted that:

- Mr W was not able to provide a copy of the instructions that he had been given.
- A number of documents were annexed to Mr W's report, but it was unclear exactly which were relied upon in forming his opinions.

In his oral evidence, Mr W said that he had identified all of the documents to which he had referred in his report. However, it became apparent that this was inaccurate. It further became evident that Mr W had not been provided with critical information including affidavits, a police statement and other material relevant to his report.

Given the deficiencies in Mr W's report, it was apparent that Mr W did not understand the defendants' cross-claim. Further, the opinions expressed by Mr W, and the reasoning which lead him to those opinions, proved to be inconsistent with the evidence and accordingly could not be accepted as persuasive.

The result of these difficulties led Schmidt J to comment:

I concluded that while Mr W's report had to be admitted, it was in the end of relatively little assistance.



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

Significance

An expert needs to ensure that all fundamental issues relating to expert evidence, including assumptions and documents relied upon in the report, are communicated in a logical, fulsome and helpful way and are clearly expressed. In addition, it is important that an expert clearly identifies all information relevant to the forming of an opinion.

As apparent in the case above, deficiencies and errors made regarding these basic principles may mean that the utility of the expert's report is undermined and given little weight by the Court.

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: 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

Matthew Fleming
+65 9126 4515
matthew.fleming@fh.com.sg

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