

# expert update

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## Can a plaintiff be an expert and be independent?

*Dwyer & Ors and Davies & Ors v Chicago Boot Co Pty Ltd [2011] SASC 27*

In the case of *Dwyer & Others v Chicago Boot*, the plaintiffs were the Liquidators of Harris Scarfe Wholesale Limited (In Liquidation) and Harris Scarfe Limited (In Liquidation) (collectively "Harris Scarfe"), which primarily operated retail department stores. Harris Scarfe went into voluntary administration on 3 April 2001, with this date accepted as the relation-back date for the purposes of determining the period relating to unfair preferences under the Corporations Act ("the Act").

The Liquidators were seeking an order requiring Chicago Boot Co Pty Ltd ("Chicago Boot"), a manufacturer and supplier of footwear products, to pay the sum of \$316,801, being the total of various payments made by Harris Scarfe to Chicago Boot between 2 January 2001 and 22 February 2001. The plaintiffs contended these payments were unfair preferences under the Act.

The Liquidators submitted that Harris Scarfe were insolvent during the relation-back period. In establishing the insolvency of Harris Scarfe, the plaintiffs relied on the report and evidence of Mr D, the Liquidator.

In this report, Mr D stated that he had formed the conclusion that Harris Scarfe was unable to pay its debts as and when they fell due, and was therefore insolvent at all times during the relation-back period.

Chicago Boot did not dispute the expertise of Mr D in preparing a report on insolvency, but submitted that the expert report should not be admissible as Mr D, as Liquidator of Harris Scarfe, was a party to the action.

Sulan J observed:

*It is not disputed that Mr D is not independent. There is no principle in Australia which would render Mr D's evidence inadmissible, based merely on his lack of independence. That fact goes to weight. In FGT Custodians Pty Ltd<sup>1</sup> one of the issues which arose was the value of a partnership upon its dissolution. The brother-in-law of one of the partners gave expert evidence of the value of the partnership. The Full Court of the Supreme Court of Victoria held that the evidence was admissible. Ultimately, the relationship of the expert to one of the parties is a matter which goes to weight.*

*Does the fact that an expert is not independent render the expert's report inadmissible?*

<sup>1</sup> FGT Custodians Pty Ltd (Formerly Feingold Partners Pty Ltd) v Mark Fagenblat [2003] VSCA 33

Sulan J further observed:

*Mr D is an officer of the Court in that he is an official liquidator. As an officer of the Court, he has duties to the Court and is subject to supervision by the Court when carrying out his duties as a Court appointed liquidator. In considering his evidence, I am satisfied that he is an expert and that his evidence was given on the basis of his expertise and his independence as an official liquidator.*

Chicago Boot's submission that the report be held inadmissible was rejected by Sulan J, who ruled that the payments were unfair preferences as alleged.

### Comment

The general duties owed by an expert witness to an Australian Court can be summarised in three categories:

1. An expert witness has an overriding duty to assist the court on matters relevant to the expert witness's area of expertise.
2. An expert witness's paramount duty is to the court and not to any party to the proceedings, including the person who has retained the expert witness.
3. An expert witness is not an advocate for a party.

The findings above highlight that an expert who is a party to the action or otherwise prima facie not independent in proceedings is not automatically seen as acting as an advocate. Provided the expert has the relevant expertise, the expert report is generally admissible by the court and independence may not be compromised on the sole basis that the expert has an interest in the proceedings.



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