

# expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

## Makita; grinding another angle

*National Telecoms Group Ltd v John Fairfax Publications Pty Ltd (No 1)*  
[2011] NSWSC 455

This defamation case arose out of a series of articles published by John Fairfax Publications Pty Ltd (No 1) (the Defendant), the last of which was published on 25 November 2002. The final article made a number of allegations about the manner in which National Telecoms Group Ltd (the Plaintiff) conducted its business, including allegations of falsifying accounts.

The Plaintiff, an operator in the telecommunications industry that sold equipment and airtime to small businesses, alleged that as a result of the articles, its financiers discontinued their funding arrangements which lead to a restructure of the company and considerable loss of profits. Around July 2002, the ACCC commenced an investigation into the Plaintiff. The Defendant alleged that the Plaintiff's restructure was caused by factors other than the articles, such as the ACCC investigation.

Mr R was retained by the Defendant as an accounting expert to provide evidence in relation to causation, in particular, the cause of the Plaintiff's restructure. Davies J considered a number of objections to Mr R's report, which resulted in parts of Mr R's report being held inadmissible.

One of the areas of challenge in relation to Mr R's report was his assessment of the financial effect of the ACCC investigation on the Plaintiff. Mr R considered whether the impact on the Plaintiff would have been different had the article in question not been published. In forming his view, Mr R detailed numerous documents, including newspaper reports, about the ACCC's investigation into the Plaintiff.

The Court found that Mr R's analysis of the documents was limited to reproducing extracts of the large volume of documents, and then drawing inferences from such documents in order to form opinions on why the Plaintiff and the financiers acted in particular ways – a matter that is ultimately for the Court to decide. As quoted by Davies J, *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* [1953] states that:

*Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court ... Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so*

*“...the...conclusion is based on an inference from the timing of events. If that is right it cannot be said to be a conclusion based on any expertise...”*

*as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury.*

The Court found that Mr R would not be assisted by s80 of the Evidence Act 1995 (which under certain circumstances allows an opinion about a fact in issue or an ultimate issue), as his opinions were not based on an application of Mr R's expertise. Instead, the detailing of the documents, the inferences drawn and the conclusions reached by Mr R were found by Davies J to effectively amount to submissions and arguments that are generally made by a party's lawyers.

While it was recognised by the Court that Mr R's curriculum-vitae demonstrated experience in engagements involving the ACCC as a party to proceedings, the Court expressed concern over Mr R's lack of direct expertise in quantifying the impact of an ACCC investigation on a company.

Davies J refers to use the principals developed in *Makita (Australia) Pty Ltd v Sprowles* [2001] by stating:

*...the distinct impression one gains is ... that his conclusion is based on an inference from the timing of events. If that is right it cannot be said to be a conclusion based on any expertise that Mr [R] has. If the timing of events is not the explanation, there is no other explanation offered for the conclusion he reaches in this paragraph. That offends the principles set out in Makita.*

Davies J further comments in relation to *Makita v Sprowles*:

*Mr [R] does not explain what particular documents he relies upon to reach that conclusion. His opinion does not show a 'demonstration of examination of the scientific or other intellectual basis on the conclusion reached'. In those circumstances it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge – Makita at [85]*

These comments stress the importance of experts limiting their opinions to those within their expertise, and explaining how such opinions or conclusions are drawn from their expertise. In this matter,

*...the conclusion...is so crucial to the case that without an adequate factual basis and proper reasoning based on Mr [R]'s expertise it cannot be permitted to stand.*



## Significance

In following the principles set out in *Makita v Sprowles*, expert witnesses are often challenged on the basis of “specified training, study or experience”. This case highlights three critical issues:

1. That conclusions drawn by the expert need to be supported by a clear demonstration of proper application of the expert’s expertise, including their factual bases and process of reasoning, rather than drawing inferences that any other informed person could do.
2. Careful consideration of the expert’s CV together with the instructions provided needs to be given to ensure that the expert has the requisite expertise, and that such experience is directly relevant to the opinions being sought.
3. That the expertise relevant to the issues being opined on needs to be clearly expressed as part of the expert’s report.



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