

expert update

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Fact or opinion?

Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd [2011] FCAFC 55

Castel is a wholesaler and distributor of electrical products, including television receivers, audio products and white goods. Castel had a distribution agreement with Toshiba under which Castel became the Australian distributor of Toshiba products. Castel successfully claimed loss and damage from Toshiba in respect of its distribution agreement. The orders were appealed by Toshiba for a variety of reasons, one of which related to the expert accounting evidence relied on by Castel.

Castel produced evidence of an independent expert, Mr A. Toshiba submitted that the whole of Mr A's evidence was inadmissible, largely because:

- a) Mr A had no special training, experience or qualifications that would allow him to express an opinion on any aspect of the brown goods industry or market in Australia.
- b) Mr A made a large number of assumptions which were not reasonable or proper because they had no factual underpinning.

Toshiba argued that Mr A's evidence did not come within the exception in s79(1) to the opinion rule in s76 of the Evidence Act 1995. Section 79(1) provides:

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

The Court found that much of Mr A's evidence was not opinion evidence at all and therefore did not need to come within s79 to be admissible.

"The exercise carried out by Mr [A] is often carried out by expert forensic accountants who identify the financial documents which are relevant to the inquiry. To the extent necessary, the documents are explained including their contents in order that the Court can understand the company's business. They are often explained to establish some trend in the company's business activities both before and after the cause of action arose. The Court could carry out the inquiry for itself. It could have regard to the underlying source documents and construct for itself the trends upon which reliance is put. However, the practice is to have forensic experts carry out the exercise in advance of the hearing in order to save the Court the time and trouble of the exercise. It is an appropriate way of presenting evidence relating to the

"Is an accounting expert's evidence limited to providing an opinion?"

financial affairs of a company which claims to have suffered a loss. Their evidence assists a Court in understanding transactions which involve complex accounting treatments. The evidence is a summary of the financial records of the company and admissible: Potts v Miller ; [1940] HCA 43; (1940) 64 CLR 282 per Dixon J at 302-303. It is not opinion evidence at all. It is a summary of the company's financial records."

In Australian Securities and Investments Commission v Rich [2005] NSWSC 149; (2005) 53 ACSR 110, Austin J when speaking of forensic accountants said:

"It seems to me that some of the work of a forensic accountant is to be treated as admissible in the same fashion as scientific facts. Suppose the report of a forensic accountant contains a complex financial calculation. The result of the calculation is not an opinion because, if the calculation is done correctly and the financial records from which it has been derived are proven, it is true as an analytic mathematical proposition without reliance on any inferences or questions of judgment. The expert's work is mathematical and analytical rather than based on scientific observation, but in both cases there is a factual conclusion, admissible as evidence of fact, derived from the application of specialised knowledge."

Further, the Court found that Mr A had sufficient knowledge based on his study and experience to give an opinion on the trends that could be observed in Castel's financial statements and he had specialised knowledge in the financial statements of corporations entitling him to give evidence of Castel's financial affairs.

The Court also rejected Toshiba's contention that Mr A's opinions were based on assumptions, the foundations of which were not proved. The Court found that Mr A's assumptions were identified in an Annexure to his report and detailed from time to time throughout his report. Where his assumptions related to what he was told by Castel's staff, there was evidence provided by various staff to the Court which identified the sources of information and the processes whereby financial information was supplied to Mr A.

Significance

The Court noted in this appeal that *"forensic accountants and persons who have qualifications in business administration and the like practise in a well-recognised field of expertise."*



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From our practical perspective as forensic accounting experts, in some instances it may be difficult to draw a distinction between a factual interpretation of an entity's financial statements and inferences or opinions which are drawn from an analysis of the financial statements. However, this should not impact on the admissibility of the accounting experts' evidence if the expert can demonstrate the opinion expressed derives from his or her 'training, study or experience'.

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