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Making Dollars and Cents Out of Damages in Commercial Litigation

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Quantifying damages can often be an overlooked part of your client's case. However, your client's success in litigation proceedings may ultimately rest upon how well you can assess your client's economic loss. Often, you will need an expert opinion to make an assessment of economic loss. This presentation examines what you need to know about working with forensic accounting experts.

This presentation will examine:

- Tips and tricks for getting value for money out of your accounting experts
- What evidence do you need to support the claim?
- Quantifying damages – how are they calculated?
- When and how to instruct an expert

- Rules on privilege and waiver

TIPS AND TRICKS FOR GETTING VALUE OUT OF YOUR ACCOUNTING EXPERTs

WHAT EVIDENCE DO YOU NEED TO SUPPORT YOUR CLAIM?

The first question is whether one needs accounting evidence at all. It is often easy to think one does, but then suffer the embarrassment of an objection being upheld on the basis of relevance. So the first major question as to whether one's getting value from one's expert, is to inquire whether his/ her report will even be admissible; and if so, on what exact question in controversy.

Thus, I will consider the role of experts generally, then hone in on the role of the expert, forensic accountant; then hone in further on authority which demarcates between an expert accountant's report is and is not admissible**.**

The role of the expert is to generalize from experience, act as librarian, act as statistician and act as advocate.

The general principles relating to the role or functions of experts, was summarized in *JTMJ and Australian Securities and Investments Commission* [2010] AATA 350 [11 May 2010], as follows [1]:

[49] Opinion evidence is evidence of "a belief or judgment which seems likely to be true, but which is not based on proo ...".[18] It has been described in a legal context as "a conclusion, usually judgmental or debatable, reasoned from facts"[19] and as "an inference from observed and communicable data".[20] It is

[1] See also *Pan Pharmaceuticals Limited (In Liquidation) v Selim* **[2008] FCA 416**

the subject of Part 3.3 of the Evidence Act 1995, which provides that such evidence is not admissible to prove the existence of the fact about the existence of which the opinion was expressed.[21] The general inadmissibility of such evidence is subject to certain exceptions. One of those exceptions is found in s 79(1) which 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."*

[50] Opinion evidence that is given by a person who has specialised knowledge based on the person's training, study or experience and that is wholly or substantially based on that specialised knowledge is in a different category. It is admissible in the courts as an exception to the opinion rule[22] and is taken into evidence in the Tribunal. As Gaudron J expressed the principle in HG v The Queen:[23]

> *"The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable 'to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'."[24]*

[51] It is clear from the authorities that the "... categories of expert evidence are unlimited..."[25] and that they are not limited to areas in which a person's special knowledge or skill is derived from scholastic studies. As Thomas JA, with whom McPherson JA and Chesterman J agreed, said in R v Lam:[26]

> *"There are many fields in which an expert's skill does not derive from scholastic studies. Examples include the practical experience of an Aboriginal tracker..., a mechanic with much practical experience of engines ... and even the capacity of a heroin addict to identify a substance as heroin ...".[27]*

Of some relevance in this case is the fact that the courts have recognised accountancy and auditing as fields of expertise. Speaking of forensic accountants, Austin J said in Australian Securities and Investment Commission v Rich (Rich):[28]

> *"This broader field of expertise, generally relating to understanding the financial health of a business enterprise, is the realm of forensic accountants. It has been said that 'their role is really to assist the court to understand the financial information, using their skills to organise, display and communicate financial information' ... or to 'help explain complex financial and accounting issues raised in criminal and civil proceedings' .... Thus, in modern litigation forensic accounting evidence is admitted to assist, not only in determining the state of insolvency of the company at the particular time as in Quick v Stoland,[[29]] but in a variety of other broadly similar financial tasks, exemplified from Australian cases decided in the recent past ..."[30]*
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> *……………………………………………………………………………………..*

[55] This passage highlights the triple requirements that an expert witness be sufficiently independent, have specialised knowledge and base his or her expert opinion on both that specialised knowledge and a relevant factual basis. …

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[56] The way in which a court or tribunal satisfies itself that the opinion is based on specialised knowledge:

> *"... would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge. …"[40]*

[57] The expert report must:

> *"...be presented in such a way that the court can readily assess whether the requisite correlation between opinions and specialised knowledge is present."*
>
> *……………………………*

[58] "…The expert witness may observe facts that do not depend upon specialist knowledge and that evidence is admissible even under the Evidence Act as opinion based on evidence of what the person saw, heard or otherwise perceived about the matter." [43]

[59] The consequences of failing to identify and articulate the assumed, accepted and observed facts were said by Austin J in Rich in a court and I respectfully suggest that the consequence is no different in this Tribunal:

> *"Thus, if the expert fails to identify and articulate the assumed, accepted and observed facts upon which he or she proceeded, the court may well be unable to identify those facts, with consequences of several kinds. First, if the court is uncertain about the factual basis used by the expert, it may be unable to comprehend the opinion so as to decide how much weight or probative value to give it. Second, if the factual basis is not articulated, the court may be unable to determine whether the facts assumed or accepted by the expert correspond to the facts proved or admitted at the hearing ...This difficulty goes to the weight or value of the evidence, on any view, and may go to strict admissibility, if the 'basis rule' discussed at 6.7 is correct. Thirdly, in extreme cases the consequence of failure to articulate the factual basis may even be inadmissibility for irrelevancy. …s 56(2)."[44]*

[60] This is consistent with the earlier case of Arnotts Ltd v Trade Practices Commission,[45] in which the Full Court of the Federal Court specifically approved passages from the work of Sir Richard Eggleston, Evidence, Proof and Probability[46] regarding four functions of expert witnesses: "generalising from experience, acting as librarian , acting as statistician and acting as advocate."[47] The generalisation engaged in by expert witnesses when expressing an opinion in their field of expertise is based on their experience and calls in aid all their training and professional experience. In doing so, Sir Richard said:

> *"... It is often said that an expert cannot give an opinion as to the ultimate fact that the court has to decide. This is inaccurate, as experts, especially valuers, often give evidence as to the ultimate fact, and in many cases the question whether that fact exists can be answered only by experts ... What the rule really means is that an expert must not express an opinion if to do*

so would involve unstated assumptions as to either to either disputed facts or propositions of law. ..."[48]

[61] He went on to give examples, as did the Full Court when it concluded that:

"...What does matter – the point emphasised by Sir Richard – is that the assumptions upon which the opinion is based are identified and articulated. Of course, if the assumptions made by the witness turned out to be different to those ultimately found by the Court, the opinion might have little relevance. ..."[49]

[62] Although the Full Court in Arnotts contemplated an expert's making assumptions about propositions of law, it is clear from the judgment of French J in Woodside Energy Ltd v Commissioner of Taxation[50] and the cases to which he referred that:

"Generally, it is not for an expert to give evidence as to the application of a legislative provision, as opposed to furnishing evidence from the view point of an economist with respect to what factors can or should be taken into consideration or ignored."[51]

[63] Whether there is sufficient parity between the assumptions and the findings of fact made by the trier of fact is ultimately a question of fact as explained by the High Court in Paric v John Holland (Constructions) Pty Ltd:[52]

"It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence ... But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages

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from Wigmore on Evidence cited by Samuels JA in the Court of Appeal ... to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense.

As Wigmore states... 'the failure which justifies rejection must be a failure in some one or more important data, not merely in a trifling respect'. ..."[53]

………………………

[65] If evidence given as expert evidence should transgress one or more of these boundaries from time to time, those transgressions do not necessarily render the whole of the evidence inadmissible in a court. That which does not transgress may properly be regarded as admissible.[55]

[66] The issue is illustrated by reference to an accountant's evidence where it is:

"... understood to be merely a summary of books and records which have been produced or identified, elaborate reasoning will be unnecessary and there will be no practical issue as to the identification of the assumed facts, because it [sic] *books and records will be identified. It is therefore not surprising that the older cases assert, without qualification, that the accountant's summary of the books and records is admissible. That is not to say that accountants' reports are exempt from the general principles as to admissible expert opinion evidence. Rather, the point is that compliance with the general principles will be obvious or can be readily established. As*

Giles JA said in Adler v ASIC [(2003) [2003] NSWCA 131; 179 FLR 1] *at [631], what is required by way of the explanation of which Heydon JA* [spoke] *in* Makita *will depend on the circumstances. Thus (at [632]):*

A solicitor shown to have specialised knowledge of conveyancing practice can give opinion evidence of general conveyancing practice without spelling out links between his training, study and experience and his opinion. The links are apparent from the nature of the specialised knowledge.

Similarly an accountant can give evidence summarising books and records of a business enterprise without having to spell out the link between his or her opinions and specialised knowledge.

The question of compliance with the general Makita *requirements will come to prominence where the accountant's evidence is more than a mere summary and where the subject matter extends beyond a contained set of books and records. ...*"[56]

Accounting / auditing evidence as to solvency: what evidence does one need to marshal?

In *Quick v Stoland Pty Ltd* [1998] FCA 1200; (1998) 157 ALR 615, the issue was whether directors had reasonable grounds to believe the company was insolvent. The liquidator had brought proceedings against them under the Corporations Law.

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Quick had unsuccessfully objected to the tender of this evidence on the basis that the facts upon which Mr Madden had based his opinion had not been proved: *Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642; *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58; (1985) 62 ALR 85. However, as Branson J has pointed out, assuming Mr Madden's evidence to be admissible, to the extent that he relied upon hearsay as a basis for his opinion, s 60 of the *Evidence Act (Cth)* operates to make that hearsay admissible as proof of the facts: see also *Welsh v R* (1996) 90 A.Crim.R. 364.

On appeal an issue was whether the court had erred in admitting a report by a Mr Madden, of well known firm of accountants; and second, whether the primary judge had erred in concluding that there were, at the relevant time, reasonable grounds to expect or suspect that the Company would not be able to pay all of its debts as and when they became due.

Per Branson J:

"It is not necessary in the present case to give consideration to whether an expression of expert opinion, the factual basis of which is not disclosed or not proved, but which otherwise falls within s 79 of the Act, will survive s 56(2) of the Act. The position may be that, in the circumstances of a particular case, a bare expression of opinion could, if accepted, rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding. In the circumstances of most cases, however, a bare expression of opinion is likely to be incapable of affecting the assessment of the probability of the existence of any fact in issue in the proceeding.

Mr Madden's report is divided with a number of sections. Section A details his instructions. Section B summarizes his professional experience and qualifications. Section C lists the documentation provided to him for the purpose of his conducting a review of the Company's financial position. Section D identifies source material which was not available to Mr Madden with the result, as this section identifies, that he was not asked to carry out his intention of reconstructing the financial accounts of the Company for certain identified periods of time. Section E records his conclusion that in order to review the solvency of the Company it was necessary to review its working capital and net assets position. It further contains his summary of certain accounts of the Company. Section F sets out Mr Madden's conclusions. Section G contains reference to certain material which Mr Madden regarded as supportive of his conclusion. Section H contains Mr Madden's overall conclusion as follows:

"For the reasons set out above, I am of the opinion that the Company was insolvent prior to 29 February 1992 and continued to be insolvent up to the appointment of the Administrator on 13 October 1993".

It was accepted before the primary judge, and before this Court, that Mr Madden is a qualified accountant and registered auditor with extensive experience as an insolvency practitioner. He is thus a person who has specialised knowledge based on his training, study and experience within the meaning of s 79 of the Act. Subject to the relevance test, he was entitled to give evidence before the primary judge of his opinion provided that his opinion was wholly or substantially based on his specialised knowledge.

It is necessary to give consideration to the requirement of s 79 of the Act that an expert opinion be wholly or substantially based on the expert's specialised knowledge. As is mentioned above, the law of evidence recognises that an expert opinion will have a factual base. This can be illustrated by two medical examples: the expert opinion of a physician as to the state of health of an individual will ordinarily be substantially based on that individual's medical history and the symptoms described by him or her; the expert opinion of a radiologist as to the soundness or otherwise of an individual's spine will ordinarily be wholly or substantially based on the radiologist's examination of an x-ray or x-rays. However, the fact that an expert opinion has a factual basis is not inconsistent with a finding that the opinion is wholly or substantially based on specialised knowledge within the meaning of s 79 of the Act. Section 79 is not concerned with the factual basis of an expert's opinion, but rather with the view, estimation or judgment inherent in the inference drawn by the expert from that factual basis. It is the expert's inference, in this sense, which s 79 requires to be wholly or substantially based on his or her specialised knowledge.

It is necessary also to give consideration to whether Mr Madden's report in fact contains evidence of any relevant opinion. The distinction between evidence of "fact" and evidence of "opinion" assumes a dichotomy which it is not always easy to draw (see the discussion of this issue in ALRC Report No. 26, Vol 1, para 156). I note that in Re Action Waste Collections Pty Ltd (in liquidation) [1981] VicRp 66; [1981] VR 691 at 703 Tadgell J characterised a statement made by a liquidator that the company was insolvent as at a particular date as not amounting "to more than a statement of belief in a conclusion of fact". His Honour placed reliance on Jones v McKenzie [1859] EngR 865; (1859) 13 Moo P.C.C. 1 at 9; [1859] EngR 865;

15 ER 1 at 4. With respect to his Honour, I doubt that Jones v McKenzie is an authority in favour of the view adopted by Tadgell J. Indeed, Lord Kingsdown, who delivered the advice of the Privy Council in Jones v McKenzie, spoke of a "correct opinion" on the subject of insolvency being dependent on accounts and other matters of fact. I consider the better view to be that, in other than obvious cases, a statement of a qualified accountant and insolvency practitioner, made on the basis of an examination of financial accounts and other company records, that a particular company is, or is not, insolvent is an expression of opinion. Corporate accounts, and corporate accounting practices, have become increasingly complex. I consider that it is generally recognised that persons with training, study and experience of the kinds enjoyed by Mr Madden possess peculiar skills in an area in which "inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance" (J.W. Smith in the notes to Carter v Boehm, 1 Smith L.C., 7th ed. (1876) p.577 cited by Dixon CJ in Clark v Ryan [1960] HCA 42; (1960) 103 CLR 486 at 491).

As Emmett J has pointed out in his reasons for judgment, which I have had the advantage of reading in draft, Mr Madden's opinions concerning the Company's insolvency are heavily based on matters of fact and, in some cases, arguably unsubstantiated factual inferences. However, it seems to me that Mr Madden's specialised knowledge does qualify him to form views and make judgments as to solvency based on financial statements and other material of the kind to which he refers in his report. Whilst recognising that, in the circumstances of this case, the matter is not free from doubt, I conclude that the opinions expressed by Mr Madden in Section H of his report are substantially based on his specialised knowledge within the meaning of s 79 of the Act. The weight appropriate to be

accorded to such opinion is, of course another matter."

Per Emmett J:

"I have read in draft form the reasons for judgment of Finkelstein J. I agree, for the reasons given by his Honour, that the respondent was only entitled to recover from the appellant the sum of the debts incurred after 31 December 1992. Having regard to the conclusions reached by Finkelstein J and his reasons for those conclusions, the admissibility of Mr Madden's report is not critical to the outcome. However, I have also read in draft form Branson J's reasons for judgment. While I agree entirely with her Honour's analysis of the scheme of the Evidence Act 1995 (Cth) ("the Act") I wish to make some observations concerning the application of the Act to Mr Madden's report…"

Mr Madden's report is concerned with the question of whether Cozihaven Homes Pty Limited ("the Company") was insolvent at various times. Under section 95A of the Corporations Law, a person who is not solvent is insolvent and a person is solvent if and only if the person is able to pay all the person's debts, as and when they become due and payable. In order to determine whether the Company was solvent at a given time, it would be relevant to consider the following matters:

** All of the Company's debts as at that time in order to determine when those debts were due and payable.*

** All of the assets of the Company as at that time in order to determine the extent to which those assets were liquid or were realisable within a timeframe that would allow each of the debts to be paid as and when it became payable.*

** The Company's business as at that time in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales.*

** Arrangements between the Company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.*

It may be that, in carrying out such an exercise, a person having Mr Madden's qualifications would be able to give admissible opinion evidence. For example, such an expert could bring his or her specialised knowledge to bear on the analysis of accounting records, expected cash flows, liquid and realisable assets such as debtors and the like. However, for reasons explained in his report, Mr Madden was apparently not able to do that. He says that he intended to reconstruct the financial accounts of the Company for the relevant periods and perform a detailed review of the financial accounts prepared by the Company's accountants as at relevant year ends during the period. However, he was unable to perform that detailed work because not all of the primary accounting records and secondary documentation of the Company were available.

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In section A of his report, Mr Madden states his terms of reference. He says that he was instructed to perform a review the Company's financial position and form an opinion "as to the solvency of the Company, namely the ability of the Company to pay its debts as and when they fall due, for the period October 1991 to 13 October 1993". Thus, he correctly states one of the issues in the proceeding. Mr Madden then states his qualifications, the documentation reviewed for his report and the limitation on source material available to him.

In Section E of his report, entitled "Financial Position of the Company", Mr Madden begins as follows:

In order to properly review [sic] *the solvency of the Company it was necessary to review the working capital and net asset positions. Both working capital and net assets are key indicators of a company's solvency.*

Working capital is determined by subtracting current liabilities (liabilities due within 12 months of balance date) from current assets (assets expected to be realised within 12 months of balance date).

The net asset position is determined by subtracting total liabilities from total assets.

He does not explain how a review of the working capital and net asset positions is a means of determining solvency, namely whether the Company was able to pay its debts as and when they became due and payable. Rather, he simply states that working capital and net assets are key indicators of solvency. While those matters may be indicators, they are not necessarily determinative.

Thus:

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> ** It is often accepted, as a rule of thumb, that a company will be regarded as insolvent if its current liabilities exceed its current assets. However, that cannot be more than a rule of thumb. A company might satisfy that requirement yet may be shown, on more careful analysis, not to be able to pay its debts as and when they become due and payable. Equally, a company may fail that test but still be able to demonstrate that it can pay all its debts as and when they become due and payable.*
>
> ** Further, a deficiency of total assets to total liabilities is not conclusive as to insolvency. A company could have a deficiency of net assets yet, because of a very strong profit making business, be in a position to pay all its debts as and when they become due and payable. That is to say, even if a net asset deficiency exists reasonable projections may indicate that the company would generate sufficient profit to be able to eliminate that deficiency before the long term debt becomes due and payable. The company would be solvent in those circumstances. Equally, a company which has a surplus of total assets over total liabilities could still be insolvent.*

It may be that Mr Madden's specialised knowledge would enable him to say that where a company has a deficiency of current liabilities over current assets and a deficiency of total liabilities over total assets, the company will normally be insolvent. Such an opinion would be admissible if based on his specialised knowledge. For example, it may be that, in the absence of primary accounting records and other secondary documentation, working capital and net assets are the best indicators available. However, it is not entirely clear that Mr Madden was purporting to express such an opinion.

Even so, the excess of current liabilities over current assets and the excess of total liabilities over total assets would need to be proved as facts. If there is a question of accounting practice involved in the determination of any of those amounts, the opinion of Mr Madden on such question, based on his specialised knowledge, would be relevant and admissible. However, absent any such questions, there would normally be no need for expert opinion to determine whether one figure is greater than another. Where the amounts are derived from balance sheets, that can be determined by the court upon examination of the balance sheets in evidence.

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Mr Madden gives his reasons for reaching the opinion set out in Section F. However, the opinion does not appear to me to be based on any specialised knowledge. Rather, the opinion appears to be based on figures derived from balance sheets of the Company as at 30 June 1991, 29 February 1992, 30 June 1992, 30 June 1993 and 13 October 1993 all which were in evidence, together with specific material relating to the Company, some of which was in evidence and some of which was not.

Some of the material referred to in Section G was in evidence. Some of it was not. In so far as that material was relied on by Mr Madden in arriving at his opinion referred to above, that opinion does not appear to be based on his specialised knowledge. Rather, it is based in part upon his examination and analysis of specific material and the inferences which he draws from that material.

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It is clear enough that the reasoning contained in Section G, together with the matters set out in Sections E and F, are the "reasons set out above" referred to in Section H. Accordingly, the opinion set out in Section H is based at least in part on Mr Madden's examination of the material identified in his report and the inferences which he draws from that material. It is not based on his specialised knowledge based on training, study or experience. In the circumstances, I consider that there is a real question as to whether the opinions expressed by Mr Madden as to the insolvency of the Company were admissible."

Finkelstein J agreed with Branson J that to the extent that expert had relied upon hearsay as a basis for his opinion, it would be admissible under s 60: see at 625. He considered the extraordinary effect of s 60 could be overcome by an order under s 136 limiting the use to be made of that evidence. Finkelstein J also agreed with Emmett J that if an accountant seeks to do no more than state what is otherwise obvious from records, the evidence is not receivable on the basis it involves no application of expertise: see at 626. Nevertheless he was of the view that as the trial judge had received some assistance from the opinions expressed by the expert that was a sufficient basis for holding that the evidence was admissible.

Quoting from HH:

"The function of an expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury, due to the technical nature of the facts, is unable to formulate. "An expert's opinion is admissible to furnish the Court with

scientific information which is likely to be outside the experience of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": R v Turner (1974) 60 *Crim.App.R 80 at 83 per Laughton LJ; see also Clark v Ryan [1960] HCA 42; (1960) 103 CLR 486 at 491-492; Murphy v R [1989] HCA 28; (1989) 167 CLR 94 at 111, 130; Farrell v R (1998) 155 ALR 652 at 655.*

In this case Mr Madden was asked to express his opinion on the financial condition of the company based on certain of the books and records of the company that had been made available for his inspection. It is not unusual for an accountant to give this type of evidence: see e.g. Potts v Miller [1940] HCA 43; (1940) 64 CLR 282; R v Seifert (1955) 73 WN (NSW) 358; Enston v Pardel (1958) 75 WN (NSW) 370. However, if the accountant seeks to do no more than state what is otherwise obvious from such records his evidence is not receivable. The position is different where some analysis of the books and records is required in order to draw the inferences that are sought to be made or if an analysis of those books and records might prove to be a difficult task for the judge or jury.

It may be doubted whether Mr Madden did give the evidence of an expert. Much of what he said would have been apparent to the trial judge from his own examination of the books of account. However, the reasons for decision show that the trial judge did receive some assistance from the opinions expressed by Mr Madden and this is a sufficient basis for holding that his evidence was admissible".

A.Ferella v Otvosi & Anor **[2006] FMCA 231 [10 March 2006]**

This case involved a consideration of whether a sequestration ought be made, and that in turn revolved around whether the debtor could satisfy the Court that he could pay his debts. He relied on an "expert" opinion.

> *[49] In this case the only examination of financial accounts on which Mr Chamberlain's opinion is based is a reference to (but no assessment of) the amount stated to be "net assets" in the Financial Report for Cavallino Unit Trust. There is no assessment of the assets of the debtors to determine the extent to which such assets are realisable within a time frame to allow debts to be paid as they become payable, or consideration of the cash flow of any business engaged in by the debtors or of the availability of borrowings. Mr Chamberlain did not reconstruct or perform a detailed review of financial accounts. He simply deducted the debts as at 14 October 2005 which had been disclosed to him from the assets disclosed, expressing an opinion as to solvency based on the amount of the net assets as disclosed, and stated that based on the indications the debts had been settled in full neither estate had any liabilities. There is no suggestion that there is a question of accounting practice involved in the manner in which the amounts were determined. There is nothing to suggest that Mr Chamberlain's conclusion that if Gustavo Ferella was solvent so, as a consequence, was Angelo Ferella was based in any way on his training, study or experience or specialised knowledge as a qualified accountant and insolvency practitioner. The report does not expose his reasoning process in this respect such as to demonstrate that this opinion was based on particular specialised knowledge (Ocean Marine v Jetopay at*

[23]).

[50] In these circumstances I am not satisfied that Mr Chamberlain gave the evidence of an expert. This is the sort of 'obvious case' (Branson J in Quick v Stoland at 375) in which the Court needs or derives no assistance in the assessment of solvency from such a report. The court is able to reach its own conclusions on the material relied upon. (See Switz Pty Ltd v Glowbind [1999] NSWSC 1296 at [35]). The 'opinion' evidence is not wholly or substantially based on specialised knowledge within s.79 of the Evidence Act 1995. (See the discussions of the law in ASIC v Rich [2005] NSWSC 149 at [281] – [284] (reversed on appeal for other reasons in ASIC v Rich [2005] NSWCA 152; (2005) 218 ALR 764)).

[51] I note further that there is authority that opinion evidence that is merely argument in support of a litigant's case is not admissible under s.79 of the Evidence Act 1995 (notwithstanding s.80). Even though an accounting expert may give an opinion as to insolvency (Quick v Stoland and see ASIC v Vines [2003] NSWSC 1095; (2003) 48 ACSR 291 at [27]) that part of Mr Chamberlain's report that draws the inference that on the assumption Gustavo Ferella is solvent so consequently is Angelo Ferella is based not on the specialised knowledge of Mr Chamberlain but rather is "essentially an argument or submission in favour of an interpretation of the evidence" (ASIC v Rich [2005] NSWSC 149 at 286 per Austin J referring to Dean Willcocks v Commonwealth Bank of Australia [2003] NSWSC 466; (2003) 45 ACSR 564). It consists of an "assertion, not apparently based on accounting expertise": Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 at [674] per Allsop

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J. For the reasons given I reject the whole report.

[52] Further, if I am wrong in finding that the report is inadmissible because s.79 of the Evidence Act is not satisfied, I would in any event exercise my discretion to exclude the evidence under s.135 of the Evidence Act 1995. As contended for by the creditors, I am satisfied that the probative value of the report is substantially outweighed by the danger that the evidence might be unfairly prejudicial to the creditors.

[53] If contrary to my view, the report is technically admissible, it is of sufficient probative value (see the definition in the Dictionary to the Evidence Act 1995) to come within s.55 as evidence of the facts stated and an opinion in relation to the critical issue of solvency, despite the fact that part of the opinion is essentially advocacy, having a minimum probative value. Taken at its highest I am satisfied, for the reasons given below that its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to the creditors. Apart from the concern that the report addresses a fact in issue and was prepared for the purposes of a an application under s.153B of the Bankruptcy Act 1966, the objections raised by Mr Johnson to Mr Chamberlain's affidavit and report relate primarily to the fact that the opinion was based on hearsay evidence and, to some extent, documentation not before the Court, that Mr Chamberlain was not available for cross-examination, that the report did not address materials filed in court by the creditor and that the opinion was expressed as based on 'facts' in dispute. In these circumstances counsel for the creditor contended that there was a significant danger that the evidence might be unfairly prejudicial to the

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creditors if it was allowed into evidence.

[54] Mr Chamberlain's opinion is expressed on the basis that the facts are that the liabilities were limited to debts of $74,656 to the Otvosis and $9,754.79 to Woollahra Municipal Council, that these debts had been paid and that the respective estates had nil liabilities. This is disputed by the creditors. The debt to the Otvosis also includes interest not taken into account and the tender of payment has not been accepted. There is evidence before the Court that the debts are not limited to those taken into account by Mr Chamberlain. Further, the 'facts' relied on by Mr Chamberlain as to the ownership, encumbrance and value of properties and assets are 'facts' which are not all otherwise in evidence before the Court, are in some respects hearsay evidence, conflict in part with the evidence of Angelo Ferella or are disputed.

[55] Mr Chamberlain was not made available for cross-examination on the hearing day. He was not asked to express his opinion in answer to a hypothetical question leaving it to the debtor to prove the facts on which the opinion was based (see Quick v Stoland at 382 per Finkelstein J). The other evidence the debtor put before the Court did not prove all the 'facts' relied on by Mr Chamberlain in expressing his opinion. There was no evidence as to his financial affairs from Gustavo Ferella before the Court. The report relied on the statements of affairs for both Ferellas. Neither statement was before the Court. The Cavallino Unit Trust Financial Report for the year ended 30 June 2005 was also relied upon. It has not been adopted by the trustees. Mr Chamberlain relied on 'kerbside' letters from real estate agents about

possible sale prices for properties. These are not valuations and are not otherwise before the Court. In any event, Angelo Ferella suggested different values for such properties. Mr Chamberlain stated that certain property was unencumbered (except for a caveat) despite the fact that the copy title search for one of those properties annexed to his report referred to a mortgage to Perpetual Trustee Company Ltd. There was no evidence on this issue otherwise put before the Court. A reference was made to a joint interest of Gustavo Ferella in a bank account in relation to which a partial statement was annexed. There was no explanation for why Mr Chamberlain relied on the credit balance at
2 December 2005 in relation to solvency at 14 October 2005.

[56] The creditors did not have the opportunity to test the evidence presented in the report and on which it relied, including hearsay evidence (see Roach v Page (No.11) [2003] NSWSC 907 at [34] and at [74] per Sperling J and cases cited therein). It is unfair, in the sense referred to by Finkelstein J in Quick v Stoland, that Mr Chamberlain's reliance on 'facts' not proved before the Court should by virtue of s.60 mean that his account of these 'facts' is to be taken as evidence of the truth of the facts so stated. The facts stated are disputed or contentious. In these circumstances there is a danger (which substantially outweighs the probative value of the evidence) that use of the evidence not only as opinion evidence but also to establish the truth of the 'facts' relied on by Mr Chamberlain not otherwise before the Court or in dispute might, taken together with the other difficulties with the report outlined above, be unfairly prejudicial to the creditors. Even if it is technically admissible the whole of the report and affidavit should be excluded under

s.135 of the Evidence Act 1995.

WHAT IF THE CLIENT ITSELF IS AN ACCOUNTANT OR AUDITOR (OR EMPLOYS ONE)?

In *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485 Campbell J doubted at [11] in relation to Code as it formerly was in the Supreme Court Rules whether the definition of "expert witness" is able to catch the situation "where an officer of a party, not engaged for any particular purpose, has, at a time before court proceedings were contemplated, expressed an expert opinion in a report, and that report is tendered in later proceedings".

In *Equity 8 Pty Ltd v Shaw Stockbrocking Ltd* [2006] NSWSC 1251 , Barrett J held admissible an affidavit of the corporate plaintiff's chief executive, who had experience in corporate finance transactions in the equity capital markets.

Objection had been taken on two bases, one of which was non compliance with the provisions for admissiblity of expert evidence ; Holding that he was qualified within the meaning of Sec 79 of the *Evidence Act* (*1995*), Barrett J continued:

"[10] The fact that Mr Wookey is the plaintiff's main witness and a principal of the plaintiff does not affect the admissibility of his opinion evidence on matters within his expertise. It might well, however, affect the weight that his evidence is ultimately found to deserve. Self-interest may eventually be seen to have compromised objectivity. That is a judgment for the future.

[11] It is objected that Mr Wookey 's evidence on the matter at hand does not conform to the requirements in Division 2 of Part 31 of the ***Uniform Civil Procedure Rules*** *2005 and that, for that reason, the court must not receive his opinion evidence. The answer to that is that Division 2 of Part 31 is concerned with the evidence of "expert witnesses" as defined by rule 31.17 and situations where experts are retained to provide reports. That is not the case here. Mr Wookey is a witness in the ordinary course who happens to have experience which causes his opinion on the relevant matter to be admissible."*

This is consistent with *Mulkearns v Chandos Developments Pty Ltd*, [2003] NSWSC 1084. in which a party (a licensed real estate agent) sought to give expert evidence under s 79 of the *Evidence Act 1995* (NSW) as to the market value of a property.

Young CJ in Eq noted at para [14] that while theUK position is that the expert evidence a party, or a close friend of a party, ought not be received, expert evidence is admissible in New South Wales from a party or close associate where the criteria of admissibility (particularly s 79) in the *Evidence Act 1995* (NSW) are made out.

However, HH noted at para [15] that:

"When one gets the situation where a party, without even paying lip service to [the expert witness code of conduct], gets into the box and tries to give *expert evidence, when there is no reason why the availability of first class expert evidence has not been presented, then that party starts behind scratch."*

See also para [334] of *ASIC v Rich* [2005] NSWSC 149, where the same opinion was expressed by Austin J by reference to numerous authorities.

ASSESSING DAMAGES FOR BREACH OF CONTRACT

[Edited extracts of the principles in contract and tort from my loose leaf service Commercial Damages (Thomson Reuters)]

[5.05] Object of damages

The object of damages for breach of contract is neither to make the defendant disgorge what it has saved due to its breach, nor to make it disgorge profits it has reaped. In contract, damages are wholly compensatory. Their fundamental purpose is to put the person whose rights have been violated, in the same position, so far as money can do so, as if those rights had been observed. This general principle is significantly eroded by the rules relating to, for example, causation, remoteness, contributory negligence, discounting, and policy considerations, etc

The general rule at common law, as stated by Parke B in *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363; [1843-60] All ER Rep 383 at Ex 855; ER 365 is:

> That where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation,

> with respect to damages, as if the contract had been performed.

See also Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

The above dictum has been cited with approval in a number of subsequent English and Australian cases including.
These cases are dealt with more fully, and their facts set out, in Chapter 9 on Remoteness

The rigorous pursuit of the rule in *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363; [1843-60] All ER Rep 383 could result in a plaintiff obtaining complete indemnity for the entire loss flowing from the breach of contract, however remote that loss may be, "however improbable, however unpredictable": *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; [1949] 1 All ER 997 per Asquith LJ. As such, in *Hadley v Baxendale* (1854) 2 CLR 517; (1854) 9 Exch 341; (1854) 2 WR 302; (1854) 156 ER 145, a limitation was imposed on the general rule expressed in *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363; [1843-60] All ER Rep 383 in relation to appropriate damages for a contractual breach. It was stated in *Hadley v Baxendale* (1854) 2 CLR 517; (1854) 9 Exch 341; (1854) 2 WR 302; (1854) 156 ER 145 at Exch 354 per Alderson B (for the court) that:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally … from such breach … or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract.

Less frequently cited but equally important to the issue of relevant knowledge is *Hadley v Baxendale* (1854) 2 CLR 517; (1854) 9 Exch 341; (1854) 2 WR 302; (1854) 156 ER 145 at EX 355-356 per Alderson B (for the court):

> If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

The *Hadley v Baxendale* (1854) 2 CLR 517; (1854) 9 Exch 341; (1854) 2 WR 302; (1854) 156 ER 145 approach has been criticised by many including Cooke P in *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 at 42-43. See also Cooke, *Remoteness of Damages and Judicial Discretion* (1978) 37 CLJ 289 and R Ahdar, *Remoteness, "Ritual Incantation" and the Future of Hadley v Baxendale: Reflections from New Zealand* (1994) 7 JCL 53.

The above dicta have been accepted and applied in Australia: see *Wenham v Ella* (1972) 127 CLR 454; 46 ALJR 498; [1972-73] ALR 353; [1972] HCA 43 at 477; *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185; [1966] HCA 38 at 191.

What must be contemplated?

The test for determining whether specific items of damage are compensable is to inquire as to whether they should they have been contemplated by the promisor *at the time of the contract*. Hindsight may well be misleading; see *Minnesota Mining and Manufacturing Co v Beiersdorf (Aust) Ltd* (1980) 144 CLR 253 at 294; and compare *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281; 131 ALR 363; [1995] HCA 4 at 293-294.

The two limbs of *Hadley v Baxendale* (1854) 2 CLR 517; (1854) 9 Exch 341; (1854) 2 WR 302; (1854) 156 ER 145 are now regarded as the statement of a single principle whose application depends on the degree of knowledge of the defendant,[1] that is, the greater the knowledge of the defendant at the time that the contract was entered into as regards to any unfortunate consequences of breach for the plaintiff, the more likely that such loss was within the reasonable contemplation of the parties. See generally Perloff, *Breach of Contract and the Foreseeability Doctrine of Hadley v Baxendale* (1981) 10 J Legal Study 39.

> For this purpose, knowledge “possessed” is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the `ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the “first rule” in *Hadley v Baxendale* [1854] EWHC Exch J70; (1854) 9 Exch 341, 156 ER 145. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the `ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause

> more loss. Such a case attracts the operation of the “second rule” so as to make additional loss also recoverable: *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 1 All ER 997 at 1002-1003 per Asquith LJ.

An authoritative restatement of the principle by the High Court, both as regards contract and tort, is contained in *Haines v Bendall* (1991) 172 CLR 60; 99 ALR 385; [1991] HCA 15 where Mason CJ, Dawson, Toohey and Gaudron JJ (with the agreement of Brennan J) said at CLR 63:

> The settled principle governing the assessment of compensatory damages, whether in actions of tort or contact, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept. It is the “one principle that is absolutely firm, and which must control all else” … Cognate with this concept is the rule, described by Lord Reid in *Parry v Cleaver* [1970] AC 1 at 13, as universal, that a plaintiff cannot recover more than he or she has lost.

[6.30] The objective of damages in tort

The objective of damages awards in cases of tort is to place the plaintiff in the position in which it would have been had the tort not been committed. It is thus necessary to determine what the plaintiff would have done had the tort not been committed: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per

Lord Blackburn; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1. How the plaintiff can best be put into the position as if the tort had not been committed will, of course, depend on the individual circumstances of the case. As Cooke P remarked, whatever verbal formulations courts employ “In truth damages are in the end always a question of fact dependent on the particular circumstances”: *Gardiner v Metcalf* [1994] 2 NZLR 8 at [12].

This chapter deals inter alia with the principles relating to misrepresentations (fraudulent and negligent) and negligent acts. The principles governing the measure of damages for these torts are identical (see *Gould v Vaggelas* (1984) 157 CLR 215; 56 ALR 31; [1984] HCA 68 where the High Court noted that the measure of damages is the same in deceit as in tort actions generally, with one exception, namely that, the rules of remoteness do not limit recovery of damages for deceitful and/or fraudulent conduct. This is explored in greater detail in the chapter *Damages and egregious conduct* from [3.10]. The principles relating to deceit are more fully dealt with in chapter *Trade Practices damages* from [7.10].

[6.1650] Damage or destruction to a profit earning chattel: general rules

In the case of damage or destruction of a profit-earning chattel used in the course of business, the plaintiff is entitled to loss of profit during the period which is reasonably required to replace or repair it (see *The Liesbosch* [1933] AC 449) so long as there was a reasonable certainty that profits would have been earned or else general damages for the loss of such profits which must reasonably have been anticipated would have been derived in that period. See *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1; [2003]

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FCA 50 at [1051] per Finn J citing *The Argentino* (1888) 13 PD 191; affirmed by *Gracie, Owners of the Steamship v Owners of the Steamship Argentino (The Argentino)* (1889) 14 App Cas 519; *Owners of the Lord Citrine v Owners of the Hebridean Coast* [1961] AC 545 at 562-565 per Devlin LJ.

Alternatively, the plaintiff can claim the costs of a substitute during the period that is reasonably required to repair or replace it: see *Athabaska Airways Ltd v Saskatchewan Government Airways* (1957) 12 DLR (2d) 187 cited in Fleming, *The Law of Torts* (9th ed, 1988), p 283. If the chattel has been destroyed, the plaintiff is also entitled to the value of the chattels lost or the cost of replacing them.

In *Liesbosch Dredger (Owners of) v Owners of SS Edison* [1933] AC 449 at 464-465 Lord Wright held at 463: “in these cases [ship collisions] the dominant rule of law is the principle of restitutio in integrum”.

The purpose of Lord Wright stating this principle was to support an award for destruction of a dredger that took into account the value to the owner of the contract in performance of which the dredger was engaged. Lord Wright said that the value of the dredger was not just its “intrinsic” value, but the value to its owner in the particular circumstances. Other consequential loss could include, in the case of a ship, the cost of wages for the crew which cannot be gainfully employed while the ship is being repaired (if loss of profits is not being claimed): see *McGregor on Damages* (15th ed, 1988) at [1256] citing *Inflexible HMS, Re* (1857) 28 LTOS 374; (1857) Sw 200; (1857) 5 WR 517; (1857) 166 ER 1094.

Screenco Pty Ltd v RL Dew Pty Ltd (2003) 58 NSWLR 720; [2003] NSWCA 319 involved the negligent destruction of the plaintiff's “jumbotron” screen, which was a profit earning chattel which it leased to organisers of sporting fixtures. In

addition to recovering the value of the screen itself (approximately $1.15 million), the plaintiff recovered consequential losses including $79,000 for lost revenue and approximately $91,000 for freight. The freight was incurred because the plaintiff needed a temporary replacement.

The plaintiff also sought interest on the lost value of its jumbotron screen, even though it had not paid for the screen by the time of its destruction.

By a unanimous judgment, the Court of Appeal upheld the primary judge's finding that, by reason of the fact that as a matter of practical reality, the plaintiff had not suffered any financial detriment which required compensation by way of interest, that such interest would not be awarded.

Where the claim is for loss of the use of a machine of a common type, e.g. a caterpillar tractor, one might expect the claim to be for the cost of a replacement: *Steamship Strathfillan (Owners of) v Owners of Steamship Dcala (The Dcala)* [1929] AC 196 at 200 per Lord Hailsham LC; cited with approval by Pincus J (as his Honour then was) in *Atkinson v Hastings Deering (Qld) Pty Ltd* (1985) 8 FCR 481; 71 ALR 93; [1985] ATPR 47,080 (40-625) at 495 (FCR).

A case illustrating the recovery of damages for lost value and also for lost profits is that of the Full Court of the South Australian Supreme Court in *Glenmont Investments Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185; [2000] SASC 429. The facts of the case marked a welcome departure from maritime misadventures, involving as they did a very large mechanical tyrannosaurus rex. It had been constructed out of flammable materials and while being dismantled after display at the Royal Adelaide Show, was destroyed through the negligent use of an oxy-acetylene torch. T-Rex had stood 12 metres high and was 30 metres long and the

trial judge said it was a "wonderful representation" of a dinosaur; with thousands of moving parts, controlled by hydraulics and mini-computers. Its creation had been the "consuming passion" of the plaintiff's director. It was intended to earn money from displays at fairs, being used in dinosaur movies and ancillary marketing. The court at [415] cited *Liesbosch Dredger (Owners of) v Owners of SS Edison* [1933] AC 449 as authority for the proposition that the prima facie measure of damages was its value "as a going concern" to its owners; and since there was no market to purchase a replacement, the starting point of quantum was the cost of making a replacement plus the profits that could have been derived absent the destruction of T-Rex.

The Full Court in *Glenmont Investments Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185; [2000] SASC 429 at [417] said that where the substantial cause of the plaintiff's inability to afford a replacement was the defendant's wrong, then while the usual date for assessment was that of the trial, the plaintiff might be entitled to have its damages assessed at a date even later than the trial.

Damages for lost profits were assessed on the basis of damages for loss of a chance to derive income from fairs, movies and the like at [421] per the court applying *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; 68 ALJR 313 at 355-356 (CLR), also discussed at [15.350].

The interesting feature of this aspect was that *Glenmont Investments* was faced with "substantial problems" when the fire occurred. There was a question mark as to its financial viability; only a small number of films ever make a profit, let alone large ones; and so on. But, said the court at [433]: "many successful ventures emerge from an unpromising start". While damages were reduced on appeal, they were still substantial. A special leave application by *Glenmont*

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Investments to the High Court on a matter unrelated to quantum was dismissed on 16 August 2001 (A5/2001); and a special leave application by O'Loughlin in matter A15/2001 was also dismissed on 16 August 2001.

PRIVILEGE AND WAIVER

COMMUNICATIONS WITH EXPERTS: ARE THEY PRIVILEGED?

New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd [2007] NSWSC 258, White J

"[15] The defendant submitted that the provisions of the *Evidence Act* 1995 (NSW) do not apply to the determination of this application. I do not agree. The questions of whether the documents are privileged, and if so, whether privilege has been waived, are to be resolved by the provisions of the *Evidence Act*, not by the common law. That is not because the Act has modified the common law, or applies by its own force to pre-trial procedures (*Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67; (1999) 201 CLR 49; *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1). Rather, it is a consequence of the rules. Rule 21.3 of the *Uniform Civil Procedure Rules* 2005 (NSW) requires that a list of documents must identify any document that is claimed to be a "*privileged document*" and must specify the circumstances under which the privilege is claimed to arise. Rule 21.5 provides in substance that a

party is not required to make available "*privileged documents*" for inspection. Rule 1.2 provides that words and expressions defined in the Dictionary have the meaning set out in the Dictionary. In the Dictionary, the expression "*privileged document*" is defined as meaning a document that contains privileged information. "*Privileged information*" is defined as meaning, relevantly, any information of which evidence could not by virtue of the operation of Div 1 of Pt 3.10 of the *Evidence Act* be adduced in the proceedings over the objection of any person. Hence, the provisions of the *Evidence Act* are made applicable by the definitions contained in the *Uniform Civil Procedure Rules*.

[16] The relevant section in Div 1 of Pt 3.10 of the *Evidence Act* is s 119. It provides:

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
(b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding,

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in which the client is or may be, or was or might have been, a party."

[17] The expressions "*confidential communication*" and "*confidential document*" are defined in s 117 as follows:

*"***Confidential communication** *means a communication made in such circumstances that, when it was made:*

(a) the person who made it, or

(b) the person to whom it was made,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

Confidential document *means a document prepared in such circumstances that, when it was prepared:*

(a) the person who prepared it, or

(b) the person for whom it was prepared,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law."

[18] Paragraph 119(b) is important. It has been held that common law legal

professional privilege does not attach to an expert's own documents, prepared by him for the purpose of expressing an expert opinion in litigation but which were not communicated to the client or the lawyer of the client, and do not reveal communications between the expert and the client, or between the expert and the lawyer for the client (*Interchase Corporations Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 1)* [1999] 1 Qd R 141 at 150-151, 153, 162; *Australian Securities and Investments Commission v Southcorp Limited* [2003] FCA 804; (2003) 46 ACSR 438 at [21]).

[19] This view is based upon the fact that:

"*Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se.*" (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 529, 543, 552, 568, 580-581, 585).

[20] Section 119 of the *Evidence Act* expressly applies both to confidential communications between the client and a third party, or between a lawyer acting for the client and a third party, for the dominant purpose of the client being provided with professional legal services relating to legal proceedings, and to the contents of a confidential document prepared with that dominant purpose, whether the document is delivered or not (*Re Southland Coal Pty Ltd (recs and mgrs apptd) (in liq)* [2006] NSWSC 899; (2006) 59 ACSR 87 at [16]- [19]; *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at [8], [15])."

***"Associated material waiver"* was explained as follows in *Matthews v SPI Electricity Pty Ltd & Ors and SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd)* [2013] VSC 33 (13 February 2013):**

"[31] It is common ground that the issues raised by the plaintiff's application are governed by the provisions of the Evidence Act 2008 (Vic) ("Evidence Act"), in particular Part 3.10, Division 1, which applies to interlocutory proceedings.[34]

[32] The application is made on the assumption that the documents identified in the Summons are properly the subject of privilege.

[33] The plaintiff claims that SPI has lost the privilege in the Summons documents by the operation of s 122, or by a combination of that section and s 126, of the Evidence Act. For present purposes, only sub-section 122(2) need be considered. It provides:

Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in sections 118, 119 or 120.

[34] The origin of this sub-section is the provision in the same terms introduced into the Commonwealth and New South Wales Uniform Evidence Acts following the Australian Law Reform Commission Report 102, prepared with the New South Wales and Victorian Law Reform Commissions.[35] Because the Victorian Act post-dated those amendments, the sub-section appeared in the Victorian legislation from enactment.

[35] The object of the sub-section was to adopt the approach of the High Court in Mann v Carnell, in which case Gleeson CJ, Gaudron, Gummow and Callinan JJ stated:[36]

What brings about the waiver is inconsistency, which the courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large.

[36] Although sub-section 122(2) is formulated a little differently from the formulation of the common law principle by the High Court in Mann v Carnell, in that it works on inconsistency between the conduct of the party and a claim of legal entitlement to confidentiality, whilst the High Court formulation works on inconsistency between the conduct of the party and the maintenance of confidentiality,[37] for present purposes nothing turns on this difference. The relevance, however, of the origin of the formulation is that the common law cases on the question of waiver of privilege continue to be relevant to the question arising under s 122 of the Evidence Act.[38]

[37] So, under the test propounded in Mann v Carnell it is inconsistency between the conduct of the client and the maintenance of the confidentiality that the privilege is intended to protect which effects a waiver of the privilege. The test for imputed waiver had previously been expressed in terms of fairness: see Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 (‘Maurice’) at 481 per Gibbs CJ, 487–8 per Mason and Brennan JJ, 492–3 per Deane J, and 497–8 per Dawson J. Fairness has become a subsidiary consideration; it may be relevant to the court’s assessment of inconsistency in some contexts but not in others.[39]

[38] In any application of Mann v Carnell, the starting point must be an analysis of the disclosures or other acts or omissions of the party claiming privilege that are said to be inconsistent with the maintenance of confidentiality in the privileged material.[40]

[39] It is well established that a voluntary disclosure of privileged documents can result in a waiver of privilege over those documents and associated material. The test applied to determine the scope of any waiver of 'associated material' is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter: Maurice at 482 and 484 per Gibbs CJ, 488 per Mason and Brennan JJ, and 498–9 per Dawson J.

[40] Associated material waiver brings into play s 126 of the Evidence Act, the related communications and documents provision. That section provides:

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

[41] Sections 4(1)(b) and 131A of the Evidence Act have the effect of applying s 126 to the interlocutory questions raised by the plaintiff's Summons.

[42] In Towney v Minister for Land & Water Conservation (NSW),[41] Sackville J made a number of pertinent observations about this section. First, that the test set out is an objective test; secondly, that its operation must be assessed

according to its terms and not on the basis that it in some way reflects the pre-existing common law; and thirdly that it was clear in his view that a mere reference in a subject document to another communication or document, of itself, does not necessarily result in a loss of privilege attaching to the subject document. The application of s 126 ultimately depends on the degree and manner in which the subject document assists in a proper understanding of the other communication or document. In relation to the meaning of 'proper understanding', Sackville J said:

"The dictionary definition of 'proper' includes 'complete or thorough'; the definition of 'understand' includes 'to apprehend clearly the character or nature of' and 'to grasp the significance, implications or importance of': *Macquarie Dictionary*."

[43] Sackville J's views were essentially accepted as correct by the NSW Court of Appeal in Sugden v Sugden.[42]

[44] A common application of associated material waiver is where an expert report has been prepared in reliance on other documents"

In *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438; [2003] FCA 804, Lindgren J helpfully summarised the following principles derived from his analysis of the case law, in relation to the waiver of privilege in connection with expert evidence, in the following terms:

"[1] Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege: cf Wheeler v Le

Marchant (1881) 17 Ch D 675; Trade Practices Commission v Sterling [1979] FCA 33; (1979) 36 FLR 244 at 246; Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1) [1999] 1 Qd R 141 (Interchase) at 151 per Pincus JA, at 160 per Thomas J.

[2] Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege: Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 ; 141 ALR 545 ; 91 A Crim R 451 (Propend); Interchase, per Pincus JA; Spassked Pty Ltd v Cmr of Taxation (No 4) [2002] FCA 491; (2002) 50 ATR 70 at [17].

[3] Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications: cf Interchase at 161-2 per Thomas J.

[4] Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents; cf Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 at 481 ; [1986] HCA 80; 69 ALR 31 at 34 per Gibbs CJ, CLR 487-8; ALR 38-9 per Mason and Brennan JJ, CLR 492-3; ALR 42-3 per Deane J, CLR 497-

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8; ALR 46-7 per Dawson J; Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83 at 98 ; [1995] HCA 39; 132 ALR 57 at 66 per Deane, Dawson and Gaudron JJ, CLR 109; ALR 75 per Toohey J; Instant Colour Pty Ltd v Canon Australia Pty Ltd [1995] FCA 870; BC9506842; Australian Competition and Consumer Commission v Lux Pty Ltd [2003] FCA 89; BC200300344 (ACCC v Lux) at [46].

[5] Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents; Interchase at 148-50 per Pincus JA, at 161 per Thomas J.

[6] It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report: cf Dingwall v Commonwealth [1992] FCA 627; (1992) 39 FCR 521; Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2) (1998) 83 FCR 397 at 400; 156 ALR 364 at 366; ACCC v Lux at [46]."

In *Traderight (NSW) Pty Ltd (ACN 108 880 968) & Ors v Bank of Queensland Limited (ACN 009 656 740) (No 14) and 13 related matters* [2013] NSWSC 211, the Bank of Queensland applied for access to a number of documents produced by an expert in response to a subpoena served on her by the bank. The expert had prepared the report on instructions from the OMB parties (OMB).

It was held that a claim for privilege in respect of communications between a party's legal advisors and an expert retained by the party, and draft reports prepared by the expert, was not waived by service of the expert's report.

OMB claimed client legal privilege in respect of:

- Draft reports of the expert containing comments, requests or advice made by the OMB legal advisors and communicated to the expert
- Draft reports of the expert created for the dominant purpose or with the expectation that those draft reports would be provided to the OMB legal advisors for the purpose of those advisors considering or providing comment or advice
- Documents recording communications between the expert and the OMB legal advisors

The issue before the Court was whether, pursuant to section 122 of the *Evidence Act*, it would be inconsistent for OMB to rely on the expert's report and at the same time maintain a claim for privilege.

Justice Ball set out the history of section 122 and noted that the meaning of "inconsistency" is informed by considerations of fairness between the conduct of the client and maintenance of the confidentiality.

His Honour observed that the fact that legal advisors have communicated with an expert and provided comments on drafts of a report does not mean the expert has not reached her own conclusions or relied on material that has not been disclosed in the report. In fact, it is of general assistance to the court when parties' legal advisors help experts to narrow the issues and present their opinions in an admissible and understandable form.

The court held that the privileged materials had not influenced the content of the expert's report in such a way that the service of the report was inconsistent with

maintaining the privilege in those materials. Accordingly, OMB was entitled to maintain its claim for privilege.

The lesson:

Legal advisors briefing an expert and wanting to maintain privilege over their communications, ought ensure that the assistance and commentary provided does not influence the expert's conclusions. It is permissible for the legal advisors to test the expert's findings by raising factual or hypothetical issues which may cause the expert to alter their conclusions.

As long as the expert continues to form his or her own conclusions, all working drafts and communications passing between the expert and the legal advisors will continue to attract privilege.

WHEN AND HOW TO RETAIN AN EXPERT

Experts should be retained as early on as possible**.** There is little purpose served, and no long term savings, in the lawyers doing their best to run the case where expert evidence is ultimately required, by deferring it to the last moment.

Deferring obtaining expert evidence until after proceedings are initiated, may well be in breach of ethical obligations if the proceedings call for a certificate as to reasonable prospects or recovering damages under the *Legal Professional Act*.

Not having such evidence may also constitute a deviation from practice note e.g. the Commercial List practice note in the NSWSC, which suggest that all evidence required the matter is to hand before proceedings commence.

The dialogue with the expert assists in defining the question to be asked; and this dialogue suffers if forced to occur under pressure and could potentially adversely affect the outcome of the case.

As to how: the usual practice of sending off a letter from one's desk, before even speaking to the expert to refine the question and to determine preliminary views, is not optimum in my respectful view.

If an expert is disinclined to support one's client, why go to the expense of obtaining a report that might only become a boomerang in the discovery process?

Experts should be sent a folder of relevant documents, with a brief outline of the case as it is then perceived, then asked to meet in person to discuss how they see the case , and what questions they think worth addressing . Sometimes, the question asked, suggests the answer to be given.

The essential requirement at the early stages of the expert's retainer is to ensure they say as little as possible, until they know enough to express and opinion. This calls for diplomatic skills to ensure esprit to corps is retained – but there can only be one leader of a team, and that is YOU, the case manager.

The letter of retainer should really say nothing more than that the expert is

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retained to advise in the matter, and to agree rates. The actual questions for consideration ought in my view be articulated as late as possible, possibly even the day when the expert does his / her report.

There is no rule preventing the lawyer working with the expert to assist in drafting, and I personally encourage this practice as nothing trumps face to face dialogue.

In *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, Lindgren J said:

"Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s 82(1) of the [Native Title Act 1992 (Cth)], the requirements of s 79 (and of s [55] as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence."

Of course, the views must be those of the expert, not the lawyer. The lawyer can assist by *structuring* the report into e.g.:

- Question briefed;
- Issues in the litigation;
- Matters which the expert is instructed to assume (i.e. which need to proved by other evidence e.g. that financial records were not kept properly and that income was understated);
- Factual matters which the expert themselves must determine (e.g. recreating a set of accounts form primary records such as Z statements form a restaurant till);
- Expression of expert opinion;
- Acknowledging the Code of Conduct;
- Attaching a CV so as to demonstrate relevant experience (NOT a standardised CV but one tailored to show relevant expertise);
- Taking Occam's razor to the ream of limitations and exclusions that many experts wish to append, which dilute the report;
- Attaching a complete list of material reviewed eg witness statements; bank statements; financial records;
- Noting *carefully* any aspect where further inquiry is required and hence qualification called for.

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