

“Isn't it obvious ?”

This paper revisits the role of an expert accounting witness, as viewed by the Courts, in light of the recent decision in *Quick v Stoland* (1), though the question of insolvency considered in that case is not considered here .

In that decision, the admissibility of an accounting expert's evidence was questioned, where an expert “seeks no more than to state what is otherwise obvious from the books and records of the company”(2).

This review is also timely in light of the various submissions on the use of experts in technical cases (3).

The role of an expert witness

In our view, expert witnesses should always ask themselves the question, “how can I assist the Court, in matters that it could not adequately resolve itself?”. In certain situations, the Court has to depend upon expert evidence to give it “a sure lead into an area of learning or experience in which the Court has no direct experience, let alone understanding.”(4)

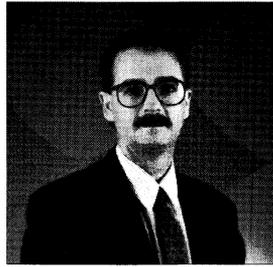
The nature of expert evidence, as distinct from witness evidence, is that it requires specialist knowledge, study or training, or experience.

Some courts distinguish between accountants who give evidence on behalf of parties, and expert witnesses. In *Kizquari v Prestoo* (5), Young J (at pg 609) refused to elevate the accountant's evidence to “expert witness status”, though his Honour accepted the accountant's evidence as “relevant and constructive”.

Although theoretically there is no formal training required to be an expert in Court (other than those that determine the area of expertise!), those who fail to appreciate the privileged role of expert witnesses, and duty to the Court, will incur the Court's wrath. As von Doussa J commented in relation to one expert's report:- “the whole exercise bordered on being farcical.” (6)

Further, in commentary concerning the lack of objective analysis required of an expert, his Honour stated that the expert's evidence :- “suffers from the same unbridled optimism and exaggeration”(as the plaintiff's evidence), (7)

It is precisely the possession of specialist knowledge or experience in an area (the



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“expertise” and “area of expertise” rules) that enables expert evidence to be received by a Court. As stated by Branson J :-

“In other than obvious cases, a statement of a qualified accountant...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 which is substantially based on specialised knowledge...”(8)

However, the expert must bring more to the exercise than providing a financial analysis that a Court could do for itself, as summarised by Emmett J:-

“An opinion based on figures derived from balance sheets is not based upon specialised knowledge based on training, study or experience, and would not be admissible...”(9) and Finkelstein J, at 141 :-

“the position is different where some analysis of the books and records is required in order to draw 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.”(10)

A key factor in admitting an expert's evidence into Court is the satisfaction of a common law rule that the evidence depends upon proper disclosure (and proof) of the factual basis of the opinion. (11)

The issue of proper disclosure has been taken up in the recently issued *Guidelines for Expert Witnesses* issued by the Federal Court of Australia (and adopted in principle by the Supreme Court Rules in South Australia) requiring an expert, *inter alia*, to give details of all material used and relied upon in preparing an opinion.

However, it is also the case that an expert witness has to deal not only with facts, but also fiction. That is, in the sense that an expert is asked to give an opinion as to

what might have happened, or should have happened, based upon experience or generally accepted principles. Such opinion evidence necessarily must be based upon assumptions, and again, the guidelines referred to above clearly state that all assumptions be clearly identified in the expert's evidence.

Conclusion

Expert evidence – its preparation, presentation, evaluation and legal analysis is becoming a specialisation on its own! (12) Further, corporate accounts and corporate accounting policies have become increasingly complex (13), so much so that inexperienced persons are unlikely to prove capable of forming a correct judgment. (14)

The accounting expert must ensure that opinions are clearly objective and identifiable as to those opinions derived from analysis of the facts, albeit the analysis may or may not have been able to have been done by the Court, and those that reflect more subjective assessments, based upon specialised knowledge and experience. Further, instructing solicitors should review expert's reports and ensure that the above criteria are evident.

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1. *Quick v Stoland Pty Ltd* 29 ACSR 130
2. *ibid*
3. See Law Council of Australia submission to the Federal Court of Australia on The Use of Experts in Technical Cases
4. Madgwick W, *The Lessons of AWA - Australian Lawyers*, November 1996
5. *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ASCR 606
6. *Hannpost v Mita Copiers Pty Ltd* (1996) 67 FCR 416
7. *ibid*
8. *ibid*
9. *Quick v Stoland*, p130
10. *ibid* page 141
11. *Pownall & ors v Conlan Management Pty Ltd* (1995) 12 WAR 370, at 375. Also see (1995) 16 ACSR 227
12. Freckleton I, Selby H, “Experts and their evidence” - *Australian Lawyer*, August 116, page 19
13. *ibid* page 134
14. *ibid* page 134