

update

8 December 2006

Friday Facts: Expert Evidence – Fact or Fiction?

Often an expert will be engaged by a party during the course of litigation to provide an opinion based on their experience and expertise regarding a key aspect of the claim being litigated between the parties.

Since the case of *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 (“*Makita*”) the basis upon which an expert evidence will be received by a Court from an expert has come into question. Parties often argue over the basis upon the expert’s opinion should be accepted by a Court and in particular the facts which need to be proven in order to accept the opinion.

In *Makita* an expert engaged by one of the parties was asked by that party’s solicitors to assume a number of facts in providing his expert opinion to the Court. His Honour Justice Heydon in deciding not to accept the expert’s evidence laid down a number of prerequisites which had to be met in order for opinion evidence to be accepted by the Court.

In particular, His Honour stated that in so far as the expert’s opinion was based on facts which the expert had “observed” those facts needed to be identified in the expert report and they needed to be proven just like any other fact in order for the opinion to be accepted.

Thus, if it was necessary to call witnesses in order to prove the facts which the expert opinion had adopted in preparing their expert report then they needed to be called in order to enable the other side to challenge the evidence being sought to be adduced.

His Honour Justice Heydon took the view that if the facts and documents relied upon by the expert were not strictly proven then the opinion proffered proceeded on a false premise.

Since *Makita* the Courts have none the less grappled with when to allow expert opinion evidence to be admitted. The question that is considered regularly is whether it is necessary for the facts based upon which the expert opinion proceeds to be proven independently, or whether it may be received based on the facts which the expert assumes in giving his or her opinion.

In *ASIC v Rich* (2005) 218 ALR 110 (“*Rich*”), the New South Wales Court of Appeal provided some further assistance in how the expert opinion evidence may conform.

In *Rich* the trial judge found that the expert opinion proffered by an expert as to the solvency of a company was inadmissible on the grounds that it had not stated the “full and real factual basis and reasoning process”.

On appeal however Chief Justice Spigelman stated that:

“The issue for a trial judge is whether the opinion expressed to be based on the facts proved or assumed is correct. In determining this issue, the judge will have regard, amongst other things, to the reasoning process (based on those facts) used by the expert. The mere fact that the expert’s opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence is no reason to exclude the evidence at this stage. The assumed facts may be proved later by other evidence. The fact that the opinion was initially formed or later reinforced by reference to other facts, not said by the expert in his evidence to be proved or assumed, is irrelevant to the question of admissibility. Once the opinion is capable of being based on the proved facts, it is admissible.”

One reason for the evolution of the principles which have arisen in Makita and Rich seems to have been a growing trend by litigants to ask their experts to adopt a set of facts and assumptions which may be more advantageous to the case they are seeking to advance. The result is that the common law has developed to prevent an expert's opinion being proffered without the underlying evidentiary facts upon which the opinion is based being proven.

For more information

For more information, please contact:

- Mary Nemeth, Partner on 03 9321 7810 or 0400 627 048 mnemeth@rigbycooke.com.au

To unsubscribe from this publication

If you do not wish to receive publications of this type from us in the future, please notify us by one of the following methods:

- Send an email to marketing@rigbycooke.com.au
- Send a fax message to "Attention: Rigby Cooke Marketing" on fax number +61 3 9321 7900
- Send a letter to "Attention: Rigby Cooke Marketing", GPO Box 4767UU, Melbourne Vic 3001

Your request to remove you as a subscriber should include the word "unsubscribe" and your full email address to allow us to correctly identify your removal from our lists.

Reprint Permission

Articles in this publication may be reproduced in whole or in part, provided that appropriate recognition is given to the author and the firm, and prior approval is obtained. To obtain approval, please contact Rigby Cooke on +61 3 9321 7852 or email marketing@rigbycooke.com.au.

Disclaimer

This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.

rigbycooke | lawyers

Level 13, 469 La Trobe Street
Melbourne Vic 3000
T 61 3 9321 7888
F 61 3 9321 7900

www.rigbycooke.com.au