

## **Agenda Item 8(b) – Extracts from Relevant Case Law**

The following are some extracts from case law relating to evidence adduced in the context of forensic accounting services.

In respect of the objection the evidence was impermissible as an attempt to inappropriately adduce expert evidence, in *Idyllic Solutions Pty Ltd & Ors – Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 568 (ASIC v Hobbs) states at:

*100 As to the third objection, which overlaps with the second, Mr Southwick made the submission by reference to the document at tab 5 that, by virtue of it being called a "reconstructed bank account", it could be inferred that it required some expertise to be compiled. Mr Clarke disputes this and submits that no particular expertise is required to list a record of what purports to be all of the payments into and out of a certain account and the dates upon which those payments occurred. The arithmetic total of those entries is said not to have required any particular expertise.*

*101 I accept that the extraction of all entries of payments described in a particular way in the underlying documents (and the addition of those amounts) would not involve any particular expertise. That said, in explaining how various schedules were compiled, there seems to be reference in the affidavit to steps taken which involve the application of an assessment or judgment as to how items recorded in the underlying documents are to be treated or interpreted or as to adjustments to be made to reconcile particular entries.*

*102 Insofar as what is being sought to be tendered is an opinion of an expert as to the characterisation of particular entries in the underlying documents or as to the reconciliation of particular accounts, that goes beyond the provision of a summary and would need to be dealt with in the ordinary way that opinions of that kind are to be proven. If there is an argument that this is an opinion that does not require expertise (such that the conclusion can be drawn from proof simply of the underlying facts) then this material could be dealt with by way of submissions at the hearing.*

Scientific facts are discussed in *ASIC v Rich* [2005] NSWSC 149 (ASIC v Rich) at:

*269 There is another category of intermediate propositions in expert reasoning, apart from assumed facts, accepted facts, opinions and expert statements of general application - namely, statements by which the expert gives evidence of facts. In the course of his or her investigations for the preparation of a report, the expert may make a lay observation which is then recorded in the report, or may observe and record something by bringing to bear his or her expertise. Observations of the latter kind have been described as "scientific facts": Phipson on Evidence (15th ed, 2003 by MN Howard and others, p 922-3, para [37-10]).*

*270 Consider, for example, the evidence of a valuer recording his or her observation of the presentation of the property being valued, the locality in which it is situated and the attributes of possibly comparable properties; or the evidence of a doctor recording his or her observation of a patient during a clinical examination. Sometimes such evidence does not in any way depend upon the expert's specialised knowledge, and is admissible simply as evidence of a directly observed fact. At other times, the witness's expertise is relevant to the making of the observation, but still, the evidence*

is admissible as evidence of an observed fact. As the learned editors of *in Phipson on Evidence* (15th ed, 2003 by MN Howard and others) say (at p 922-3, para 37-10):

*"Expert witnesses have the advantage of a particular skill or training. This not only enables them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness. ... A microbiologist who looks through a microscope and identifies a microbe is perceiving a fact no less than the bank-clerk who sees an armed robbery committed. The only difference is that the former can use a particular instrument and can ascribe objective significance to the data he perceives. The question of subjective assessment and interpretation which is the essence of opinion evidence hardly enters into the matter at all."*

271 *Such evidence is different from the assumed and accepted facts upon which the expert relies for the purposes of expressing his or her opinion, because this evidence is of the expert's own making. It is not hearsay because it is evidence of the expert's own work and observation, and it is relevant in a "secondary sense", because it forms part of the expert's reasoning process: see *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA* ("The Torenia") [1983] 2 Lloyd's LR 210, at 233 per Hobhouse J.*

272 *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.*

In relation to accountants providing a straightforward summary of financial evidence, ASIC v Rich stated at:

309 *ASIC's cases begin with *Potts v Miller* (1940) 64 CLR 282, where Dixon J said (at 303) that when "books are allowed in evidence or their production is not insisted upon, an accountant's statement of the result of his examination is receivable as the evidence of a person of skill". What the accountant is permitted to do, according to Street CJ in *Lakeman v Finlay* (1959) 59 SR(NSW) 5, at 7, is to "summarise and give his opinion as to the trading results or financial results disclosed by the figures contained in the books which are in evidence". In *R v Hally* [1962] Qd R 214, at 228, Gibbs J said the accountant who has examined "books and accounts" could give evidence of "the effect of their contents". In *Re Montecatini's Patent* (1973) 47 ALJR 161, at 169, he said that when the books are produced, the accountant may "state their general effect".*

310 *These observations seem to envisage a straightforward summary of the financial evidence, rather than an elaborate analysis. Thus, Young J, writing extra-curially, referred to an "expert summary of books and financial records" [emphasis supplied]: "Practical Evidence – Affidavits - Part II" (1982) 66 ALJ 298. In *Spassked Pty Ltd v Federal Commissioner of Taxation (No 2)* (2002) 49 ATR 642, at [13]-[14] Lindgren J referred to *Potts v Miller* as permitting the accountant who has inspected*

*financial records to "summarise their effect" in evidence. So far as one can tell from the law reports, the evidence to which the older cases was directed was not the kind of elaborate analytical report that is under consideration the present case.*

In relation to accountants providing a summary of a company's financial records, *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] FCAFC 55 stated that:

*203. The exercise carried out by Mr Acton 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 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.*

*204. In Australian Securities and Investments Commission v Rich* [2005] NSWSC 149; (2005) 53 ACSR 110, Austin J when speaking of forensic accountants said at [272]:

*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.*

*205. Mr Acton's evidence was almost entirely factual and consisted no more than identifying the appropriate costs and margins relating to both the defective and non-defective goods. The evidence was not of the kind that Austin J rejected in *Dean-Willcocks v Commonwealth Bank of Australia* (2003) 45 ACSR 564 which consisted of conclusions which were not for an expert but for the Court to reach.*