



Express law fast track information for clients

10 March 2005

Admissibility of expert evidence

Expert evidence may be found inadmissible in circumstances where the expert has not fully articulated the factual basis for his or her opinions, particularly where the expert has participated in an earlier advisory capacity prior to engagement as an expert. If an expert has been engaged to provide advice during investigations, then subsequently is engaged to provide expert evidence in litigation, there is a risk that the expert evidence will be found inadmissible.

ASIC v Rich & Ors

New South Wales Supreme Court, 7 March 2005, [2005] NSWSC 149

Background

ASIC brought civil proceedings against the defendants in respect of the failure of One.Tel Ltd at the end of May 2001.

ASIC intended that evidence about the financial position of the company and the significance of documentary records would be given by an expert witness. The expert had prepared a report about which Austin J at [8] observed: '[it] is a central plank of ASIC's case against the defendants, and its removal is likely to cause substantial damage to the structure of the case.'

The objections to the admissibility of the expert's report turned on two issues. The first was alleged formal defects in the report, which the defendants argued meant that the report did not satisfy the statutory requirements of the *Evidence Act 1995 (NSW)*. The second related to the expert's relationship with ASIC.

The Court found that the expert and his staff had been extensively involved in assisting ASIC with its investigation of One.Tel from the commencement of the investigation. The expert had access to transcripts of examinations conducted by ASIC and he and staff from his firm attended examinations. The expert was involved in planning sessions about identifying individuals for examinations by ASIC, and he had access to a large volume of documents from the investigation. He and his team assisted in the preparation of the statement of claim and the expert attended conferences with counsel for ASIC. All of this occurred prior to the time the expert was engaged to provide his independent expert opinions.

In a detailed judgment, the Court held that it was more likely than not that the expert did not exclude, when forming the opinions set out in his expert's report, information acquired by him during the investigation phase and by his staff who continued to assist ASIC. Even if it could not be established that the expert took into account excluded information, there would be a substantial risk that it may have happened.

The Court therefore found the expert had, albeit most likely unconsciously, relied on excluded materials and consequently not fully articulated the factual basis on which he formed his opinions and his reasoning process. Accordingly his report did not satisfy the statutory requirements of the *Evidence Act 1995* (NSW) (which in relevant terms is the same as the *Evidence Act 1995* (Cth)).

The Court found that the expert's report was inadmissible in its entirety.

Implications

The decision in *ASIC v Rich & Ors* demonstrates that there can be practical difficulties in persuading a Court that an expert witness has been able to discount, or not take account of, information he or she had access to prior to being engaged as an expert witness. In this case this has resulted in a finding that a key element of the plaintiff's case is inadmissible.

When engaging an expert to provide advice prior to the commencement of litigation, agencies should consider at an early stage if it is likely that expert evidence will be required in any subsequent court proceedings. If it is, thought needs to be given to the nature of the assistance that will be sought prior to litigation and to the nature of the proposed retainer to provide expert evidence, and whether in the circumstances of the case it is appropriate to engage a different person as an expert witness.

Agencies should also be mindful of the Federal Court *Practice Direction: Guidelines for Expert Witnesses* issued on 19 March 2004. It notes in its Explanatory Memorandum that while a pre-existing relationship between an expert and a party to the proceedings will not disqualify an expert from giving evidence, an expert may find it difficult to maintain the requisite level of objectivity where he or she is significantly involved in preparing the case.

Agencies should ensure when engaging expert witnesses that detailed records are kept of what documents and information are provided to the expert, to minimise any uncertainty about the factual basis on which the expert has formed his or her opinions.

Text of the decision is available at:

<http://www.lawlink.nsw.gov.au/scjudgments/2005nswsc.nsf/66950614059df523ca25673900081e8e/fffaf601b14cfb86ca256fba00074a92?OpenDocument>

For further information please contact:

Steven Small
Senior Lawyer
T 03 9242 1311 F 03 9242 1237
steven.small@ags.gov.au

Simon Anderson
Lawyer
T 03 9242 1230 F 03 9242 1237
simon.anderson@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:
<mailto:unsubscribe@ags.gov.au>