

# Is that a fact?

## *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd [2011] FCAFC 4*

### Summary

According to “the opinion rule”<sup>1</sup>, witnesses must state facts, not give opinions. They must speak only to what was directly observed or perceived by them. Experts, on the other hand, can give opinions based on their specialised knowledge<sup>2</sup>. This case considers whether the evidence given by a lay witness was opinion, statements of fact or unparticularised statements of fact. It states that there is a continuum on which facts and opinions sit and that it is difficult to identify when the former passes to the latter. So, what makes a fact a fact and an opinion an opinion? Justice Finkelstein concluded in his minority judgment that:

*“Where evidence in not fully particularised, the dividing line between what is opinion and what is fact is hard to draw and depends on the extent to which the evidence goes beyond the witness’ direct observations or perceptions. While a lack of particularity may affect the weight to be given to the evidence, it does not necessarily render it inadmissible as opinion evidence.”*

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### Background

In 2004, the appellant, a lender, received an application for a loan of \$2.4 million from a commercial property developer (**the client**) who offered real property as security. The appellant engaged the respondent to value the property which it valued at \$4 million exclusive of GST. Relying on the valuation, the appellant lent the amount to the client and the loan was secured by a first mortgage over the property.

The respondent accepted that it over-valued the property and in making the valuation it: (a) breached the terms of its retainer; (b) acted negligently; and (c) contravened s.52 of the *Trade Practices Act 1974* (Cth). It was accepted that if that property had been valued at less than \$4 million, the appellant would not have made the loan to the client.

The client made some payments in discharge of its obligations to the appellant, however it ultimately defaulted on the loan. Consequently, the appellant took possession of the property and sold it for \$2.2 million exclusive of GST.

The appellant claimed damages under two heads:

- Capital loss – being the difference between the \$2.4 million loan and the net proceeds of the sale of the property; and
- Income loss – being the difference between the interest that it would have received from an alternative borrower on similar terms and the interest it actually received from the client.

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At trial, Justice Marshall found that the appellant had suffered no loss. He said that the loss on the loan should be assessed on an aggregated basis, incorporating both lost capital and lost income which resulted in the appellant making a profit on the loan. Also, he said that the appellant had failed to prove it lost any income. Whilst the trial judge admitted the evidence of Mr G, a senior manager of the appellant, who stated that the appellant would have entered into an alternative loan on similar terms if it had not lent \$2.4 million to the client, the trial judge stated that the evidence did not establish the loss claimed.

The appellant appealed regarding the quantum of damages.

### Was the evidence opinion evidence?

The controversial aspect of Mr G's evidence concerned what he said that the appellant would have done had it not lent \$2.4 million to the client. At trial the respondent objected to Mr G's witness statement and renewed this objection on appeal.

One of the grounds of objection was that the evidence was inadmissible by reason of the opinion rule per s 76 of the *Evidence Act 1995* (Cth) which states that: "[e]vidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed". The respondent characterised Mr G's "assertions" as opinions.

The appellant stated that much of Mr G's evidence was as to facts not opinions and, to the extent that it was opinion evidence, it was admissible by virtue of the lay opinion exception per s 78 of the Evidence Act. That section provides that "the opinion rule does not apply to evidence of an opinion expressed by a person if: (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event".

The term opinion is not defined in the Evidence Act. However, in the context of the general law of evidence it is often defined as "an inference from observed and communicable data"<sup>3</sup>.

Justice Finkelstein, in his minority judgement, stated:

*"It has often been observed that the distinction between evidence of fact and evidence of opinion is difficult to draw."*

*"One problem with the distinction is its artificiality; as the Australian Law Reform Commission (ALRC) has noted, there is really a continuum between fact and opinion, the former passing imperceptibly into the other at some point..."*

Justice Finkelstein summarised that the essence of the respondent's complaint was that Mr G's evidence involved assertions which were not fully particularised. For example, the respondent said that Mr G drew an inference by saying that, after making the loan to the client, the appellant rejected other loans amounting to \$2.4 million, without particularising any specific loans rejected. Justice Finkelstein stated:

*"Where evidence is not fully particularised, the dividing line between what is opinion and what is fact is not always easy to draw and clearly depends on the extent to which the evidence goes beyond the witness' direct observations or perceptions. While a lack of particularity may affect the weight to be given to the evidence, it does not necessarily render it inadmissible as opinion evidence."*

Justice Finkelstein ruled that most of Mr G's evidence was clearly statements of fact rather than opinion. Mr G put forward two further propositions that the appellant:

- (1) had an opportunity (or opportunities) to make a loan (or loans) on similar terms to the client loan; and
- (2) would have taken one of those opportunities, had it not lent money to the client.

Justice Finkelstein ruled that the first proposition was simply an unparticularised statement of fact. In relation to the second proposition, Justice Finkelstein relied on a line of Australian authority which suggests that evidence as to what a person would have done in a hypothetical circumstance is not an opinion for the purposes of s 76 of the Evidence Act.<sup>4</sup> Consequently, Justice Finkelstein ruled that Mr G's evidence was not opinion for the purposes of s 76 of the Evidence Act and it was therefore unnecessary for the court to consider whether the evidence would nonetheless be admissible under the lay opinion exception (under s 78). Justice Jacobson and Justice Besanko agreed as to the admissibility of Mr G's evidence.

## Court guidelines and rules

### Australia

Practice Note CM 7 of the Federal Court of Australia: *Expert Witnesses in Proceedings in the Federal Court of Australia*<sup>5</sup> sets out the guidelines for expert witnesses and is intended to facilitate the admission of opinion evidence. In respect of the form of the Expert's Report in relation to opinions, facts and assumptions it states:

2.1 An expert's written report must comply with Rule 23.13 and therefore must:

...

(e) set out separately each of the factual findings or assumptions on which the expert's opinion is based;

(f) set out separately from the factual findings or assumptions each of the expert's opinions; and

(g) set out the reasons for each of the expert's opinions; ...

2.2 The expert must also state that each of the expert's opinions is wholly or substantially based upon the expert's specialised knowledge<sup>6</sup>.

2.5 If, after exchange of reports or at any other stage, an expert witness changes the expert's opinion, having read another expert's report or for any other reason, the change should be communicated as soon as practicable (through the party's lawyers) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.

2.6 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

### Singapore

The Rules of Court of the Supreme Court of Singapore state the following in relation to the requirements of expert evidence (O. 40A, r. 3) in relation to opinions, facts and assumptions:

(2) An expert's report must —

(c) contain a statement setting out ... the basis upon which the evidence was given;

## Professional Standards

### Australia

The Accounting Professional & Ethical Standards Board ("APESB") in Australia issued APES 215 *Forensic Accounting Services*<sup>7</sup> ("the Standard") effective from 1 July 2009. It sets the standards for Members<sup>8</sup> in the provision of quality and ethical Forensic Accounting Services<sup>9</sup> and has drawn on the requirements of court

guidelines and rules of the various Australian jurisdictions. Paragraph 5.6 of the Standard sets out the following mandatory requirements as to the Report<sup>10</sup> of an Expert Witness<sup>11</sup> in relation to opinions, facts and assumptions:

*Subject to any legal requirements or restrictions, a Member providing an Expert Witness Service shall clearly communicate in any Report:*

...

(f) the opinions formed by the Member;

(g) whether an opinion is provisional rather than concluded, and, if so, the reasons why a concluded opinion has not been formed;

(h) the significant facts upon which the opinions are based;

(i) the significant assumptions upon which the opinions are based and the following matters in respect of each significant assumption:

(i) whether the Member was instructed to make the assumption or whether the Member chose to make the assumption; and

(ii) if the Member chose to make the assumption, then the reason why the Member made that choice;

(j) if the Member considers that an opinion of the Member may be misleading because a significant assumption is likely to mislead, then a statement to that effect and an explanation of why the assumption is likely to mislead;

(k) where applicable, that the Member's opinion is subject to the veracity of another person's Report upon which the Member's Report is based;

(l) the reasoning by which the Member formed the opinions, including an explanation of any method employed and the reasons why that method was chosen;...

In addition, APES 215 includes Appendix 1: Use of the terms "facts", "assumptions" and "opinions" which analyses some examples to assist a Member determine whether a matter is a fact, an assumption or an opinion. It states:

***"Generally a fact can arise where the Expert Witness has applied specialised knowledge but has not applied any significant degree of expert judgement. However, where the Expert Witness applies a significant degree of expert judgement and draws an inference then the result will be an opinion."***

## Singapore

APES 215 is applicable to Members outside of Australia to the extent to which they are not prevented from so doing by specific requirements of local laws and/or regulations<sup>12</sup>. The Institute of Certified Public Accountants of Singapore or any other body in Singapore has not issued a specific equivalent standard to APES 215 and consequently it may act as useful guidance to accountants providing Forensic Accounting Services there.

## Relevance

Witnesses, including expert witnesses, should diligently apply themselves to the question of whether they are referring to a fact, or expressing an opinion. Whilst this case highlights that often there may be difficulty associated with discerning fact from opinion (because there is really 'a continuum between fact and opinion'), guidance on the issue can be found in both court guidelines and rules and professional standards of those acting as an expert witness. One important consideration therefore when selecting an expert (aside from the more obvious matter of the extent and suitability of their specialised knowledge) is the extent to which they are familiar with the relevant guidelines, and their ability to distinguish between assumption, fact and opinion.

For further reading on this case, please refer to the October 2011 issue of **Damages Matters – What is the value of a chance?** (available at <http://www.kordamentha.com/publications>) where we look in more depth at the approaches to formulating damages claims and claims for lost opportunity under the TPA.

Whatever the factual, accounting, financial or e-discovery issues that arise, KordaMentha Forensics' expertise and experience can bring clear thinking, objectivity and effective communication of ideas to help find the facts, understand the relevant issues and clarify the financial and other impacts in a cost-effective way.

## Endnotes

1. S76 of the *Evidence Act 1995* (Cth).
2. Specific exceptions to the opinion rule are listed in the Note to the text of s 76 of the Evidence Act and include lay opinion (s 78) and expert opinion (s 79).
3. <http://www.judcom.nsw.gov.au/publications/benchbks/civil/opinion.html> and <http://www.alrc.gov.au/publications/9.%20The%20Opinion%20Rule%20and%20its%20Exceptions/introduction>
4. Refer to paragraphs 53 to 58 of the minority judgement of Finkelstein J.
5. [http://www.fedcourt.gov.au/how/practice\\_notes.html](http://www.fedcourt.gov.au/how/practice_notes.html)
6. A requirement which was introduced when the Practice Note was updated in August 2011
7. <http://www.apesb.org.au/attachments/APES%20215%20Standard.pdf>
8. Defined in APES 215 in paragraph 2 as follows: "Member means a member of a professional body that has adopted this Standard as applicable to their membership, as defined by that professional body." Professional bodies that have adopted the Standard include the Institute of Chartered Accountants in Australia ("ICAA"), CPA Australia and the National Institute of Accountants ("NIA").
9. Defined in APES 215 in paragraph 2 as follows: "Forensic Accounting Services means Expert Witness Services, Lay Witness Services, Consulting Expert Services and Investigation Services."
10. Defined in APES 215 paragraph 2 as follows: "Report means a written report, affidavit or written statement that is for the purpose of communicating expert evidence or lay evidence in Court."
11. Expert Witness is defined in APES 215 paragraph 2 as follows: "Expert Witness means a Member who has been engaged or assigned to provide an Expert Witness Service. As an Expert Witness, the Member may express opinions to the Court based on the Member's specialised training, study or experience on matters such as whether technical or professional standards have been breached, the amount of damages, the amount of an account of profits, or the amount of a claim under an insurance policy."
12. Paragraph 1.4 of APES 215

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