expert matters

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Sometimes it is best to settle for less

Tenth Vandy Pty Ltd v Natwest Markets Australia Ltd; Thomas v Natwest Markets Australia Ltd [2012] VSCA 103

Introduction

In this edition of Expert Matters, Sally Davitt, a director in our Sydney office, considers a case where an expert admitted to being "reckless" in his quantification of damages in circumstances where his report was alleged to have been used as the basis for a settlement offer.

Background

Mr Thomas operated "The Inn Things", a cafe in Waverley Gardens Shopping Centre in Victoria, through his company, Tenth Vandy Pty Ltd ('the appellant'). The shopping centre was extensively renovated, during which time the café remained open but was not itself renovated.

During the renovation period, Mr Thomas repeatedly requested rent reductions from his landlord as he claimed the renovation was causing him to lose business. There was copious correspondence between the parties over a two year period, relating to both the rental amounts and the state of the café's premises, which the landlord claimed required modernisation. In 1993, Mr Thomas claimed that the business was near to bankruptcy due to the renovations and other changes to the centre.

Tenth Vandy went into arrears on its rent in October 1993. After further correspondence and final demands over a three month period, the landlord repossessed the premises and terminated the lease in January 1994.

Mr Thomas claimed that the landlord[1] had repudiated the lease, causing Mr Thomas to suffer loss and damage, including losing the entire value of the business.

Settlement offers

The landlord made a settlement offer to Mr Thomas of $50,000 in 2001. In 2009, this offer was increased to $250,000. In contrast, Tenth Vandy made the following counter offers (described by the appeal judges as "ridiculous"):

- $1.5 million in 2001
- $2.5 million and, separately, $300 million in 2007[2]
- $60 million in 2009.

Given the evident differences in the settlement offers, the matter proceeded to trial, and the primary judge found that it was unreasonable to refuse the landlord's offer of $250,000. He awarded costs to the landlord[3].

Tenth Vandy lodged an application for leave to appeal this decision on the basis that it had relied upon an expert report which had indicated it may be entitled to recover millions of dollars.

The expert reports

Mr Thomas had engaged an expert, Mr J[4], to provide a report quantifying the appellant's loss. Mr J quantified the loss of profits up to the forfeiture of the lease (January 1994) at approximately $105,000. However, in total, Mr J quantified the appellant's loss at between $3.7 million and $5.2 million, of which a large proportion related to "the opportunity loss of not furthering business opportunities"[5].

Mr J admitted on cross-examination that Mr Thomas had told him prior to the preparation of his report that Tenth Vandy's loss should be approximately $12 million. Albeit his final report produced a lower figure, Mr J admitted that he had been "reckless" in reaching the conclusions expressed in his report.

In contrast, the landlord had engaged another expert, Mr M, who prepared a report quantifying:

- loss of profits up the forfeiture of the lease in January 1994 of $8,251, and
- loss of profits to the expiry date of the lease in July 1995 of $59,319.

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Mr M assumed that because the lease would have expired in 1995, that any loss of earnings relating to periods after expiry of the lease should be excluded. He also said that the value of the loss of opportunity to sell the business in 1994 was $nil.

The appeal judges appear to have agreed with Mr M's approach, and dismissed any claim for future loss saying that, given the "*parlous state of the appellant's business before the refurbishment works began and the lack of an option to renew the lease, there was never any reasonable prospect of recovering those sums.*" They also referred to Mr Thomas's claim in 1993 that the business was near to bankruptcy.

Given the appeal judges preferred Mr M's report, which identified losses significantly smaller than those in Mr J's report, Tenth Vandy's basis for the appeal was not convincing, and the appeal judges found that:

> *It is sad that Mr Thomas, an intelligent man, convinced himself that Tenth Vandy's claim justified the ridiculous settlement offers he made to the respondent. …..[the Primary Judge] was entitled to take the absurdity of these counter offers into account….it was clearly open to his Honour to find that it was unreasonable for the appellant to reject the respondent's offer….and to order that the appellant pay the respondent's costs on an indemnity basis.*

Tenth Vandy's application for leave to appeal was therefore refused.

Significance

Given the sums that Tenth Vandy was demanding in settlement, it is unclear whether the matter would have settled prior to trial (or whether an appeal would have been launched) had Mr J followed the requisite professional standards (discussed below). However, this case highlights the dangers of an expert relying on information provided to him without adequate professional scepticism, both in terms of costs to the client, and the reputation of the expert.

While this judgement did not refer to the professional standards that guide expert accountants, if, as Mr J acknowledged, he had been "reckless" in offering his opinions, it would appear unlikely that he met either the Victorian Supreme Court's Expert Code of Conduct or APES215 – the Forensic Accounting professional standard. In particular, APES215 requires that "*A Member shall not knowingly or recklessly make a statement or cause another to make a statement in or in connection with a Forensic Accounting Service that, by its content or by an omission, is false or misleading.*" Further, there are the overriding duties of the forensic accountant to act with professional competence and due care and an obligation not to act as an advocate to their party.

Endnotes

1. At the time of the alleged repudiation, Natwest Markets Australia Ltd (as it is now known) was the mortgagee in possession of the centre.
2. This latter amount was an alternative option referring to "Agreement to forego intended new career". Tenth Vandy claimed in the first hearing that it was clear that some of these offers were not serious, and were meant to indicate that the landlord's offers were derisorily low. The judge said that Tenth Vandy's correspondence did not indicate this, and *"when couched with other material, tends to indicate that the plaintiff was not behaving reasonably".*
3. With a leading law firm and a QC acting for the landlord's lawyers, such a decision would have had significant financial consequences for Tenth Vandy.
4. The name of the expert accountant identified in the Court of Appeal judgment is incorrect.
5. The judgement does not refer to what these other opportunities could be.

Whatever the factual, accounting, financial or eDiscovery issues that arise, KordaMentha Forensic's 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.

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