

Getting The Best From A Single Expert

The Family Law Rules of March 2004 (“the Rules”) provide for the use of single expert witness, unless court approval has been obtained, to prepare an assessment of the value of the matrimonial asset pool particularly when a business or complex corporate structure is involved.

So what can be done when you or your client disagree with the conclusions of the single expert witness?

Rule 15.56 of the Rules enables the party’s to put questions to the single expert witness, in writing, within 21 days of receipt of the expert’s report. However, the questions must be only for the purpose of clarifying the expert’s report and must not be vexatious or oppressive, or require the expert witness to undertake an unreasonable amount of work.

The single expert witness must then answer these questions, again in writing, within a further 21 days, Rule 15.66.

A party to the proceedings may also seek to cross examine the single expert witness at the hearing or trial, Rule 15.0, provided the single expert has been informed in writing at least 14 days before the date fixed for the hearing or trial.

These processes limit the extent to which a single expert witness can be questioned before the hearing. As a consequence of a successful cross examination of a single expert, his or her opinion may be struck out entirely. This could lead to considerable delays and additional costs.

In order to avoid such problems we believe more time should be spent in reaching agreement on the scope of the single expert witness which should be detailed in the joint letter of instruction. **For example the scope should:**

- include a copy of any relevant orders;
- provide the exact names of each party involved and the entities to be valued
- detail when the report is required by;
- advise whether the valuation is to be of the whole entity or the party’s interest therein;

- provide copies of basic financial documents such as ASIC searches, financial statements and income tax returns to enable the expert to provide a realistic estimate of their fees;
- advise the names, and contact details, of other experts appointed to report on such things as the value of plant and equipment, property values and market rentals, etc;
- detail the nature, extent and timing of submissions from each party; and
- advise the required effective date of any valuation.

The benefits of a properly prepared joint letter of instruction include:

- resolving issues that could potentially cause additional dispute between the parties;
- assisting in ensuring that the report sought is obtained when required; and
- reducing the cost of the experts report by reducing the experts need to seek clarification and confirmation from both parties.

In complex or large matters the early use of a shadow expert to can help identify valuation and taxation issues that should be included in the letter of instructions.

Appointments of single expert witnesses are occurring in other jurisdictions and given the potential savings in time and cost that can result it is expected that such appointments will become a more regular occurrence.

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Munday Wilkinson

Our Aim

Munday Wilkinson is a boutique forensic accounting firm.

We offer the legal profession, and others, quality service and technical proficiency commensurate with that of the Big 4.

At the same time we are able to provide a more personalised service as we operate in a framework that enables us to be very responsive to our clients while at the same time delivering a high quality service in a cost effective manner.

Our Services

We have extensive experience in:

- business and company valuations
- quantification of economic loss
- loss of earnings assessments /reviews
- family law investigations, valuations, tax issues for proposed settlements
- fraud reviews and investigations
- due diligence reviews
- professional negligence matters concerning accountants, tax advisors, auditors and directors
- compulsory acquisitions
- solvency issues
- expert determinations
- expert witness services

Munday Wilkinson is Melbourne's largest dedicated forensic accounting firm.

We can provide forensic accounting services for a wide variety of dispute related matters from the small to the large.

Disputes on Sale of a Business

We have been engaged as forensic accountants in numerous matters involving business sales / acquisitions disputes.

Typical areas of dispute relate to:

- Warranties provided to induce the sale.
- Deferred consideration based on future performance.
- Completion accounts to determine the final purchase price.

In order to obtain a higher degree of certainty on the information provided to them purchasers frequently seek warranties on various matters.

The strength of these warranties frequently effect the purchase price decisions.

In the event that there is a dispute over an alleged misrepresentation – the measure of damages is the difference between what was paid for the business and what would have been paid, had the real position been known. We have prepared numerous reports in relation to this particular situation involving representations such as customer numbers, passing traffic, franchise support, performance levels or attributes and stock costing.

When the price or part of the sale price is based on future performance, the risk to the vendor increases due to vendor losing control of business decisions and not being able to verify information on the business after the transfer. Often there are premiums to the purchase price based on the future business reaching set levels of profit. If the terms of how profit is calculated are not clearly defined, disputes frequently arise. In our experience the consistency of application of accounting policies between the vendor and the purchaser is frequently the key issue in such disputes.

Where completion accounts are required to determine the final price, judgemental valuation decisions can impact upon areas such as stock obsolescence, doubtful debts, value of work-in-progress, etc. As these amounts can be manipulated they are frequently the cause of dispute between the parties. Again the key issue in such cases is consistency – are the policies applied to value such items consistent with that in the previous accounts upon which the Agreement was entered?

Asbestos Related Matters – Past & Future Loss of Earnings

Every year hundreds of Australians are discovering that they are victims of asbestosis, a fatal lung disease related to the historical exposure to asbestos. Sadly, in most cases the victim will die within twelve to eighteen months after diagnosis of the disease.

Depending upon the victim's age at the time of diagnosis, many are still active participants in the work force with an expectation that they would have continued to work and earn an income for many years to come.

After consultation with their lawyers many people diagnosed with asbestosis find that they are able to make a claim for damages including compensation for their loss of earnings and other employment related benefits.

The employment situation of each victim is unique and variables that need to be considered include the nature and extent of income received and the number of years the victim had expected to work until retirement.

In many cases the calculation of the lost future earnings can be relatively straightforward. For example, a 62 year old male earning an after tax income of \$1,000 per week who had an expectation that he would have retired at age 65. In such cases actuarial life tables can be utilised to calculate the present value of the expected stream of income.

Difficulties in calculating the past and future losses can arise in circumstances where the plaintiff is:

- self employed
- owns and operates a business or professional practice
- is relatively young with expectations of future salary increase
- an employee remunerated on a commission basis and/or paid regular and variable bonuses
- an employee receiving non cash benefits

Other difficulties arises where the plaintiff had intended to alter his or her current working structure some time in the future and move to part-time employment prior to retirement.

Every situation requires careful individual examination to ensure that all variations and contingencies are considered.

In difficult cases our analytical skills as forensic accountants are often sought. The following cases illustrate some of the variables we have encountered in the preparation of expert reports in asbestos related matters:

- a motel owner operator who, due to illness, was forced to sell the business earlier than expected, incurring a loss on sale
- an engineer who had received regular annual salary increases and had an expectation of future real increases
- a self employed plumber with historically low earnings not indicative of future earning potential
- a senior computer industry executive remunerated based upon large but fluctuating sales commission and detailed industry formulas
- an owner of a medium sized business who was unable to sell his business on the same basis as it was operated by him due to the loss of non transferable agency agreements
- a real estate agent with large but variable commission income based upon commercial real estate developments
- a full time employee with 'after hours' use of his employers plant & equipment to manufacture products for sale on his own account
- a full time employee on minimum award rates receiving variable production and attendance bonuses

When briefing a forensic accountant in asbestos related matters lawyers for the plaintiff need to provide the following instructions:

- if the plaintiff is still working the expected date the plaintiff will cease working and whether or not they are receiving sick pay from their employer
- if the plaintiff has already stopped working the date employment ceased and whether there were any period of sick leave taken without pay or any social security payments or other benefits received since ceasing work.

What's Been Happening

Since our last newsletter, we have continued to be involved in a wide variety of forensic accounting and valuation matters, including:

Provision of expert evidence in the:

- Federal Court on the quantification of losses incurred by a transport business.
- Federal Magistrates' Court on the shareholders loans and tax consequences of such loans.
- Family Court as a single expert on the value of a variety of businesses.

Assisting in mediations and compulsory conferences at:

- VCAT on the quantification of losses incurred as a result of a compulsory acquisition of part of the land used by a tyre retail business.
- Family Court on the value and composition of matrimonial asset pools.

Appointed to provide expert determinations in disputes involving:

- The management fee to be charged under an agreement between an AFL Football Club and management entity in relation to club owned venue.
- The value of a shareholding in a computer software business.

Preparation of valuations as a single expert for Family Court proceedings for the following businesses:

- Manufacturer and distributor of dairy equipment and ancillary products
- Retailer and Wholesaler of men's clothing
- Three accountancy practices
- Two medical practices and service entities
- Consulting engineer
- Recruitment company
- Audio visual importer and retailer
- Local and line haul transport operators
- Fruit and vegetable wholesaler
- Real estate agency
- Specialist consultancy practices
- Telecommunications retailer
- Earth moving and sand mining
- Precision engineer
- Property developer
- Plant hire
- Restaurant
- Building and Electrical contractors
- Data and Optic cabling
- Limousine service
- Body corporate manager

Preparation of quantifications of loss and damage reports for the following businesses:

- Skydiving and joy flights.
- Solicitor.
- Mortgage finance lender.
- Milk product distributor.
- Catering and entertainment business.
- Night club/restaurant.
- Property investment company.

Assessing the loss of earnings as a result of personal injury, particularly in regard to asbestos victims including:

- Electrical manufacturers agency business.
- MRI door manufacturing business.
- Cleaning franchise.
- Caravan assembler – assessment bonuses.
- Occupational health and safety co-ordinator.

Conducting fraud investigations:

- Defalcation by manipulation of payroll records and EFT transactions at a specialised manufacturing business owned by large international company.
- Theft from an ATM at a university bookshop that operated at two campuses.

Alleged manipulation of ownership of assets in a deceased estate.

Ongoing investigation into a professional income protection insurance policy dispute involving a major Australian insurance company and a medical practitioner.

Presentation of our third annual lecture on Dispute Analysis at a post graduate course at The University of Melbourne.

Further Information

If you would like further information regarding this newsletter or our services, please contact either Russell Munday, Bruce Wilkinson or Paul Spence at:

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