Appointing and Challenging the Expert in Family Law Business Valuations

Suzanne Delbridge
Director – Delbridge Forensic Accounting

June 2023

Introduction

The challenges of a family law property matter are inarguably many and varied, and the time and cost incurred in the valuation process can be extensive, to say the least. There are numerous rules and regulations to guide the valuation process[1], and a level of expertise should be reasonably expected of the expert retained. Nevertheless, the parties may be lumbered with a valuation report that is open to, or should be, challenged. This paper seeks to both explore how to effectively approach such a situation, and also provide some insight as to how to avoid such a predicament in the first place.

The importance of APES 215

In the event that an expert is required in a family law matter to determine the value of a business conducted by one of the parties, or equity interest therein, it is essential to consider who should, and who should not, be appointed to complete that task.

For the purpose of this paper, I assume that the business valuation is required to resolve the property dispute, and that the expert is an appropriately qualified accountant, and not a business broker or other professional holding themselves out as being expert in business valuation.

[1] I acknowledge that the readers of this paper are likely to be located across Australia, and as such the rules of both the Federal Circuit and Family Court of Australia (the "*Family Law Rules 2021*") and the Family Court of Western Australia (the "*Family Court Rules 2021*") will be relevant. I have endeavoured to reference both sets of rules throughout the paper and trust that the referencing does not create unintended confusion. The FCFCoA rule is stated first, and then the FCoWA rule.

Accounting Professional and Ethical Standard "**APES 215 – Forensic Accounting Services**" was issued in December 2008, with its latest revision in July 2019 (commencing 1 January 2020). https://apesb.org.au/wp-content/uploads/2020/03/Revised_APES_215_July_2019.pdf
The standard is mandatory for Members of Chartered Accountants Australia and New Zealand, CPA Australia, and any other accounting professional body that adopts the standards (the "Member/s"). As such, it would be expected (in most circumstances) that the affidavit verifying the expert's report[2] would explicitly acknowledge compliance with APES 215. It is therefore useful to consider the requirements of the standard, and how those requirements might impact the valuation evidence obtained, and /or open the door to challenge.

Members must be guided by the "spirit" of the standard, not just the words, and the standard applies *regardless of whether the forensic accounting service or expert witness service was of that nature (ie forensic or expert) when the work commenced*. All too often we see cases where a business valuation was obtained from the incumbent accountant soon after separation and, when the matter fails to settle early on, it is followed by years of argument, and a mountain of costs, when one party is wedded to the value and the other party disputes it. Once familiar with the requirements of APES 215, it will be evident that the incumbent accountant should decline to value the business in the first place.

For the purpose of the standard, "Forensic Accounting Services" means Expert Witness Services, Lay Witness Services, Consulting Expert Services and Investigation Services, and "Expert Witness Service" means a Professional Activity provided in the context of "Proceedings" to give expert evidence in a Report or, in certain circumstances, orally.

"Proceedings" means a matter before a Court, or a matter which the Member has a *reasonable expectation will be brought before a Court*[3], or a matter in which the Member is undertaking Professional Activities to help a Client or Employer make an assessment as to whether a matter should be brought before a Court.

---

2 ***Family Law Rules 2021*** - Chapter 7, Rule 7.21(2); ***Family Court Rules 2021*** – Part 15, Rule 287(2)

3 The timeframe for considering compliance with APES 215 is earlier than **Rule 7.18(4)** (**Rule 284(4)**) which states that the expert's duty to the court arises when instructions are received (Rule 713/Rule 279) or the expert is informed that they may be called to give evidence

Relevantly, in the context of a family law matter, that may journey from informal settlement discussions, to mediation, to trial or arbitration, "Court" means:

- any body so described;
- all other bodies exercising judicial or quasi-judicial functions;
- professional disciplinary tribunals;
- industrial and administrative tribunals;
- statutory or parliamentary investigations and inquiries;
- royal commissions; and
- arbitrations and mediations.

A member providing a Forensic Accounting Service has the following Fundamental Responsibilities:

- Public interest; and
- Professional Independence; and
- Professional competence and due care; and
- Confidentiality

In terms of Public Interest, a Member shall be, and be seen to be, free of any interest which may be regarded as being incompatible with the fundamental principles of Section 110 Integrity and Section 120 Objectivity of APES 110 – Code of Ethics for Professional Accountants.

Independence is a two-pronged requirement, comprising both:

(a) *Independence of mind* - the state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgement, thereby allowing an individual to act with integrity, and exercise objectivity and professional skepticism; and

(b) *Independence in appearance* - the avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude that a Firm's, or a Member's integrity, objectivity or professional scepticism has been compromised.

To my knowledge, there is no requirement at law that an Expert Witness be free of any relationship with parties to Proceedings. For example, there is no legal prohibition on a Member in Public Practice acting as an Expert Witness for a Client for whom the Member provides other Professional Services. In such circumstances, a Member who is providing an Expert Witness Service shall disclose all matters in the Member's Report that would assist the Court to assess the degree of the Member's Independence.

However, great care should be taken in assessing the risk, and potential fallout, of appointing an Expert Witness where the Independence test is not met. Failure to meet the independence test may result in the evidence being given no weight, let alone add significantly to the time and cost burden of the property dispute.

While it would be an odd case for a single expert appointment to be made if the independence test is not met, in my opinion the same considerations must be made in appointing an adversarial expert.

I pause at this juncture to consider whether there is a difference between an "adversarial expert" and "shadow expert", as the terms are often used interchangeably.

If there is a differentiation to be made, and I think there is, I suggest that a shadow expert might be engaged earlier, and work quite closely with their instructing party, with there being no intention that they would prepare a report for filing in the proceedings. For example, a shadow expert might be retained by the party who has less knowledge of the business/structure, for the purpose of reviewing and explaining financial statements, considering the reasonableness of responses to be given to the single expert's queries, reviewing a draft report, advising on settlement proposals, and the like. On the assumption that the shadow expert would not ordinarily become a witness in the case[4], it may be uncontroversial for an existing compliance accountant to undertake the shadow role, *provided of course that they have the expertise to do so, and do not frustrate the process*.

4 See ***Forsburg and Stubbs*** (2019) FCCA 1884, where Judge Betts considered whether a shadow expert property valuer could be later appointed as an adversarial expect in the case

I also acknowledge that in complex property cases, the incumbent accounting firm, if not the accountant personally, may be best equipped to provide shadow expert services that may be required by the business owner party, given their existing knowledge of the business and structure.

However, in the majority of matters, the involvement of the incumbent accountant should be limited to assisting with provision of the source materials required to allow the party to meet their disclosure requirements, and to facilitate the efficient completion of the expert's report.

Alternatively, an adversarial expert may be retained for a discrete task, such as critiquing a single expert report, drafting questions, and if necessary, preparing an alternate valuation. The adversarial expert would be retained in the knowledge that a report may be required to be filed in the proceedings, if permission is given by the court to do so (more on that below). Obviously, the larger and more complex the property pool, the more likely it is that there might be a single, shadow and adversarial expert. This is usually problematic in smaller matters where the financial capacity of the parties to fund more than one expert is limited. In no circumstances should an adversarial expert be an incumbent / ongoing accountant.

The fundamental requirement for the accountant to demonstrate Professional competence and due care generally requires the Member to have specialised knowledge derived from training, study or experience[5].

Where a Forensic Accounting Service, or part thereof, requires the consideration of matters that are outside a Member's professional expertise, the Member shall seek expert assistance or advice from a suitably qualified third party on those matters or decline all, or that part of, the Forensic Accounting Service. Where the Member relies upon the advice of a third party, the Member shall disclose in any report issued by the Member the name and qualifications of the third party and the area in the report where the third party advice has been obtained.

[5] Consistent with section 79 of the *Evidence Act 1995*

Examples that often occur in the context of a valuation for family law purposes would be the valuation of real property (including the assessment of commercial rent), valuation of plant and equipment, vehicles and the like, and assessment of commercial remuneration of the owner operator.

In addition to the requirements of the relevant family law rules[6], APES 215 echoes the following for a Member who is acting as an Expert Witness:

(a) the paramount duty to the Court which overrides any duty to the Client or Employer;
(b) a duty to assist the Court on matters relevant to the Member's area of expertise in an objective and unbiased manner;
(c) a duty not to be an advocate for a party; and
(d) a duty to make it clear to the Court when a particular question or issue falls outside the Member's expertise.

APES 215 also contains specific directives regarding false or misleading information and changes in opinion. A Member must 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, if a Member becomes aware that an opinion expressed, or other evidence given by the Member in a report or in oral evidence was based on information that was false, misleading or contained material omissions and that situation has not been subsequently disclosed in a report or in oral testimony, the Member shall promptly inform, as appropriate, the legal representative of the client, the employer or the Court of the situation. The Member shall also consider whether it is necessary to issue a supplementary report, which dovetails the requirements under the family law rules[7].

In addition to the APES 215 requirements, the "**APES 225 – Valuation Services**" professional and ethical standard reiterates the fundamental requirements of APES 215 and the Independence requirements are the same.
https://apesb.org.au/wp-content/uploads/2020/03/Revised_APES_225_July_2019.pdf

[6] ***Family Law Rules 2021*** – Rule 7.18 (1), (2), (3) and ***Family Court Rules 2021*** – Rule 284 (1), (2), (3)
[7] ***Family Law Rules 2021*** – Rule 7.18 (5) and ***Family Court Rules 2021*** – Rule 284 (5)

APES 225 sets out a comprehensive list of the inclusions required in a valuation report, including sufficient detail of the valuation calculations to allow a reader to understand how the Member has determined the conclusion. The requirements are more comprehensive than those set out in **Rule 7.22** (**Rule 288**). The readers of this paper may find this a novel requirement, given many valuation reports are incredibly difficult to follow, with insufficient workings or transparency to allow the reasoning for the conclusion to be understood.

APES 225 requires the Member to gather sufficient and appropriate evidence by such means as inspection, inquiry, computation and analysis to provide reasonable grounds that the valuation report and the conclusions therein are properly supported.

When determining the extent and quality of evidence necessary, the Member must exercise professional judgement, considering the nature of the valuation, the type of valuation service and the use to which the valuation report will be put. **Keep in mind, however, that the valuation is not an audit**.

Family Law Rules 2021 / Family Court Rules 2021

Chapter 7 of the ***Family Law Rules 2021***, (FCFCoA)[8] and **Part 15, Division 5** of the ***Family Court Rules 2021*** (FCoWA)[9], thankfully have materially consistent requirements, and, from an expert's perspective, they appear to operate in largely the same way.

The purpose of Part 7.1 per **Rule 7.02** (and Division 5 per **Rule 268**) is as follows:

(a) to ensure that parties obtain expert evidence only in relation to a significant issue in dispute;

(b) to restrict expert evidence to that which is necessary to resolve or determine a proceeding;

(c) to ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness;

8 https://www.legislation.gov.au/Details/F2021L01197

9 https://www.legislation.wa.gov.au/legislation/prod/gazettestore.nsf/FileURL/gg2021_144.pdf/$FILE/Gg2021_144.pdf?OpenElement

(d) to avoid unnecessary costs arising from the appointment of more than one expert witness;

(e) to enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, if that is necessary in the interests of justice.

While a refresh on the rules in their entirety might be of benefit, this paper will focus on those rules that are relevant to the topic of Appointing and Challenging the Expert. The single expert rules have now been in play for around 18 years, and a comprehensive knowledge of the requirements of the rules should be held by any practitioner regularly involved in family law property matters. Reference to the "bad old days", being prior to the *Family Law Rules 2004*, is made in topical judgements, when permission is sought for more than one expert in a case[10].

Often the issues that arise in a valuation report have their genesis in the instructions given, the communication with the expert along the way, and disputed factual matters. The latter is a big issue in the current environment of pandemic affected trading results, and contention as to the path back to normality (if there is such a thing).

The rules provide a framework which, if followed, is effective in facilitating the efficient / effective completion of an expert valuation report.

If the parties are able to agree on the appointment of a single expert, they do not need the court's permission to tender a report or adduce evidence from the single expert – Rule 7.03(2) (Rule 269(2)).

There is a divergence between the *Family Law Rules 2021* and *Family Court Rules 2021* when it comes to communication with the expert, with the requirements of Rules 7.03(3) and (4) not found in the WA rules:

(3) A party must not communicate unilaterally with a single expert witness, except as permitted by these Rules.

[10] For example, Forsburg & Stubbs (2019) FCCA 1884

(4) Any communication between a party and a single expert witness must, at the same time, also be provided to all other parties engaging that single expert witness, except as permitted by these Rules.

Per Rule 7.05 (Rule 271), helpfully the court may, in relation to the appointment of, instruction of, or conduct of a proceeding involving a single expert witness, make an order, including an order:

(a) requiring the parties to confer for the purpose of agreeing on the person to be appointed as a single expert witness; or

(b) that, if the parties cannot agree on who should be the single expert witness, the parties give the court a list stating –

  (i) the names of people who are experts on the relevant issue and have consented to being appointed as an expert witness[11]; and

  (ii) the fee each expert will accept for preparing a report and attending court to give evidence[11]; or

(c) appointing a single expert witness from the list prepared by the parties or in some other way; or

(d) determining any issue in dispute between the parties to ensure that clear instructions are given to the expert; or

(e) that the parties –

  (i) confer for the purpose of preparing an agreed letter of instructions to the expert; and;

  (ii) submit a draft letter of instructions for settling by the court; or

(f) settling the instructions to be given to the expert; or

(g) authorising and giving instructions about any inspection, test or experiment to be carried out for the purposes of the report; or

(h) that a report not be released to a person or that access to the report be restricted.

[11] Notwithstanding, we regularly receive instructions in matters, annexing orders pertaining to the appointment, that we have no prior knowledge of, and certainly have not provided a fee estimate or confirmed availability or timeframe for the report

As noted already, often the issues that arise in a valuation report have their genesis in the instructions given, the communication with the expert along the way, and disputed factual matters. This is interesting in the context of the requirements of Rule 7.13 (Rule 279), which includes the following:

(1) All instructions to an expert witness must be in writing and must include:
    (a) the issues about which the opinion is sought; and
    (b) a description of any matter to be investigated, or any experiment to be undertaken or issue to be reported on; and
    (c) full and frank disclosure of information and documents that will help the expert witness to perform the expert witness's function.
(2) If a single expert witness is appointed, the parties must give the expert an agreed statement of facts on which to base the report.
(3) However, if a single expert witness is appointed and the parties do not agree on a statement of facts:
    (a) unless the court directs otherwise, each of the parties must give to the expert a statement of facts on which to base the report; and
    (b) the court may give directions about the form and content of the statement of facts to be given to the expert.

Notwithstanding the requirements in the rules, the quest for joint instructions, documents (ie *"full and frank disclosure of information and documents that will help the expert witness to perform the expert witness's function"*) and an agreed statement of facts is an endless one. It is also interesting to observe that many of the reported decisions pertaining to the appointment of another expert cite information being given to an adversarial expert that was not made available to a single expert[12]. Surely it would be more effective for a single expert to prepare the report under two scenarios, taking into account the competing facts, than the alternative of having a cast of experts involved, with an apples v oranges situation emerging?

[12] See ***Neales & Neales*** (2021) FamCA 525 and ***Helinski and Bassett*** (2021) FCWA 244

Family law practitioners are uniquely placed to guide the process, and keep their client (and their compliance accountant) on track when it comes to the provision of information required by the expert. A helpful practitioner will review the response compiled by the party/accountant and at least cross check it against the request list from the expert. A not so helpful practitioner will sit on the sidelines while incomplete / rubbish responses are provided, that invariably result in the end cost being higher, and the report open to challenge.

Contents of the expert's report

Pursuant to Rule 7.22 (Rule 288):

(1) An expert's report must:

(a) state the reasons for the expert witness's conclusions; and

(b) include a statement about the methodology used in the production of the report; and

(c) include the material referred to in subrule (2) in support of the expert witness's conclusions.

(2) For the purposes of paragraph (1)(c), an export's report must include the following in support of the expert witness's conclusions:

(a) the expert witness's qualifications;

(b) the literature or other material used in making the report;

(c) the relevant facts, matters and assumptions on which the opinions in the report are based;

(d) a statement about the facts in the report that are within the expert witness's knowledge;

(e) details about any tests, experiments, examinations or investigations relied on by the expert witness and, if they were carried out by another person, details of that person's qualifications and experience;

(f) if there is a range of opinion on the matters dealt with in the report—a summary of the range of opinion and the basis for the expert witness's opinion;

(g) a summary of the conclusions reached;

(h) if necessary, a disclosure that:

(i) a particular question or issue falls outside the expert witness's expertise; or

(ii) the report may be incomplete or inaccurate without some qualification and the details of any qualification; or

(iii) the expert witness's opinion is not a concluded opinion because further research or data is required or because of any other reason.

The door will be wide open for challenge of the expert report if the above requirements are not met, together with the requirements of APES 225 Valuation Services[13].

Some experts may release a draft of their report for review of factual accuracy prior to it being finalised, or the instructions given may compel them to do so. This is the first opportunity to ensure that the report meets the reporting requirements, and if the matter is complex, is the time to have the shadow expert review the report for reasonableness. However, the release of a draft is NOT the time for questions, alternative scenarios or cross-examination. It is an opportunity to make sure that the factual information that forms the basis of the expert's opinion is both complete and accurate, and correctly interpreted by the expert.

Timing is everything in these situations. If you are hoping to use a particular expert as your shadow or adversarial expert, retain them early (I would suggest at the same time as the single expert is retained) and keep them informed of the progress of the single expert report and likely timing of release of the draft report. It is also useful to ensure that the shadow expert receives all the material given to the single expert, and not in one mammoth production of documents along with the draft report. It is obviously frustrating to receive a long awaited single expert report and then learn that your desired shadow expert is unavailable. If the shadow expert is aware of the matter from the outset, and already familiar with the issues in the case, it would be difficult for them to decline to review the draft when it materialises, even though there may be a brief window of time available.

[13] APES 225 – at 5.2

Clarification of the single expert report

After the release of the single expert report, there is an opportunity to clarify the content of the report. First by way of conference (Rule 7.25 (Rule 291)) and secondly through the asking of questions (Rule 7.26 (Rule 292)).

In my experience, parties rarely avail themselves of an opportunity to have a conference with the expert after the release of the report – I recall having participated in just one (!) despite preparing hundreds of reports every year. This seems to me to be a lost opportunity, which if used properly could go a long way to resolving any concern and achieve clarification of any aspect of the report. In view of the flexibility that is afforded per the rules, greater use of the rule should be made.

Rule 7.25 (Rule 291) Conference:

(1) Within 21 days after receiving the report of a single expert witness, the parties may enter into a written agreement about conferring with the expert witness for the purpose of clarifying the report.

(2) The agreement may provide for the parties, or for one or more of them, to confer with the expert witness.

(3) Without limiting the scope of the conference, the parties must agree on arrangements for the conference.

(4) It is intended that the parties should be free to make any arrangements for the conference that are consistent with this Division.

Note: For example, arrangements for a conference might include the attendance of another expert, or the provision of a supplementary report.

(5) Before participating in the conference, the expert witness must be informed of arrangements for the conference.

(6) In seeking to clarify the report of the expert witness, the parties must not interrogate the expert witness.

(7) If the parties do not agree about conferring with a single expert witness, the court, on application by a party, may order that a conference be held in accordance with any conditions the court determines.

If it is intended that questions will be asked of the expert pursuant to Rule 7.26 (Rule 292) it is thoroughly recommended that the proposed questions be drafted by an adversarial expert (or perhaps the shadow expert if there is one already retained) with appropriate training, study or experience in the relevant field, and an understanding of the requirements of the rules as follows:

Rule 7.26 (Rule 2921) Questions to single expert witness

(1) A party seeking to clarify the report of a single expert witness may ask questions of the single expert witness under this rule:
   (a) within 7 days after a conference (if any) is held under rule 7.25; or
   (b) if no conference is held under that rule—within 21 days after the party received the single expert witness's report.

(2) The questions must:
   (a) be in writing and be put once only; and
   (b) be only for the purpose of clarifying the single expert witness's report; and
   (c) not be vexatious or oppressive, or require the single expert witness to undertake an unreasonable amount of work to answer.

(3) The party must give a copy of any questions to each other party.

Again, retain the adversarial expert early, as there is such a short (21 day) window in which to review the report and draft questions. With some experienced experts now declining single expert work there may be added availability of experts to undertake this work.

Just as the conference with the expert is not an opportunity for "interrogation", the questions are not an opportunity for cross examination, alternative scenarios, a valuation update, or *"what if the world was flat"* type questions (we have seen them all!).

The single expert can object to answering the questions (Rule 7.27(3) (Rule 293(3)) and if that is the case, the expert must state the reason for the objection or inability in the document containing the answers.

In my experience a family law practitioner who knows the rules will raise an objection when the questions raised by the opposing party clearly fall outside of the rules. This often comes as a welcome relief, as there is a level of discomfort as an expert having to remind the party asking the questions of the content of the rules.

There can be a degree of ambiguity in the terms "clarification", "vexatious or oppressive" and "unreasonable amount of work", with the latter being relative to the complexity of the valuation report.

Watts J, in ***Picton & Picton*** (2009) FamCA 867, a parenting case, considered whether the 86 questions raised of a single expert were within the rules prevailing at that time (Rule 15.65), and had the following to say:

> *12 The matters which Dr M has been asked to consider, either discretely or in their entirety, include 86 different items. The vast majority of the questions ask Dr M to assume facts which I am told are not conceded by the husband.*
>
> *13 It is the husband's submission that the purpose of the rule is to enable questions to be asked of an expert that clarify her opinion as opposed to challenge her opinion. The husband concedes that the questions in the document are legitimate questions to put to an expert in cross examination if the report is to be challenged, but ought not to be allowed pursuant to a rule which allows questions to "clarify" (that is, to make clear something that is not clear from the report).*
>
> *16 Counsel for the wife submits that the questions posed to the single expert are a legitimate use of the court rules; are made in a bona fide attempt to reduce the issues at trial; and are intended to clarify whether there is a proper basis for strong recommendations made by Dr M.*
>
> *31 The purpose of the proposed questions goes well beyond seeking to clarify the single expert witness's report. I have concluded that the purpose is in effect to take a deposition in writing from Dr M of evidence that she might otherwise give in response to questions in cross examination during the hearing, if those questions were allowed in the hearing at the time when Dr M gave her evidence. Also, in the circumstances of this case I have concluded that it would be asking Dr M to do an unreasonable amount of work to answer the questions that have been asked.*

Properly considered questions can be very effective in obtaining the clarification sought. Alternatively, good questions of a not-so-good expert will lay the ground work for an application to be made for the appointment of an adversarial expert.

On occasion I have reviewed other expert reports that are so inadequate that I have had concerns as to the efficacy of the time and expense that would be incurred in drafting the questions and the single expert answering them. However, in most cases it is the proper first step to take if the single expert is to be challenged, and/or an application made for another expert.

It is interesting that there is no explicit requirement to have asked questions of the single expert pursuant to Rule 7.26 (Rule 292) prior to making an application for another expert, however it does seem to be a point that is given serious consideration by the court when determining an application for another witness[14].

Obtaining leave to rely on another expert

While an adversarial expert might be retained early on in the proceedings, the matter may well progress such that there is no need to make an application to rely on a report or adduce evidence from that expert. That will very often be the case when a good single expert and a good adversarial expert are retained.

However, there may be legitimate reasons for disputing the opinion of the single expert, that have not been resolved through the asking of questions / provision of material / efforts to guide or redirect along the way. This may result in an application needing to be made, in which case Rule 7.08 (Rule 274) must be considered:

(1) If a single expert witness has been appointed to prepare a report or give evidence in relation to an issue, a party must not tender a report or adduce evidence from another expert witness on the same issue without the court's permission.

(2) The court may allow a party to tender a report or adduce evidence from another expert witness on the same issue if it is satisfied that:

[14] See ***Forsburg and Stubbs*** (2019) FCCA 1884; ***Salmon and Ors and Samon*** (2020) FamCAFC 134; ***Helinski and Bassett*** (2021) FCWA 244; ***McVean and Manton*** (2022) FedCFamC1F 376, with the court denying the application for another expert with reasons including that the single expert had not been asked questions

(a) there is a **substantial body of opinion** contrary to any opinion given by the single expert witness and the contrary opinion is or may be necessary for determining the issue; or

(b) another expert witness knows of matters, not known to the single expert witness, that may be necessary for determining the issue; or

(c) there is another **special reason** for adducing evidence from another expert witness.

The court may be reluctant to make an order permitting a party to appoint another expert, departing from the single expert approach, with Kent J observing in ***Tsoutsouvas and Tsoutsouvas and Ors*** (2012) FamCA 521

> *"In any case where a single expert has been appointed, allowing another party to tender evidence from another expert on the same issues creates an imbalance. That is, only one party may have what may be described as an adversarial expert, whilst the other party has only the evidence of the single expert who has acted within the constraints, in terms of instructions, as provided for in the Rules. The further possibility is the other party seeking to have their own expert to redress that perceived imbalance, undermining the original purpose of appointing a single expert; that is, to avoid a "battle of the experts".*

The hurdle as to whether there is a "**substantial body of opinion**" contrary to the single expert, or just a "different opinion", can be difficult to establish[15]. As Kent J observed in ***Salmon and Ors & Salmon*** [2020] FamCAFC 134 at [27]:

> *"It has been recognised in many authorities from various jurisdictions having similar rules of practice with respect to expert evidence that a mere difference of opinion, particularly in the area of valuation, would ordinarily not be sufficient to engage the*

[15] A paper by Jim Mellas, Barrister, "**Dilemmas with Single Expert Reports**" prepared for TEN in June 2013 sets out relevant decisions up until that time:

https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/June_2013,_Sound_Education_in_Family_Law,_Dilemmas_with_Single_Expert_Reports.html

discretion to permit expert evidence other than the jointly appointed single expert. As Applegarth J observed in Conias Hotels Pty Ltd v Murphy & Anor ("Conias"):[5]

> *"It almost may be taken for granted that experts adopting the same methodology applied to the same facts and applying the same assumptions might come to different opinions, simply as a matter of professional judgment. On valuation issues, the mere fact that different experts come to different opinions simply identifies that, in many cases, there is a range of opinion within which the actual value of real property, a business or other thing can be legitimately arrived at".*

At [35], Kent J goes on to say:

> *"the words "substantial body of opinion" in r 15.49(2) [the predecessor to r7.08(2)(a)] are to be given real meaning, as was the approach taken by the primary judge. The approach that the words have meaning of substance has been adopted, correctly in my view, in other decisions at first instance in this Court.*
> *The mere expression of an opinion as to value by another expert, no matter how substantially contrary it is to that of the single expert, does not in and of itself constitute "a substantial body of opinion" within the meaning of the rule. If such a contrary opinion is founded upon identified and accepted methodology recognised within the field, or some identified and recognised field of expertise different to that founding the single expert opinion, then the requirement of "a substantial body of opinion" will be fulfilled."*

Kent J observed that the nature and substance of, and the reasons for, the differences between the single expert and the other expert are precisely of a kind that the mechanisms in r 15.64B (conference) and r 15.65(questions) are directed to address, and the appointment of an adversarial expert was denied.

Similarly, what comprises a "special reason" (Rule 7.08(2)(c)) was considered in *Simonsen & Simonsen* [2009] FamCA 698, at 10 to 14 where Murphy J said:

> *"As r 15.49 [the predecessor to r7.08(2)(a)] makes clear, however, the circumstances in which an additional expert can give evidence or prepare a report, once a single expert has been appointed by the court, are somewhat truncated.*

That is evident from the restricted nature of the two opening subparagraphs of r15.49(2), and the requirement for the reason by which a court should be satisfied that the other expert witness or evidence is necessary, being "special".

The general thrust of the Rules has been referred to by the Full Court in ***Bass & Bass*** *(2008) FLC 93-366. As the court in that case made clear, the adducing of evidence from an additional expert, is not something which ought occur in the usual course, or simply by application made by a party. In simple terms, the word "special" as used in r 15.49 has real meaning.*

It is important to understand that Pt 15.5 of the Rules does not preclude a party from obtaining on their own behalf expert evidence, nor does it preclude a party from obtaining such expert evidence, (including from more than one expert, should they so choose), in respect of all matters relevant to the proceedings before a court, and all matters relevant to a report and/or evidence produced by a single expert."

In ***Padnall and Padnall*** (2014) FamCA 904 at 37 Berman J also considered "special reason" and said:

"The question remains whether there is any "another special reason" for adducing evidence from another expert witness. It is often the case that a party does not like the valuation of the single expert and has obtained a valuation which is different in its outcome. If that alone establishes a special reason then it would make the actual provisions of Rule 15.49 meaningless in relation to real estate and other valuations".

In this case a dispute had arisen regarding the existence of goodwill in a business and there were clear differences in the methodology adopted by each of the experts. Berman J observed that while the Husband did not properly exhaust his remedies pursuant to the rules in respect of questions to be asked and answered of the single expert, her answers would not have been significantly different from an earlier response. Each expert had prepared multiple reports and there underlying approach had remained the same throughout. The judge ultimately found that [53]:

"this is not a case where there is simply a holding of different opinions but rather, there are clear and obvious differences in the methodology to be adopted by each of the valuers and that the Court would be significantly assisted by the evidence both from the single expert Ms J and Mr H.

It is acknowledged that it is always open to a trial judge to hear the evidence and if still left unassisted at the conclusion of cross examination, the trial can be adjourned and another expert report ordered. That option in this case has significant disadvantages, particularly where the consequential effect of allowing the proposed evidence on the proceedings is benign"

Neales and Neales (2022) FedCFamC1A 41 involved a real property valuation dispute, and an appeal from an order made by a primary judge who had dismissed the Husband's application to discharge the single expert, or in the alternative, grant leave to appoint another expert, and on the granting of leave, for those experts to confer. The single had been asked questions and had responded, and appellate court found that the husband would suffer a substantial injustice if leave to appeal were not granted because there were different methodologies that had resulted in a substantial difference in value, which had the potential to more adversely impact the husband than the wife. It appears that on their own each of the issues raised by the Husband did not warrant the appointment of another expert, however when considering the matters in aggregate the "other special reason" test was satisfied.

In *Moretto and Cosola* (2022) FedCFamC1F 433, Riethmuller J observes at [7]:

"The rules contained in r 7.08 of the Rules cannot be applied in a way that results in a significant valuation issue being largely foreclosed (at least on a practical level) from effective challenge in the litigation, as that would compromise the interests of justice and therefore go beyond the purpose of the rules: see r 7.02(c) of the Rules and the poignant example of a terrible injustice caused by the reliance upon a single expert discussed in Penelope Kari,"Opinion: 'Single experts' – Guns for hire?" (2007) 29 Bulletin (Law Society of South Australia). Similarly, r 7.08 of the Rules is not to simply relieve judges of the burden of making findings as between competing experts where there is a real issue as to valuation. Rather, it is to ensure that judicial time (and thus public resources) are not wasted on protected hearings involving multiple experts where the nature of the dispute is disproportionate to the costs involved".

While the respondent was unsuccessful in their argument that there was a substantial body of opinion, the argument that there was "another special reason" was established [30]:

> *"Whether cross-examination may be a sufficient tool to avoid injustice in this case depends upon whether it would be open to the court to make a finding as to the value of the property as contended for by the respondent if the single expert is successfully cross-examined to sufficiently weaken his evidence. As the value contented by the respondent is well outside the range ascribed by the single expert, after relevant information sharing and questions, it is difficult to avoid the conclusion that there is a real risk of an evidentiary "vacuum" arising in this case if the respondent's contentions as to value are correct. Notably, this is not a case where the evidence of the respondent's expert could be said to be obviously unrealistic or unpersuasive, rather a case where there appears to be a genuine dispute between the experts. I am persuaded that the respondent has established a "special reason" in the context of this case, namely that there is a real risk that she will be unable to effectively put her case as to the value of the applicant's property if she is limited to cross-examination of the single expert, in circumstances where the respondent's case on this point is reasonably arguable and involves an amount so great that the additional litigation costs are not disproportionate."*

Leaving aside the hurdles, should a party seek to rely on another expert, the party must make an application pursuant to Rule 7.10 (Rule 276) and file an affidavit pursuant to Rule 7.11 (2) (Rule 277(2)) detailing the following:

(a) whether the party has attempted to agree on the appointment of a single expert witness with the other party and, if not, why not;
(b) the name of the expert witness;
(c) the issue about which the expert witness's evidence is to be given;
(d) the reason the expert evidence is necessary in relation to that issue;
(e) the field in which the expert witness is expert;
(f) the expert witness's training, study or experience that qualifies the expert witness as having specialised knowledge on the issue;

(g) whether there is any previous connection between the expert witness and the party.

It seems evident that to be in a position to respond to the requirements of Rule 7.11(2) (Rule 277(2)), the adversarial expert will have already been retained by the party, and have completed sufficient work to enable the issues in dispute to be properly articulated. This may be a preliminary view, with a formal opinion to follow after the appointment is made.

When deciding whether to permit a party to tender a report or adduce evidence from another expert, the court may take into account (per Rule 7.11(3) (Rule 277(3)):

(a) the purpose of this Part/Division;
(b) the impact of the appointment of an expert witness on the costs of the proceeding;
(c) the likelihood of the appointment expediting or delaying the proceeding;
(d) the complexity of the issues in the proceeding;
(e) whether the evidence should be given by a single expert witness rather than an expert witness appointed by one party only;
(f) whether the expert witness has specialised knowledge, based on the person's training, study or experience:
    (i) relevant to the issue on which evidence is to be given; and
    (ii) appropriate to the value, complexity and importance of the proceeding.

From a procedural view point, it is interesting to observe that the single expert will usually play no part in, or have any knowledge of, an application being made for the appointment of another expert. This may well disadvantage that party who is seeking to rely on the single expert[16].

I noted with interest in the paper by Mr Mellas (referenced at footnote 15 above) the mention of the appointment of an adversarial expert in the matter of ***Pitt & Pitt*** (2009) FamCA 620.

16 See ***Helinski and Bassett*** (2021) FCWA 244

The Wife's application was successful on the basis of assertions as to methodology and significant differences in the valuation outcome, without those assertions being tested, or put to the single expert.

Leave was given and the adversarial expert was appointed for the Wife, and the matter proceeded to trial. What followed was somewhat of a disaster for the Wife, with Rose J noting in his eventual trial judgment (***Pitt & Pitt*** (2011) Fam CA 172)[17]:

> *168. On the application of the wife, and pursuant to Orders made on 16 July 2009, Ms N was permitted to provide a report in relation to the value of the interest of the parties in the entities, to which I have referred, on the basis of a substantial body of opinion and knowledge expressing a different conclusion to that given by Ms D.*
>
> *201. I accept the evidence of Ms D in preference to that given by Ms N for the following reasons.*
>
> *205. The first basis is that I accept the submissions that Ms N, was arguably not "independent" or appropriately qualified as contended by her. Ms N's evidence satisfies me on the balance of probability that she allowed her independence to be compromised by a failure to properly consider the import of the instructions provided of the relevant valuation due to the weight that she gave to the "non-binding indicative offer" and a lack of objective analysis of prospective machinery sales, in the absence of "specialised knowledge " as defined in Rule 15.43.*
>
> *206. In that regard, I accept the submissions made by senior counsel for the husband that Ms N was in fact not "a certified practising accountant" as sworn by her and it is clear from the evidence that she does not, nor has she ever held that qualification as eventually conceded by her during the course of cross-examination.*
>
> *207. With reference to Ms N having "relevant specialised knowledge" on one or other of the bases referred to in Rule 15.3, I am not satisfied that the evidence demonstrates that she is imbued with that fundamental requirement. Therefore, whilst I accept that Ms N's occupation has been that of a principal of an entity whose business undertaking has been providing insurance claims service, not only does her business advertise its services in a manner in which valuations of companies or businesses is absent, she did not produce, when challenged, copies of any reports of prior relevant valuations or assessments notwithstanding ample opportunity to do so over the days in which she gave oral evidence.*
>
> *208. As Ms N conceded, she has never given evidence as a forensic accountant.*
>
> *209. In addition, Ms N's methodology and approach for the purpose of the valuation of goodwill was fundamentally flawed as illustrated by the comparison she undertook of the value of goodwill being related to the value of the net tangible assets regardless of whether certain assets or liabilities were utilised for the purpose of the business undertaking.*

[17] While for the sake of brevity some of the judgment could be excluded from this paper, it makes for a great read in terms of what **not** to do as expert witness!

210. Rather alarmingly, in Ms N's first report when embarking upon the exercise of determining the maintainable earnings of R Pty Ltd she utilised results for only part of a trading year. Ms N simply extrapolated those results to give the result for one year without noting that caution should be adopted of the inherent risk in doing so due to changes in R Pty Ltd's earnings and expenses on a quarterly basis.

211. Ultimately, Ms N appeared to concede in subsequent evidence that her approach was incorrect.

212. The fact that concessions were made by Ms N during the course of her later evidence, does not overcome the fundamental errors made in her reports prepared pre-trial.

213. In her Affidavit filed 25 May 2009, Ms N gave opinions expressed in her annexed report as being both independent and impartial and that she had used her best endeavours to comply with Part 15.5 of the Family Law Rules having read and understood them.

214. Rule 15.59(3)(d) provides that the "expert witness" has a duty to:
"...consider all material facts, including those that may detract from the expert witnesses' opinion.

215. I am satisfied that Ms N failed to carry out her duty, to which I have referred. As Ms N conceded during the course of cross-examination, following prevarication, her report only comprised material that supported her conclusion notwithstanding that when her report was prepared she had been provided with a copy of and had read the relevant expert witness rules. I do not accept Ms N's subsequent evidence attempting to resile from that acknowledgment as the manner in which she gave her evidence impressed me as being an attempt at reconstruction.

216. In the alternative to the approach of outright rejection of the evidence given by Ms N for the reasons stated, I have concluded that greater weight is given to the evidence of Ms D compared to that of Ms N in all areas in which their evidence conflicts. My reasons are as follows.

217. Ms D fulfilled the role of the court appointed single expert.

218. The appointment of Ms D was by consent. No issue has been taken in relation to her relevant qualifications as stated in that she has fulfilled the roles of an expert and an expert witness in accordance with Rule15.43.

219. Ms D produced detailed and considered reports which applied accepted methodology, albeit that the discrete, individual issues relevant to that methodology were the subject of conflict as between her and Ms N.

220. With regard to so much of the evidence of Mr X, the internal accountant for R Pty Ltd which proffers opinion evidence, I do not attach any weight to it but rather have considered the evidence of Ms D as the court appointed expert.

221. In addition, I am satisfied that the evidence of Ms D as a whole showed not only meticulous preparation and consideration, but that all material matters of relevance, regardless of whether they were contrary to those considerations eventually adopted by her were also considered. I accept that any error which may be pointed to and conceded by Ms D was not of such substance as to taint her ultimate conclusions.

222. My additional reasons include Ms D's substantial experience in providing reports and oral evidence in relation to the valuation of companies and company interests of one or more parties, as well as business undertakings in respect of which there is no worthwhile comparison so far as Ms N's actual knowledge and experience are concerned.

223. I found Ms D's reasoning and her application of methodology on discrete issues to be persuasive and I am satisfied on the balance of probabilities that such evidence is to be accepted in preference to that given by Ms N. The defects of Ms N's approach on such issues were clearly demonstrated so far as I am concerned. Indeed, I am reinforced in that view having regard to the professional and competent manner in which Ms D gave her oral evidence as opposed to the, at times, unexplained prevarication and evasiveness which was unfortunately demonstrated by Ms N.

When an application for more than one expert has been successful, it will be necessary for the experts to confer prior to the trial (Rule 7.31 (Rule 297)), which will result in the preparation of a joint statement. There may also be a requirement for evidence to be given concurrently, which in my experience can come in different shapes and sizes.

Should the application for an adversarial expert be unsuccessful, that expert may still play a role in assisting with the drafting of questions that might be put to single expert in cross examination.

Typical problems / regular errors in valuation reports

The types of issues arising in valuation reports will be many and varied depending on the expertise (or lack thereof) of the valuer, the quality of the information provided, and the competing assertions of the parties. The issues that we see regularly include:

- Failure to prepare a report that responds to the instructions given;
- Failure to provide a report that is easily read and understood by a non-accountant;
- Failure to consider whether the calculated goodwill value is personal goodwill of the owner/operator, or commercial goodwill of the business enterprise;
- Failure to correctly distinguish core business assets and liabilities from surplus assets and debt;
- Failure to present reasons for adjustments, weighting of results in determining future maintainable earnings;
- Irrational/limited support for the selected earnings multiple;

- Failure to reconcile inter-entity loan accounts in large group valuations;
- Failure to consider appropriate minority / liquidity constraints in the circumstances of the subject valuation;
- Failure to seek instructions / make adjustment for assets immediately written off or the subject of accelerated depreciation;
- Failure to adequately review the documents provided and resolve anomalies (again keeping in mind that the valuation is not an audit).

On that note, I will finish, with a final war story from a matter where I was retained to critique the report of a single expert in a case involving a financial services business in Western Australia. This is another example of what not to do as an expert.

Every opportunity was afforded to this expert to correct his error – questions were asked, a joint statement was prepared, and unfortunately common sense did not prevail and the matter went to trial. The decision is not reported, however the trial judge had the following to say about the expert evidence:

> *"The difference in the presentation of the two experts was disturbing.*
>
> *Mr X was a singularly unimpressive witness, and at times his presentation and evidence about matters relevant to the preparation of his report were embarrassing.*
>
> *It beggars belief that an individual holding himself out as an expert, qualified to value corporate entities in the context of proceedings such as these could prepare both a draft and final report as to the value of the shareholding in a company where the dealings with the shares are agreed by that expert to be governed by the Constitution, and not realise that they did not have a complete copy of the Constitution, or rather two Constitutions, in the preparation of such a report.*

Further, I am troubled by the failure of Mr X to include the correspondence referring to that very relevant fact from his file in the drop box referred to by Mr Barrister QC. Not only, in my view, had Mr X seemingly disregarded a material flaw in a central part of evidence, but then it would seem had failed to be open about his omission."

"I consider his conduct in this regard to be disgraceful".

Suffice to say, the single expert was successfully challenged.