NIIFA NEWS 35

Approved Expert Financial Witnesses

The Newsletter from The Network of Independent Forensic Accountants

EXPERT EVIDENCE BY THE BACK DOOR

Is the Court's permission required to adduce expert evidence?

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TYPHOO TEA CONTROVERSY

Further helpful guidance on the level of compensation payable on the termination of a Commercial Agency has been given in the case of Alan Ramsay Sales and Marketing Limited v Typhoo Tea Limited [2016] EWHC 486 (Comm).

Alan Ramsay Sales and Marketing Limited acted as a commercial agent selling Typhoo Tea for its principal. When Typhoo terminated the agency, a claim was made for compensation pursuant to The Commercial Agents (Council Directive) Regulations 1993.

In considering the appropriate level of compensation to award, the court applied the principles set out in the leading case of Lonsdale[1] but also provided some additional guidance on the method to be used in valuing the agency. Specifically the court concluded that:

i. A multiple should be applied to profits based on the average price/earnings ratio of the FTSE for the Consumer Goods and Consumer Services sector, discounted by 40% for lack of marketability and by a further 30% for the small size of the agency;

ii. The multiple should be further discounted by 20% from five to four to reflect that fact that the hypothetical purchaser of the agency was deemed likely to be an individual or small business with conservative and cautious outlook and modest means.

iii. It was not relevant that the agency was terminable on 12 months' notice and that this did not put an upper limit on the multiple. The reason for this was that the Lonsdale judgment made it clear that, when valuing the agency, it was to be assumed that it would continue without the principal invoking the termination provision.

iv. It was necessary to estimate what wage costs incurred by the agent related to the Typhoo agency and which were in relation to other activities. These were assessed by comparing the wage costs for the last year of the Typhoo agency with the wage costs for the following year, being the year after the agency had ended, taking account of staff who had left. The difference between the two was deemed to be the saving to the claimant from not running the Typhoo agency and thus representing, in broad terms, the wage costs of running it.

v. It was appropriate to make a deduction for the notional remuneration for the shareholder/director of the agent based on the salary for a sales manager derived from the Annual Survey of Hours and Earnings, multiplied by the proportion of his time that he was deemed to have devoted to the agency.

vi. The court should not assume that the notional purchaser was a start-up operation as opposed to an established business and that, if it was the latter, then the overheads of the business would be incurred by it anyway, irrespective of whether this additional agency was taken on. Instead an element of the fixed costs should be deducted from the gross contribution of the agency to derive a net earnings figure to which the appropriate multiple should be applied.

"commercial agents may be withdrawn as a consequence of Brexit"

Finally it is worth mentioning the possibility that the protection currently afforded to commercial agents may be withdrawn as a consequence of Brexit. There is little doubt that the commercial agency regulations are somewhat of an anathema to English jurisprudence that typically affords protection only to employees and consumers and not to commercial entities entering into business-to-business contractual arrangements.

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[1]Lonsdale v Howard & Hallam Limited [2007] UKHL 32; [2007] ICR 1338. At [9]-[13]

SURVEY OF INSTRUCTING SOLICITORS – RESULTS PUBLISHED

In conjunction with forensic accountancy students at Sheffield Hallam University, more than 5,000 solicitors were invited by members of NIFA to take part in a survey about the instruction of expert accountancy witnesses.

One of the results of the survey was that, despite a general feeling that the Courts can be reluctant on occasion to consent to expert evidence being adduced, the vast majority of respondents (76 percent) either thought the Courts' attitude was best described as "relaxed" or "willing, subject to cost considerations". Seven percent of respondents described the courts as being positively enthusiastic and, interestingly, an equal number thought that the courts were positively averse to the instruction of experts.

"Enthusiasm for Hot Tubbing"

Another surprising result of the survey was the level of enthusiasm for witness conferencing or so-called "Hot Tubbing". Only just over a quarter of respondents were wary of the process or reluctant to have it employed in cases on which they acted, with the majority being either relaxed or positively in favour. Given these attitudes, it is perhaps surprising that concurrent evidence remains such a rarity. The survey results suggest that one might reasonably expect to see its use increase over time.

Finally, it was reassuring that, when asked to rank the factors influencing the choice of expert in order of importance, on average, the reputation and experience of the expert came top of the list, but opposing party's view of the expert came at the bottom. Interestingly, the reputation of the expert's firm (as opposed to the expert himself or herself) was ranked only seven out of ten and, surprisingly, cost came in only at number five.

EXPERT EVIDENCE BY THE BACK DOOR

A recent Court of Appeal Hearing[1] has considered whether or not the Court's permission is required to adduce expert evidence.

The issue is particularly relevant in the context of divorce proceedings in which it is becoming increasingly common for accountancy valuation reports to be appended to a Form E as part of the voluntary disclosure, without any application having been made to admit expert accountancy evidence.

The Court of Appeal held that:

i. the Court's permission was required if the evidence was from a person *"instructed to prepare expert evidence for the purpose of proceedings"*, but

ii. if the evidence was not from a person *"instructed to prepare expert evidence for the purpose of proceedings"*, the opinion of a properly qualified expert was prima facie admissible, because of the application of the Civil Evidence Acts of 1972 (s3) and 1995 (s1(1)).

"could be deemed admissible"

This suggests that an accountancy valuation report that has, for example, been prepared for the purposes of implementing a share scheme, for example, could be deemed to be admissible and could be a way of adducing expert evidence "by the back door". That said, the mere fact that the Court might be willing to consider the evidence would not necessarily mean that it would be given as much weight as evidence adduced by an expert instructed pursuant to the proceedings.

[1] Mondial Assistance (UK) Ltd v Bridgewater Properties Ltd [2016] EWCA 999 (Ch)

Beyond All Question

NIFA, THE NETWORK OF INDEPENDENT FORENSIC ACCOUNTANTS, SETS AND APPLIES HIGH STANDARDS TO BE DELIVERED BY OUR APPROVED EXPERT FINANCIAL WITNESSES

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OGDEN TABLES DISCOUNT RATE ANNOUNCED

Large increases in the quantum of claims for future losses are expected following the announcement of a new discount rate.

With effect from 20 March 2017, claims for future loss in personal injury, fatal accident, and clinical negligence claims will be calculated with reference to the new rate of minus 0.75%.

The long-awaited announcement of the new discount rate was made by the Lord Chancellor, Liz Truss, who has the power to review the rate vested in her by virtue of the Damages Act 1996.

There have been repeated calls by claimants' legal advisers to reduce the 2.5% rate which has been applied since 2001. The new rate is considerably lower than many had expected.

> The insurance industry has warned of increases to premiums and concerns have been expressed about the likely effect on the NHS of higher claims against it.