

NO. 003/2010

BETWEEN: CHIEF REGISTRAR

Applicant

AND: WILLIAM WYLIE CLARKE

Respondent

Applicant : Ms V. Lidise with Mr A. Chand
Respondent : Mr J Lockhart SC with Mr P. Lowing
Date of Hearing : 30th November 2010 and 1st December 2010
Date of Ruling : 1st December 2010

RULING

1. The Applicant seeks to tender a report of G H Whiteside & Co, Chartered Accountants dated the 28th of February 2002 with respect to the audit of the trust account maintained by Jamnadas, Clarke & Associates in respect to the year ended 30th September 2001.
2. Objection is taken to the tender of the report.
3. The basis of the objection is based on the principles expressed in the decision of the New South Wales Court of Appeal in *Makita (Australia) PTY LTD v Sprowles [2001] NSWCA 305* and further that by virtue of section 114 of the Legal Practitioners Decree 2009 this Commission must act fairly in relation to proceedings before it.
4. In further support of the objection it is submitted that particulars were sought by the Respondent of the Applicant and that request was responded to by the Applicant.
5. The particulars that were sought might be summarised as requiring the material on which the audit report was based.
6. The particulars furnished detailed that the Applicant relied upon the contents of the audit report. No background material was particularised.

7. The Commission is not bound by the rules of evidence but as I have said it is required to act fairly in these proceedings.
8. When one looks to the Civil Evidence Act to seek some assistance little is forthcoming.
9. Section 15 of that act appears to allow opinion evidence to be given by an expert but does little to qualify or elaborate on how that might occur.
10. In *Makita v Sprowles* Mr. Justice Heydon considered relevant authorities throughout Australia, England, New Zealand and elsewhere and in paragraph 59 of the judgment said:

"a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions."

11. His honour further said it in paragraph 71:

"examining the substance of an opinion cannot be carried out without knowing the essential integers underlying it."

12. And then at paragraph 85 the judgment is stated :

*"In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson C.J.'s characterisation of the evidence in *HG v The Queen* on "a combination of speculation, inference, personal and second-hand views as*

to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise".

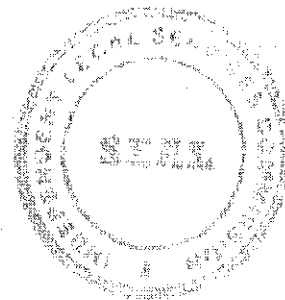
13. It is not in issue that the 1st of the required element is present. Here the witness, Mr Whiteside, has and it is acknowledged he has the training, study or experience to become an expert in the relevant field.
14. What is in issue in determining the admissibility of the audit report is the 2nd of the elements identified by his honour and that is the intellectual basis of the conclusions reached on which the opinion is based.
15. The quoted passage says these matters should be made expressive to enable the Commission to be satisfied that the opinion formed is based wholly or substantially on the experts specialised knowledge.
16. It is submitted on behalf of the Applicant that the Commission should not or need not follow the principles express in **Makita v Sprowles** and that there are to date no guidelines or jurisprudence in this country dealing with the admissibility of expert reports.
17. To act otherwise than in accordance with the principles that fall from **Makita v Sprowles** would be not to act fairly to the parties in these proceedings in particular the Respondent.
18. In reaching this conclusion weight, of necessity, must be placed upon the particulars sought by the Respondent and the particulars furnished by the Applicant which quite squarely places the Applicants reliance on the audit report and nothing that underlies that report was particularised to enable evaluation of the experts opinion.

ORDERS

1. Tender of the audit report is rejected.



JOHN CONNORS
COMMISSIONER



1 DECEMBER 2010