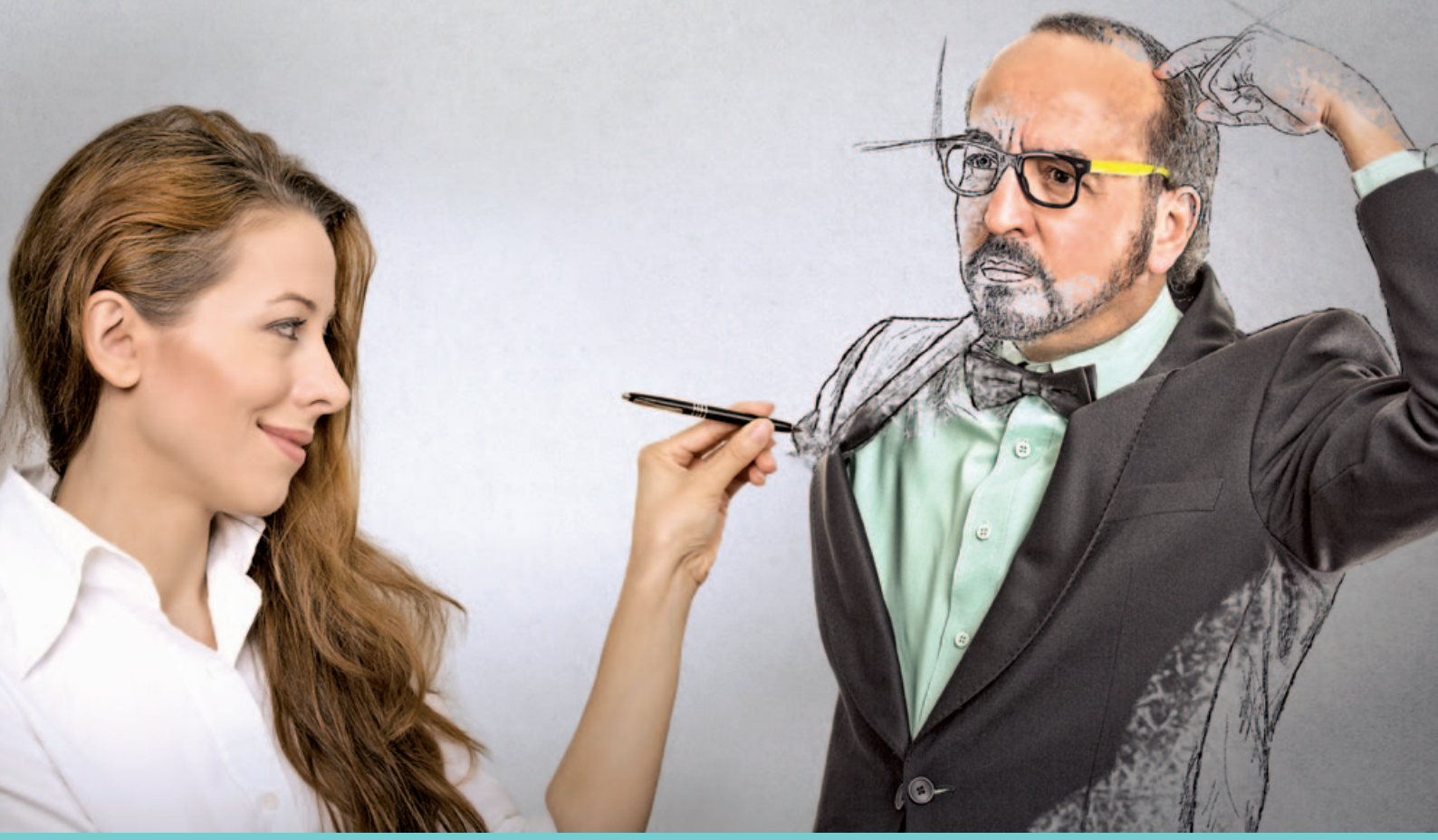
NIIFA NEWS 32

Approved
Expert
Financial
Witnesses

The Newsletter from The Network of Independent Forensic Accountants

"NOBBLING" THE WITNESS

A lesson in why the independence and objectivity of expert evidence is sacrosanct



Also in this issue:

TAX: TO PROVIDE OR NOT TO PROVIDE, THAT IS THE QUESTION

Those who undertake share valuations frequently have to opine as to whether a deduction should be made for contingent tax liabilities.

In the Family Courts, it is generally accepted that, in order to achieve a fair division of marital assets between divorcing parties, account needs to be taken of the capital gains tax that would arise if they were to be realised. That position was endorsed in the Scottish case of Dow v Sweeny[1] in which the judge concluded that the net value of the matrimonial property was its value after deduction of latent capital gains tax.

By contrast, the position in the commercial courts is less clear cut. In the case of Goldstein v Levy Gee[2], the court considered whether it would be appropriate when valuing shares in a company to make a deduction for the corporation tax that would be payable if the company were to sell its investment properties.

The court recognised that a hypothetical buyer of the shares in the company would acquire a latent tax liability that would crystallise if the properties were subsequently sold by the company. However, the buyer could defer the liability by delaying a sale of the properties or avoid it altogether by selling the shares.

In the judge's opinion, the test as to whether and to what extent a discount for latent tax should apply should be assessed with reference to what might have been negotiated between a hypothetical buyer and a hypothetical seller. In the words of the judgement:

> *"The natural aspiration of the seller would be to achieve no deduction for contingent tax liabilities. The natural aspiration of the buyer would be to achieve 100 per cent deduction. Both the hypothetical buyer and the hypothetical seller are willing. I do not think that anyone suggested any particular reason why one would have a stronger bargaining position than the other. If the parties are of equal bargaining power, it seems to me that they would meet in the middle and agree a deduction of 50 per cent of the contingent tax liabilities."*

The effect of this judgment is not necessarily that a deduction of 50% of the contingent tax will be appropriate in all cases. A competent valuer will need to take a pragmatic and commercial approach which should take into account relevant factors including the history of the business and the particular circumstances prevailing at the valuation date. In some cases this may suggest that a deduction of more than 50% of the latent tax is appropriate but in other cases a lesser deduction may be justified.

[1](2003) SCLR 85
[2][2003] EWHC 1574 (Ch)

"NOBBLING" THE WITNESS

According to the Oxford English Dictionary to "Nobble" is to "influence or thwart by underhand or unfair methods", which was exactly what had been done to an expert witness according to Justice Wilson of the Ontario Superior Court in her judgment in the case of Moore v Getahun.

The case was not noteworthy for its facts, which related to a motorcycle accident in which the plaintiff injured his wrist and claimed that the medical treatment he had received had caused him permanent harm. What was of interest about the judgement was Justice Wilson's comments about the practice of draft expert reports being reviewed by a party's lawyer before being finalised and served on the other side.

The judge pulled no punches saying:

"I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral."

Her comments were prompted by an admission by one of the defendant's experts that he had made changes to his draft report, prior to finalising it, following a telephone discussion with defence counsel. She concluded that:

"that the meeting between defence counsel and Dr Taylor involved more than simply superficial, cosmetic changes. The conversation took place over a period of one and a half hours. Some content helpful to the plaintiff in the August 27, 2013 draft report was deleted or modified. I find that Dr Taylor's opinion, although not changed, was certainly shaped by defence counsel's suggestions."

It was the judge's view that the practice of discussing draft reports with counsel was improper and undermined the expert's credibility and neutrality.

These opinions caused considerable concern in the legal profession and in the community of expert witnesses where it was recognised that, if accepted, the trial judge's ruling would have represented a major change in practice.

Accordingly the case was appealed. The appellate court held that it was widely accepted that consultation between counsel and expert witnesses in the preparation of reports, within certain limits, was necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims.

For that reason the appeal court concluded that the trial judge had erred in criticising the consultation between the expert and counsel, concluding that:

"Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case."

The appeal court went on to say that:

"Consultation and collaboration between counsel and expert witnesses is essential" and that *"counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared. Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes."*

So the practice of being able to discuss draft reports with counsel has therefore not been consigned to history, albeit it is important for experts and those instructing them to bear in mind that nothing should be done that could interfere with the independence or objectivity of the expert's evidence.

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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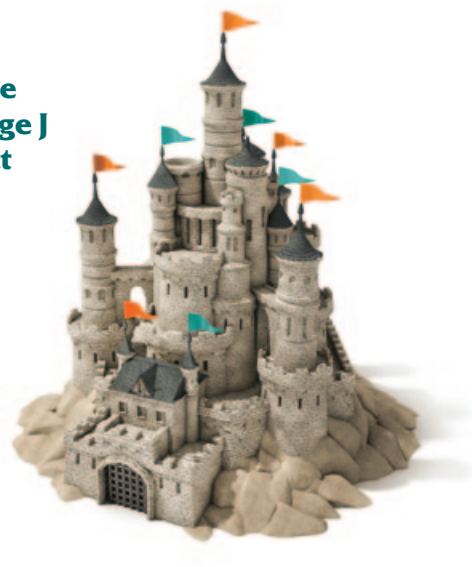
PROBLEMS, PROBLEMS, PROBLEMS

One has to sympathise with anyone going through a divorce but in the case of B v B[1] Coleridge J had to deal with a problem that many would love to have.

The parties had broadly agreed that the assets in the case of £40m should be split as nearly as possible in half. However one of the key issues that remained was which of them was to retain their castle!

[1]B v B [2013] EWHC 1232 (Fam)



ACCOUNTANCY GETS GLAMOROUS

Accountants are always looking at ways to improve the image of their profession and are now delighted by the announcement that Ben Affleck is shortly to star in an upcoming American action thriller, The Accountant.

Affleck is due to play the role of a mild-mannered government accountant who moonlights as a highly trained assassin.[1]

[1]NIFA members pride themselves on the breadth of their combined expertise but, for the avoidance of doubt, they should like to make it clear that they are not qualified to accept instructions for contract killings of any sort.