SUPREME COURT OF QUEENSLAND

CITATION:	*Chambers & Ors v Brice* [2012] QSC 305
PARTIES:	**JOHN CHARLES CHAMBERS** (first plaintiff) **and** **DORRIGO PROPERTY PTY LTD** (second plaintiff) **and** **HARROD HOLDINGS PTY LTD** (third plaintiff) **v** **ROBERT ANDREW CREETH BRICE** (defendant)
FILE NO:	1317 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	8 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2012
JUDGE:	Peter Lyons J
ORDER:	**1. Paragraphs 1.2 (ii), 2.1, 2.2, 5.5, 5.6, 5.7 and the expressions "and best" in paragraphs 5.4, 5.10 and 5.11 of the Vincents report be struck out;** **2. Costs in the cause.**
CATCHWORDS:	EVIDENCE - ADMISSIBILITY AND RELEVANCY - OPINION EVIDENCE - EXPERT OPINION - IN GENERAL - where the plaintiffs allege the defendant, an accountant, breached his fiduciary duties to the first plaintiff - where an expert accountant report identifies professional standards and provides expert evidence as to whether the defendant's conduct fell short of those standards - where the plaintiffs do not allege that the defendant owed any professional obligations to the first plaintiff - where the defendants submit that the expert accountant report does not tend to prove or disprove an issue on the pleadings - whether the expert accounting report is relevant to the question of the existence or content of fiduciary duties owed by the defendant to the first plaintiff

EVIDENCE - ADMISSIBILITY AND RELEVANCY - OPINION EVIDENCE - EXPERT OPINION - IN GENERAL - where expert accountant report refers to "industry practice" - where expert accountant report refers to "best practice" but does not identify the meaning of that term - where no reasoning process is revealed by which it is said the conduct described in the report amounts to "best practice" - whether "industry practice" is a summary description of observations made as to practices generally followed in the accounting profession such that it is unnecessary to identify a process of reasoning or application of principles - whether in circumstances where no reasoning process to support the expert opinion with respect to "best practice" is revealed, the references in the expert evidence to "best practice" are inadmissible

EVIDENCE - ADMISSIBILITY AND RELEVANCY - OPINION EVIDENCE - EXPERT OPINION - IN GENERAL - where expert accountant report provides details of the expert's experience as an accountant, in particular, that he has had to deal with issues relating to the independence of an accountant and situations of conflict of interest in practice - whether this evidence is relevant

Australian Securities and Investment Commission v Rich (2005) 218 ALR 764, considered
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588, cited
Gould v Companies Auditors and Liquidators Disciplinary Board (2009) 71 ACSR 648, cited
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705, followed
Rogers v Whitaker (1992) 175 CLR 479, cited
Rosenberg v Percival (2001) 205 CLR 434, cited
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257, cited

COUNSEL: D Kelly SC, with E Goodwin for the plaintiff
R Bain QC, with G Beacham for the defendant

SOLICITORS: Hopgood Ganim for the plaintiff
Macrossans for the defendant

[1] The first plaintiff is a veterinarian who conducted a business of breeding, raising and selling wagyu beef cattle. The defendant was (at least for about 14 years) his accountant.

[2] At the trial, the plaintiffs proposed to rely upon a report by an accountant, Mr Paul Vincent (*Vincents report).* The defendant has objected to the admission of the report, and has sought a determination of the objection in advance of the trial.

Pleaded issues

[3] The first plaintiff alleges that preliminary discussion took place between the first plaintiff and the defendant in July and August 2007, relating to the defendant's acquisition of an interest in the first plaintiff's business (*preliminary discussions*).

[4] The first plaintiff alleges that he and the defendant entered into an agreement, initially made around the end of August 2007, for the sale of one-half of the wagyu business to the defendant (*first agreement*). He alleges that, on the defendant's advice, the sale was structured so that, of the purchase moneys, the sum of $1.5m was paid as a loan pursuant to a loan agreement, repayable in three annual instalments; though to be offset by payments to be made by the defendant under a lease he entered into; with the result that the loan would not become repayable. The loan was to be secured over a property that the first plaintiff was intending to purchase in New South Wales.

[5] The plaintiffs allege that the second plaintiff was incorporated for the purpose of purchasing the property in New South Wales; and then borrowed the sum of $1.5 million (*loan agreement*), as a consequence of the First Agreement.

[6] The plaintiffs allege that the first agreement was varied in March 2008 (*second agreement*).

[7] The first plaintiff alleges that the defendant was, in his dealings with the first plaintiff, a fiduciary; and that he breached his obligations as a fiduciary in respect of each of the preliminary discussions, the first agreement, the loan agreement, and the second agreement, by failing to advise the plaintiff to obtain his own valuation of the cattle being sold; to seek independent commercial and legal advice; and that the defendant was no longer acting in the first plaintiff's interest, but in his own self-interest.

[8] The defendant controverts some of the allegations relating to the preliminary discussions. He denies the making of the first agreement and the second agreement, but admits the loan agreement. He alleges that he ceased to be the first plaintiff's accountant by late 2004; and denies that, at the time of the preliminary discussions, the alleged first agreement, the loan agreement, and the alleged second agreement, he was a fiduciary in relation to the first plaintiff; or that he breached any fiduciary obligation owed to the first plaintiff.

[9] It might be added that the loan was made, for which security was given over two properties, one being the New South Wales property owned by the second plaintiff, and one owned (it would seem) by the first plaintiff and his wife (who is the defendant by counterclaim).

Summary of Vincents report

[10] The Vincents report commences by setting out the questions which its author was asked to consider. It then states a summary of the conclusions reached by the author.

[11] Section 3.0 of the report sets out what is said to be the background. In essence, that portion of the report states:

(a) The first plaintiff conducted a business relating to wagyu beef cattle;

(b) The defendant became the first plaintiff's accountant by about 1990, providing general taxation, business and corporate structuring advice to him;
(c) The defendant is an experienced chartered accountant, who retired from the firm of which he was a partner on 30 June 2004, but continued to be employed by that firm as a consultant;
(d) In his dealings with the first plaintiff, the defendant acquired an intimate understanding of the business of the first plaintiff (and associated entities);
(e) The defendant approached the first plaintiff with a view to acquiring some of the first plaintiff's herd;
(f) There were then a series of dealings between the defendant and the first plaintiff, generally consistent with the plaintiffs' pleadings, resulting in the first agreement, the loan agreement and the second agreement.

[12] Section 4.0 of the report primarily deals with the Code of Ethics for Professional Accountants (*Code*); although brief mention is made of a review of potentially relevant statutory provisions, and the author's lack of success in identifying any directly relevant case law.

[13] Section 5.0 of the report considers the defendant's conduct, and responds to the questions mentioned previously. The documents considered by the author are identified, and their effect summarised. The summary is to the same general effect as section 3.0 of the report, though it also includes a statement that the first plaintiff did not seek separate advice on the transactions, nor was he advised by the defendant to do so. Section 5.4 sets out the author's views as to "industry practice" and "best practice" when an accountant retires, including when he retires from a partnership but continues as a consultant. Paragraphs 5.8 to 5.11 set out the author's view as to industry practice and best practice regarding the issuing of engagement letters to clients. By reference to the Code, it states requirements to identify potential conflicts of interest, and appropriate responses, expressing the view that "the circumstances" presented a "self interest conflict", and thus a "direct threat to compliance with the fundamental principles of the Code"[1]. It identifies ways in which accountants deal with conflicts of interest, expressing the view that the defendant had a number of obligations to the plaintiff. There follow further references to the Code, including that part of it which nominated safeguards to be considered when a potential conflict of interest was identified.

[14] Finally, the report sets out the author's experience in dealing with conflicts of interest (paragraphs 5.26-5.35).

Submissions

[15] For the defendant, it was submitted that the Vincents report is irrelevant. The plaintiffs do not allege that the defendant owed any professional obligation to the first plaintiff; nor do they allege a relationship between any professional obligation and any alleged fiduciary duty. It was therefore submitted that the Vincents report does not tend to prove or disprove an issue on the pleadings. It was also submitted that "as a matter of case management" the report should be excluded from evidence,

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1 Para 5.18.

because it has the potential to raise a false issue in the pleadings, namely, the professional obligations of the defendant to the first plaintiff.

[16] The report expresses views about "industry practice" and "best practice" in certain circumstances. The defendant submitted that the report does not identify the reasoning process for reaching conclusions about these matters; nor does it identify the facts upon which those opinions are based; for example it does not identify why particular practices are industry practice or best practice. Accordingly it fails to provide criteria by which the opinion can be analysed. Nor are the assumed facts identified.

[17] The plaintiffs submitted that the Vincents report identifies professional standards; and provides expert evidence as to whether the defendant's conduct has fallen short of these standards. Expert evidence of this kind is relevant to determining the content of a duty of care, or a duty to act "adequately and properly" under a statute (in respect of an insolvency practitioner). By analogy, such evidence is relevant to determining the specific content of fiduciary duties in a particular case. It was submitted that the Vincents report sets out the assumption on which it is based. Although the defendant had made a general submission that the report purports to give evidence as to the ultimate issue, the plaintiffs submitted that the defendant failed to demonstrate that by reference to particular passages of the report.

[18] Objection was taken to paragraphs 5.26 to 5.35 of the Vincents report, which relate to the author's experience as an accountant, and in particular, that he has had to deal with issues relating to the independence of an accountant and situations of conflict of interest in practice. It was submitted for the defendant that this evidence is not relevant, it being inherently of no probative value in relation to any issue in the case; or alternatively, it not being shown that the situations of which he had had experience were sufficiently similar to the present case, to be of any assistance. For the plaintiffs, it was submitted that this evidence was admissible as showing Mr Vincent's experience and his capacity to express an opinion about a conflict which an accountant might face.

Relevance, and the ultimate issue

[19] The cases referred to on behalf of the plaintiffs demonstrate that expert evidence about professional standards and their breach is admissible in a professional negligence action.[2] On the question whether a liquidator had breached a statutory obligation to carry out or perform adequately and properly duties and functions associated with that office,[3] expert evidence was considered admissible (and, in that case, necessary).[4]

[20] It might be observed that these cases are concerned with duties which are broadly expressed. There is not a complete analogy between them and a case said to involve a breach of a fiduciary duty.

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2 *Rogers v Whitaker* (1992) 175 CLR 479, 489-490; *Rosenberg v Percival* (2001) 205 CLR 434 at [6]-[7], [63]; *Sullivan Nicolaides Pty Ltd v Papa* [2011] QCA 257 at [131]; *Moy v Pettman Smith (a firm) and Anor* [2005] 1 WLR 581 [19], [26], [28].

3 See s 1292 of the *Corporations Act* 2001 (Cwlth).

4 *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) 71 ACSR 648 at [253]-[257].

[21] In essence, the first plaintiff alleges that the defendant, notwithstanding his retirement from the partnership to which he remained a consultant, and the fact that another person (whether primarily or entirely) associated with the partnership provided accounting services to the plaintiff, remained in a position where he was subject to a fiduciary obligation to advise the first plaintiff to seek independent advice before entering into a transaction with the defendant. No authority has been cited to support the proposition that expert evidence is irrelevant to that question (or to the existence or content of fiduciary obligations generally). It may well be that a careful examination of the law relating to fiduciary obligations would demonstrate that the existence of a fiduciary obligation, and its content, are matters purely for the court, and depend only on the establishment of facts relating to the relationship between the first plaintiff and the defendant. However, I have not had the benefit of detailed submissions on that question. In those circumstances, and because the case has some unusual features, I am not prepared to exclude the evidence on the ground that it is irrelevant.

[22] I accept the submission made by the plaintiffs that the defendant did not demonstrate that the Vincents report gives evidence as to an issue to be decided by the Court. The Court will have to determine whether, at the time of the agreements alleged by the plaintiffs, the defendant was in a fiduciary relationship with the first plaintiff; the content of any fiduciary obligation owed by the defendant to the first plaintiff; and whether any such obligation was breached. The Vincents report does not purport to determine those matters.

References to best practice and industry practice

[23] The Vincents report does not explain what is meant by the expression "industry practice". In those circumstances, I would take it to refer to a practice generally followed in the accounting profession. As such, it is a summary description of observations apparently made by the author of the report. It follows that it is not the result of a process of reasoning, or the application of principles. Accordingly, the failure to identify such things does not render the evidence inadmissible. The objection to the reception of such evidence because the reasoning and principles are not identified should not be upheld.

[24] No submissions were made about the meaning of the expression "best practice"; nor is its meaning explained in the Vincents report.

[25] In paragraph 5.4 it is used when responding to a question which asks "What, if anything, an accountant acting reasonably would do [in particular circumstances]"; and whether certain actions in those circumstances were "industry and/or best practice".

[26] In paragraphs 5.10 and 5.11, the report responds to a question as to the usual process in relation to retainer agreements with clients. It does so, first by noting the fact that no standard had been issued by the Accounting Professional & Ethical Standards Board at the times in respect of which the opinion is expressed; and then by expressing an opinion as to industry practice and best practice.

[27] It is at this point that it is necessary to focus on some propositions found in the judgment of Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v*

Sprowles (Makita).[5] They are to the effect that expert evidence should include the criteria necessary for testing the accuracy of the conclusion reached by the expert;[6] and the evidence of the expert must state the reasoning process by which the expert came to the opinion expressed in evidence.[7] Two principles can be identified as lying behind each of these propositions. One is that expert opinion evidence can be given, only if it be shown that the opinion is the product of the application of the relevant expertise to the facts on the basis of which the opinion is expressed.[8] This demonstrates that the opinion lies within the witness's field of expertise. The other is that it remains the function of the court to determine the facts, even those proven by expert opinion evidence; so that the trier of fact is to form its own independent judgment, though by reference to the evidence in the case.[9]

[28] The reference as to "best practice" in these paragraphs of the Vincents report presents some difficulty. The expression rather suggests that some standard has been applied; and that that standard has some recognition in the accounting profession. However, that standard is not revealed in the report. Nor does the report reveal the reasoning process by which it is said that the conduct described in these parts of the report amounts to "best practice".

[29] In *Makita*, Heydon JA stated that for expert evidence to be admissible, it must explain how the field of specialised knowledge in which the witness is expert applies to the assumed fact, so as to produce the opinion advanced by the expert.[10] In *Australian Securities and Investment Commission v Rich,*[11] Spigelman CJ (with whom Giles and Ipp JJA agreed) accepted that the expert's "prime duty" is to identify "the facts and reasoning process which he or she asserts justify the opinion". Thus a failure to state the reasoning process by which the opinion is reached has the consequence that the opinion is itself inadmissible.[12] It follows that, in these paragraphs, the references to best practice (as distinct from industry practice) in the Vincents report are not admissible.

Mr Vincent's professional experience

[30] In my view, the submission of the plaintiffs should be accepted. Once it is accepted that expert opinion evidence might be given on the conflict situation alleged by the plaintiffs, evidence of the experience of the witness who is to be called to express such an opinion is admissible.

Conclusion

[31] Objections to the expressions of opinion as to the meaning of the word "consultant" have been accepted by the plaintiffs. Save as to them and to some of the references to best practice, I overrule the objection. Subject to submissions from the parties as to the form of order, I propose to order that paragraphs 1.2(ii), 2.1, 2.2, 5.5, 5.6, 5.7,

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5 (2001) 52 NSWLR 705.
6 See *Makita* at [59], [61], [87], [88].
7 See *Makita* at [79], [85], [86].
8 See *Makita* at [85], [86].
9 See *Makita* at [59], [67], [68], [71], [72], [73], [80], [82] and [87].
10 See *Makita* at [85].
11 (2005) 218 ALR 764 at [105].
12 See also *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37], [42].

and the expressions “and best” in paragraphs 5.4, 5.10 and 5.11 of the Vincents report be struck out.