

A POST-COVID HYPOTHETICAL

TOPIC *Valuations & adversarial experts*

FAMILY LAW CPD BREAKFAST

SPEAKERS Bronia Tulloch & Laurence Fudim

BRONIA TULLOCH

T 9225 8153

E broniatulloch@vicbar.com.au

PRACTICE AREAS

Family Law

- Care & Protection
- Parenting Orders
- Property Disputes

Commercial Law

Alternative Dispute Resolution (ADR)

Appellate

Equity & Trusts



Bronia was admitted to practice in 1996 and joined the Bar in 1998.

Bronia's areas of experience include residence and contact, contravention proceedings, child support, property (including de facto relationships), child and spousal maintenance, intervention orders, enforcement proceedings and costs disputes. She has a particular interest in relocation cases, financial matters which involve family businesses and appeals.

She appears regularly in Federal Circuit Court, the Family Court and the Full Court sitting in Melbourne, on circuit and interstate. Bronia is also available for paperwork and advice in all areas of family law, including the preparation of written submissions and Notices of Appeal.

Bronia is frequently briefed as a mediator and on behalf of a party in mediations and settlement negotiations. She is able to communicate with clients, solicitors and appear in court and at mediations via telephone and video link when required.

LAURENCE FUDIM

T 9225 7777

M: 0423 814 894

E laurence.fudim@vicbar.com.au

PRACTICE AREAS

Family Law

- Care & Protection
- Child Disputes
- Children's Court
- Family Provision
- Guardianship & Administration
- Parenting Orders
- Powers of Attorney
- Property Disputes

Alternative Dispute Resolution (ADR)

Intervention Orders



Laurence practises in a broad range of matters across family law and associated jurisdictions (including intervention order matters) in Victorian and interstate courts.

He appears regularly in the Federal Circuit and Family Court of Australia in both interim defended and final defended hearings in relation to parenting and property proceedings. Since joining the Bar, he has appeared in person in the Melbourne, Brisbane and Sydney registries.

Immediately prior to coming to the Bar, Laurence worked as a solicitor in a specialist family law firm in Brisbane, Queensland, where he acted for clients in a variety of matrimonial and de facto law matters, including property settlement, spousal maintenance, parenting, child support and cases involving allegations of family violence and/or child abuse.

Laurence graduated with first class honours in his Bachelor of Laws degree. He also holds a Bachelor of Arts and a Graduate Diploma of Legal Practice.

He is reading with Dan Sweeney and his senior mentor is Geoffrey Dickson QC.

VALUATIONS AND ADVERSARIAL EXPERTS

In response to a Post-Covid Hypothetical

1. INTRODUCTION

- a. In family law proceedings parties may agree as to the value of their assets, but in the absence of agreement, an asset will need to be valued. Valuation evidence is given by a suitably qualified expert witness. Most valuations are obtained in relation to major assets such as real estate and businesses. In some matters, valuations will be obtained in relation to cars or plant and equipment. It is less common for parties to incur the cost of valuing chattels such as furniture, art or jewellery as the disputed values might not be much more than the cost of a valuation. However, in some matters involving high values or high conflict, those type of assets might also be valued. Sometimes, valuations are required in relation to superannuation. For example, in the case of a defined benefit scheme.

2. POST-COVID HYPOTHETICAL

- a. In our post-Covid hypothetical there is a dispute regarding the value of the real properties owned by the parties. Just prior to the mediation in March 2022, the parties obtained joint valuations of the Sorrento property (valued at \$2.7million) and the Malvern property (valued at \$3.3million).
- b. Four months later, the wife obtained a shadow valuation for the Malvern property at \$3.0million. The Husband obtained a shadow valuation for the Sorrento property at \$2.1million.
- c. The shadow valuation for the Malvern property includes three comparable sales that were not referred to in the valuation of the joint expert. Those properties sold between March 2022 and July 2022.
- d. The shadow valuation for the Sorrento property includes two comparable sales that are not referred to in the valuation of the joint expert, one of these was in February 2022 and the other in April 2022. The joint expert gives the land size for the Sorrento property as 950 square metres. The shadow expert says that this is a mistake and the correct land size is 875 square metres.

3. THE NEW RULES

- a. The rules in relation to the preparation and admission of expert valuation evidence are found in the new *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (“**the New Rules**”) at Chapter 7 - “Experts and Assessors”. Part 7.1 contains the rules in relation to experts.
- b. Prior to the New Rules, the relevant rules in the Family Court (now Division 1) were found in Part 15.5 of the *Family Law Rules 2004* (“**the Old Rules**”).
- c. The applicable rules for matters in the Federal Circuit Court (now Division 2) were found in the *Federal Circuit Court Rules 2001* (“**FCC Rules**”).
- d. One of the notable differences between the Old Rules and the FCC Rules was the requirement for the appointment of a single expert witness under the Old Rules but not the FCC Rules.
- e. The *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* set out at Part 2 that the New Rules now also apply to proceedings in Division 2 of the Court. Consequently, the requirement that a single expert be appointed now applies to all family law matters.
- f. While numbered differently, the provisions of the New Rules are either identical or virtually the same as the equivalent provisions in the Old Rules.
- g. At Rule 7.02 of the New Rules, the purpose of Part 7.1 is stated. This provision is identical to Rule 15.42 of the Old Rules.

7.02 - Purpose of Part 7.1

The purpose of this Part 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;*
- (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.*

4. APPOINTMENT OF A SINGLE EXPERT WITNESS

- a. A single expert witness can be appointed jointly by the parties or by order of the court.
- b. The appointment of a single expert jointly by the parties is set out in Rule 7.03 of the New Rules. This provision is identical to Rule 15.44 of the Old Rules save that (3) & (4) are new additions).

7.03 Appointment of single expert witness by parties jointly

(1) If the parties agree that expert evidence may help to resolve a substantial issue in a proceeding, they may agree to jointly appoint a single expert witness to prepare a report in relation to the issue.

Note: Subrules 7.13(3) to (5) set out the requirements that apply to instructions to a single expert witness appointed by agreement between the parties.

(2) A party does not need the court's permission to tender a report or adduce evidence from a single expert witness appointed under subrule (1).

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

(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.

- c. It should be noted, as per rule 7.03(2), that evidence obtained by the joint appointment of a single expert witness automatically becomes evidence in the proceedings.
- d. The appointment of a single expert witness may occur by order of the Court pursuant to Rule 7.04 of the New Rules. This provision is substantially in the same terms as Rule 15.45 of the Old Rules.

7.04 Order for single expert witness

(1) The court may, on application or on its own initiative, order that expert evidence be given by a single expert witness.

(2) When considering whether to make an order under subrule (1), the court may take into account any matters relevant to making the order, which may include the following (without limiting the matters which may be relevant):

- (a) the overarching purpose of these Rules (see rule 1.04) and the purpose of this Part (see rule 7.02);*
- (b) whether expert evidence on a particular issue is necessary;*
- (c) the nature of the issue in dispute;*
- (d) whether the issue falls within a substantially established area of knowledge;*
- (e) whether it is necessary for the court to have a range of opinion.*

(3) The court may appoint a person as a single expert witness only if the person consents to the appointment.

(4) A party does not need the court's permission to tender a report or adduce evidence from a single expert witness appointed under subrule (1).

- e. As with the appointment of a single expert jointly appointed by the parties, pursuant to Rule 7.04(4), evidence given by a single expert appointed by the Court automatically becomes evidence in the proceedings.
- f. The New Rules (as with the Old Rules) provide detailed directions in relation to the appointment, management and requirements of the single expert witness, see: Orders the court may make - Rule 7.05 of the New Rules (Rule 15.46 of the Old Rules); Single expert witness fees and expenses - Rule 7.06 of the New Rules (Rule 15.47 of the Old Rules); Single expert witness's reports - Rule 7.07 of the New Rules (Rule 15.48 of the Old Rules).
- g. When the expert evidence is to be given by an expert witness who is not a single expert witness, the Court's permission is required: See Division 7.1.3, Rules 7.10 and 7.11 of the New Rules (Rules 15.51 and 15.52 of the Old Rules).
- h. The New Rules contain specific requirements in relation to the instructions to be provided to any expert witness (single expert or otherwise): Division 7.1.4 - Rule 7.13 (there have been some changes in drafting but these have the same effect as Rule 15.54 of the Old Rules). There are mandatory disclosure requirements in relation to expert's reports (see Rule 7.14 of the New Rules and Rule 15.55 of the Old Rules). The expert witness's duty to the Court is set out in detail at Rule 7.18 of the New Rules (Rules 15.59, 15.60 and 15.61 of the Old Rules).
- i. Rule 7.20 of the New Rules (see 15.61 of the Old Rules) provides that an expert witness's evidence-in-chief comprises of the expert's report, changes to the report in a notice under subrule 7.18(5) and any answers to questions given under Rule 7.27. Rule 7.21 of the New Rules prescribes the form of the expert's report (Rule 15.62 of the Old Rules). Rule 7.22 prescribes the contents of the expert's report (Rule 15.63 of the Old Rules).

5. APPOINTING ANOTHER EXPERT

- a. It is not uncommon when jointly appointed valuation evidence is prepared that one or both parties do not agree with the opinion provided. Most litigants have opinions about the value of their real estate or business interests and these may not match the opinion provided by the single expert. In circumstances where a party seeks to challenge a valuation provided by the single expert, they will often obtain a valuation from a different expert.

- b. It is usual for a party to want to have the Court consider the alternate valuation evidence prepared by their expert by admitting the alternate valuation into evidence. This is an option, but it is not necessarily easy or simple.
- c. Rule 7.08 of the New Rules (see 15.49 of the Old Rules) sets out that the Court's permission is required to tender a report or adduce evidence from another expert witness and the factors that the court must take into account:

7.08 Appointing another expert witness

(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:

- (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.*

- d. As discussed in the cases referred to below, persuading the court to give permission to admit evidence provided by the other expert witness can be a difficult application to win.
- e. Where more than one expert witness has expressed an opinion about the same subject matter, if the court has ruled that the evidence of an adversarial witness shall be admitted, but before the Court is called upon to determine which expert opinion should be accepted, there is a requirement that there be a conference of those experts. Having discussed the matter, some expert valuers will adopt some of the ideas or opinions of the other expert and adjust their opinion. This might resolve the valuation dispute in its entirety or at least bring the range of opinions closer together. At that point, the parties might be able to compromise on value rather than incur the extra cost of having the court determine the valuation dispute. See Rule 7.31 of the New Rules (and Rule 15.69 of the Old Rules):

7.31 Conference of expert witnesses

(1) In a proceeding to which this Division applies:

- (a) the parties must arrange for the expert witnesses to confer at least 28 days before the earlier of the following:*

- (i) *the first day of the trial in which the experts' reports are to be relied on in evidence;*
- (ii) *the first day when the experts' reports are otherwise to be relied on in evidence; and*
- (b) *each party must give to the expert witness the party has instructed a copy of the court approved brochure entitled Experts' Conferences—Guidelines for expert witnesses and those instructing them in proceedings in the Federal Circuit and Family Court of Australia.*

Note: The brochure is available on the court's website.

- (2) *The court may, in relation to the conference, make an order, including an order about:*
 - (a) *which expert witnesses are to attend; or*
 - (b) *where and when the conference is to occur; or*
 - (c) *which issues the expert witnesses must discuss; or*
 - (d) *the questions to be answered by the expert witnesses; or*
 - (e) *the documents to be given to the expert witnesses, including:*
 - (i) *a copy of Divisions 7.1.4, 7.1.5 and 7.1.6 of these Rules; and*
 - (ii) *relevant affidavits; and*
 - (iii) *a joint statement of the assumptions to be relied on by the expert witnesses during the conference, including any competing assumptions; and*
 - (iv) *all expert's reports already disclosed by the parties.*
- (3) *At the conference, the expert witnesses must:*
 - (a) *identify the issues that are agreed and not agreed; and*
 - (b) *if practicable, reach agreement on any outstanding issue; and*
 - (c) *identify the reason for disagreement on any issue; and*
 - (d) *identify what action (if any) may be taken to resolve any outstanding issues; and*
 - (e) *prepare a joint statement specifying the matters referred to in paragraphs (a) to (d) and deliver a copy of the statement to each party.*
- (4) *If the expert witnesses reach agreement on an issue, the agreement does not bind the parties unless the parties expressly agree to be bound by it.*
- (5) *The joint statement may be tendered as evidence of matters agreed on and to identify the issues on which evidence will be called.*

6. CLARIFICATION OF SINGLE EXPERT REPORTS

- a. Admitting into evidence the report prepared by an alternate expert is not the only option in circumstances where a party does not accept the valuation provided by the single expert. Either with or without the benefit of an alternate valuation prepared by another valuer (often called a “**shadow expert**” or “**adversarial expert**”), a party has the option of clarifying the single expert valuation. The relevant provisions are set out in Division 7.1.6 of the New Rules (and Division 15.5.6 of the Old Rules).

Division 7.1.6—Clarification of single expert witness reports

7.24 Purpose of Division 7.1.6

- (1) The purpose of this Division is to provide ways of clarifying a report prepared by a single expert witness.*
- (2) Clarification about a report may be obtained at a conference under rule 7.25 or by means of questions under rule 7.26.*

7.25 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.*

7.26 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.*

7.27 Single expert witness's answers

- (1) A single expert witness must answer a question received under rule 7.26 within 21 days after the later of the following:
 - (a) the date the expert witness received the question;
 - (b) the date the fees and expenses for answering the question are paid or secured.
- (2) An answer to a question:
 - (a) must be in writing; and
 - (b) must specifically refer to the question; and
 - (c) must:
 - (i) answer the substance of the question; or
 - (ii) object to answering the question.
- (3) If the single expert witness objects to answering a question or is unable to answer a question, the single expert witness must state the reason for the objection or inability in the document containing the answers.
- (4) The single expert witness's answers:
 - (a) must be:
 - (i) attached to the affidavit under subrule 7.21(2); and
 - (ii) sent by the single expert witness to all parties at the same time; and
 - (iii) filed by the party asking the questions; and
 - (b) are taken to be part of the expert's report.

7.28 Single expert witness's costs

- (1) The reasonable fees and expenses of a single expert witness incurred in relation to a conference are to be paid as follows:
 - (a) if only one of the parties attends the conference—by that party; or
 - (b) if more than one of the parties attends the conference—by those parties jointly.
- (2) If a single expert witness answers questions under rule 7.27, the expert witness's reasonable fees and expenses incurred in answering any questions are to be paid by the party asking the questions.
- (3) A single expert witness is not required to undertake any work in relation to a conference, or answer any questions, until the fees and expenses for that work or those answers are paid or secured.
- (4) In this rule:

attend includes attendance by electronic communication.

7.29 Application for directions

A party may apply to the court for directions relating to a conference with a single expert witness or the asking or answering of questions under this Division.

- b. Single expert witnesses can also be challenged during the final hearing via cross-examination. Even if the single expert was jointly appointed by parties, the single expert is not called as their witness at trial, but a witness of the court. Consequently both parties may cross-examine the single expert witness. Rule 7.09 of the New Rules (15.50 of the Old Rules) sets out the provisions in relation to the cross-examination of a single expert witness.

7. DISPUTING A REAL ESTATE VALUATION

- a. Most valuations of residential real estate contain the same basic elements:
 - i. A description of the property including title particulars, land size, location and a detailed description of the buildings and improvements on the property;
 - ii. An internal and external inspection of the property is generally considered to be essential to ensuring that the expert is able to accurately identify and describe the property;
 - iii. It is expected that photographs are taken of the key parts of the property, and these are included in the report;
 - iv. A list of comparable sales with an opinion offered as to whether the subject property is inferior or superior to other comparable properties. The sale price and date of sale of the comparable properties are also an essential requirement;
 - v. A statement of the expert's opinion as to the value of the subject property and some explanation as to why.
- b. Commercial properties also require an analysis of the net income derived or able to be derived from the property including the status of any current lease agreements. Valuation of those properties will most probably be assessed by reference to an expected return on investment. The benchmark for the expected return depends upon a comparison of the return on similar properties.
- c. The starting point when challenging a real estate valuation is to undertake a careful examination of the description provided in relation to the property:
 - i. Is the land size accurately recorded?
 - ii. Are the building and improvements correctly described?
 - iii. Are there any unusual features in relation to the title which might impact upon value? For example, a leasehold interest (usual for Alpine properties), a company share structure rather than body corporate (common in flats and apartments in older suburbs such as St Kilda),

covenants or easements. Could there be a rezoning of the property in the near future?

- d. If the property has been misdescribed, this could undermine the assumptions upon which the opinion as to value has been based.
- e. The next element are the comparable sales. Are they actually comparable? In a fast-moving market, sale prices from 3 months prior might not reflect the current state of the market. The comparable sales need to be sufficiently contemporaneous with the date of the valuation. Are the sales geographically comparable? There can be big differences from one suburb to the next relating to each suburb's amenity, level of perceived prestige, school zones or proximity to the beach or other desirable or undesirable features. Is the land size sufficiently comparable to the subject property? Is the type of house sufficiently comparable? For example, can a Victorian home be compared to a modern home even if they are located nearby?
- f. Valuers obtain comparable sales from a common database available to their industry and real estate agents. Different valuers valuing the same subject property might elect to use different comparable sales based on their subjective assessment of how comparable those sales are to the subject property. There are obvious limitations on assessing comparable sales based only on the information derived from a database. Some valuers might have better "local knowledge" and may have actually personally viewed the comparable sales as well as the subject property. Some properties are unique, and it can be difficult to find truly comparable sales.
- g. Some recent decisions regarding disputed real estate valuations are:
- h. ***Bollen & Bollen [2020] FamCA 605 (23 July 2020)***:
 - i. A decision of Macmillan J.
 - ii. Involved a dispute over the value of a beachside property in a location described in the judgment as "F Town".
 - iii. The single expert gave a value of \$11,000,000 in September 2019. The husband wanted to retain the property. Wife instructed another valuer to value the property on her behalf and he concluded that the market value was \$13,500,000.
 - iv. At the commencement of the final hearing the wife sought to adduce the evidence of her valuer.
 - v. Macmillan J held at paragraph 27:
"Although I do not accept as submitted by counsel for the wife that there was a "substantial body of opinion contrary to any opinion given by the single expert witness" as referred to in Rule 15.49 of the Family

Law Rules 2004 I do accept as referred to by Thornton J in Parkes & Parkes [2015] FamCA 1210 (at [29]) "... the overarching consideration ... is one of fairness and justice between the parties".

- vi. The wife was permitted to adduce the evidence of her valuer and the two valuers conferred.
- vii. Both valuers moved from their original positions to \$12,250,000.
- viii. The wife then sought to cross-examine her own valuer as she did not accept his evidence as to value.
- ix. The decision provides a good summary of the relevant authorities at paragraph 33 and 34 referring to the decision of the Full Court in *Phillips & Phillips (2002) FLC 93-104* at 44 which summarises the earlier authorities, including the following principals:
 - 1. No fixed rule as to the proper method of valuation, it depends upon the facts of the case;
 - 2. Where one expert is preferred reasons should be given;
 - 3. It is not open to merely adopt a mean or average;
 - 4. But the court is not bound to accept one or the other of competing valuations, it can form its own view by the proper application of established principles of valuation.
 - 5. Sale of the property is an option where resolving the valuation dispute is too difficult and complex.
- x. Ultimately her Honour did not accept submissions by the wife's counsel that the property should be sold. She accepted that the husband should keep it. He was ordered to pay the wife a sum based upon the overall value of the asset pool with the value of the subject property at \$12,250,000.

i. Manesh & Manesh (No 3) [2021] FedCFamC1F 293 (25 March 2021)

- i. Judgment of Johns J.
- ii. Orders were made by the Court providing for a process to arrange for the engagement of a single expert valuer to value an overseas property located in "Country C". The parties appointed a single expert valuer who produced a valuation but subsequently refused to execute an affidavit.
- iii. The wife sought the husband's cooperation to tender the original valuation, but the husband refused. The wife then provided the husband with three options for retaining an alternative expert, and requested that the husband select one. The Husband failed to provide a response and the wife proceeded to engage "Mr D" as an expert.
- iv. On day 1 of the trial, the wife was granted leave to rely upon Mr D's valuation.

- v. The husband cross-examined Mr D over the course of two days, challenging his qualifications and the methodology adopted in the report, amongst other things.
- vi. The trial continued for a further period, and on the 8th day of the trial (the final day), the husband made an application to reopen evidence and sought leave to adduce his own expert evidence in relation to the value of the Country C property that he obtained from “Mr G”.
- vii. The husband attempted to rely on Rule 15.49(2)(c) of the Old Rules. The equivalent in the New Rules is 7.08(2)(c). He contended that there was “*another special reason*” for adducing the evidence, however he failed to support his contention. The husband also failed to produce evidence of his communications with Mr G, nor of his attempts to engage with the wife in relation to the appointment of a single expert. He also failed to clarify the evidence of Mr D by way of questions in accordance with Rule 7.26 of the Rules.
- viii. Her Honour, at paragraph [20] held that:

“The single expert rules have been formulated so as to avoid delay in proceedings, to streamline the process by which valuation evidence is obtained and to ensure that issues such as property value can be address in a just and timely fashion.”

- ix. Her Honour found that the husband had not established the existence of a special reason that would justify the admission of the evidence from another expert, and having regard to the principle of avoiding delay, her Honour dismissed the husband’s application.
 - x. The judgment did not provide any information as to what value Mr attributed to the property or what value the husband was seeking to rely upon.
- j. ***Dovgan & Dovgan [2021] FamCA 306 (14 May 2021):***
- i. A decision of Harper J
 - ii. There was a dispute about a property at “Suburb L” and a business “M Pty Ltd”.
 - iii. The joint expert valued the property at \$12,500,000.
 - iv. The wife challenged the value on the basis that long standing valuation principals were not adopted, and the valuer failed to take into account the possibility of rezoning.
 - v. The wife sought to adduce further valuation evidence from her expert.
 - vi. At paragraphs 130 onwards, the Court discussed the case law in relation to the appointment of another expert witness. Detailed consideration was given to arguments in relation to whether or not the wife’s further valuation was a “*substantial body of opinion*”, as per Rule

15.49 of the Old Rules. At paragraph 181 it was held that the discretion in rule 15.49(2) had not been enlivened.

- vii. At paragraph [214], reference was made to the Full Court decision in *Salmon and Ors & Salmon [2020] FamCAFC 134* and at [215], the relevant principles in relation to valuation, which mostly overlap those set out in *Phillips*.
- viii. The Court considered the question of the value of the property at "Suburb L" and came to the conclusion that it was \$12,500,000.

k. *Neales & Neales [2021] FamCA 525 – First Instance – (21 July 2021)*

- i. First Instance decision of Gill J, which as set out below has been overturned by the Full Court.
- ii. The matter involved a portfolio of 13 commercial properties and the central issue involved a dispute about the value.
- iii. The parties jointly appointed a single expert referred to in the judgment as "Mr B" who attributed a value to the properties of between \$33.835 million to \$34.190 million, the difference being dependent on the method of valuation used.
- iv. The parties subsequently asked questions of Mr B pursuant to the Rules and Mr B provided his answers.
- v. The husband disagreed with the valuation and instructed a shadow expert, Mr D, to prepare a report as to the value of the real estate, which ultimately came back at \$22.465 million – a difference of about \$11.3 to \$11.7 million. In Mr D's report, Mr D provided a critique of the valuation methodology used by Mr B.
- vi. The husband made an application to the Court seeking for Mr B to be discharged and for the appointment of Mr D as either a single expert or an adversarial expert.
- vii. In support of his application to discharge the single expert, the husband asserted that:
 - 1. Mr B did not comply with the terms of reference;
 - 2. Mr B had failed to adequately disclose his reasoning in arriving at his expert opinion;
 - 3. Mr B failed to take into account material matters relating to the leases and subleases in respect of the properties; and
 - 4. Mr B ought to be removed as an expert because Mr B "*comes with a closed mind inconsistent with the duties of an expert*".
- viii. In support of the application to appoint Mr D as a single expert or a shadow expert, the husband submitted that:
 - 1. the use of a different methodology by Mr D reflects a substantial body of opinion contrary to the opinion given by the single expert (as per Rule 15.49(2)(a) of the Old Rules);

2. that Mr D knew of matters not known by Mr B (Rule 15.49(2)(b) of the Old Rules); and
 3. the importance of the value of the properties to the proceedings and the magnitude of difference between the opinions expressed by the two experts constitute “a special reason” for adducing evidence from him (as per Rule 15.49(2)(c) of the Old Rules).
- ix. With respect to the application to discharge Mr B as a single expert, his Honour held that the contentions of the husband have not been established.
- x. In relation to whether permission should be granted for the husband to rely on Mr D as a shadow expert, his honour concluded:
1. With respect to the submissions made by the husband pursuant to Rule 15.49(2)(a) of the Old Rules, that Mr D’s opinion does not go so far as to establish that the alternate methodology used by him constitutes a “*substantial body of opinion*”. His Honour held that “*what [Mr D] proffered was an alternate approach that he opined was superior*”, but that that was insufficient to meet the requirements of the Rules;
 2. In relation to submissions pursuant to Rule 15.49(2)(b) of the Old Rules, that the matters relating to the lease status of some of the properties were matters in the knowledge of the husband and within his ability to correct, his Honour held that:

“while the additional information may technically bring the application within the rule, it is also a matter that can be dealt with by means of an application for directions pursuant to Rule 15.67A”.
 3. In relation to Rule 15.49(2)(c) of the Old Rules, his Honour held that “*allowing further expert evidence merely because of a divergent conclusion is inconsistent with the purpose of the provisions...*”. His Honour held that the large divergence did not constitute a special reason such as to justify the appointment of a further expert.
- xi. As such, his Honour dismissed the Husband’s application for the appointment of Mr D as a single expert or shadow expert.

I. Jess & Garvey [2021] FedCFamC1F 189 (12 November 2021)

- i. Judgment of Bauman J.
- ii. This matter involved a single expert referred to as Mr HH being appointed by order of the Court. The single expert provided a valuation on the property at “Suburb L” of \$1.3 million.

- iii. The husband raised issues with the single expert's opinion by providing questions to the single expert in relation to alleged deterioration in the interior and surrounds of the property.
- iv. The single expert explained why he did not see that there *"is any significant variation and reduction in the value of the property taking into account the existing presentation of the subject property"*.
- v. The husband disagreed with the single expert and retained a shadow expert, Mr GG, to prepare a valuation of the property. The wife refused to allow Mr GG to inspect the interior of the property, and Mr GG subsequently provided valuation "from the kerbside". Mr GG valued the property at \$1.7 million – a difference of \$400,000.
- vi. The Suburb L property represented a major joint asset of the parties. In circumstances where the wife sought to retain the property, his Honour noted that the wife would benefit from a lower valuation, and the husband would benefit from a higher valuation.
- vii. The husband made an application pursuant to Rule 7.08 of the New Rules to rely upon the affidavit of Mr GG, and for the two experts to confer prior to trial. The application was made orally during an interim hearing.
- viii. Senior Counsel for the husband submitted that there were limitations raised by Mr HH in his valuation and that there was a 'significant valuation uncertainty' due to the impact of COVID-19 on the market.
- ix. His Honour held, at para [17], that the above submissions, together with the substantial difference in valuations, amounts to *"another special reason"* under Rule 7.08(2)(c) for adducing the shadow expert evidence. His Honour held that the circumstances of this case were such that it was in the interests of justice to grant the husband's application. As such, the husband was permitted to rely on the shadow expert evidence and orders were made for the two experts to confer.

m. Neales & Neales [2021] FamCA 525 – Full Court – (28 March 2022)

- i. Decision of Aldridge, Tree & Schonell JJ.
- ii. Appeal from first instance decision of Gill J where the parties instructed expert "Mr B" to value a portfolio of properties which came back with a value of between \$33.835 million to \$34.190 million. The husband obtained a shadow expert valuation on the properties which resulted in a value of \$22.465 million. The trial judge dismissed the husband's application seeking leave to rely upon the shadow expert and seeking orders discharging the single expert.
- iii. On appeal, counsel for the husband argued that there were a number of matters which collectively constitute *"another special reason"* under Rule 7.08(2)(c) of the New Rules (Rule 15.49(2)(c) of the Old Rules) and

that the trial judge erred in not taking these matters into consideration when determining the husband's application. Counsel for the husband argued that these matters included:

1. the fact that the single expert and shadow expert adopted alternative methodologies;
 2. that matters were known to the shadow expert that weren't known to the single expert;
 3. that if the difference of over \$11 million arises as a result of a difference in methodology and information that warrants consideration as another special reason; and
 4. that in circumstances where the wife seeks a cash payment from the husband, the husband will be left with the consequences of the findings as to value.
- iv. Their Honours agreed with the husband's submissions in relation to the above grounds and held, at paragraph [42], that the primary judge fell into error by not taking into consideration these matters in aggregate in addressing Rule 15.49(2)(c) of the Old Rules.
- v. In addition, the wife in this case sought a cash payment from the husband and their Honours also held that, in circumstances where the husband would be left holding the properties post settlement, *"the consequences of the significant difference in value may more adversely impact the husband than the wife."*
- vi. This case is a good example of where a party was permitted to rely on a shadow expert valuation and the application of Rule 7.08(2)(c), being *"another special reason"*.

8. DISPUTING A BUSINESS VALUATION

- a. The "moving parts" of a business valuation are probably more complex than that of a real estate valuation.
- b. It is a matter for the expert valuer to determine the appropriate methodology.
- c. The majority of business valuations start by assessing value on a future maintainable earnings basis. However, other possible methods are:
 - i. Direct comparison with recent sale of similar businesses;
 - ii. Net present value or discounted value of future cashflows;
 - iii. Valuation of net tangible assets; or
 - iv. "Rules of thumb" formula applicable to specific industries.

- d. The future maintainable earnings method requires a review of profit and loss in recent accounting periods and adjusting for items that are abnormal or non-recurring.
- e. Interest and tax are excluded to arrive at 'Earnings Before Interest and Tax' (**EBIT**) or depreciation and amortisation might also be excluded to arrive at EBITDA.
- f. Usually, a figure for average EBITDA over the past few years is arrived at. That figure is then multiplied by a capitalisation rate. A decision as to the correct capitalisation rate is subjective and determined by matters such as the type of business, the time that the business has been operating, the type of customers, reliance on key individuals etc.
- g. The benefit of the Future Maintainable Earnings Valuation (**FME**) method is that it has the ability to take into account goodwill, which is not accounted for in a valuation based only on net tangible assets. If the value arrived at from the FME method exceeds the net tangible assets value (usually a result of the business having low profits in relation to the capital invested in the business), the FME method is generally deemed unsuitable, and the net tangible assets value will be used.
- h. With the FME method, adjustments will be made for assets which are not essential to the operation of the business (i.e. surplus cash at bank). This results in the equity value of the business. That value, less the net tangible assets, is the goodwill of the business.
- i. In each of the steps above, numerous decisions and assumptions are made by the valuer. For example:
 - i. In arriving at EBIT, adjustments for abnormal or non-recurring expenses – the types of expenses that fit into this category – might involve a judgment call by the valuer based upon information provided by the operator of the business.
 - ii. Adjustments for market remuneration for an owner-operator who is not paying themselves a market wage. This might in fact need separate expert evidence as to market remuneration.
 - iii. Over how many years or period should the EBITDA be averaged. During COVID, some valuers excluded various periods or included others to account for the unusual situation in the market at that time. This is a highly subjective decision that is likely to vary between valuers even in relation to the same business.
 - iv. A determination of the appropriate capitalisation rate. This might be based on information from the business operator which the non-operating party does not accept.

- j. Changing the figures used at any or a number of the above steps can result in very different results regarding the bottom line value of the business.
- k. Sometimes, there is confusion or double counting in relation to related party loan accounts. The manner in which these items are treated should be carefully viewed, as there can be confusion about this issue by valuers who are not familiar with the family law process.
- l. Further adjustments might need to be made where the parties or one of them does not have the controlling interest in the business, and a discount needs to be made on account of the interest being a minority interest. The appropriate level of discount is a subjective determination.
- m. Given the multiple moving parts of a business valuation it might be particularly useful for another expert to review the single expert valuation and assist with the formulation of questions for the single experts. Although it is not essential. The asking of those questions might cause the single expert to revise their opinion as to the value of the business. As with real estate valuations, an application can be made for the alternate valuation to be adduced as evidence in the proceedings, although such an application can be difficult to win.
- n. ***Salmon and Ors & Salmon [2020] FamCAFC 134 (1 June 2020):***
 - i. Decision of Ryan, Aldridge & Kent JJ.
 - ii. The trial judge dismissed an application to tender a report or adduce evidence from another expert witness in relation to valuation reports. That decision was appealed and the appeal was dismissed.
 - iii. The Full Court held that there was no error by the trial judge in the exercise of discretion.
 - iv. The differences of opinion between the single expert and the other expert were:
 1. An inclusion of assets by one valuer of assets related to the business that were relevant to the broader property pool but not the equity in the business itself, being loan accounts. With those assets removed the difference between the two valuations was much smaller.
 2. A difference in the rate of adjustment for commercial remuneration for the husband who was operating the business (where there was not expert evidence about this issue).
 3. A difference in the capitalisation rate.
 4. A difference of opinion in the discount applied on account of the husband's minority interest in the business.

- v. The trial judge held that the differences in opinion could be clarified pursuant to the further questions and conferences provisions in the rules.
- vi. It was open for the trial judge to find that there was not a substantial body of opinion contrary to any opinion given by the single expert witness – Rule 15.49 of the Old Rules.
- vii. The Full Court at paragraph 27 held that a mere difference of opinion, particularly in the area of valuation, would ordinarily not be sufficient to engage the discretion to permit expert evidence other than the jointly appointed single expert.
- viii. The Full Court referred at paragraph 30 to the decision of Lord Woolf MR in the decision of *Daniels v Walker [2000] 1 WLR 1382* the point being made that applying to tender a report from another expert should not be the first step. Other options such as questions and the meeting of experts should occur before that step is contemplated.
- ix. The Full Court also referred at paragraph 40 to the fact that once an alternate expert opinion was obtained, the parties are not precluded from having the continued assistance of that expert. At paragraphs 41 and 42 that it should not be assumed that the court is bound to accept the valuation of the single expert and the court is bound to arrive at its own conclusion. Further at paragraph 44 that the fixing of the capitalisation rate is a matter to be determined by the trial judge.

o. *Keevers & Keevers [2021] FedCFamC1F 338 (22 December 2021)*

- i. Decision of Wilson J.
- ii. His Honour dismissed the husband's application to rely on an adversarial expert with respect to valuation of a business operated via the Keevers Family Trust ("**the business**").
- iii. The single expert in this matter was referred to in the judgment as "Mr C". He valued the business initially at \$50.890 million and later, following correspondence between the parties' solicitors, at \$52.968 million. The husband disagreed with the valuation and sought a valuation from a "Mr B", chartered accountant. Mr B conducted a forensic review of Mr C's valuation and concluded that the business value was between \$37.39 million to \$46.39 million.
- iv. The husband brought an application pursuant to Rule 7.11 of the New Rules and argued that the Court ought to permit him to adduce the shadow expert evidence as the circumstances satisfied the elements of Rule 7.08(2)(a).
- v. His Honour held that the husband did not articulate by reference to the facts of the case precisely what was "*the same issue*" in respect of which a substantial body of contrary opinion existed, nor that the

contrary evidence “*is or may be necessary for determining the issue*” – as per Rule 7.08(2)(a).

- vi. His Honour quoted the first instance decision of Gill J in *Neales & Neales* [2021] FamCA 525 (21 July 2021). (As set out above that decision was overturned on appeal on 28 March 2022.)
- vii. His Honour also quoted the case of *Tsoutsovas & Tsoutsouvas and Ors* [2012] FamCA 521 where Kent J held, at paragraph [26] that:

“A number of cases highlight the need to address questions to a single expert or to take the steps provided for in the Rules (such as a conference) to clarify a single expert report before embarking upon an application to be allowed to adduce evidence from another expert witness.”

- viii. His Honour observed that, having an agreed single expert on an issue and then having an adversarial expert on the same issue creates an imbalance, undermining the original purpose of appointing a single expert, as was observed in *Tsoutsouvas*.
- ix. His Honour helpfully provided some guidance for establishing that a substantial body of opinion exists that is contrary to the opinion held by the single expert. At paragraph 39 of the judgment, his Honour stated that a party must first identify the precise issue in respect of which contrary opinion is said to exist. Then evidence must be before the Court that “*a particular school of thought*” exists indicating that a substantial body of opinion exists on a specific issue (the subject of the expert evidence) and that that opinion is contrary to the opinion held by the single expert.
- x. Leave to adduce the shadow expert’s evidence was refused, although it was noted by his Honour that, given that the husband has indicated that he intended to cross-examine Mr C at trial, that would accommodate and ameliorate any contention that irredeemable prejudice might be caused to the husband by not allowing him to adduce Mr B’s evidence.
- xi. This case is a good example of the Court’s reluctance to deviate from the idea that, if practicable, and without compromising the interests of justice, expert evidence is given on an issue by a single expert. It is also a case which provides guidance for practitioners when giving advice or drafting submissions with respect to an application to adduce adversarial expert evidence pursuant to Rule 7.08(2)(a). However, given the reference of Wilson J in this decision to the first instance decision in *Neales*, which was later overturned, it might be wondered if the outcome of this case would have been different had it been determined after the decision of the Full Court in *Neales* had been decided.

p. *Toma & Doyle [2022] FedCFamC1F 215 (8 April 2022)*

- i. Decision of Wilson J.
- ii. In this case, interim orders were made by consent for the appointment of a single expert who was to provide a valuation of, *inter alia*, shares.
- iii. The wife made an interlocutory application in which she sought to discharge the single expert.
- iv. Interestingly, the wife's application to discharge the single expert was made prior to the single expert providing his valuation report.
- v. The wife contended that no purpose would be served in the single expert attributing a value to the relevant shares because the price of the shares in the relevant entity is determined by the board of directors. The wife also argued that the methodology opined is compromised by the husband's failure to provide full and frank disclosure and that therefore the opined methodology is limited in scope and likely to be an inaccurate valuation.
- vi. The primary question in this case was whether the New Rules contain an express provision conferring power on the Court to make an order for the discharge of an order for the appointment of a single expert.
- vii. His Honour held that no such express power is conferred by statute, nor has there been any clear position expressed by the Court with regard to this question in past cases. His Honour stated at paragraph [28]:

"...the inherent power of this Court, possessed as it is of a statutory jurisdiction, does not extend to the making of an order for the discharge of a single expert."

As such, his Honour dismissed the wife's application and observed that the wife can seek leave to cross-examine the single expert at trial should she wish to do so, subject to of course her compliance with Rule 7.09 of the New Rules.

9. OTHER TYPES OF VALUATIONS: CARS, CHATTELS, PLANT AND EQUIPMENT

- a. The same principles apply in relation to the valuation of other assets, being that a single expert must be appointed.
- b. Formal valuations are not often obtained for cars, unless they are collectables or particularly valuable. In that case it might be very important to find the correct expert who has the relevant expertise.
- c. Art, jewellery and antiques will also require specialist valuers. The usual issue is whether the cost of such valuations is proportionate to the dispute.

- d. For many businesses it is not appropriate to rely upon the depreciation schedule in relation to plant and equipment. For example, businesses with valuable machinery and vehicles: farms, manufacturing, earthworks, roadworks, transport and similar may have machinery that depreciates in the second hand market place at a much lesser rate than that allowed by the ATO for tax purposes.
- e. Relying solely on the depreciation schedule might result in a significant undervaluation of plant and equipment. Often the challenge in such businesses is to ensure that an appropriate list which adequately describes the items to be valued has been prepared. Frequently the depreciation schedule in tax returns and financial statements is also vague and it can be difficult to ensure accurate identification. The valuer should take photographs at the inspection to ensure that the correct items are being inspected.
- f. Misidentification or not accounting for all items is the most likely cause of valuation disputes in relation to chattels.

10. CONCLUSION

- a. Engaging a second expert to assist in challenging the single expert can be helpful, but the first step should be clarification of the single expert valuation by way of questions to the single expert and/or a conference. This may in fact result in the single expert changing their opinion in any event.
- b. An application to the Court to tender a report or adduce evidence from another expert can be difficult to win, but still might be the appropriate option if the amount of money involved in the disputed valuation is significant.
- c. In order for the Court to appoint an adversarial expert the Court need only be satisfied that one of the three avenues in Rule 7.08(2) of the New Rules has been met. In recent decisions, particularly the Full Court decision of *Neales*, it appears that the most likely option for success may be found in Rule 7.08(2)(c). Careful consideration should be given to the matters relied upon when making an application for the appointment of an adversarial expert witness, bearing in mind that there are three possible avenues that may be pursued.

Bronia Tulloch | Barrister
Mobile: 0412 265 373
broniattulloch@vicbar.com.au

Liability limited by a scheme approved
under Professional Standards Legislation.

Laurence Fudim | Barrister
Mobile: 0423 814 894
laurence.fudim@vicbar.com.au

Liability limited by a scheme approved
under Professional Standards Legislation.