FAMILY COURT OF AUSTRALIA

SALMON AND ORS & SALMON ***[2020] FamCAFC 134***

FAMILY LAW – APPLICATION IN AN APPEAL – PROPERTY – EXPERT EVIDENCE – Consideration of Part 15.5 of the Family Law Rules 2004 (Cth) – Where the primary judge refused permission under r 15.49 for expert evidence other than the single expert but extended the time periods for a conference (r 15.64B) and questions to the single expert (r 15.65) – Whether the applicants have established "a substantial body of opinion contrary to" the opinion of the single expert or "special reason" within the meaning of r 15.49(2) – Interpretation and application of the expert evidence rules.

FAMILY LAW – APPLICATION IN AN APPEAL – LEAVE TO APPEAL – Where the orders from which leave to appeal is sought are a discretionary decision as to a matter of practice and procedure – Whether any discretionary error was made by the primary judge – Whether there is any basis for the grant of leave to appeal – Where the procedures for clarifying the single expert's opinions had not been employed in advance of the application determined by the primary judge or the application for leave to appeal – Where on the proper interpretation of the applicable expert evidence rules there is no discretionary error demonstrated – Leave to appeal refused – applicants to pay the respondent's costs.

Family Law Act 1975 (Cth) ss 79, 97(3)

Family Law Rules 2004 (Cth) Pt 15.5, rr 1.04, 1.06, 15.42, 15.49, 15.64B, 15.65
Queensland Uniform Civil Procedure Rules 1999 (Qld) r 429N(3)
Supreme Court Rules 1970 (NSW) Pt 39

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39
Australian Coal & Shale Employees' Federation v The Commonwealth (1953) 94 CLR 621; [1953] HCA 25
Bass and Bass (2008) FLC 93-366; [2008] FamCAFC 67
Conias Hotels Pty Ltd v Murphy [2012] QSC 297
Commonwealth v Milledge (1953) 90 CLR 157; [1953] HCA 6
Daniels v Walker [2000] 1 WLR 1382
Demetriou v Demetriou [2019] FamCA 625
D v S [2009] QSC 446
Borriello v Borriello (1989) FLC 92-049; [1989] FamCA 48
Chick and Chick (1987) 12 Fam LR 64; [1987] FamCA 69
Lenehan and Lenehan (1987) FLC 91-814; [1987] FamCA 8
Mallet v Mallet (1984) 156 CLR 605; [1984] HCA 21
Medlow & Medlow (2016) FLC 93-692; [2016] FamCAFC 34
Owners of Strata Plan 58577 v Banmor Developments Finance Pty Ltd [2006]

NSWCA 325
Padnal & Padnal (No 3) [2014] FamCA 904
Salt & Salt [2018] FamCA 259
Simonsen & Simonsen [2009] FamCA 698
Walker Corporation Pty Ltd v Sydney Habour Foreshore Authority [2008] NSWLEC 282

FIRST APPELLANT:	Mr Salmon
SECOND APPELLANT:	B Pty Ltd
THIRD APPELLANT:	Mr C Salmon and Ms D Salmon and Mr E Salmon as Trustees for the B Pty Ltd Superannuation Fund
RESPONDENT:	Ms Salmon by way of her Personal Legal Representatives Mr Simpson and Ms Simpson
FILE NUMBER:	BRC 10433 of 2015
APPEAL NUMBER:	NOA 103 of 2019
DATE DELIVERED:	1 June 2020
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane (via video link)
JUDGMENT OF:	Ryan, Aldridge & Kent JJ
HEARING DATE:	1 June 2020
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	24 October 2019
LOWER COURT MNC:	[2019] FamCA 910
REPRESENTATION	
COUNSEL FOR THE FIRST APPELLANT:	Mr Page QC with

	Ms McLennan
SOLICITOR FOR THE FIRST APPELLANT:	Williamson & Associates
COUNSEL FOR THE SECOND AND THIRD APPELLANTS:	Mr Galloway
SOLICITOR FOR THE SECOND AND THIRD APPELLANTS:	Williamson & Associates
COUNSEL FOR THE RESPONDENT:	Ms Dart
SOLICITOR FOR THE RESPONDENT:	Hartley Healy

ORDERS

(1) The first to third appellants' application for leave to appeal the orders made by the primary judge on 24 October 2019, filed 21 November 2019 be dismissed.

(2) The first to third appellants be jointly and severally liable to pay the respondent's costs of and incidental to the application in an appeal in the amount of $12,250 within one (1) month.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Salmon and Ors & Salmon* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NOA 103 of 2019
File Number: BRC 10433 of 2015

Mr Salmon
First Appellant

And

B Pty Ltd
Second Appellant

And

Mr C Salmon and Ms D Salmon and Mr E Salmon as Trustees of the B Pty Ltd Superannuation Fund
Third Appellant

And

Ms Salmon by way of her Personal Legal Representatives Mr Simpson and Ms Simpson
Respondent

EX TEMPORE REASONS FOR JUDGMENT

KENT J

1. Rule 15.49(2) of the Family Law Rules 2004 (Cth) ("the FLR") provides the Court with a discretion to allow a party to tender a report or adduce evidence from an expert witness, other than the single expert witness, if the Court is satisfied of one of the conditions expressed in that rule.

2. Rule 15.64B provides for a conference with the single expert witness and r 15.65 provides for questions to be asked of the single expert witness, as the ways in which clarification about a single expert's report may be obtained.

3. On 24 October 2019, the primary judge, on an interlocutory application brought in property settlement proceedings[1] where the single expert accountant had produced valuation reports, made orders extending the time period provided for in r 15.64B to facilitate a conference with the single expert witness, and the time period provided for in r 15.65 for questions to be asked of the single expert witness. Her Honour otherwise dismissed the application for permission to tender a report or adduce evidence from another expert witness.

4. The determinative issue on this application for leave to appeal from those orders is whether in all of the circumstances the decision of the primary judge is attended by sufficient doubt to warrant it being reconsidered by the Full Court and whether substantial injustice would result if leave were refused, supposing the decision to be wrong.[2]

5. The determination of the primary judge was an exercise of a discretionary judgment as to a matter of practice and procedure. The principles governing appellate intervention with respect to such determinations are well established.[3]

6. In my opinion, for the reasons which follow, no discretionary error on the part of the primary judge has been demonstrated. Her Honour's decision is not attended by a sufficient doubt to warrant it being reconsidered by the Full Court and leave to appeal from that decision ought be refused.

The proceedings and the parties

7. On 28 October 2015, the late Ms Salmon ("the wife") commenced property settlement proceedings consequent upon her final separation from Mr Salmon ("the husband") ending their approximate 20 year relationship and marriage which produced two children now aged 19 years and 16 years respectively.

8. Sadly, the wife passed away in late 2015 and her parents as Personal Legal Representatives were substituted as parties ("the Estate"). By an order made on 28 July 2017, each of B Pty Ltd ("the Company") and the Trustees of the B Pty Ltd Superannuation Fund ("the Trustees") were joined as parties to the proceedings.

9. Pursuant to orders made in the course of proceedings, Mr F, chartered accountant, was appointed the single expert witness ("the single expert") to value the interests of the husband and/or the wife in relevant entities including the Company and other related entities including the superannuation fund. The single expert has produced three reports respectively dated 2 September 2016, 6 October 2017 and 18 July 2019.

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[1] Pursuant to s 79 of the *Family Law Act 1975* (Cth) ("the Act").
[2] *Medlow & Medlow* (2016) FLC 93-692.
[3] See, *Adam P Brown Male Fashions Proprietary Limited v Philip Morris Inc* (1981) 148 CLR 170; *Australian Coal & Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 per Kitto J at 627.

10. Mr W, chartered accountant, ("the other expert") prepared a report at the request of the husband, which includes a "critique" of the single expert's report and which is dated 22 August 2019. It is that report and the opinions expressed by the other expert in that report which were the subject of the application before the primary judge.

11. On 18 September 2019, the husband, the Company and the Trustees filed an Application in a Case seeking an order in these terms:

> 1. That pursuant to the provisions of Rule 15.49 of the *Family Law Rules*, the first, second and third applicants be permitted to tender a report and adduce evidence from [Mr F] of [X Accountants] on the basis that there exists in such report and evidence a substantial body of opinion contrary to the opinion given by the single expert witness and that the contrary opinion is necessary for determining several issues relevant to this matter.
>
> (As per the original)

12. The application was opposed by the Estate.

Approach of the primary judge

13. In identifying relevant background, the primary judge recorded at [4] the involvement of the husband in the business conducted by the Company and details of his shareholding and that of other members of his family. At [5], her Honour refers to the $1.3 million loan the husband owes, used to fund the acquisition of his shareholding in the Company. At [7], her Honour refers to the husband's debt to the Company on his loan account in the amount of $833,201 and at [6] and [8] reference is made to the husband's liability of approximately $1.6 million to the V Bank used to fund the acquisition of land and construction of what was the former matrimonial home.

14. Against that background her Honour set out the relevant question and the applicable rules (at [14]–[17]). After referring to the relevant expert evidence rules and some authorities, her Honour moved to consider the opinions expressed by the single expert (at [23] and [24]). At [25], her Honour discusses a 5 June 2019 letter sent from the husband's solicitors to the single expert, her Honour correctly noting that the letter was not in accordance with r 15.65 and, given that it was sent prior to the last report of the single expert, that it does not deal with the single expert's most recent report. At [28]–[31], the primary judge identified the different conclusions of each expert and the reasons for those differences as follows:

> 28. I do not accept the submission, in relation to the table appearing at paragraph 3.1.1 of [Mr W's] report, that the difference in the opinions of the experts reflects a disparity between them of $2,855,577. In reality, [Mr F's] report values the interests of the parties in the identified entities and does not purport to set out the

value of the parties interests in the broader 'property pool'. By contrast, [Mr F] sets out the net worth of the parties in the broader 'property pool' by including as a liability the husband's loan account and an external loan account (the [V Bank] commercial bill) unrelated to the value of the parties' interest in the entities. The real difference in their opinions relates to the husband's interest in the company, which [Mr F] values at $1,221,000 and [Mr W] values at $498,624.

29. The reasons for that difference are threefold. Firstly, [Mr W] adopts a different rate of commercial remuneration for the husband than [Mr F]. Secondly, [Mr W] adopts a different capitalisation rate. Thirdly, [Mr F] applies a discount to the husband's interest in the company of 30% because of his minority interest.

30. In relation to the rate of commercial remuneration, neither expert has expertise in the assessment of a commercial remuneration for the husband, as they both concede. Evidence will have to come from an expert in that field.

31. While [Mr W] adopts a different capitalisation rate (or multiple) to [Mr F] he concedes the discretionary nature of the rate or multiplier adopted i.e. it is not a matter of there being a substantial body of opinion contrary to [Mr F].

(As per the original)

15. Her Honour concluded that discussion (at [32]) with the correct observation that whether or not a discount for minority interest is to be applied, is a matter for a trial judge and that any further possible errors made by the single expert as identified by the other expert could be the subject of clarification by the means provided for in the FLR (at [33] and [34]).

16. To that end, as already noted, her Honour made orders extending the relevant time periods for a conference with the single expert (r 15.64B) and for questions to be asked (r 15.65).

17. Her Honour was not satisfied that any of the conditions prescribed in r 15.49(2) were fulfilled such as to enliven the discretion under that rule for the Court to give permission for the other expert's report to be tendered or for that evidence to be adduced.

Leave to appeal and grounds of appeal

18. The facts relied upon by the appellants said to establish an error of principle or a substantial injustice are stated as follows:

1. A primary issue in this proceeding brought under section 79 of the *Family Law Act*, is the value to be attributed to the shares of the First Respondent in the company [B Pty Ltd]. A single expert

valuer has been appointed who prepared two assessments of the value. The Respondents have enagaged [sic] [Mr W] to assess the value of the shares of the First Respondent. There is a vast difference between the valuers as to the value of the First Respondent's shares. The differences are based on differing assessments of significant matters resulting by the operation of the company. Despite attempts to resolve some of those differences, resolution has failed.

2. It is axiomatic that findings of value should be made on the best evidence available. To deprive a Respondent of an opportunity to adduce evidence supporting a valuation would be a serious denial of natural justice which might well undermine the integrity of the proceedings.

(As per the original)

19. As the arguments in support of leave being granted were related also to the grounds of appeal if leave were granted, reference should also be made to the grounds of appeal which are as follows:

1. That in dismissing the application filed on September 2019 brought under Rule 15.49 of the Family Law Rules the trial judge erred in that she failed to find that there was a substantial body of opinion given by the Respondent's expert valuer and that such contrary opinion remains necessary to determine the issues in order to provide fairness and justice between the parties.

2. That having regard to the fact that a major issue in the proceedings was the proper assessment of the value of the asset pool of the parties, the exclusion of the report of [Mr W], the Respondent's valuer was an error in that it removed any element of fairness and justice of the Respondent in the substantive proceedings.

(As per the original)

Permission for another expert witness

20. The purpose of Part 15.5 of the FLR regulating expert evidence in proceedings under the *Family Law Act 1975* (Cth) ("the Act") is expressed in r 15.42 as follows:

15.42 Purpose of Part 15.5

The purpose of this Part is:

(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 case;

(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; and

(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 necessary in the interests of justice.

21. Rule 15.49 provides:

15.49 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 that the contrary opinion is or may be necessary for determining the issue;

(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.

22. Rule 15.64B provides:

15.64B Conference

(1) Within 21 days after receipt of the report of a single expert witness, the parties may enter into an 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 advised 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.

23. Rule 15.65 provides:

15.65 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 the conference under rule 15.64B; or

(b) if no conference is held, within 21 days after receipt of the single expert witness's report by the party.

(2) The questions must:

(a) be in writing and be put once only;

(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.

Note: A party may cross-examine a single expert witness (see rule 15.50).

24. Underlying the whole of the FLR is the statutory requirement in s 97(3) of the Act that the Court endeavour to ensure that proceedings are not protracted. In pursuit of that requirement, r 1.04 expresses that the main purpose of the FLR "is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the

case". Rule 1.06 mandates that the Court must apply the FLR to promote the main purpose.

25. Court rules of practice regulating expert evidence, and the use of single expert evidence, and providing the Court with the discretion to appoint another expert, are not peculiar to this jurisdiction. The principles governing the exercise of discretion to appoint another expert have been considered in other jurisdictions in connection with rules similar to the FLR.

26. As Beazley JA observed of the similar rules in Part 39 of the Supreme Court Rules 1970 (NSW) in *Owners of Strata Plan 58577 v Banmor Developments Finance Pty Limited and Others*[4] such rules involve consideration of a balance between competing, though not disconnected, factors in the judicial system:

> … The first factor relates to case management principles and the need for the courts to provide, so far as is possible, expeditious resolution of disputes. The second relates to ensuring, again so far as is proper and possible, that the disputes are resolved so as to provide justice according to law to the parties to the dispute…

27. It has been recognised in many authorities from various jurisdictions having similar rules of practice with respect to expert evidence 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. As Applegarth J observed in *Conias Hotels Pty Ltd v Murphy & Anor* ("*Conias*"):[5]

> It almost may be taken for granted that experts adopting the same methodology applied to the same facts and applying the same assumptions might come to different opinions, simply as a matter of professional judgment. On valuation issues, the mere fact that different experts come to different opinions simply identifies that, in many cases, there is a range of opinion within which the actual value of real property, a business or other thing can be legitimately arrived at.

28. Applegarth J was there referring to the discretion provided by r 429N(3) of the Queensland Uniform Civil Procedure Rules 1999 (Qld) which empowers the court to appoint an additional expert if "the court is satisfied … there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the issue". That rule is, in its terms, broader than r 15.49(2) of the FLR but nevertheless his Honour referred to authority in support of the conclusion that mere differences of opinion on valuation are not enough.[6]

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[4] [2006] NSWCA 325 at [2].
[5] [2012] QSC 297 at [5].
[6] Including *D v S* [2009] QSC 446; *Walker Corporation Pty Ltd v Sydney Habour Foreshore Authority* [2008] NSWLEC 282 at [33].

29. It bears emphasis (as Applegarth J emphasised in *Conias*) that fulfilment of a condition expressed in the relevant rule enlivens a discretion. That is, even if one or more of the conditions expressed in r 15.49(2) of the FLR are fulfilled, that simply enlivens the Court's discretion to give permission for another expert. The relevant circumstances of the case will need to be considered as to how that discretion is to be exercised even where one or more of the conditions are fulfilled.

30. In *Daniels v Walker*,[7] the Court of Appeal in the United Kingdom considered rules of practice similar to the FLR. Lord Woolf MR (with whom Latham LJ agreed) referred to those rules at page 1386 as follows:

> …rule 1.1 begins:
>
> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable …
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues …
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."
>
> Rule 35.1 places a duty on the court to restrict expert evidence. It reads: "Expert evidence should be restricted to that which is reasonably required to resolve the proceedings." Rule 35.6 contains a provision dealing with the ability of the parties to put questions to experts…Rule 35.7 gives the court power to direct that evidence is to be given by a single joint expert…

31. At pages 1387–1388, Lord Woolf MR observed:

> In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained

[7] [2000] 1 WLR 1382.

> a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.
>
> In the majority of cases, the sensible approach will not be to ask the court straight away to allow the dissatisfied the party to call a second expert. In many cases it would be wrong to make a decision until one is in a position to consider the situation in the round. You cannot make generalisations, but in a case where there is a modest sum involved a court may take a more rigorous approach. It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report.
>
> …
>
> In a case where there is a substantial sum involved, one starts, as I have indicated, from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether to ask questions or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved. It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept that it is necessary for oral evidence to be given by the experts before the court. The cross-examination of expert witnesses at the hearing, even in a substantial case, can be very expensive.

32. An approach similar to that expressed by Lord Woolf MR was taken by the Full Court of this Court in *Bass and Bass*.[8] In that case the Full Court referred to the observations of Lord Woolf MR[9] and the Full Court expressed the conclusion that both the application for permission made to the trial judge, and the application for leave to appeal refusal of that permission "have what can best be described as a premature quality". At [49] the Full Court said:

> … Division 15.5.6 of Part 15.5 provides a procedure for clarifying matters contained in a report prepared by a single expert witness. It was confirmed before us that that procedure had not so far been employed in this case. While we acknowledge that procedure may only be of limited assistance to the father given the nature of his complaints, we are nevertheless, of the opinion that that procedure ought to have been attempted before the application was made to Steele J, or to this Court.

[8] (2008) FLC 93-366.
[9] At page 82,487.

33. As highlighted by the Full Court in *Bass*, an application for permission for another expert is interlocutory. Whilst each case falls to be considered on its merits there may be important differences, both in terms of fulfilling one or other of the conditions expressed in r 15.49(2), and the exercise of discretion if a condition is fulfilled, if an application for permission is made **after** the conference and questions process has been exhausted.

34. In this case, the primary judge was correct to conclude (at [25]) that the 5 June 2019 letter from the husband's solicitors was not sent in accordance with the provisions of r 15.65 and moreover that it did not address itself to the single expert's most recent report, given that the letter was sent prior to the preparation and delivery of that report. Moreover, review of that letter reveals that whilst the letter contains instructions, and a number of assertions, it does not reveal any "question" being posed to the single expert, let alone a "set of questions" as was submitted to this Court.

35. In my opinion, viewed in the context of s 97(3) of the Act, r 1.04 and the purpose of Part 15.5 expressed in r 15.42, the words "substantial body of opinion" in r 15.49(2) are to be given real meaning, as was the approach taken by the primary judge. The approach that the words have meaning of substance has been adopted, correctly in my view, in other decisions at first instance in this Court.[10] The mere expression of an opinion as to value by another expert, no matter how substantially contrary it is to that of the single expert, does not in and of itself constitute "a substantial body of opinion" within the meaning of the rule. If such a contrary opinion is founded upon identified and accepted methodology recognised within the field, or some identified and recognised field of expertise different to that founding the single expert opinion, then the requirement of "a substantial body of opinion" will be fulfilled. As the Full Court observed in *Chick and Chick*,[11] an expert witness may refer to textbooks and other published material to support his or her material without being forced to call the author for cross-examination. It is to be considered as one of the bases upon which the expert has formed his or her opinion.

36. In this case, the other expert has not identified any such bases for his contrary opinions such as to impress those opinions with the status of a "substantial body of opinion". I reject the submission made by counsel for the husband that by reference to the other expert's critique that it is not clear what methodology of value was applied by the single expert. In my opinion, the bases of assessment set out at Part 2 of the single expert's report and in particular paragraph 28 within that Part makes it crystal clear as to the methodology applied by the single expert.

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[10] See, for example, *Padnal & Padnal (No 3)* [2014] FamCA 904 at [34] per Berman J; *Demetriou v Demetriou* [2019] FamCA 625 at [21]-[22] per Harper J; *Salt & Salt* [2018] FamCA 259 per Gill J.
[11] (1987) 12 Fam LR 64 ("*Chick*").

37. As already referred to, the primary judge, having carefully considered the nature and substance of, and the reasons for, the differences between the expressed opinions of the single expert and the other expert, was correct to conclude that the bare opinions of the other expert did not constitute "a substantial body of opinion" within the meaning of the rule. For the same reasons, the primary judge was correct to conclude that "another special reason" within the meaning of subparagraph (c) of the rule was also not demonstrated.

38. Rule 15.64B (conference) provides, in sub-rule (4) for the parties to be free to make any arrangements for the conference that are consistent with Part 15.5. As the note to that sub-rule refers, arrangements for a conference with a single expert might include the attendance of another expert. Given the nature and substance of, and the reasons for, the differences in the opinions identified by the primary judge, the real differences that might remain after the r 15.64B (conference) and r 15.65 (questions) procedures was unknown. Moreover, the nature and substance of, and the reasons for, the differences between the single expert and the other expert are precisely of a kind that the mechanisms in r 15.64B (conference) and r 15.65 (questions) are directed to address.

39. It remains only to address some of the submissions made before the primary judge, repeated on this application, which in my respectful view overstate the consequences to the present applicants for leave of the primary judge's refusal of permission for another expert, and the trial proceeding with only the expert evidence of the single expert. Those submissions are to the effect that if a trial judge does not accept the single expert's opinion as to the appropriate capitalisation rate of the future maintainable earnings of the Company's business, or if a trial judge does not accept the single expert's opinion as to no discount applying to the husband's minority interest in the Company, there will be "no evidence" on these issues and "[n]o just decision would then be possible".[12]

40. Those submissions ought be rejected for a number of reasons. First, they are founded on the assumption that nothing can be achieved by the conference and questions processes. Given the nature and substance of, and the reasons for, the differences between the experts, that assumption cannot be made. Until those processes are undertaken the concluded opinions of the single expert are unknown. Moreover, as the primary judge identified at [18] by reference to *Simonsen & Simonsen*[13] the appellants are not precluded by anything in the FLR from availing themselves of the continued assistance of the other expert, including for the conference and questions processes. Indeed, one possibility is that the outcome of those processes may provide a proper bases for fulfilling one of the conditions in r 15.49(2) and that the discretion thereby conferred by

[12] Appellants' Outline of Argument at paragraphs 31 to 33.
[13] [2009] FamCA 698.

the rule is enlivened and ought to be exercised in favour of permission being granted for another expert.

41. Second, the submissions assume that a trial judge is bound to accept expert evidence of valuation, or expert evidence upon the identified issues, and that in the event that the trial judge does not accept the single expert's evidence in some respect, there will be "no evidence" to enable those issues to be justly determined.

42. This contention ignores well settled principles as to the means by which a trial judge determines questions of valuation, as expressed by the High Court in *Commonwealth v Milledge*[14] ("*Milledge*") as "a commonsense endeavour, after consideration of all the material before the court, to fix a sum satisfactory to the mind of the court as representing the value" *Milledge* has often been applied by the Full Court of this Court[15] in emphasis of the principle that a court must arrive at its own conclusion as to value by application of established principles of valuation.

43. As to the appropriate capitalisation rate of future maintainable earnings, a specific example referred to at paragraph 31 of the Appellants' Outline of Argument, the first point to note is that whilst the other expert opines as to a rate different to that adopted by the single expert, the other expert acknowledges with reference to the rate adopted by the single expert "[w]hilst this is at the higher end of an acceptable rate [presumably range] in my view, I appreciate that it is a subjective view".[16]

44. That aspect aside, the fixing of an appropriate capitalisation rate is a matter to be determined by the trial judge. A well-known example appears in *Mallet v Mallet*.[17] In *Mallet*, the trial judge rejected the methodology of two out of three expert valuers, and whilst accepting the methodology of the third expert, rejected that expert's opinion as to the appropriate capitalisation rate to be applied and the trial judge arrived at his own conclusion.[18] That approach was endorsed by both the Full Court of this Court and the High Court.[19]

45. The other example agitated in the Appellants' Outline of Argument at paragraphs 32 and 33 is the issue of any discounting to be applied to the value of the husband's minority shareholding in the Company.

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[14] (1953) 90 CLR 157.
[15] See, *Lenehan and Lenehan* (1987) FLC 91-814; *Chick*; *Borriello v Borriello* (1989) FLC 92-049.
[16] Paragraph 8.4.1 of the other expert's report.
[17] (1984) 156 CLR 605 ("*Mallet*").
[18] *Mallet* at 612.
[19] See, for example, Gibbs CJ at pages 616-617, Wilson J at 638-639 and Dawson J at pages 649-650.

46. Whether or not a discount to the value of the husband's minority shareholding is to be applied is quintessentially a question of law, not of accounting. It is determined by such things as questions of control of the Company, by reference to the legal rights conferred by the shareholding held involving interpretation of the Articles of Association of the Company and the application of relevant principles of company law. In *Mallet,* the trial judge fixed the capitalisation rate by reference to, amongst other things, findings as to the husband's capacity to control the affairs of the subject company. The submission that this issue or its determination depends upon expert accounting evidence is misconceived.

47. For these reasons, I would order that leave to appeal from the orders made by the primary judge on 24 October 2019 be refused.

48. In that event, the Respondent seeks party and party costs, itemised in a Costs Schedule filed on 25 May 2020 in a total sum of $12,073.69, not including any allowance for perusal by the solicitor of the Appeal Book. Making some allowance for that, a reasonable fixed sum for costs is $12,250 as counsel for the Respondent confirmed.

49. The Appellants have been wholly unsuccessful. Nothing about their combined financial circumstances is called into consideration as a discretionary factor contrary to making an order that those parties be jointly and severally liable to pay the Respondent's costs of and incidental to this application.

50. I would therefore further order that the Appellants be jointly and severally liable to pay the Respondent's costs of and incidental to this application in the fixed sum of $12,250.

ALDRIDGE J

51. I agree with the reasons given and the orders proposed by Justice Kent.

RYAN J

52. I also agree and the orders of the Court will therefore be:

    (1) The first to third appellants' application for leave to appeal the orders made by the primary judge on 24 October 2019, filed 21 November 2019 be dismissed.

    (2) The first to third appellants be jointly and severally liable to pay the respondent's costs of and incidental to the application in an appeal in the amount of $12,250 within one (1) month.

I certify that the preceding fifty-two (52) paragraphs are a true copy of the ex tempore reasons for judgment of the Honourable Full Court (Ryan, Aldridge & Kent JJ) delivered on 1 June 2020, edited to correct grammatical errors and some infelicity of expression.

Associate:

Date: 2 June 2020