

## INDUSTRY INSIGHTS

By Andrew Cummins

# When an expert witness is not required in an insolvent trading claim – the case of Treloar Constructions v Brian McMillan



A number of issues may prohibit the prosecution, or defence, of insolvent trading claims in the courts.

One is cost. It's sometimes assumed, in such cases, that it's mandatory to engage the services of a forensic accounting professional to produce a formal expert witness report.

The expense of such reports can be high – in complex cases, in fact, they may amount to a seven-figure sum.

This shouldn't, however, prevent people in such situations from seeking expert guidance. They may find that a formal report is not always required in every instance.

Consider the case of Treloar Constructions v Brian McMillan.

### McMillan seeks our help

Brian McMillan is a businessman who established a motor vehicle dealership, McMillan Prestige Pty Ltd, that engaged Treloar Constructions Pty Ltd in late 2005 to build a show room in the Sydney suburb of Five Dock.

McMillan believed he had an agreement to represent Volkswagen on the site and that the latter would contribute to the show room construction costs.

However, Volkswagen allegedly reneged on the arrangement and chose an alternative representative. This caused problems in McMillan's business and he was eventually unable to pay Treloar.

Many years after the demise of McMillan's company, Treloar decided to sue McMillan for insolvent trading. Treloar claimed that McMillan knew his business couldn't pay its debts when he engaged Treloar for the show room building project.

That's when McMillan approached BRI Ferrier.

### Running out of time

McMillan came to us only three weeks before the case was due to be heard. His solicitor had also withdrawn due to personal reasons.

Treloar had engaged an expert witness to provide a forensic accounting report that supported their claim. This report argued that McMillan's company was

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insolvent when it engaged Treloar, and that McMillan knew about it at the time.

McMillan, therefore, asked BRI Ferrier if we could provide a report in reply.

We responded by first recommending a legal firm, Somerset Ryckmans, to represent him in the case.

We also indicated that there was not enough time to produce a report in response to the other side's expert. In any case, the potential cost would undoubtedly have been prohibitive.

However, we indicated that there were many issues with Treloar's expert witness report, and that a competent barrister should be able to discredit it.

Without producing a formal counter-report, we sent Somerset Ryckmans a list of the problems we saw in the report.

This was enough to enable McMillan to win the case.

### How McMillan won

There were two main reasons the court judged in favour of McMillan.

First, the creditor couldn't prove there was a debt due for payment.

Second, the court didn't accept the expert's report and therefore determined the plaintiff couldn't prove McMillan's company was insolvent at the time it incurred the debts alleged by Treloar.

McMillan's barrister did well in picking apart the report based on the comments BRI Ferrier had sent to Somerset Ryckmans.

In fact, many of these comments were reflected in the court's judgement.

### The judgement

The court determined that Treloar's expert witness report was seriously flawed.

Some of the assumptions the expert witness had made were incorrect, and some of the tables and figures upon which he rested his analysis were either

wrong or unreliable.

Treloar's expert witness was brought entirely unstuck by the combination of a skilful cross-examination, glaring deficiencies in the material with which he was armed, and his occasional ventures into speculation.

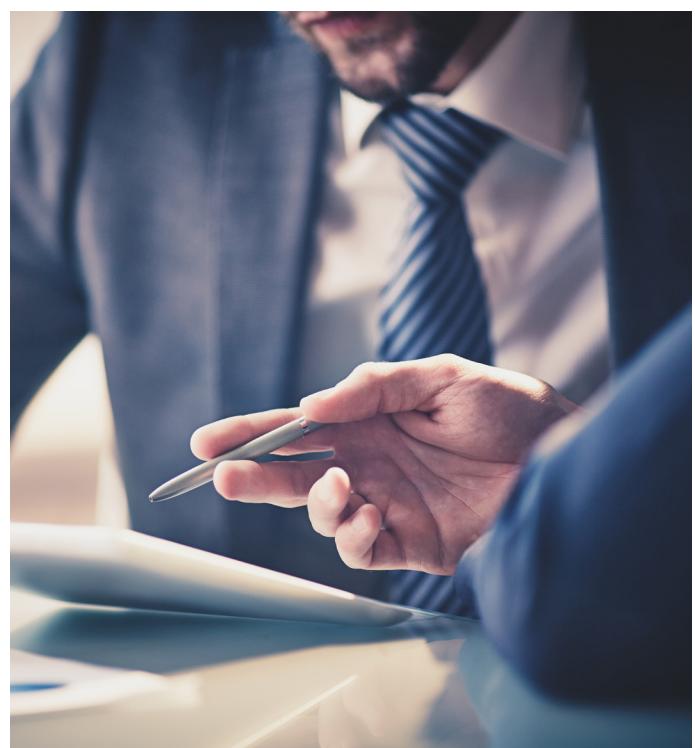
Despite the lack of contrary expert opinion, the court did not accept the expert witness's flawed opinion nor his flawed report.

In the words of the judgement, "even had he had the best will in the world, he lacked sufficient information to complete a proper cash flow test, and offered only rather ineffectual, and in many ways erroneous, analyses of a series of inconclusive indicia. The result is an unfortunate combination of speculation and omission."

### Why professional guidance is worthwhile

This case suggests that, in a defence against an insolvent trading claim, it's not always necessary to provide an expert's report in reply.

However, it's still advisable to seek professional guidance from a forensic accounting expert. A reputable professional may be able to use their



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expertise to achieve a positive result without the cost of a formal report.

At the very least, they'll be able to provide a recommendation either way. You can only make the right decision if you approach the right expert and ask the relevant questions.

### About BRI Ferrier

BRI Ferrier is a unique affiliation of expert business recovery, insolvency, forensic accounting and advisory firms. We provide practical, innovative services that help financially distressed businesses to recover or at least minimise the negative impacts of insolvency.

With over 160 staff and eleven practices in Australia, New Zealand, Hong Kong and the United Kingdom, we work with clients of all types – from individuals, sole traders and small businesses to public corporations and government entities.

We also work with financiers, solicitors, accountants and creditors to address the needs of all stakeholders when businesses face financial challenges.

### How BRI Ferrier can help

BRI Ferrier can assess your current situation and advise on a path forward to minimise further risk.

Early intervention is often the key for a successful restructure of your business. If you or your client is experiencing financial challenges then don't delay, contact us today.

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