

Closer examination

Graeme Fraser and Rakesh Kapila look at when it is necessary and proportionate to instruct a forensic accountant in financial proceedings



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'A forensic accountant's report could show that Bob's shares in Better Bricks have substantive value and that they represent a significant proportion of Bob and Abigail's joint matrimonial assets. This could result in a different allocation of the matrimonial assets between the parties.'

Changes relating to the use of expert evidence in family proceedings mean that the instruction of forensic accountants in financial proceedings requires technical precision and an appropriate understanding of case law, together with the procedural rules and guidance. By reference to a practical worked example, this article examines how family law practitioners and forensic accountants should operate to ensure that the appropriate evidence can be obtained.

Case summary

Abigail is married to Bob, who is one of the directors and shareholders in Better Bricks, a family business, in which the other shares are vested in Bob's parents and his two siblings. Abigail was distraught to discover that Bob has been having an affair with Carrie, one of Abigail's former best friends, and also a key customer of Better Bricks.

Bob and his family have always been highly secretive about the company's finances, but during the marriage Abigail witnessed them enjoying a lavish lifestyle, including many exotic family holidays, a passion for sports cars, and fine dining. Abigail was astonished when shortly after separation Bob disclosed that he personally is heavily indebted.

During voluntary disclosure, Bob prepared a Form E indicating that the current value of Better Bricks is nil, and also provided disclosure of his income as being insufficient to pay the mortgage on the family home, a large, detached, mock Tudor home, believed to be worth in the region of £5m.

When to obtain a forensic accountant report

Since Abigail and Bob have had a great lifestyle and Bob has never indicated that he could not afford the mortgage on their house, Abigail has assumed that the family business is profitable enough to provide Bob with a solid income. Abigail's solicitor should seek to obtain the company's signed financial statements for the last three years, including detailed profit and loss accounts, and obtain the financial statements filed at Companies House. If they show that the business has been profitable for most of the recent past, it is probable that Better Bricks has value as a going concern. It is also possible that the revaluation of any real estate owned by the company could boost its valuation. In these circumstances, Abigail's solicitor should consider instructing a forensic accountant to provide initial advice on the valuation of the business and on its ability to provide Bob with a reasonable income in the future. A forensic accountant would also need to consider carefully the basis underlying Bob's claimed indebtedness. It will of course be important to take account of the costs involved in instructing an expert.

Although an expert may be instructed by Abigail's solicitors without the permission of the court, the court's permission must be obtained before the expert evidence may be put before the court. The general approach is to instruct a single joint expert, since the instruction of different experts can have the effect of polarising the couple's positions, rather than bringing agreement closer, as well as significantly affecting costs.

Beauty parades, initial views and shadow forensic accountants

Abigail's solicitor has a duty to consider with Abigail what expert evidence is required following the exchange of voluntary financial information to enable her to make informed decisions at an early stage.

An expert will have a high degree of skill and knowledge in a particular subject and relevant and up-to-date expertise with regard to the issue at hand, together with sufficient education and communication skills to produce a clear written report. In order to ensure that a forensic accountant with the right level of expertise is selected, a number of potential experts whom the solicitor considers suitable to instruct should be contacted to obtain details of their experience in valuing the type of business undertaken by the company, their expertise in producing reports in family proceedings and their fee arrangements, the first consideration being whether each possible instruction and cost is proportionate to the case. It will also be necessary to ensure that there are no potential conflicts of interest.

Following the choice of expert, it will be appropriate to establish at the outset the information required by the forensic accountant, because proper disclosure assists in obtaining value for money. The forensic accountant will be aware that although initial advice would be used to assist Abigail in mapping the way forward, the expert's prospective role will entail a duty to help the court on matters within their expertise. This duty overrides any duty to Abigail and her solicitor.

It is possible that Abigail and her solicitor decide that a forensic accountant will not be required to prepare a report for disclosure, and that the main task will be to assist them in relation to the financial disclosure and in advising on various financial aspects of matters outside Abigail's solicitor's expertise. In these circumstances, the expert will be undertaking work as a 'shadow expert' to assist in advising Abigail on an ongoing basis. Shadow experts should not, however, be instructed in place of a single joint expert. They can assist in deciding

whether expert evidence is required, or in advising Abigail on aspects of the evidence once a single joint expert report has been provided, including any further questions that may need to be put to the expert, jointly where possible. They should only be considered where it is proportionate and in Abigail's best interest to do so. The advice cannot be put to the court without permission, which is unlikely to be granted where a single joint expert has been instructed. Cost implications must

should include a request of what the expert's likely fees will be, including their basis of charging and other terms of business. Carrying out the initial enquiries by email enables there to be transparency and all communications can be provided to the other side and to the court easily.

Applying for directions from the court

The instruction of experts in family proceedings is governed by Pt 25, Family Procedure Rules

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be considered with Abigail. Much depends on whether there is sufficient expertise in the solicitor's law firm. It will not usually be appropriate for a shadow expert to subsequently be appointed as a single joint expert in the case.

Proportionality and fees

It may be difficult for Abigail's solicitor to instruct an expert who has to be paid for reviewing documents and providing initial views but with these views being unknown before instructions are issued. In order to ensure that the costs incurred are proportionate, the forensic accountant should be asked to undertake an overview of some key documents without charge and to highlight whether such an overview suggests that it would be worthwhile issuing formal instructions. In addition, the prospective instructions should be broken down into different stages and ongoing instructions should be issued at different points in time only after work has been undertaken satisfactorily until that stage and on the basis of the forensic accountant's costs having been justified. Costs are bound to be a significant consideration, but should not be the only one, as it is important to ensure the expert has the right qualifications and skills to produce a report. Preliminary enquiries

2010 (FPR 2010) and the associated practice directions. On this basis, Abigail's solicitor should let her know that expert evidence may not be put before the court without its permission and that the court may give permission only if it is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings.

The application must be made as soon as it becomes apparent that it is necessary to make an application, and by no later than the first appointment. As much notice as possible should be given to Bob and to the court, if possible in writing, with the application then made orally at the hearing. If the issue does not arise until after the first appointment, it may be necessary to apply to court for a specific directions hearing to resolve the issue, with an explanation for the delay. Sometimes, the nature of the business involved will mean that ongoing instruction of the forensic accountant is required.

The court's directions will be required if solicitors representing the parties agree that expert evidence should be put before the court on particular issues, ie the valuation of the business and the income derived by Bob from the company. The general approach of the court is likely to be that a single joint expert should be instructed. In the event that the parties

cannot agree on a single joint expert, an application would need to be made to the court to resolve this issue rather than each party instructing its own experts.

It is good practice to bring to the first appointment the names of specific proposed experts, including their willingness to accept joint instructions. This enables the court to make specific directions. However, before the names of prospective

Initial enquiries should be conducted by email to ensure transparency and to make certain that all communications can be provided to Bob's solicitors and the court.

If the application needs to be made to the court, this must be compliant with FPR 2010, PD 25D, para 3.11 which means that the purpose of the instruction and the identity of the expert are clear and that all the relevant enquiries have

disclosure that has already taken place. Assuming that Bob holds most of the information regarding the assets to be valued, it is sensible for Bob's solicitor to draft the joint letter of instruction with enclosures, which can then be sent to Abigail's solicitor for approval.

It would be appropriate to specify the basis of valuation, to highlight that Better Bricks is to be valued at a particular date and that consideration needs to be given to valuing his shareholding in addition to valuing the business as a whole. It may also be appropriate to seek the expert's opinion on technical matters involving the ability of the business to release funds to Bob and his ability to dispose of his shares.

The joint instruction letter should provide any information which has been sought by the expert or indicate when such information is likely to be available. The expert should also be notified of the basis upon which further information should be sought and whether it is appropriate for the expert to contact the parties or staff from Better Bricks. In addition to the information sought by the expert, the parties should provide a copy of the order giving permission to instruct the expert, an agreed list of essential reading and a copy of FPR 2010, PD 25A.

The instruction letter should also include any assumptions to be made, the principal known issues, arrangements for attendance at Better Bricks or its external accountants' offices and a clear indication of the deadlines applicable to the provision of the expert's draft report, its

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experts are decided upon by the parties, preliminary enquiries need to be made of experts who the parties have agreed to contact with regard to various matters, including, *inter alia*, the existence of conflicts of interest, establishing that the matter is within their range of expertise, ensuring that the timeframe for the preparation of reports and court attendance is consistent with the expert's commitments, and obtaining details of the expert's fee arrangements. It is helpful if the expert has standard details of the information that will need to be produced to enable them to ask for more case-specific information, as it may be unwise to accept valuation evidence regarding a company from the company's external accountants, and caution is therefore advised.

been made. The court may give directions about the payment of the expert's fees and expenses, and any inspection or examination that they wish to carry out.

Single joint instruction letter to forensic accountant

The joint instruction letter should be agreed between the parties and both parties or their solicitors should sign the letter before it is sent out within five business days following the permission hearing. The instruction letter should include the context in which the expert's opinion is being sought and the specific questions to be answered, with the information and documents to be provided being appropriate to the case, and the level of

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finalisation and the time available for the answering of questions raised by the parties.

If the letter of instruction cannot be agreed, ultimately, the judge dealing with the proceedings can be called upon to settle the letter on the basis of a written process only without a hearing. Only the court can determine disputed facts, so if different interpretations are possible, the expert should be asked to give two separate valuations.

It is advisable to build into the process potential delay if agreement still needs to be reached on the terms of the letter of instruction, costs or the information to be provided, to enable the expert to have sufficient time to obtain further instructions, review these and prepare his or her report. A copy of any order or other document affecting an expert must be served on them within two days of receipt.

Inspection of information and compiling the report

The expert needs to undertake work with immediate effect because it is important to identify at an early stage any additional information required by them. Appointments with the parties, Better Bricks and its external accountants should be secured at an early stage and details of the information sought should be provided at pre-agreed times for consideration before such appointments.

If the expert does not secure crucial information which has been sought after instructions have been issued, the parties' solicitors should be notified with immediate effect and an indication should be provided as to the further time which may be required to prepare the report after such information has been received. Copies of all information provided to the expert should be clearly legible, properly sorted, paginated and indexed where proportionate to do so. If certain facts cannot be established, the expert may need to agree with the parties' solicitors the assumptions to be made. For instance, the lack of updated financial statements may result in the expert having to assume that the business's future financial performance will mirror that of the recent past.

It is good practice for all communications with a single joint expert to be addressed to both parties or their lawyers, and any communication with one party will need to be copied to the other. Particular care should be taken with telephone discussions with an expert. It is advisable for a contemporaneous attendance note to be prepared with a copy sent to Bob or his solicitor immediately.

If the letter of instruction cannot be agreed, ultimately, the judge dealing with the proceedings can be called upon to settle the letter on the basis of a written process only without a hearing.

A draft report needs to be produced in good time, and served on both parties simultaneously. Some single joint experts will prepare a draft report for submission to the parties to ensure that any factual inaccuracies can be taken into account before the finalisation of the report. The final report will include a statement that the expert understands and has complied with his or her duty to the court. The report must be verified by a statement of truth.

The single joint expert will need to be prepared thereafter to answer questions raised by or on behalf of the parties within ten days of the date on which the report is served. The primary purpose underlying such questions, which may only be put to the expert once, is to enable the parties to seek clarification on aspects of the report rather than raising fresh issues for consideration by the expert.

Information that can be produced, and how it may affect the outcome

A forensic accountant's report could show that Bob's shares in Better Bricks have substantive value and that they represent a significant proportion of Bob and Abigail's joint matrimonial assets. This could result in a different allocation of the matrimonial assets between the parties in comparison to

a situation in which Bob's shareholding is worthless, as contended by him. The expert's report could also consider the current financial performance of the business and pinpoint the level of income which the business could provide to Bob on a sustainable basis in the future. In addition, a report prepared on behalf of Abigail could consider ways in which a settlement could be constructed. The forensic accountant should also offer

insights into the ways in which Bob's indebtedness arose, its 'validity' and the use to which the borrowed funds were put, eg the purchase of assets.

Cases run collaboratively or through mediation

A forensic accountant's work in a collaborative setting is likely to be less formal and may therefore be more cost-effective. There is no reason why a less formal report prepared by a single joint expert cannot be considered at a mediation with the expert being available for any questions to be raised, or why a jointly appointed expert cannot assist the parties with technical questions in a collaborative setting. However, it is more likely that the parties may wish to first refer to their own family law practitioners who can assist both in explaining technical issues and in the negotiations between the parties.

Conclusions

It is likely to be in Abigail's interest to use the services of a forensic accountant. However, careful consideration will need to be given to the stance taken by the court and, in particular, whether a single joint expert will need to be instructed. Foremost among the factors to be taken into account will be the costs involved in the context of the issues to be considered. ■