VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D721/2011

CATCHWORDS

Application for reinstatement by owner and builder – appointment of expert pursuant to Terms of Settlement – whether expert influenced by owner in performance of his tasks – whether Terms of Settlement frustrated – whether parties bound by expert's final assessments

APPLICANT	Eliana Constructions & Development Group Pty Ltd (ACN 132 817 362)
RESPONDENT	Dr Amgad Sidrak
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Reinstatement hearing
DATE OF HEARING	23 October 2013
DATE OF ORDER	20 December 2013
CITATION	Eliana Constructions and Development Group Pty Ltd v Sidrak (Domestic Building) [2013] VCAT 2160

ORDER

1. The proceeding is reinstated.
2. The applicant must pay to the respondent the sum of $286,828.98.
3. Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs for hearing before Deputy President Aird for 2 hours.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr J Stavris of Counsel
For Respondent	Mr K Oliver of Counsel

REASONS

1 The applicant builder and the respondent owner have both filed applications for the reinstatement of the proceeding and other orders. The parties' respective applications arise out of Terms of Settlement ('TOS') which called for work to be done by the builder and assessed by an expert, John Anderson. The parties disagree about whether the expert has properly performed his role, and the effect on the TOS.

BACKGROUND

2 On or about 28 September 2009 the applicant builder and the respondent owner entered into a contract for the construction of a new home in East Doncaster. After the parties fell into dispute, the builder commenced proceedings in this Tribunal, in August 2011, seeking payment of approximately $300,000 it contended remained outstanding under the contract, including variations. The owner disputed the claim, and filed a defence and counterclaim, in December 2011, claiming approximately $400,000 for the rectification of defects and completion of the works. A Further Amended Defence and Counterclaim were filed on 6 February 2013. The owner relied on an expert report prepared by Stuart McLennan. The builder relied on expert reports prepared by James Campbell.

3 After four days of hearing, commencing on 18 February 2013, including a view attended by the presiding member, the parties, their lawyers and their experts, the parties reached a settlement, and entered into Terms of Settlement ('TOS') dated 25 February. The items identified by Mr McLennan as being defective and incomplete, and the works required to rectify the defective works were contained in Appendix C and Appendix E to the TOS. Mr Campbell's expert reports are Appendix F to the TOS. Under the TOS the builder was to complete and rectify the works set out in Appendix C and Appendix E subject to some exclusions as set out in the TOS.

4 On 26 July,[1] the builder filed an Application for Directions Hearing or Orders seeking the following orders:

> 1. An Order for reinstatement of the Proceedings bearing action number D721/2011 on the ground that the Terms of Settlement dated 25 February 2013 entered into between the parties have not been properly complied with by virtue of the conduct of the Respondent, and/or his servants, agents and/or representatives.
>
> 2. Such further and/or other Orders this Honourable Tribunal deems fit.

The builder nominated this as an urgent application because:

[1] As all correspondence and communications were in 2013, I have only referred to the months not including the year.

1. On or about 19 June 2012 the Respondent took action in locking the Applicant from the worksite known as and situate at [the property].
2. As a consequence of the Respondents conduct the Applicant has suffered and is suffering severe financial loss and damage.

5 The application was supported by an affidavit by Magdy Sowiha, director of the builder, sworn on 19 July 2013.

6 The application was listed for a reinstatement hearing on 26 July when the Tribunal made the following orders:

1. **The hearing of the Applicant's application for reinstatement of the proceeding, and any application made by the Respondent pursuant to Order 3(c) below, is adjourned to 10:00 a.m. on 13 September 2013 before Deputy President Aird or Member Farrelly at 55 King Street Melbourne with 1 day allocated.**
2. By 9 August 2013 the Applicant must file and serve:
   (a) written confirmation of the orders being sought;
   (b) any further affidavit material in support;
   (c) written submissions.
3. By 23 August 2013 the Respondent must file and serve:
   (a) response affidavit material (if any);
   (b) written submissions;
   (c) any application for orders the respondent seeks.
4. By 6 September 2013 the Applicant must file and serve:
   (a) any submissions in reply;
   (b) any further affidavit material in respect of an application made by the Respondent pursuant to Order 3(c) above.
5. Costs reserved.

7 On 9 August the builder filed Submissions in which it indicated it was seeking the following orders:

(a) Reinstatement of proceeding number D721/2011;

OR ALTERNATIVELY

(b) A review of the mutually appointed expert's determination as contained in the two notices issues to the builder with the reinstatement of the builder to the project and the appointment of an expert by the VCAT other than John Anderson to complete the construction of the house pursuant to the terms of settlement dated 25 February 2013;

(c) A stay of the execution of the terms of settlement made on 25 February 2013;

(d) Payment of outstanding progress claims submitted to the expert John Anderson between April 2013 and June 2013, with such sum to be deducted from the $250,000 payment due to the builder upon completion of the terms of settlement.

8 During the reinstatement hearing, Mr Stavris of Counsel, who appeared on behalf of the builder, indicated that the builder was now seeking orders that the TOS be set aside, contending they had been frustrated, and that the proceeding be reinstated.

9 On 28 August the owner filed an Application for Directions Hearing or Orders, together with submissions, seeking an extension of time for the filing and service of further material, including submissions, by both parties (orders 1-3). He also sought the following orders:

4. The proceeding is reinstated.
5. Pursuant to the terms of settlement, by consent:
   (a) the Applicant pay to the Respondent $347,102.60, being the assessed amount;
   (b) the Applicant pay to the Respondents the expert's costs of producing the First Notification, the Second Notification and the assessment fixed at $33,777.83; and
   (c) the Applicant pay to the Respondent the Respondent's costs of this application to be assessed on the County Court Scale of costs on a party and party basis in default of agreement.

10 An affidavit by the owner's solicitor, David Naidoo, sworn on 29 August, in reply to Mr Sowiha's affidavit, and in support of the owner's application, was filed on 5 September.

11 The affidavits filed in support of the applications are voluminous, both filling a lever arch folder, with numerous exhibits.

12 When the matter came on for hearing before me on 13 September, the builder applied for an adjournment because Mr Stavris, who had appeared for it at the substantive hearing, and had been briefed to appear at the reinstatement hearing, was caught up in a Federal Court hearing which had run over time. Mr Downie of Counsel appeared on behalf of the builder, and indicated that he had received the brief late the previous day, had not had time to absorb all of the material and that there were matters raised in Mr Naidoo's affidavit which Mr Stavris wished to address. Having regard to the Tribunal's obligations under ss97 and 98 I allowed the adjournment and made the following orders:

1. **This hearing is adjourned to 23 October 2013 before Deputy President Aird commencing at 10:00 a.m. at 55 King Street Melbourne – allow 1 day.**
2. The date by which the applicant must file and serve any submissions in reply together with any supplementary submissions to the respondent's application is extended to 27 September 2013.

3. By 27 September 2013 any further affidavit material relied on by either party must be filed and served.
4. By 7 October 2013 the respondent must file and serve any further submissions.
5. The applicant must pay the respondent's costs thrown away occasioned by the adjournment fixed in the sum of $4,750.

Note:

The respondent has amended his application and now seeks judgement in the sum of $253,051.67 plus the expert's costs.

13 No further material has been filed by or on behalf of the builder.

14 At the reinstatement hearing on 23 October the owner was represented by Mr Oliver of Counsel. Mr Stavris indicated that he had reviewed the file, and a week before the reinstatement hearing he had decided it was desirable for the builder's expert to inspect the property but that access had been denied by the owner. He submitted that in the event the builder's application was successful that the builder should be provided access to inspect the premises so that it and its expert could address the issues raised in the expert's Final Report.

THE TERMS OF SETTLEMENT

15 Under the TOS the parties relevantly agreed, in summary, that:

(i) The builder would commence the building and rectification works by 12 March 2013 and bring such works to completion by 12 August 2013, or such later date as the expert determines pursuant to paragraph 7,

(ii) The builder would submit progress claims to the expert on dates not earlier than:

a. the first progress payment 25 March 2013

b. the second progress claim 15 April 2013

c. further progress claims up to a maximum of one per fortnight. If more than 7 progress claims were submitted to the expert the builder was to be responsible for the costs of the expert assessing the progress claims, otherwise the parties would share the expert's costs equally.

(iii) The expert was to assess the progress claim within 2 business days of it being submitted to him by the builder, and notify the builder and the owner of his assessment;

(iv) The owner was to pay the assessed amount within 3 business days of receiving the notification from the expert;

(v) Paragraphs 5 and 6 set out a process for approval of an extension of time by the expert. Any application by the builder for an extension of

time, other than in the case of inclement weather, was to be made in writing within 48 hours of the commencement of the delay [no applications for an extension of time have been made by the builder];

(vi) Paragraph 7 and 8 set out a process for notification by the builder to the expert when the works reach Completion; inspection and determination by the expert whether the works have reached Completion; payment by the owner to the expert of the unpaid balance; and delivery by the builder to the expert of all keys, an occupancy permit and all certificates and warranties in the builder's possession. The expert to deliver payment to the builder, and the keys, occupancy permit and certificates to the owners.

(vii) Paragraph 9 set out the process to apply if the expert determined the works had not reached completion, or if the builder failed to notify the expert by 12 August 2013, or such later date as approved by the expert, that the works had reached completion:

> …the expert, within 7 days after the date of the inspection under paragraph 8 or within 7 days after the date for completion, whichever occurs first, shall provide a report to the owner and the builder ("the expert's first report') setting out:
>
> (c) those items of building works that have not been completed;
>
> (d) those items of the rectification work that have not been rectified;
>
> (e) any new items of defective work; and
>
> (f) the date by which the works referred to in sub-paragraphs (c), (d) and (e) must be completed.

(viii) The builder was to pay the cost of the expert's first report;

(viii) The builder was to carry out the completion and rectification works set out in the first expert's report by the date determined by the expert;

(ix) The expert was to re-inspect the works within 7 days after the date for completion of the rectification works as determined by the expert, and within 14 days provide a report identifying any completion or defective works still to be completed or rectified, *together with the expert's assessment of the reasonable cost of completing and rectifying those works ("the assessed amount")*('the second report');

(x) The builder was to pay the assessed amount to the owners within 7 days of receiving the expert's second report, after deducting any approved progress payments which have not been made;

(xi) Paragraph 15 provides that if the builder fails to pay the owner the assessed amount within 14 days of receiving the second

report, the owner can reinstate the proceeding in the Tribunal and obtain an order (by consent) against the builder for the assessed amount, the experts' costs of producing the first and second reports, and the owner's reasonable legal costs of obtaining the order.

(xii) Paragraph 16 provides that the assessed amount is deemed to be:

(a) the amount that the builder would have paid to the owner under clause 44.1 of the building contract [referred to in that clause as the "negative balance"] if the owner had brought the building contract to an end under clause 43 of the building contract; and

(b) the amount that the builder would have been liable to pay to the owner by way of damages for repudiating the building contract.

(xiii) Paragraph 19 provides that if the owner fails to pay the builder any amount certified by the expert, the builder can have the proceeding reinstated and obtain orders (by consent) for payment of the certified amount, the expert's costs and the builder's reasonable legal costs in obtaining judgement.

(xiv) Under paragraph 20 the parties agreed:

The amount certified by the expert…is deemed to be:

(a) all amounts that the owner would have paid to the builder under…the building contract if the builder had brought the contract to an end under clause 42 of the building contract;

and

(b) all amounts that the owner would have been liable to pay to the builder, whether by way of damages or a *quantum meruit*, following a repudiation by the owner of the building contract and these terms of settlement.

(xv) Paragraph 23 provides:

If, at any time prior to the date for completion the expert is of the opinion that the builder is not carrying out the works in a timely, proper or workmanlike manner, the expert shall notify the builder and the owner accordingly ("the first notification").

(xvi) Under paragraph 25 the parties agreed:

If, after a period of not less than 7 days after the date of the first notification, the expert remains of the opinion that the builder is not carrying out the works in a timely, proper or workmanlike manner:

(a) the expert shall notify the builder and the owner accordingly forthwith ("the second notification");

(b) the builder shall forthwith cease carrying out the works;

(c) the building contract will be deemed to have been validly terminated by the owner under clause 47 of the building contract;

(d) the expert shall inspect the works within 7 days after the date of the second notification; and

(e) the expert shall, within 14 days of inspecting the works, provide a report to the owner and builder setting out those items of the building works and the rectification works that, in the opinion of the expert, have not been completed or rectified by the builder, together with the expert's assessment of the reasonable cost of completing and rectifying those works.

(xvii) Paragraph 26 provides:

> The report provided under sub-paragraph 25(e) shall be treated for the purposes of these terms of settlement as if it was the expert's second report and paragraphs 15 and 16 of these terms of settlement shall apply.

(xviii) Paragraph 28 and 29 provide:

> 28. If, at any time prior to the date of completion, the builder believes that it is neither reasonable nor necessary to carry out any item of the works or part thereof, the builder may notify the expert in writing. If, after receiving such a notice from the builder, the expert considers that it is neither reasonable nor necessary to carry out the said item of the works (or part thereof), the expert shall notify the owner and the builder in writing of his decision and that item of the works (or part thereof) is thereafter deemed to have been completed under these terms of settlement.
>
> 29. To avoid doubt, as part of his consideration of the matters under paragraph 28, the expert will consider an engineer's, manufacturer's or building surveyor's certification that any item of the works (or part thereof) are neither necessary nor reasonable.

There is the following footnote to paragraph 28:

> eg because an engineer has provided a certificate under section 238 of the *Building Act 1993* or the relevant building surveyor has accepted that the work is an *Alternative Solution* under the Building Code of Australia. In particular, the builder submits that items of the works relating to the staircases, wall cladding and rendering systems, brickwork, insulation, steel and sub-floor structure are items which may be suited to this type of certification.

(xix) In paragraph 35 the parties agreed that:

> the assessments, opinions, decisions and reports of the expert under these terms of settlement are final and binding and shall

> have effect as if the said assessments, opinions, decisions and reports were decisions of a special referee appointed by VCAT pursuant to sub-section 95(1)(a) of the Victorian Civil and Administrative Tribunal Act 1998…Production of a certificate or determination issued by the expert is conclusive proof of the matters contained therein.

(xx) Under clause 38 the builder releases the owners from all claims made in the proceeding.

(xxi) Under paragraph 40 of the TOS the parties agree that any other dispute arising under the building contract during the building period:

> … must be referred to the expert for his expert determination, which determination is final and binding on the parties.

Appointment of the expert

16 Although 'expert' is defined in the TOS as meaning *John Anderson or such other person appointed as such under these terms of settlement,* there is no process set out in the TOS for the appointment or briefing of the expert.

17 Mr Sowiha states in his affidavit that, on or about 25 February, Mr Stavris enquired of Mr Anderson ('the expert') *firstly about his ability to be appointed as an expert, secondly about his likely costs and charges.* (sic) He also states that the expert wrote to the parties on 7 March setting out the terms of his appointment.

18 Mr Naidoo deposes in his affidavit that in response to a telephone call he received from the expert enquiring as to whether he was to be appointed under s94 or s95 of the VCAT Act he wrote to the expert on 27 February enclosing copies of the TOS, Appendix C and Appendix E of the McLennan report and James Campbell's reports dated 15 February and 28 June 2012. The expert confirms receipt of this letter and the documents in his letter to the parties dated 7 March.

19 The expert's letter of 7 March sets out the terms on which he is prepared to accept the appointment, including calculation and payment of his fees, the time for his first inspection, access, that he requires an electronic copy of Appendix C and Appendix E, and the James Campbell reports and, importantly, that *I require all communication with me to be by way of email with all parties representatives being copied in.*

20 As noted above, the parties agreed in the TOS that the expert's *assessments, opinions, decisions and reports…shall have effect as if [they] were decisions of a special referee appointed by VCAT pursuant to sub-section 95(1)(a)* of the VCAT Act.

21 Section 95(1)(a) of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') provides:

> The Tribunal may refer any question arising in a proceeding to a special referee for the special referee-

(a) to decide the question...

22 Although the parties agreed in paragraph 34 of the TOS to apply to the Tribunal for orders that the Tribunal appoint the expert pursuant to s95(1)(a), if such an appointment were necessary to give effect to the TOS, the parties did not apply for such an order. The matters to be decided by the expert are set out in the TOS and include:

(i) the assessment of the builder's progress claims,

(ii) forming an opinion as to whether the builder was carrying out the works in a *timely, proper or workmanlike manner,*[2]

(iii) notifying the builder and the owner, if not satisfied *at any time prior to the date for completion* that the builder was not carrying out the work in a *timely, proper or workmanlike manner*[3] ('the first notification')

(iv) notifying the builder and the owner, not less than 7 days after the first notification, if the expert *remains of the opinion that the builder is not carrying out the works in a timely, proper and workmanlike manner*[4] ('the second notification'),

(v) inspecting the works within 7 days after the date of the second notification,[5]

(vi) within 14 days of such inspection, providing the owner and the builder with a report setting out details of the works which remained incomplete and/or defective, together with the expert's assessment of the reasonable costs of completing and rectifying those works.[6]

HAVE THE TOS BEEN FRUSTRATED?

23 The builder contends that the owner instructed his solicitor to engage in extensive communication with the expert much of which, he contends, was *inflammatory, unnecessary and provided for an interference with the expert's work* and has therefore *derailed the whole settlement process* thus creating an environment where the builder was reporting to the expert more frequently than contemplated by the TOS, and at a greater cost. Therefore the TOS have been frustrated.

24 The owner submits that there is simply no evidence to support the builder's contention that the correspondence from his solicitor to the expert has derailed the settlement process, and frustrated the TOS.

25 Whilst clause 41 of the TOS expressly restricts the times when the owner may attend site, there is nothing stated about the right of the owner or the builder to make submissions to the expert.

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[2] TOS [23] and [25]
[3] TOS [23]
[4] TOS [25(a)]
[5] TOS [25(d)]
[6] TOS [25(e)]

26 At paragraph 30 of his affidavit, Mr Sowiha states:

> The Respondent has caused this settlement process to be derailed by instructing his lawyers to interfere with the project management and the work of the expert. I am certain, as previously deposed in my affidavit that the Respondent and the expert have communicated directly with each other or via their lawyers at the exclusion of my lawyer or myself and hence this has biased the objective performance of the mutually appointed expert.

27 Counsel for both parties referred me to Halsbury's Laws of Australia where at [110-9595]:

> Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
>
> The concept of frustration is therefore concerned with the position of the parties to a contract where, subsequent to formation of the contract and without default of either party, performance of the contract has become impossible or has radically changed.

28 That is not the case here. Even if I were satisfied that the owner, through his lawyers, had written unnecessary or inflammatory correspondence to the expert in an attempt to influence him, there is absolutely no evidence that the expert has been influenced. For the reasons discussed below I find the TOS have not been frustrated.

Correspondence by or on behalf of the owner with the expert not copied to the other party

29 From the correspondence exhibited to the affidavits (and as referred to by Mr Anderson in his correspondence with the parties copies of which are also exhibited to the affidavits), it is apparent that the only communications with expert by or on behalf of the owner which have not been copied to the builder's solicitor, as disclosed in Mr Naidoo's affidavit, are:

- a letter dated 27 February from the owner's solicitor to the expert providing him with details of his appointment. This was in response to a telephone call from the expert enquiring whether he had been appointed under s94 or s95 of the VCAT Act;
- an email dated 28 February advising the expert the email address of the builder's solicitors;
- emails dated 28 February enclosing copies of the building permit documentation, and the contact details of the two building surveyors who had respectively issued building permits in respect of the contract works;

- a letter to the expert dated 5 March advising the mobile telephone number of the building surveyor who had issued the stage 2 permit for the contract works;
- another letter dated 5 March advising the owner would prefer not to make the initial payment due under the TOS until the expert had confirmed receipt of all relevant materials and provided details of his charges,
- letter dated 8 March, following receipt of the expert's letter dated 7 March, clarifying that the owner is the respondent in this proceeding, that he does not have access of the site, and that therefore access will need to be arranged through the builder's representatives, further that Mr McLennan was the expert retained by the owner, and enclosing further copies of Appendix C and Appendix E to Mr McLennan's report;
- Letter dated 20 May 2013 to the expert which, Mr Naidoo states he has been advised by his secretary, was inadvertently not copied to the builder's solicitor. This letter sets out the owner's concerns in relation to the reuse of the existing timber flooring, areas of damp, water leaks and the top painting on the render at the back of the house looking patchy; and
- Letter dated 13 June referring to the expert's email dated 13 June and advising *we are in the process of considering the matters raised in your email* and noting the expert had not yet issued any invoices to the owner.[a copy of the expert's email dated 13 June is not exhibited to Mr Naidoo's affidavit, nor to Mr Sowiha's affidavit].

30 Mr Naidoo also deposes in his affidavit that the only contact the owner had with the expert prior to him issuing the Second Notification were:

- a brief conversation with the expert in March seeking an address to send the contract specifications to him, and
- writing to the expert to confirm he had received the owner's deposit.

31 With the exception of the letters of 20 May and 13 June, the communications with the expert by and on behalf of the owner are, in my view, uncontroversial. Whilst it would have been preferable for the builder's lawyers to have been provided with copies of the relevant correspondence, the provision of information and documents to the expert shortly after the TOS were executed, in circumstances where the TOS do not provide for a process for instructing the expert, is not untoward. In any event, in his letter of 7 March advising of terms of appointment, the expert referred to the letter of 27 February, and having subsequently received other emails and documents. Any concerns the builder had about this correspondence could, and should have been raised prior to acceptance of the expert's terms of appointment.

32 Although copies of the letters dated 20 May and 14 June should have been sent to the builder's solicitors, I am not persuaded that they can be regarded as having influenced the expert in the performance of his terms of appointment.

Correspondence by or on behalf of the builder with the expert not copied to the owner

33 Mr Naidoo states in his affidavit that the first time his office received copies of the correspondence exhibited at MS-26, MS-28, MS-32, MS-39 and MS-41 of Mr Sowiha's affidavit was when he received a copy of Mr Sowiha's affidavit exhibiting those documents (for the ease of reading I will refer to Mr Sowiha as the builder when considering correspondence from him).

- MS-26 is an email from the builder to the expert of 17 May with a copy to the builder's solicitor:

  > Dear John,
  > First I would like to thank you for all your effort and support.
  > Please see attached files
  > 1.Full set of the structure engineer (sic)
  > 2.Stare case details (sic)
  > 3.Soil Report
  > 4.Certificate of Compliance-design for all updates
  > 5.Approved inspection for the steel and retaining walls

- MS-28 is an email from the builder to its solicitor dated 22 May, with a copy to the expert, enclosing a *Compliance Certificate for the roof plumbing* [which as discussed below is a compliance certificate for the rectification works only].

- MS-32 is the builder's response dated 28 May to the expert's assessment of the first claim, in which it took issue with the expert's assessments in relation to a number of items, which Mr Sowiha said he had discussed with the relevant building surveyor who had confirmed compliance with the BCA and *referred* Standards. The builder requested that the assessment be amended to include the amount claimed.

  The builder confirmed that all compliance certificates would be submitted to the expert with the occupancy permit, before the final claim, relying on clauses 38 of the building contract which provides that all certificates are to be provided to the owner when the final payment is made, and clause 8-3-ii (sic) of the TOS requiring the builder to deliver all certificates to the expert when the final claim was paid by the owners.

- MS-39 is an email dated 11 June from the builder to its solicitor and the expert confirming he had attended site earlier that day with

the builder's second claim and a number of certificates which are listed and:[7]

> …
>
> Bank cheque …but need some clarification why I should pay the full invoice not only 50% "Paid already" as per the agreement – please explain. (sic)

- MS-41 is an email from the builder to its solicitor with a copy to the expert dated 17 June apparently in response to matters raised by the owner's solicitor on 14 June and forwarded to the builder by the expert [the email of 14 June has not been exhibited to either of the affidavits]. The builder also states:

> I'm really concern about the owner or the owner's lawyer collecting any certificates from you until the final payment received in full…please refer to the agreement [the TOS] Item 1H, your promise on site and our earlier request in writing. (sic)

34 No explanation is proffered for the failure of the builder to copy the owner or his solicitor in on any of this correspondence.

Correspondence from the owner's solicitor to the expert copied to the builder's solicitors

35 Whilst under clause 41 of the TOS, the parties expressly agree that the owner will not attend site other than by arrangement in accordance with the process set out in that clause, there is no restriction or prohibition on the parties contacting or making submissions to the expert.

36 A careful consideration of the correspondence exhibited to Mr Sowiha's affidavit indicates prolific correspondence from the owner's solicitor to the expert, which with the exception of the correspondence referred to above, was all copied in to the builder's solicitor. At no time prior to termination of the building contract pursuant to the TOS, did the builder or the builder's solicitor raise any concerns about or object to any of this correspondence, or express concern that the expert was being influenced in the performance of his appointment. Rather, on 17 May Mr Sowiha, when sending the expert various documents thanked him for *all your effort and support.*

37 In considering whether the expert was influenced in the performance of his appointment by the correspondence from the owner's solicitor, it is necessary to consider his performance.

Correspondence leading up to the first claim

38 On 3 April the expert emailed the parties' lawyers noting the TOS required the builder to submit the first two progress claim not earlier than 25 March and 15 April respectively, and that he had not yet received any progress

[7] See paragraph **insert** below

claims from the builder. He expressed concern, and requested that the builder provide him with a Schedule of Works.

39 On 17 April the owner's solicitor wrote the expert noting that the builder was entitled to make progress claims under the TOS with the first to be made no earlier than 25 March and the second no earlier than 15 April then:

> The paragraphs governing the progress claims presuppose that the works would progress at a sufficient rate to ensure that the builder brought the works to completion by 12 August 2013…and would have been in a position to have made progress claims by 25 March and 15 April 2013 respectively.
>
> To the best of our client's knowledge the builder has not made any progress claims and despite your request as early as 3 April 2013 for the builder to provide a Schedule of Works the builder has not done so. Our client is therefore concerned that the builder is not progressing the works as contemplated by the Terms of Settlement.
>
> …
>
> In the circumstances our client would be pleased if you could conduct an inspection with a view to determining whether or not the builder is carrying out the works in a timely and proper workmanlike manner and if appropriate after such an inspection to proceed in terms of paragraph 23 of the Terms of Settlement.

40 On 17 April the expert emailed the parties' lawyers advising that he had received a copy of a letter from the owner's solicitor. He continued:

> 2. Clause 4 in the terms of settlement provide for the builder to make the first progress claim not before 25th March but as the second progress claim is to be made not earlier than 15th April I understand the thrust of the term in the agreement requires me to receive the first claim before the 15th April.
>
> 3. As I have not yet received any response to my request for a copy of the builder's work schedule nor the first claim from the builder, I request the builder's intentions in relation to both that work schedule and the first claim. In the absence of a satisfactory response, it is my intention to request access to the site from the builder at short notice and inspect the works on Monday 22nd April or Tuesday 23rd April.
>
> 4. Also, I inform the parties of my intention to seek directions from the Tribunal in circumstances where I do not receive a satisfactory response to my requests, within a reasonable time frame, to enable me to comply with my role in the terms of settlement.

41 On 18 April the builder's solicitor forwarded a Work Schedule by email to the expert and the owner's solicitor, apologising for the delay in forwarding the material.

42 On 22 April the owner's solicitor wrote to the expert with a copy to the builder's solicitor, noting in particular:

> 11. …The …work schedule took the form of a colour coded bar chart. The bar chart however does not appear to address a number of critical issues [which are listed].
>
> 12. …the bar chart does not demonstrate that there is a logical/practical sequence to the works… The owner is concerned about the time sequence of works…
>
> In the circumstances the owner is concerned about the builder's compliance with the Terms of Settlement and to that end would be pleased if John Anderson could urgently conduct an inspection and gain clarity of the Schedule of Works proposed by the builder.

43 On the same day the expert wrote to the builder's solicitor confirming receipt of the email from the owner's solicitor and advising:

> I too am concerned about progress in the matter and more particularly that no work had commenced when I inspected the property on 14th March.

The expert gave notice of his intention to inspect the works the following days, which was confirmed by the builder's solicitor who stated that according to the builder works had been progressing

44 On 8 May the builder's solicitor wrote to the expert advising that before providing the expert with the first claim, the builder requested an inspection on site with the expert. On 9 May the expert advised the parties he would be carrying out the requested inspection on 18 May.

45 On 9 May the owner's solicitor wrote to the expert advising the owner should be present at any meetings other than *simple inspections.*

46 Notwithstanding his letter of 8 May, on 10 May the builder's solicitor enquired as to the purpose of the inspection in the absence of the first claim. Later the same day, the builder's solicitor emailed the expert again, advising:

> My client's instructions are that he desires to err on the side of caution to highlight his intentions of what works are intended into the future.
>
> On the day, he intends to provide you with the claim and a schedule of when he intends to complete the works. In view of the history of this matter, prevention rather than cure where there is no misunderstanding with directions, precision and clarity. We intend to avoid misunderstandings into the future.
>
> With respect, and for the purposes of Mr Naidoo attention, in view of past performance, an attendance by your client as a proposed meeting can only deemed as "unhelpful". (sic)

47 On the same day the expert advised the parties:

> …

2. In circumstances where I have not received any response from the builder in response to my letter dated 23rd April I remain concerned that the work is not proceeding in a timely manner. However, after considering the submissions in all of the correspondence dated 8th and 9th May, I inform the parties that I intend to carry out an inspection pursuant to the first claim at 10.00 am on Wednesday 15th May. I understand that I will be provided with the first claim document prior to or at the time of the commencement of that inspection.
3. After considering the request of the owner to be in attendance during the inspection, I do not agree with that proposition. However, I invite the owner to provide me with a list of any issues of workmanship with which he is concerned prior to or during any stage of the work.
4. Also, I intend to consider [the matters raised in Mr Naidoo's and Mr Yianoulatas ' letters of 8 May] in my determinations.

48 On 14 May the owner's solicitor emailed the expert a list of the owner's concerns, as requested.

49 On 17 May the expert confirmed he had met the builder on site, and received the first claim and

2. In order for me to assess some of the works I made it known to the builder at the time of receiving the first claim that I require further information from him by way of:
   a. details of the proposed design work for rectification of balconies to achieve compliance with the provisions of the BCA under the contract particularly with regard to required freeboard and prevention of water ingress
   b. copy of compliance certificate for the roof plumbing.
3. [further information was sought in relation to the flooring]
4. I require the information as described in 2 and 3 above to be provided to me in order to complete my assessments of the first claim. Should I not receive the information by 4.30 pm on Monday 20th May it is my intention to finalise my assessments on Tuesday 21st May.

…

50 As noted above at paragraph 33, later the same day the builder emailed the expert, with a copy only to its solicitor:

Dear John,

First I would like to thank you for all your effort and support.

Please see attached files

1. Full set of the structure engineer
2. Stare case details

3. Soil Report
4. Certificate of Compliance-design for all updates
5. Approved inspection for the steel and retaining walls

(sic)

51 It is apparent from the correspondence set out above, that the expert was fairly responding to correspondence from both parties during this time, and that the builder had no concerns at all with the expert's performance, until it received his first assessment.

The expert's first assessment

52 In the builder's first claim, which was submitted to the expert on 15 May, the builder claimed the works were 55.2% complete and claimed $124,500.

53 On 17 May the expert sent an email to the parties' solicitors confirming that he had attended site as advised on 15 May, that the builder had given him the first claim and:

2. In order for me to assess some of the works I made it known to the builder at the time of receiving the first claim that I require further information from him by way of:
    a. details of the proposed design work for rectification of balconies to achieve compliance with the provisions of the BCA under the contract particularly with regard to required freeboard and prevention of water ingress
    b. copy of compliance certificate for the roof plumbing.

54 The expert's first assessment is dated 21 May 2013. Under the heading 'Submission', the expert states:

…

3. Also, I invited the builder on a number of occasions from 23rd April by email and again on 15th May to submit documents with regard to his intention to rectify items of work described in Appendix C or justify some work that has been carried out since by way of:
    i. a program of estimated dates by which trades can be expected to complete the rectification work described in Appendix C.
    ii. details of the proposed design work for rectification of balconies to achieve compliance with the provisions of the BCA under the contract particularly with regard to required freeboard and prevention of water ingress.
    iii. cross sections of architectural design drawings
    iv. engineer's certification for the construction of the retaining wall along the east side of the dwelling without an articulation joint
    v. manufacturer's certification for the construction and sealing of the flashing along the base board and the top of the lower

brickwork to confirm that the method used is a satisfactory alternative solution to the recommended method.

vi. copy of compliance certificate for the roof plumbing.

4. Of the documents described in 3 above I have received only a copy of Appendix C with marked up handwriting (the marked up Appendix C) attached as Schedule B indicating:

   i. the items that the builder says have been completed or

   ii. the month they will be completed or

   iii. that they were agreed not to be done or

   iv. some other reasons why some of the items of work have not been done.

5. I have not received any other documents or written submissions from the builder as provided for at 28 in the terms of settlement.

55 The expert determined that payment of an amount of $49,500 was fair and reasonable noting in his conclusions:

8. Attempts to rectify some elements of work such as flooring, balconies and rendering appear to have been performed out of logical sequence and probably at wasted cost due to the builder not having carried out rectification work on defective plastering and balustrade around the balconies beforehand and now having the need to protect floors and membranes in the process.

9. In consideration of clause 23 in the terms, I believe that some elements of work are not being carried out in a timely, proper and workmanlike manner. Further, I find it difficult to accept that the builder's inaction in this matter to date has not been a wilful disregard of good building practice and procedures called for in the terms of settlement. [underlining added]

10. In summarising my assessment of the value of the first claim:

    i. The builder has claimed an amount of $124,500.

    ii. In the circumstances described above and in consideration of the likely costs involved to rectify significant items of defective works as described in Appendix C, I have determined that payment of an amount of $49,500 to the builder is fair and reasonable.

    iii. My assessments are provided in Schedule C.

56 The expert also noted in paragraph 6 of his Assessments of First Claim:

The marked up Appendix C[8]

The handwritten comments on the document have not been very helpful and demonstrate that rectification of some significant items of work has been undertaken by the builder contrary to compliance or

[8] The builder has made various notations on Appendix C, many seemingly indicating the month in which they were to be carried out, others simply 'done', 'completed', 'N/A', 'Please advice' (sic)]

> without consideration of certification by an appropriately qualified engineer or practitioner. It is quite likely that some of the work that has been carried out by the builder or that the builder intends to carry out in accordance with Appendix C will not be able to be certified. [underlining added]

57 The builder contends that the sentence which I have underlined in the above extract demonstrates that the expert had made up his mind that some of the works could not be certified. I do not accept this. It was entirely appropriate for the expert, having been appointed pursuant to the TOS to assess and certify the builder's progress claims, to raise any concerns he had with the progress or quality of the work when issuing his assessments.

Correspondence with the expert after the first claim and before the first notification (copied to the other party)

58 On 20 May the owner's solicitor wrote to the expert.[9] This letter sets out the owner's concerns in relation to the reuse of the existing timber flooring, areas of damp, water leaks and the top painting on the render at the back of the house looking patchy.

59 On 22 May, the builder emailed its solicitor a compliance certificate for the roof rectification works. The expert was copied in to this email, but not the owner's solicitor. Although in paragraph 22 of his affidavit Mr Sohiwa states that he emailed the expert a copy of the compliance certificate for the roof rectification works, in the covering email, the builder describes this as the *Compliance Certificate for the roof plumbing*.

60 On 23 May the owner's solicitor wrote to the expert with a copy to the builder's solicitor advising:

(i) that the only works the parties had agreed would not be carried out were those set out in paragraphs 30(a)-(d) of the TOS;

(ii) that the builder's failure to provide various documents sought by the expert in his email of 21 May constitutes non-compliance with the TOS, in respect of which the owner's rights are expressly reserved;

(iii) and seeks confirmation from the expert that *paragraph 9 of your email of 4.18pm on 21 May 2013 constitutes the first notice for the purposes of Clause 23 of the TOS.*

61 The owner's solicitor also sets out the owner's concerns in relation to the expert's assessments and seeks clarification about a number of matters. In particular, he states in this letter:

> Our client is also concerned that it is not a matter for the builder to estimate the cost of rectifying each item referred to in Appendix C. It is a matter for you as an expert to make an assessment of what each item is worth in dollar terms and then on receipt of the builder's claim

[9] This is one of the letters which was not copied in to the builder's solicitor.

you then ought to exercise your discretion in assessing that claim with reference to your own determination of the value of specific item in Appendix C.

62 On 24 May, the expert wrote to the parties' solicitors advising:

1. I received an email from the builder on 22 May with a copy of a Plumbing Compliance Certificate that described work being for 'adjustments made to job' with a value of between $1000-$4999. In response to that email I have concluded that this document represents only the certification of some rectification work that seems likely to have been carried out. As such it does not comply with my request on 15th May for copy of the Compliance Certificate for all the roof plumbing works in total.

   For the purpose of clarity I have not been provided with copy of any Plumbing Compliance Certificates at all from any of the parties and the purpose of my request was for a certificate (or certificates) that represents work carried out for the total of the roof plumbing work prior to me arranging an inspection of the roof. [underlining added]

2. In addition I note that the email does not copy in either of the owner's or builder's legal representatives so I have attached a copy of that email to this one.

3. Further, I confirm that I have not received any other documents at all by way of my requests for further documents or certifications or as provided for under t[he] TOS.

4. I inform the parties that I intend to carry out an inspection of the works [date and time] to consider progress of the work, performance against the time line in the schedule of works until that time and receive any documentation as previously requested that may be provided to me by the builder between now and then…

5. Also I received a letter by email from David Naidoo dated 23rd May that lists a number of points of concern to the owner. The points are noted and I intend to address those points in a response to the letter after my inspection.

The First Notification

63 The First Notification is dated 3 June. The expert confirms that he carried out an inspection on 28 May, as arranged *to consider the progress of the works, performance against the time line in the schedule of works and to receive requested documentation from the builder.*

64 The expert confirms that work had advanced with regard to various items. Further that he had received a file of documents including:

3. …a letter from the builder (Attachment 1) with the builder's own comments relating to my assessments of items 1, 2, 4, 5, 6, 7 ad 9 in the first claim that in the main provide his own statements, after what I understand to be his discussions with the relevant building

surveyor Vince Arborea, as to why those elements of work comply with the BCA and referred Australian Standards.

…

5. None of the documents provide certification or otherwise from either an engineer, building surveyor or manufacturer pursuant to clause 29 of the TOS with regard to 1, 2, 4, 6 and 7. [underlining added]

6. In considering my obligations in the TOS, I remain to receive the following certifications from either an engineer, building surveyor or manufacturer for the design and/or as built with regard to items considered in the first claim being for:

   [Items 1, 2 and 4 with details]

6. During my discussion with the builder at the time of the inspection, I informed the builder that he should await certification of the above works before proceeding with further ongoing works that may be directly or indirectly related to work pending certification. [the paragraph numbering '6' is duplicated]

7. The builder undertook to arrange for the certifications to be obtained and copies to be forwarded to me by 31st May.

8. In circumstances where the builder has not responded to my requests in relation to these items of work since between 23rd April and 31st May and in consideration of my obligations pursuant to [paragraph] 28 of the TOS I now issue this first notification. In doing so I remind the parties of my obligations under [paragraph] 25 of the TOS and encourage the builder to obtain the relevant certifications and provide them to me by email before 4.30pm on Monday 10th June.

Correspondence with the expert after the First Notification

65 On 6 June the owner's solicitor wrote to the expert:

…

As you are aware, in accordance with paragraph 1(b) of the TOS building works forming part of the work that the builder must perform under the TOS includes amongst other things:

"plus the work the subject of all variations claimed by the builder in the VCAT proceeding".

In this regard we enclose copy of the variation in the specification requested by the client and claimed by the builder in the proceeding.

Separately in relation to Item 9 in the builder's response to your assessment attached to your letter dated 3 June 2013 about timber flooring the builder claimed that he was waiting for the owner's response to the timber flooring. All information regarding the timber flooring has been provided to the builder…

66 At 8.32am on 11 June the expert emailed the builder's solicitor advising he had arranged for an inspection of the roofing work at 2.30pm and that he understood that *access will be available into the property through the gap in the front fence as usual so it will not be necessary for any special access arrangements.*

67 On the same day the owner's lawyer sent a letter to the expert referring to the First Notification and seeking clarification by return mail whether the builder had paid the expert's outstanding invoice, and whether:

> The builder has provided certification from either an engineer, building surveyor or manufacturer for the design and/or as built with regard to items considered by your in the first claim and referred to in paragraph 6 of your First Notification. If so, could you please let us have copies. We note that the builder "undertook to arrange for the certifications to be obtained and copies to be forwarded to you by 31 May 2013". If you did not receive the certifications by 31 May 2013 and received them subsequently please let us know the date on which you received them. If they have not been received at all then we would now be pleased if you would let us know what steps you are taking to comply with paragraph 25 of the TOS.

68 At 4.08pm on the same day, the builder emailed its solicitor confirming he had attended the site earlier that day with the second claim and the following certificates:

2. The certificates
   a. Building surveyor's letter [dated 5 June 2013]
   b. Engineer's Certificate of compliance – Design for alfresco to replace the columns [dated 7 June 2013]
   c. Engineer's Certificate of compliance – Inspection for using welding instead of bolts [dated 16 November 2010]
   d. Engineer's Certificate of compliance – Inspection of footing pads [dated 17 June 2010]
   e. Engineer's Certificate of compliance – Inspection for front concrete stairs [dated 16 November 2010]
   f. Roof plumber – list of work completed at the property [but no compliance certificate].

69 No issue was raised by the builder in this correspondence about the expert arranging an inspection of the roof, which I note was scheduled to take place at 2.30pm, the same time the builder said he attended the site. The first time any issue was raised about this inspection was in Mr Sowiha's affidavit filed in support of the builder's application for reinstatement.

The Second Claim

70 The builder's Second Claim was given to the expert at an on-site inspection on 12 June. The second claim is for $121,750 and states that the work is 76.1% complete.

Assessments of Second Claim and Second Notification

71 The expert's Assessments of Second Claim and Second Notification is dated 17 June. Relevantly, the expert states:

1. This document should be read in conjunction with my Assessments of the First Claim dated 21st May 2013.
2. Since the 17th May I have made a number of requests of the builder for:
   a. details of his proposed design work with regard to prevention of water ingress into the building
   b. cross sections of architectural design drawings
   c. engineer's certification for the construction of the retaining wall without an articulation joint
   d. manufacturer's certification for the construction and sealing of the flashings along the base board and the top of the lower brickwork copy of compliance certificate for the roof plumbing.
3. I received the Second Claim from the builder on Tuesday 12th June together with:
   a. a letter from Vince Arboree, the relevant building surveyor of VA Building Services Pty Ltd (the RBA) dated 5th June 2013 addressing:
      i. BCA compliance requirements with regard to external moisture entering a building
      ii. his satisfaction for the structure of the staircase
      iii. his satisfaction for frame structure of the Alfresco
      iv. external walls, render and flashings
   b. Certificates of compliance from Phillip Biviano, structural engineer, for:
      i. Design – the use of 150mm posts in lieu of brickwork piers
      ii. Inspection – the use of fillet welds in lieu of bolts for beam and beam to post connections
      iii. Inspection – front concrete staircase
      iv. Inspection – structural soundness of brick wall next to neighbour's property at no 16
   c. List of works relating to roof plumbing on a letterhead of Fine Edge Property Services.

   A copy of the Second Claim and the attached documents was sent to both parties representatives on 14th June.
4. In addition, I received:
   a. correspondence from David Naidoo:

i. dated 3rd June with copy of the owner's photographs of water ingress and

ii. dated 16th June with a copy of a letter from the owner listing his concerns.

b. notification from the owner's bank confirming payment of $1,220.45 being his share of my account dated 21st May

c. an email from the builder dated 14th June submitting at point 2 with regard to the owner's responsibility for landscaping at 30.b.iv in the TOS *"the owner need to think carefully about the volume of water collected from the park when he choosing the right AG Pipe Size"* (sic)

5. In circumstances where there is a significant issue being claimed for alleged defective roof plumbing work, I arranged for an inspection of the roof to be carried out on 11th June by Robert Quick, plumbing consultant. I have attached copy of Robert Quick's report date 12th June as Attachment A.

I carried out inspections on 12th and 15th June for the purpose of considering the further water ingress and progress of the work relative to the second claim.

Observations

[the expert sets out his observations, particularly in relation to moisture and water ingress, the relationship between internal and external floor levels and failure to apply a membrane to all necessary areas]

Conclusions

11. The statements in the document dated 5th June from the RBS do not satisfy my request for any intended design details.

12. The submission by the builder with regard to the landscaping being the owner's responsibility does not preclude the builder from ensuring the water tightness of the dwelling…

13. Extensive work will be required for rectification of the roofing defects, water ingress and cladding issues among other issues already listed in Appendix C or as a consequence of work performed out of sequence of good building practice and planning.

14…

15. In the absence of any documentation from the manufacturer of the foam claddings system, I am unable to support the method of flashing that has been used along the bottom of the external walls. Extensive work will be required …

16. <u>Contrary to good building practice and notice given to the builder in my assessments of the First Claim and the First Notification, the builder continues to proceed with work out of sequence with good planning.</u> [underlining added]

[examples are provided]

…

19. On the basis of the foregoing, pursuant to my responsibility under [paragraph] 23 of the TOS, I remain concerned that the works are not being carried out in a timely proper or workmanlike manner and that the cost of rectification will be too significant to allow me to approve any amount of the claim…

20. I now issue this Second Notification pursuant to clause 25 of the TOS and my invoice for payment by the builder pursuant to [paragraph] 27 in theTOS.

Correspondence between the Second Notification and the expert's final report (copied to the other party)

72 On 18 June the owner's solicitor wrote to the builder's solicitor advising:

> We refer to the email of the expert dated 18 June 2013 and attachments.
>
> As you are aware, by reason of the Second Notification both the TOS and the building contract is now at an end. Therefore your client's licence to be on site is at an end.
>
> Please therefore ensure that under no circumstances should your client or any of its agents attend the site. If your client has any equipment or plant or anything on site your client must make arrangements with our client to access the premises for the sole purposes of collecting those items at a mutually convenient time.

73 On 18 August the expert emailed the parties' solicitors advising that his report would be available on Monday 19 August and would be released upon payment of his final account, and that if it remained unpaid at 4.30pm on 26 August he would release the report to whichever party paid his account in full. He enclosed an invoice for his estimated final fees and a Statement of Account showing an outstanding balance of $33,777.83 for payment by the builder pursuant to clause 28 of the TOS.

The Final Building Report

74 Mr Naidoo states in his affidavit that, on 28 August 2013, he received a copy of the expert's assessment of the reasonable cost of completing and rectifying the works under the contract in accordance with clause 25 of the TOS ('the final report') which he served on the builder by emailing it to its solicitor on 29 August. Further that on 18 August he received a copy of the expert's invoice, and on 19 August he received a copy of the following email from the builder's solicitor to the expert:

> I acknowledge receipt of your email the contents of which have been noted.
>
> As far as we are, and were concerned, as per the Terms of Settlement and developments in this matter, your services were terminated and I am instructed by my client that a copy of your report was/is not required.

75 In the final building report, the expert states that it has been prepared in accordance with sub-paragraph 25(e) of the TOS. He states in clause 3 of the Preamble that:

> In that process [of carrying out further inspections and inquiries] I found the need to engage Robert Quick, a building consultant specialising in plumbing work, Roy Harding, a building surveyor and consultant, and Tim Gibney, a structural engineer, to assist me with my investigations and assessments in relation to and a number of plumbing, structural and drainage issues (sic).

and at paragraph 4

> I met with Robert Quick on 12th June 2013 and both Roy Harding and Tim Gibney on 22nd July 2013 and each have responded with reports and written comments in relation to the information that I have requested and that has been included in this report.

76 The expert states in paragraph 19 of the report that the estimated cost of rectification is $174,514.60 and that the estimated cost of completion is $74,537.

77 The expert issued an Amended Building Report dated 30 August amending the estimated cost of completion to be *in the order of $78,*537. He estimated that the cost of variations *that I have been reasonably able to assess in difficult circumstances, is in the order of $94,051.* He assessed the amount payable by the builder to the owner as $343,102.60.

78 On 3 September the expert issued a Second Amended Building Report in which he has seemingly revised the assessment of the variations to $275,406 without any explanation, confirmed the costs of rectification at $174,514.60 and the estimated cost of completion as being in the order of $78,537 and he assessed that the amount payable by the builder to the owner is $27,555.60:

79 The owner initially claimed payment for the total amount of the expert's assessment: $343,102.60 plus the expert's costs, but has since amended his claim to $253,051.60 plus the expert's costs, noting that the expert has erred in assessing the cost of the variations which were compromised by the TOS.

ARE THE PARTIES BOUND BY THE EXPERT'S ASSESSMENT?

80 The owner contends that I should enter judgement for the sum assessed as the cost of completion and rectification: $253,051.60 plus the expert's costs of $33,777.83. Further, that the amount assessed by the expert for variations should be severed from the Final Report, as this is a task the expert was not required to carry out under the terms of his appointment, as set out in the TOS.

81 Despite having made orders for the filing of further submissions by the builder, during the reinstatement hearing, counsel for the builder submitted for the first time that if the owner's application was successful that the proceeding should be reinstated and judgement entered for the amount of

the expert's final assessment (after taking into account the variations). At the conclusion of the reinstatement hearing I made orders for the owner to file and serve his submissions in relation to quantum, and in particular, as to whether the Tribunal was bound to adopt the entire report of the expert by 30 October. Orders were made for the builder to file and serve its reply submissions in relation to quantum by 6 November.

82 The owner's submissions were filed on 30 October. When no reply submissions were received from the builder, the proceeding was listed for a compliance directions hearing when the solicitor appearing on behalf of the builder advised the Tribunal that the builder did not wish to file any reply submissions.

83 The builder contends I can have no confidence in the amounts assessed for completion and rectification works given the apparent failure of the expert to understand the terms of his appointment in relation to the assessment of the variations. Further, that the expert has ignored the certifications provided by the builder, which he was required to consider under paragraphs 28 and 29 of the TOS.

84 I reject this.

85 Under paragraph 35 of the TOS, the parties specifically agreed that the assessment by the expert of the costs to complete and/or rectify the works in the event of termination pursuant to paragraph 25, would be final and binding as if it was a determination by a special referee appointed under s95(1) of the VCAT Act. In my view, it matters not that formal orders were not made for Mr Anderson to be appointed as a special referee under s95 – the parties agreed that his appointment was to proceed as if he had been appointed under s95.

86 In *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd*[10] Nettle JA said at [51]:

> I agree with the judge that the question of whether it is open to review an expert determination on the ground of error is in the first place to be decided according to whether the determination answers the contractual description of what the expert was required to determine. I also agree with the judge that the question of whether an error in determination deprives the determination of compliance with the contractual description of what the expert was required to determine is in the first place to be answered according to whether the error occurred in respect of a task which the contract entrusted to the expert. As Mason, P. explained in *Holt v. Cox,* although mistake is not itself a ground for vitiation of a final and binding expert determination, a mistake may still be of such a nature that the resultant determination is beyond the realm of contractual contemplation – beyond anything which the parties may be supposed to have intended to be final and binding – and therefore susceptible to review.

[10] [2006] VSCA 173

87 His Honour continued:

> 53 Therein lies the distinction drawn in some of the authorities, and observed by the judge in this case, between an error in the exercise of a judgment, opinion or discretion entrusted to an expert, and an error which involves objective facts or a mere mechanical or arithmetical exercise. Subject to the contract in question, it is easier to suppose that parties to a contract contemplate that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation.
>
> 54 As this case demonstrates, however, matters are likely to be more complex where error occurs in the course of an exercise which is partly comprised of discretion, judgment or opinion and partly constituted of objective fact or mechanical calculation. In some such cases, the overriding discretionary or judgmental character of the exercise may so inform each step in the determination as to put even those steps which are matters of objective fact or mere mechanical calculation beyond the scope of permissible review. In other instances it may appear that, despite the overall character of the exercise, the various steps in the determination are severable, according to whether they are essentially discretionary or judgmental or simply matters of objective fact or mechanical calculation, and that those steps which are of the latter kind are within the scope of permissible review. The question in each case is what the parties should be presumed to have intended, and that is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created. [underlining added]

88 The parties clearly agreed in the TOS that, in the event the expert issued a Second Notification, the TOS and the building contract would be at an end save for the assessment by the expert of the cost of any outstanding rectification and completion works. The parties agreed that the assessment of the expert would be final and binding and that they would be bound by the assessment.

89 In *Commonwealth v Wawbe*[11] Gillard J said at [17]

> The parties to a contract agree that the value is to be determined by an expert acting as such and using his own skill, judgement and experience. He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties' common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination "warts and all" and subject to such deficiencies as one would expect in the circumstances. The parties put in place the procedure, they must accept the results unless it was contrary to their common intention.

[11] [1998] VSC 82

and at [44]

> The trend of the authorities establish that the mistake must be of a kind which demonstrates that the valuer did not perform his task as required by the contract making allowance for the fact that the valuer in construing the agreement, where necessary, is a valuer not a lawyer.

90 In my view, these comments are equally applicable to the situations such as this where an expert is appointed to carry out a specific task because of his special expertise. There is simply no evidence that the expert did not perform his task in accordance with the contract - the TOS as incorporated into his retainer by his letter dated 7 March.

91 The builder contends the expert did not perform his task in accordance with the contract because he failed to have regard to the certifications provided by the builder. I understand these to mean the certificates forwarded to the expert by the builder on 11 June.

92 However, this is to ignore the process set out in paragraph 28 of the TOS. If the builder believes it is neither reasonable nor necessary to carry out any items of the works or part of the works then:

(i) the builder may notify the expert in writing,

(ii) if, after receiving notice from the builder, the expert agrees, the expert is to notify the owner and the builder in writing of his decision, and such item would be deemed completed.

Paragraph 29 requires that in determining whether works are neither necessary nor reasonable, the expert will consider an engineer's, manufacturer's or building surveyor's certifications.

93 There is no evidence before me of the builder having notified the expert in writing that it believed any of the works were neither reasonable nor necessary. The submission on behalf of the builder that it would not have entered into the TOS *if the alternative certification was to be the subject of the expert's acceptance* is to ignore the very clear process set out in paragraph 28, which anticipates the expert making a decision having considered the notice from the builder, including any of the certifications as set out in paragraph 29. Paragraph 29 requires the expert to consider a certification from an engineer, manufacturer or building surveyor as part of his consideration under paragraph 28 as to whether an item of the works are neither necessary nor reasonable. It does not require the expert to accept such certifications as conclusive evidence that such works are neither necessary nor reasonable.

94 A consideration of the correspondence from the expert set out above, and noting that notwithstanding the clear process set out in paragraph 28, reveals the expert invited the builder to provide him with such certification. Despite those requests, as noted in the Assessments of the Builder's Second Claim, and in the Final Report, the builder has failed to provide any certification from the manufacturer in relation to the foam cladding.

95 Further, in preparing his Final Report the expert sought reports from an expert building surveyor and an expert engineer, and relied on their certifications to determine that certain works were not necessary nor reasonable. If any party is prejudiced by this it is the owner, not the builder.

96 I am of the view that it was entirely within the expert's discretion to seek advice and certification from an expert engineer and an expert building surveyor to assist him in the performance of his task.

The Quick Report

97 In circumstances where the expert has serious concerns about the roof, and on being asked for the relevant compliance certificate, the builder provided the expert with a compliance certificate for the rectification works (although this was not made clear by the builder), it was entirely appropriate for the expert to seek a report from an expert roof plumber to assist him in performing his functions under the contract. As noted above, although notice of this inspection was given to the builder and a copy of Mr Quick's report was attached to the Second Notification, no issue was raised about Mr Quick's inspection until Mr Sowiha raised concerns in his affidavit.

98 I reject the submission on behalf of the builder that the expert was obliged to notify the parties that he did not accept that the compliance certificate for the roof plumbing works provided to him by the builder on 22 May certified the whole of the roof plumbing works. The expert had repeatedly asked the builder to provide him with copies of all compliance certificates. In circumstances where:

(i) the rectification budget for the roof was $40,000, and

(ii) in its first claim, the builder claimed the roof rectification works were 100% complete and claimed the full $35,000, and

(ii) the disclosed value for the roof plumbing works in the compliance certificate provided to the expert on 22 May is $1,000 to $4,999, and

(iii) there was evidence of continuing water leaks,

it was entirely appropriate for the expert to seek and rely on the expert opinion of a roof plumbing expert.

99 Curiously, as I do not think it assists the builder, counsel for the builder referred me to *Brian Duglash v Ed Mayers,*[12] a decision of the Supreme Court of Hong Kong High Court, described in the Austlii report as a Court of First Instance where Le Pichon J at [47] said:

> …The leading authority is the English Court of Appeal's decision in **Jones v Sherwood Computer Services Plc** [1992] 1 WLR 277 which held that:

[12] [1997] HKCFI 64, [1997] 2 HKC 814, HCA8423/1994

> "…where parties had agreed to be bound by the report of an expert, the report, whether or not it contained reasons for the conclusion in it, could not be challenged in the courts on the ground that mistakes had been made in its preparation unless it could be shown that the expert had departed from the instructions given to him in a material respect…"

and at [52]

> …For my part, I am not persuaded that the duty of an expert to act fairly brings into play the principles of natural justice in its full rigour. Further, I do not accept that "fairness" requires that the expert's conduct be subjected to microscopic examination which is what the Defendant has sought to do. A common sense approach is required and nothing short of conduct that cannot, on any reasonable view, be said to be broadly fair would suffice to impugn an expert's determination. In other words, some degree of egregiousness must be established.

CONCLUSION

100 My overwhelming impression is that the expert has been very fair and even handed in the performance of his tasks, and in dealing with the parties. In his letter of 7 March the expert made it clear that all correspondence with him was to be copied to both parties. It seems that where he was uncertain whether correspondence had been copied to the other party, he attached a copy to his next email.

101 Noting the expert continually expressed concern that the works were not progressing in a timely ordered manner, and identified defects in those works, the failure by the builder to carry out the works in a timely, proper or workmanlike manner was entirely within the builder's control. The expert did not prevent the builder from carrying out the rectification and completion works it agreed to carry out under the TOS. It matters not that the owner through his solicitor, reminded the expert of his obligations under the TOS. When the parties entered into the TOS they agreed the functions to be performed by the expert, including the relevant time frames.

102 In summary:

(i) the parties agreed work would commence works by 12 March and complete them by 12 August.

(ii) the owner would pay the builder $250,000 to carry out the works, with a payment of $25,000 to be paid by 5 March, which was paid.

(iii) the balance of $225,000 was to be paid by progress payments with the first progress claim to be submitted not earlier than 25 March, the second progress claim to be submitted not earlier than 15 April, with further progress claims up to a maximum of 7 at the rate of one per fortnight, with the builder to pay the costs of the expert in assessing the claim/s if more than 7 progress claims were made,

(iv) if at any time prior to completion the expert believed the builder was not carrying out the works in a timely, proper or workmanlike manner, he was to notify the owner and the builder – the first notification.

(v) if after a period of not less than 7 days after the date of the first notification the expert remained of the opinion that the builder was not carrying out the works in a timely, proper and workmanlike manner he was to notify the owner and the builder – the second notification – whereupon the building contract would be deemed to have been validly terminated,

(vi) the expert to inspect the works within 7 days of the second notification, and

(vii) within 14 days from the date of the inspection, the expert to provide the owner and the builder with a report identifying the outstanding completion and rectification works, together with the expert's assessment of the reasonable cost of completing and rectifying those works.

103 If the builder truly believed that the owner and/or his solicitors were unreasonably interfering with the expert's performance of his task under the TOS, the time to raise those concerns was before the Second Notification, not after the contract had been terminated by the Second Notification.

104 Further, the parties expressly agreed in the TOS that if the expert remained of the view after not less than 7 days after issuing the First Notification that the works were still not proceeding in a timely, proper and workmanlike manner that he could issue the Second Notification. When the builder entered into these TOS it agreed to these time frames. Whether it considers it fair that the expert issued the Second Notification in June when completion was not due under the TOS until 12 August is irrelevant. The Second Notification was issued within the time frames allowed by the TOS.

105 There is no evidence that performance of the contract by the builder without default by either party, became impossible or was radically changed. The builder's obligations were to carry out the rectification and completion works in accordance with Schedules C and E to the TOS, in a timely, proper or workmanlike manner. As is clearly demonstrated by the correspondence from the expert to the builder set out above, almost from the time his appointment was confirmed, the expert was seeking information and certification from the builder, and expressing concern about the method and manner in which the works were being carried out.

106 As I am satisfied the expert has performed the task required of him under the TOS, I find the parties are bound by the expert's final report. The builder cannot now seek to challenge any part of that report, and therefore a further inspection by the builder and/or its expert is unwarranted.

107 The expert has assessed the completion and rectification costs as he was required to do, and the variations which he was not required to assess, and in respect of which the builder has released the owner in the TOS. As the expert's assessments for the completion and rectification works are clearly identifiable I am satisfied that judgement can and should be entered for the assessed amounts for those works.

108 Accordingly, I will order that the proceeding be reinstated and that the builder pay the owner $253,051.60 together with the expert's costs of $33,777.38 – a total of $286,828.98.

109 As I have not heard from the parties on the question of costs, I will reserve costs with liberty to apply.

DEPUTY PRESIDENT C AIRD