VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D671/2011

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Admissibility of evidence; without prejudice communications; duty of confidentiality owed by expert consultants; whether appropriate to convene preliminary hearing; whether questions of admissibility of evidence best left for the presiding member to determine at or during trial.

APPLICANT	David Malcolm
FIRST RESPONDENT	Brurob Nominees Pty Ltd ACN 005 252 157, t/as Langford-Jones Homes
SECOND RESPONDENT	Stuart Spence (struck out)
THIRD RESPONDENT	AG Zoanetti & WN Maxwell Pty Ltd ACN 118 536 477 t/as Gippsland Building Approvals
FOURTH RESPONDENT	Wayne Sanders
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	17 March 2014
DATE OF ORDER	18 March 2014
CITATION	Malcolm v Brurob Nominees Pty Ltd t-as Langford-Jones Homes (Domestic Building) [2014] VCAT 276

ORDER

1. The Applicant's application to strike out the witness statement of Robert Lees dated 8 October 2013 is refused.
2. The Applicant's application to strike out paragraphs 55-62 of the witness statement of Bruce Langford-Jones dated 8 October 2013 is refused.
3. The Applicant's application to strike out paragraphs 3-8 of the witness statement of Tony Croucher dated 8 October 2013 is refused.

4. The Applicant's application to strike out paragraphs 15-17 of the witness statement of Robert Beverley dated 8 October 2013 is refused.

5. The costs of and associated with the Applicant's application are reserved, with liberty given to the parties to apply. Should any application for costs be made pursuant to this order, I direct the Principal Registrar to list the proceeding for a further directions hearing before SM E Riegler as soon as convenient, with one hour allocated.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr J Forrest of counsel.
For the First Respondents	Mr Squirrell of counsel.
For the Second Respondent:	No appearance
For the Third Respondent:	Ms K Devenish solicitor and L Boughton (law clerk)
For the Fourth Respondent:	Mr L Rees solicitor

REASONS

INTRODUCTION

1. This interlocutory application concerns the admissibility of evidence proposed to be given by various witnesses to be called by the First Respondent at the hearing of this proceeding. In particular, the Applicant, being the registered owner of a residential dwelling located in South East Gippsland (**'the Owner'**), seeks an order that the witness statement of Mr Robert Lees, building consultant, be struck out and that various paragraphs in the witness statements of other witnesses proposed to be called by the First Respondent (**'the Builder'**) also be struck out. The grounds upon which the Owner relies are twofold, namely:

   (a) First, he contends that the proposed evidence relates to without prejudice communications and therefore should be excluded.

   (b) Second, he further contends that the proposed evidence to be given by Mr Robert Lees is confidential communication as between Mr Lees and the Owner and therefore should be excluded.

2. The nature of the evidence which the Owner seeks to have excluded concerns an allegation raised in the Builder's defence that the Owner and the Builder entered into an agreement, wherein Mr Lees, being the building consultant engaged by the Owner, was to confer with Mr Croucher, the building consultant engaged by the Builder, for the purpose of preparing a joint report dealing with defective works. According to the Builder, it was further agreed that on completion of the works set out in the joint report and certification by Mr Lees that the works had been completed satisfactorily; the Owner was to make payment of the *Fixing Stage* progress claim, previously invoiced by the Builder. The Owner disputes that any such agreement was entered into. He contends that although a joint inspection took place, he had at all material times, reserved his right and expressly advised the Builder that all communications leading up to and associated with the joint inspection were conducted on a without prejudice basis.

Without prejudice communication

3. A number of affidavits were filed by both parties in support of their respective positions. In that respect, the Owner relies upon the following affidavits:

   (a) David Malcolm sworn on 24 and 31 January 2014; and

   (b) Lance Guymer sworn on 23 December 2013.

4. The Builder relies upon following affidavits:

   (a) Rowland Hassall affirmed on 29 January 2014; and

   (b) Bruce Langford-Jones affirmed on 13 March 2014.

5. Mr Forrest of counsel appeared on behalf of the Owner. He argued that the evidence of the Owner, as set out in his supporting affidavit, makes it clear that all communications leading up to and including the joint inspection were to be conducted on a without prejudice basis. In particular, the Owner deposes to the following:

> 41. Over the course of the next few weeks in June 2011, I telephoned BLJ [Bruce Langford-Jones] on a number of occasions to make arrangements for the joint inspection to occur. In each of these conversations I stated openly and frankly to BLJ that the joint inspection and my involvement in the process was to be on a without prejudice basis and I reserve all my rights at law. I made the statement after receiving legal advice prior to receiving Croucher's report dated 2 June 2011.
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> …
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> 48. After we returned, it was suggested by both Lees and Croucher that they should prepare a joint report which would indicate what the concluded opinions were after their discussions and it would be provided to the parties.
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> 49. I was agreeable with that occurring as it had been recommended to be done by both experts and I accepted their advice in good faith.
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> 50. It was not suggested by either expert that the publication of the joint report would be on an open basis.
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> 51. I understood that the joint report would be prepared under the auspices of the joint inspection and would, therefore, be published on a without prejudice status consistent with the joint inspection.

6. Mr Forrest submitted that no agreement was ever reached as to what was to follow after the joint report was prepared by the experts. Therefore, he contended that all communications including the joint report were without prejudice and should not be disclosed during the course of the hearing.

7. By contrast, Mr Squirrell of counsel, who appeared in behalf of the Builder, argued that a concluded agreement had been reached between the parties, the effect of which was that the joint report was to form the scope of rectification work to be completed by the Builder. He submitted that once the rectification works were completed, Mr Lees would inspect the works and if satisfied that the works were completed properly, approve payment of the *Fixing Stage* progress claim. In support that contention, Mr Squirrell pointed to extracts of the witness statements of Mr Lees, Mr Bruce Langford-Jones, Mr Croucher and Mr Beverley, all of which have been filed in the proceeding. He also relied upon the affidavits of Mr Hassall and Mr Bruce Langford-Jones. In particular, Mr Hassall deposes to the following:

> 10. Bruce Langford-Jones advised me and I verily believe that on 6 June he arranged an on-site meeting between Croucher, Lees, the applicant

and himself to prepare a scope of works. On 8 June 2011 I received a copy of the joint Report prepared by Tony Croucher and signed by him and Lees. On 28 July 2011 I sent a letter to B & C [the Applicant's previous solicitors] confirming all work required by the Joint Report had been carried out by the Builder to the satisfaction of Lees and the builder had about 7 weeks work to complete the contract works.

11. I am informed by Bruce Langford Jones and I verily believe that:

    a. The on-site joint meeting he arranged and attended with Croucher, Lees and Malcolm was not a meeting at which Malcolm said was to be held "without prejudice".

    b. his recollection of the site meeting and the surrounding circumstances of the meeting as set out in his witness statement at paragraphs 55-62 is accurate.

8. Mr Bruce Langford-Jones states further:

    4. Malcolm says that he always stated in each conversation and again on site that his involvement in the joint meeting process was "on a without prejudice basis" and that he "reserved all (of his) rights at law". He says that I agreed with this.

    5. To the best of my recollection Malcolm did not state that this was the basis of him agreeing to the joint meeting or of him participating in the meeting on site with Lees and Croucher.

    6. So far as I was aware the purpose of the joint meeting was to see if the two experts could agree as to what defects existed and what needed to be done to fix them, so that the job could be back on track and the house would then be completed.

9. In my view, it is not appropriate at this interlocutory stage of the proceeding to exclude evidence going to the issue of whether parties entered into a part settlement agreement concerning defects which existed at a particular point in time and payment of the *Fixing Stage* progress claim. Clearly, the evidence set out in the affidavits filed in support of, and in opposition to, this interlocutory application and in the various witness statements is relevant to the question whether parties entered into the alleged agreement. To exclude that evidence would be to deny the Builder an opportunity to prove an aspect of its defence. Clearly, that would be a denial of natural justice.

10. Mr Forrest submitted that if the proposed evidence was to be allowed, then it was appropriate for the Tribunal to convene a preliminary hearing confined to determining whether the alleged agreement was entered into. He suggested that such a preliminary hearing could be concluded within three hearing days.[1] Mr Forrest argued that the convening of a preliminary hearing would ensure that if the Tribunal ultimately determined that no agreement was entered into, then the evidence of without prejudice communication could be

[1] Mr Squirrell suggested that the preliminary hearing would occupy five hearing days.

excluded without the presiding member being exposed to that excluded evidence at final hearing. Mr Squirrell argued that it was not unusual for a court or the Tribunal to hear objections to evidence during the course of a hearing and to rule that the evidence be excluded. In such a case, the court or the Tribunal would simply disregard the excluded evidence from its decision-making process. Consequently, he contended that it was inappropriate to convene a preliminary hearing on the question of whether the alleged agreement was entered into, given the time and expense associated with that course of conduct. He further argued that the witnesses required to give evidence in the preliminary hearing would be the same witnesses giving evidence in the main hearing and it would be unfair if he was required to 'unravel' his litigation strategy when cross-examining witnesses on what would essentially be the same or similar subject matter to be canvassed in the main hearing. A similar point was made by Byrne J in *Hyder Consulting (Victoria) Pty Ltd v CGU Insurance Ltd*:[2]

> … Furthermore the credit of a witness called on one issue may be affected by the evidence of that witness or of other witnesses on other issues. The advantage, in terms of saving court time and expense, of trying certain questions or parts of the case before others may be eroded, if not destroyed where a party at the first trial cross-examines the witness on the deferred questions on the basis that this ordinarily goes to the credit of that witness. Where this course is adopted, the cross-examiner is bound by the rule that answers given cannot be contradicted. The position is otherwise if the cross-examination to be justified as going to an issue. These considerations lead to the conclusion that the advantages of the severance of questions for trial before other questions or the division of a trial in two parts, as a technique of efficient trial management, may lead to unfair advantage or disadvantage to a party or may prove to be illusory.

11. In my view, it is inappropriate to convene a preliminary hearing going to the question of whether parties entered into the alleged agreement. I have formed this view for a number of reasons. First, the issues and evidence concerning the preparation of the joint report and any alleged agreement which followed from that conduct are so interwoven into the factual matrix of the present dispute that to isolate the evidence into a preliminary hearing runs the risk that the same facts would again be canvassed in the main hearing, with the risk of there being inconsistent findings.

12. Second, the conflict between the evidence to be given by the Builder and that of the Owner is whether certain matters were agreed between those parties. Whether one version is to be accepted over the other will depend, in part, on how credible each witness presents when giving oral testimony. To restrict the evidence only to questions comprising a preliminary hearing would, in my view, also restrict the Tribunal's ability to assess credibility. In particular, the Tribunal would only be given a snapshot of each person's evidence and not

[2] [2001] VSC 449 at [25].

have the benefit of hearing evidence from that person covering all issues in dispute.

13. Third, it is not clear to me what evidence is said to be without prejudice communications. In particular, the evidence as set out in the witness statements and affidavit material referred to above, really hinge on what each witness will say was agreed or was not agreed. It is not in contention that a joint inspection took place or that a joint report was prepared. Whether that took place pursuant to an agreement reached between the parties or under the auspices of without prejudice communications is a question of fact to be decided by the Tribunal. The determination of that question will, in all likelihood, also determine the question whether the joint report is to be received as evidence or not. In my view, the presiding member hearing the main hearing will be in no worse position to evaluate and deal with any objections concerning the admissibility of any without prejudice communications when and if those objections arise during the course of that hearing.

14. Therefore, I accept Mr Squirrell's submission that even if without prejudice communication is unwittingly disclosed during the course of a witness giving his or her evidence, the presiding member is able to disregard that evidence, when determining the issues in dispute. That situation is not uncommon. Indeed, that very situation is discussed in *Protec Pacific Pty Ltd v Cherry*,[3] which was relied upon by the Owner in this interlocutory application. That case concerned an application for an injunction preventing Professor Cherry, a consultant engaged by Protec, from communicating with another party in connection with the Supreme Court proceedings or divulging any information confidential to Protec in connection with those Supreme Court proceedings. His Honour, Habersberger J, commented as follows:

> [70] I do not consider that granting Protec's application involves any infringement of the principle that there is property in a witness, because Steuler would still be entitled to call Professor Cherry as a witness, if Protec did not. This issue was considered by Johnson J in *Rapid Metal Developments.* After referring to a number of authorities, his Honour held that:
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> > a court will not intervene to prevent an expert witness giving evidence on behalf of another party but will take appropriate action to prevent the witness from disclosing confidential or privileged information.
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> Part of the appropriate action which Johnson J thought necessary in that case was, in broad terms, to restrain the equivalent party to Steuler, through its solicitors or otherwise, from utilising, in the course of preparing its case, the reports of the expert witness and any document in his files, which he had provided to it, other than documents which it had obtained from another

[3] [2008] VSC 76.

source not involving any breach of confidentiality. His Honour made the point that:

> Pre-trial discussions, held as they are in the absence of a representative of the opposing party protecting that party's interest, would run the risk of a breach of confidentiality.

Consequently, his Honour held that, in his view, the trial process was "the more appropriate arena" to deal with the relevant issues, as the equivalent party to Protec, through its counsel, would "then be in a position to immediately raise any issue of breach of confidentiality [sic] arising from a specific question put to the witness". I respectfully agree with and adopt that approach.

15. Consequently, I decline to order that the proposed evidence of Mr Lees, Mr Croucher, Mr Bruce Langford-Jones and Mr Beverley as set out in the relevant paragraphs of their respective witness statements be excluded on the ground that it may constitute without prejudice communication. I further decline to order that a preliminary hearing be convened to decide whether the alleged agreement referred to above was entered into between the parties. As I have indicated, that is a matter best left for the presiding member hearing the main proceeding.

Breach of confidentiality

16. That then leaves the question whether Mr Lees' witness statement is to be struck out, with the effect that Mr Lees is to be excluded from giving evidence in the proceeding, on the alternative ground that any communication as between the Owner and Mr Lees is confidential and not to be disclosed. In that respect, the Owner objects to certain parts of Mr Lees' witness statement, wherein Mr Lees recounts certain statements made to him by the Owner, concerning the alleged agreement.

17. As I have already mentioned, the Owner relies upon the decision of Habersberger J in *Protec* as authority for the proposition that an expert owes an equitable duty of confidence to its principal. In *Seager v Copydex Ltd,*[4] Lord Denning MR described the equitable principle as:

> … the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it…

18. In *Coco v A N Clark (Engineers) Ltd*,[5] Sir Robert Megarry J formulated the concept by reference to the following elements:

    (a) the information had to have the necessary quality of confidence about it;

    (b) it must have been imparted in circumstances importing an obligation of confidence; and

[4] [1967] 2 All ER 415 at 417.
[5] [1969] RPC 41 at 47-8.

(c) there must be an unauthorised use.

19. In *Protec*, affidavit material was relied upon in support of the injunction application which indicated that instructions had been provided to Professor Cherry which were of a confidential nature. Indeed, Habersberger J found that it was likely that Professor Cherry had learnt something about Protec's attitude, strategy and approach to the litigation it was involved in that was likely to be confidential in nature.[6] His Honour stated:

> 45. … As referred to above, Professor Cherry was initially briefed by Mr McKellar, he visited the WMC site with Mr Smith, Protec's managing director, in about March 2003, and he received information from both Mr Smith and Mr McKellar in 2004 and/or 2005. I consider it more than likely that, at least in his discussions with Mr Smith, Professor Cherry was given some information about Protec's relevant knowledge and experience which was not publicly known. Whilst in Professor Cherry's opinion it may not have been very important to them technologically, it would nevertheless be confidential information.

20. The facts in *Protec* are somewhat different to the facts in the present case and, in my view, are distinguishable. In particular, in *Protec*, there was evidence sufficient to satisfy the court that Professor Cherry had been furnished with confidential information. There is no evidence of that occurring in the present case. In particular, in the present case, the Owner seeks an order to exclude evidence concerning Mr Lee's account of what the Owner had told him concerning the alleged agreement. In my view, the evidence simply concerns a factual issue in dispute. Ultimately, the Owner can deny that he made the alleged comment to Mr Lees and it is for the Tribunal to determine whether the evidence of the Owner is to be preferred over that of Mr Lees.

21. In my opinion, there is nothing in the comment made by Mr Lees which could be said to be confidential. This is not a situation where Mr Lees is proposing to give evidence disclosing confidential matters concerning the Owner's litigation strategy or advice given to the Owner in relation to technical matters, the subject of the dispute. Indeed, if questions of that nature were put to Mr Lees, it would be open for the Owner to object to Mr Lees answering the question.

22. The fact that Mr Lees may owe a duty of confidentiality to the Owner is not, in itself, a ground to prevent the Builder from calling Mr Lees to give evidence in the proceeding. As I have already indicated, the Tribunal will be in a position to intervene to ensure that no privileged or confidential information is disclosed by Mr Lees, when he gives his evidence at trial. As to the proposed evidence set out in his witness statement, I am not satisfied that any of the information could be said to constitute confidential communications as between Mr Lees and the Owner, although there may be aspects of his witness statement that are objectionable on other grounds.

[6] [2008] VSC 76 at [49].

Nevertheless, as I have repeatedly said, I am of the view that questions of admissibility are best left for the presiding member to deal with during the course of the main hearing. Consequently, I decline to order that the witness statement of Mr Lees be struck out at this stage of the proceeding.

SENIOR MEMBER E. RIEGLER