Building Cases, Expert Witnesses – The Litigant`S Destiny Is Often In Their Hands.

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Building Cases and the Dangers and Vagaries of Flawed Expert Testimony.

Having practised construction law for nigh on 25 years I have observed that possibly the greatest risk in construction litigation concerns the viability of expert testimony. I am not in a "club of one" when expressing this view, fellow partners Justin Cotton and Stephen Smith well known construction lawyers who practise cross jurisdictionally are of like mind. Further support for this proposition is found in a recent Supreme Court Decision in Victoria where the Judge stated that "an independent and impartial adviser can be invaluable to a party facing the prospect of a substantial and costly dispute, but so too can a dedicated partisan expert fighting for the best outcome for his instructing party be equally valuable".

One salient common denominator in the thousands of building disputes that our firm has had conduct of over the years is the disparity of opinion on defect diagnosis, be it causation or solution and cost of rectification estimates. Increasingly I have formed the view that whether we, i.e. us lawyers, like it or not the lawyer can be somewhat of bit player in determining the outcome of a case. Although the legal fraternity may be the legal amphitheatre ring masters, the real people "slogging it out in the ring" are the expert witnesses. So much depends upon an accurate diagnosis of construction failure and an infallible rectification costing and this is the realm of expert testimony.

In our experience ninety percent of building cases are about five core issues:

• Is there a defect?
• What is the cause?
• How does one fix it?
• Who is responsible and in what proportion?
• How much does it cost to fix the problem?

One may ask where is the law involved in the above analyses? Good question as the above quandaries require the deployment of technical expertise of the likes of building, engineering and design persuasion.

Yet even though the winning and losing of a case is largely contingent upon the veracity and persuasiveness of the expert, it is invariably the legal team that bears the brunt of client disquiet and discord if a case fails. And be under no illusion, the angst can be palpably stressful and conducive to a distraught legacy. Little wonder, when a home owner for instance loses a case because the cost of rectification was overestimated the result often heralds the onset of financial and emotional carnage and for fear of labouring the point it is the lawyers who are invariably blamed.

Why so? Because lawyers make for easy targets, they are insured and are governed by legal practice Acts of Parliament. They can be sued for negligence and real opprobrium can be brought to bear, because the profession is highly regulated. Lawyers can also be held guilty of misconduct for ethical misdemeanours. No issue is taken with the level of accountability that is brought to bear upon lawyers, issue is taken with the fact that expert witnesses in building cases are not accountable to any independent regulator or for conduct that falls well shy of the professional mark.

Expert witnesses do not come within the disciplinary jurisdiction of any state regulator. This means that if they are negligent there is no compulsory professional indemnity cover that provides indemnification for negligence. Nor is there any disciplinary body that presides over questionable or flawed conduct. So if an expert provides advice that provides the basis of the running of a case and such advice falls well short of the requisite level of professionalism in terms of diagnostic cause or sound rectification valuation, the redress is limited and not well evolved. To this extent it is a bit of a cottage industry, notwithstanding that the more venerated members of the expert witness fraternity have excellent qualifications and acumen, the fact remains that there is nothing stopping any minion holding out or practising as an expert witness; be he or she a failed contractor, failed consultant or merely someone who has been unable to find any other vocational home.

Instances of extremes in costing largess

Decades of practise have provided a litany of cases of extraordinary disparity of expert pronouncements. A couple of instances come to mind.

In one matter the cost of rectification proffered by the defendant team was $350,000.00, yet is was found that there were only $30,000 worth of defects.

In another recent matter the experts considered that the cost of rectification would be nigh on quarter of a million yet the finding was in the order of $65,000.

In a recent VCAT decision earlier this year, the owner claimed for the costs to demolish and rebuild the subject property, in the amount of $327,800. The owner based this claim on the evidence of an expert witness. The Tribunal found that the expert's opinion that the property required demolition was not justified, and awarded the owner the roundest of all figures: $0.00.

In that case the expert himself came under fire from the Tribunal member for presenting the conclusion that the property required demolition, without adequate justification to support this conclusion.

In another matter in which this firm currently acts, there is a similarly great differential between the two experts' opinions. One expert advocated the demolition and rebuilding of the subject property, at a total cost of around $350,000. The other expert opines that the property is in need of nothing more than minor plaster work, costing somewhere in the region of $5,000 to $10,000.

These 4 examples are a very small dollop of the many hundreds of cases that have graced our firm that have been characterised by expert variance. The writer at conferences frequently quips that in 25 years of practice he has never encountered a case where the plaintiff and defendant experts agree on either diagnosis or cost. This is remarkable really because they purport to be professionals and are paid accordingly. It begs the question why is it that one of the expert consultants gets it so terribly wrong? Is the diagnosis of construction failure (or lack of) such a dark and metamorphic art when we are well into the third millennium? And if so, what is going to be done about it?

How Serious a problem is it?

It is a huge problem. If an expert displays too much largess in terms of his or her cost of rectification then that exaggeration will shape the expectations of the client. If the expert advises "owner X" that the cost of rectification is likely to be $300,000, then that is the cost that the case will be built upon. The lawyers will plead that as the "go to war figure" and the client will expect to receive something akin to that in the litigation dividend. If on the other hand the expert advises that the building is a "pull down job" rather than a rectification job, which may be the case where there are certain problems like slab heave, then that is the way the pleadings will be fashioned and the client will expect demolition and rebuild and the attendant costs.

If one takes the above examples and the other side`s experts state that the rectification costs are fifty odd thousand dollars or in the case of the second example, renovation rather than demolition is the "tonic", one does not need to be exceptionally bright to work out that there are potentially two very different endings to the tale of litigation. Where a case runs to trial, the litigation gestation period may have been well over 18 months and the legal spend well in excess of $150,000.00. There is a terrible amount at stake and a loss can culminate in financial ruination, in the case of domestic building disputes marital breakdown and associated collateral misery.

I recall one matter where the case took nearly 4 years to get to trial. It concerned 3 families and a three town house development. One of the brothers, lost everything, including his marriage and developed cancer. Miraculously he survived but his encounter nevertheless bears testimony to all that can go wrong with building disputes.

In one of the matters noted above where the hapless owner walked away with $0.00, the Senior Member hearing the matter suggested that the expert's troubling opinion may have encouraged an owner to pursue a claim which was ultimately unsuccessful. I quote directly from the judgment:

In passing, I should say something as to the expert evidence given in this proceeding. I am troubled by [the Applicant's expert's] recommendation that the dwelling should be demolished…..That said, I can well understand that the opinion expressed [by the Applicant's expert] may have instilled fear and apprehension in the mind of the Owner as to the structural integrity of the building and may have encouraged the Owner to prosecute this claim in the way in which he has, rather than looking at alternative avenues for resolution.

The magnitude and the consequences of the disparity and variance of expert testimony in the view of fellow construction partners and experts Stephen Smith and Justin Cotton can be staggering and is without a doubt the biggest bane of construction litigation. Stephen Smith, Managing Partner of Lovegrove Solicitors and construction barrister of 25 years standing states that "reliance upon expert testimony in some matters is a bit like Russian Roulette, except that it`s often people's homes and families that one`s playing with". Stephen adds that clients are most at risk when they choose their own experts rather than resorting to experts who enjoy a preeminent reputation. He further opines that the carrying out of due diligence on choice of experts is becoming increasingly critical, such is their ability to shape the destiny of the case.

What is the Fix?

There are a couple of solutions worthy of consideration.

One Expert or set of experts nominated by the Court.

As plaintiff and defendant experts according to Messrs Lovegrove, Cotton and Smith, rarely if ever agree on diagnosis and never seem to agree on costs then there would be mileage in removing the adversarial role for experts. This could be done by the courts and tribunals having an accredited panel of experts. The parties will have an expert from the panel foisted upon them and the parties will on a 50/50 basis pay for an experts or experts to develop the diagnosis and the rectification costing. Such experts (as they would be court nominated) would be independent and such independence would be magnified by the fact that they are

remunerated on a 50/50 basis by both parties. These experts would then publish their findings amongst the parties, to enable the parties and their counsel to negotiate resolution and in worst case scenarios run matters at trial.

Net effect no Adversarialism, no hired guns, no bending to the client's whim, no costing largess or conversely costing forecast parsimony. The costs of expert deployment would accordingly be diminished by a factor of 50%. Trials would be shortened by a factor of 40% because there would be half the number of experts and far less time deployed in cross examination. No doubt matters would settle much earlier and the volume of matters that would progress to trial could well plummet. Acts of Parliament that regulate the building industry would serve the consumer and building industry alike if they were amended to make such a dispute resolution regime compulsory.

Regulation

It is time that regulation was introduced to regulate expert witnesses. They could be included as categories of practitioners within the ambit of practitioner registration regimes. Alternatively depending on the jurisdiction, be it a Court or a tribunal, a requirement could be imposed to require expert witnesses to have been accredited or trained by bodies such as the Australian Institute of Building or it`s NZ counterpart, the NZIOB. Without such accreditation the experts would be ineligible for appearance work. Likewise such accreditation should be accompanied by professional indemnity cover so that in the event of negligent diagnosis or seriously flawed rectification costings the expert could be sued by the aggrieved client.

The qualifications for registration should also be prescribed, be it engineering, building, architectural or so forth. Nebulous qualifications and experience are less than ideal, qualification and experience based rigor is critical. An additional prerequisite should be the provision of references from past clients or lawyers that have deployed the expert, such references would attest to the virtues and competence of the given expert. Part of the qualification criteria should also be a certificate or accreditation in expert testimony. The writer is collaborating with the University of Newcastle in the development of such a module. The module will also involve training in ethics and probity to ensure that the trainees are appraised of the critical virtues of independence, impartiality and the fashioning of testimony that stands up to objective professional scrutiny.

What are the consequences of not fixing the problem?

Justin Cotton, partner and head of Practitioner Advocacy at Lovegrove Solicitors sums up as follows:

"The consequences of not fixing the problem are a continuation of the "same old same old" malaise where building litigation remains unnecessarily adversarial and "all about the dollar" as combatants square off all the way to trial, based on sometimes unrealistic expectations. Or failing that, the parties find themselves in mediations or compulsory conferences arguing overly extreme positions on the technical merits, before finding themselves settling somewhere that neither party is satisfied (because of the fear of incurring excessive legal fees)."

"Perhaps more legal stoushes would settle at an earlier stage if all technical experts adhered to the maxim at all times that their first duty is to assist the Tribunal (or the Court) to reach a just outcome, rather than acting too much as an advocate for one party or the other. We hasten to add that not every expert falls into this trap, and indeed many of the experts who are well known and regarded by the Tribunal often find themselves coming to similar conclusions as their 'opposing' expert. But there have been other instances where experts have arrived at VCAT mediations almost acting as advocates for one of the litigants. This in fact tarnishes the credibility and 'independence' of their opinions, which can then (and should be) challenged."

"On larger infrastructure projects internationally, one form of alternative dispute resolution has seen a panel of experts retained at the outset of the project, who have periodic meetings during the works and are thus appraised of the specifics of the works from the outset, and before there is any dispute. This could be a panel of three experts with one person chosen by the developer, one by the head contractor, and perhaps a third who is appointed as a 'neutral' by the two other experts. If and when a dispute evolves, these experts are used to effectively adjudicate the outcome".

"Whilst this is not feasible for smaller scale construction contracts, the principles of consultant 'conclaves' are the same, that is the working together for a solution rather than acting as combat litigants. In this model there is still room for traditional litigation where needed, because there will always be competing interests and differences of opinion, but the litigation "roller coaster" is not allowed to get out of control and is constrained within reasonable boundaries".