BuildLaw: In Brief

Maintaining privilege in expert communications

A recent Victorian Supreme Court decision gives some guidance as to when, in Australia, an expert's report will be admissible in evidence, and the extent to which lawyers may communicate with experts regarding the evidence they are preparing without compromising the admissibility of that evidence. This latter question is of great interest to lawyers; New South Wales Young Lawyers has created a guide devoted entirely to the briefing of experts.

While communication between a lawyer and expert is essential to the preparation of a useful expert's report, that communication should be carefully managed. In particular, communication between a lawyer and expert that is regarded as impermissible may come out in discovery and weigh against the credibility of the report.

In the recent case of *Finance & Guarantee Company Pty Ltd v Auswild (Expert Evidence Ruling)* (***Finance***), the plaintiffs objected to the admissibility of an expert report on the grounds of lack of independence. The judgment formed part of proceedings in relation to an alleged breach of fiduciary and equitable duties by former directors of Preston Motors Group.

Riordan J held that a loss of independence was not established, and so the evidence was admissible.

The Judge referred to the NSW Young Lawyers' Practitioner's 'Guide to Briefing Experts' to support the proposition that detailed discussions between a lawyer and expert about material that could be made available to the expert for their report and the questions that the expert might be capable of addressing were to be expected. It would also not be inappropriate for a lawyer to discuss preliminary views early in the process.

To retain independence, it is important that a) the expert approach questions impartially, and b) the lawyer does not attempt to influence the expert's opinion.

In addressing whether a lack of independence would render a report inadmissible, the Judge referred to *Rush v Nationwide News Pty Ltd (No 5)*, where it was stated that *an actual or perceived lack of independence, impartiality or objectivity of an expert witness goes to weight, not admissibility.*

Finance confirms that while a lawyer may discuss extensively with an expert as they prepare their report, they must not attempt to influence the expert's opinion. Doing so will not necessarily render the evidence inadmissible but will certainly militate against its credibility.

Cross claims in Expert Determination

When an Issue is referred to Expert Determination, can the Expert validly decide on a cross claim which bears no relation to the initial issue?

It is not uncommon, in Australia at least, for a contract to specify that certain unresolved disputes must be referred to Expert Determination – where an expert makes a binding decision on the matter before them. In fact, the standard form contract provided by the New South Wales Government for construction projects valued at over $1 million does so (**Contract**). This Contract was used by Poonindie Pty Ltd (trading as Ted Wilson and Sons) (**TWS**) and Eurobodalla Shire Council (**the Council**) for construction works at a sewage treatment plant.

After the parties sought an Expert Determination for a dispute, TWS contested the validity of the determination. TWS brought proceedings seeking a declaration that the determination was void, arguing that some of the issues decided in the determination were outside of the Expert's jurisdiction. The Supreme Court of New South Wales dealt with the issue in *Poonindie Pty Ltd t/a Ted Wilson and Sons (TWS) v Eurobodalla Shire Council* [2019] NSWSC 1485.

NSW GOVERNMENT

According to the contract:

- a party wishing to refer an 'issue' to Expert Determination must follow the procedure set out in clauses 69 and 70 of the Contract (including correct notification to the other party of the issue being brought); then
- in response to any 'issue' referred to the Expert, the other party may raise 'any defence, set-off or cross-claim'.

In this case, TWS brought an 'issue' for determination. The Council responded with three cross claims (**the additional disputes**). The Expert determined all four issues. TWS contended that the Expert had no jurisdiction to deal with the additional disputes, because they were not connected with the subject matter of the initial 'issue'. The problem from TWS' perspective was that while the applicant was required to adhere to the procedure set out in clauses 69 and 70 when raising issues, the respondent could bring any claims as cross claims without adhering to the procedure.

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The Court declined to declare the determination void. The Court said, *it has been accepted for a very long time that a cross claim does not have to bear any relationship to the claims put forward by the plaintiff or applicant.*

While the Court accepted parties were free to agree upon a different regime, in this case the Court did not find any reason to restrict the application of the clause which, plainly read, allowed any… cross-claim to be brought in response to an 'issue' referred to the Expert. The Court observed that if parties wished to restrict how a cross claim could be brought under the Contract, they would need to specify that.

Failure to give notice no bar to claim for damages where defects incapable of rectifications

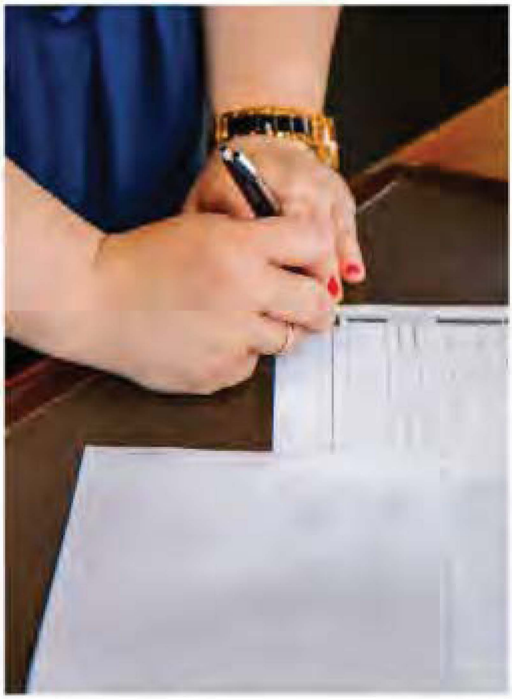
In the recent NSW Court of Appeal decision in Visual Building Construction Pty Ltd v Armitstead (No 2) [2019] NSWCA 280, the Court considered whether a contract could be validly terminated without notice if the defects were unable to be remedied.

Visual Building Construction Pty Ltd (**the Appellant**) entered into a contract with Mr David Armistead and Ms Maria-Luisa Patisso (**the Respondents**) for the construction of two duplex buildings on a block of land in Caddens, NSW. There were delays and defects to the contracted building work. To remedy this, two variations to the contract were agreed to. They detailed the specific requirements for compliance with a rectification order.

It came to light that the Appellant had never obtained a Construction Certificate, which was required before building works could commence. Further, the Respondents alleged that the Appellant had failed to complete the works by the date for completion, failed to rectify defective works specified in the variations to the contract, and failed to proceed with due diligence.

Because of these failings, the Respondents purported to instantaneously terminate their contract with the Appellant. They commenced proceedings in the District Court seeking damages for breach of contract. At trial, the Appellant argued that the Respondents' failure to provide the 10-day notice period, which would allow them to remedy any defect, rendered the termination of the contract invalid. The Judge at first instance held that, as it was not possible to remedy the failure to obtain a construction certificate, the Appellant's argument must fail. Accordingly, damages were awarded to the Respondents.

The Appellant appealed this finding to the New South Wales Court of Appeal. They made the same argument and did not challenge the award of damages. The Court unanimously dismissed the



appeal. To commence works without the necessary construction certificate was held to be a fundamental breach incapable of remedy. As such the contract was validly terminated. The lack of a notice period was no bar to the termination of a contract when the defects were such that they could not have been properly remedied.

UK Government to fund replacement of all Grenfell-style cladding

After the tragedy of the Grenfell fire, all eyes turned to finding the cause of the disaster. It was discovered that the aluminium composite material cladding (**ACM cladding**) used was highly combustible and resulted in the rapid spread of the fire. Over 400 tower buildings with similar cladding have since been identified by the United Kingdom Government. Despite the obvious risk, building owners have been slow to replace ACM cladding. Determining who should bear the cost of such replacement has been complex. In response, the Government has announced a $200 million fund to speed up the process of removing and replacing the ACM cladding on privately-owned high-rise buildings.

As a pre-requisite to the use of the fund, entities responsible for removing ACM cladding must apply at the earliest possible juncture and must continue to pursue any available claim under latent defect insurance policies.

To make use of the fund, applicants must meet three eligibility criteria. First, the fund must be used for the benefit of lease holders of residential buildings which are over 18 metres tall. Second, applicants will need to confirm that they are replacing cladding with materials of limited flammability. Finally, owners will still be expected to actively pursue 'all reasonable claims' against any party involved in the original cladding installation, and to pursue warranty claims 'where possible'.