

# Expert “evidence” needs to be more than just bald assertions to win the day

By Adrian Sharma



Leakage issues in a building can be a real dampener. A recent decision of the Queensland Civil and Administrative Tribunal (the **Tribunal**) which considered conflicting expert evidence on water ingress issues in a newly built property highlighted the importance of having sufficient and specific expert evidence to support the denial of a claim. It also emphasised the essential role this plays in the outcome of a matter.

## Background

In *Jones and Anor v Rutch Constructions Pty Ltd*,<sup>1</sup> Eric Jones and Lorraine Johnston (**owners**) had entered into a Master Builders Residential Building Contract (the **contract**) with Rutch Constructions Pty Ltd (**Rutch Constructions**) to build their home. It was for a timber framed, two story blockwork on slab construction in Caloundra. In addition to the general warranties

<sup>1</sup> *Jones and Anor v Rutch Constructions Pty Ltd* [2022] QCAT 82.

in the contract, Rutch Constructions' quote expressly provided for compliance with the Building Code of Australia (**BCA**) and all other relevant standards.

In December 2013, about six months after moving in, the owners noticed water ingress problems in the property. They complained to Rutch Constructions on several occasions, mainly relating to water ingress from stormwater drainage, waterproofing, window installation, external control joints as well as corrosion of steel columns. They requested Rutch Constructions to put in place plans to investigate the root causes of the problems and carry out actions to rectify them.

Rutch Constructions made a number of attempts over the years to rectify the issues highlighted by the owners, without much success. While it acknowledged that there had been some minor water penetration by settlement cracks, it claimed that these had been attended to in a timely manner and that it had not had to fix the same area twice.

The owners then engaged an expert with 45 years of experience in the building and construction industry. The expert examined the water ingress issues in the property and prepared a detailed and extensive report. Rutch Constructions engaged an expert of its own, who had comparable experience in the construction industry. This expert investigated the complaints made by the owners and prepared his own report.

## Taking the matter further

Dissatisfied with the actions taken by Rutch Constructions to address the water ingress issues in their property, the owners took the matter to the Tribunal. They alleged that Rutch Constructions failed to comply with its obligations under the contract and also alleged breaches of implied warranties under the then repealed Domestic Building Contract Act 2000 (**DBCA**). The Tribunal held a hearing where both parties presented expert evidence. The owners also gave evidence and provided an extensive and



descriptive history of the problems they endured. Their evidence was supported by numerous photographs from 2014 to 2019. Mr Rutch, from Rutch Constructions, also gave evidence. The Tribunal found his evidence to be defensive, noting his refusal to concede obvious facts.

It was clear from the evidence of the experts, which included their respective findings after inspecting the property, that their opinions were contradictory and there was very little that they agreed on. This resulted in a greater reliance on the observations of the owners and their detailed record of events, including the photographs of the damage caused by the water ingress.

## Assessment of the expert evidence

In making its determination on the matter, the Tribunal examined in great detail the experts' reports and their opinions. It found that Rutch Constructions' expert did not address in any detail the numerous references by the owner's expert of the breaches by Rutch Constructions not only of the contract, plans and specifications but also the Building Act 1975, Australian Standards and National Building Codes. The Tribunal found that the owners' expert presented a detailed report, and commented that it is not sufficient to simply deny that there have been contractual breaches, which is what Rutch Constructions' expert often did in his report.

Rutch Constructions' expert criticised the owners' expert when it came to reliance on moisture meter data and suggested that more testing was required. However, Rutch Constructions itself did

not follow this up. There was a bald criticism; but no evidence to counter the data presented by the owners' expert was obtained or presented during the hearing. This was fatal. The Tribunal noted that each party had an equal opportunity to obtain evidence that would not only support their own claims, but to respond to the evidence of the other party. The Tribunal found that while Rutch Constructions had the ability to obtain further scientific evidence to support the denial of claims made against it, it failed to do so.

The Tribunal accepted the evidence of the owners' expert. It also accepted the evidence given by the owners themselves, including the photographs detailing the water ingress issues in their property, as proof of breach by Rutch Constructions. It found that there was continuing water ingress due to the failure of Rutch Constructions to comply with its obligations under the contract, and breaches of implied warranties under the DBCA. Rutch Constructions was ordered to pay the owners the sum of \$162,370.27.

## Conclusion

Although it may not make the headlines as much as it used to, the leaky homes crisis in New Zealand is well documented. Not only do leaky homes present a health hazard, they can also cost a fortune to fix. This case is a pertinent reminder to those pursuing legal action regarding leaky homes (and any other claim) of the importance of gathering and presenting evidence that not only supports their claims but responds to the evidence of the other party. This decision is a good reminder that bald assertions and denials will not carry the day, even when they are made by experts.

## ABOUT THE AUTHOR



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Originally from Fiji, his previous role was as a State Counsel at the Fiji Independent Commission Against Corruption where he successfully prosecuted a wide range of complex fraud and corruption cases.

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