

Why litigants should carefully choose expert witnesses

Expert evidence has been identified as one of the principal sources of expense, complexity and delay in civil proceedings. In this article we outline the consequences that can happen to one of the parties when an “expert” is found to be less than objective and not an expert.

The moral of the story is to ensure your expert is expert and objective too.

A recent Building Case highlights the consequences for litigants

This is an extract from a recent VCAT decision *Dwell v Nava Homes Pty Ltd* where the Tribunal made very clear findings about the role of experts.

The Brief Facts

Mrs Dwell (Owner) entered into a contract with Nava Homes Pty Ltd (Builder) for the construction of a new home in Williamstown.

The construction of the home included the supply and laying of approximately 100 square metres of internal ceramic tiling. The Owner contends the laying of the tiling is defective and claims \$16,469.50 for its removal and replacement.

The tiling was laid as a stack bond pattern using approximately 2.5 mm to 3.00 mm width grout joints straight and true in both directions.

The Issues

There are two issues to be determined:

- Was the installation of the tiling defective or non-compliant with the relevant Australian Standard and/or the 2007 Building Commission Guide to Standards and Tolerances?
- If so, what is the appropriate method and reasonable cost of rectification?

Was the installation of the tiles defective or non-compliant?

The owners expert inspected the tiling on 19 July 2014 and provided a report to the Owner dated 28 July 2014.

At the commencement of the hearing, the builders experts report was produced, which was undated but was said to comprise: “*First Response 30/10/2014 – Second Response after Inspection 03/02/2015*”.

Although the report claims to comply with the Practice Note, but it did not comply with paragraphs 8 (*An expert has a paramount duty to the Tribunal and not to the party retaining the expert*), 9 (*An expert witness has an overriding duty to assist the Tribunal on matter relevant to the expert's expertise*), 10 (*An expert is not an advocate for a party to a proceeding*) 11 (*What must be included in the report of an expert witness*), 16 (*The format of an expert witness report*), and 24 (*When must an expert witness report be filed and served*).

In his report and oral evidence to the Tribunal, the expert appeared not to assist the Tribunal but was seen as an advocate for Nova Homes Pty Ltd. The report was dated 28 October 2014, contains photographs that do not have any accompanying explanatory notes and was not filed with the Tribunal until the day of the hearing or served on The Owner at all. Addendum A to the report was headed *Rectification Cost Estimate*, the value of which was shown as \$0.00.

Not only was the expert's response to the owners expert report initially prepared before he himself had inspected the tiling, his response to paragraphs 28-41 was simply an attack on the owners expert credibility. For example -

"The CTS report writer has made assumptions that are not within his area of expertise. I have read through the owner's expert resume and found no formal qualifications that he has any conference to make these statements other than personal opinion. (sic) He is not noted as an engineer in either structural or thermal and his opinions are not fact. The owner's expert has taken a position of foretelling some future event that has not at this point occurred.

The owner's expert alarmist approach to suggest Critical failure may well cause the home owners to seek a costly legal assistance as they have taken the owners expert's word for the near pending disaster that he would suggest is about to happen.

I caution all parties to seek qualified professional opinions that are based on solid engineering facts, rather than gut feel and pending gloom." [sic]

The expert evidence findings

The outcome of this proceeding was determined by the evidence of the respective experts called by each party.

The tribunal preferred the evidence of the owner's expert for the following reasons:

- The Owners expert has had 48 years' experience in the tiling industry, 30 of which were in the employ of a major tiling company and subsequently as a private consultant to the tiling industry;

- Although he does not have any formal academic qualifications, he has accreditation under AS/ISO 9001 (Quality Management Systems) achieved in 1987, and upgraded in 1994;
- He has held a number of senior positions in the tile and stone, and construction industries and I find that he is qualified to offer an opinion on the quality of the tiling works.
- Before compiling his report, he inspected the tiling at the subject property;
- His report complies with Practice Note PNVCAT 2: Expert Evidence;
- His report and evidence demonstrates a detailed knowledge of the causes of defective tiling works.

On the other hand, the builder's expert:

- Has academic qualifications in building surveying only;
- Claims to be qualified to teach Australian Standard 3958.1 – Tile Installation, but his report did not identify the institution from where he has obtained this qualification;
- Has no qualifications as an engineer although he criticises the owners expert for a similar lack of engineering qualifications;
- Has practical experience as a carpenter, an owner-builder and a site manager on residential and commercial projects;
- Does not have specific experience in the practical aspects of tiling;
- Responded to the owner's expert's report before he inspected the tiling; and
- In his report in reply to the owner's expert report, failed to adequately respond to the owner's expert's opinion as to the causes of the defective tiling works.

Therefore the tribunal did not have regard to the builder's expert's reports or evidence.

Summary

The effective and fair use of expert evidence is one of the most significant issues which the courts now face and this case serves a warning to experts and parties and illustrates the desirability of using experts who are truly expert as well as exercising objectivity.

If you or someone you know wants more information or needs help or advice, please contact us on 1800 888 783 or email doyles@doylesconstructionlawyers.com.