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"Most unsatisfactory" conduct in addressing building defects

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Parties in court proceedings are expected, in keeping with the overriding purpose in section 56 of the *Civil Procedure Act 2005 (NSW)*, "*to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*" As stated by the Judicial Commission of New South Wales' Civil Trials Bench Book, at [2-0010]:

> *The intent of the UCPR and the court's practices is to ensure that parties are given a fair opportunity to advance their cases, while ensuring that litigation is not conducted by ambush or surprise.*

(Here, the Judicial Commission quotes Schmidt AJ in *Worthington bht Worthington v Hallisy [2022] NSWSC 753* at [16].)

Following from the overriding purpose, parties are thus specifically required and obligated where possible to eliminate delay in Court proceedings: section 59. As observed by the majority (of Gummow, Hayne, Crennan, Kiefel and Bell JJ, with whom French CJ and Heydon J agreed) in *Aon Risk Services Australia Limited v Australian National University [2009] HCA 27* at [112] and [114]:

> *Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.*
> *[…]*
> *It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants.*

The decision of *The Owners – Strata Plan No 95242 v Karimbla Properties (No 42) Pty Ltd [2024] NSWSC 1625* is an example of where the proceedings has not been pursued as strictly to the rules as might be expected, which "*shows in how unsatisfactory the matter has proceeded*" (at [34]) and has resulted in a "most unsatisfactory" (at [39]) outcome.

This decision, by his Honour Justice Stevenson, is in respect of a building defects proceeding brought by an owners corporation of a large strata development at Zetland against, *inter alia*, members of the Meriton Group: at [2], [4]. His Honour had found "most unsatisfactory" various conduct by the Plaintiff, *inter alia*:

1. the inconsistency of decision making (at [37] – [38]);
2. incompleteness in the preparation of evidence (at [24]);
3. lack of proper dispatch by the Plaintiff (at [26]); and
4. failure of the Plaintiff to properly explain to the Court the reason for requiring leave for additional evidence (at [33]).

The Plaintiff is an owners corporation of a large apartment complex with around two hundred and twenty three (223) lots (at [2]). The Plaintiff's proceedings, commenced almost nineteen (19) months prior to this judgment (at [3]), had initially been pleaded in respect of alleged building defects to only a fraction of the lots, with the Plaintiff only adducing evidence of building defects from experts arising from inspections to only a fraction of the lots (at [8]).

The Plaintiff had around five (5) months after the commencement of proceedings, and notwithstanding they had only evidence in respect of building defects to a fraction of the total number of lots stated their intent to shortly finalise and

serve “all expert reports” which they intended to rely (at [9]). As his Honour observed:

> *There was no hint then that the reports that the Owners Corporation then proposed to serve, and did subsequently serve, would be otherwise than all the evidence on which it would rely.* (at [10])

It was only after the service of, what was expected to be, the final Plaintiff’s expert report, when the Defendants requested the Plaintiff for the usual Scott Schedule, setting out the Plaintiff’s claimed defects, that the Plaintiff resiled from their initial position that evidence is finalised (at [13]).

The Plaintiff did subsequently provide a Scott Schedule around a year after the commence of the proceedings. The Defendant sought confirmation that, with the Scott Schedule having been served, that the Plaintiff’s evidence is now finalised. To which the Plaintiff’s solicitor initially responded that they required instructions as to whether evidence is finalised and then culminating in a response from that Plaintiff which, as his Honour observes, reveals that the Plaintiff understood the evidence they’ve served is incomplete and would require supplementation. But the Plaintiff had hoped to resolve the entirety of the proceedings without needing to acquire the supplementary evidence (at [24]).

Notwithstanding that the Plaintiff suggested they hoped for settlement discussions to take place, his Honour observed that for several months after no steps were taken by the Plaintiff to engage in negotiations with the Defendants, and which culminated in Plaintiff again resiling from their stated course of action, now not pressing for negotiations and proceeding with acquiring the supplementary evidence, now in respect of defects for 100% of the lots (at [30]).

The Plaintiff then proceeded at the subsequent directions hearing to request the Court to grant additional leave of around ten (10) months to serve their expert liability evidence and citing that this protracted duration was required as expert suitability was only available starting from around three (3) months’ time.

This judgment was made in respect of the directions hearing. His Honour observed in respect of the explanation provided by the Plaintiff for requiring additional leave for service of evidence that, at [33]:

> *What is absent from the evidence before me is an explanation from the Owners Corporation as to why it was that a decision was taken to serve evidence over a year ago based on an inspection of between a quarter and a half of the units in the building, and why it is only now that the belated decision has been taken to seek to conduct a more wide-ranging investigation of the defects said to exist in the building.*

His Honour observed there is insufficient evidence available for a conclusion to be made as to why the Plaintiff required additional time for evidence or for the change in direction in respect to evidence, one could only speculate, but from what is available it can be presumed that:

1. the plaintiff had initially hoped, over a year before this judgment, that the evidence in respect of only a portion of the units would be sufficient to press claims on alleged defects for the balance of uninspected units throughout the building (at [37]); but
2. subsequently, had “a change of heart” (at [38]), that claims on the uninspected units cannot be prove by inference but with evidence.

His Honour found the conduct of the Plaintiff to be “*most unsatisfactory*” (at [39]), but that notwithstanding was not prepared to “*shut out*” the Plaintiff to now “*establish [the] case it now proposes*” (at [42]), and proposed orders allowing leave for the Plaintiff to serve further evidence (at [43]). But, his Honour restricted that any further evidence can only be in respect of the uninspected units and to defects that were previously identified (at [44]). Additionally, his Honour found that there should be an order that the Plaintiff pay for the costs thrown away by the defendant (at [45]).

Ultimately, his Honour did not make orders but reserved judgment in respect of orders and invited the parties to confer and agree on terms of the orders with consideration of the reasons given by his Honour in this judgement (at [47]).

This judgment reveals failure by the Plaintiff to determine on how to properly dispatch of the proceedings they brought but additionally a failure to comply with their obligations to notify the Court and the opposing party/ies in such circumstances.

As stated *in obiter* by her Honour, Judge Given in *Amirbeaggi (trustee) in the matter of Billiou (bankrupt) b Biliou [2023] FedCFam26 949* at [11]:

> *any party who apprehends an inability to [comply with the orders made by the Court] should approach the Court in advance (and in accordance with the terms of any specific liberty to apply) proffering an explanation for the foreshadowed inability to comply. It should be a rare state of affairs indeed in which the Court is approached for dispensation after orders have been breached. In such a circumstance, an*

> *explanation is not only warranted, but essential to explain to the Court why the orders have been breached and to seek any further indulgence.* (emphasis added)

This expectation is also found in the practice note of the Technology and Construction List, which is the list for this matter, and although not mentioned by his Honour, at [22], that:

> *The Court's expectation of Practitioners appearing in the Lists includes that:*
> *(d) if there is slippage in an agreed timetable, further agreement will be reached without the need for the intervention of the Court;*

The failure of the Plaintiff to turn their mind to what evidence they wanted to be prepared and rely upon, and added to that their failure to communicate with the Court and the opposing party of their intentions would, as stated by counsel for the Meriton Group parties, Mr Sirtes SC, whose submissions his Honour had viewed *in obiter* favourably (at [41]), "*turn case management on its head*." Additionally submitted by Mr Sirtes SC is that the "*Court did not allow parties to file their evidence episodically and at a time of their own choosing*." (at [40])

This scenario, as rightly observed by Mr Sirtes SC, is different from further expert investigations being required arising from served expert evidence or there being a material change in circumstance on the ground, and "*nothing has changed since they did their first reports. The experts do not say that new defects have appeared since their first reports… The Plaintiff wishes to put forward a massively expanded case… of all the remaining units it elected not to inspect in 2023…*"

The takeaway from this judgment is that if, from the outset, it was suspected that the defects were systemic and that the Plaintiff wished to put forth such a case, this should have been clarified in the initial service, even if a wholescale investigation was not possible at the time. Similarly, if there was indeed such a significant change of heart as to the substance of the case, this should have been outlined more clearly and promptly.

As has been suggested throughout this piece, this judgment is rich in practical takeaways for future litigants, particularly in within the technology list or in matters in respect of building and construction matters, as to what conduct is "most unsatisfactory" and by its corollary, what conduct is most satisfactory:

1. the completion of service of evidence should be made expressly and unambiguously;
2. should there be need to reopen evidence, a full and proper explanation should be given to the Court (and to opposing parties);
3. parties should at all times be open with the Court and with opposing parties where there is likely to be slippage or change of direction in the proceedings; and
4. changes to the direction of a case and the evidence presented should be avoided.

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