

Supreme Court

New South Wales

Medium Neutral Citation:	The Owners – Strata Plan 65111 v Meriton Apartments Pty Ltd [2016] NSWSC 650
Hearing dates:	11 & 12 May 2016
Decision date:	20 May 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Referee's construction of operative agreement correct
Catchwords:	PRACTICE - reference by court - finding by referee as to the proper construction of operative agreement - whether referee erred in law; CONTRACTS - proper construction – settlement deed – contract to do residential building work – nature of builder's obligation to effect rectification works - whether certifier empowered to alter manner in which rectification works be effected and designated standard be achieved
Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW) , Uniform Civil Procedure Rules 2005 (NSW) .
Cases Cited:	Homebush Abattoir Corporation v Bermria Pty Ltd (1991) 22 NSWLR 605, Maritime Services Board of New South Wales v Australian Shipping Commission (1991) 27 NSWLR 258, Super Pty Ltd v SJP Formwork (Aust) Pty Ltd (1992) 29 NSWLR 549.
Category:	Procedural and other rulings
Parties:	The Owners – Strata Plan 65111 (Plaintiff/Respondent) Meriton Apartments Pty Limited (Defendant/Applicant)
Representation:	Counsel: T Davie (Plaintiff/Respondent) F Corsaro SC (Defendant/Applicant) Solicitors: Bannermans Lawyers (Plaintiff/Respondent) N Malouf (Defendant/Applicant)
File Number(s):	SC 2008/290601

Judgment

1. The defendant, Meriton Apartments Pty Limited, developed and built a residential tower building in George Street, Sydney which became known as the “Summit Apartments”.
2. Construction work was completed in March 2001, at which time the plaintiff Owners Corporation was created.
3. On 11 January 2008 the Owners Corporation commenced proceedings against Meriton claiming damages for defects alleged to exist in the common property.

4. On 28 March 2014 the whole of those proceedings were referred to Mr Janet Gray, an architect, for inquiry and report, under [Uniform Civil Procedure Rules 2005 \(NSW\) Pt 20 r 20.14](#).
5. The referee delivered her report on 28 August 2015.
6. Meriton and the Owners Corporation are now in dispute as to the extent to which the report should be adopted.
7. It is common ground that the report should be adopted pursuant to [UCPR Pt 20 r 20.24](#) insofar as it concerns general building defects, out of pocket expenses and mechanical services.
8. What is in contest is the adoption of that part of the report that deals with fire and life safety defects. The referee determined that Meriton should pay the Owners Corporation some \$1.17 million in respect of those defects.
9. One matter that the referee was called upon to consider was the proper construction of a Settlement Deed executed by the Owners Corporation, Meriton and the Council of the City of Sydney on 30 September 2002.
10. A critical matter dividing the parties is whether the referee's construction of the Settlement Deed was correct.
11. It is common ground that this raises a question of law which, on an application for adoption of a referee's report, I must myself determine: [Super Pty Ltd v SJP Formwork \(Aust\) Pty Ltd](#) (1992) 29 NSWLR 549 at 563 E; [Homebush Abattoir Corporation v Bermria Pty Ltd](#) (1991) 22 NSWLR 605 at 609 F; [Maritime Services Board of New South Wales v Australia n Shipping Commission](#) (1991) 27 NSWLR 258 at 272 D.
12. In those circumstances Mr Davie, who appeared for the Owners Corporation, and Mr Corsaro SC, who appeared for Meriton, agreed that I should publish a preliminary judgment expressing my opinion as to the proper construction of the Settlement Deed and, in particular, whether the referee's construction of the Settlement Deed is correct.
13. I was assured that, in that event, the remaining issues concerning adoption of the report would be either resolved or, at the very least, substantially reduced.

Decision

14. The referee correctly construed the Settlement Deed.

Background

15. Meriton completed construction work by 20 March 2001. The strata plan was registered and the Owners Corporation was created on that date.
16. The Council issued an occupation certificate on 21 May 2001.
17. Some 13 months later, on 24 June 2002 the Council issued a “Notice of Intention to Issue an Order” (“the Notice”) under s 121B of the *Environmental Planning and Assessment Act 1979 (NSW)* in respect of fire and life issues.
18. In the Notice, the Council stated that it intended to issue a “Terms of the Order” requiring Meriton to do all things necessary to ensure that the property complied with the fire and life safety clauses of the Building Code of Australia (“BCA”) and would require a certificate from an independent certifier confirming compliance with those requirements.
19. The Notice stated that the reason for making such an order included that there were penetrations through the bounding walls between some units which were not protected in accordance with the requirements of the BCA and that such lack of protection might facilitate fire to spread.
20. The BCA contains performance requirements dealing with, amongst other things, protection against the spread of fire. The BCA permits compliance with those performance requirements by adopting “deemed to satisfy” or “DTS” provisions in the BCA. The BCA also contemplates that its performance requirements can be satisfied by a specific scope of work, supported by independent judgment, of an alternative method of satisfying the relevant performance requirements of the BCA. These are referred to as “Alternative Solutions”.
21. After issuing the Notice, the Council commenced proceedings against both the Owners Corporation and Meriton in the Land and Environment Court seeking orders to compel the Owners Corporation and Meriton to comply with the requirements of the BCA concerning fire and life safety issues.
22. Those proceedings were settled on the terms set out in the Settlement Deed.

The 30 September 2002 Settlement Deed

23. The Settlement Deed referred to “Rectification Works”, defined in the Deed as follows:

“...all works necessary to cause the Designated Standard to be achieved so that the Building complies with the performance based fire and life safety requirements stated in the BCA”.

24. The definition referred to “Designated Standard” which was defined as follows:

“...the appropriate standards to be achieved and/or requirements to be satisfied in the conduct of the Rectification Works in order for the performance based fire and life safety requirements stated in the BCA to be met which have been agreed between the Parties and more particularly described in the documents contained in Annexure A.”

25. “Annexure A” referred to in that definition included, relevantly, a document called “Alternative Performance Based Solution” dated 28 August 2002 prepared by Mr Robert Taylor from Fire Engineered Solutions Pty Ltd and a “Brief to address Fire and Life Safety” dated 25 September 2002 prepared by Mr Michael Wynn-Jones.

26. Clauses 3 and 4 of the Settlement Deed provided:

“3. DESIGNATED STANDARD

3.1 Acknowledgment

The Parties acknowledge and agree that the Rectification Works must be carried out in order for the Building to satisfy the Designated Standard and the issues identified in the Existing Notice to be addressed.

3.2 No Departure

No party is entitled to give any direction which has or may have the affect of causing the Rectification Works to be carried out in a manner that results in the Building not satisfying the Designated Standard and the issues identified in the Existing Notice not being appropriately addressed.

4. RECTIFICATION WORKS

4.1 Conduct of Rectification Works

(a) Meriton is responsible for the conduct of the Rectification Works and must ensure that they:

(i) are carried out:

(A) in a proper and workmanlike manner;

(B) in accordance with all Authorisations and the requirements of any relevant governmental agency;

(C) in accordance with the methodology and requirements of the briefs and specification contained in Annexure A in order for the Building to achieve the Designated Standard; and

(D) with all due expedition;

(ii) are conducted in such a manner in order to minimise disturbance to occupants and users of the Building; and

(iii) comply with all proper directions given by the Certifier under this Deed and any relevant governmental agency relating to the Rectification Works...”.

27. Clause 5.1 provided that the Council would engage the Certifier.

28. Clause 5.2(a) dealt with the function of the Certifier and provided:

“(a) The function of the Certifier is to:

(i) supervise the conduct of the Rectification Works;

(ii) issue notices to the Parties in accordance with this Deed concerning works that the Certifier considers necessary in order for the Building (or relevant part of it) to achieve the Designated Standard and (acting reasonably) determine responsibility for those works;

(iii) certify to the Parties in accordance with this Deed that the Rectification Works have been carried out and that the Building (or a relevant part of it) has achieved the Designated Standard.”

29. Clause 6 dealt with “Certification” and provided:

“6.1 Notification of Rectification Works completion

If Meriton considers that the Rectification Works have been carried [out] in respect of any part of the Building (comprising an individual Apartment, group of Apartments and/or Common Areas) so that the Designated Standard is achieved for that part of the Building, Meriton must give a notice to each of the City, the Owners Corporation and the Certifier requesting an inspection by the Certifier of that part of the Building referred to in the notice.

6.2 Inspection

(a) The Parties must do everything reasonably necessary to enable the Certifier to promptly inspect that part of the Building referred to in the notice given under clause 6.1 in order to allow the Certifier to determine whether or not in his professional opinion the Rectification Works have been carried out so that the Designated Standard has been achieved in relation to that part of the Building described in the notice given under clause 6.1.

...

6.4 Expert determination

(a) In determining whether the Designated Standard has been achieved and issuing a Rectification Works Certificate, the Certifier is taken to be acting as an expert and not as an arbitrator.

(b) In the absence of fraud the determination of the Certifier will be final and binding on the Parties.”

The Taylor 28 August 2002 “Alternative Performance Based Solution”

30. The Taylor report was expressed to document the “findings of a fire safety engineering assessment carried out for the proposed fire safety upgrade” to the building.
31. Mr Taylor recorded that the BCA DTS provisions required openings in walls between apartments to be “protected with an approved system” but that some openings in the building did not comply with those provisions. These were the openings identified in the Notice. He stated that “Meriton have advised that they will protect all openings in accordance with BCA DTS provisions, except for very minor ones”.
32. The “very minor” openings were those less than 900mm²
33. Mr Taylor proposed an Alternative Solution, in accordance with what he described as a “Trial Concept Design” which:
 1. permitted these minor openings to be “unprotected” (provided they only occurred between wet areas; that is between bathrooms, lavatories and laundries);
 2. permitted a number of PVC pipes situated over wet areas, and which passed through fire resisting walls between units, to be provided without fire collars,

(together, “the Excepted Matters”);
 3. but otherwise assumed compliance with BCA DTS provisions, the installation of a specified sprinkler system and a number of other matters.
34. Mr Taylor concluded that such an Alternative Solution would meet BCA fire safety performance requirements.
35. The report concluded with the recommendation that the building be upgraded in accordance with Mr Taylor’s “Trial Concept Design” and that:

“A suitable inspection regime should be developed to the satisfaction of [the Council] to ensure that the assumptions contained within this report [namely, those set out at [33(3)] above] are validated. Any non-compliance are [sic] to be rectified or re-assessed.”
36. I read this last passage as recommending that a regime be established to ensure that, relevantly, other than in relation to the Excepted Matters, the building complied with the BCA DTS requirements.

37. I read Mr Taylor's reference to the possible need for reassessment to refer to the possibility that his assumption as to BCA DTS compliance (other than in relation to the Excepted Matters) may be misplaced and the possible need to reassess whether, if it turned out that his assumption was misplaced, the Excepted Matters should be permitted to remain.
38. Mr Taylor was only prepared to condone the Excepted Matters if the building was otherwise BCA compliant.
39. Thus, he said (at section 9) that "[t]he buildings are assumed to comply with BCA DTS provisions" other than in relation to the Excepted Matters. Earlier (in the executive summary), he said that "[t]he provisions listed in Section 9 are to be strictly adhered to."
40. That requirement coupled with the recommendation for a "suitable inspection regime to ensure that the assumptions...are validated" demonstrated that the Alternative Solution proposed by Mr Taylor did not merely assume BCA compliance, other than in relation to the Excepted Matters; it required it.

The Wynn-Jones 25 September 2002 "Brief to address Fire and Life Safety"

41. In his "brief" Mr Wynn-Jones:
 1. referred to Mr Taylor's Alternative Solution and stated that the building "will need to be inspected to determine the extent of compliance with the DTS provisions as [Mr Taylor's] Alternative Solution relies on the assumption that the building otherwise complies with the DTS provisions"; and
 2. stated that the purpose of his brief was to develop an inspection regime to allow the extent of such compliance to be determined.
42. Mr Wynn-Jones listed a number of matters he considered "critical in terms of fire and life safety" but emphasised he was not thereby purporting to "set out the...rectification regime".
43. Later in his report, Mr Wynn-Jones outlined the inspection regime he proposed.
44. I see nothing in that regime, or anything else in the report, as suggesting that Mr Wynn-Jones saw his function as being to augment or extend the Alternative Solution Mr Taylor had proposed. On the contrary, Mr Wynn-Jones recited that the "extent of the alternative solution" was "as detailed" in Mr Taylor's report. He made clear that his function (evidently as "certifier" under the soon to be executed Settlement Deed) was to inspect to ensure the building "otherwise complies".

45. Very shortly after the date of his document, the Council appointed Mr Wynn-Jones as “Certifier” under the Settlement Deed. I will return to the nature of that role below. It appears that his 25 September 2002 brief was written in anticipation of that appointment.

The referee’s analysis

46. The referee referred to cl 3.2 of the Settlement Deed (set out at [26] above) and to the passage in Mr Wynn-Jones’ report (set out at [41] above), and continued:

“From this alone it is clear that all work other than the Taylor Alternative Solutions had to comply with the BCA DTS Provisions.”

47. The referee continued:

“177. Further, the adoption of the two Alternative Solutions tested and approved by Mr Taylor was subject to: 1) an assumption, set out at Section 3.7 of the Taylor Report, that *‘all openings in the building other than those specifically addressed in this report are assumed to be protected in accordance with BCA DTS provisions’*; and 2) *‘strict adherence’* to a provision, set out at Section 9 of the Report, that except for the two Alternative Solutions, the buildings complied with the BCA DTS Provisions. The rationale on which the Alternative Solutions was founded included the fundamental premise that, apart from one possible exception outlined above, all other fire and life safety construction at the Summit met the BCA DTS Provisions. Without rectifying the non-complying construction, the very rationale on which the Alternative Solutions was founded was defeated and for this reason I do not accept that the Taylor report justified further departures from the BCA DTS Provisions. On the contrary, it underlined the need for *‘strict adherence’* to these provisions.

178. From the above it can be seen that, apart from the construction work that was described in the two Taylor Alternative Solutions, the Designated Standard described in the Deed required that all fire and life safety construction comply with BCA DTS Provisions. In carrying out the rectification work under the Deed, Meriton, under the direction of Mr Wynn-Jones, did not rectify much of the existing construction so that it complied with the BCA DTS Provisions. As the Deed required such compliance and contained a provision that the work could not be varied, I find that Meriton was in breach of the Deed and in breach of the HBA S. 18B(a) warranty, which was in the nature of a strict promise. Details of the claims are set out below. They are first described in categories of alleged defective work and then are then individually identified in the attached Referee’s Fire and Life Safety Schedule.”

48. The matter for consideration is whether the referee’s analysis of the proper construction of the Settlement Deed was correct.

The proper construction of the Settlement Deed

49. As Mr Corsaro submitted, the essential matter for consideration is the ambit of Meriton's "scope of work". That is, what, in substance, did Meriton promise to do under the Settlement Deed.
50. The key promise by Meriton is to be found in the opening words of cl 4.1(a) of the Settlement Deed, namely, to be "responsible for the conduct of the Rectification Works".
51. In order to carry out the Rectification Works, Meriton was required to carry out all the works "necessary to cause the Designated Standard to be achieved" (definition of "Rectification Works": see [23] above).
52. The parties defined the "Designated Standard" to mean the BCA fire and life safety requirements "which have been agreed between the Parties and more particularly described in the documents contained in Annexure A."
53. I read those words to mean that the parties (including the Council) had agreed as to what needed to be done to comply with the BCA fire and life safety requirements, namely, the matters specified in the documents contained in Annexure A; the Taylor and Wynn-Jones reports. Thus, as Mr Davie put it in written submissions, the Settlement Deed did not merely require conformity with the BCA requirements; it specified the manner in which conformity was to be achieved.
54. Clause 4.1 set out how Meriton was to carry out the Rectification Works.
55. To start with some uncontroversial matters, Meriton was required to carry out the work in a proper and workmanlike manner (cl 4.1(a)(i)(A)), in accordance with all "Authorisations" and the like (cl 4.1(a)(i)(C)), with all due expedition (cl 4.1(a)(i)(D)) and so as to minimise disturbance to other occupants and users in the building (cl 4.1(a)(2)).
56. Further, and consistently with the definitions of "Rectification Works" and "Designated Standard", the conduct of the Rectification Works was to be "in accordance with the methodology and requirements of the briefs and specification contained in Annexure A in order for the Building to achieve the Designated Standard" (cl 4.1(a)(i)(C)).
57. This requirement is somewhat repetitive (in that carrying out the Rectification Works, by definition, required achievement of the Designated Standard). But is also confirmatory of the parties' intention that achievement of the Designated Standard (and thus satisfaction of the BCA fire and safety requirements) was to be by way of what is called the "briefs" and the "specification" in Annexure A.

58. The “briefs” referred to in cl 4.1(a)(i)(C) must be a reference to Mr Wynn-Jones’ “Brief to address Fire and Life Safety” and, the “specification”, to Mr Taylor’s “Alternative Performance Based Solution” document.
59. Finally, Meriton was to carry out the Rectification Works to ensure that “they” (that is, the Rectification Works) complied with all “proper” directions given by the Certifier.
60. “Certifier” was defined in the Settlement Deed to mean Mr Wynn-Jones:
- “...or any other person the [Council] considers to be suitably qualified to provide the certification required under this Deed regarding the Rectification Works having been carried out in such a manner so that the Designated Standard is achieved for the Building (or any part of the Building).”
61. That definition shows that the parties contemplated that Mr Wynn-Jones was to certify whether or not the Designated Standard had been achieved.
62. It would be inconsistent with that role for Mr Wynn-Jones to give a direction that did not have the effect of promoting the Designated Standard. Were Mr Wynn-Jones to give a direction which did not promote achievement of the Designated Standard (as the parties agreed that Designated Standard to be; namely compliance with the “methodology and requirements” of the Taylor and Wynn-Jones documents) then it could not, in my opinion, be said that such a direction was a “proper” direction for the purposes of the Settlement Deed.
63. For those reasons, I accept Mr Davie’s submission that in order for a direction under cl 4.1(a)(iii) of the Settlement Deed to be “proper” it would have to be one which was consistent with, and promoted achievement of the Designated Standard, in the manner that the parties had specified such standard be achieved.
64. For the same reason I do not accept Mr Corsaro’s submission that Mr Wynn-Jones was entitled to give directions which had the effect that Meriton could carry out the Rectification Works in a manner which did not promote such achievement of the Designated Standard.
65. I do not see that cl 6 of the Settlement Deed takes the matter any further.
66. Clauses 5.2, 6.1 and 6.2 (set out at [28] and [29] above) provided a mechanism for Mr Wynn-Jones to conduct inspections to ensure that Meriton’s Rectification Works achieved the Designated Standard. They comprised the regime recommended by Mr Taylor (see [36] above).
67. Clause 6.4 provided that Mr Wynn-Jones’ determination as to whether the Designated Standard had been achieved was final and binding, absent fraud. It did not, however, give Mr Wynn-Jones

the power to give a direction under cl 4.1(a)(iii) inconsistent with the achievement of the Designated Standard.

68. It follows that Meriton's obligation under cl 4.1 was, relevantly, to carry out the Rectification Works so that they were "in accordance with the methodology and requirements" in the Taylor and Wynn-Jones reports (in particular, in accordance with the Taylor report as it was in that report that what was to be done was set out) and to "achieve the Designated Standard".
69. The Designated Standard was the BCA fire and life safety requirements as "agreed between the parties" and "more particularly described" in Annexure A; relevantly in the Taylor report.
70. For the reasons I have explained, that Designated Standard was full BCA DTS compliance otherwise than in relation to the Excepted Matters.
71. That is, in effect, how the referee construed the Settlement Deed at [178] of her report (see [47] above).
72. In my opinion, she was correct to do so.
73. I will now invite the parties to consider the implications of this conclusion, so far as concerns the adoption of the referee's report.

Decision last updated: 20 May 2016