The Owners – Strata Plan 65111 v Meriton Apartments Pty Ltd - [2016] NSWSC 909

Supreme Court

New South Wales

- Amendment notes

Medium Neutral Citation:	**The Owners – Strata Plan 65111 v Meriton Apartments Pty Ltd [2016] NSWSC 909**
Hearing dates:	On the papers, submissions received 22 and 23 June 2016
Decision date:	01 July 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Referee's report to be adopted in full
Catchwords:	PRACTICE – reference out by court of entire proceedings to referee – whether report should be adopted – earlier finding that referee correctly construed contract – consideration of remaining objections to adoption of report
Legislation Cited:	Home Building Act 1989 (NSW)
Cases Cited:	Bellgrove v Eldridge [1954] HCA 36; 90 CLR 613 Radford v De Froberville [1977] 1 WLR 1262 Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd [2009] HCA 8; 236 CLR 272 The Owners – Strata Plan 65111 v Meriton Apartments Pty Ltd [2016] NSWSC 650 Wenco Industrial Pty Ltd v WW Industries Pty Ltd [2009] VSCA 191; 25 VR 119
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. On 20 May 2016 I published a judgment dealing with the proper construction of the Settlement Deed made between the parties on 30 September 2002; *The Owners – Strata Plan 65111 v Meriton Apartments Pty Ltd* [2016] NSWSC 650.

2. I decided that the referee had correctly construed the Settlement Deed.

3. I then invited submissions as to any other issues requiring decision in order to determine whether the referee's report of 28 August 2015 should be adopted.

4. I have now received written submissions from both parties, who agree that I may decide the matter on the papers.

5. Only two issues were raised (by Meriton).

6. In considering those issues, I will use the same abbreviations as in the judgment of 20 May 2016. These reasons assume familiarity with my earlier judgment.

Clause 6.4(b)

7. The first issue concerns cl 6.4(b) of the Settlement Deed.

8. I referred to that clause at [29] at [67] of my judgment.

9. The Settlement Deed recorded the terms on which the parties settled a dispute arising from the proceedings I referred to at [21] of the judgment.

10. The Settlement Deed had the effect of conferring on the Owners Corporation the right to have Meriton carry out the Rectification Works in accordance with the "methodology and requirements" set out in the Taylor and Wynn-Jones Reports to achieve the Designated Standard.

11. The effect of cl 6.4(b) is that the opinion of Mr Wynn-Jones as to whether the Designated Standard had been achieved was, absent fraud, final and binding on the parties.

12. The issue that Meriton seeks to raise is whether that clause is void by reason of s 18G of the *Home Building Act 1989* (NSW) which provides that:

> "A provision of an agreement or other instrument that purports to restrict or remove the rights of a person in respect of any statutory warranty is void."

13. I do not see that cl 6.4(b) has this effect.

14. Rather, it simply places in the hands of an independent third party the question of whether or not the standard that they agreed should be achieved (the Designated Standard) had been achieved.

15. However, I am not able to see what effect this conclusion has on the question of whether or not the referee's report should be adopted.

16. As Mr Davie, who appears for the Owners Corporation, pointed out, the effect of cl 6.4 was not an issue in the proceedings the subject of the reference and was not a matter debated before the referee.

The Bellgrove v Eldridge issue

17. The second issue concerns the measure of damages adopted by the referee.

18. The referee awarded the Owners Corporation some $1.17 million in respect of fire and life safety defects, being the amount she found was necessary to cause the Rectification Works to meet the Designated Standard according to her construction of the Settlement Deed.

19. I have found that the referee's construction of the Settlement Deed was correct.

20. Meriton does not challenge the referee's calculation of the $1.17 million. However, it contends that it would not be reasonable for the Owners Corporation to carry out the Rectification Work necessary to achieve the Designated Standard (that is, the work the Settlement Deed, on its proper construction, called for) because the rectification work actually done by Meriton, and certified by Mr Wynn-Jones as achieving the Designated Standard (evidently on his reading of the Settlement Deed) was sufficient to ensure BCA compliance. That is evident, Meriton contends, because the building has been annually certified as fire compliant since the work was done.

21. In that regard, Meriton drew attention to the familiar principles in *Bellgrove v Eldridge* [1954] HCA 36; 90 CLR 613 and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; 236 CLR 272.

22. In a building case such as this, the prima facie measure of damages is the "amount required to rectify the defects complained of and so give to [the plaintiff] the equivalent of a building on [its] land which is substantially in accordance with the contract" (per Dixon CJ, Webb and Taylor JJ in *Bellgrove* at 617).

23. The qualification of that general principle is that "not only must the work undertaken be necessary to produce conformity [with the contract], but that also, it must be a reasonable course to adopt" (at 618).

24. In *Tabcorp Holdings* the High Court stated that "the test of unreasonableness is only to be satisfied by fairly exceptional circumstances", for example, where the innocent party was "merely using a technical breach to secure an uncovenanted profit" (at [17] , citing Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262).

25. As I have said, in this case, the effect of the referee's decision is to provide the Owners Corporation with an award of damages sufficient to enable it to cause the "Rectification Works" to be carried

out in accordance with the Settlement Agreement, as she (correctly) construed it, so as to achieve the Designated Standard.

26. I do not see this as a case where the Owners Corporation has argued for the adoption of an unreasonable course to ensure the Rectification Works achieved the Designated Standard or where it is using a "technical breach" to achieve an "uncovenanted profit". The Owners Corporation has done no more than argue that Meriton should do what, on the proper construction of the Settlement Deed, it promised to do.

27. As I understood it, Meriton's point was that the work done under Mr Wynn-Jones' supervision, and certified by him as being compliant with the BCA, albeit not in accordance with the Designated Standard (as informed by the Taylor report) complied with the requirements of the BCA and was, in effect, "good enough" and sufficient to achieve fire compliance certification.

28. However, as Mr Davie points out, the referee did not overlook this point in her report.

29. At [196] and [197] she said:

> "As the assertion that the work complied with BCA Performance Requirements was only relevant to Meriton's defence (ie that work that was necessary to comply with the DTS Provisions was unreasonable), the onus was on Meriton to…demonstrate that the work complied with the Performance Requirements…
>
> For this reason, in relation to each category of defect outlined below, I consider whether the reasoning that Mr Wynn-Jones articulated as an expert witness demonstrated that the contentious construction he approved as a Certifier met BCA Performance Requirements."

30. The referee went on to consider, in relation to each item, whether the reasoning that Mr Wynn-Jones had articulated, demonstrated that the construction that he approved as certifier in fact met BCA performance requirements. In relation to all items upon which the Owners Corporation was successful, the referee found that he had not.

31. In his written submissions of 22 June 2016 Mr Corsaro SC, for Meriton, said that the referee's findings as to the matters referred to at [30] are the "subject of the challenges" dealt with in a large number of paragraphs in his written submissions of 27 October 2015, that were before me at the hearing on 11 and 12 May 2016.

32. However, Mr Corsaro did not develop those submissions either at the hearing in May 2016, nor in his 22 June 2016 submissions.

33. Indeed, as I have said, at the hearing in May, it was agreed during the hearing that I should publish a preliminary judgment dealing with the proper construction of the Settlement Deed and I was assured the question of construction would resolve, or at least substantially reduce, all the remaining issues concerning the adoption of the report.

34. I am not persuaded that, in engaging in the exercise I have described at [30], the referee revealed some underlying misconception of the evidence or made findings not rationally open to her, such as to warrant my reconsideration of those matters.

35. In that regard, I have in mind the observations of Redlich and Bongiorno JJA and Beach AJA in *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* [2009] VSCA 191; 25 VR 119 at [17] (a case to which Mr Corsaro drew my attention):

> "[G]enerally, the referee's findings of fact should not be re-agitated in the Court. The Court will not reconsider disputed questions of fact where there is factual material sufficient to entitle the referee to reach the conclusions he or she did, particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. Thus, the Court will not ordinarily interfere with findings of fact by a referee where the referee had based his or her findings upon a choice between conflicting evidence."

36. There being no other challenges to the adoption of the referee's report, I propose to order that it be adopted in full.

37. I invite the parties to confer and agree on the orders necessary to give effect to these reasons, and those of 20 May 2016.

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Amendments

01 July 2016 - [35] - Typographical error corrected

Decision last updated: 01 July 2016