

CITATION: *Henderson v Henley Properties (QLD) Pty Ltd*
[2016] QCAT 215

PARTIES: William Henderson
(Applicant)
v
Henley Properties (QLD) Pty Ltd
(Respondent)

APPLICATION NUMBER: BDL256-13

MATTER TYPE: Building matters

HEARING DATE: 1 June 2016

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**

DELIVERED ON: 8 July 2016

DELIVERED AT: Brisbane

ORDERS MADE:

1. **The applicant is not permitted to rely upon expert evidence by Mr Fox.**
2. **The applicant must file in the Tribunal two (2) copies and give to the respondent one (1) copy of a report by Mr Giaroli containing an amended underpin design, by:**
4:00pm on 20 July 2016.
3. **The respondent must file in the Tribunal two (2) copies and give to the applicant one (1) copy of a report by Mr Wright in response to the report by Mr Giaroli, by:**
4:00pm on 10 August 2016.
4. **The parties must file in the Tribunal two (2) copies and exchange one (1) copy of final reports by Mr Costanzo and Mr Meager by:**
4:00pm on 17 August 2016.
5. **The applicant is permitted to rely upon the reports of Andrew Middleton dated 3 March 2016 and 22 April 2016.**
6. **Any report to be relied upon by the respondent in response to the reports of Andrew Middleton dated 3 March 2016 and**

**22 April 2016 must be filed and served by:
4:00pm on 10 August 2016.**

- 7. The application is listed for an Experts' Conclave to commence in Brisbane at 9:30am on 12 September 2016.**
- 8. The member of the Tribunal convening the conclave shall have such powers, including making directions or other orders, as are required:
i) for the conduct of the conclave; and
ii) for the conduct of the proceeding.**
- 9. The parties must file in the Tribunal two (2) copies of:
i) The name, specialisation and contact details of the experts to participate in the Conclave; and
ii) An agreed list of issues to be considered by the experts at the Conclave; and
iii) A list of documents provided to their experts by:
4:00pm on 22 August 2016.**
- 10. If the parties are unable to agree on a set of issues, each party must file in the Tribunal two (2) copies and give to each other one (1) copy of a list of issues they propose to be considered by the experts at the Conclave, by:
4:00pm on 29 August 2016.**
- 11. In either case the Tribunal will settle the list of issues to be considered by the experts at the Conclave and will provide the settled list to each party and to the experts, by:
4:00pm on 5 September 2016.**
- 12. The Registrar must provide a copy of the experts' joint report to the parties within seven (7) days of receipt by the Tribunal.**
- 13. If the experts prepare a joint report, that**

report will be the experts' evidence in chief. An expert may only submit a further report on issues of disagreement recorded in the joint report.

14. Except with the Tribunal's leave, a party may not:
- i) raise a matter not already mentioned in the joint report.
 - ii) submit evidence from an expert (whether or not they participated in the conclave) that contradicts, departs from or qualifies an opinion about an issue the subject of agreement in the joint report.
 - iii) submit evidence from any other expert about matters mentioned in the joint report.
15. The application is listed for a Directions Hearing on 28 September 2016 at 1:30pm.

CATCHWORDS:

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – EXPERT REPORTS AND EXPERT EVIDENCE – where party seeks to engage new expert – where experts have previously engaged in conclaves and joint reports prepared – where proposed expert said to have greater expertise – whether appropriate to permit new expert evidence

Queensland Civil and Administrative Tribunal Act 2009 (Qld), ss 3, 4, 28

QCAT Practice Direction 4 of 2009

Aon Risk Services Australia Limited v Australian National University [2009] HCA 27
Grasso & Anor v CMG Consulting Engineers Pty Ltd [2011] QCATA 244
Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd as trustee of the QC Trust & Ors [2014] QCA 267

APPEARANCES:

APPLICANT:

Mr R O'Sullivan, Shand Taylor Lawyers

RESPONDENT:

Mr D Cliff, Mills Oakley Lawyers

REASONS FOR DECISION

- [1] Henley Properties built a home for Mr Henderson. Mr Henderson says that the building work was defective. Mr Henderson filed in an application for a domestic building dispute in the tribunal in 2013. The proceeding has since meandered along without a great deal of urgency.
- [2] On 31 March 2016 Mr Henderson filed an application in the tribunal seeking further directions in the proceeding. One of the directions sought relates to the filing of a further expert report by Mr Eric Fox, an engineer. Henley opposes the filing of the report.
- [3] It is appropriate to outline a short chronology of the relevant events in the proceeding:

Date	Event	Relevant detail
21.10.13	Application for domestic building dispute filed	
21.11.13	Response filed	
26.06.15	Amended application for domestic building dispute filed	
14.03.14	Compulsory conference held	
03.09.14	Experts' conclave held – the first conclave	First joint report prepared
02.10.14	Directions hearing	Proceeding listed for hearing on 16 and 17 March 2015
27.11.14	Further compulsory conference held	Hearing on 16 and 17 March 2015 confirmed
18.02.15	Directions hearing	Hearing dates vacated. Proceeding listed for hearing on 25 and 26 June 2015
04.06.15	Directions hearing	Hearing dates vacated.
16.07.15	Amended response filed	
21.07.15	Directions hearing	Experts conclave on 1 September 2015 confirmed; hearing on 9 and 10 November 2016 confirmed
01.09.15	Experts' conclave held – the second conclave	Second joint report prepared
07.10.15	Directions hearing	Hearing dates vacated. Further experts conclave listed on 27 November 2015
07.12.15	Experts' conclave held – the third conclave	
09.12.15	Directions hearing	Further experts' conclave listed for 10.05.16
31.03.16	Application filed by applicant	Application seeking leave for further report to be filed by Eric Fox
22.04.16	Directions hearing	Experts' conclave on 10.05.16 vacated

- [4] The first conclave was attended by:
- Mr Giorgio Giaroli, engineer, for Mr Henderson
 - Mr Peter Wright, engineer, for Henley
- [5] The second conclave was attended by:
- Mr Giorgio Giaroli, engineer, for Mr Henderson
 - Mr Peter Wright, engineer, for Henley
- [6] The third conclave was attended by:
- Mr Giorgio Giaroli, engineer, for Mr Henderson
 - Mr Jason Meager, quantity surveyor, for Mr Henderson
 - Mr Peter Wright, engineer, for Henley
 - Mr Flavio Costanzo, quantity surveyor, for Henley
- [7] Subsequent to the third conclave, Mr Henderson obtained a report from Mr Andrew Middleton, a geotechnical engineer. Mr Middleton's report dated 3 March 2016 has been filed in the tribunal¹ (the first Middleton report). There is a further report by Mr Middleton dated 22 April 2016² (the second Middleton report). Henley objects to Mr Henderson being permitted to rely upon the second Middleton report.
- [8] On 22 March 2016, the solicitors for Mr Henderson wrote to the solicitors for Henley in which they raised the issue of obtaining a '*fresh report*' from Mr Eric Fox '*in the place of Mr Giaroli*' which was said to be necessary as following '*conferring with our client's experts*' which resulted in '*further investigation (being) required*'.³
- [9] In his submissions, and in a departure from his earlier advice to Henley, Mr Henderson says that the report of Mr Fox is intended to supplement the report of Mr Giaroli. The need for the further report is said to arise out of the report by Mr Middleton dealing with the reactivity of the soil. Mr Henderson says that the proposed report will address the performance of the slab and associated structure and the most appropriate method of any required remediation works. Mr Henderson says that Mr Fox will not be asked to address matters that have been the subject of agreement between Mr Wright and Mr Giaroli including the roof truss system, whether the original design was adequate for the site classification or whether site drainage has contributed to ground movement. Mr Henderson says that the matters upon which Mr Fox will report are matters that have not been resolved or finalised between the parties.

¹ Report, Andrew Middleton dated 3 March 2016, exhibit AM-2 to Affidavit of Andrew Middleton filed 9 March 2016.

² Report, Andrew Middleton dated 22 April 2016, exhibit AM-B to Affidavit of Andrew Middleton filed 22 April 2016.

³ Letter Shand Taylor to Mills Oakley, 22 March 2016.

- [10] Henley opposes Mr Henderson being given leave to adduce further evidence from Mr Fox. Henley says that the issues raised in the reports by Mr Middleton are not new and that the issue of the reactivity of the soil was the subject of a report in 2007 (the Fuller report) and filed in the tribunal in the proceeding in 2014.⁴

The reports by Andrew Middleton

- [11] The first Middleton report identifies the relevant subsurface soil conditions. Mr Middleton notes that the surface movements of the soil profile are consistent with a Class E (extremely reactive) classification for the existing alluvial silty clay profile. Mr Middleton suggests steps that could be taken to reduce the reactive surface movement of the site. He notes that good practice in design, construction and management of the site will be required to accommodate potential site movements. Mr Middleton comments on available options depending on whether the existing building is underpinned or demolished and reconstructed.
- [12] The second Middleton report relates to additional investigations undertaken to recover further samples for laboratory testing and to assess the conditions at the site. The further testing revealed that the soil is classified as extremely reactive. Mr Middleton refers to the Fuller report and the findings in that report classifying the soil as extremely reactive however notes the variation between Mr Middleton's findings and Mr Fuller's findings, the latter recording a lower to significantly lower shrink swell value and surface movement reading than those found by Mr Middleton.

The expert evidence of Mr Giaroli

- [13] The issue of the classification of the site and the subsoil reactivity has been raised in a series of reports by Mr Henderson's expert, Mr Giaroli, exhibited to an affidavit by Mr Giaroli filed in January 2014. The reports, prepared in 2009, May 2013 and September 2013, all refer to excessive ground movement. Mr Giaroli's report of 16 May 2013 refers to the need for bored piers to be installed after first obtaining advice from a geotechnical engineer as to the required depth for the piers to be sunk. In his report dated 17 September 2013, Mr Giaroli rejects underpinning of the slab and reconstruction of the house as being 'excessive' remediation options, instead recommending the installation of a moisture barrier or a polyurethane injection system.
- [14] Mr Giaroli prepared a report in March 2015 following a further inspection of the property in November 2014. In that report Mr Giaroli noted that further investigation was required to ascertain what was happening to the residence and that the continual movement was leading him to believe

⁴ Report Warren Fuller dated 4 September 2007; affidavit of Alex Raleigh filed 24 February 2014.

that a '*complete strengthening of the existing slab and footing system*' was required. Appended to the report is a letter from Mr Giaroli to Mr Henderson's solicitors in which he notes that a '*general reduction in the soil reactivity effects on the footing system is considered essential*'.⁵

The joint reports

- [15] Joint reports have been prepared by Mr Giaroli and Mr Wright (Henley's expert) following the experts' conclaves. In the first joint report, Mr Giaroli expresses the opinion that excessive footing flexibility and consequent movement is the cause of the cracking in the dwelling.
- [16] In the second joint report Mr Giaroli and Mr Wright agree that '*the DEQ footing design was considered adequate for the site classification noted in the geotechnical report*'. This appears to be a reference to the Fuller report. Mr Giaroli states that the '*house is overly flexible for the existing soil conditions*'.

The expertise of Mr Giaroli and Mr Fox

- [17] The essential thrust of Mr Henderson's argument is that Mr Fox is more qualified than Mr Giaroli to comment on slab design and performance and the analysis of slab and footing system failures.
- [18] Mr Giaroli's curriculum vitae refers to his '*over 30 years of Civil and Structural Design experience*'.⁶ His expertise includes providing forensic, legal and condition reports. Mr Giaroli has, according to his CV, presided over numerous successful developments including high rise residential towers in Brisbane, significant industrial and commercial developments for high profile clients and significant civil projects.
- [19] Mr Giaroli says that his analysis has focussed on the original slab design and the extent to which landscaping, vegetation and drainage have contributed to the cracking at the residence.⁷ He says that whilst he is an experienced structural engineer his experience is primarily in the design stage and that he has less experience in the area of forensic investigation of engineering failures, compliance with particular codes and standards and the rectification of non-conforming slabs. Mr Giaroli says that an engineer '*with more specific experience in the area of forensic investigation of slab performance and rectification would be a more suitable expert to provide an opinion on those issues*'.⁸
- [20] Mr Fox's curriculum vitae is also before the Tribunal. The CV notes that footing systems for houses and similar scale buildings on reactive soils are a '*speciality*' of Mr Fox and that he has extensive experience in the investigation and design of remediation for damaged slabs.

⁵ Letter G Giaroli to Shand Taylor, 1 December 2014.

⁶ Affidavit of Giorgio Giaroli filed 24 January 2014 – Exh "GEG-1".

⁷ Statement of Giorgio Giaroli dated 17 May 2015.

⁸ Statement of Giorgio Giaroli dated 17 May 2015 at [6].

Discussion

- [21] Mr Henderson's home was constructed in 2007. Soon after moving in, cracks began to appear inside the house. In 2009 Mr Giaroli provided advice to Mr Henderson about the issues being experienced by Mr Henderson regarding the dwelling. Mr Henderson has continued to rely upon the expertise of Mr Giaroli, engaging him as an expert in the proceeding.
- [22] Mr Henderson says that Mr Fox will only be asked to report on matters that have not yet been resolved or finalised as between the experts these matters being the performance of the slab and the methods of rectification.
- [23] Mr Henderson says that Mr Giaroli has stated in joint expert reports that he does not consider the slab is performing in accordance with AS2870 but he has not provided any analysis or further detail of his reasons in this regard. Mr Henderson's submission suggests a failure by Mr Giaroli to address the issue, a failure by Mr Henderson to ask Mr Giaroli to address the issue or perhaps both. Mr Henderson says that Mr Fox will examine the issue in a more '*in depth continuation of matters already raised but not yet resolved*'.⁹
- [24] Mr Henderson says that the experts '*agreed at the last expert's conclave that any debate (about the possible methods of rectification) could not be advanced without further geotechnical analysis*'.¹⁰ The joint report coming out of the third conclave is not before the Tribunal. If the experts have discussed with the parties the proposed joint report before it has been finalised, filed and provided to the parties, this raises the very serious question of non compliance with the practice direction which states that the joint report must be prepared by the experts without any further reference to or instruction from the parties.¹¹ If the experts are of the view that further evidence is required this is a matter that should be addressed by the experts through the tribunal.
- [25] The involvement of Mr Fox in relation to the issue of rectification work will, says Mr Henderson, be a natural continuation of the process currently underway.
- [26] After three conclaves and two joint expert reports, Mr Henderson now seeks to present and rely upon the opinion of another expert. The issue of the reactivity and stability of the soil is not a recent development in the proceeding having been raised in the expert reports from the outset. The initiating application filed by Mr Henderson refers to the failure by Henley to ensure that the slab and associated footings installed on the property were suitable for the prevailing site conditions and there being no moisture barrier around the building despite the existence of highly reactive soil on the property.

⁹ Applicant submissions 17 May 2016 at [9].

¹⁰ Ibid at [10].

¹¹ QCAT Practice Direction No 4 of 2009 at [10].

- [27] It appears that the parties have had the benefit of legal representation and/or advice from a very early stage of the proceeding. The formulation and presentation of the respective parties cases, including the appropriate expert evidence, has no doubt been the subject of detailed consideration by the parties and their legal representatives.
- [28] Presumably Mr Henderson has given some thought to the evidence he will be required to lead in order to prove his claim. That the obtaining of expert evidence by Mr Henderson, in the form of the reports by Mr Middleton addressing the issue of the reactivity of the soil, has been left to such a late stage in the proceeding is surprising and unfortunate – surprising in that the issue of the soil reactivity has been very much alive for some years and unfortunate in that it now has the potential to further delay the final resolution of the matter.
- [29] The evidence before the Tribunal as to why Mr Henderson should be permitted to rely upon Mr Fox is, at best, slim. Whilst not diminishing in any way the credentials and expertise of Mr Fox, the application by Mr Henderson has the flavour of a party who has identified a '*better*' expert and wishes to rely upon that expert. That experts in a particular field have subjective strengths and areas of interest is not to the point in the present case. It has been almost 7 years since Mr Henderson first engaged Mr Giaroli and almost 3 years since Mr Henderson commenced this proceeding. This has been more than sufficient time for the parties to assess and decide upon the most appropriate experts to engage.
- [30] At this very late stage Mr Henderson seeks to rely upon another expert in order to undertake a '*continuation*' of the expert evidence process. I disagree with the characterisation of Mr Fox's involvement as a '*continuation*'. The involvement of Mr Fox will be to supplement and possibly complicate the evidence.
- [31] I do not accept that Mr Giaroli is unable to provide an analysis of the performance and or failure of footing systems. What Mr Giaroli says is that another expert may be more suitable to provide an opinion. He does not say that Mr Fox is such an expert. Mr Giaroli does not refer to Mr Fox at all. Mr Giaroli has previously expressed opinions about the performance of the slab and the footings. There is nothing before me to suggest that Mr Giaroli has had cause to doubt his expertise in the past when offering expert opinion.
- [32] The proposed evidence by Mr Fox will potentially create significant uncertainty in the further conduct of the proceeding. Issues will arise if the opinions already expressed by Mr Giaroli are in conflict with opinions to be expressed by Mr Fox. Mr Henderson does not address how such issues might be resolved.
- [33] Limiting the evidence of Mr Fox in the manner suggested by Mr Henderson is problematic. As Henley submits, Mr Fox will address rectification methods including, for example, the installation of a moisture barrier however he will not address the issue of site drainage as a

contributor to site movement as this is an issue agreed upon by Mr Giaroli and Mr Wright. Mr Fox will be precluded from expressing a view as to the cause of site movement even if his opinion conflicts with the agreed opinions contained in the joint reports. Mr Fox will potentially be restricted in expressing his own comprehensive opinions on a range of issues.

[34] Difficulties will arise if Mr Fox expresses opinions on matters not the subject of agreement between Mr Giaroli and Mr Wright (as Mr Henderson says he will) and which may result in Mr Henderson having two experts expressing conflicting opinions. A party to a proceeding may call evidence from only one expert for each area of expertise.¹² If Mr Fox does indeed offer an opinion on issues ventilated by Mr Wright and Mr Giaroli and in relation to which opinions have been expressed by those experts, the question arises as to whether the evidence of Mr Fox should be allowed on such issues and why Mr Henderson should be permitted to rely upon more than one expert.

[35] In accordance with directions made in the proceeding, Mr Henley has filed a draft letter of instruction to Mr Fox. In that letter, Mr Fox is asked to make a number of assumptions including: that the original footing design complied with AS 2870 based on the Fuller report; site drainage has not contributed to ground movement; there is evidence that ground movement commenced prior to handover of the building; the building was designed as articulated masonry veneer construction; that for the purposes of the installation of moisture barrier as a rectification method, it is accepted that the vegetation on the golf course and on the property have contributed to subsidence of the rear edge of the slab.

[36] The first point to make about the letter of instruction is whether it contravenes Practice Direction 4/2009 which provides:

A person must not give, and an expert must not accept, instructions to adopt or reject a particular opinion in relation to an issue in dispute in a proceeding.

[37] On its face, the letter of instruction appears to instruct Mr Fox to accept opinions in relation to a number of issues. It is arguable that where the experts have reached agreement, there is no longer an issue in dispute and it is permissible for Mr Fox to be instructed to accept those opinions. The “issues” referred to in the Practice Direction are however those in dispute in the proceeding. This involves a very different enquiry and I incline toward the view that the letter of instruction is in breach of the Practice Direction.

[38] The letter of instruction illustrates the difficulties associated with any attempt to quarantine the evidence of Mr Fox and the potential for the issues and evidence to be made more complex by that evidence, with increased expense to the parties and further delay in the final resolution of the proceeding.

¹² QCAT Practice Direction No. 4 of 2009 at [2].

[39] Ultimately, the question to be addressed on this application is whether or not the proceeding has reached a point where it is appropriate to place limits upon the ability of Mr Henderson to adduce further evidence from another expert.¹³ This question must be answered by reference to the objects and functions of the tribunal and the principles set out in *Aon Risk Services Australia Limited v Australian National University*¹⁴ where it was held:

In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

[40] The principles in *Aon* are of general application and apply before a matter is listed for hearing.¹⁵

[41] The objects of the QCAT Act are to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick.¹⁶ The procedures it adopts are within its discretion, subject to the Act itself and enabling Acts, or the Rules, always observing the rules of natural justice and acting with as much speed as are permitted by the Act, the Rules or an enabling Act.¹⁷

[42] This proceeding has now been on foot for almost 3 years. As the chronology in these reasons illustrates, the progress of the matter has been less than optimal.

[43] For the reasons I have outlined, allowing the further evidence of Mr Fox has the very real potential to add a further, and unacceptable, level of complexity to the evidence and the issues in dispute, which will result in increased cost to the parties and further delays in the proceeding. Allowing the evidence of Mr Fox would not be consistent with the principles espoused in *Aon*, nor with the objects of the QCAT Act and functions of the tribunal in achieving those objects.

[44] I make the following orders:

1. The applicant is not permitted to rely upon expert evidence by Mr Fox.
2. The applicant must file in the Tribunal two (2) copies and give to the respondent one (1) copy of a report by Mr Giaroli containing an amended underpin design, by:

4:00pm on 20 July 2016.

¹³ *Grasso & Anor v CMG Consulting Engineers Pty Ltd* [2011] QCATA 244.

¹⁴ [2009] HCA 27.

¹⁵ *Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd as trustee of the QC Trust & Ors* [2014] QCA 267.

¹⁶ QCAT Act s 3(b).

¹⁷ *Ibid* s 28(1) and (3).

3. The respondent must file in the Tribunal two (2) copies and give to the applicant one (1) copy of a report by Mr Wright in response to the report by Mr Giaroli, by:

4:00pm on 10 August 2016.

4. The parties must file in the Tribunal two (2) copies and exchange one (1) copy of final reports by Mr Costanzo and Mr Meager by:

4:00pm on 17 August 2016.

5. The applicant is permitted to rely upon the reports of Andrew Middleton dated 3 March 2016 and 22 April 2016.

6. Any report to be relied upon by the respondent in response to the reports of Andrew Middleton dated 3 March 2016 and 22 April 2016 must be filed and served by:

4:00pm on 10 August 2016.

7. The application is listed for an Experts' Conclave to commence in Brisbane at **9:30am on 12 September 2016.**

8. The member of the Tribunal convening the conclave shall have such powers, including making directions or other orders, as are required:

- i) for the conduct of the conclave; and
- ii) for the conduct of the proceeding.

9. The parties must file in the Tribunal two (2) copies of:

- i) The name, specialisation and contact details of the experts to participate in the Conclave; and
- ii) An agreed list of issues to be considered by the experts at the Conclave; and
- iii) A list of documents provided to their experts by:

4:00pm on 22 August 2016.

10. If the parties are unable to agree on a set of issues, each party must file in the Tribunal two (2) copies and give to each other one (1) copy of a list of issues they propose to be considered by the experts at the Conclave, by:

4:00pm on 29 August 2016.

11. In either case the Tribunal will settle the list of issues to be considered by the experts at the Conclave and will provide the settled list to each party and to the experts, by:

4:00pm on 5 September 2016.

12. The Registrar must provide a copy of the experts' joint report to the parties within seven (7) days of receipt by the Tribunal.
13. If the experts prepare a joint report, that report will be the experts' evidence in chief. An expert may only submit a further report on issues of disagreement recorded in the joint report.
14. Except with the Tribunal's leave, a party may not:
 - i) raise a matter not already mentioned in the joint report.
 - ii) submit evidence from an expert (whether or not they participated in the conclave) that contradicts, departs from or qualifies an opinion about an issue the subject of agreement in the joint report.
 - iii) submit evidence from any other expert about matters mentioned in the joint report.
15. The application is listed for a Directions Hearing on **28 September 2016 at 1:30pm.**