

CITATION: *Mt Cotton Constructions P/L v Greer* [2016] QCAT 281

PARTIES: Mt Cotton Constructions Pty Limited
(Applicant)
v
Damien Greer
Kate Greer
(Respondent)

APPLICATION NUMBER: BDL190-14

MATTER TYPE: Building matters

HEARING DATE: 4 August 2016

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**

DELIVERED ON: 4 August 2016

DELIVERED AT: Brisbane

ORDERS MADE: **IT IS THE DECISION OF THE TRIBUNAL THAT:**

1. The application for miscellaneous matters filed 25 July 2016 is refused.

THE TRIBUNAL DIRECTS THAT:

1. The application is listed for an expert's conclave in Brisbane on 19 August 2016 at 9:30 am.
2. The member of the Tribunal convening the conclave shall have such powers, including making directions or other orders, as are required:
 - a. for the conduct of the conclave; and
 - b. for the conduct of the proceeding.
3. The parties must file in the Tribunal two (2) copies of:
 - a. the name, specialisation and contact details of the experts to participate in the Conclave; and
 - b. an agreed list of issues to be considered by the experts at the

- Conclave; and**
- c. a list of documents provided to their experts by:
4:00pm on 15 August 2016.**
- 4. 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 16 August 2016.**
 - 5. The Registrar must provide a copy of the experts' joint report to the parties within seven (7) days of receipt by the Tribunal.**
 - 6. 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.**
 - 7. Except with the Tribunal's leave, a party may not:**
 - a. raise a matter not already mentioned in the joint report.**
 - b. 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.**
 - c. submit evidence from any other expert about matters mentioned in the joint report.**
 - 8. The directions hearing on 17 August 2016 is vacated.**
 - 9. The matter is listed for a directions hearing in Brisbane on 7 September 2016 at 3:30 pm.**
 - 10. The hearing in Brisbane on 10, 11, 12, 13 and 14 October 2016 is confirmed.**

CATCHWORDS:

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – EXPERT REPORTS AND EXPERT EVIDENCE – OTHER MATTERS – where applicant had relied upon evidence of quantum meruit claim – where applicant had abandoned previous application for expert evidence – where applicant made further application for expert evidence – where allowing expert evidence

would result in adjournment of hearing – whether applicant satisfactorily explained delay in making application for further evidence – where delay caused by decision by applicant in the conduct of the claim – considerations relevant to permitting late evidence – consideration of principles in *Aon Risk Services Australia Ltd v Australian National University* - where application to adduce late evidence refused

Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27
Cement Australia Pty Ltd v Australian Competition and Consumer Commission [2010] FCAFC 101
Ketteman v Hansel Properties Ltd [1987] AC 189
Mango Boulevard P/L v Spencer & Ors [2010] QCA 207

APPEARANCES:

APPLICANT: Mr M Taylor instructed by DCL & Associates Lawyers

RESPONDENT: Mr L Campbell instructed by Colin Biggers & Paisley Lawyers

REASONS FOR DECISION

What is this application about?

- [1] Mt Cotton Constructions Pty Limited ('MCC') undertook building renovations for Mr and Mrs Greer ('the Greers'). The parties fell into dispute. MCC filed an application for a domestic building dispute claiming monies it says are owed to it by the Greers pursuant to the building contract. In the alternative MCC claims a quantum meruit. The Greers dispute MCC's claim. The proceeding has been listed for a five-day hearing. MCC has applied to the Tribunal for leave to rely upon further expert evidence relevant to the quantum meruit claim. The application is opposed by the Greers. For the reasons that follow, I dismiss the application by MCC.

A short history of the dispute

- [2] The application for a domestic building dispute was filed by MCC in August 2014. It is useful to set out a brief chronology of the proceeding.

Date	Event
7 August 2014	MCC files application for domestic building dispute
16 February 2015	MCC files amended claim
3 September 2014	Greers file response and counter application
13 February 2015	Greers file amended response and counter application
8 September 2014	Directions made for parties to file statements of evidence
3 October 2014	Directions made extending the dates for filing statements of evidence
28 January 2015	Directions made for parties to file statements of evidence and expert reports and listing matter for experts conclave
5 May 2015	Directions made vacating experts conclave and requiring the parties to file statements of evidence
17 August 2015	Experts conclave held
1 October 2015	Joint report by Mr Browning and Mr Carpenter filed
12 November 2015	Compulsory conference held
5 April 2016	MCC files application seeking orders, inter alia, that it be permitted to file further expert evidence quantifying the remedial scope of works
12 April 2016	Directions made requiring, inter alia, MCC to file and further expert evidence relating to defects, and the Greers to file any further expert evidence in relation to the costs of the works claimed to be have been carried out by MCC. Matter listed for experts' conclave and hearing dates on 10-15 October 2016 set.
20 June 2016	Directions made for MCC to file a reply to the amended response and counter application
21 June 2016	Directions made by consent listing experts conclave on 25 July 2016
25 July 2016	MCC files present application

[3] Relevant to this application, the amended claim pleads:

- a) that the parties entered into a costs plus agreement;¹
- b) that the agreement, as varied, contained:
 - i) A supervision portion calculated at \$5,000 per day;

¹ Amended Claim at [12].

- ii) An external works portion calculated on a prime cost basis and any additions or changes at cost plus 10%;
 - iii) An internal works portion at cost plus 10%;
 - iv) Rectification works portion at cost plus 10%;
 - v) All other portions of the agreed works to be carried out on a cost plus basis;
- c) that in the alternative to its entitlement under the agreement, MCC is entitled to quantum meruit in the amount of \$350,345.02.²
- [4] Mr Scroope, the director MCC, has filed a statement in the Tribunal dated 10 October 2014. Attached to the statement are a number of folders containing various documents. Mr Scroope says that the original contract works were the subject of detailed timesheets and third party invoices in the payment claims and other material filed in the proceeding. Mr Scroope refers to this '*source material*' as '*8 eastlight folders attached to my first statement*'.³

MCC's expert evidence

- [5] MCC filed a report by Mr John Browning on 23 March 2015.⁴ Mr Browning is a building expert. Mr Browning was briefed to:

Examine the plans and supporting documentation...and provide schedules of works done for:

- The "internal trades", in particular the plumbing, plastering, electrical and tiling works; and
- The "external additional works", in particular the garage and part driveway works, and backyard additional works.⁵

- [6] Mr Browning notes in his report that he was instructed not to cost the schedule items as this was being carried out by Mr Flavio Costanzo.

- [7] MCC has filed a report by Mr Costanzo.⁶ Mr Costanzo was instructed to prepare a report addressing the cost of carrying out the works contained in the report by Mr Browning. It appears from his report that Mr Costanzo was briefed with at least some of the eight folders of material relied upon by Mr Scroope.

The April 2016 application by MCC

- [8] A compulsory conference was held on 12 November 2015 following which directions were made for a directions hearing to be held on 6 April 2016. On 5 April 2016, MCC filed an application seeking a number of directions including that MCC file '*any further expert evidence quantifying the costs*

² Amended Claim at [28].

³ Affidavit of Christopher Scroope, filed 25 July 2016.

⁴ Expert Report of Accuform Pty Ltd, 18 March 2015 authored by Mr John Browning.

⁵ Ibid.

⁶ Expert Report Flavio Costanzo, filed 30 March 2015.

of the remedial scope of works identified in the joint expert report of Messrs Browning and Carpenter ...'.

[9] In opposing that application, the Greers submitted:

- The Tribunal had made directions after the compulsory conference that any further statements of evidence were required to be filed and served by MCC by 12 February 2016.
- MCC had not complied with the direction.
- Despite the fact that MCC had changed legal representation, its current solicitors had been retained prior to the compulsory conference.
- MCC had not taken any steps in the 5-month period following the compulsory conference to file any further evidence.
- The solicitors for the Greers had written to the solicitors for MCC on 16 February 2016 putting MCC on notice that if MCC did not file and serve further material the Greers would be seeking a hearing date on the basis of the then evidence.

[10] The application by MCC was listed for a hearing on 12 April 2016. MCC relied upon an affidavit by its solicitor Mr Anderson.⁷ Mr Anderson referred to having reviewed the file and noted a number of matters, which '*require attention*'.⁸ When the directions hearing was held on 6 April 2016, MCC indicated that it was seeking to adduce expert evidence in relation to costing the contract works, that is, the quantum meruit. The Greers objected to the proposed further evidence principally on the basis that MCC had adopted a certain course of action in relation to this aspect of the claim in relying upon the evidence of Mr Scroope to quantify the quantum meruit. The Greers also raised concerns about the issue of costs, arising out of allowing the proposed late evidence.

[11] When the application was heard on 12 April 2016, MCC advised the Tribunal that it would not pursue the application to adduce expert evidence in relation to the original contract works.

[12] Directions were made on 12 April 2016 listing the matter for an experts' conclave on 22 June 2016. Hearing dates in October 2016 were also set. On 21 June 2016, directions were made listing the experts' conclave on 25 July 2016.

The present application by MCC

[13] MCC filed the present application on 25 July 2016 seeking leave to adduce expert evidence in respect of the quantum meruit value of the building works it performed for the Greers.

⁷ Affidavit of Duncan Anderson, filed 5 April 2016.

⁸ *Ibid*, at [3].

- [14] MCC relies upon an affidavit by Mr Pasetti, the solicitor for MCC.⁹ Mr Pasetti refers to having been briefed by Mr Anderson, the solicitor formerly in his employ, in relation to various matters. Mr Pasetti refers to the material contained in the folders filed by MCC and referred to in Mr Scroope's original statement. Mr Pasetti also refers to Mr Scroope's instructions to his firm on 7 April 2016 that MCC would not seek to adduce expert evidence in relation to the quantum meruit claim relating to the contract works.
- [15] Mr Pasetti says that having received the Greers' latest expert evidence on 4 July 2016 he has reviewed the evidence including the substantive materials previously filed by Mr Scroope for the purposes of progressing the matter. Mr Pasetti says that having reviewed the materials, there is insufficient evidence of timesheets or supplier invoices in respect of the contract works to allow substantial or full recovery for those works on a quantum meruit basis. Mr Pasetti also says that the material filed by MCC, as it presently stands, would take a substantial time to put to the Tribunal at the hearing.
- [16] Mr Pasetti says that the delay since April 2016 in MCC seeking to adduce further expert evidence in relation to the quantum meruit claim is solely due to MCC's error in respect of the current evidence. Mr Pasetti says that, after receiving the Greers' further expert evidence in July 2016, he raised with Mr Scroope concerns that the original material did not contain the detail Mr Scroope had advised. Mr Pasetti says that had the expert material been filed by the Greers earlier he would have undertaken a review of the material filed by Mr Scroope earlier.
- [17] MCC also relies upon an affidavit by Mr Scroope.¹⁰ Mr Scroope says that following the directions hearing on 6 April 2016 and discussions with his legal advisors, he considered whether there were alternative means available to pursue the cost of the contract works without expert evidence being required. Mr Scroope says that he did not consider that further expert evidence was necessary to recover the value of the contract works on a quantum meruit basis. Mr Scroope says that over the period 23 July to 24 July 2016 he reviewed the evidence and the source materials he had previously filed. He says that there is no complete record of timesheets and third party invoices for the contract works. Mr Scroope says that expert evidence is required to recover for the contract works on a quantum meruit basis.
- [18] MCC says that granting the application will result in the trial dates in October being vacated but considers that the matter will be ready for trial by mid December 2016.¹¹

⁹ Affidavit of Bruce Pasetti, filed 27 July 2016.

¹⁰ Affidavit of Christopher Scroope, filed 25 July 2016.

¹¹ Applicant's outline, at [2].

[19] MCC refers to the Tribunal's directions made 12 April 2016. It is appropriate to pause here to set out those directions as they are relevant to this aspect of the submissions:

- MCC was directed to file and serve any further expert evidence in relation to the claim for defects by 20 May 2016.
- The Greers were directed to file and serve any further expert evidence in relation to the costs of the works claimed to have been carried out by MCC by 20 May 2016.
- The experts' conclave was listed for 22 June 2016.
- The matter was listed for hearing on 10,11,12, 13 and 14 October 2016.

[20] MCC says that following the directions hearing in April 2016 and prior to the deficiencies in the applicant's evidence being discovered by Mr Scroope and MCC's solicitors, the applicant was waiting for the provision of the Greers' further expert evidence.¹²

[21] The Greers say that MCC first alleged a claim of quantum meruit in early February 2015 in the Amended Claim. They say that in April 2016 MCC decided not to pursue obtaining further expert evidence in relation to the quantum meruit claim. The Greers rely upon Mr Scroope's sworn evidence.¹³ The Greers say that having elected to pursue its claim in a particular way and in reliance upon particular evidence, MCC now seeks to change tack, that the decision to rely upon Mr Scroope's evidence was a tactical one and rather than any suggestion MCC will be shut out from pursuing its claim, MCC is merely being held to an earlier election as to the evidence it would rely upon at the hearing.

[22] The Greers say that allowing the further evidence will result in an irreparable element of unfair prejudice to the Greers in unnecessarily delaying the proceeding. The Greers say that the trial dates cannot be preserved if the further evidence is allowed. They say that allowing the evidence, and thus delaying the final hearing, would undermine confidence in the administration of civil justice if a legally represented party is permitted to, four months after making an informed and deliberate decision not to take a step in a proceeding, renege on that earlier decision which will jeopardise the hearing dates and cause the Greers to incur additional stress and costs.

Consideration

[23] The question of whether to allow or disallow a party the opportunity to rely upon evidence is one approached with great caution. The potential consequences of not allowing evidence calls for careful consideration of whether procedural fairness is afforded and whether a particular course of action is in the interests of justice.

¹² Ibid, at [9].

¹³ Affidavit of Christopher Scroope, filed 25 July 2016.

- [24] The proceeding was commenced in 2014. MCC subsequently amended the claim in February 2015. The claim for a quantum meruit by MCC has been alive since this date. In March and April 2015 MCC filed expert reports by a builder and a quantity surveyor. MCC was legally represented at that time. There is nothing to suggest that the obtaining of the reports, including the scope of the instructions to the experts, was other than on the instructions of MCC.
- [25] Indeed, it was not until April 2016 that MCC sought leave to adduce expert evidence in relation to the quantum meruit claim. The explanation offered by MCC for this is, at best, unconvincing. MCC said that it had retained its current solicitors in November 2015. The application by MCC in April 2016 seeking orders, inter alia, that MCC be given leave to adduce expert evidence in relation to the quantum meruit claim was prompted by what MCC said was a review of the file.¹⁴ In subsequent written submissions by its counsel, MCC said that *'In light of concerns expressed by the Tribunal, the applicant will not pursue that part of the application seeking to tender expert evidence on the original contract Works'*.¹⁵ The reference to the original contract Works is the quantum meruit claim. The *'concerns'* referred to in the submission is presumably relating to the issue of costs which was, quite predictably, raised at the initial hearing of the April application.
- [26] The review of the file conducted by MCC's solicitors led to the April 2016 application. This review was said to have revealed matters requiring attention but which are essentially what MCC now says were deficiencies in the evidence.¹⁶
- [27] It is clear that MCC instructed its solicitors not to pursue that part of the application relating to expert evidence quantifying the quantum meruit claim.
- [28] The solicitor for MCC, Mr Pasetti, says that MCC provided instructions at the time of the April 2016 application that the folders of material contained evidence supporting the value of each part of the contract works and that it was on the basis *'of that belief and the costs consequences threatened against the applicant, we were instructed not to pursue expert evidence on (the quantum meruit claim)...*'.¹⁷ Mr Pasetti does not say whose belief he is referring to. Mr Pasetti's affidavit does not depose to any of the events leading up to the April 2016 application. In oral submissions at the hearing of the present application, counsel for MCC said that the relevant circumstances leading to the April 2016 application were addressed in that application.
- [29] In its submissions MCC says that following the April 2016 application it waited for the further expert evidence which the Greers had been directed

¹⁴ Affidavit of Duncan John Anderson, filed 5 April 2016.

¹⁵ Applicant's further outline, filed 7 April 2016.

¹⁶ Affidavit of Duncan John Anderson, filed 5 April 2016, at [3].

¹⁷ Affidavit of Bruce Pasetti, filed 27 July 2016, at [4].

to file following which its solicitors '*reviewed the evidence generally*'.¹⁸ Mr Pasetti says that the delay in seeking leave to rely upon further expert evidence is '*solely due to the applicant's error in respect of the state of the current evidence*'.¹⁹

- [30] MCC's explanation for the delay in seeking the present orders is that:
- a) it changed solicitors in November 2015;
 - b) the new solicitors did not have the opportunity to review the file until February or March 2015;
 - c) having reviewed the file and having made a decision to apply for leave to adduce expert evidence on the quantum meruit claim MCC proceeded to make the April 2016 application to the Tribunal;
 - d) MCC then decided not to proceed with the application and to rely upon the evidence to support the quantum meruit claim that it had in fact relied upon from the outset of the proceeding;
 - e) having further reviewed the file in July 2016 after receiving the Greers further expert evidence, MCC decided that the considered position it had taken prior to and subsequent to the April 2016 application was based upon a mistake as to the state of the evidence thus leading to the present application.
- [31] MCC relies upon a number of authorities in support of its application. The principles espoused in *Aon Risk Services Australia Ltd v Australian National University*²⁰ are of specific application.
- [32] MCC brings this application for late evidence two years after the commencement of the proceeding and 18 months after filing the amended claim in which the quantum meruit claim was pleaded.²¹ The present application is therefore brought after a lengthy delay by MCC.
- [33] The hearing dates were set in April 2016. I agree with the submissions by the Greers that granting the application will likely lead to the hearing dates being vacated. This much is conceded by MCC. The Greers' expert will be unavailable for an extended period of time up until approximately one (1) month before the hearing.²² The Greers say that if the further evidence is allowed they will require a further building surveyor's report, a further quantity surveyor's report, a conclave of the building experts, a conclave of the quantity surveyors and the issuing of joint reports by the experts.²³ It may well be that further lay evidence is required. There is, in my view, no realistic possibility that the hearing dates can be preserved if the application is granted.

¹⁸ Applicant's outline, at [8].

¹⁹ Affidavit of Bruce Pasetti, filed 27 July, at [16].

²⁰ [2009] HCA 27.

²¹ Ibid, at [214] - [215].

²² Affidavit of Timothy Mitchell, filed 3 August 2016.

²³ Respondents' submissions, filed 3 August 2016.

- [34] Prejudice to the Greers is a relevant consideration.²⁴ The Tribunal is entitled to weigh in the balance of the discretion whether to permit the further evidence the strain the litigation imposes upon litigants.²⁵ As the Court of Appeal has observed '*(the) emotional and financial strain on litigants who are natural persons and financial stress on corporations are relevant considerations, as are the effect of uncertainty on business and other plans and on the deployment of resources*'.²⁶ Mr Greer, a solicitor and principal of a law firm, deposes to the fact that when the hearing dates were set he went to considerable lengths to ensure that he cleared his diary to ensure that no client related hearings were listed at the time of the trial.²⁷ Mr Greer also deposes to the fact that he and his wife have organised their personal and professional commitments around the hearing dates.²⁸ Mr Greer provides a detailed synopsis of his schedule until the hearing dates. He deposes to the stress, financial and otherwise, that he and Mrs Greer have experienced as a result of what he says is the defective building work and the present litigation and seeks an expeditious resolution of the matter.²⁹ I accept that an adjournment of the hearing will cause considerable inconvenience and distress to the Greers.
- [35] It is also relevant to consider the prejudice to other litigants and the efficient use of tribunal resources.³⁰ The public interest in the efficient use of tribunal resources is a relevant consideration in the exercise of the discretion whether to allow the further evidence. This matter has been listed for a five-day hearing. Tribunal resources are scarce and securing five consecutive days for the hearing of a complex building dispute poses challenges. The listing of the matter means that other matters could not be set down for hearing on October dates. Other litigants have consequently been held out from securing hearing dates. Abandoning the hearing dates will not automatically result in other matters being listed. The matter will be required to be relisted, possibly for more than five days. This will result in further use of scarce tribunal resources.
- [36] The explanation by MCC for the delay is a relevant consideration.³¹ I find the explanation provided by MCC to be unconvincing. Clearly, MCC made a conscious decision, with the assistance of legal advisors, to conduct its claim in a particular way and to rely upon specific evidence to support the quantum meruit claim. One would have thought that the engagement of new legal representatives would have resulted in a review of the matter including a consideration of the state of the evidence. This is in fact what occurred, leading to the application in April 2016. It is at this juncture however that the explanation proffered by MCC becomes problematic.

²⁴ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, at [214].

²⁵ *Ibid*, at [100] citing *Kettelman v Hansel Properties Ltd* [1987] AC 189 at [220].

²⁶ *Mango Boulevard P/L v Spencer & Ors* [2010] QCA 207, at [20].

²⁷ Affidavit of Damien Greer, filed 3 August 2016, at [4].

²⁸ *Ibid*, at [5].

²⁹ *Ibid*, at [9] – [12].

³⁰ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, at [182], [189], [192], [212], [214], [215].

³¹ *Ibid*, at [215].

The legal representatives having reviewed the evidence and presumably then giving advice to MCC, the April 2016 application for, among other things, further expert evidence supporting the quantum meruit claim, was brought by MCC. MCC then abandoned the application ostensibly on the bases that the existing evidence was sufficient and given the possibility of an adverse costs order. I find this aspect of the explanation and submissions by MCC difficult to accept. If MCC was truly convinced that the state of the evidence was such that further expert evidence was required, the prospects of an adverse costs order, limited as it would have been to costs thrown away by the late evidence, should not reasonably have deterred it. Instead, MCC made a conscious decision to proceed on the basis that the evidence was sufficient.

- [37] The explanation by MCC as to the change in its position regarding the evidence leading to the present application is less than satisfactory. MCC says that a further review of the evidence led to this change in position. That evidence was essentially unchanged from April 2016 and the position MCC had taken since filing its amended claim in February 2015.
- [38] The nature and importance of the further evidence to MCC's claim is another relevant consideration.³² MCC says that the further evidence is required in relation to an amount of \$121,349.09 which is in issue at contractual rates.³³ The Greers have filed two (2) reports by Gary Thompson, a quantity surveyor. Those reports quantify the claim by MCC for variations and the claim for rectification work. Relevant to the claim by MCC for quantum meruit is the report quantifying the claimed variations. Mr Thompson quantifies the claimed variations at between \$157,809.77 and \$186,972.51. MCC's expert, Mr Costanzo, quantifies the claimed variations at \$327,006.57. It is entirely unclear from MCC's submissions why the receipt of the reports by Mr Thompson resulted in MCC undertaking a review of the evidence resulting in the present application. It is also difficult to reconcile the submission by MCC that in not permitting the further evidence it will be prohibited from satisfactorily proving the value of the works with the following submission:

There is benefit to the Tribunal and the respondents in having the Contract Works quantified by expert evidence, and directly addressed in the response. The alternative is that the applicant will have to work through such of the original materials as support aspects of the Contract Works (payment claims and other collections of documents contained in the eighth volume Annexure to the statement of Mr Scroope) at trial on a document by document basis. This is time-consuming and does not allow prior rebuttal by the respondents.³⁴

- [39] I would observe the following:
- a) the Greers do not complain that they are prejudiced in any way by not having the opportunity for "prior rebuttal";

³² Ibid, at [214].

³³ Applicant's outline, at [21].

³⁴ Applicant's outline, at [25].

- b) the submission suggests that MCC can lead evidence in relation to the quantum meruit claim;
 - c) MCC does not provide any detail of what the deficiency is in the evidence relating to the quantum meruit claim.
- [40] The need to maintain public confidence in the judicial system and administration of justice is the final consideration.³⁵ MCC was directed on four separate occasions prior to the April 2016 application to file statements of evidence. It elected not to file expert evidence to support the quantum meruit claim. It then brought an application in April 2016 seeking leave to rely upon expert evidence on the quantum meruit claim. It abandoned that application. Now, some two months before the hearing, MCC seeks leave to rely upon further expert evidence. Granting the application will necessarily involve the adjournment of the hearing. It is unlikely that a further hearing date before 2017 is unlikely.
- [41] MCC relies upon *Cement Australia Pty Ltd v Australian Competition and Consumer Commission*³⁶ and says that its failure to seek to adduce the expert evidence earlier arises out of a mistake as to the state of the evidence. The High Court in *Aon* referred to the consequences of a mistake by a party in the conduct of their claim. *Cement Australia* involved an appeal from a decision from the primary judge to allow a late amendment of the applicant's statement of claim resulting in the adjournment of the trial. The amendment arose out of what was said to be an error of judgement by the ACCC in the way in which the claim had been pleaded.
- [42] The Full Court of the Federal Court observed in *Cement Australia* that the responsibility of how the ACCC's case was pleaded, having regard to the available evidence and the applicable law, ultimately belonged to counsel for the ACCC. The Full Court distinguished the explanation by counsel for the ACCC as to the error in the form of pleading from the situation in *Aon* where the delay in raising the late claim was a deliberate tactical decision.³⁷
- [43] *Cement Australia* does not assist MCC. In my view, the inescapable conclusion is that MCC made a tactical decision in April 2016 not to pursue expert evidence in relation to the quantum meruit claim. The solicitors reviewed the evidence before the April 2016 application. This review in fact prompted the application. MCC then abandoned the application. It is impossible to conclude that this was other than a conscious tactical decision.
- [44] The delay by MCC in bringing the application is significant. The matter has been listed for hearing and allowing the evidence will result in the trial being adjourned. There will be prejudice to the Greers if the application is

³⁵ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, at [182]

³⁶ [2010] FCAFC 101.

³⁷ Op cit 36 at [52]

allowed, both in costs and the financial and emotional strain of the litigation as a result of the further delay in the final resolution of the matter. Adjourning the trial will inevitably result in wastage of tribunal resources and the use of additional resources occasioned by an additional conclave of the experts and further directions hearings. As I have indicated, I do not accept the explanation by MCC for the delay in bringing the present application. MCC may experience some additional burden in presenting its case however in not permitting the further expert evidence, it is essentially bound to the case it has run since February 2015. Finally, in my view the public confidence in the justice system would be undermined by allowing evidence at this late stage causing an adjournment of the hearing in circumstances where MCC seeks to resile from a deliberate tactical decision in relation to the evidence and the manner in which it conducted its claim.

[45] The application by MCC should be refused.

Orders

[46] I order that the application for miscellaneous matters filed 25 July 2016 is refused.

[47] I make the following directions:

1. The application is listed for an expert's conclave in Brisbane on 19 August 2016 at 9:30 am.
2. The member of the Tribunal convening the conclave shall have such powers, including making directions or other orders, as are required:
 - a. for the conduct of the conclave; and
 - b. for the conduct of the proceeding.
3. The parties must file in the Tribunal two (2) copies of:
 - a. the name, specialisation and contact details of the experts to participate in the Conclave; and
 - b. an agreed list of issues to be considered by the experts at the Conclave; and
 - c. a list of documents provided to their experts by:

4:00pm on 15 August 2016.

4. 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 16 August 2016.

5. The Registrar must provide a copy of the experts' joint report to the parties within seven (7) days of receipt by the Tribunal.
6. 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.
7. Except with the Tribunal's leave, a party may not:
 - a. raise a matter not already mentioned in the joint report.
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8. The directions hearing on 17 August 2016 is vacated.
9. The matter is listed for a directions hearing in Brisbane on 7 September 2016 at 3:30 pm.
10. The hearing in Brisbane on 10, 11, 12, 13 and 14 October 2016 is confirmed.