

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Craig MacGregor Davies (t/a Trojan Tilers) v Austruct Pty Ltd* [2019] QCAT 266

PARTIES: **CRAIG MACGREGOR DAVIES (T/A TROJAN
TILERS**
(applicant)

v

AUSRUCT PTY LTD
(respondent)

APPLICATION NO BDL047-18

MATTER TYPE: Building Dispute

DELIVERED ON: 6 September 2019

HEARING DATE: 22 August 2019

HEARD AT: Brisbane

DECISION OF: Dr J R Forbes, Member

ORDER: **The Respondent Austruct Pty Ltd must pay to the Applicant Trojan Tilers the sum of \$17,388.25 within 21 days.**

CATCHWORDS: CONTRACT – BUILDING AND CONSTRUCTION
CONTRACT – MINOR CIVIL DISPUTE – minor
commercial building dispute – subcontract – where
subcontractor suing for moneys due – where opponent
counterclaiming for defective work – where opponent
seeks to tender evidence of more than one expert –
whether one expert rule applies – whether defects major
or minor – preferred expert advises minor – where offer
of subcontractor to remedy defects gratis not accepted –
whether compensation recoverable for defects

*Queensland Building and Construction Act 1991 (Qld) s
77*

*Queensland Civil and Administrative Tribunal Act 2009
(Qld) Schedule 3*

QCAT Practice Direction No 9 of 2009

*Uniform Civil Practice Rules 1999 (Qld) rules 367(3)(e),
423, 429H*

Ardlethan Options Ltd v Easdown (1915) 20 CLR 285

CH2M Hill Australia Pty Ltd v New South Wales [2012] NSWSC 808

D v S [2009] QSC 446

Iezzi Constructions Pty Ltd (in liq) v C & E Pty Ltd [2005] QSC 158

Jamif Pty Ltd v Grant Torrens International Marine Pty Ltd [2006] QSC 229

Simpson v Brett and Suncorp General Insurance Ltd (unreported, Qld SC Rockhampton, McMeekin J, 8 December 2008)

Stolfa v Owners of Strata Plan 4366 (No 2) [2008] NSWSC 531

APPEARANCES: Ms J MacGregor-Davis for the Applicant
Mr A Ward for the Respondent

REASONS FOR DECISION

- [1] In 2016-2017 a commercial-residential complex was being built beside the Story Bridge at Kangaroo Point Brisbane. On 21 December 2016 the Respondent Austruct Pty Ltd ('Austruct') engaged the Applicant Trojan Tilers ('Trojan') to install waterproofing and to lay tiles on its behalf.
- [2] Trojan now claims that it is still owed almost half its contract price¹, while Austruct alleges that Trojan's work is so seriously defective that it owes Austruct \$25,000.
- [3] On 13 June 2017, having fulfilled a precondition,² Trojan commenced these proceedings, claiming \$17,734.55 for the balance of its agreed price. The calculation of that amount is not in dispute.
- [4] Two months later Austruct responded with a counterclaim for \$25,000³, alleging defective work, and claiming cleaning costs, payment for goods supplied and variations allegedly not approved. If upheld, Austruct's action would, of course, conveniently extinguish its obligation to pay Trojan about 45% of the contract price and leave Austruct \$7,000-odd in credit. Accordingly, relying upon a set-off, Austruct contends that it is entitled to reject Trojan's claim.

Trojan's quest for payment

- [5] The contract provided for periodic invoices and payments as sections of Trojan's job were completed. But Mrs MacGregor-Davis says that even before the 'balconies dispute' existed, Trojan had considerable difficulty in obtaining regular and timely payment from Austruct. She particularises this grievance as follows⁴ in a list not disputed:

(a) A deposit of \$5000 was never paid. (Austruct says that it was not a term of the agreement.)

¹ \$32,734.55/

² *Queensland Building and Construction Act 1991* (Qld) s 77(2).

³ \$25,000 is the monetary limit of the Tribunal's jurisdiction: QCAT Act Schedule 3: 'prescribed amount' defined.

⁴ Operations and Compliance Manager of Trojan, affidavit sworn on 24 April 2019, paragraphs 13 to 46.

- (b) However, when Trojan, on 24 and 30 December 2016 sought payment of the deposit, Austruct replied that it would be lodged 'overnight'. It was not.
- (c) Messages sent by Trojan to Austruct on 27 and 28 December 2016 were not answered.
- (d) Austruct secured a pause by asking for copies of invoices and bank account details, which Trojan supplied.
- (e) On 27 and 30 January, and 2, 3 and 6 February 2017 Trojan sent messages to Austruct requesting payment of outstanding invoices. Austruct did not respond.
- (f) On 6 February 2017 Mr Ward of Austruct denied that he was 'hanging up' on Mrs MacGregor-Davis' phone calls and sent her a text message stating that he was 'trying to call [her] back'. He did not do so.
- (g) On 8 February 2017 Mr Ward emailed Trojan to say that 'he [would] have more funds soon as he [was] trying hard to chase up a payment claim' made upon an unnamed third party.
- (h) On 9 February 2017 Trojan enquired 'what was going on as no money had been received'.
- (i) On 10 February 2017 Trojan informed Austruct that Trojan would 'escalate' its complaints by reporting them to the Queensland Building and Construction Commission (QBCC). Austruct replied that it expecting payments from its debtors and would soon be transferring money to Trojan.
- (j) On 11 February 2017 Austruct ordered Trojan to fit wall skirting and to complete waterproofing and tiling. Trojan declined to perform any further work until it received a 'significant amount of remittance'
- (k) On 14 February 2017 Trojan informed Austruct that it had received 'nothing but broken payment arrangements' and once again sought a meaningful discussion. Austruct's Mr Ward replied that he was in a meeting but would call back when it concluded. He did not do so.
- (l) On the next day Trojan asked why the promised return call did not occur. Mr Ward replied that he 'was having some phone issues'.⁵ However, on 17 February 2017, when he and Trojan had several discussions about a replacement subcontractor, 'Mr Ward appeared to have no phone issues on this day.'
- (m) By 17 February 2017 Trojan was in serious financial difficulties. Ward stated that 'he would authorise a payment of \$2,500 ... into our personal account'. One week later Ward promised that 'money would be forthcoming next Wednesday the 1st of March'.
- (n) Messages from Trojan to Austruct on 20 and 21 March and 10 May 2017 received no response.

⁵ Presumably this was a claim that Austruct's phones were out of order. 'Issue' is currently a vague and much abused term, not restricted to points of disagreement, but variously used to indicate illness, mechanical faults, and all manner of difficulties.

Tiling work – repairs or total demolition and replacement?

- [6] By far the largest item in Austruct’s list of claims is an amount of \$26,391, allegedly required to re-do, totally, Trojan’s tiling on two balconies. It is common ground that, in some places, the tiles, as laid by Trojan, do not allow a complete runoff of water, so that ‘pooling’ occurs from time to time.
- [7] Trojan’s case is that this problem can be satisfactorily and less expensively resolved by lifting tiles where ‘dips’ occur, augmenting the bedding and relaying the tiles involved. But Austruct, for its part, insists that complete retiling of the affected areas is necessary.
- [8] Expert evidence in support of Trojan’s view is given by Mark Peter Kennedy, a registered builder and a member of the Queensland Building and Construction Commission for some 25 years. According to Mr Kennedy ‘total removal of the tiled area is not called for’, and he describes a procedure for eliminating ‘pooling.’⁶ He favours a modest, relatively inexpensive and non-destructive solution to what is scarcely a major building problem.
- [9] However, Austruct insists that occasional puddles on the outdoor patios can only be avoided by complete demolition and replacement, at an estimated cost in excess of \$25,000. For that proposition Austruct relies on no fewer than three experts, namely Garry Carpenter (Datum Building Consultancy)⁷, Robin Spencer Architects Pty Ltd⁸, and Christopher Felix Boyle.⁹ Mr Boyle’s report appears almost as an afterthought, fourteen months after that of Datum, nearly one year after Robin Spencer’s, and about four weeks before the hearing.

The One expert rule

- [10] At the hearing, Mr Ward stated that, at an interlocutory stage, the Tribunal had told him that the Boyle report might (or would) not be admitted in evidence. The reasons for that warning appear below. However, I received that report provisionally, so as to have an opportunity to consider whether to allow it as a matter of discretion.
- [11] After such consideration I have decided that the Boyle report should not be admitted, and I rule accordingly. This decision rests upon a relatively recent and important reform of civil procedure, commonly referred to as the ‘one expert rule’. The *Uniform Civil Procedure Rules 1999* (Qld) (‘the UCPR’) provide:

The main purposes of this part¹⁰ are to ... ensure that, if practicable, and without compromising the interests of justice, expert evidence is given on an issue by a single expert agreed by the parties or appointed by the court; and ... to avoid unnecessary costs associated with the parties retaining different experts...¹¹

- [12] Elsewhere the UCPR state:

⁶ Affidavit and Report of M P Kennedy for Brisbane Pre-Purchase Inspections, filed herein on 29 July 2018 page 10 recommendation number 1.

⁷ Report of Garry Carpenter (Datum) dated 14 May 2018.

⁸ ‘Defects List’ prepared by Robin Spencer Architects Pty Ltd 30 August 2018.

⁹ The Boyle report was filed herein on 12 July 2019. 6

¹⁰ Part 5 - Expert evidence.

¹¹ UCPR rule 423. See also rule 429H.

The court may make an order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules ... [T]he court may at any time ... limit the number of witnesses (including expert witnesses) a party may call on a particular issue ...¹²

[13] The UCPR apply in this Tribunal.¹³

[14] The 'one expert' rule serves several worthy purposes: (a) it avoids the delay, expense, complexity and possible oppression of an opponent by a party calling a multiplicity of experts; (b) it dispels of the popular misconception that the party with the most experts will prevail; and (c) it discourages 'expert shopping', whereby a party dissatisfied with an initial opinion, looks about for someone else who, it may even be hinted, will better support his case

[15] The rule is no longer a novelty; 'timely' reminders of it, and strict applications were issued by the Supreme Court over ten years ago,¹⁴ and the file in this case shows that Austruct has had the benefit of professional advice. The rule may be relaxed in 'exceptional' circumstances, but it should not be thought that the mantra 'the interests of justice' is a ready escape from the rule itself. In *CH2M Hill Australia Pty Ltd v New South Wales*¹⁵ McDougall J observed:

The purpose of [the one expert rule] would be subverted if the court were simply to regard, as exceptional circumstances, the fact that a party did not appreciate that particular evidence was expert evidence. That would mean that parties who were ignorant or inattentive would gain a procedural advantage, possibly of a very significant nature, denied to parties who were careful ... I do not think that anything in the Rules, or for that matter in the 'just, quick and cheap' objective ... requires such a conclusion.

[16] I see no sufficiently 'exceptional' or compelling circumstances in this case. When the Boyle report was filed, Austruct had already filed (already contrary to the rule) two expert opinions on the 'repair or replace' issue. The Boyle report is not admitted in evidence.

Rival reports compared.

[17] For Austruct, the Datum report deals with several matters which could not conceivably be seen as Trojan's responsibility. For example, there is extensive criticism of the roof construction, unfavourable comment on fire protection installation, and disapproval of 'PVC pipework to the roof water plumbing on the existing Night Owl building'.

[18] However, Datum's 'Balcony Repair Costs' are predicated on 'removal of all tiles and bedding'¹⁶ without any justification of that radical conclusion, or discussion or criticism of the more conservative view of Mr Kennedy. The repairs, as Datum

¹² UCPR rule 367(3)(e).

¹³ QCAT Practice Direction No 4 of 2009. Paragraph 2: 'A party ... may call only one expert for each area of expertise.'

¹⁴ *Jamif Pty Ltd v Grant Torrens International Marine Pty Ltd* [2006] QSC 229 at [21]; *Iezzi Constructions Pty Ltd (in liq) v C & E Pty Ltd* [2005] QSC 158 at [12]; *D v S* [2009] QSC 446. The rule was strictly applied in *Stolfa v Owners of Strata Plan 4366 (No 2)* [2008] NSWSC 531 and *Simpson v Brett and Suncorp General Insurance Ltd* (unreported, Qld SC Rockhampton, McMeekin J, 8 December 2008).

¹⁵ [2012] NSWSC 808 at [16].

¹⁶ Annexure 'K' to Datum Report.

suggests with surprising precision, would cost \$26,391. That is an estimate only; the balconies remain as Trojan left them.¹⁷

- [19] Also for Austruct, there remains the brief Robin Spencer report. It was originally obtained by the head contractor, but in effect Austruct adopted it as its own. It may remain upon the record, as one not averse to the interests of Trojan. It contains two relevant comments: (a) 'builder to take up tiles re level and relay to correct faults'; and (b) 'replace tiles holding water'. Each comment is reconcilable with the Kennedy view. Spencer's comment '(b)' specifies the 'tiles *holding water*', not the tiles in general.
- [20] The qualifications and experience of Trojan's expert, Kennedy, are impressive, and relying on his report, coupled with Robin Spencer's brief but cautious comment, I find it more probable than not that the tiling problem could be dealt with quite adequately in the manner that Kennedy recommends. According to Kennedy most water on the balconies drains satisfactorily, indicating that the 'fall' towards the outlets is generally adequate.
- [21] I note that on 6 June 2017 Ward told Trojan: 'We suggest holding off on purchasing [a] large qty of tiles at this stage until a suitable method is agreed upon to rectify these works.'¹⁸ Evidently, at that stage, neither the Datum nor the Robin Spencer report was interpreted by Ward as inevitably calling for wholesale revision of the work. The Kennedy solution was still on the cards. It was only after Boyle report that the much more expensive method was unequivocally adopted by Austruct.

Mitigation

- [22] A party claiming redress is expected to take all reasonable steps to minimise loss or damage, a duty to the opponent.¹⁹ It is simply a matter of fairness and reasonableness towards the opponent. In late January 2017 Trojan corrected some silicone defects without charge.²⁰ On 20 April 2017 Trojan made this open offer:

In the event that our independent building inspector finds defective workmanship to be below Australian standards, we are more than happy to address ALL work of scope that DOES NOT meet QBCC Standards at no additional cost to Austruct.²¹

- [23] However, Austruct has not seen fit to allow Trojan back.²² The letter just quoted is cordial, and there appears to be no such mutual animus that compromise and reconciliation are impractical. It is Austruct's choice to reject practical compensation in kind and without charge, but in those circumstances it is not appropriate recover a substantial sum that they may or may not ever spend on the balconies, or which simply serves to absolve them from paying Trojan more than one half of the contract price. There will be no award for demolition and wholesale replacement of the balcony tiles.

Resolution

¹⁷ Affidavit of Craig MacGregor-Davis sworn 24 April 2019 paragraphs 22(b), 43.

¹⁸ Email Ward to Jennifer MacGregor-Davis 6 June 2017.

¹⁹ *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285.

²⁰ Affidavit of Craig MacGregor-Davis sworn 24 April 2019 paragraph 4(d).

²¹ Email Trojan to Austruct 20 April 2017 emphases in the original.

²² Affidavit of Craig MacGregor-Davis sworn 24 April 2019 paragraph 14(a).

- [24] Austruct claims \$2,160 for employing third parties to apply silicone to skirting tiles and splashbacks. This claim is not specifically contested by Trojan, and it is admitted that Trojan ceased work for a period as a protest against delayed payments.²³ This claim is allowed.
- [25] Further, Austruct claims \$1,288.03 for materials supplied to Trojan. Trojan contends, and I accept, that these goods were ordered before Trojan's arrival by the subcontractor who resigned.²⁴ It is unclear whether they were invoiced to the latter, or (as seems more likely) to Austruct. In any event, insofar as they were used by Trojan, the benefit accrued to Austruct. This claim is disallowed.
- [26] Austruct also claims \$400 for part of the cost of cleaning cement splatters and builder's debris. This appears to be a reasonable charge, and it is allowed.
- [27] For reasons set out above, Austruct's claim of \$26,391 for demolishing and replacing balcony tiles is disallowed.
- [28] It follows that Austruct is entitled to set off against the balance of Trojan's remuneration an amount of \$2,560, leaving in Trojan's favour a balance of \$15,174.55.
- [29] Trojan has applied for interest and costs. Interest is allowed in accordance with the relevant Practice Direction²⁵ at \$1,896 with costs of \$315.70.
- [30] In the overall result Austruct owes Trojan \$17,388.25. There will be judgment for that amount.

Order

- [31] The Respondent Austruct Pty Ltd must pay to the Applicant Trojan Tilers the sum of \$17,388.25 within 21 days.

²³ Affidavit of Jennifer MacGregor-Davis sworn 24 April 2019 paragraph 26.

²⁴ Affidavit of Craig MacGregor-Davis sworn 24 April 2019 paragraph 34.

²⁵ QCAT Practice Direction 9 of 2013.