

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BS7746 of 2006

THE CORPORATION OF THE TRUSTEES  
OF THE ORDER OF THE SISTERS OF  
MERCY IN QUEENSLAND

First Applicant

MATER MISERICORDIAE HEALTH  
SERVICES BRISBANE LIMITED  
ACN 096 708 922

Second Applicant

AND

BAULDERSTONE HORNIBROOK PTY LTD  
ACN 002 625 130

First Respondent

A.W. BAULDERSTONE HOLDINGS  
PTY LTD  
ACN 007 520 381

Second Respondent

PHILLIPS SMITH CONWELL ARCHITECTS  
PTY LTD  
ACN 009 866 862

Third Respondent

BRISBANE

..DATE 27/09/2006

ORDER

CATCHWORDS: Uniform Civil Procedure Rules r 429S - two experts appointed jointly in advance of litigation to give an opinion on issues likely to arise regarding apparently defective tiling - no direction at this stage (but liberty to apply for it) to require the appointees to identify and explain any disagreement with certain extant reports

HIS HONOUR: The parties are to be congratulated in being forerunners in invoking rule 429S of the Uniform Civil Procedure Rules.

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I have made an order in the following terms which for the most part is by their consent. It is unusual in appointing not a single expert but two gentlemen jointly. Agreement on their being selected has spared the Court from some trouble, such as pursuit of issues under sub-rule (4)(d). There is not any doubt in my opinion that the power to appoint "an expert" authorises the appointment of two to act jointly. No doubt their report will make it clear, should there be differences between them, what those are and the reasons.

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The purpose of the new rule is to enable anyone who apprehends there may be litigation to obtain an expert report at an early stage which may be useful in litigation should any happen.

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There has been a difficulty with tiling referred to in the order. A threat to safety may exist and rectification may become necessary. The only difference among the parties arises from the request of Ms Klease on behalf of her client, the third respondent architects, that an additional provision be included in the order requiring that the joint experts' report set out and explain the extent to which they disagree with the views, and perhaps findings, set out in the expert or similar reports, already extant, which are listed in the order.

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Ms Klease has not been able to point to anything in rule 429S which would authorise such a provision but I agree with her that compliance with rule 428 which is required by rule 429S(10) may well require the joint experts to deal with that specific task. The other parties are opposed to the additional provision. It may send the joint experts off on exercises that are not likely to be helpful such as verifying hearsay information that is included in the extant reports. A minor issue, perhaps a major one, may be the additional costs which would be incurred.

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The applicants have to bear the costs, at least in the first instance, under rule 429S(12). There does not seem to be any difficulty about ordering the third respondent to bear, in the first instance, any additional costs which the exercise they want carried out might generate.

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In the end, what I propose to do is acknowledge the third respondent's concern by reserving liberty to apply in the draft order provided by Mr Schulte with particular reference to the third respondent having it in respect of seeking

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"A direction that the experts set out and explain the extent to which they disagree with identified parts of the reports identified in 3(a) above."

Mr Duffy and Mr Schulte have persuaded me that it might be advisable to confine the extra task contemplated for the joint experts in that way. If the liberty to apply is available, then the Court can consider the matter and impose appropriate terms as to costs. The utility of having the joint experts' comments on expert views already obtained is easy to

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understand but I am not persuaded that there should be a blanket direction about it at this point.

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I order in terms of the initialled draft which provides as follows:

1. Mr Peter Hartog and Dr Ron Blackwell be appointed joint experts pursuant to rule 429S UCPR (the experts) to enquire into and report in writing (the report) to the Court and to the parties on the questions of:

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(a) the cause of the tiling defects on Stanley Street of the Childrens Hospital, in particular how and why the tiles have failed;

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(b) how those defects might be rectified to ensure that there are no further failures.

2. The parties are to agree within 21 days of this order on the instructions to be provided to the experts. The instructions are to include that any opinions expressed in the accompanying documentation are entirely non-binding on the experts.

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3. A brief to the experts be prepared by the applicants in consultation with the other parties and such brief shall include:

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(a) Previous Reports:

(i) Ardex facsimile report dated 9 March, 2004;

(ii) Investigation report John Parnell dated 30 September, 2004;

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(iii) S J King report dated 20 August, 2004;

(iv) S J King report dated 12 December, 2005;

(v) ETRS report dated 22 February, 2006; and

(vi)	Richard Bowman report.	
(b)	Contract Documentation:	1
(i)	Architect's contract dated 1 December, 1997;	
(ii)	Deed of variation, undated;	
(iii)	Building contract, undated, consisting of:	10
	1. Formal Instrument of Agreement;	
	2. General Conditions of Contract;	
	3. Formal Undertaking;	
	4. Parent Guarantee and Indemnity;	
	5. Form of Undertaking;	20
	6. Key Personnel;	
	7. Site Management Plan;	
	8. Site Plan;	
	9. Apprentice Training Requirements;	
	10. Quality Assurance Requirements;	30
	11. Delay Costs;	
	12. Record of Payment Form;	
	13. Statement of Contractor;	
	14. Statutory Declaration by Contractor;	
	15. Statutory Declaration by Subcontractor;	40
	16. Drawings;	
	17. Specification;	
	(iv) Specification 23 - ceramic tiling dated 1 June, 1999.	50
(c)	Photographs & Drawings.	
4.	Without limiting the enquiry to be conducted by the experts, the experts may consult with Mr Richard Bowman and/or Mr S J King in relation to their reports	

- identified in paragraph 3 above. Any costs of Mr Bowman and/or Mr King for conferring with the experts are to be costs of the experts in preparing the report and borne by the parties in accordance with paragraph 7 below. 1
5. All communications with the experts are to be in writing. Copies of all communications with the experts are to be provided to the other party contemporaneously (insofar as is reasonably practicable). 10
6. The experts may inspect, and the applicants will give, or will use their best endeavours to give, access to the expert to inspect the alleged defects. More than one inspection may be carried out as the experts consider required. Neither party, nor any person associated with either party (including their legal representatives) are to be present at any inspection by the experts without the consent in writing of the other party or the other party's legal representatives. 20 30
7. The costs of the experts in preparing the report be borne by the applicants in accordance with rule 429S(12) UCPR.
8. The experts are to provide the report to the Court and to the parties within 90 days of being provided with the brief referred to in paragraphs 2 and 3 above. 40
9. The report should have the above Court heading on the first page and the Registrar is directed to file the report in this application.
10. All parties are entitled to cross-examine the experts at trial. 50
11. Any proceedings issued by one or both of the applicants against any of the respondents be issued in this application.

12. The costs of and incidental to this application are to be the cost in any such proceedings. 1
13. The right of all parties, to apply under rule 429S(11) for other expert evidence to be led, be reserved.
14. Liberty to apply, and in particular to the third respondent for a direction that the experts set out and explain the extent to which they disagree with identified parts of any of the reports identified in 3(a) above. 10

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