

expert update

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A change of mind

Joseph Street Pty Ltd & Anor v Tan & Anor [2010] VSC586

These proceedings concerned the ability of a vendor to rescind a sale contract, which either party could do if subdivision of the property was not registered by December 2006. In September 2007, the Vendors sought to rescind the contract based on this clause. The Purchasers sought specific performance of the contract primarily on the basis that the Vendors had not used their 'best endeavours' to register the plan.

The Purchasers' case rested substantially on the evidence given by one of their experts, Mr T, a building surveyor. In his report dated March 2010, Mr T gave the opinion that:

...I believe that there is practically no reason why the subdivision application was not submitted to Council as early as 23 May 2006.

In his evidence, he opined that:

- At the time footings for each unit had been completed, well prior to lock up stage, it was possible to survey the property and prepare a plan of subdivision.
- He rejected the proposition that it was necessary to wait until shortly prior to lock up.
- He thought the registration of the plan of subdivision could have been achieved by August 2006.

During cross-examination, it emerged that Mr T had provided an earlier report to the Purchasers' solicitors, dated July 2009. In his July report, Mr T gave the opinion:

Lock up stage for the units was achieved by 20 August 2006 which is an appropriate time for the surveyor to submit a plan for certification. The plan was certified by Council on 2 November 2006 and lodged with the Titles Office on 8 January 2007 without a Statement of Compliance.

The timing of each of the preceding steps in this subdivision appears to be reasonable by comparison with statutory time constraints and industry reality.

Accordingly, contrary to the opinions in his report dated March 2010, Mr T's earlier report appeared to conclude that the appropriate time to lodge the plan for

“Of course an expert is entitled to change their opinion, provided they set out the reasoning and rationale behind the change”.



certification was at lock up stage and lodgement of the plan with the Titles Office in January 2007 was reasonable.

Mr T had not referenced these opinions or this earlier report in his report dated March 2010, nor was there an explanation as to why Mr T had changed his opinion in his later report.

When questioned by Justice Forrest during cross-examination, Mr T stated that he had reviewed his opinion in respect of the lock up stage based on verbal instructions from the Purchasers' solicitor.

Justice Forrest found Mr T's evidence to be "inherently unreliable" on the basis that Mr T had compromised his independence by altering a significant part of his report based on the verbal discussions with the solicitor for the Purchasers.

Forrest J stated:

Expert witnesses have an overriding obligation to the court, as made clear in the Rules and Code of Conduct. If an expert changes his mind as to a relevant part of his or her opinion, then the basis for that change must be stated. This is all the more important where that alteration of opinion is brought about by a discussion with the representative of the party by whom he has been engaged. It is fundamental, I think, that in such a situation, every piece of correspondence or discussion should be set out so as to demonstrate that there is a proper basis for the change of opinion rather than simply a partisan approach.

This is a point of substance, not nitpicking, as the question of whether the plan could be lodged with the Council in May or October is of importance. Ultimately I am forced to take an adverse view of the objectivity of Mr T and have, in the main, put his opinion on all issues to one side.

For reasons in part related to the unreliability of Mr T's evidence, the Court found the Purchasers had not established that the Vendors had not used their 'best endeavours' and accordingly, the notice of rescission was valid and the Purchasers had no entitlement to specific performance.



Significance

It is sometimes necessary for an expert to change an opinion, particularly in instances where new information becomes available, or circumstances lead the expert to conclude the initial opinion was in error¹.



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When changing an opinion, it is important to remember that an expert's obligation is to the Court, not the party by whom you have been engaged and there must be valid reasons for making such a change. As a result, where discussions with the engaging party have led to a change in opinion, it is necessary for experts to detail those discussions and how those discussions have resulted in the altered opinion. Failing to detail the basis for a change in opinion, especially in circumstances where that change is favourable to the engaging party, as detailed by Forrest J, can lead to the perception that an expert is acting as an advocate which can have adverse consequences to both the expert and the client's cause.

¹ For example, refer to the Federal Court Practice Direction – “Guidelines for Expert Witnesses”, at paragraph 2.8, regarding obligations concerning changing a previous opinion.

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