

# Reporting on Defective Building Work

Presented by Chris Short from

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# De-mystifying the role of the Expert Witness in Building Disputes

Presented by Tom Grace from



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*Tom is a former engineer who ran his own construction company for over 20 years, completing many projects in the residential, commercial and industrial sectors, before entering the legal profession. His wealth of practical business experience coupled with his knowledge of engineering and construction give him a significant advantage in dealing with disputes.*

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# Topics Covered

1. What is a building consultant and who can be one?
2. Instructions from the owner vs. a lawyer
3. Access to building sites
4. Everyday construction faults
5. Non-destructive inspection
6. Incomplete, defective and non-compliant work
7. Statutory warranties
8. The contract - obligations of the builder and the owner
9. Types of report
10. Who uses the report and what for
11. Where are you when it hits the fan?
12. The Courts in SA
13. Alternative Dispute Resolution
14. Court Rules and Practice Directions
15. Essential inclusions in the report
16. Your opinion

# What is a building consultant?

- Definition - Building Work Contractors Act
- Licensing
- What lawyers think of experts

# Who can be a building consultant?

## Qualifications

- are you qualified?

# Who can be a building consultant?

## Experience:

- what is your experience in the building industry?
- can you anticipate a construction problem?
- can you diagnose a building fault?



# Who can be a building consultant?

Limitations:

- being limited in your field of expertise

# Who can be a building consultant?

Can you do it?

- knowledge of codes
- accuracy of reporting



# Instructions from the owner?

- scope of instructions
- limitations imposed
- assumptions
- sticking to your knitting

# Instructions from a lawyer?

- scope of instructions
- limitations imposed
- assumptions
- sticking to your knitting



**“I know nothing about the subject,  
but I’m happy to give you my expert opinion.”**

# Instructions

Does it matter?

# Building Work in Progress

Getting access to site:

- is it agreed by the Builder?
- is it denied by the Builder?
- negotiated access
- court ordered access

What if you just do it?

Now let's...  
Spot the Problem?



































**SUPPORT  
& HOLD DOWN  
HERE**

Mitek

Mitek



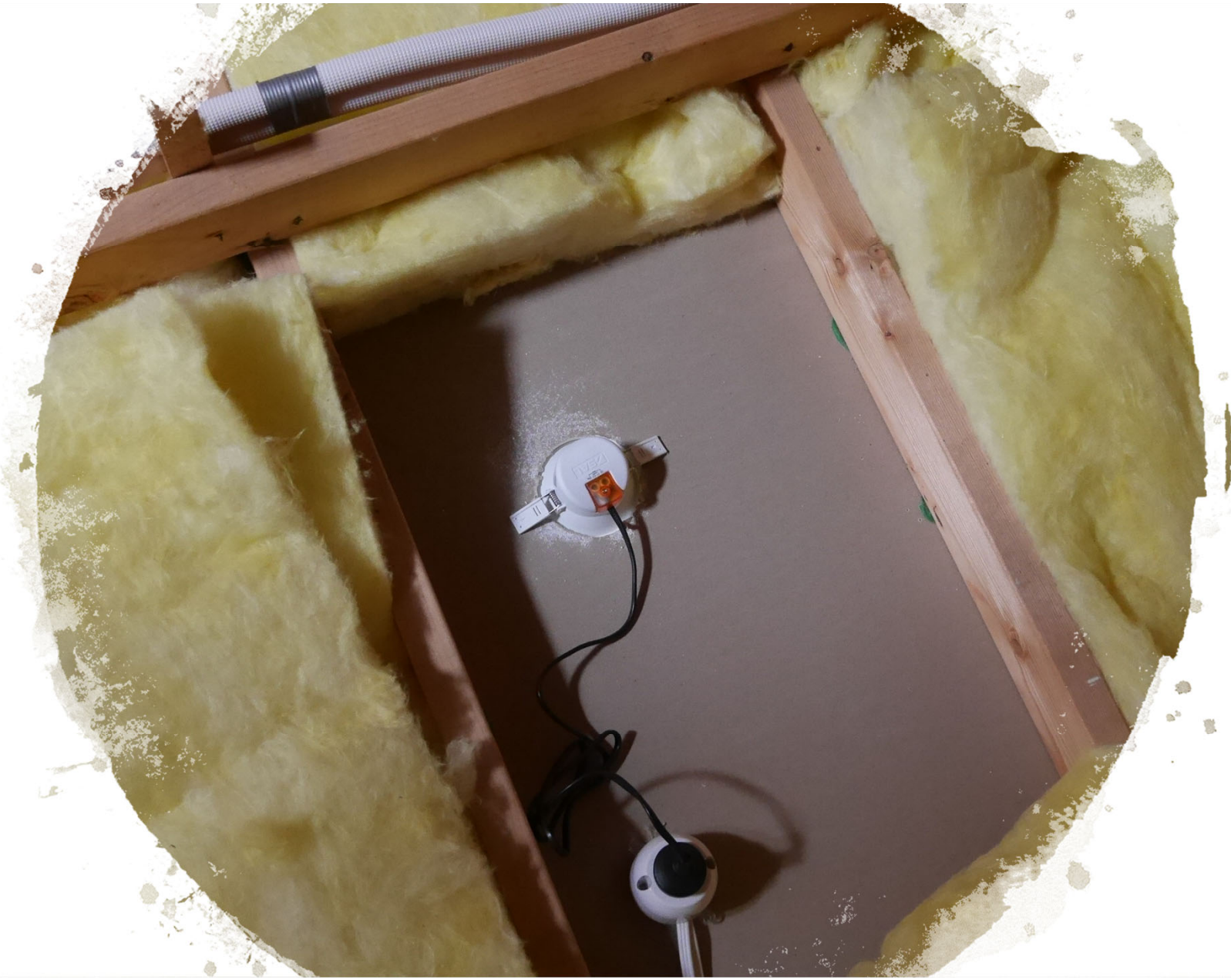




















# After the Event

- Incomplete work
- Defective work
- Non-compliant work



# Building Work Contractors Act

Statutory warranties:

- the Builder's responsibilities



# The Contract

## Contract Terms:

- The Builder's responsibilities
- The Owner's responsibilities

# Types of Report

- Construction report
- Report for legal purposes

The essential differences

# Use of the Report

- Owner negotiates with the builder
- Lawyer's tool to force the builder to act
- Consumer Business Services tool to force the builder to act

# When it hits the fan

## Going Legal:

- every word in print...
- staying calm
- being an expert witness
- not personal standards

# When it hits the fan

Accuracy of content:

- How accurate?
- Reference to Building Rules and Australian Standards
- Using other consultants as a resource

# When it hits the fan

Your legal liabilities

# The Courts

## Magistrates Court

- No representation up to \$12,000

The court building expert



# The Courts

## District Court and Supreme Courts

- unlimited jurisdiction

All claims under the BWCA must be commenced in the Magistrates Court

# The Courts

Your duty as a witness:

- Despite who pays you
- Not being a barracker

# Giving evidence in court

- Almost always what you saw or heard
- Exception is that an expert can give an opinion
- Only an expert who has qualifications and expertise in the relevant field
- Detail is important

# Current situation in SA

- Several of the experts who frequently give evidence are at or close to retirement age
- They can pick and choose their cases
- They are paid as well as lawyers
- There is an opening for new blood
- Needs ability and application



# Report

You may have to give the opposing party:

- All of the documents you were given
- All of the notes you made
- Any draft reports
- Any emails from the lawyers or client

# Rules to be met before expert evidence is admitted into Court

1. Is the opinion relevant? (relevance rule)
2. Does the expert have 'specialised knowledge'? (the expertise rule)
3. Is the opinion based on specialised knowledge? (the expertise basis rule)

(cont.)

(...continued)

4. Is the opinion based on assumed or observed facts that will be proved at trial, (the factual basis rule). In particular:
  - a) Are the 'facts' and 'assumptions' on which the expert's opinion is founded disclosed  
(the assumption identification rule)
  - b) Is there evidence to prove the assumptions  
(the proof of assumptions rule)
  - c) Is there a statement of reasoning showing how the 'facts' and 'assumptions' relate to the opinion

# Case Histories

## Dura v Hue

- Dispute over apartments – contract terminated – defective work and incomplete work
- Various expert reports ruled inadmissible
- Instructive as to what not to do
- NSW case but common law position and rules are virtually identical in SA



# Mr M's Evidence

- Plasterboard walls - rework of the builder's defective work by the new builder
- Mr M was asked by the old builder to look at the rework to give evidence that it was no better
- Mr M compared it to the "VCAT Guide to Standards and Tolerances"
- Mr M said it was not compliant work
- The VCAT Guide is irrelevant in Court
- Mr M's evidence was useless

# Mr B's Evidence

- Said to be a programming expert – time delay claim
- Written report failed to include statements showing his specialised knowledge – oral evidence allowed
- 30 years experience – building consultant, courts, arbitrations, residential and commercial disputes.

# Mr B (cont.)

- Prepared reports on rectification of defects
- Bachelor of Building Melb Uni 1977
- Studied programming in final year – Gantt charts
- Given programming evidence on 6 occasions over last 15 years
- Used MS Project – mainly residential

## Mr B (cont.)

*“ultimately his evidence was an exercise in putting through the mouth of an apparent expert the inferences and hypotheses on which Dura advanced its position.*

*Experts who permit a commitment to the cause of their instructing party to overshadow their commitment to the [rules] do not ultimately serve that party’s cause”*



# Mr L's Reports

- 5 reports in all on defects
- 2, and 3 were photos only – admitted as evidence but not expert evidence
- 4 and 5 were of the rework – irrelevant
- 1st report – in response to a notice to show cause why contract should not be terminated.

# Mr L's First Report

- Mr L said the contract did not specify a tolerance or standard (assumption)
- Did not disclose what papers he had – not clear he had seen the contract/speci
- Assumption was incorrect – under cross examination admitted he did not have the contract, drawings etc.

# Mr S's report

- Quantity surveyor brought in to estimate value of work at contract termination by sacked builder.
- Assumed work was all ok when he made estimate.
- Assumption was not made out. Client (solicitor?) failed to make clear to Mr S that the work had been found defective by others

# Mr V's report

- Quantity surveyor - provided with an estimate from another party as to the value of some mechanical and electrical work.
- Relied on that other estimate
- Failed to prove it was accurate at trial
- Assumption not correct
- Irrelevant anyway as no qm claim allowed



# Mr F's report

- Given version M of the drawings and used them for his report – version P was the contract version
- Did not receive copies of all other expert's reports
- Asserted that work was within normal tolerances but did not refer to specific provisions in the contract/specification to support this claim

# Alstom Case

- Mr H: sent an email saying “I am on the legal team (part-time) for the Playford wrap-up.”
- “he considered himself to be part of the legal team but “in a very junior role ... to continue advising on data that we had collected and presenting it”. He assented to the proposition that he saw himself as part of the legal team, or a member of a legal team, or part of a legal team and that his role was to assist them in their endeavours to secure a win “[i]f the facts supported that”.
- Others helped him write his report and were not called to give evidence

# Miscellaneous thoughts

- Don't rely on others for evidence – take your own measurements and photos
- State assumptions clearly
- Don't give estimates of legal costs
- Don't compare work to irrelevant codes
- Ensure that you keep records of all documents that are sent to you
- Write in plain English and be concise

# Cross examination

- Can be the expert's nightmare scenario
- Only answer the question asked and then stop talking
- Never use unnecessary adjectives
- Ask for questions to be repeated if flustered
- Remain calm – never raise your voice

# ADR – what does it mean?

- Arbitration - outcome enforceable as a judgement of the court
- Dispute Reference - outcome enforceable as a judgement of the court

# ADR – what does it mean? (cont.)

## Conciliation:

- banging heads together
- high success rate

## Mediation:

- assisting parties to reach an outcome

# Court Rules

- What rules?
- Practice Direction

# Your Report

## Essential inclusions

- Who are the parties?
- Reference to your instructions  
What docs have you been provided with?
- What docs have you relied on?



# Your Report

## Essential inclusions

- Disclaimers
- Reference to Codes
- Your CV
- Statements - Court Rules, Practice Directions



# Your Report

## Language:

- not subjective (e.g. very, worst)
- keep it simple
- educating the reader
- explanatory notes, using brackets



# Your Report – finally

YOUR BL\*!?!\*  
OPINION !!!

Aahhh -  
Everyone's  
got one...



# Questions



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