

Remedial Works Settlements - Cautionary Tales

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This article discusses potential pitfalls of settling matters on the basis of a scope of remedial works to be supervised by an expert.

Introduction

It is tempting, at mediations or compulsory conferences, to entertain offers by builders to remedy allegedly defective works. If the owner has not completely lost faith, it may seem a good solution for all parties. No more legal costs and all made good.

In litigation, there is a need to formalise such arrangements which is typically done with terms of settlement and scope of works documents. These may be combined in some cases but I will address each separately.

I have been appointed as the independent expert to superintend remedial works set out in such settlements on several occasions and have encountered common problematic issues. Some of these experiences may be helpful for those considering such a process.

Typically, the independent expert in such cases is not involved in the settlement arrangements. He starts with a deed and scope of works and the task of getting the work done. The deed and scope may be composed by lawyers under time pressure in a negotiating environment that limits their technical input.

Technical Content

Construction works are traditionally defined by specifications and drawings and controlled by contracts. The need for these is obvious and would not be questioned by any reasonable person embarking on a building project. A remedial works project may be more complex and the works more demanding to define than fresh construction works. However, in these matters the scope of works documents are often not supported by drawings or specifications. It is left to the independent expert to define or detail the works. Some works may be obscure until other works are advanced such as demolition or excavation. Thus, there is a works definition and specification process to unfold which may occur in multiple stages.



Specifying remedial works can be complex

It is likely that the parties will have something to say about these undefined works and the expert may have to exercise discretion in giving them consideration without over-democratising the process.

The Personalities

In the cases in which I have been involved the personalities have been challenging. Typically there is an owner who is insistent that he is entitled to perfection and a builder who is determined to cut every possible corner. The matter started as a dispute so it should



Reliance on goodwill can be over optimistic

not be a surprise to the expert that he cannot rely upon much goodwill. The parties are generally not to be relied upon and it is not helpful to have them involved in decisions however good-natured they may seem.

It is often said that a successful mediation is one in which all parties are similarly dissatisfied. The same principle applies in these cases. The best outcome is that the owner is delivered a project with which he is not happy and the builder feels prevailed upon. From the independent expert's perspective this means he will be working with unhappy people, perhaps for many months.

Settlement Terms

The settlement terms may be completed without the input, or even the knowledge, of the independent expert. In one case, my services were incorporated in settlement terms without my being asked. This places one in a potentially difficult position. My suggestion to an expert in this position is to read the terms very carefully and set out in writing exactly what you will do and not do and have it agreed by the parties retaining you before you commence. If you were not a party to the terms, you are not bound by them and you may have to correct any unreasonable obligations or expectations. It is also important to have indemnity if possible as the potential for retribution is high. A good set of settlement terms will indemnify the expert and any other experts he needs to get involved to assist.

Practical Implications

This may be a long and arduous process with a large number of inspections. Incessant emails and 'phone calls are likely and may be difficult to control.

Suggestions for Experts

Be wary of involvement in such matters. Do not get drawn into acting as the project manager. Try and get works documented in as much detail as possible as early as you can. Don't be afraid to call for drawings and the inputs of others. Try to maintain as much control as possible. Be prepared for months of angst.

Suggestions for Lawyers

Always cash out if you can. If you must settle on a scope of works basis get as much expert input into the scope as you can. Try and provide the parties and the expert/s as much practical ongoing support you can. Your clients may want to stop spending money on you but they may still need you. Be prepared to entertain re-negotiating during the project if it is not going to plan. Consider a review clause, partway through the process.