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## Judge calls out Corrs Chambers’ ‘combative’ conduct in building defects suit



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A judge has called out the “combative correspondence” between solicitors at Corrs Chambers and another law firm in a construction defects suit.

New South Wales Supreme Court Justice James Stevenson rejected an application by defendant FKP Constructions, represented by Corrs, for the costs of preparing

correspondence and an affidavit in a dispute with the plaintiff owners corporation over documents said to be required to complete expert evidence.

The judge said he could “see no justification” for the order, which “might be seen to encourage” parties to engage in a similarly contentious course of correspondence.

“Faced with instructions from their experts that further documents were needed to finalise their reports, rather than explain in detail to the Owners Corporation what such documents were and why they were needed, the defendant’s solicitor engaged in the combative correspondence I have set out,” the judge said.

“And then, faced with the equally combative correspondence from the Owners Corporation’s solicitors, rather than adopt the appropriate course of seeking pre-evidence disclosure and showing, by evidence, the existence of exceptional circumstances for the purposes of Practice Note SC Eq 11, the defendants’ solicitors served the notice to produce, the effect of which was to cause further intemperate correspondence to be exchanged.”

The owners corporation of a residential development in Woolloomooloo is suing FKP Constructions alleging substantial defects in the building.

The impugned correspondence kicked off in August, when the owners corporation failed to respond to FKP’s request for documents recording maintenance work carried out by the owners corporation for the last 10 years, including third-party works said to be necessary for the completion of expert reports by FKP, which the owners corporation declined as “a veiled attempt of discovery”.

FKP subsequently threatened to file a notice to produce and seek indemnity costs.

In his decision, the judge noted that while FKP’s letter stated that its expert evidence could not be completed without the requested documents, “other than at a high level of generality, no explanation was given as to why that was so”.

Addressing FKP’s filing of a notice to produce the documents, the judge said taking the step was “not appropriate” in the circumstances.

“In circumstances where a party’s expert states that he or she requires documents within the other party’s possession in order to complete his or her reports, the appropriate course is for the first party to explain to the other why such documents are needed by the expert and, absent agreement, to file a motion seeking disclosure before evidence and explaining why there are “exceptional circumstances” of the kind to which Practice Note SC Eq 11 speaks,” he said.

The judge noted that FKP's "extremely broad" notice to produce sought documents including any document recording various kinds of works carried out on the building since September 2014

After the owners corporation complained that the notice to produce was "broad and oppressive", a solicitor for FKP made an affidavit setting out why the documents were needed by their experts, which the judge noted was the first time the information had been communicated to the owners corporation.

Subsequent consent orders were made requiring the plaintiff to produce certain of the documents, with FKP seeking an order that the owners corporation pay the costs of preparing various solicitors letters and the affidavit, which the judge roundly rejected.

"What the circumstances do show is how unhelpful and productive of unnecessary legal costs it is for the solicitors experienced in the manner in which this List works, and who should understand what expectation the Court has concerning resolution of disputes in this List, to engage in heated correspondence, rather than calmly considering and discussing an orderly resolution of the issue at hand," the judge said.

The case is *The Owners – Strata Plan No 89791 v FKP Constructions Pty Ltd*.

The owners corporation is represented by David Weinberger, instructed by Construction Legal. FKP Constructions is represented by Brett Le Plastrier, instructed by Corrs Chambers Westgarth.