CONFIDENTIAL AND WITHOUT PREDUDICE

*** (The builder) was asked to quote for the refurbishment and extension to an existing Commercial building, including an attached managers dwelling. The property is owned by *** (clients company) as trustee for (The client's Superannuation Fund). The director is *** (clients name). The building is a ***(shop) situated in a strip shopping centre on the main road in ***(suburb) with a laneway at the rear to service the attached shops. Parking is also available in front of the shop. The building has a Thai restaurant abutting one side and an accountancy practice on the other.

*** (The builder) is director of ***(company name) , a registered builder of 30 years and a member of the Master Builder's Association of Victoria.

Prior to preparation of the quotation *** (the builder) contacted the *** (council's name) being the relevant Council, and was advised that the proposed works were Commercial and that a Commercial builder was required.

The quotation dated 13 June 2003, and the revised quotation of 4 July 2003 stated that if Domestic Registration was required this would be by negotiation. This was stated very clearly as the client at this time had not submitted to the builder the Building Permit and so the classification had not been determined by *** (the client's) surveyor . Also if Domestic Insurance was deemed a requirement by the Surveyor then this would in fact be a variation due to the extra cost of the insurance and possible extra time needed to obtain. (Insurance is a cost that is not necessary if you are not conducting works within that classification. i.e. Commercial or Domestic. Eg. Domestic Builders would not need to pay for Commercial Insurance.)
The works had been priced in accordance with the advice by the ***(Council's name)

*** (The builder) contacted the Council in about June 2003. The Building Surveyor was aware of the property, as a planning permit had been issued. His comment was along the lines that it was a managers flat attached to the existing Commercial Practice in a Commercial group of shops and that it had to be constructed by a Commercially Registered builder.

The method of construction was Commercial with the use of lightweight factory construction panels and internal partition walls (which could be removed without touching the structure.) It has a standard Commercial roof structure.

The Client in conjunction with his Architect appointed his Building Surveyor some time prior to 20 March 2003. His building Surveyor through his Architect requested from ***(the builder) a copy of their insurance, a requirement for the issue of the permit. This was provided on the 16 July 2003. About the 4 July 2003 a copy of the contract was provided to *** (the client). This was signed on 28 July. The building permit was issued on 1 September 2003. The Client took possession on 23 February 2004.

*** (The client's) Building Surveyor deemed that Domestic Warranty Insurance was **not applicable** as stated in capitals on the building permit. The Surveyor deemed the works Class 6 and Class 4.
The Building Code of Australia Publication is in two volumes:
Commercial Buildings - being Class 2 to 9
Residential Buildings - being Class 1 and 10

*** (name) at the Building Commission (9285 ****) described a Class 4 Building as being apperturtant to Class 6 with Class 4 being such as a Caretakers residence and **does not** require **D**omestic **W**arranty **I**nsurance **(DWI)**
In addition, his opinion was that the contract was not issued under the Major Domestic Contracts Act. The work was done under a Commercial Contract and DWI is not required under a Commercial Contract. His comment was "A Contract is a Contract is a Contract".

The Builder relies on the Building Surveyor who has tremendous power. *** (The client) had appointed their own Building Surveyor prior to their tender request to *** (the Builder). The Building Commission has stated to us that the Building Surveyor is the "Gate Keeper" of our industry.
They have also confirmed that a Commercial Builder is to be engaged to perform the work of Class 6 and Class 4.

On 1 June 2004, ***(the client) served a notice of demand on our company,
Their demand was to complete the construction when there was in fact $120,000 still outstanding, and in addition they were claiming $30,000 damages for lack of Domestic Warranty Insurance. There was less than $10,000 of minor completion works still to done.

***(The builder) initiated an on site meeting with *** (The client), their Legal representative and their building consultant ***(Name) in order to attempt to resolve the situation. A list of the items outstanding was agreed, and that ***(the builder) was upon the payment of $30,000.00 plus GST to commence the completion items. On the issue of the Occupancy Permit a further $30,000.00 plus GST was to be paid. In fact *** (the builder) only received the 1st $30,000.00 with the comment that *** (the client) had forgotten to add the GST. The disputed variations at the time would then be negotiated through, after works had been completed and paid for. The non payment of the second payment or GST from the 1st payment in accordance with our agreement then caused works to be suspended

We were unsuccessful in trying to have the dispute heard with the Justice Department as *** (the client) refused to attend and they continued proceedings to VCAT. We have made offers of compromise in order to obtain resolution. The project was all but complete save for minor items as the client was withholding $90,000. All items would have been promptly completed if the client had agreed to pay in accordance with the agreement and had not sued our company. It is indeed an insult that the Judge referred to these incomplete items as defects as they certainly were nothing more than incomplete items because of the huge amount of monies *** (the client) was withholding from the claims.

Given that all our attempts to resolve the dispute were ignored, ***(the client) left us with no option but to attend as the respondents in VCAT along with his Building Surveyor with whom he latter reached an agreement. (unknown)
We were notified about the 10 July 2005 that the case would commence on Monday 31st July, 2005. On Friday 27th July at 4.00pm we received a telephone call from our Solicitor stating that the Judge (approximately 75 years of age) was taking 3 months holidays and our case would not proceed at as planned.
The case was eventually heard in October 2005 and after 12 days in court the Judge deemed that the contract would be voided due to lack of DWI (there was Commercial Insurance) and that he was not satisfied that the builder had undertaken sufficient enquiry with respect to the nature of the works.

Hence, the $90,000 outstanding on the contract was deemed not owing to the builder. ***(The builder) was ordered to pay the client $25,500 for what the Judge decided was overpayment. The fact that there would be no contract in place many of the variations were deemed not acceptable even though they had been signed and or paid for during the course of construction. To add insult to injury Judge **** deemed that we pay *** (the client) $4,000 in interest. ***(The client) was also granted their costs. (We estimate that these would have to be in excess of $200,000) The Judge determined that the lack of DWI was only worth **$8,000.**
The Judge took 12 months to bring down his decision, and failed to notify us of the date he was doing so. Hence, we found out after the event.

To simplify, the end contract was $383,561. ***(The client) had paid $264,395 before taking legal action. Then an additional $30,000 in the agreement, thus the amount outstanding at the start of the hearing was $89,167.
The Judge determined that we pay $25,500 back to *** (the client) plus $4,000 interest.
And ordered to pay their costs (estimated to be in excess $200,000).
***(The client) and his girlfriend had been living and working in the building for more than 3 years (the “Managers Flat” upstairs has been subsequently sold for $600,000 and this when they claimed it could not be sold due to lack of DWI). We had to remortgage our home to ensure that the tradesmen and suppliers were paid.

As a result of this action by *** (The client) we have spent more than $300,000 in Legal Costs and this is climbing.

And in the event that the clients Building Surveyor and the relevant Council Authority and indeed the Building Commission of Victoria all confirmed that DWI was not required, surely the builder must rely on the advice from their expertise**. If** all three professional advisors were incorrect than surely there is a case that exceptional circumstances exist. Why should the builder suffer such exceptional hardship which may very well see the demise of his business when he was only complying with the directions and requirements of the managers (“Gate Keepers”) of our industry?

Does not commonsense make good law?

This travesty of the previous four years has not only caused devastating financial hardship, but the stress has taken a serious toll on our health, and with the family life lost with our children.

After 30 years in the Building Industry to have a decision of this one man which is so extreme and solely based on the Builders Warranty Insurance regime, one cannot help but question what personal bias he has against builders or is it just simply ignorance to the very basic facts.

***(The client) refused the Department of Justice, 2 offers of Compromise and used the $120,000 owed to us for the works to crush us. What sort of precedence does it set when clients can successfully manipulate the legal system for such extraordinary monetary gains?

The ramifications of voiding a legally binding contract signed by two companies for ultimately what the Judge valued as a loss of $8,000 for the lack of DWI is nothing less than illogical and a shameful emasculation of the court's duty to be fair. Evidently Law and Justice are not always the same.