



SUMMARY

Case: Bacic & Anor v Tulip Holdings Ltd (in liq) & Ors

File No: TRI 2008-100-000046/ DBH 00606

Court: WHT

Adjudicator: P McConnell

Date of Decision: 11 June 2009

Background

The claimants, Mr and Mrs Bacic, experienced problems with their new home from the day they moved in. Some remedial work has been carried out but the majority is yet to be done. The first, fifth and ninth respondents were removed during the proceedings and so the claimants sought \$275,523.25 from the following parties:

- Second respondent, North Shore City Council (Council): territorial authority
- Third respondent, Mr Fairgray: general manager of development company
- Fourth respondent: Mr Zgierski-Boreyko: issued Practical Completion Certificate
- Sixth respondent, Mr Lake: site manager
- Seventh respondent, North Harbour Roofing Limited: roof installer
- Eighth respondent: Mr Ford: director of the building company

Summary of Facts

- 1998: Melview Ponderosa Ltd owned the site and engaged architects to complete drawings and specifications for 3 blocks of units for building consent. After the construction of 2 blocks, Melview sold the development and the plans of the third block to Buildcorp Developments Ltd (Buildcorp), later known as Tulip Holdings Ltd
- 17 October 1999: the claimants bought the unit “off the plans” as it was yet to be constructed. They entered into an agreement to purchase the unit from Buildcorp subject to their solicitor’s approval. The agreement provided that settlement would be completed upon the issuing of title and on “practical completion”. It also stated that the vendor would use its best endeavours to provide a Code Compliance Certificate (CCC) on the settlement date. However the absence of a CCC would not entitle the purchasers to delay the settlement date and/or claim compensation
- September 2000: Buildcorp engaged Mr Zgierski-Boreyko to inspect and write a letter of practical completion for the complex. Buildcorp’s lawyers assured him that even though he was not involved in the design or construction of the units, this was not out of the ordinary. Mr Zgierski-Boreyko issued a Practical Completion Certificate in October 2000 confirming that an inspection of the complex was undertaken, the units achieved practical completion and that the units were built in accordance with the plans and specifications
- About 18 October 2000: the Council undertook a final inspection, which failed. Some of the issues pointed out by that final inspection were resolved by 30 January 2001. The claimants were later advised by Buildcorp that the issue of the CCC was imminent and that there were only minor issues to be resolved
- 6 November 2000: the purchase of the unit was settled and the claimants moved into the unit after their solicitor advised that the terms of the agreement were met

- The claimants experienced problems from the day they moved in. They contacted Buildcorp regarding the problems and defects. Buildcorp dealt with some of the issues but advised that others were more of maintenance, which the claimants would need to address themselves. Buildcorp also advised that the outstanding issues were minor and that they and the Council were working to resolve them
- The claimants had significant difficulty getting detailed information from the Council regarding their file and the issuing of the CCC. On at least 2 occasions the Council had given them the wrong file. The first time they saw the Council memorandum was when they received the WHRS assessor's report in January 2004
- September 2002: during a Body Corporate meeting, other unit holders expressed concerns about cracks they noticed in their units. The subsequent lack of a cohesive approach to resolving the problems on the part of all the unit holders meant that some owners began to undertake further investigations and carry out their own repairs on a unit by unit basis. The Body Corporate therefore passed a resolution that owners would be responsible for completing and paying for any remedial work that directly benefited their unit
- 6 January 2003: the claimants lodged an application with WHRS and the assessor's report concluded that the dwelling was a leaky home
- March 2004: the Council issued a notice to rectify the building work
- June 2005: the Council requested access to the unit so that Prendos could carry out an invasive report - a copy of which was sent to the claimants in October 2006
- The claimants attempted to get quotes and approval to carry out the remedial work. A proposal for targeted repairs was put before the Council but it advised that it would not issue a building consent for the proposed work
- Late 2007: the claimants applied for an addendum report. The claim is based on an estimate of repair costs

Claim

The claimants' sought the amount of \$275,523.25, calculated as follows:

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| • Costs incurred for inter-tenancy wall repairs (half-share) | \$ 13,330.00 |
| • Estimated remedial work | \$213,339.25 |
| • Consequential costs | \$ 12,184.00 |
| • General damages | \$ 50,000.00 |

There was some dispute relating to the \$17,437.50 for the deck reconstruction and its 10% contingency allowance of \$9,400. However the Tribunal was satisfied that the remedial work cannot be completed without reconstruction of the deck and so the \$17,300 estimate was established as part of the remedial work claim. The Tribunal also accepted that a contingency allowance of \$9,400 was reasonable

Professional Fees

The Tribunal concluded that \$182,643.75 for remedial work had been established

Consequential Losses

The Tribunal accepted that relocation expenses are reasonable and necessary given the extent of the repair work and the size of the dwelling. No one disputed the claim for consequential amounts and so the claim of \$12,184.00 was allowed

General damages

The Tribunal held that the claimants clearly established that they have suffered considerable stress and inconvenience, which will continue throughout the remedial work. The Tribunal stated that there was nothing about this claim to suggest that the

level of general damages should be lower than what has been awarded by the High Court to owner-occupiers of apartments in multi-unit complexes. The Tribunal therefore awarded general damages of \$20,000 to each of the claimants.

Summary of Decision

Liability of the Council - territorial authority

In regards to the building consent process, the Tribunal held that the Council had reasonable grounds upon which it could be satisfied that the provisions of the Building Code could be met if the building work was completed in accordance with the plans and specifications and technical literature. The Tribunal therefore concluded that the Council was not negligent at the building consent stage. However in relation to the inspection process, the Council was found jointly and severally liable for the full amount of the claim for it had not established a regime, nor did not follow any regime capable of identifying key waterproofing issues.

Liability of Mr Fairgray – General manager of Buildcorp (development company)

The claim against Mr Fairgray was dismissed, as there was insufficient evidence to establish that he had any direct responsibility or involvement in either the construction or its supervision. There was also no evidence directly linking any decisions he made to the defective workmanship, which have resulted in the dwelling leaking

Liability of Mr Zgierski-Boreyko – issuer of Practical Completion Certificate

The claim against Mr Zgierski-Boreyko was dismissed, as there was insufficient evidence that the claimants relied on the Practical Completion Certificate as a confirmation of the construction's quality or an assurance that the construction was defect-free. There was also no evidence that he was negligent in carrying out the inspection or that the claimants' loss was a result of any such negligence

Liability of Mr Lake – site manager

Unlike the project manager who was primarily responsible for contracting tradespeople and the sequencing of work, Mr Lake's responsibility as the site manager was more to ensure that the tradespeople came and did the work in accordance with the project plan as set out by the project managers. Moreover the Tribunal accepted that Mr Lake did not have the responsibility or the qualifications for ensuring that the work was completed in accordance with technical literature and the plans and specifications. Accordingly Mr Lake was not held responsible for the defects in relation to the deck and the more minor defects. However the situation is different for the windows that were installed in the west wall. Mr Lake knew where the windows were to be fitted and was involved in cutting the holes and installing the windows. He was also the only person who supervised that work on behalf of Buildcorp. The Tribunal therefore found that Mr Lake was negligent in assisting and/or supervising the installation of the windows in the west wall. The Tribunal assessed his liability at 33% of the total repair costs, excluding the reconstruction of the deck and the half share of the unit inter-tenancy wall. Mr Lake's joint and several liability therefore amounted to \$62,161.50

Liability of North Harbour Roofing Ltd – roof installer

The claim against North Harbour Roofing Ltd was dismissed, as there was no evidence that its building work was a current contributing factor to the dwelling leaking. At the very most the historic leaking from the repaired valley flashing may have contributed to the current damage. But the degree to which it has contributed to the damage is not sufficient to be regarded as a substantial and material cause.

Liability of Mr Ford – director of AJ Ford Developments Ltd (building company)

The claim against Mr Ford was dismissed, as there was insufficient evidence to conclude that he was personally liable as he neither undertook the defective construction work nor supervised it. Although there was clear evidence that some of the work carried out by AJ Ford Developments Ltd contributed to the dwelling leaking, Mr Ford did not, in his personal or individual capacity, enter into a contract to carry out the building work; nor did he carry out the construction work.

Contributory Negligence

The argument that the claimants were contributory negligent failed, as the Tribunal held that they took reasonable steps in entering into the agreement for sale and purchase, dealing with delays in the building contract, and in settling the purchase.

Failure to Mitigate

There was no reduction to the amounts established as the Tribunal held that the claimants had not failed to mitigate their loss because:

- There were significant delays in getting the remedial work done due to a lot of confusion about the work required and the claimants had growing concerns about the escalating costs faced by others in the complex undertaking repairs
- There was little evidence suggesting that the costs have increased since 2005 as a result of the claimants deferring remedial work
- Lack of maintenance was not a relevant issue as the claimants have been meticulous in their maintenance work

Result

The Council and Mr Lake breached the duty of care they each owed to the claimants and as a result the Council was found liable for the full amount of \$234,827.75 while Mr Lake was found liable for \$64,720.24.

Although each of these respondents are joint tortfeasors, Mr Lake only has responsibility in relation to one area of damage. In relation to that one area, the Tribunal attributed 80% responsibility to Mr Lake and 20% to the Council. The Tribunal therefore ordered:

- The Council to pay the claimants \$234,827.75 and is entitled to recover a contribution of up to \$49,729.20 from Mr Lake for any amount paid in excess of \$183,098.55
- Mr Lake is ordered to pay the claimants \$62,161.50 and is entitled to recover a contribution of up to \$12,423.30 from the Council for any amount paid in excess of \$49,729.20

Therefore if these two respondents meet their obligations under this determination this will result in the following payments being made by the respondents to the claimants:

- Council \$183,098.55
- Mr Lake \$49,729.20

The claims against Mr Fairgray, Mr Zgierski-Boreyko, North Harbour Roofing Limited and Mr Ford are dismissed