



SUMMARY

Case: Finlay & Anor v Baker & Ors – PROCEDURAL ORDER NO. 4

File No: TRI 2009-101-000014/ DBH 04646

Court: WHT

Adjudicator: R Pitchforth

Date of Decision: 3 September 2009

Background

This Procedural Order deals with the removals and joinders of certain parties. In particular, the Tribunal deals with issues surrounding a claimant claiming for the leaks against one of the subcontractors (a labour-only builder). The claimant however is a builder and he and his company managed the construction the dwelling.

Removals

Mr Sizemore

Mr Sizemore applied for removal upon grounds set out in previous procedural orders. As there was no further opposition to his removal, the Tribunal accordingly removed Mr Sizemore from these proceedings.

Mr Baker

Mr Baker applied to be removed from these proceedings.

- 1991 claimants purchased the property upon which units A and B were built
- 1994 property transferred to Mrs Finlay
- 18 April 1997 property transferred to Lajak Holdings Ltd, for which the claimants are the shareholders and directors. Mr Finlay was a builder as was Lajak
- March-May 1998 Mr Finlay had plans and specifications prepared addressed to “Lajak Holdings and Mr and Mrs SH Hagan”
- 22 May-24 June 1998 A contract was consequently signed between ‘John Finlay Lajak Holdings’ and the Hagans
- 2 June 1998 Mr Finlay applied for building consent as the owner, contact person and builder. The consent was issued to Mr Finlay in those capacities Mr Finlay, as an employee of Lajak, was actively involved in the project and did not confine himself to acting as a director. He contracted with Mr Baker to provide carpenters labour-only, arranged and programmed other sub-trades, made decisions about changing materials specified, attended site meetings, altered the design of the parapet wall and behaved as if he were the builder.
- 24 July 1998 Lajak acknowledged Mr Baker’s price for a labour-only contract. Mr Baker issued his first invoice to Mr Finlay while subsequent invoices were to Lajak

- 11 December 1998 Unit A was completed and sold to the Hagans (the Hagans' weathertight claim against Lajak was settled on 25 February 2008)
- 1999 Mr Baker ceased work on unit B
- 21 August 2002 Lajak sold unit B to Mr and Mrs Finlay

The Tribunal found that Mr Baker could have owed the subsequent purchasers a duty of care. But the subsequent purchaser was Mr Finlay – the same person who was conducting the construction project and who had control over its management. Mr Finlay was in a unique position to inspect all aspects of the work and so if Mr Baker was negligent, Mr Finlay should have noticed and had the matter corrected.

The Tribunal also noted that there is a close association between the claimants and Lajak. In order for someone to be a subsequent purchaser to whom a duty is owed, there needs to be a break in the chain of ownership thereby indicating a clear distinction between a previous owner and a subsequent owner of the same dwelling. In this case, Finlays' ownership and Lajak's ownership is blurred thereby making it difficult to identify the claimants as subsequent owners of the dwelling requiring a subsequent duty of care.

Much of the damage seems attributable to Lajak, for instance, the departure from the plans, the substitution of proprietary systems and materials for the cladding and waterproof membranes and the management of the building project. Mr Finlay is possibly the least vulnerable person regarding this dwelling having personally supervised all aspects of its construction and then purchasing it from his company. The Tribunal therefore found that he is not an innocent purchaser as he had every opportunity to conduct an intermediate examination.

The Tribunal did not find that there was a duty of care or a potential liability in negligence in relation to the activities of Mr Baker. The Tribunal therefore concluded that it was fair and appropriate in all the circumstances for him to be removed

Mr Lamb

This application was deferred as it is dependent on Mr Baker's removal application

Joinder

Mr Donaldson

Mr Baker applied to join Mr Donaldson. Affidavit evidence was produced to show that Mr Donaldson was not involved in this building in a way that would make him liable to the owner. The application was declined without opposition

Tauranga City Council

This application was deferred pending the decision on Mr Baker's application for removal