



SUMMARY

Case: Johnston v Abide Homes Ltd

File No: TRI-2008-100-101/ DBH 5051

Court: WHT

Adjudicator: S Pezaro

Date of Decision: 11 August 2009

Background

After purchasing the house from the third respondents, Mr and Mrs Towne the claimants discovered that the external wall was rotten. The claimants filed an application with the WHRS and as a result further damage was detected further. The claimants repaired the house and claimed the cost of its repairs as well as interest and general damages against:

- First respondent Abide Homes Ltd: building company engaged by Townes
- Third respondents Mr and Mrs Towne: previous owners
- Fifth respondent Mr Grubner: engaged by Abide to do the building work
- Sixth respondent Mr Abbot: Abide's Building Contracts Manager
- Seventh respondent Mr Miller who worked for Mr Grubner
- Eighth respondent Mr Wratt: supplier and installer of the butynol products for the roof. Mr Wratt was not fit to attend the adjudication and could not afford legal representation

Quantum

Targeted repairs were carried out on the house in 3 stages amounting to the aggregate sum of \$133,368.93. The total claim was \$157,892.93. There was no challenge to the repair costs claimed other than questions raised by the Townes about the claim for their claimants' own labour, for certain repairs and betterment.

Labour charges

The claimants charged \$25 per hour for work and added it to the cost of repairs. That work included gardening work, preparing and packing and unpacking household items for storage, removing furnishings, wrapping and covering furniture left in place during the remedial work and reinstating handrails and cleaning decks. The Tribunal declined to award this claim for although this work was required, there was no basis for awarding these costs and such work is appropriately compensated by an award for general damages. The sum of \$125 was therefore deducted from the second repairs and \$1,875 from the third repairs.

Certain repairs

The Tribunal deducted \$283.50 from the claim for the third repairs as certain repairs were not costs arising from weathertightness defects.

Betterment

- (i) *Interior and Exterior Painting*

The Tribunal deducted the total cost of painting of \$5,318 from the claim in accepting that ten years is outside the limit for exterior paintwork and the majority of the repairs were carried out when the house was more than ten years old

(ii) Texture Coating

The Tribunal deducted two-thirds of the cost of the coating – ie \$466.67 from the first repairs, \$1,921.33 from the second repairs, and \$8,745 from the third repairs given that the texture coating should be expected to last 15 years and the age of the house

Interest

Interest was therefore calculated at the rate of 4.7% from 8 June 2009. But in considering the situation surrounding the claimants' reluctance to attend mediation the Tribunal awarded interest up to 16 February 2009 rather than up to the date of this determination as claimed by the claimants.

General Damages

The claimants claimed \$9,000 each for general damages. Given recent awards by the High Court the amount of damages claimed by the claimants was considered an appropriate level of award. The Tribunal therefore awarded the claimants \$9,000 each – a total of \$18,000 which was apportioned to each stage of the repairs.

Summary of Quantum

The Tribunal concluded that the claimants were entitled to claim from the respondents a total of \$136,046.25 being:

- Repairs \$114,554.36
- Interest \$ 3,491.89
- General damages \$ 18,000.00

Decision

Liability of Abide Homes Ltd – building company

As a builder, Abide owed a non-delegable duty of care to subsequent owners as it was responsible for engaging and co-ordinating all subtrades involved in the construction, for supplying the material and ensuring the standard of the work carried out by all trades. The Tribunal found that Abide was negligent in failing to ensure that the work was carried out to the required standards and was therefore held jointly and severally liable for the costs arising from the defects

Liability of Mr and Mrs Towne – previous owners

The claims against the Townes in both negligence and contract were dismissed:

(i) In Negligence – Townes as developers

The Tribunal held that the fact that the Townes subdivided sections and built houses for rental purposes, did not justify a finding that they assumed a role of a developer

(ii) In Contract – Alleged breach of vendor warranties

In terms of clause 6.2(5)(b) and (d) of the sale and purchase agreement, the Tribunal held that the Townes were entitled to think that once a code compliance certificate had been issued the works had been completed in accordance with the building consent. The Tribunal therefore held that there was no legal basis for holding the Townes liable for breaching the warranty when they did not exercise any control over the construction and had obtained the necessary Code Compliance Certificate.

Liability of Mr Grubner – builder engaged by Abide

The Tribunal found that Mr Grubner breached his non-delegable duty of care as a builder and was therefore jointly and severally liable for the defects that arose from his work. Mr Grubner was engaged by Abide as a builder who was competent to carry out the work for which he was contracted. He described himself as an experienced builder at that time and he therefore must have led Abide to believe that he had the necessary knowledge. If he did not have the required knowledge, he either should not have accepted the contract or should have ensured that he obtained the technical specifications required.

Liability of Mr Abbot – Abide’s Building Contracts Manager

As the contracts manager, the Tribunal found that Mr Abbot was responsible for supervising the quality and standard of the work carried out by the builders and other subtrades onsite, for setting the order in which the work was to be carried out and co-ordinating that work. As a result, Mr Abbot owed a non-delegable duty of care to subsequent owners and was therefore jointly and severally liable for the defects.

Liability of Mr Miller – builder

The Tribunal was not satisfied that there was any evidence that Mr Miller breached his duty of care in a manner that caused any of the relevant defects. The claim against Mr Miller was accordingly dismissed.

Apportionment of Liability

According to the findings of liability made above, the Tribunal held that Abide has the greatest responsibility for the manner and standard of construction and for ensuring that Mr Abbot, as its employee, performed his tasks to the required standard. Mr Grubner and Mr Wratt were engaged by Abide for their particular expertise and although Mr Abbot had to ensure that their work met the required standard it would be unreasonable to expect him to observe every aspect of their work. The Tribunal therefore apportioned responsibility to Abide at 70%, Mr Abbot at 15% to either Mr Grubner or Mr Wratt depending on the particular repairs at 15%.

Conclusion and Orders

In summary, if Abide, Mr Grubner and Mr Abbot meet their obligations under this determination, the following payments will be made by them to the claimants:

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| Abide Homes Limited | \$95,232.37 |
| Mr Grubner | \$14,923.24 |
| Mr Abbot | \$20,406.94 |
| Abide and Mr Abbot, jointly and severally | \$5,483.70 |