

WEATHERTIGHT HOMES TRIBUNAL

CLAIM NO: TRI-2009-101-15-18

BETWEEN **MAYFAIR STREET UNITS**
Claimant

AND **LYN & MERLYN SPARGO**
First Respondent

AND **NORFOLK HOMES LIMITED**
Second Respondent

AND **LINDSAY MACK**
Third Respondent

AND **GIANNE MARCHESAN**
Fourth Respondent

AND **ROSS BRYANT DESIGN NETWORK
LIMITED**
Fifth Respondent

AND **ROSS BRYANT**
Sixth Respondent

AND **BRYAN WAKELIN (REMOVED)**
Seventh Respondent

AND **BRUCE ARMSTRONG**
Eighth Respondent

AND **DAVID WASHER**
Ninth Respondent

PROCEDURAL ORDER NO. 2
Dated 11 June 2009

Conference

1. I convened a conference on this claim on 8 June 2009.

Those present were:

- Roger Pitchforth, Tribunal Member,
 - Rachael Cole, Case Manager,
 - Grant Brittain (representing the claimants),
 - Philip Gardyne (representing the first respondents),
 - Lindsay Mack (the third respondent & on behalf of the second respondent),
 - Rachel Moses (representing the fifth & sixth respondents),
 - Danny Jacobson (representing the seventh respondent),
 - David Washer (the ninth respondent of claim TRI-2009-101-000018 only)
2. A schedule showing the names and addresses of the parties and their counsel or representatives is attached.
3. Counsel are reminded that parties should attend preliminary conferences even though counsel have been instructed¹.

Removal of parties

4. Section 112 of the Act provides that the tribunal may order that a party be struck out of adjudication proceedings if it is fair and appropriate in all the circumstances. It is generally accepted that an application for removal or strike out should only be made as a preliminary issue where a claim is untenable in fact and law. An adjudicator should not attempt to resolve genuinely disputed issues of fact unless he or she has all the necessary material before him or her. Even then the jurisdiction to strike out should be exercised judiciously and sparingly because evidence is often disputed and requires testing and determination at hearing.
5. Where, however, a party is opposing an application for removal on the basis of disputed facts they must produce or point to some cogent evidence in support of

¹ Chair's Directions 3.3

their opposition. It is insufficient to say that there are disputed facts without providing some detail of what they are. In addition it is insufficient to say there could be disputed facts or to require the Tribunal to go on a fishing expedition to see if some conflicting evidence may arise in the course of adjudication.

Lynn Eval Spargo & Merlyn Ruth Spargo

6. Lynn Eval Spargo and Merlyn Ruth Spargo, the first respondents have applied to be removed from these proceedings.
7. The application was deferred with the consent of the parties.

Lindsay Andrew John Mack

8. Lindsay Andrew John Mack has applied for removal on the grounds that he was not a party to the construction contracts. Mr Mack says that Norfolk Homes Limited (Norfolk) organised labour, materials and subcontractors to build the apartments. Norfolk contracted with Mike Donnison, builder, on a labour only contract to build units 9,10,11 and 12.
9. Mr Brittain opposed the application pending more factual information.
10. The matter was deferred for further submissions and either the formulation of detailed allegations or an indication of evidence showing that Mr Mack may be liable.

Bryan Wakelin

11. Bryan Wakelin applies to be removed on the grounds that he was an employee of Bay Building Certifiers Limited (BBC) and independent building certifier. He was not a building certifier under the Act.
12. This situation is not uncommon in areas where the local authority delegated inspection work to contractors. Claims against local authorities relating to their duties under the Building Act 1991 in this situation are not usually successful leaving those who suffered a loss to pursue those involved in the building certifying process.
13. The claimants have therefore claimed against the employee of the certifying company alleging negligence.

14. The provisions of the Building Act 1991 with reference to the certification process were:-

56 Issue of building certificates

- (1) A building certificate issued by a building certifier under this section shall—
- (a) Be in writing; and
 - (b) Identify the specific item or items that are the subject of the certificate, being items not excluded by any limitation on the building certifier's approval; and
 - (c) Identify the specific provisions of the building code with respect to which those items are certified, being specific provisions in respect of which the building certifier is approved; and
 - (d) Be signed by the building certifier; and
 - (e) Be accompanied by any relevant project information memorandum.
- (2) A building certifier may issue a building certificate, in the prescribed form, pursuant to this section if the building certifier is satisfied on reasonable grounds that—
- (a) The proposed building work would comply with applicable provisions of the building code if the construction or alteration is properly completed in accordance with the plans and specifications; or
 - (b) The building work complied with the applicable provisions of the building code on the date of certification.
- (3) A building certifier may issue a code compliance certificate, in the prescribed form, pursuant to section [43](#) of this Act if the building certifier is satisfied on reasonable grounds that the building work complied with the provisions of the building code on the date of certification.
- [(3A) Subject to subsections [\(2\)](#) and [\(3\)](#) of this section, a building certifier may, at the building certifier's discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.]
- (4) Where a building certifier considers on reasonable grounds that particular building work does not comply with particular items of the building code, that certifier shall forthwith notify the territorial authority that a notice to rectify should be issued in respect of that building work.
- (5) A building certifier shall not issue a building certificate or a code compliance certificate unless a scheme of insurance approved by the Authority applies in respect of any insurable civil liability of the building certifier that might arise out of the issuing of the certification.

15. The provisions relating to Code Compliance Certificates were:-

43 Code compliance certificate

- (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
- (2) Where applicable, the owner shall include with that advice either—

(a) Any building certificates issued by building certifiers under section 56 of this Act to the effect that any items of the building work comply with specified provisions of the building code; or

(b) A code compliance certificate issued by a building certifier under this section and section 56(3) of this Act to the effect that all of the building work complies with each of the relevant provisions of the building code.

[(2A) omitted]

(3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that—

(a) The building work to which the certificate relates complies with the building code; or

(b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

[(3A) omitted]

(4) The provisions of this section shall be deemed to enable interim code compliance certificates to be issued, subject to specified conditions, in respect of any part of any building work for which a building consent had previously been issued, whether or not it was previously intended that different parts of that building work were to have been completed in stages, but those interim certificates shall be replaced by the issue of a single code compliance certificate for the whole of the building work at the time the work is completed, to the extent required by the building consent.

(5) Where a building certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.

(6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

(7) Where a territorial authority is notified by a building certifier pursuant to section 56(4) of this Act that the certifier considers that particular building work does not comply with the building code, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

[(8) Subject to subsection (3) of this section, a territorial authority may, at its discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.]

16. A building certifier was defined in s 2 as:-

Building certifier means a person approved as a building certifier by the Authority under Part 7 of this Act:

17. The local authority had power to appoint a building certifier under s 52 if the applicants met certain criteria including under s 52(6) (c):-

(c) That a scheme of insurance approved by the Authority will apply in respect of any insurable civil liability of the applicant that might arise out of the issuing by the applicant of a code compliance certificate under section 43 of this Act or a building certificate under section 56 of this Act.

18. If the statutory arrangement included liability of employees of certifiers, one would have expected the statute to provide for the insurance of employees as well.

19. Section 90 provided restrictions on the right to sue. It said :-

90 Civil proceedings against building certifiers

Civil proceedings against a building certifier in respect of the exercise by the building certifier of the building certifier's statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort and not in contract.

20. Responsibility in tort rests solely on the certifier. There is, in effect, a statutory bar to bringing a claim against a mere employee of a certifier.

21. In this situation the certifier appointed under the Building Act 1991 was Bay Building Certifiers Limited.

22. Bay Building Certifiers Limited issued consent for the construction of '4 visitor accommodation units' in May 2000. There has been no Code Compliance Certificate produced.

23. The claimant alleges that Mr Wakelin, as an employee of a certifier, carried out his duties negligently. If I am wrong and the statute does contemplate redress against an employee of a certifier I consider the matter of negligence.

24. Mr Wakelin's role as an employee was to undertake inspections as required by his employer as and when directed. He would be required to do an inspection an hour, including travelling time. He covered a wide area. He looked at matters which he was instructed to inspect. He was not acting as a clerk of works. He reported on each inspection. He was not necessarily the only person carrying out the inspections. All inspectors reported to the employing certifying company. The company issued any certificates.

25. Details of the alleged negligence are:-

- Mr Wakelin did not detect that the balustrades had been constructed with a flat top comprised of Harditex over timber framing with a top-fixed handrail which

did not comply with the manufacturer's specifications and was not in accordance with good trade practice of the day.

- That Mr Wakelin did not detect the same problem when carrying out the final building inspection which led to the interim code compliance certificate.

26. The claimant says that the balustrade does not comply with the Harditex parapet detail. The claimant also alleges that the penetration of the handrail has caused the water ingress into the timber framing and structural timber. The Harditex parapet detail does not provide instruction relating to the addition of a handrail.

27. There is no evidence or allegation that such a handrail was unusual at the time of construction. There is no evidence that an inspector would have been alerted to the potential for leaking at that time. (It is, of course, now well known.)

28. The certifier was responsible for ensuring that the building was completed as required. There is no evidence that Mr Wakelin was directed to confirm that the balustrade was properly constructed.

29. The claimant says that Mr Wakelin owed the claimant a duty of care as a person who originally committed a tort during the course of his employment. He is a joint tortfeasor with his employer. The claimant relies on the judgment of Venning J in *Body Corp 189855 v North Shore City Council* [2008] BCL 800, where the judge discusses the role of a director who is also an employee and shows that there is no reason why an employee director cannot be liable as well as the company.

30. There is no evidence to show that he was negligent and no duty of care imposed on an employee of a certifier in relation to this type of allegation.

31. I do not find that there is a sufficiently tenable case against Mr Wakelin for him to remain as a party. He is therefore removed.

David Washer

32. David Washer has applied for removal from these proceedings.

33. Mr Brittain said that he had further evidence that would be forwarded to the tribunal. The application was deferred for further submissions and the production of evidence showing that Mr Washer may be liable.

Joinder

Mike Donnison

34. The third respondent filed an application for joinder of Mike Donnison.

35. Mr Donnison's whereabouts is unknown. Mr Mack is to make further enquiry after discussion between the parties.

Timetabling

36. It was agreed by all parties that the current timetable would be cancelled and that all applications and further documents will be filed by 19 June 2009. All responses will be filed by 26 June 2009. All applications will be dealt with on 29 June 2009 at 11.30 am.

DATED the 11th day of June 2009.

Roger Pitchforth

Tribunal Member