



SUMMARY

Case: Mayfair Street Units v Spargo

File No: TRI 2009-101-000015 to 18/ DBH 05319, 05320, 05322 & 05326

Court: WHT

Adjudicator: C Ruthe

Date of Decision: 21 December 2009

Background

This claim relates to two consolidated claims whereby the respondents involved in both claims are identical. This decision thereby considered issues of liability and apportionment together. The first claim relates to Unit 11 owned by Mr and Mrs Franklin which was for \$255,049.09. The other claim relates to Unit 12 owned by Kereopa Whanau Trust. The settlement payments in both claims were made by the fifth and sixth and ninth respondents and therefore the remaining respondents include:

- First respondents: Mr and Mrs Spargos – alleged co-developers, directors of the development company and vendors of unit 11
- Second respondent: Norfolk Homes Ltd – contracted by Mayfair Court to build and supervise the development
- Third respondent: Mr Mack – director of Norfolk Homes and alleged project manager
- Fourth respondent: Mr Marchesan – plasterer and texture coating applicator, and managing director of Europlast Systems Ltd
- Tenth respondent: Mr Williams – pre-purchase inspector engaged by the House Inspection Company (BOP) Ltd (struck off), which was contracted by the Trust

Facts

- Prior to 1999: The Mayfair Street complex commenced its life as a commercial motel
- 15 September 1999: Riverside Holdings Ltd purchased the property of which the Spargos were directors. Riverside subsequently became Mayfair Court Ltd (struck off)
- 1 May 2000: the Spargos applied for subdivision for 13 freehold unit titles
- 12 May 2000: building consent was issued in the names of the Spargos
- 2002/2003: units 11 and 12 were completed
- 14 January 2004: the Franklins purchased unit 11
- 27 November 2003: the Trust purchased unit 12

Decision

Liability of the Spargos – as developers and vendors

The differentiation between the Spargos and Mayfair Court Ltd were so ill-defined and interwoven that it was impossible to conclude as to when their individual involvement ended. The Tribunal thereby found that the Spargos were personally involved as developers and so there was no need to deal with issues relating to their roles as directors. Neither Mr nor Mrs Spargo had any expertise in building and construction and so they relied on experts and proceeded with caution before deciding to contract with Norfolk Homes Ltd. The Spargos' involvement was also limited to only accepting

the designs, authorising the making of necessary applications and paying the invoices received. However by failing to set up the development company before construction began, the Spargos could not hide behind the company and so as developers they were held jointly and severally liable. As for the claim against them as vendors, the Franklins purchased the unit from the Spargo Trust whereby the Spargos and Mr Slavich were trustees. However as the Trust was not joined to the proceedings and the Spargos were not the vendors, the Spargos could not be liable for the breach of the vendor warranty.

Liability of Norfolk Homes Ltd – as head-contractor and project manager

Although Norfolk did not appear at the hearing the Tribunal held that it breached the obligations of a builder and therefore it was liable

Liability of Mr Mack – managing director of Norfolk and alleged project manager

The Tribunal found that Mr Mack's personal involvement was extensive and so he was personally liable as a company director who was very much in control of the whole project. There was no evidence to show that Mr Mack was employed by Norfolk Homes as project manager and therefore this part of the claim was dismissed.

Liability of Mr Marchesan – plasterer

Although Mr Marchesan did not participate in these proceedings, the Tribunal held that due to his direct involvement he breached his duty of care and was thereby liable

Liability of Mr Williams – pre-purchase inspector for unit 12 only

The Tribunal found that Mr Williams was not liable for the following reasons:

- The claim could only be pursued against the House Inspection Company rather than Mr Williams as the contract was with the company and not Mr Williams personally
- Mr Williams carried out moisture readings but did not write the pre-purchase report
- Mr Williams' response that he would buy the house could not reasonably be construed as a professional opinion upon which the claimant could place reliance.
- There were no particulars in the claim against Mr Williams under the Fair Trading Act and there was no evidence that his conduct was misleading or deceptive

Quantum

Remedial costs

These costs were not contested for both units and so these amounts were allowed

General damages

General damages can only be awarded to individuals who are owners and so the Franklins were awarded \$25,000 each but the Trust's claim was declined.

Betterment

The Tribunal held that there was an escalation in repair costs for both units and so betterment was adjusted to the sum of \$9,727 for unit 11 and \$12,000 for unit 12

Project management fees

The Tribunal held that the project management fees on a reclad were excessive for both units and so \$15,100 was allowed for unit 11 and \$22,700 was allowed for unit 12

Other amounts

For unit 11 there was no evidence to show why Sky or dog kennelling should be allowed and therefore these claims were deducted. For unit 12, there was no

evidence to show why furniture needed storing during a reclad and so only \$1,000 was allowed

Summary of quantum

The Franklins were entitled to claim \$210,500 whilst the Trust were entitled to \$213,200

Contribution

In accepting the assessor's analysis, the Tribunal made the following apportionments:

- The Spargos were jointly and severally liable for 100% of the claim
- Norfolk Homes was liable for 45% of the claim
- Mr Marchesan was liable for 55% of the claim

Result

Franklins' Claim

Based on the Tribunal's findings of liability, the following payments are to be made:

- The Spargos are to pay the Franklins \$210,500 and are entitled to recover a full contribution whereby they can recover up to \$94,725 from Norfolk Homes and Mr Mack, and up to \$115,775 from Mr Marchesan
- Norfolk Homes is to pay the Franklins \$210,500 and is entitled to recover a contribution of up to \$115,775 from Mr Marchesan
- Mr Mack is to pay the Franklins \$210,500 and is entitled to recover a contribution of up to \$94,725 from Norfolk Homes and Mr Mack
- Mr Marchesan is to pay the Franklins \$210,500 and is entitled to recover a contribution of up to \$94,725 from Norfolk Homes and Mr Mack

If each respondent meets their obligations the following payments will be made to the Franklins:

- Mr Mack \$94,725
- Mr Marchesan \$115,775

Trust's Claim

Based on the Tribunal's findings of liability, the following payments are to be made:

- The Spargos are to pay the Trust \$213,200 and are entitled to recover a full contribution whereby they can recover up to \$95,940 from Norfolk Homes, up to \$95,940 from Mr Mack, and up to \$117,260 from Mr Marchesan
- Norfolk Homes is to pay the Trust \$213,200 and is entitled to recover a contribution of up to \$95,940 from Mr Marchesan
- Mr Mack is to pay the Trust \$213,200 and is entitled to recover a contribution of up to \$117,260 from Mr Marchesan
- Mr Marchesan is to pay the Trust \$213,200 and is entitled to recover a contribution of up to \$95,940 from Norfolk Homes and Mr Mack
- The claims against Mr Williams were dismissed

If each respondent meets their obligations the following payments will be made to the Trust:

- Mr Mack \$95,940
- Mr Marchesan \$117,260