



CONSTRUCTION LAW UPDATE No. 805

The Dream Client

Introduction

In December 2007, Justice Sulan of the Supreme Court of South Australia handed down a decision in relation to a pre-purchase building inspection report. (*Brown v Dream Homes P/L* [2007] SASC 443). The Supreme Court heard an appeal against the decision of a Magistrate who found in favour of the owner but awarded nil damages. The Full Court has recently granted leave to appeal against the decision reported on in this update.

The history

Ms Brown entered into a contract to purchase a 40 year old home. During the cooling off period, she asked Mr Duckworth of Dream Homes to perform a pre-purchase inspection of the home. Within the cooling off period, Mr Duckworth provided an 8 page report with a final summary page.

The report specified that it had been carried out in accordance with AS4349.1, the relevant standard for the pre-purchase inspection of buildings.

On completion of the inspection, Mr Duckworth met Ms Brown and her partner at the home and handed over the inspection report. The final page listed 8 items that required urgent attention. They were:

1. *Remove rear garden bed & replace with path/pavers.*
2. *Get full white ant treatment done.*
3. *Refix front eave back into position.*
4. *Clean the gutters out.*
5. *Get Origin Energy to test for gas leaks.*
6. *Replace rear verandah gutter.*
7. *Service and adjust internal doors.*
8. *Fit approved type smoke detector.*

The last entry on the report under the heading 'General' reported "House is structurally sound".

Ms Brown and her partner discussed the last page of the report with Mr Duckworth and then advised the agent by telephone that she did not intend to cool off.

After moving into the home, Ms Brown found that the window locks were faulty, some of the windows jammed and there was cracking in a number of areas. She engaged a consultant, Mr Hignett, who concluded that the home was showing movement across the frontage, including wall cracks, cracking cornices, non-opening windows and that the cause was inadequate site drainage resulting in footing movement. He recommended replacement of the paving and installation of new windows.

Ms Brown sought legal advice. The lawyers obtained a further inspection report that was highly critical of the home and expressed the opinion that:

"[the home] needs lots of work. Prior to the work the causes of the severe cracking which has occurred requires to be assessed by a structural engineer and a rectification specification drawn up".

Ms Brown claimed that Mr Duckworth had said that the home was structurally sound, that the cracking was negligible to very slight, that there was evidence of minor movement and settlement which was normal and that there was no need for her to have an assessment by an engineer.

The proceedings commence

Proceedings were issued in the District Court. Ms Brown obtained a valuation report which said that the defects in the home devalued it by \$30,000 making it worth only \$195,000 rather than the \$225,000 it would be worth if it was free of the defects. In addition to the claim for the \$30,000, Ms Brown claimed a further \$27,000 for the costs incurred in purchasing and selling the home. Prior to trial, Ms Brown did sell the home, but when she sold it she obtained \$225,000 for it, forcing her to abandon the \$30,000 diminution claim. The

matter was transferred to the Magistrates Court because of the reduced quantum and some amendments were made to the claim at that time.

AS4349 requires an inspector to recommend to an owner to have a further inspection by a specialist inspector, such as an engineer, “if applicable”. In the amended claim, Ms Brown said that Mr Duckworth should have told her to obtain a report from an engineer on the structural stability of the home, and that if he had done so, she would have cooled off. She claimed that she was concerned to know of any defects in the home and that sign of movement was one such defect.

Under cross examination, Ms Brown conceded that she had only read the summary page of the report. Mr Duckworth led evidence from an engineer who expressed the opinion that the home was structurally sound. The Magistrates Court found that Mr Duckworth’s failure to recommend an inspection by an engineer was a breach of his duty and that he was liable to Ms Brown for that breach.

However, as the value of the home had increased during the time that Ms Brown owned it, the Magistrate held that she was entitled to nil damages, offsetting her claim for costs incurred of \$27,000 against the \$30,000 increase in value. Ms Brown appealed to the Supreme Court.

The appeal to the Supreme Court

The Court did not accept Ms Brown’s claim that she would not have bought the home if an engineering inspection had been recommended as she had not read the whole report.

The Court said a pre-purchase inspector is not obliged to recommend an engineer’s inspection unless it is appropriate to do so. As Mr Duckworth had led evidence at the trial from another engineer saying that the home was structurally sound, he was not liable for failing to recommend that an engineer check that the home was structurally sound. Mr Duckworth was not liable to Ms Brown.

Justice Sulan went on to consider the issue of quantum and said that it was not correct to reduce the damages claim by the increase in value of the home during the time that Ms Brown owned the home. He said that if Mr Duckworth had been liable, he would have awarded to Ms Brown the costs she incurred when she purchased the home of \$27,000 including costs such as costs to purchase, costs while occupying, costs to sell, costs of moving

to a new property and costs of the expert reports. However, because Justice Sulan considered that Mr Duckworth had not breached his duty, Ms Brown failed to recover these damages.

Conclusion

Building consultants need to be aware of the requirements of AS4349 and ensure that they comply with them, or deal with them in their contract. AS4349 is now the benchmark for the common law duty of care of inspectors. In this instance, the inclusion of a contractual obligation to comply with the requirements of AS4349 highlighted the potential requirement to recommend an engineering inspection.

It is very likely that the legal costs incurred by both parties in this dispute, which is now to proceed to another level of appeal, will dwarf the amount in dispute, suggesting that a commercial resolution at an early stage would have been in the interests of both parties.

Contributor: Tom Grace

Tom is a former engineer who ran his own construction company for 20 years before becoming a construction lawyer. He has wide experience in the engineering and construction law field and specialises in the resolution of commercial disputes.

Contact Details

Tom Grace – Partner
Direct: (08) 8110 8004
tom.grace@feg.com.au

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Fenwick Elliott Grace is a law firm that specialises in providing legal services to the construction and engineering industries.

Office: Level 10, Optus Centre
431 King William Street
ADELAIDE SA 5000

Ph: (08) 8110 8000
Fax: (08) 8231 2922
Web: feg.com.au

If you would like to receive our legal publications by email, please contact Amanda Atkins on (08) 8110 8000 or by email at amanda.atkins@feg.com.au.