



CONSTRUCTION LAW UPDATE No. 902

The Dream Appeal

Introduction

In Update 805 we reported on a Supreme Court of South Australia decision in relation to a pre-purchase building inspection report and noted that leave to appeal had been granted. See <http://www.feg.com.au/documents/Update805.pdf>. The Full Court recently handed down its decision on the appeal.

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.

Mr Duckworth's written report specified that it had been carried out in accordance with AS4349.1, the relevant standard for the pre-purchase inspection of buildings. There was no written contract between Mr Duckworth and Ms Brown.

On completion of the inspection, Mr Duckworth met Ms Brown and her partner at the home and handed over his report. It referred to a number of small cracks in the home but did not mention a significant (10mm) patched crack in the brickwork at the front of the home. It described the home as "structurally sound". Mr Duckworth said later that he did not mention the large crack because he thought it was related to a pergola and not caused by footing movement.

Ms Brown purchased the home. After moving in, she found doors and windows jammed and noticed the large crack. An architect, a consultant and an engineer all inspected the home and concluded that the jamming windows and doors were related to footing movement, as was the large crack.

The proceedings commence

Ms Brown claimed that she had paid \$30,000 too much for the home because of Dream's failure to point out the large crack. Before the

matter went to trial she sold the home. As she made a profit of \$30,000 on the sale, the claim for paying too much was abandoned. It later emerged that it was Mr Duckworth and a partner who purchased the home to redevelop the site.

Ms Brown continued with the claim on the basis that she had incurred transaction costs of \$27,000 when buying and selling the home.

The Magistrate found that a failure by Mr Duckworth to recommend an inspection by an engineer was a breach of his duty of care and that he was liable to Ms Brown for that breach. The Magistrate said that had the large crack been pointed out to Ms Brown, she would have cooled off rather than purchase the home.

However, as the value of the home had increased by more than the transaction costs during the time that Ms Brown owned it, the Magistrate held that she was entitled to nil damages. Ms Brown appealed to the Supreme Court.

The Judge in the Supreme Court reversed the finding of the Magistrate. He noted Ms Brown did not read the written report before deciding to buy the home and overturned the finding that she would not have bought the home if she had known about the crack.

He concluded Mr Duckworth was not liable for failing to recommend an engineer's inspection because the evidence established that the home *was* structurally sound. However, the Court noted that, if Mr Duckworth had been liable, it was not correct to offset the increase in value of the home against the transaction costs and he would have had to pay Ms Brown \$27,000.

Ms Brown appeals again

Ms Brown appealed to the Full Court. The three judges have now handed down a 2:1 decision on the matter, reflecting the fine balance of the legal position. However, the principles now delivered will likely set in stone

the framework for pre-purchase inspections in this State.

The Full Court has now reversed the decision of the Supreme Court, finding that Mr Duckworth breached his contract with Ms Brown by failing to report on the patched crack. Because he should have realised that the crack was caused by footing movement, he should not have given an unqualified opinion that the house was structurally sound. Justice Kourakis commented that the summary to the report should have suggested obtaining an engineer's report.

On the issue of damages for the breach, the Court said that while it was generally correct to offset the profit made against the transaction costs, if the profit was in fact a result of inflation in the value of property, then Ms Brown had not actually benefited. The Court accepted that Ms Brown's intention was to purchase a property to secure a foothold in the Adelaide market. If she had cooled off instead of purchasing the home, she could have bought another home without a large crack. She would have then enjoyed the same increase in value, but without the detriment of an undiscovered defect that affected the value and enjoyment of her purchase.

Ms Brown failed to originally plead or lead evidence as to the general increase in the value of property while she owned the home. She had applied to the Supreme Court to do so but the Judge did not allow the application. It is not uncommon for damages to be imprecisely pleaded.

The Court referred the matter back to the Supreme Court to give Ms Brown an opportunity to attempt to persuade the Court to receive further evidence of the general increase in the value of property during the period Ms Brown owned the home. The Court said that to the extent this prejudiced Dream Homes, it could be compensated by Ms Brown paying its wasted costs.

The Court's observations

The Full Court made some important observations about the duty of a pre-purchase inspector. The observations particularly apply where there is no written contract between the inspector and the potential purchaser. In this case, AS4349 will describe the duties of the inspector and is clearly the benchmark for the common law duty of care of inspectors.

The Court noted that the time constraints and/or cost constraints of a visual inspection

might not allow an inspector to reach a conclusive opinion about material defects. However, if that could not be done, the purchaser could reasonably expect to be so informed. Hence, Ms Brown had a reasonable expectation to be informed that there was a large crack and that Mr Duckworth was not sure what had caused it.

AS4349 contemplates that the inspector, when faced with such a dilemma, will recommend that expert advice be obtained. The standard says that the adequacy of house foundations and footings is outside of the expertise of an inspector and emphasises the need for an inspector to remain within his or her area of expertise.

Conclusion

Building consultants should ensure they enter into a written contract for each inspection in order to clarify their obligations. They should avoid descriptions such as "structurally sound" as they are not typically qualified to do so. The summary to a report should include a recommendation to obtain an engineer's report as to structural soundness.

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