

Court decides on liability

BY MITCHELL GRANT, HEANEY & CO

In some weathertightness claims, the council is often sued for failing to carry out its final inspection of building works properly. It is argued that the council should have seen various defects and done something about it.

So what of the liability of a pre-purchase inspector engaged by a prospective purchaser who may come several years after the final inspection by the council to inspect the property?

The recent high court appeal of *Mok & Ho v Bolderson & Ors* (High Court, Auckland, 17 March 2011, CIV-2010-404-007292) sheds light on what a pre-purchase inspector's liability might be in such a situation.

In this case, the developer bought the section in September 1996 and applied for a building consent from the council. The inspections were undertaken by Approved Building Certifiers Limited (ABC). The construction of the house occurred between October 1997 and May 1998. The code compliance certificate (CCC) was issued on 8 May 1998.

Just over a year later in July 1999 Mr B, on behalf of his company was engaged to prepare a pre-purchase inspection report for the claimants before they bought the house. Mr B was a qualified building surveyor who had 30 years building experience, had specialised in pre-purchase inspections for around 12 years and was a member of the Master Builders Association. Mr B carried out a visual inspection, prepared a handwritten report on site and provided it to the claimants after explaining its contents.

He was on site for three and a half hours and was paid \$200.

The owners proceeded to buy the house only to discover some years later that it was leaking.

The claimants brought claims against a number of parties in the Weathertight Homes Tribunal. The claims against Mr B were for engaging in misleading conduct

Adopting this test the High Court found that the report contained statements that were wrong or failed to provide advice of their full implications. The High Court noted that at the time the report was carried out Mr B would have had information available to him that when used to gauge the condition of the house should have led to the conclusion that it

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in breach of the Fair Trading Act 2006 (FTA) and in tort for negligent misstatement.

The claimants were unsuccessful in their claim against Mr B in the tribunal. The adjudicator found that the report met the required standard in the industry at the time, was produced with reasonable skill and care and was thus not misleading for the purposes of the FTA and similarly Mr B was not liable for making a negligent misstatement. The claimants appealed the decision to the High Court. The High Court disagreed with the decision of the tribunal.

It concluded that when assessing a claim under the FTA the test was not whether the inspector conformed to the common practices of a pre-purchase inspector at the time of the inspection. Rather it was an objective assessment of the reasonableness of the inspector's conduct, taking into account the availability of information to him or her.

contained defects (for example the Good Stucco Practice Guide).

It also concluded that Mr B had made negligent misstatements as to the condition of the house but it was unclear whether that conduct had caused the claimants' loss. For that reason this part of the claim was referred back to the tribunal.

Mr B was held liable for 25 per cent of the loss suffered. The court took some guidance from the approach taken by the courts to apportionment of responsibility to councils at 15 per cent and 20 per cent in the leaky building cases but added another 5 per cent to take into account the proximity (closeness of relationship) between Mr B and the purchasers.

The decision is of significant importance to pre-purchase inspectors. Their actions will now be the subject of careful scrutiny by the courts. They will not necessarily be able to avoid liability by saying that they "met the standards of the time".

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