BUILDERS' REGISTRATION ACT 1939 (WA)

BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA AND DANMAR HOMES PTY LTD [2010] WASAT 28

25 FEBRUARY 2010

DR B DE VILLIERS (MEMBER), MR D MOUCHEMORE (SESSIONAL MEMBER), MR R CAMPBELL (SESSIONAL MEMBER)

Disciplinary proceedings against builder for negligence who allegedly built houses without a building licence and without complying with approved plans - Responsibilities of a builder to apply for building licence and to build in accordance with approved plans - Do the same obligations rest on a subcontractor - Responsibilities of subcontractor - Test for subcontractor - Relationship between builder and subcontractor - Can the Tribunal rely on extrinsic information and evidence to determine the relationship between parties - Tribunal must take all information into account - Tribunal not limited to the terms of the written contract - Test of reasonability and the standard expected of a reasonable and competent builder - What would a fair-minded and reasonable builder do in the same circumstances - What would a fair-minded and reasonable subcontractor do in similar circumstances - Did the subcontractor fail to adhere to the reasonable standard

The Builders' Registration Board of Western Australia applied for disciplinary steps to be taken against the respondents on grounds that they had commenced with the building of dwellings in a retirement village without the necessary building licences and that they had deviated from the approved plans.

The Builders' Registration Board had a two-fold argument: firstly, it contended that Danmar Homes Pty Ltd was the builder of the works and in this capacity it had the responsibility to ensure that the necessary building licences were in place prior to the works being undertaken. Danmar Homes Pty Ltd further had to ensure that the works...
complied with the specifications of the approved plans. Secondly, the Builders' Registration Board contended that even if Danmar Homes Pty Ltd had been a subcontractor to the registered builder, (Kemmish Nominees Pty Ltd) as was contended by Danmar Homes Pty Ltd, it should nevertheless have sighted the building licenses and the approved plans and it should have ensured that all works took place in accordance with approved plans. The respondents were therefore negligent by not adhering to the standard of care that a reasonable and competent builder would have applied.

The respondents rejected the contention that they were negligent. Their reply to the allegations was twofold. Firstly, they said that Danmar Homes Pty Ltd was not the registered builder for the work but that Kemmish Nominees Pty Ltd was the registered builder. This perspective was confirmed by two directors of Kemmish Nominees Pty Ltd in evidence before the Tribunal. According to the directors, Danmar Homes Pty Ltd was a subcontractor to Kemmish Nominees Pty Ltd. Secondly, as a subcontractor to Kemmish Nominees Pty Ltd, Danmar Homes Pty Ltd was not required to apply for building licences. Kemmish Nominees Pty Ltd repeatedly assured Danmar Homes Pty Ltd that proper building licences had been issued. Furthermore, Danmar Homes Pty Ltd built in accordance with the working plans Kemmish Nominees Pty Ltd provided to it. There was no obligation on Danmar Homes Pty Ltd to sight the approved building plans. Danmar Homes Pty Ltd therefore complied with the standard that would be expected of a reasonable and competent subcontractor.

The Tribunal agreed in general with the Builders' Registration Board that a legal obligation exists for a subcontractor to take reasonable steps to ensure that building licences are current and that works take place in accordance with approved plans. The facts of each situation must be considered to determine if the legal standard has been met by the subcontractor.

The Tribunal dismissed the application for the following reasons: if all the evidence about the contract and arrangements between Danmar Homes Pty Ltd and Kemmish Nominees Pty Ltd and Moss Glades Pty Ltd were taken into account, it appears that Danmar Homes Pty Ltd was not the principal builder but a subcontractor for Kemmish Nominees Pty Ltd; Kemmish Nominees Pty Ltd had effective control over the building site, had applied for the building licences, liaised with the local authority about the licences and building plans, oversaw all the works on site, gave day to day directions to Danmar Homes Pty Ltd, ensured quality control of the works, had permanent presence and an office on the site and signed off on all the works completed by Danmar Homes Pty Ltd.

In so far as the duties of Danmar Homes Pty Ltd as a subcontractor were concerned, the Tribunal was satisfied that Danmar Homes Pty Ltd acted in a way that a reasonable and competent builder would have done and that it was not negligent by relying on the assurances given by the registered builder, Kemmish Nomines Pty Ltd. Danmar Homes Pty Ltd made repeated enquiries with Kemmish Nominees Pty Ltd about the building licences and received assurances that licences had been issued and that everything was under control; it took directions from Kemmish Nominees Pty Ltd; and it built in accordance with plans that, according to Kemmish Nominees Pty Ltd, had been approved; and it received repeated assurances from Kemmish Nominees Pty Ltd that issues with the local authority were being attended to.

The Tribunal concluded that the Builders' Registration Board failed to demonstrate that a reasonable competent subcontractor would have taken further steps in the discharge of its duties. The precaution taken by Kemmish Nominees Pty Ltd was not inconsistent with what a reasonable subcontractor would have done in similar circumstances.

The application was therefore dismissed.
LEGAL PROFESSION ACT 2008 (WA)

LEGAL PRACTITIONERS COMPLAINTS COMMITTEE AND SEGLER
[2009] WASAT 205 (S)
11 MARCH 2010
JUSTICE J A CHANEY (PRESIDENT), JUDGE J PRITCHARD
(DEPUTY PRESIDENT), MR J MANSVELD (MEMBER)

Legal practitioners - Professional misconduct and unsatisfactory professional conduct - Solicitor encouraging client to act contrary to law - Deliberately misleading regulatory authority - Appropriate penalty

On 21 October 2009, the Tribunal published reasons for decision in respect to a complaint brought by the Legal Practitioners Complaints Committee against a solicitor, Mr Martin Lee Segler. The Tribunal made findings of professional misconduct and unsatisfactory professional conduct against Mr Segler. The parties then made written submissions as to penalty.

The Complaints Committee sought orders that the practitioner be reprimanded, and that his practising certificate be suspended for a period of six months, or alternatively that a fine of $10,000 in respect to the finding of professional misconduct and $7,500 in respect to the finding of unsatisfactory professional conduct be imposed. The Complaints Committee also sought an order for payment by the practitioner of its costs in relation to the proceedings.

The Tribunal considered the principles to be applied in relation to disciplinary penalties, the nature of the findings against Mr Segler and the parties' respective submissions. Having considered those matters, the Tribunal concluded that the appropriate penalty in relation to the finding of professional misconduct was that the practitioner be suspended from practice for a period of three months. In relation to the finding of unsatisfactory professional conduct, the Tribunal concluded that an appropriate range of penalties included suspension from practice or a substantial fine, but having regard to the effect on the practitioner's financial position of the suspension for professional misconduct, it concluded that a two month period of suspension in relation to the unsatisfactory professional conduct, rather than a substantial fine, was appropriate. The Tribunal ordered that the practitioner should pay the costs claimed by the Complaints Committee, which consisted only of its disbursements including counsel fees.

GREENWOOD AND LEGAL PROFESSION COMPLAINTS COMMITTEE
[2010] WASAT 31
25 FEBRUARY 2010
JUDGE J PRITCHARD (DEPUTY PRESIDENT), MS D DEAN (MEMBER),
MR M ODES QC (SENIOR SESSIONAL MEMBER)

Legal profession - Meaning of reasonable likelihood - Whether reasonable likelihood practitioner will be found guilty by State Administrative Tribunal of unsatisfactory professional conduct or professional misconduct - Application for review of decision dismissing complaint

Mr Paul Greenwood sought a review of a decision of the Legal Profession Complaints Committee of its decision to dismiss his complaint alleging unsatisfactory professional conduct or professional misconduct by Mr Brickhill. Mr Greenwood's allegations pertained to Mr Brickhill's conduct in the course of representing an appellant in a District Court appeal in which Mr Greenwood was the respondent, and in acting for the appellant in proceedings in the Supreme Court. The Committee determined that there was no reasonable likelihood that the Tribunal would make a finding against Mr Brickhill of unsatisfactory professional conduct or professional misconduct in relation to the allegations made by Mr Greenwood.
The Tribunal identified 16 discrete allegations by Mr Greenwood that Mr Brickhill had engaged in unsatisfactory professional conduct or professional misconduct. On the review Mr Greenwood also sought to raise further allegations of unsatisfactory professional conduct or professional misconduct, arising from Mr Brickhill’s responses to the Committee in the course of its investigation of the complaint. The Tribunal determined that it did not have jurisdiction to deal with these further allegations.

The Tribunal also considered the extent of its functions and discretions in a review under s 435 of the Legal Profession Act 2008 (WA), and the inter-relationship between that Act and the provisions of the State Administrative Tribunal Act 2004 (WA). The Tribunal found that it was not necessary in this case that it determine whether its functions and discretions differed from those of the Committee under s 424 and s 425 of the Legal Profession Act 2008 (WA). Accordingly, the Tribunal proceeded on the basis that its role was to determine the correct and preferable decision on the question whether there existed a reasonable likelihood that the Tribunal would find Mr Brickhill guilty of unsatisfactory professional conduct or professional misconduct in relation to the allegations made by Mr Greenwood.

One of those allegations was that Mr Brickhill signed a certificate of correctness for the appeal book in the District Court appeal, and thereby certified that he had inspected the originals of the documents in the appeal book, when he admitted that he had not in fact done so. The Tribunal determined that there was a reasonable likelihood that Mr Brickhill would be found guilty of unsatisfactory professional conduct in relation to this allegation. The Tribunal set aside this part of the decision of the Committee, and ordered that the Committee reconsider the complaint against the practitioner in accordance with the Tribunal’s reasons for decision and the Legal Profession Act 2008 (WA).

The Tribunal found that there was no reasonable likelihood that the Tribunal would find Mr Brickhill guilty of unsatisfactory professional conduct or professional misconduct in relation to the remainder of the allegations made by Mr Greenwood.