

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1088/2011

#### CATCHWORDS

Building project at Dinner Plain Victoria; Domestic building contract entered by owners' agent; two builders named in contract; main builder replaced by further builder; works not completed; owners' claim for loss against named licensed builder dismissed because no causal connection between builder's actions and owners' loss.

<b>FIRST APPLICANT:</b>	Snowy Corner Pty Ltd (ACN 124 185 851) (in liquidation)
<b>SECOND APPLICANT:</b>	York Developers Pty Ltd (ACN 114 677 191)
<b>FIRST RESPONDENT:</b>	Mr Guntram Sperling
<b>SECOND RESPONDENT:</b>	Dr Heidi Kastner
<b>THIRD RESPONDENT:</b>	Modern 1 Design Pty Ltd (ACN 147 344 483) (de-registered)
<b>FOURTH RESPONDENT:</b>	Fingal Holdings Pty Ltd (ACN 094 394 591) (de-registered)
<b>FIFTH RESPONDENT:</b>	David Winchester
<b>FIRST APPLICANT BY CROSS CLAIM:</b>	Desmond Thomas Fraser
<b>SECOND APPLICANT BY CROSS CLAIM:</b>	Maureen Fraser
<b>FIRST RESPONDENT BY CROSS CLAIM:</b>	Mr Guntram Sperling
<b>SECOND RESPONDENT BY CROSS CLAIM:</b>	Dr Heidi Kastner
<b>BEFORE:</b>	Senior Member M. Farrelly
<b>WHERE HELD:</b>	Melbourne
<b>HEARING TYPE:</b>	Hearing
<b>DATE OF HEARING:</b>	1, 2, 3, 4, 5 and 9 September 2014 (Closing written submissions received September 2014 and 21 September 2014)
<b>DATE OF ORDER:</b>	16 October 2014
<b>CITATION:</b>	Snowy Corner Pty Ltd v Sperling (Building and Property) [2014] VCAT 1292

## ORDERS

**On the Crossclaim brought by the First and Second Applicants by Crossclaim, Mr and Mrs Fraser, against the First and Second Respondents to the Cross Claim, Mr Sperling and Dr Kastner:**

1. The claim by the Applicants by Cross Claim, Mr and Mrs Fraser, as against the first and second respondents to the Cross Claim, Mr Sperling and Dr Kastner, is dismissed.
2. Costs reserved.
3. **I direct the Principal Registrar to list any application for costs before Senior Member M. Farrelly allowing half a day.**

**On claim of the Second Applicant, York Developers Pty Ltd, against the Fifth Respondent, Mr Winchester:**

1. The application of the Second named Applicant, York Developers Pty Ltd, against the Fifth Respondent, Mr Winchester, is dismissed.
2. Costs reserved.
3. **I direct the Principal Registrar to list any application for costs before Senior Member M. Farrelly allowing half a day.**

**SENIOR MEMBER M. FARRELLY**

**APPEARANCES:**

For the First and Second  
Applicants by Crossclaim  
(Mr D. Fraser and Mrs M.  
Fraser):

Mr J. Gray, solicitor

For the Respondents by  
Crossclaim  
(Mr G. Sperling and  
Dr H. Kastner):

Mr Sperling and Dr Kastner in person

For the Second Applicant  
(York Developers Pty Ltd):

Mrs M. Atwell, Director, in person

For the Fifth Respondent:  
(Mr D. Winchester):

Ms Symons of Counsel

## REASONS

- 1 This proceeding arises from a failed building development project in the Victorian snowfields at Dinner Plain which resulted in devastating financial consequences for some of the parties involved. The primary claimants in this proceeding are Mr and Mrs Fraser, the Applicants by Crossclaim.
- 2 In 2009 Mr and Mrs Fraser purchased a block of land at Dinner Plain, and in late 2010 they commenced construction of two homes on the land. Finance for the land purchase and the construction project was obtained from the National Australia Bank (“NAB”). The loans were secured by mortgages over the Dinner Plain property and Mr and Mrs Fraser’s residential home in Corowa. In August 2011, at which time the construction of the two homes was nearing completion, the building works stopped. In 2013, by which time no further building works had been carried out and Mr and Mrs Fraser had fallen well behind in their loan repayments, the NAB exercised its right as mortgagee to sell the two incomplete homes at Dinner Plain and Mr and Mrs Fraser’s residential home in Corowa.
- 3 Mr and Mrs Fraser bring their claim against Mr Sperling and his wife Dr Kastner, who together form the partnership trading as “The Alpine Woodpecker”. Mr and Mrs Fraser say that the Alpine Woodpecker, one of several builders involved in the development project, abandoned the building project causing Mr and Mrs Fraser’s ensuing loss and damage. The loss and damage claimed is:
  - (a) \$58,000 being the profit say they would have made had the two Dinner Plain homes been completed and sold. The lost profit is calculated as the difference between their total borrowings, \$762,000, to finance the purchase of the Dinner Plain land and the construction of the two homes on the land, and the estimated completion value of the two homes, \$820,000, as estimated by a valuer appointed by the NAB during the course of construction of the homes.
  - (b) \$250,000 as the value of their residential home in Corowa which was sold by the NAB; and
  - (c) \$524,012 being their residual debt to the NAB (as at June 2013), after their home in Corowa and the two Dinner Plain properties were sold.
- 4 Mr Sperling and Dr Kastner deny liability, and say that the Alpine Woodpecker’s role in the building project was limited to Mr Sperling providing supervision services for a fee of \$10,000 for each of the homes to be constructed. They say also that the “Owner” under the building contract was not Mr and Mrs Fraser, but rather the entity Snowy Corner Pty Ltd (“Snowy”) which was controlled by Mrs Fraser’s son, Mr Michael Atwell.

5 This proceeding includes a separate claim brought by York Developers Pty Ltd (“York”), the second named applicant, against Mr David Winchester, the fifth named respondent. Mr Winchester was a director of Fingal Holdings Pty Ltd (“Fingal”), a building company also involved in the construction of the Dinner Plain homes. York says Mr Winchester owes rent and outgoings for the period 1 June 2011 to 19 October 2011 in respect of Mr Winchester’s lease of a residential property at Dinner Plain owned by York. Mr Winchester says that the home was provided rent free to provide accommodation for sub-contractors of Fingal during the period of construction of the Dinner Plain homes. He says this arrangement was agreed to by Mr Atwell. Mr Winchester says also that if anyone has liability for the rent and outgoings claimed, it is Fingal.

6 I will consider Mr and Mrs Fraser’s claim first.

## **MR AND MRS FRASER’S CLAIM**

### **THE HEARING**

7 The hearing commenced on 1 September 2014 and ran for 5½ days, concluding at lunchtime on 9 September 2014. (Evidence and submissions in respect of York’s rental claim were heard on the afternoon of the second day and the morning of the third day).

8 Mrs Fraser and her son Mr Atwell gave evidence.

9 Mr William Reid, a certified valuer, gave evidence by telephone in answer to a summons issued at the request of Mrs Fraser.

10 Mr Evers, the building surveyor who issued permits in respect of the construction of the Dinner Plain homes, produced documents and gave brief evidence in answer to a summons issued at the request of Mr and Mrs Fraser.

11 Mr Sperling and Dr Kastner gave evidence with the assistance of a German interpreter. Mr Sperling and Dr Kastner also produced witness statements of Ms Jane Foley and Mr Mike Smith. Neither Ms Foley or Mr Smith gave evidence at the hearing.

12 Mr Winchester gave evidence.

13 Mr James Grey, solicitor, represented Mr and Mrs Fraser. Mr Sperling and Dr Kastner were self represented.

## **CHRONOLOGY AND EVIDENCE**

### **Building Contracts**

14 In early 2009, Mr and Mrs Fraser purchased a block of land (“lot S2”) at Dinner Plain. The land purchase price was approximately \$165,000. To finance the purchase, Mr and Mrs Fraser borrowed \$200,000 from the NAB. Mrs Fraser says that a loan sum in excess of the cost of the land was

obtained in order to provide funds to service the loan until such time as two homes were constructed and sold.

- 15 Mr and Mrs Fraser intended, under the management and guidance of Mrs Fraser's son, Mr Atwell, to construct two homes on lot S2, the lot itself being divided into two lots, and to sell the completed homes at a profit. Mrs Fraser produced at the hearing partial copies of an "off the plan" sale contract in respect of each of the lots, the sale price for each lot being \$575,000. One of the contracts identifies the purchaser as York, and the contract is signed by Mr Atwell in his [then] capacity as director of York. The other contract identifies the purchaser as Terri Atwell, the sister of Mr Atwell and the daughter of Mrs Fraser.
- 16 In or around 2009/2010, Snowy also purchased two blocks of land ("lots 5 and 6") at Dinner Plain, adjacent to lot S2. Snowy intended to build a home on each of lot 5 and 6. Mr Atwell was to manage the construction of the homes on lots S2, 5 and 6.
- 17 In late 2010, Mr Atwell met Mr Demetriou, the director of Modern 1 Design Pty Ltd ("Modern"). Modern was a builder operating in the Dinner Plain area. Mr Atwell says that he and Mr Demetriou reached an agreement whereby Modern would construct two homes on lot S2 and one home on each of lots 5 and 6, and Modern would also purchase Lots 5 and 6 under "off the plan" sale contracts with Snowy. Mr Atwell was unaware, at the time, that Mr Demetriou was not a registered building practitioner ("RBP").
- 18 Mr Atwell and Mr Demetriou prepared documents to give effect to their agreement.
- 19 Mr Atwell arranged for the preparation of the "off the plan" sale contracts for Lots 5 and 6. The Lot 5 sale contract identified a purchase price of \$650,000 with a deposit of \$65,000 payable on the signing of the contract. The Lot 6 contract identified a purchase price of \$700,000 with a deposit of \$70,000 payable on the signing of the contract. Mr Atwell says that the sale prices were not the "real" agreed sale prices, but rather inflated prices apparently intended to assist in the obtaining of finance for the project. He says the "real" sale prices for each of lots 5 and 6 as agreed with Mr Demetriou was the cost to construct the homes on lots 5 and 6 together with an allowance for interest until settlement of the sale contracts and an allowance for costs associated with the sale of the two properties. Mr Atwell says that he and Mr Demetriou agreed that SNOWY would not require payment of the deposits identified in the sale contracts and, in return, Modern would not require payments of the deposits identified in the building contracts for Lots 5 and 6.
- 20 Mr Demetriou prepared three building contracts, one for the two homes to be constructed on lot S2, one for the home to be constructed on lot 5 and one for the home to be constructed on lot 6.

- 21 At law, a builder must not enter into a contract for the construction of a home unless the builder is an RBP or, in the case of the builder being a partnership, at least one of the partners is an RBP, or, in the case of a builder being a corporation, at least one of its directors is an RBP.<sup>1</sup> Before the construction of a home may commence, a building surveyor must issue a building permit for the proposed building works. A building surveyor must not issue a building permit for the construction of a home unless he or she is satisfied that the builder is an RBP who is covered by “*required insurance*”.<sup>2</sup> The required insurance (“warranty insurance”) is prescribed by Ministerial Order made under Division 3 of Part 9 in the *Building Act* 1993. In essence, warranty insurance provides indemnity to owners in respect of defective or incomplete building works. Warranty insurance policies invariably include a clause, as allowed under the ministerial order, that the indemnity is not available unless the builder is dead, disappeared or insolvent.
- 22 Mr Demetriou was not an RBP. He approached Mr Sperling whom he knew to be an RBP. Mr Sperling immigrated from Germany to Australia in 2003. In Germany he had been a master builder. In 2007 he completed a Housing Industry Association training course which enabled him to become a RBP. Mr Sperling’s wife, Dr Kastner, also immigrated from Germany to Australia in around 2003. In 2009, Mr Sperling and Dr Kastner commenced trading as a partnership under the trading name “the Alpine Woodpecker”. With Mr Sperling as the RBP, the partnership carried out building works, mainly cabinetry and home renovations.
- 23 The evidence of Mr Sperling and Dr Kastner, in respect of their agreement reached with Mr Demetriou, is, briefly, as follows:
- (a) Mr Demetriou introduced himself to Mr Sperling at Mr Sperling’s workshop in Tawonga on 18 November 2010. Mr Demetriou said he was involved in a building project for the construction of several homes at Dinner Plain and he asked Mr Sperling whether Mr Sperling was interested in assisting in the project. Mr Demetriou needed an answer quickly as the homes were to be constructed ahead of the snow/ski season which commenced in June 2011.
  - (b) Following their meeting on 18 November 2010, Mr Demetriou sent an email to Mr Sperling which states in part:

“It was a pleasure meeting you today. I am looking forward to working with you... Can you also please provide me your registered building business name, ABN, warranty insurance name and number so I can prepare contracts with your business and my business name.”
  - (c) Mr Sperling and Dr Kastner subsequently met Mr Demetriou at their home on 26 November 2010. At this meeting, Mr Demetriou

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<sup>1</sup> Section 29 *Domestic Building Contracts Act* 1995

<sup>2</sup> Section 24A of the *Building Act* 1993

generally described the homes to be constructed on lots S2, 5 and 6 and the proposed construction prices. Mr Demetriou told them that the owner of the three lots was Mr Atwell, and that Mr Demetriou would purchase lots 5 and 6 from Mr Atwell. Mr Demetriou gave Mr Sperling Mr Atwell's phone number. Mr Sperling says that a split of the profits to be made from the three building contracts was generally discussed, but no agreement was reached. Mr Sperling's role in the construction of the homes was to act as technical supervisor.

- (d) After the above meeting, Mr Sperling telephoned Mr Atwell to briefly discuss the construction projects. Mr Sperling says that Mr Atwell confirmed:
- that he [Mr Atwell] knew Mr Demetriou
  - that Mr Atwell was intending to enter into building projects at Dinner Plain with Mr Demetriou; and
  - that he [Mr Atwell] owned the land at Dinner Plain on which the homes were to be constructed.
- (e) On 2 December 2010, Mr Sperling and Dr Kastner met Mr Demetriou at the office of Mr Demetriou's accountant, Mr Paul Vey. Mr Demetriou brought to the meeting the three building contracts, each in duplicate, he had prepared. The contracts were standard form HIA "New Homes" contracts. In each contract, Snowy was the named "owner" and Modern and the Alpine Woodpecker were the named builders. Mr Demetriou told Mr Sperling and Dr Kastner that Snowy was Mr Atwell's company. Each contract was signed by Mr Demetriou in his capacity as director of Modern and dated 28 November 2010. The contract for construction of the two homes on lot S2 identified a contract price of \$562,000 and a construction period of 240 days. None of the contracts were signed by the named "owner", Snowy.
- (f) Following the meeting, outside Mr Vey's office, Mr Sperling signed each of the three contracts (in duplicate) in his capacity as partner of the Alpine Woodpecker.
- (g) Mr Sperling says that an agreement, as between Modern and the Alpine Woodpecker, as to the profit the Alpine Woodpecker would derive from the project to construct the homes on lots S2,5 and 6, was reached on 8 December 2010 at a meeting attended by himself, Dr Kastner and Mr Demetriou at the office of Mr Demetriou's solicitors, Nevin Lenne & Gross. Mr Sperling says the agreement provided that the Alpine Woodpecker would receive a fee of \$10,000 for each home constructed at Dinner Plain. The fees were to be paid by Modern. Modern, whose role was to construct the homes, would receive the builder's profit under the building contracts. A written agreement to this effect was prepared by Modern's solicitors. Mr



Sperling says that it wasn't until early February that the agreement was signed by himself and Mr Demetriou. He says that Mr Demetriou took the agreement to obtain the signature of Mr Atwell on behalf of Snowy, as Snowy was also named as a party in the agreement. Mr Sperling says that he never received back from Mr Demetriou a copy of the signed agreement. All he has retained is a copy of an unexecuted draft of the agreement.

- 24 Mr Atwell says that he never signed, and had no knowledge of, the agreement between Modern and the Alpine Woodpecker as to the fees the Alpine Woodpecker was to receive from Modern. He assumed that Modern and the Alpine Woodpecker were partner builders under the three building contracts.
- 25 Mr Atwell says he signed the three building contracts in his capacity as director of Snowy. He says also that, in respect of the contract for the building works to be carried out to lot S2 ("the lot S2 building contract"), Snowy executed the contract as agent of Mr and Mrs Fraser. Mr Atwell says that, about a week or two after he signed the lot S2 building contract, he amended the contract so that it recorded Mr and Mrs Fraser as the "owners" in place of Snowy, and he then arranged for Mr and Mrs Fraser to sign the amended contract. As discussed below, the amended contract was not produced in this proceeding until the fourth day of the hearing.
- 26 Mr Atwell and Mrs Fraser gave evidence as to the signing of the lot S2 building contract by Mr and Mrs Fraser. The evidence is confusing and unconvincing. The confusion is due largely to the fact that Mr Atwell, who assisted his parents in obtaining the NAB finance, had prepared an *alternative* lot S2 building contract for presentation to the NAB. The alternative contract identifies a higher contract price of \$635,000. Mr Atwell apparently considered it acceptable to produce a false contract document for the limited purpose of obtaining bank finance. It is understandable, if not excusable, that Mr and Mrs Fraser went along with the ruse because they trusted Mr Atwell to manage their affairs in respect of the lot S2 building contract.
- 27 I heard much evidence from Mrs Fraser and Mr Atwell as to the circumstances surrounding their signing of the lot S2 building contract, both the "real" contract and the "alternative" contract presented to the NAB. Their evidence was materially different in some respects.
- 28 Quite remarkably, Mr Atwell announced on the fourth morning of the hearing that he had, just that morning, found the [real] original lot S2 building contract as amended and signed by Mr and Mrs Fraser. Having regard to the fact that the proceeding commenced in December 2011, and during the interlocutory stages of the proceeding a number of orders had been directed at the production of building contracts, it is very surprising that it took until the fourth morning of the hearing for Mr Atwell to discover the original contract.

- 29 Although I have reservations as to reliability of Mrs Fraser's and Mr Atwell's evidence as to the signing of the lot S2 building contract, I do not dwell on the issue because, in the end, it is not a determinative factor in my decision.

### **Permits and Modern's cessation of works**

- 30 On 10 December 2010, Mr Sperling made application to QBE Insurance for warranty insurance in respect of the two homes to be constructed pursuant to the lot S2 building contract. On 17 December 2010, QBE issued a warranty insurance certificate for each of the two proposed new homes. The certificates identify Mr Sperling and Dr Kastner as the builder carrying out the works, and Snowy as the owner.
- 31 On 12 January 2011 Mr Eyers, a building surveyor, issued building permits for the lot S2 homes. Mr Sperling says he believes that Mr Demetriou applied for and obtained the building permits. The permits, which cover "stage 1 – footings only", were issued to the owners, identified as Desmond Thomas Fraser and Maureen Fraser. The permits note the builder as the Alpine Woodpecker and Mr Sperling as the designated RBP. Mr Sperling says that he did not sight the permits until March 2011 when stage 2 permits were also issued by Mr Eyers.
- 32 In December 2010, the NAB engaged Mr Read, a certified practising valuer, to provide valuations as to the estimated market value of the 2 homes to be constructed on lot S2. Mr Read's valuations, dated 21 December 2010, provide an estimated market value on completion of \$410,000 (inclusive of land value) for each of the two homes. His valuations note Modern as the builder.
- 33 Building works in respect of lots S2, 5 and 6 commenced in around late December 2010/early January 2011 and progressed until March 2011 when Mr Atwell and Mr Demetriou fell into dispute. There is little evidence as to the nature of the dispute, save that it involved a payment claim made by Modern which Mr Atwell/Snowy refused to pay. In her witness statement, Mrs Fraser says:
- In March 2011, Michael [Atwell] told us Demetriou had left the site. I phoned Demetriou and he said he was not returning if Michael did not pay him \$50,000. He said he had bought materials in advance for other stages.
- 34 Mr Atwell says that the dispute arose because Demetriou did not honour the agreement that Modern would not demand payment of the deposits identified in the building contracts for Lots 5 and 6. Whatever the cause of the dispute, by late March 2011 the building works stopped and Modern walked away from the project leaving its subcontractors owed a significant sum of money. At this time, the building works were at around frame stage for the two homes on lot S2, and approaching fixing stage for the homes on lots 5 and 6.

- 35 Dr Kastner says that she and Mr Sperling felt some responsibility to bring the construction of the homes on lots S2,5 and 6 to completion, partly because they wanted to do the right thing, and partly because Mr Sperling was the nominated RBP for the project. At that time, March 2011, Modern had paid the Alpine Woodpecker \$8,000 as part of the total fees, \$10,000 for each of the four homes to be constructed, the Alpine Woodpecker was to receive from Modern. The Alpine Woodpecker received no further payments from anyone.
- 36 When works stopped in late March 2011, Mrs Fraser spoke to Mr Sperling for the first time. In her witness statement Mrs Fraser says:
- I then rang Sperling and asked him what was he going to do about our buildings now that Demetriou had left the site and he said he would discuss it with Michael [Atwell]”.
- 37 Mr Sperling says that when he received the phone call from Mrs Fraser, he did not know who she was. He says he told her that he did not have a contract with her and that he would try to get more information.
- 38 On 1 April 2011 Mr Atwell’s lawyers, Burke & Associates, sent an email to Mr Sperling which, amongst other things, asserted Mr Sperling’s responsibility as the RBP for the building projects at lots S2, 5 and 6. The email makes it clear that Mr and Mrs Fraser were the owners of lot S2.

### **The April 2011 Agreement**

- 39 It is in late March 2011, that Mr Winchester and Fingal became involved in the building project. Business associates of Mr Winchester had recently signed a sale contract for the purchase of the block of land (“lot S4”) adjacent to lot S2. It was the intention of Mr Winchester and his associates that Fingal would construct a modular home on lot S4 so that it would be ready for occupation for the coming ski season. In March 2011, Mr Winchester visited Dinner Plain to inspect lot S4 and found that it and lots S2, 5 and 6 were enclosed behind locked security fencing, and that there was building materials and rubble scattered on lot S4. Mr Winchester was aware that Mr Atwell was the real estate agent involved in the sale of lot S4. He contacted Mr Atwell and was informed by Mr Atwell of the problems then being experienced in the construction projects on lots S2, 5 and 6. Mr Winchester proposed to Mr Atwell that Fingal step in and take over the role of Modern to bring all of the building works to completion. Fingal would, at the same time, gain access to build the modular home on lot S4.
- 40 On 1 April 2014, Mr Winchester rang Mr Sperling to discuss the proposal he had put to Mr Atwell. Within a day or so Mr Winchester met Dr Kastner and Mr Sperling to discuss the proposal in more detail.
- 41 Both Mr Atwell and Mr Sperling say that Mr Winchester was very persuasive in putting his proposal to them. Both of them saw Mr

Winchester's proposal as a solution to the problem created by the abandonment of the building works by Modern.

- 42 In early April 2011, Mr Winchester provided to Mr Atwell and Mr Sperling a document confirming the proposal. The document includes information, supplied by Mr Atwell and his lawyers, as to payments made up to that point in time to Modern and as to monies owing to various subcontractors of Modern. Mr Sperling and Dr Kastner sought their own legal advice on the proposal, as did Mr Atwell. On or about 12 April 2011, the document was signed by Mr Atwell on behalf of Snowy, Mr Sperling on behalf of the Alpine Woodpecker, and Mr Winchester on behalf of Fingal. The document ("the April 2011 agreement") reads as follows:

**BUILDING WORKS AT SNOWY CORNER, DINNER PLAIN**

We refer to our recent discussions regarding the completion of building works on Lots 5 & 6 (Owner Snowy Corner Pty Ltd) and Lot S2 (Owner Fraser)

We understand that the status of payment under the building contract is as follows:

Stage	Lot S2 \$	Paid \$	Lot 5 \$	Paid \$	Lot 6 \$	Paid \$
Deposit	Nil					
Base Stage	84,300	84,000	42,000	42,000	43,800	43,800
Frame Stage	84,300	84,000	42,000	42,000	43,800	43,800
Lock Up Stage	196,700		98,000	98,000	102,200	102,200
Fixing Stage	140,500		70,000		73,000	
Completion	56,200		28,000		29,200	
Total Contract Price	\$562,000	\$168,000	\$280,000	\$182,000	\$292,000	\$189,800

With regard to Lots 5 & 6 we understand that an amount of \$50,000 was held back from payment of the Lock Up Stage payment. Subject to resolution of the current problem we understand this amount will be available to assist in completion of building works and payment of outstanding credits.

We understand that payments to the following sub contractors are outstanding.

Name	Amount \$ (A)	Amount (B)	Comment
New Gen Painting	4,455.00	5,455.00	
Van Heek - Labour	64,735.00	64,735.00	
Van Heek –Scaffolding	22,220.00	22,220.00	
Van Heek – Fencing	1,732.50	1,732.50	
Nicoll Engineering	12,584.00	12,584.00	
Gary Peterson – Earth Moving	495	495	

Mark Foley – Plumbing	4,900.90	4,900.90	
Brian Taggart – Electrical	9,366.50	9,366.50	
Hamish Nelson	3,080.00		Modern 1 Design creditor
Bunnings – Windows	26,000.00		COD with Bunnings
Unallocated		511.10	To cover Sundry exp
	\$150,568.90	\$122,000.00	

Note

- Column (A) is known creditors
- Column (B) is creditors to be paid from funds to be placed in Trust

AGREEMENT

- (h) Fingal Holdings Pty Ltd (David Winchester) takes on the obligations of Modern 1 Design Pty Ltd to complete the construction of Lots 5 & 6 and Lot S2. This will be done under the framework of the existing building contract arrangements with Guntram Sperling.
- (i) Fingal Holdings Pty Ltd does not take on any obligation Modern 1 Design Pty Ltd has to any subcontractor prior to its (Fingal) commencement on site.
- (j) Snowy Corner Pty Ltd (Atwell) place \$50,000 in the Trust account of Burke & Associates to assist payment of the outstanding creditors as pr above. Payments to be made from these funds on the authorisation of Guntram Sperling, David Winchester and Michael Atwell.
- (k) From the payment of the Lock Up Stage claim for S2 of \$196,700 an amount of \$72,000 to be paid into the Trust account of Burke & Associates to assist payment of the outstanding creditors as per above. Payments to be made from these funds on the authorisation of Guntram Sperling, David Winchester and Michael Atwell.
- (l) Progress Claims for Building Works to be made on the invoice of Fingal Holdings Pty Ltd. The claim is to be supported by photographic evidence that works to that stage have been completed. The Progress Claim is to be paid directly by the NAB to Fingal other than for the \$72,000 referred to above which is to be paid to Burke & Associates.
- (m) David Winchester to take on the plumbing compliance obligations for all plumbing works on each of the 4 buildings.

- 43 The April 2011 agreement provides for Fingal to take over the obligations of Modern to complete the construction of the homes to lots S2, 5 and 6.

- 44 A very important feature of the April 2011 agreement is the special provision it makes for the payment of monies owing, at that time, to subcontractors of Modern. It is clear, from clause 2 in the agreement, that Fingal took no responsibility in that regard.
- 45 The agreement identifies creditors of Modern owed a total of \$150,568.90, of which subcontractors comprise \$122,000. Clauses 3 and 4 in the agreement provide for the payment of \$122,000 into the trust account of Burke & Associates, Mr Atwell's then lawyers, which was to be used to pay the creditors/subcontractors. The \$122,000 was to be sourced:

\$50,000 from Snowy; and

\$72,000 of the lock-up stage payment to be made under the lot S2 building contract.

The agreement provides that payments out of the trust fund would be made *on the authorisation of Mr Sperling, Mr Winchester and Mr Atwell.*

- 46 The first sentence in the April 2011 agreement refers to Snowy as owner of lots 5 and 6 and "*Fraser*" as owner of lot S2. The agreement is not signed by Mr or Mrs Fraser. Mrs Fraser says she first saw the agreement shortly after it was signed. Both she and Mr Atwell say that, in relation to the lot S2 building contract, the agreement was signed by Mr Atwell in his capacity as director of Snowy and as agent for Mr and Mrs Fraser.

#### **Failure to make payments into trust fund; Advance payments to Fingal**

- 47 Shortly after the signing the April 2011 agreement, Fingal commenced further building works at lots S2, 5 and 6. Mr Sperling says his involvement from that time on was limited to occasional inspections and advice on technical issues, and that Fingal managed the building works and directed the building subcontractors.
- 48 Fingal forwarded its progress claims, including claims under the lot S2 building contract, to Snowy.
- 49 Most unfortunately, the \$122,000 that was to be paid into the trust account of Burke & Associates never eventuated.
- 50 Mr Atwell says that, instead of paying \$50,000 into the trust account, Snowy made the \$50,000 payment direct to Fingal. Mr Atwell says this was done at Mr Winchester's request.
- 51 In May 2011, Mr Winchester began corresponding directly with Mrs Fraser in respect of progress claims under the lot S2 building contract. In early May 2011, Mrs Fraser made advance payment of \$40,000 to Fingal. On 16 May 2011 Mr Winchester provided Mrs Fraser with a "receipt" from Fingal which states:

Fingal Holdings Pty Ltd acknowledges receipt of \$40,000 from Maureen Fraser being an advance of monies payable under the building contract for S2 in respect of lock up stage.

- 52 On 30 May 2011, Fingal forwarded its invoice to Snowy for the whole of lock up stage progress claim, \$196,700, under the lot S2 building contract. On 31 May 2011, Mrs Fraser made payment to Fingal in the sum of \$156,700. The payment, together with the previous advance payment of \$40,000, constituted payment in full of the lock up stage payment under the lot S2 building contract.
- 53 Neither Mrs Fraser nor Mr Atwell proffers any explanation as to why \$72,000 of the lot S2 contract lock up stage payment was not paid into the trust account of Burke & Associates in accordance with the April 2011 agreement.
- 54 There is no evidence that Mr Sperling authorised, or had any knowledge of, the lock up stage payments made to Fingal.
- 55 The fixing stage payment under the lot S2 building contract was \$140,500. In July and August 2011, Mrs Fraser made further advance payments to Fingal totalling \$73,081. The payments were “advance” in the sense that they were made before the fixing stage of the building works had been reached. The payments were acknowledged by Mr Winchester in correspondence to Mrs Fraser dated 26 August 2011. On the same day, 26 August 2011, Fingal issued a progress claim in the sum of \$95,250 to Snowy as a “*progress claim for building works on property known as Lot S2 Snowy Corner P/L, Dinner Plain. Fixing stage 80%.*” Mrs Fraser paid Fingal \$95,250 on 29 August 2011. The payment, together with the advance payments of \$73,081, brought to \$168,331 the sum paid by Mrs Fraser to Fingal in respect of the fixing stage payment, before the fixing stage was completed. The lot S2 building contract provides for a fixing stage payment of only \$140,500.

### **Cessation of works**

- 56 After receipt of the payments, Fingal ceased carrying out building works at lot S2. The works were approaching, but had not yet reached, “fixing” stage. The works remaining to be done included the installation of kitchen cabinetry and fittings and the installation of floor coverings.
- 57 On 29 September 2011 Mrs Fraser wrote to Mr Winchester in the following terms:

Hi David,

We need your help.

We are in severe financial trouble. We would not have advanced you all of our \$73,000 if we had known we would not get any of it back for so long. We have no money left and cannot pay our interest payments this month. We would have held some back from the last payment you got from the bank had we been aware of these further delays.

Would you please transfer some money into our account...

It is imperative that we can claim some GST this quarter and hence I ask again can you PLEASE send me a tax invoice for fixing \$140,500 dated prior to 30 September 2011.

You have been paid for more than the full amount of \$140,500.

From your next progress claim to the bank we will have to have returned to us some money to cover our commitments.

We have done everything in our power to help assist you financially and now ask you respond likewise.

58 In October and November 2011, Mrs Fraser sent further emails to Mr Winchester requesting the return of advance monies paid, the provision of a tax invoice in respect of the fixing stage claim and confirmation that the building works at lot S2 would continue. On 25 November 2011, Mr Winchester sent an email to Mrs Fraser advising her, amongst other things, that Fingal intended to complete the building works at lot S2 shortly. However, Fingal never returned to carry out any further works and never refunded Mrs Fraser any of the advance payments made.

59 Mr Sperling says that, when the works stopped in August 2011, he was told by Mr Luke Van Heek, a building subcontractor engaged first by Modern and then by Fingal, that Mr Van Heek would not be returning to work at lots S2, 5 and 6 because money he was owed had not been paid. Mr Van Heek is one of the subcontractors, the main subcontractor creditor in dollar terms, noted in the April 2011 agreement. The money he was owed, at the time of the April 2011 agreement, was supposed to have been paid out of the \$122,000 trust account referred to in the April 2011 agreement. As discussed above, payment into the trust account never eventuated.

60 That Mr Van Heek was not paid is confirmed in correspondence from Mr John Crozier, a director of Fingal, to Mr Van Heek dated 11 January 2012. The letter says in part:

We attach a printout of our statement of works undertaken by you for us. We are still verifying its accuracy as we had thought some additional payments had been made. This statement includes the additional \$25,000 we paid on 20 and 21 April 2011. Including this amount we owe you \$17,904.75 for works undertaken. There are also invoices outstanding for scaffold for S2 of \$14,630 and S4 for \$14,630.

*In addition we understand that you are owed money from Modern 1 Design as follows:*

*Labour \$64,735*

*Scaffold \$22,220.*

[emphasis added]

61 Mrs Fraser says that when Fingal ceased works in late August 2011, there were funds available from the NAB to pay for the completion of the lot S2



building works, however the NAB would not release any of those funds until the works were actually completed.

- 62 Although it is not entirely clear on the evidence, it appears that by December 2011 Mr Atwell and Mrs Fraser reached the conclusion that Fingal would not be returning to complete the building works. On 22 December 2011, Snowy commenced this proceeding against Modern, Fingal and Mr Sperling and Dr Kastner. Fingal subsequently filed a counterclaim against Snowy and Mr and Mrs Fraser claiming it was owed money in respect of the building works it carried out at lot S2. Subsequently, on 29 November 2012, Mr and Mrs Fraser commenced their Crossclaim in the proceeding against Mr Sperling and Dr Kastner, Modern and Fingal. Snowy was subsequently placed into liquidation, and Modern and Fingal were subsequently deregistered leaving only Mr Sperling and Dr Kastner as the “live” respondents to Mr and Mrs Fraser’s Crossclaim.
- 63 Mr and Mrs Fraser took no action, after December 2011, to bring the construction of the lot S2 homes to completion or to otherwise mitigate their loss. Mrs Fraser says in her witness statement:

The non completion of S2 [the homes at Lot S2] put us in an impossible position financially. We were unemployed pensioners and NAB refused to advance further funds until further work was completed. We could not afford to pay anyone else to complete the project.

- 64 In February 2013, the NAB took possession of the incomplete lot S2 homes and sold them for a combined sum of \$275,000, and in April 2013, the NAB took possession of Mr and Mrs Fraser’s home in Corowa and sold it for \$250,000. The sale proceeds were insufficient to meet the debt owed to the NAB. As at June 2013, the Mr and Mrs Fraser’s residual debt to the NAB was around \$524,000, and it continues to escalate.

## DISCUSSION

- 65 In my view, it is open to find that Mr and Mrs Fraser were, through the agency of Snowy, parties to the lot S2 building contract. At the time Mr Sperling signed the contract on behalf of the Alpine Woodpecker partnership, the agency of Snowy was undisclosed. However, at the time Mr Sperling signed the April 2011 agreement, an agreement which subsumed the lot S2 contract, the agency of Snowy was, or ought to have been, apparent to Mr Sperling and Dr Kastner. That Mr and Mrs Fraser were the owners of lot S2 was made clear in the email of 1 April 2011 from Burke & Associates lawyers to Mr Sperling.
- 66 However, for the reasons set out below, I find that Mr Sperling and Dr Kastner are not liable for the loss and damage claimed by Mr and Mrs Fraser because they have not *caused* that loss.
- 67 In my view, it is evident from the terms of the April 2011 agreement that the establishment of the trust fund, out of which creditor subcontractors

were to be paid, was a critical factor in the agreement to bring Fingal into the building project as the builder in replacement of Modern. The fact that subcontractors of Modern were owed money was a matter that had to be addressed. I accept Mr Sperling's evidence that it is difficult to find subcontractors willing to work in the Dinner Plain area, and that it was important, if the construction of the homes on lots S2, 5 and 6 were to be completed, that the subcontractors engaged in the works were paid.

- 68 Snowy did not pay \$50,000 into the trust fund. Instead, it paid the \$50,000 direct to Fingal. \$72,000 of the lock up stage payment under the lot S2 building contract was also not paid into the trust fund. Instead, Mrs Fraser, who says she saw the April 2011 agreement shortly after it was signed, paid the full lock up payment direct to Fingal. The trust fund never eventuated and subcontractors were not paid. It is not disputed that the primary subcontractor, Mr Van Heek, was not paid and that, as a result, he refused to carry out any further works after August 2011.
- 69 Mr Sperling and Dr Kastner did not authorise the departures from the April 2011 agreement, that is, the payments being made direct to Fingal rather than to the intended trust account. There is no evidence that Mr Sperling or Dr Kastner had any knowledge of such payments.
- 70 On the evidence before me, I find that the failure to establish the trust fund, and the resulting failure to pay subcontractors, was a significant factor in the collapse of the building project at lots S2,5 and 6. Mrs Fraser, along with Snowy and Fingal, had a direct hand in the failure to establish the trust fund. Mr Sperling and Dr Katner had no hand in it at all.
- 71 As noted above, when Fingal ceased works in late August 2011, *fixing* stage had not yet been reached, yet Fingal was paid in excess of the total fixing stage payment as set out in the lot S2 building contract. In that circumstance, it is not surprising that, as Mrs Fraser says, the NAB refused to advance more funds until the building works were completed.
- 72 To the extent the inability of Mr and Mrs Fraser to access funds for the completion of the lot S2 works was a factor in the cessation of the works, Mr Sperling and Dr Kastner played no part in that circumstance arising.
- 73 There is very little evidence as to what role the Alpine Woodpecker performed in respect of the lot S2 building works. In my view, it is clear that the Alpine Woodpecker was introduced to the building project by Mr Demetriou of Modern for the sole purpose of delivering Mr Sperling's RBP status which was required to obtain the building permit and the warranty insurance, and without which the works could not proceed. It is also my view, having heard evidence from Mr Sperling and Dr Kastner, that at the time Mr Sperling signed the building contracts for lots S2, 5 and 6, he and Dr Kastner believed that the Alpine Woodpecker's role in the project was to be significant, in terms of managing the carrying out of the building works, and that they would receive a significant portion of the profits from the project. What they ended up with, following negotiations with Mr

Demetriou *after* the building contracts were signed and *after* warranty insurance was obtained and building permits were issued, was an apparent agreement to receive a fee of \$10,000 from Modern for each of the four homes. In the end, they received \$8,000 payment from Modern and no payment from anyone else.

- 74 Mr Sperling says that, after the April 2011 agreement, he provided occasional technical advice and site inspections, and that Fingal managed the building works and directed the building subcontractors. His evidence in this regard is uncontested. The Alpine Woodpecker engaged no subcontractors, and did not issue or authorise progress payment claims for the building works. Under the April 2011 agreement, Mr Sperling, along with Mr Winchester and Mr Atwell, was to authorise payments from the trust fund that was to be established to pay creditor subcontractors. The trust fund never eventuated and while the actions of Mr Winchester and Mr Atwell were behind the failure to establish the trust fund, Mr Sperling had nothing to do with it at all.
- 75 Fingal engaged subcontractors. Fingal issued progress payment claims to Snowy, and they were paid by Mrs Fraser without referral to, or authorisation from, the Alpine Woodpecker. When asked by Fingal to make advance contract payments, Mrs Fraser made the payments without referral to, or authorisation from, the Alpine Woodpecker. It is clear, in my view, that Mr and Mrs Fraser, their agent Snowy (effectively, Mr Atwell) and Fingal all acted on the basis that Fingal, and not the Alpine Woodpecker, was the “builder” under the lot S2 building contract who was responsible for the carrying out the building works, issuing progress payment claims for the works and receiving payment in respect of such claims.
- 76 Fingal bears much responsibility for the cessation of the lot S2 building works and the ensuing loss to Mr and Mrs Fraser. Fingal sought, and accepted payment of, monies that, under the April 2011 agreement, ought to have been paid into the trust fund intended to meet the claims of creditor subcontractors. Fingal sought, and accepted payment of, contractual payments in advance of its entitlement under the lot S2 building contract. Fingal ceased carrying out works in late August 2011, at least partly because its subcontractors were unwilling to continue with the works unless they were paid.
- 77 Mr and Mrs Fraser plead that Fingal and Mr Sperling and Dr Kastner abandoned the building works. While such allegation might be sustainable as against Fingal, it is not, on the evidence, sustainable as against Mr Sperling and Dr Kastner. There is no evidence to suggest that Mr Sperling, on behalf of the Alpine Woodpecker, was unable or unwilling to continue in his technical advisory role.
- 78 Mr and Mrs Fraser plead that they made “overpayment” in respect of the lot S2 building works, and that the overpayment was made on the false representation of Mr Sperling and Dr Kastner and Fingal that the

overpayment amount was due and payable. Presumably this is a reference to payments made to Fingal in advance of the prescribed stage payments under the lot S2 building contract. While such allegation might be sustainable as against Fingal, it is not, on the evidence, sustainable as against Mr Sperling and Dr Kastner. As discussed above, Mr Sperling and Dr Kastner played no part in the issuing of progress payment claims or the approval of progress payment claims.

- 79 On all the evidence, I am not satisfied that Mr Sperling or Dr Katner have breached any contractual responsibility to Mr and Mrs Fraser, or that their actions have caused the loss and damage claimed by Mr and Mrs Accordingly, Mr and Mrs Fraser's claim must fail.
- 80 For completeness, I note that in the course of the hearing Mr and Mrs Fraser sought leave to amend their Further Amended Points of Crossclaim. The effect of the proposed amendment was to add, as an alternative to the allegation that the lot S2 building contract was formed through the agency of Snowy, the allegation that Mr and Mrs Fraser entered the lot S2 contract directly and not through the agency of Snowy. The application to amend the pleading was pressed on the fourth day of the hearing after Mr Atwell produced, for the first time, the original lot S2 contract as amended and signed by Mr and Mrs Fraser. I refused the application for two reasons. First, having regard to the length of the proceeding prior to the hearing and the multiple pleadings already filed, I did not consider it fair to Mr Sperling and Dr Kastner to allow the late amendment. Second, having heard the evidence of Mrs Fraser and Mr Atwell as to the circumstances of the amendments to, and the signing of, the lot S2 contract by Mr and Mrs Fraser, I did not consider the proposed alternative allegation to be sustainable.
- 81 In any event, had I allowed the proposed pleading amendment, it would have made no difference to the decision I have reached for the reasons set out above.

## **CONCLUSION**

- 82 For the above reasons I will order that Mr and Mrs Fraser's Crossclaim against Mr Sperling and Dr Kastner be dismissed. I will reserve the question of costs with liberty to apply, and I draw the parties' attention to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

## **THE YORK RENT CLAIM**

- 83 York brings a claim against Mr Winchester for rent and outgoings allegedly owed in respect of York's lease of a home at Dinner Plain to Mr Winchester in the period 1 June 2011 to 19 October 2011. The sum claimed is \$20,085 for rent and \$2,712.21 for outgoing expenses including water rates, electricity usage, gas usage and cleaning expense.

- 84 York was represented by its director, Mrs Morag Atwell, with the assistance of her husband, Mr Atwell. Mr Winchester was represented by Ms Symons of Counsel.
- 85 Mrs Atwell and Mr Winchester gave evidence.
- 86 York says that in the period Fingal and Mr Winchester were involved in the construction of lots S2, 5, 6 and lot S4, Mr Winchester rented a property at Dinner Plain known as Lot 3, Crooked 1, Roney Macs Twist, Dinner Plain (“the Crooked 1 premises”), owned by York. Mrs Atwell worked at the property management agency, “Atwell and Co.”, and says that she arranged the rental of the Crooked 1 premises to Mr Winchester.
- 87 Mr Winchester says that, for the period of rent being claimed by York, the Crooked 1 premises provided accommodation for various building subcontractors, including Mr Van Heek, engaged in the construction of lots S2, 5 and 6. He says that the premises were provided rent free to Fingal pursuant to an agreement that he, on behalf of Fingal, reached with Mr Atwell. Mr Winchester says the agreement was collateral to the April 2011 agreement in that it was recognised by Mr Atwell that, for the building works at lots S2, 5 and 6 to proceed, the subcontractors involved in the works would need accommodation.
- 88 Mr Winchester says that even if rent is owed, which he denies, it is owed not by him personally but by Fingal.
- 89 It is common ground that, in addition to the Crooked 1 premises, other properties at Dinner Plain not owned by York were used as accommodation for Fingal subcontractors and Mr Winchester himself, and that the rental for those other properties was paid by Fingal.
- 90 With the availability of properties at Dinner Plain changing at the commencement of the ski season, 1 June 2011, Mrs Atwell sent an email to Mr Winchester on 17 May 2011 as follows:

Hi David

I just wanted to touch base with you in regards to accommodation availability as it is drawing close to the beginning of the ski season.

Your agreement for Snowy River [another property] ends on 10 June 2011. I just need to know ... if you require this house after this date and for how long? At this stage I have holiday bookings so can be flexible but just need to know.

You mentioned you may want to take a property for the ski season, is this still the case? They are renting fast so will need to know by the end of the week and if you do need something, and how many bedrooms?

With regard to the crooked and Humffray properties [other properties at Dinner Plain], I need to give the owners some sort of rental while your tradespeople are living there to cover utilities and outgoings. I am happy to negotiate a reduced rate with these owners but just

wanted to chat to you first to see what you think is reasonable. My proposal would be the same rate as Snowy River at \$300 pw but have not run this past them yet so let me know your thoughts. *This does not apply Crooked 1 [the premises] as we are the owners and are happy to supply this house as you have helped us out so much!*

I have seasonal tenants starting on 1<sup>st</sup> June 2011 in Crooked 1 and either Crooked 2 or Humffray 3 at this stage so I will need to coordinate and have these cleaned and ready for these tenants by this date. I will therefore need these properties vacated by 27<sup>th</sup> May 2011

....

[emphasis added]

- 91 Mrs Atwell s says that the Crooked 1 premises were provided rent free for a limited period only from around 20 May 2011 to 31 May 2011. She says that it was always her intention to rent the Crooked 1 premises for the ski season commencing on 1 June 2011 at the usual rental rate. As indicated in her abovementioned email of 17 May 2011, she says that she had a tenant lined up for the premises starting on 1 June 2011. However, that tenant pulled out and, as a result, the Crooked 1 premises became available for continued accommodation for Fingal’s representatives and subcontractors after 1 June 2011. Mrs Atwell says, however, that the rent free period ended on 31 May 2011 and that this was made evident in her email of 17 May 2011. She says also that she had phone calls with Mr Winchester to the same effect.
- 92 Mr Winchester says that Mrs Atwell’s email of 17 May 2011 confirms the opposite, namely that Fingal’s continued use of the Crooked 1 premises from June 1 2011 onwards would, as it had been prior to June 1, be rent free.
- 93 Mrs Atwell’s email of 17 May 2011 is open to alternative interpretations. I need not make a final determination as to which is the preferred interpretation because, whatever the interpretation, I am not satisfied on the evidence before me that a lease agreement existed as between York and Mr Winchester. Any lease agreement in respect of the Crooked 1 premises was, in my view, between York and Fingal.
- 94 Mrs Atwell says that she sent a lease document to Mr Winchester for execution and that Mr Winchester never returned the document to her. Mr Winchester denies receiving any lease documentation in respect of the Crooked 1 premises. Mrs Atwell is unable to produce a copy of the alleged lease document.
- 95 None of the email communications between Mrs Atwell and Mr Winchester produced in evidence make any reference to a lease document in respect of the Crooked 1 premises.
- 96 It is not disputed that:
- Mr Winchester, himself, did not reside at the Crooked 1 premises;

- Subcontractors engaged by Fingal, including Mr Van Heek, were accommodated at the Crooked 1 premises during the course of the construction works at lots S2 , 5 and 6; and
- Fingal paid rent in respect of other properties at Dinner Plain not owned by York.

- 97 In my view, these facts support Mr Winchester's submission that if there was a lease agreement in respect of the Crooked 1 premises, it was an agreement between York and Fingal, and not an agreement with Mr Winchester in his personal capacity.
- 98 Having regard also to the fact that York is unable to produce a lease document, I find that York has failed, on the balance of probabilities, to meet the burden of proving its claim.
- 99 Accordingly, the claim for rental and outgoings bought by York against Mr Winchester fails.
- 100 For the above reasons I will order that York's claim against Mr Winchester be dismissed. I will reserve the question of costs with liberty to apply, and I draw the parties' attention to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

**SENIOR MEMBER M. FARRELLY**