



GREENWAY CHAMBERS

Recent cases of interest concerning damages, pleadings and prejudice, and the Design and Building Practitioners Act

Presented by Richard Cheney SC & Frank Hicks SC



Shoal Bay Beach Constructions No. 1 Pty Ltd v Mark Hickey & Ors trading as Sparke Helmore

[2023] 23 NSWCA



A client sues its solicitor

The duty to advise a property developer

1. Off the plan sale of units
2. Developer does not give timely notice to extend time to complete
3. Purchasers rescind – sales lost
4. Developer complains solicitor did not advise about need to serve EOT notices by particular date



The duty to advise a property developer

1. Developer wound up in insolvency
2. Appellant obtains assignment of developer's right to sue
3. 2 units: lots 50 and 52
4. Contracts made 6 and 7 August 2015
5. Either party could rescind if conditions precedent to completion not satisfied w/i 12 months of contract
6. "Registration Date"



Shoal Bay Beach Constructions v Sparke Helmore

A date missed

Developer right to extend in certain circumstances including inclement weather and authority approval delays: cl 43

Had to give notice at least 1 month prior to Reg'n Date



Shoal Bay Beach Constructions v Sparke Helmore

A date missed

Construction delays – units not complete by Aug 2016

Developer fails to give the cl 43 notices extending time

Both purchasers rescind



Shoal Bay Beach Constructions v Sparke Helmore

Developer sues

Developer sues its lawyers

Negligent failure to:

- “alert” of impending deadlines for extension notice
- advise developer of rights under cl 43
- seek instructions whether to serve notices



Shoal Bay Beach Constructions v Sparke Helmore

Developer sues

Sparkes' retainer included

“Acting on Conveyances for Residential Apartments”

Fee proposal:

“... the requisite technical and commercial skills in the area of strata developments and is considered the leading firm in the Hunter region in the provision of legal services in this area.”



Shoal Bay Beach Constructions v Sparke Helmore

Glorious 'win' for Developer

Trial judge (Adamson J) finds negligence / breach of retainer

In failing to alert the Developer to the imminent expiry of the period within which the Registration Dates could be extended.

Assesses Developer's loss and damage: \$370k



Shoal Bay Beach Constructions v Sparke Helmore

The bad news

30% contributory negligence – deducts \$110k

Judgment for \$258k

No costs

(\$258k within District Court jurisdictional limit)



Shoal Bay Beach Constructions v Sparke Helmore

Prior advice

Ample evidence of Sparkes having advised the Developer earlier in the relationship of the need to serve a Notice extending time not later than 1 month before the Registration Date



Earlier advice #1 – held to be critical

Email exchange 15 Dec 2014:

Developer asks:

“Andrew are those sunset dates with allowable extension? Or are they drop dead dates that buyers can rescind?”

Sparkes replies:

“Refer to special condition 43 of the Contract regarding extensions. The extension must be notified a minimum of 1 month prior to the Registration Date and the reasons you can delay are set out in 43.1 a to 43.1 e.”



Shoal Bay Beach Constructions v Sparke Helmore

Earlier advice #2

Email exchange in 17 March 2015:

Sparkes asks:

“Will an extension to the dates be needed or is the construction timing OK?”

Developer answers:

“Not yet. Completion expected December 2015. 6 month extension for delays is noted. Noted you need to exercise right to extend one moth (sic) prior to sunset date.”



Earlier advice #3

Sparkes' email to Developer Feb 2016 (5 months before deadline):

“If the vendor wishes to extend the Registration Date in the contracts, special condition 43 applies. This clause requires that **a minimum of 1 month prior to the Registration Date** (i.e. the Sunset Date) the vendor can extend the Registration Date for any of the following:

...”



Shoal Bay Beach Constructions v Sparke Helmore

Earlier advice #4

Sparkes provides Developer updated sales schedule setting out the Sunset Dates for the contracts.

Included lots 52 and 50 showing Sunset Dates of 6 August and 7 August 2016 and noting:

“six month extension is also available in addition”.



Shoal Bay Beach Constructions v Sparke Helmore

Developer aware of deadline #1

Internal developer email cc: Sparkes Feb 2016 (5 months before deadline)

“Adrian

If we can get builder to sign off on delays as per below items in [Sparkes’] email (inclement weather, strike and then a very broad term or whatever etc) then we can exercise option in contract for sale to extend sunset date ...”



Shoal Bay Beach Constructions v Sparke Helmore

Developer aware of deadline #2

Developer procures certification from project superintendent of 85 day EOT for inclement weather delays



Developer aware of deadline #3

March 2016 Developer instructs Sparkes to send letters to purchasers of units whose Registration Dates fell in **June or July 2016** [not Aug '16] advising that they were instructed that the vendor would not achieve completion of the project by the Registration Date, and whilst the vendor was able to make an extension of time claim pursuant to cl 43 of the Contract, it preferred to vary the Registration Date to a new Registration Date of 31 October 2016.



Shoal Bay Beach Constructions v Sparke Helmore

No instructions re subject units

no instructions given to Sparkes to issue letters to purchasers of lots 50 and 52 requesting an extension of the Registration Dates, or to prepare cl 43 notices to extend Registration Dates.



Notices served too late

Mid July 2016 (less than a month before Reg'n Date

Sparkes recommends the “same Extension of Time Notices served earlier are now served on those purchasers with July, August and September Registration Dates”.

Sparkes serve notices on the solicitors for the purchasers of lots 50 and 52 with Super's EOT certificate

Purchasers object to notices as late and rescind.



Shoal Bay Beach Constructions v Sparke Helmore

The issue

White JA at [79]

But the question remained whether, in exercising due care and skill, Sparke Helmore ought to have sought instructions in relation to contracts for the sale of lots 50 and 52 where, if notice of extension of time were to be given, notice would have had to be given before 6 or 7 July 2016.



NSWCA: no duty to remind / chase instructions

White JA at [88]

“Sparke Helmore was not negligent in failing to remind the Developer of the advice previously given or, what amounts to the same thing, in not seeking instructions prior to 6 and 7 July 2016.”



Shoal Bay Beach Constructions v Sparke Helmore

NSWCA: no duty to remind / chase instructions

White JA at [85]

The position is as expressed in R J Jackson QC & J L Powell (General Editors), Jackson & Powell on Professional Negligence (3rd ed, 1992, Sweet & Maxwell) at par [4-106]:

“As a general rule there is no duty on a solicitor to remind a client of advice once it has been given...”



Shoal Bay Beach Constructions v Sparke Helmore

White JA at [95]: contrib neg 80%

“The appellant’s challenge to the finding of contributory negligence was based upon its contention that Sparke Helmore was obliged to telephone the Developer weekly to ascertain which contracts should be extended.”



Shoal Bay Beach Constructions v Sparke Helmore

The lessons?

Some comfort about the duty to advise

Don't go back for your hat!



Roberts v Goodwin Street Developments

[2023] NSWCA 5, per Kirk and Griffiths JA, with whom Ward P agreed in part and dissented in part.

1. The measure of damages.
2. Prejudice and pleadings.
3. The application of the statutory duty under the *Design and Building Practitioners Act* by reference to s.4 and s.36.



123 259 932 v Cessnock City Council

[2023] NSWCA 21, per Brereton JA, with whom Macfarlan and Mitchelmore JJA agreed.

1. Reliance damages in the case of breach and repudiation of contract
2. The presumptions and matters of evidence relevant to the claim
3. Principles of remoteness and the limbs of *Hadley v Baxendale*



The Owners Strata Plan 84674 v Pafburn

[2023] NSWSC116, per Rees J

1. The proportionate liability (concurrent wrongdoer) provisions of the *Civil Liability Act* and the non-delegable duty pursuant to s.37 and s.39 of the *Design and Building Practitioners Act*.
2. A defendant to an action for breach of the statutory duty is entitled to invoke the apportionment provisions of the *Civil Liability Act*.

