



SUMMARY

Case: Aitken & Anor v Lauder milk & Ors – INTERIM DECISION

File No: TRI 2008-101-000098/ DBH 04231

Court: WHT

Adjudicator: R Pitchforth

Date of Decision: 29 May 2009

Background

The claimants are owners of a leaky house. Some of the leaks have been repaired while others require further remedial work. The claimants sought redress from the parties they believe to be responsible for the leaks. Some respondents were removed from these proceedings thereby leaving the remaining respondents:

- First respondents: Mr and Mrs Lauder milk (Lauder milks) – first occupiers of the house and shareholders of EquusLoco Ltd (company that owned the property but was removed from the register 1 December 2008)
- Second respondent: Mr Jones – designer
- Third respondent: Mr Rule – builder
- Fourth respondent: Marlborough District Council – the territorial authority
- Fifth respondent: Contour Roofing (Nelson) Ltd – butynol layer
- Ninth respondent: Mr Fyfe – Equus applicator

Facts

- 2000: house was built
- EquusLoco owned the property and contracted for the construction of the house. As directors of EquusLoco, the Lauder milks undertook all necessary actions regarding the construction
- Mr Rule had discussions with the Lauder milks about a possible house. Mr Rule introduced the Lauder milks to Mr Jones, an architectural designer
- Mr Jones' contract with EquusLoco was to provide drawings for a building consent. The contract did not provide for Mr Jones to supervise the work
- Changes were made to the plans but it is not known whether Mr Jones knew of this or whether further consents were obtained for such changes
- EquusLoco sold the property to the claimants by a contract dated 23 July 2003. EquusLoco ceased trading after the sale and was removed from the register
- 25 July 2003: the Council inspected the property for the purpose of obtaining a Code Compliance Certificate. The ground clearances for the cladding were accepted however the inspector required that the hot water cylinder be strapped and for the cylinder's frost caps to be on hunter valves
- The Lauder milks occupied the house until October 2003 during which they saw no evidence of leaks

Claim

The Tribunal held that the proper cost of remediating the leaks in the subject dwelling is \$25,362.35 (inclusive of GST)

Decision

Liability of Mr Jones - designer

The Tribunal found that the plans, as submitted for consent purposes, were adequate and that the proposed dwelling could have been constructed as a weathertight building. Mr Jones is therefore not liable and the claim against him was dismissed.

Liability of Contour Roofing (Nelson) Ltd – butynol layer

Contour Roofing (Nelson) Ltd's contract was to partly lay butynol into a partly completed gutter. When they attended the site they were not able to complete the work because the roof structure was not complete and no iron was laid on the roof. They were present on site for only 4 hours and they were not asked to return. Because they did not return, Contour did not issue a warranty. The Tribunal therefore found that this small amount of work had not contributed to the damage and loss and accordingly the claim against Contour Roofing (Nelson) Ltd was dismissed

Liability of Mr Fyfe – equus applicator

Mr Fyfe took little part in these proceedings. Nevertheless the Tribunal held that there was no evidence that any work done by Mr Fyfe was the cause of any leak and damage. Mr Fyfe was accordingly removed from these proceedings

Liability of the Council - territorial authority

The Tribunal held that the plans were suitable for consent purposes and accordingly the Council was not found liable for that stage of the development. However in regards to its inspections, the Tribunal concluded that the observations would have been easy to make as little was hidden and therefore the Council failed to ensure that the Building Code was complied with. The Council's inspections failed to pick up the changes referred to by Mr Jones and the obvious faults referred to above. The Tribunal therefore found that the changes were sufficient to put the Council on notice and therefore they should not have issued the Code Compliance Certificate. To do so was negligent.

Laudermilks – previous owners

The Tribunal found that the building was not built in accordance with the plans and the differences are sufficient for an owner to notice during the course of construction. It was clear that EquusLoco was the developer, while the Laudermilks were the directors of that company. However the Laudermilks, as occupiers of the house and as those involved in the planning of the house and changes to the plans, were involved in the work on behalf of the company, not just as directors. They did or authorised work, which was not code compliant, and they knew, or ought to have known, that changes to the plans were made. They clearly had control over the way in which the building was built and therefore they were negligent. The Tribunal therefore held that the Laudermilks owed a duty of care to the claimants. They breached that duty of care and are therefore liable to the claimants.

The Tribunal also concluded that the Laudermilks never undertook any groundwork on site. Nor did they place any soil against the cladding, with the exception of the path and terrace. However if it turns out that the Laudermilks, rather than Mr Rule, laid the tiles, the Laudermilks will have responsibility for the consequences of that decision

Contributory Negligence

In following the decision in *Sunset Terraces*, the Tribunal held that the claimants were not negligent in not obtaining a pre-purchase report. Moreover there was no evidence that landscaping has either caused the leaks nor that the current owners do not properly maintain the building. The Council's submission regarding contributory negligence therefore failed.

Contribution

The Laudermilks seek indemnity from the other respondents and the Council also seeks indemnity or contribution from the Laudermilks and Mr Rule. However without further information from Mr Rule and the Laudermilks, it was difficult for the Tribunal to make the allocations. Therefore the question of an allocation of contribution between the parties is reserved.

Summary

- Mr Fyfe is removed
- The claim against Mr Jones is dismissed
- The claim against Contour Roofing (Nelson) Ltd is dismissed
- The Laudermilks, Mr Rule and the Council are jointly and severally liable to the claimants for the sum of \$25,362.35 (inclusive of GST). The question of an allocation of contribution is reserved