



## **SUMMARY**

**Case:** Aldridge & Ors as Trustees of the SL & KM Aldridge Family Trust v Boe  
**File No:** TRI-2009-100-000067  
**Citation:** [2010] NZWHT Auckland  
**Adjudicator:** KD Kilgour  
**Date of Decision:** 12 November 2010

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### **Background**

The claimants brought a claim regarding their home which they purchased in 2006. They sought full remedial costs from the four remaining respondents to the claim:

- First respondents: Mr and Mrs Boe, previous owners
- Second respondent: Hamilton City Council, territorial authority
- Fourth respondent: Mr Swart, labour-only builder
- Fifth respondent: Mr Murphy, building surveyor engaged by the Boes

### **Facts**

- 1995: Mr and Mrs Boe purchased land and plans were drawn up for the construction of a dwelling
- 14 March 1997: Council granted resource consent
- December 1997: Mr Swart commenced building work
- September 2005: Final inspection arranged
- 17 March 2006: Council advised Boes of work required before a Code Compliance Certificate (CCC) can be issued
- December 2006: Claimants purchased dwelling
- 13 June 2008: Council issued notice to fix
- 7 July 2008: Claimants lodged their claim with WHRS

### **Summary of Decision**

#### *Claim in Contract*

The claimants alleged that the Boes ought to be found liable in contract due to misrepresentations made prior to the purchase. The Tribunal found that the claimed misrepresentations amounted to no more than an opinion or that they were not in fact misrepresentative. The claimants also contended that the vendors were in breach of their warranty under the contract. However, the Tribunal held that the warranty should be seen in the context of the whole agreement and that as the claimants knew of the weathertightness issues they were prohibited from seeking a claim under the contract's warranty.

#### *Claim in Tort*

The claimants alleged that the Boes breached their duty of care owed as developers and/or head contractors. The Tribunal did not accept the contention that that Mrs Boe was a developer as the project was not for financial benefit. However, it was accepted that Mrs Boe's role in the project was akin to that of a head contractor and as such, that she owed the claimants a duty of care. The Tribunal considered that there was insufficient evidence suggesting that the trades specifically relied on Mrs Boe to

manage the work in terms of compliance with building requirements and as such it was found that Mrs Boe did not breach the duty of care that she owed.

*Volenti Non Fit Injuria (Voluntary Acceptance of Risk)*

It was submitted that the claimants' claim against the respondents should fail as the claimants voluntarily assumed the full extent of the risk of buying a house with no CCC and known weathertightness defects. Based on a subjective assessment of all the evidence the Tribunal found that the respondents had established that Mr Aldridge had full knowledge of the nature and extent of the risk he ran in purchasing the home and that he chose to incur the risk of his own mischance. As such the Tribunal found that the acts and/or omissions of the respondents did not cause the claimants' loss.

*Lack of Causation*

It was submitted that the claimants' loss was not caused by any act or omission of the respondents, but instead by the claimants. It was submitted that the claimants took a calculated risk that the house needed to be repaired in order to obtain a CCC and after realising that the risk did not pay off the claimants could not then place responsibility on the respondents for their bad bargain. The Tribunal accepted these submissions.

**Result**

The Tribunal held that as the claimants voluntarily and knowingly acquired a home that had weathertightness defects and no CCC it would be wrong in law and principle to impose liability on the respondents. The claimants' overall claim was dismissed.