

**IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI-2009-101-0064**

BETWEEN	ANDERSON FAMILY TRUST Claimants
AND	KELLY and BARRY DOYLE First Respondent
AND	MAX KEEN Second Respondent
AND	PALMERSTON NORTH CITY COUNCIL Third Respondent
AND	NOVACOCA LIMITED Fourth Respondent
AND	NOVACRETE LIMITED Fifth Respondent
AND	SHELDON PEPE Sixth Respondent
AND	GIANCARLO PEPE Seventh Respondent

DETERMINATION
Dated 16 December 2009

I. INTRODUCTION

[1] The issue for determination is the claim against Mr Keen. All claims against other respondents have been settled.

[2] This is a small claim with total remedial costs of \$20,477.00. It was agreed there would be a facilitated negotiation at the initial Procedural Order conference on 12 October 2009. As a result of the facilitated negotiation which was chaired by Ms MacKenzie, there was a partial settlement with all parties except for the second respondent Mr Keen who did not participate. Mr Keen was the builder of the deck.

[3] The claimants have chosen to pursue their claim against the deck builder. A further settlement conference was heard in this matter in an endeavour to resolve the claim between the Anderson Family Trust and Mr Keen. Unfortunately this matter was not resolved. At the conclusion of that conference it was agreed that the parties would continue to negotiate and attempt to achieve a settlement. It was agreed if no such settlement could be achieved then the adjudicator would make a determination.

[4] The determination was deferred to enable the assessor to clarify information relating to deck problems.

Claim against Mr Keen

[5] The Tribunal sought further clarification of the extent of the liability, if any, of the builder arising from his failure to construct the surface of the deck in the manner which had been designed, and being non compliant with the building consent which had been granted - namely he had failed to stagger the joints, glue and screw in to place the balcony and deck floor substrates with countersunk screws.

[6] On Friday 11 December 2009 evidence was heard from the Assessor. Mr Smith, Mr Keen's expert, attended together with Mr Keen and his counsel. The claimant did not attend.

[7] Mr Miller, the assessor, in his report of 16 March 2009 had noted the above defects. The question was the degree of contribution to the leaking.

[8] In the report at paragraph 15.5 the assessor said:

15.5 What damage may be caused by leaks in the future?

15.5.1 Left as is, there would be increased internal & external damage below the lower deck and damage would result to the lounge ceiling or upper deck framing.

15.5.2 The ply substrate would also lose its H3 treatment by leeching and rot."

[9] At the teleconference Mr Miller stated these had been a contribution but he agreed with Mr Smith that it was of a minor nature. Mr Smith's view was that irrespective of the manner in which the substrate had been affixed to the deck structure the deck surface applied would have failed. In other words the manner of the construction of the deck had made no contribution to the leaks.

[10] Counsel for Mr Keen argued that as the substrate had made no difference, the deck would have leaked in any event and therefore his client had no liability.

[11] The Tribunal does not accept this as the case. The Tribunal considers it significant that the cracking follows the lines of the joints in the plywood substrate. This was most clearly seen in Photos no. 40 and no.42 annexed to the Assessor's Report. This is corroborative of the assessor's view that the lack of rigidity was a contributor to the leaks.

[12] The evidence of the assessor on this point is preferred to that of Mr Smith. There is a causal link between the way the deck was constructed and

although only a minor contribution to existing damage it becomes a more significant factor in relation to future damage.

[13] The substrate on the deck was built contrary to the plans and specifications and contrary to the building consent. This has meant the claimants are required to replace that substrate in order to effect remediation. The critical point is that remediation requires its replacement. The Tribunal considers the builder liable in tort for negligent construction of the deck.

Quantum

[14] The Tribunal accepts Mr Dobson's submission that as outlined in the Orca Report, Mr Keen's liability is limited to the replacement costs for the two deck substrates. The quantum is set as follows:

(1) Remediation of deck one (see item no.7, page 5, Orcas Report).	\$2,040.00
(2) Removing balcony deck floor substrate staggering of all joints gluing and screwing with screws on top deck.	\$850.00
(3) Plus contingency allowance 8%	\$231.20
(4) Plus contractor's overhead and margin 7.5%	\$216.75
(5) Plus GST	<u>\$417.24</u>
TOTAL	\$3,755.19

[15] The Tribunal hereby determines that the second respondent is liable to the claimants in a sum of \$3,755.19.

DATED at Wellington this 16th day of December 2009

C B Ruthe

Tribunal Member