IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000048
[2011] NZWHT AUCKLAND 58

BETWEEN	BENJAMIN CHARLES GRUBB AND LLOYD NORMAN WHALEN as trustees of the BAS TRUST Claimants
AND	AUCKLAND COUNCIL First Respondent

Hearing:	9 and 10 June 2011
Closing Submissions:	17 June 2011
Appearances:	Mr G Shand and Mr C Lane for the claimants Ms F Divich and Mr M Grant for the respondent
Decision:	26 October 2011

FINAL DETERMINATION
Adjudicator: R M Carter

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[1] Mr Grubb and Mr Whalen as co-trustees bought a house at 36 Point View Drive, East Tamaki Heights at auction in 2008. Before the auction, Mr Grubb took advice from two builders he knew, one of whom was Mr Whalen, inspected the house and the Council's file, and spoke by telephone to his daughter, who is an architect, and to the builder about the house.

[2] After the auction but before settlement of the purchase, Mr Grubb arranged for a thermal imaging company, The Imaging Specialists Limited, to carry out an inspection. This inspection and report, which is referred to as the Drybuild report, revealed shortcomings and recommended remedial attention at a number of locations.

[3] In 2009, the claimants applied for a WHRS assessor's report. This report showed that the house was a leaky home as a result of numerous defects.

[4] Mr Grubb and Mr Whalen contracted with a builder specialising in remedial work to repair the house. They now seek damages from the Council to cover the cost of repairs and associated costs, and general damages. They claim that the Council was negligent in carrying out its inspections and in issuing a Code Compliance Certificate when the house did not comply with the Building Code.

[5] The Council concedes it was negligent in failing to detect four particular defects in its inspections and it accepts that three of those defects caused sufficient damage to require a total re-clad. However the Council says the claimants were contributorily negligent and contributed significantly to their own losses by not taking further investigative steps before they purchased the house. The claimants deny that they were negligent in any way. Therefore the issues I need to decide are:

a) Did the claimants cause or contribute to their own loss by not taking further steps to check the house before the auction?
b) Did the claimants cause or contribute to their own loss by not taking further steps between the auction and settlement?
c) If the claimants contributed to their own loss, how big a contribution did they make?

DID THE CLAIMANTS CAUSE OR CONTRIBUTE TO THEIR OWN LOSS BY NOT TAKING FURTHER STEPS TO CHECK THE HOUSE BEFORE THE AUCTION?

[6] Mr Grubb outlined the steps he took before purchase. By that stage Mr Grubb and his partner had looked at about 30 houses in six months and attended five auctions, bidding unsuccessfully at three. He stated that this house was attractive because it was in a good area and it was a home and income, having a flat attached which was tenanted. He stated he looked at the house three times and noted a long crack in the kitchen floor tiles and cracks in two or three internal walls. The two builders he spoke to said that these cracks were probably the result of settling and would not be the result of weathertight failures. He also inspected the Council file and spoke to the builder of the house.

[7] Mr Grubb also spoke to his daughter, who lives north of Auckland, and to Mr Whalen who lives some of the time in the Coromandel and did not come to Auckland and inspect the house himself. Mr Grubb said Mr Whalen takes no part in the trust's decisions and is there to protect the interests of Mr Grubb's children if anything happens to him.

[8] Mr Grubb denied that he was an expert in building. He said he had organised the building of two houses before but he himself did nothing technical on them, only some labouring.

[9] Mr Shand listed the steps Mr Grubb took before he purchased the house. He made enquiries of the real estate agent and through the agent, the vendor, obtained a LIM report from the agent, sought advice from two builders on what to look for in order to determine whether a building has weathertightness issues or not, inspected the house three times, inspected the Council file and records and checked the building had a Code Compliance Certificate, phoned the builder, and obtained the name of the plasterer. Mr Shand submitted that the steps he took were reasonable. He submitted that there is no obligation in law to obtain a pre-purchase report, and the report he obtained after purchase only raised minor maintenance issues. For those reasons, he submitted, the defence of contributory negligence cannot succeed.

[10] Ms Divich submitted that she had difficulty getting Mr Grubb to answer her questions as to what he had asked his builder friends about. She submitted that there were visual defects which at the time, December 2008, should have been enough to alert Mr Grubb to the risks of buying this kind of property without having obtained a pre-purchase report.

[11] In her closing submissions, Ms Divich referred to Ellis J's reserved judgment *Findlay v Auckland City Council*[1]. In that case Her Honour set out the questions to be addressed in deciding contributory negligence cases.

[12] Paraphrasing paragraph [64] of that judgment, to assess the existence and extent of any contributory negligence on the part of Mr Grubb and Mr Whalen, I need to address the following three questions:

- What is it that can fairly be said on the evidence to have been done or not done by Mr Grubb and Mr Whalen that contributed to their loss in having to pay for the repair of the house?
- To what degree can those actions or inactions be said to represent a departure from the standard of the reasonable person in their position?
- What was the causative potency of those actions or inactions in relation to the damage suffered?

[13] Mr Grubb's evidence was that he did not obtain a pre-purchase building report because he did not think he was going to be successful at the auction, though he thought the interior cracks may mean the house would sell for a reduced price. Mr Grubb was aware of another house in the area that was sold for over $900,000.00, though at the hearing he said that was a better house. The limit to the finance available for the purchase was $700,000.00. In the event he purchased this house at the auction for $685,000.00.

[14] However Mr Grubb was not the only purchaser and is not the only claimant. The other purchaser and claimant, Mr Whalen, did not inspect the house at all. Mr Shand submitted that the test set out by Stevens J in *Hartley v Balemi*[2] did not impose a particular, higher duty on someone who is a builder, but Ms Divich submitted that Baragwanath J set out a slightly but importantly different test in *Byron Avenue* when he decided that the test is what a reasonable person, having the characteristics of the person concerned, would have done[3].

[15] I consider that any prudent purchaser, especially one with experience as a carpenter, would take the step of inspecting a house before buying it, particularly this house. Mr Whalen did not do so, yet he had that kind of experience. This was a monolithically clad house

[1] HC Auckland CIV-2009-404-6497, 16 September 2010
[2] HC Auckland CIV 2006-404-2589, 29 March 2007
[3] [2010] NZCA 65 at [79],[80]

and Mr Grubb acknowledged that he was aware of the problems these houses often have. At the very least Mr Whalen should have insisted that Mr Grubb arrange for a builder to inspect the house in his place.

[16] If Mr Whalen or a builder had done so, he probably would have noticed at least some of the defects the assessor noted in his report. These defects included the base of the stucco plaster exterior cladding being finished below the finished ground line; insufficient clearance from floor to ground lines; no control joints or expansion joints to the stucco exterior cladding; numerous sealed cracks to the stucco plaster exterior cladding; defective window and door flashings; no sleeves or formed sealant joints at penetrations; face fixed downpipes, light fittings and alarm siren box; the deck in too close contact with stucco exterior cladding; and plaster board interior lining cracked on numerous exterior walls. The Council submitted that a reasonable pre-purchase inspection report would have identified these alleged defects including ground clearances, lack of control joints or cracking to the cladding, external penetrations and window joinery defects.

[17] I also find it difficult to accept that none of the people Mr Grubb consulted indicated these key risk areas that he should look for when he inspected the house. When replying to Ms Divich's questions, Mr Grubb said he was advised to look out for mould etc, and that he considered the advice he received was reasonable and adequate. Mr Grubb's answers in this respect seem to have been incomplete, because by late 2008 the defects to look out for were becoming well known amongst building professionals. If Mr Grubb himself was unable to spot the defects, he was negligent in not arranging an inspection by someone who could. It was imprudent for the claimants to rely on Mr Grubb's inspections.

[18] The assessor's report was dated March 2010, over a year after the purchase, but most of the defects he identified above were

visible defects and many were part of the construction in 1999/2000 and so would have been as visible in November 2008 as they were in March 2010.

[19] Mr Grubb saw the advertisement for the property on 28 November 2008. It was to be sold at auction eight days later on 30 November. The parties both introduced evidence from solicitors with expertise in the field of property conveyancing.

[20] Timothy Jones gave evidence as a conveyancing expert engaged by the Council. He stated that in his experience it is not common for purchasers to seek advice from solicitors before entering into an agreement for purchase of the property. Purchasers would insert protection conditions but did not want to hold up the momentum by having the solicitor review the contract first. However an auction is a sale at a fixed point in time.

[21] Mr Jones stated that by 2008 it was common practice for agents to provide prospective purchasers with an information memorandum or pack comprising a draft auction agreement, a title search and possibly a LIM report for the property. Mr Jones stated that in his experience the number of prospective purchasers of auction properties seeking advice from a solicitor would be far greater than ordinary contracts, for two reasons. The first is because with the information pack they would seek advice before attending the auction, and secondly they could aim for the auction date and would have time to seek advice.

[22] Mr Jones went on to set out the advice a solicitor would give to a client intending to purchase a property at auction in 2008. This included the recommendation of obtaining a building report. He stated that by 2008, it was common for a solicitor to ask the client about the type of property being purchased. He stated that in 2008 public awareness of the leaky building problem and the fact that it affected particular types of houses built in a particular period, such as

this one, led many purchasers buying that type of property to carry out a building report before purchasing. He then set out what advice and options would be available to the client if an adverse report came after entering an unconditional contract.

[23] In response to Mr Jones' evidence, Robert Eades, who is also an experienced property lawyer, stated that he believed Mr Jones could only be an 'expert' in limited ways. He agreed with Mr Jones that it was not common for purchasers to seek advice before entering a negotiated agreement in 2008, but it was far from unusual. It is quite common for a client to contact his lawyer before an auction, but it is not always the case that a prospective bidder has time to consult widely before an auction. Often they find out about the auction long after advertising commences or they mull it over and decide to bid late in the piece. In 2008 and since then, it remains common for agents to provide an information pack which might be taken to the lawyer before the auction but it does not always happen. A close reading of the information pack may be all that is needed.

[24] A lawyer would have emphasised that a successful bid at auction results in an unconditional agreement. Mr Eades did not consider that a lawyer would usually or ought necessarily to have recommended that the client obtain a building report. A full report takes time and is expensive. A superficial report might even be dangerous. Other pragmatic enquiries may be appropriate.

[25] Mr Eades agreed that at the time there was public awareness of the leaky building problem, but he was not sure that many purchasers bidding on a "typical leaky building" would necessarily have obtained a building report, only because the construction was "typical".

[26] Mr Jones and Mr Eades stated or implied there is no ability to negotiate the terms of sale and purchase in an auction situation - the terms are as set out in the documents presented beforehand.

[27] This evidence from these two well qualified solicitors shows that a purchaser is not necessarily negligent in not seeking advice from his lawyer before an auction. I conclude that in the circumstances of this case where there was an element of risk it was somewhat imprudent to bid at an auction without having taken legal advice first.

[28] However Mr Grubb did not obtain a report on the property before the auction because he did not think he would be the successful bidder, not because he did not consult his solicitor. Mr Grubb denied he was taking a risk but he must have been aware that he and Mr Whalen were taking a risk when he was bidding at the auction without having identified the risk factors themselves or arranged a pre-purchase inspection (with or without a written report). He purchased unconditionally. In doing so, the claimants did not act reasonably and prudently.

[29] Alternatively Mr Grubb *was* aware of the risk factors, but went ahead anyway. The note that his solicitor Paul Friedlander made after the purchase, that Mr Grubb was "aware of building technique all ok" (see paragraph 31 below), suggests this. Either way, the obvious explanation is that Mr Grubb took the risk because he was getting the house for a favourable price. Given the steps he took, including obtaining a report after the auction, it is not credible that Mr Grubb was unaware of the real possibility of some weathertight problems with this house, as well the internal cracks, when he made the successful bid for it.

[30] In reaching my decision I have also had regard to Heath J's statement in the High Court[4] that there has never been an expectation in New Zealand of a purchaser obtaining an expert report to establish that the house is soundly built. That judgment was in 2004, and the judgment in *Hartley* was given in early 2007. But this

[4] Body Corporate 188529 v North Shore City Council, HC Auckland, CIV 2004-404-3230, at [577] (Sunset Terraces)

purchase was in late 2008, and the house in question was of a kind typical of 'leaky homes'. Mr Jones' evidence was that purchasers were by then well aware of the leaky homes problem; as was Mr Grubb.

DID THE CLAIMANTS CAUSE OR CONTRIBUTE TO THEIR OWN LOSS BY NOT TAKING FURTHER STEPS BETWEEN THE AUCTION AND SETTLEMENT?

[31] After the auction but before settlement, Mr Grubb sought a thermal imaging report from Drybuild. Mr Grubb said that the reason why he decided to obtain the thermal imaging report was to check the vendors' undertaking to him that to their knowledge the building did not have any leaking problems. He said he now wished to have the building checked for that reason. Mr Shand submitted that the claimants commissioned the Drybuild report to confirm their belief the property was weathertight.

[32] Mr Friedlander, who acted for Mr Grubb in the purchase, provided the Tribunal with the notes he took when he received instructions from Mr Grubb over the telephone after the auction. Mr Friedlander's notes stated:

> 8/12/2008
> Ben Grubb
> LIM – all ok
> No building report
> Discussed with daughter who is an architect
> Aware of building technique all ok
> Contacted owner who said no problem with the building
> Ben will get a building report also
> Will mortgage TSB
> Tenancy go with it
> House and granny flat and take over tenancy agreement
> Will get agent to provide copy of tenancy agreement.

[33] It is a fine distinction between checking that a building is not leaky and checking an informal undertaking that to the best of the

vendors' knowledge it is not leaky. The fact that Mr Grubb arranged for this report indicates that he had some doubt or concern. That is a reasonable inference since Mr Grubb had purchased at the auction at what appeared to be a favourable price without having had a builder inspect the house before he and Mr Whalen bought it.

[34] Mr Grubb said that when he got the Drybuild report he found it to be of no use. He said he discussed the report with Michael Back, the thermographer. Mr Grubb said he found Mr Back's answers to be equivocating and that he could not get a straight answer from Mr Back. Mr Grubb said that he did not get the report until two days before the settlement date, 15 January 2009.

[35] However Mr Back said that his answers to Mr Grubb were along the lines that he would usually have given with a report of this nature.

[36] The report said in its summary that the house appeared to be well constructed and in good condition with several signs of high moisture content levels. It stated the main contributing factors to the increased moisture levels were failures from the mitres to the joinery, from the roof to wall junctions, from the ground clearance, from both shower to wall junctions, from the external penetrations and from cracks in the cladding. It did not record moisture levels much above the danger mark of 20%. However at the end of the report the reader was asked to note that while some readings were below 20%, they can still be elevated when viewed in relation to the readings in areas where there were no issues. In those areas, readings were generally less than 14%. I accept Mr Back's evidence that he did not resile from the report when he discussed it with Mr Grubb.

[37] Victoria Carter, the vendor's real estate agent, gave evidence that eight days was enough to obtain a pre-purchase report but she had never experienced a person obtaining a pre-purchase report after an auction. The solicitors giving evidence also said that a further

inspection could have been arranged before settlement, albeit with some difficulty and it may have cost more because it was urgent. If that had been done a reduced price might have been negotiated. However the claimants went ahead and settled with the vendors, thereby giving up the possibility of reminding the vendors of their undertaking and negotiating a reduced price.

[38] Mr Jones said that in his experience acting for vendors in 2008 and 2009, vendors would be very anxious to avoid the voiding of an agreement. By this time the economic downturn had affected the real estate market significantly and vendors were having difficulty in selling property. Therefore, in his experience, vendors would be more likely to accept a reduction in the purchase price than to bring an end to the agreement and seek to resell the property.

[39] I conclude that Mr Grubb was negligent in not discussing the Drybuild report with his solicitor, Mr Friedlander, a report which, to say the least, stated that the house did have actual problems. I do not accept that, having been concerned enough to arrange for the Drybuild report after the auction, Mr Grubb was justified in putting it to one side because he did not think that it was of any value. I conclude that Mr Grubb did act negligently because even if he did have reservations about the Drybuild report and even if the settlement was approaching, he should have turned to Mr Friedlander for advice.

[40] Mr Friedlander's evidence was that there were options that could have been explored but the difficulty was that they were at the 11th hour of an agreement. He said practically it would be very difficult at that stage to do anything by way of making good on the undertaking. The point is however that Mr Grubb did not consult Mr Friedlander to even explore the possibilities that Mr Jones suggested, referred to in paragraph 36 above.

[41] I consider that if he had done so it was unlikely that Mr Friedlander would have been able to arrange for a further expert's

report urgently and to successfully negotiate a reduced purchase price in the time available. The unconditional nature of the purchase contract and the shortness of time before settlement probably meant the purchasers had no real choice but to settle. So on balance I have concluded that the 'causative potency' between the claimants' negligent failure to take advice or action on the Drybuild report, and the claimants' losses, is absent because of the shortness of time and contractual obligation in the agreement.

IF THE CLAIMANTS CONTRIBUTED TO THEIR OWN LOSS, HOW BIG A CONTRIBUTION DID THEY MAKE?

[42] At paragraphs 14 to 18 and 28 to30 above, I have reached the view that Mr Grubb and Mr Whalen acted negligently before Mr Grubb purchased on their behalf, in so far as Mr Whalen did not inspect the house, or they did not arrange an actual inspection by another carpenter or builder, before they bought it. Only Mr Grubb inspected it. Alternatively Mr Grubb really did know there were structural issues involving some risk of moisture ingress and he took the risk. In those fundamental respects there is a clear and direct nexus between the claimants' inaction and action, and subsequent loss.

[43] Mr Shand introduced evidence from a builder, Nigel Armstrong, that the repairs necessary to make good the defects in the Drybuild report would have cost little more than $20,000.00, but Ms Divich challenged that, saying that there were other necessary costs that estimate did not take into account. I consider that the Drybuild report pointed to the possibility of repair costs greater than $20,000.00, although at that stage they were not quantified. In any event the Drybuild report was obtained after the purchase, and in the end the claimants' actual loss after the settlement was much higher, so the estimate of $20,000.00 is not relevant.

[44] The parties asked me to decide if the claimants were 'the material or substantial cause of their own loss', or whether they contributed to their own loss.

[45] The Court of Appeal has stated that the extent of contributory negligence is a matter for judgement in the circumstances of the case, ranging from a small deduction from the damages awarded to a very high one. In her judgment in *Findlay*, Ellis J stated that in determining the contribution made by a claimant or plaintiffs, the Court may have regard to the contributions to the loss of persons not actually party to the case.

[46] In this case, the builder is not a party, and nor is any other building party a respondent. However, given that the claimants were themselves negligent in this case, it is likely that the builder would have been found jointly and severally liable for 100% of the loss and 50%-55% of the loss on apportionment between liable parties. Also, where the Council is found to be negligent in cases where the house has to be re-clad, the Council is frequently jointly and severally liable for 100% of the loss and liable for 20%-25% on apportionment.

[47] That being the case, it would be going too far to say the claimants were the material or substantial or only cause of their own loss, or that their actions removed all causal potency from the Council's omissions in carrying out its inspections. On the other hand it is reasonable to conclude that in the circumstances Mr Grubb and Mr Whalen contributed 25% of their total loss. This amount is consistent with Ellis J's remark that the defence of contributory negligence operates differently from the solidary (joint and several) liability imposed on defendants. Her Honour stated that a plaintiff who has been contributorily negligent will have his entitlement to damages reduced, but only by an amount that is fairly reflective of the extent of his responsibility. In my view a 25% reduction fairly reflects the extent of the claimants' responsibility in this case.

CONCLUSION AS TO QUANTUM

[48] The quantum claimed is $276,122.17, made up of:

Repair costs including Council and professional fees	$240,622.11
Consequential losses	$8,150.00
General damages	$25,000.00
Interest to 8 June 2011	$6,262.56 (continuing at $33.92 per day until payment)
Subtotal	$280,034.67
Less betterment	$3,912.50
TOTAL	**$276,122.17**

[49] A deduction of 25% is $69,030.54. That leaves a balance of $207,091.63.

[50] The Court of Appeal has laid down $25,000.00 as a guideline for an award of general damages for an occupied dwelling and $15,000.00 for a claim where the owner lives elsewhere. Mr Grubb does occupy the house and a 25% reduction in general damages reflects the fact that the stress Mr Grubb has suffered because the house is leaky was to a degree self inflicted, and is consistent with and part of the deduction overall. No deduction has been made to take account of the fact that Mr Whalen does not occupy the house, and so this reduction, of $6,250.00, from the general damages might be said to be a modest one. For that reason the claimants' claim for interest to continue at $33.92 per day from 8 June until payment is declined.

ORDER

[51] In summary, I conclude that the Council was negligent in carrying out its inspections which gave rise to 100% of the claimants' loss. The claimants contributed 25% of their loss, which is deducted. I order the respondent Auckland Council to pay the claimants the sum of $207,091.63 forthwith accordingly.

DATED this 26th day of October 2011

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R M Carter

Tribunal Member