



SUMMARY

Case: Carey Clan Trust v Still

File No: TRI 2009-101-000022/ DBH 05711

Court: WHT

Adjudicator: C Ruthe

Date of Decision: 23 December 2009

Background

The claimant pursued their claim against a number of parties, many of which were removed from the proceedings prior to the hearing. The remaining respondents therefore included the first and second respondents, Mr and Mrs Still, the third respondent, Tauranga City Council and the seventh respondent, Western Coatings Ltd. The claimant later settled with the Council thereby leaving the claims against the Stills and Western Coatings.

Factual Background

- 14 May 1999: The Stills applied for a building consent
- Mid-1999: Construction began
- February 2007: the claimant trust purchased the dwelling from the Stills who built the dwelling as their family home
- 13 March 2007: code compliance certificate obtained
- January 2008: claimant's filed claim with the Tribunal

Decision

Liability of the first and second respondents, Mr and Mrs Still

There was no appearance by the Stills. Mrs Still filed an email which was treated as an application for removal. Mr Still attended the teleconference however the removal application was declined. In failing to participate in the proceedings, the Tribunal dealt with the claims made against under section 75 of the Act

(i) First Respondent, Mr Still as builder/head contractor/project manager

The evidence before the Tribunal made it abundantly clear that Mr Still's involvement in the construction was extensive. He undertook much of the building work, chose most of the materials, engaged and paid all of the subcontractors and was in control of the construction throughout. The Tribunal held that he was effectively the project manager and lead developer. The Tribunal also found that Mr Still also breached his duty of care as a director of the seventh respondent, Western Coatings and as a result of his negligent he was found jointly and severally liable for 100% of the claim

(ii) Second respondent, Mrs Still as developer

The Tribunal was satisfied that Mrs Still had a role in the project. She was a joint applicant for the building consent and the subdivision of the property. Various items of correspondence from the building inspectors referred to her. The Tribunal therefore drew the inference that Mrs Still would have had input and involvement in the construction and therefore was a co-developer with her husband.

(iii) First and second respondents as vendors - Breach of clause 6.2(5) of the sale and purchase agreement

The Tribunal found that all of the faults which led to leaks were in breach of the statutory obligations imposed by the Building Act 1991. The Tribunal therefore held that the Stills breached clause 6.2(5) and were therefore liable pursuant to the terms of the contract for the damage suffered by the claimant

Liability of seventh respondent, Western Coatings Ltd

Mr Still was a plasterer by trade and was the director of Western Coatings, the plastering subcontractor engaged to undertake the plastering work on the house. This company owed a duty of care to subsequent purchasers to perform its work with due skill and care. The evidence of the defective plastering work established that Western Coatings breached its duty of care in performing that building work. Due to its negligence and the damage suffered by the claimant's as a result, the Tribunal assessed its liability at 45% of the claim

Quantum

Remediation

The Tribunal considered that the appropriate amount for remediation was \$526,750.00

Consequential Losses

The Tribunal accepted the claimant's claim of \$68,430.23 for consequential losses

General Damages

The Trust abandoned their claim for general damages

Summary of Quantum

• Remedial costs	\$526,750.00
• Consequential losses	<u>\$ 68,430.23</u>
Total	<u>\$595,180.23</u>

Costs

The claimant applied for costs. The Tribunal considered that this was a case in which costs should be awarded against the Stills due to their lack of participation in the proceedings. The Tribunal held that the Stills put the claimant to extra legal costs and have acted in bad faith by not being involved. The Tribunal therefore awarded the claimant \$9,728.00 for costs based on the claimant's schedule of costs which was in accordance with the scale provided by Category 2B of the District Court Rules.

Result

- The claim was proven to the extent of \$595,180.23 together with costs of \$9,728.00
- The Stills and Western Coatings Ltd were jointly and severally liable and thereby ordered to pay the claimant \$604,908.23
- The Stills are entitled to recover a contribution of up to \$272,208.70 from Western Coatings, whilst Western Coatings is entitled to recover a contribution of up to \$332,699.53 from the Stills
- The claimant's can only seek and obtain the amount from the Stills and Western Coating up to and including the sum that, together with the settlement sum with the Council does not exceed \$604,908.23