

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000050
[2012] NZWHT AUCKLAND 52**

BETWEEN	VAUGHAN STUART DARBY AND MARY ANN DARBY as Trustees of the DARBY TRUST Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	ANTHONY LAWRENCE ALLEN Second Respondent
AND	CEDRIC DUDLEY FRENCH Third Respondent
AND	DARYN MCDONALD (Removed) Fourth Respondent

Hearing: 27, 28 and 29 August 2012

Appearances: S Wroe for the claimants.
F Divich for the first respondent.
J Holland for the second respondent.
V Whitfield for the third respondent.

Decision: 18 December 2012

PARTIAL DETERMINATION
Adjudicator: P R Cogswell

[1] Vaughan Stuart Darby and Mary Ann Darby are the trustees of the Darby Trust. The Darby Trust is the owner of a property at 8 Tawhana Crescent, Red Beach, Hibiscus Coast, Auckland.

[2] The house on the property is badly affected and damaged by the entry of water. The proposed repair costs are significant.

[3] Mr and Mrs Darby brought this claim against three respondents:

- a) Auckland Council, the relevant territorial authority.
- b) Anthony Lawrence Allen, who was alleged to have been the developer of the property or its project manager; and
- c) Cedric Dudley French, who was alleged to have been the builder of the house.

[4] At the commencement of the adjudication hearing, Ms Wroe, advised that the parties had reached agreement on certain issues in the claim.

[5] The first area of agreement was in relation to quantum. All parties confirmed at the opening of the hearing that the amount of the claimants' claim was agreed. The total amount of the claim was agreed to be \$511,611. That sum is comprised as follows:

Estimated repair costs	\$395,000
Pre-remedial costs	\$62,078
Consequential losses	\$22,533
General damages	\$25,000
Interest	\$7,000
TOTAL	\$511,611

[6] Accordingly, the hearing proceeded on the basis that there were no disputed quantum issues.

[7] The other significant development at the commencement of the hearing was a concession by the Council that it was liable to the claimants in the agreed quantum amount of \$511,611.

[8] The Council conceded that it owed the claimants duties of care when it issued the building consent, when it carried out inspections of the property during construction and when it issued the code compliance certificate and that it breached those duties of care.

[9] The Council also conceded at the commencement of the hearing that:

- a) It was reasonable for the Darbys in 2004 to rely on the code compliance certificate issued in 2003; and
- b) It was no longer advancing an argument that the Darbys were required to take legal advice before entering into the sale and purchase agreement for the purchase of their home.

[10] On the basis of the admission of liability from the Council, the evidence of Mr and Mrs Darby was taken and following that evidence, Ms Wroe sought and was granted leave to be excused from the remainder of the hearing.

[11] The hearing thereafter proceeded on the basis that the Council was asserting rights of contribution from Mr Allen and Mr French. Mr Allen and Mr French advanced their own defences to the claimants' claims against them.

[12] In closing submissions received from the Council, the legal effect of Mr Allen presenting Council with a producer statement in the name of the plasterer was raised. It had not been raised in either the Council's response or its opening submissions.

[13] In its closing submissions, the Council raised the question of whether the presentation of the false producer statement was a *novus actus interveniens* which broke the chain of causation in respect of the Council's negligence. The Council submits that Mr Allen's conduct was an intervening act that broke the chain of causation in so far as the Council's conduct was concerned.

[14] Perhaps not surprisingly given that the claimants' counsel withdrew from the hearing following the Council's admission of liability to her clients, the claimants object to the Council now being able to run a new defence.

[15] I have considered the Council's closing submissions and also the admissions made at the commencement of the hearing. I am not prepared to entertain the *novus actus interveniens* argument raised by the Council.

[16] Rather, I intend to enter judgment by admission against the Council in the claimants' favour in the amount of \$511,611.

[17] That is done on the basis of the unequivocal admission of claim given by the Council at the commencement of the hearing. That admission was unqualified as to any further developments that may arise in the course of the hearing. To allow the Council to resile from its unqualified admission would be unfair to the claimants, as they relied on the Council's admission of liability when they sought leave to be excused from the remainder of the hearing.

[18] The Council cannot now seek to change its stance as a result of the way the evidence has transpired at the hearing. In my view, once the unqualified admission of claim was given, the Council assumed the risk that other issues may be raised during the hearing that impacted or could impact upon its liability.

[19] In any event, the fact of Mr Allen's alleged forging of the producer statement was clearly an issue that the Council had at the forefront of its mind before this hearing commenced.

[20] The Council had raised the possibility that the producer statement was a forgery in its response dated 24 July 2012. The issue of Mr Allen having signed the producer statement was expressly pleaded in the context of a cross-claim in deceit against Mr Allen.¹

[21] As part of its preparation for the hearing, the Council obtained the evidence of Linda Winifred Katherine Morrell. Ms Morrell is a forensic document examiner. Her brief of evidence considered the signature on the producer statement in issue and concluded that the evidence pointed towards Mr Allen being the writer of the entries on the questioned document.

[22] Accordingly, the Council was aware of the possibility that the producer statement was a forgery at the time it prepared its case and at the time when it conceded liability to the claimants.

[23] In addition, there are other defects which are not affected by the producer statement allegedly given by the plasterer. Examples of those defects include poorly formed rainwater outlets, deck gutters inadequately waterproofed and leaking joinery. The Council did not rely on the producer statement in relation to those defects. It still issued a code compliance certificate.

[24] Accordingly, even if I was minded to allow the Council to raise a new defence in the face of its admission, I would not hold that the receipt of the allegedly forged producer statement was a *novus actus interveniens* that completely snapped the chain of causation. There are

¹ Response dated 24 July 2012 at [26].

other serious defects that are not covered by the plasterer's producer statement.

[25] While the claims against Mr Allen and Mr French and contribution claims will be decided by a separate determination, it is appropriate that judgment is entered against Auckland Council in favour of Vaughan Stuart Darby and Mary Ann Darby as trustees of the Darby Trust in the amount of \$511,611.

CONCLUSION AND ORDER

[26] The Auckland Council is to pay Vaughan Stuart Darby and Mary Ann Darby as trustees of the Darby Trust the sum of \$511,611.

DATED this 18th day of December 2012

P R Cogswell
Tribunal Member