IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000106
[2013] NZWHT AUCKLAND 30

BETWEEN	NZ DOMAINE INVESTMENTS LIMITED Claimant
AND	SHANE EDWARD PLUMMER Second Claimant
AND	TAURANGA CITY COUNCIL First Respondent (DISCONTINUED)
AND	WARWICK BROUGHTON Second Respondent
AND	BUBBLEHEAD LIMITED (WATERPROOFING SYSTEMS 1997 LIMITED) Third Respondent (DISCONTINUED)
AND	AQUATIGHT ROOFING SERVICES LIMITED Fourth Respondent (DISCONTINUED)
AND	MICHAEL BURGER Fifth Respondent (DISCONTINUED)
AND	ELLEX HENG HOCK SOON Sixth Respondent (DISCONTINUED)

Hearing: 12 December 2013

Appearances: Helen Rice for the Claimants and Tauranga City Council

Decision: 17 December 2013

FINAL DETERMINATION
Adjudicator: M A Roche

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[1] NZ Domaine Investments Limited is the registered owner of 7/3 Grace Avenue, Mt Maunganui. Shane Plummer is the sole director and shareholder of NZ Domaine.

[2] Mr Plummer bought the property in 2008 and subsequently transferred it to NZ Domaine. In 2010 the tenants of the property brought weathertightness issues to the attention of Mr Plummer who lodged a claim with the Weathertight Home Resolution Service.

[3] The WHRS assessor concluded that the house required remedial work. NZ Domaine subsequently engaged Preview Building Surveyors Limited to provide professional services in relation to the remedial work. On investigation, Preview found that more extensive remediation was required. This work was carried out with the exception of the remediation of a deck. NZ Domaine and Mr Plummer have claimed the full cost of the remedial work that has been carried out, the cost of the remedial work that is required on the deck, lost rent, interest and general damages.

[4] Prior to the hearing, the claimants discontinued their claim against all respondents except for Warwick Broughton. The claim was then subrogated to Tauranga City Council who pursued the claim against Mr Broughton on behalf of the claimants.

[5] Mr Broughton attended the preliminary conference that was held when the claim commenced at the Tribunal. He has not actively participated in the proceeding since. He has filed no documents and failed to attend subsequent procedural conferences despite being notified of them. On 26 November 2013 he was served with the finalised claim and the signed witness statements together with a procedural order directing him to file a response to the claim together with any witness statements by 4 pm on 9 December 2013. The order stated that if Mr Broughton did not respond to the claim, the hearing would proceed on a formal proof basis.

[6] Mr Broughton did not respond and accordingly the formal proof hearing proceeded. The witnesses were excused from attending the hearing and their witness statements were admitted as evidence.

[7] The issues I need to address are:

i. Does Mr Plummer have standing as a claimant?
ii. Should general damages be awarded?
iii. What were the defects which caused water ingress?
iv. Did Mr Broughton breach the duty of care he owed to the claimant/s as the builder and project manager of the property?
v. What is the appropriate cost of the remedial work?
vi. What consequential losses have been incurred?

Does Mr Plummer have standing as a claimant and should general damages be awarded?

[8] The Weathertight Homes Resolution Services Act 2006 (the Act) specifies that in order to be eligible, a claimant must own the dwellinghouse to which the claim relates[1]. The registered owner of the property is NZ Domaine. Mr Plummer claims that as the sole shareholder and director of NZ Domaine, he is the property's indirect owner. Ms Rice argued that Mr Plummer is eligible to be a claimant because owner is defined in the Act as including "a shareholder of a company, the principal purpose of which is to own the dwellinghouse or dwellinghouses within the company–share complex concerned".[2]

[9] I do not accept that Mr Plummer is an owner for the purposes of the Act. I consider that the definition Ms Rice relies on is qualified by the reference to a company-share complex and is intended to reflect the ownership structure of a multi unit complex where individual dwellinghouses are allocated to the shareholders in a company that owns a multi unit complex. It does not apply to the situation where a company with a single shareholder owns a single dwellinghouse. It was also argued that the situation of Mr Plummer is analogous to the ownership of a dwellinghouse by a trustee. I do not accept this. The difference between a trust and a company is that a company has a separate legal personality. A trustee may own a dwellinghouse in that capacity, however they are the registered owner. Had Mr Plummer in fact owned the house in trust, he would have no difficulty establishing that he is the owner for the purposes of the Act.

[1] Weathertight Homes Resolution Services Act 2006, ss 14-16.
[2] Weathertight Homes Resolution Services Act 2006, s 8.

[10] Mr Plummer is not an owner of the property and does not have standing as a claimant. General damages are not available to limited liability companies.[3] It follows that the claim for general damages is not established.

What were the defects which caused water Ingress?

[11] The director of Preview, Graham Hodgson, filed a brief of evidence to which he annexed a schedule setting out the construction defects he discovered at the property and the damage each defect gave rise to. These defects were located on the roof, on the balcony decks and also arose from defective installation of the cladding.

[12] The roof defects included lack of clearance from claddings, poorly constructed flashing details at the roof parapet to wall junctions, an inadequately formed rainwater scupper-outlet a downpipe outlet discharging directly onto the balcony deck and incorrectly installed deck tile fitting. The balcony defects included poor positioning and construction of scupper outlets and overflows, poorly constructed junction details, insufficient fall, lack of suitable stand up backing support for the liquid–applied membrane, insufficient clearance allowance from the back of cladding and the apartment floor. The cladding defects included unflashed junctions, unprimed timber mouldings and scribers, a lack of sealing and non compliant building wrap installation.

[13] I accept the evidence before me concerning the defects and accept the necessity of the remedial action recommended by Mr Hodgson in the schedule in relation to each defect. No evidence to the contrary has been filed.

Did Mr Broughton owe a duty of care to the claimant and if so, was this duty breached?

[14] The claim against Mr Broughton alleges that he was the builder and project manager of the property. Mr Broughton was the director of Broughton Homes & Developments Limited (in liquidation) which was the

[3] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 (CA); *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).

owner of the land on which the property was built. A building consent in respect of the house was issued to Broughton Homes & Developments Limited. One of the signed witness statements was provided by Michael Burger.[4] Mr Burger is a waterproofing specialist and was involved in the waterproofing work at the property. Mr Burger states that he saw Mr Broughton at the property dressed as "a builder" with a builder's belt on and states that he was in charge of the job. He also states that he had worked with Mr Broughton on other projects and on these projects frequently saw him working "on the tools" and that he ran "the projects like he did at the property". He states that Mr Broughton was almost always on site organising "everything and everyone and overseeing their work".

[15] Mr Burger's evidence was served on Mr Broughton and is uncontested. I accept that Mr Broughton had the role of builder and project manager in respect of the property. Both builders and project managers owe a duty of care to future owners.[5] This duty is to take reasonable care to prevent damage when constructing buildings or managing the construction of the buildings.

[16] As noted above, the property was built with defects that caused damage. I find that in creating and/or allowing the dwelling house to be created with these defects, Mr Broughton breached the duty of care he owed to the claimant and is liable for the damage caused by these defects.

What is the appropriate cost of the remedial work?

[17] The claimant has spent $258,702.57 on remedial work to repair the defects and damage. Particulars of this expenditure are set out in the brief of evidence of Shane Plummer[6] and relevant invoices were filed with the hearing documents. Mr Plummer and Mr Hodgson both state in their briefs that further remedial work is required to be carried out on the decking at the mid floor level and that this work is estimated to cost $52,663.32. This cost is further particularised in the brief of Mr Plummer.

[4] Brief of Evidence of Michael John Burger dated 22 November 2013.
[5] *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA); *Body Corporate No 188289 v Leuschke Group Architects Limited* (2007) 8 NZCPR 914 (HC).
[6] Brief of Evidence of Shane Edward Plummer undated.

[18] The apartment is a rental property. The claimant seeks damages in respect of the lost rental income which has resulted from the need to reduce the rent on the apartment while it was leaking and the need to vacate the apartment for 22 weeks while the remedial work was carried out. Mr Plummer has annexed a spreadsheet calculating the lost rent to his brief. He claims that the claimant has lost the sum of $15,200. I accept this and also accept that the lost rent is a consequence of the defects and can be appropriately awarded as a consequential loss.

Interest

[19] The claimant is seeking interest on the cost of the remedial work and the lost rent. The Act provides for interest to be awarded at the rate not exceeding the 90 day bill rate plus two per cent.[7] A schedule of interest was attached to Mr Plummer's brief. At my request this was recalculated and filed with the Tribunal on the day of the hearing. The 90 day bill rate plus 2 per cent is 4.69 per cent. The schedule prepared by Mr Plummer calculates interest on each payment made from the date of that payment in respect of the remedial work. This is $23,793.92. Mr Plummer has claimed a lesser amount of interest in respect of the lost rent and has provided a schedule calculating this interest at a rate of 4 per cent from the date of loss. This schedule was annexed to the brief that was served on Mr Broughton. I award this sum.

Conclusion as to quantum

[20] The claim has been established to the amount of $351,540.42 which is calculated as follows:

Remedial Costs	$258,702.57
Future remedial costs	$52,663.32
Lost rental	$15,200.00
Interest on remedial costs	$23,793.92
Interest on lost rent	$1,180.61
TOTAL	**$**351,540.42

[7] Weathertight Homes Resolution Services Act 2006, Schedule 3, Part 2, s 16.

[21] Mr Broughton is ordered to pay the claimant the sum of **$**351,540.42 forthwith.

DATED this 17th day of December 2013

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M A Roche
Tribunal Member