

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2013-100-000034
[2014] NZWHT AUCKLAND 4**

BETWEEN	DAVID AND MAY CHING Claimants
AND	GIRISH REGMI (<u>Removed</u>) First Respondent
AND	AUCKLAND COUNCIL Second Respondent
AND	ENG KIONG CHOO Third Respondent

Hearing: 12 March 2014

Appearances: Marie Harrison and Kathryn Lydiard, counsel for Auckland Council
No appearance from the Claimants
No appearance from the Third Respondent

Decision: 31 March 2014

FINAL DETERMINATION
Adjudicator: M A Roche

[1] In 2004 David and May Ching bought a house in Royal Oak which is one of four in a development carried out by Turkmani Developments Limited (in liquidation). In 2009 Mr and Mrs Ching migrated to Australia and rented the house out. After being advised that the house was leaking by their property manager, Mr and Mrs Ching lodged a claim with the Weathertight Homes Resolution Service. The WHRS assessor concluded that the house leaked and required extensive remedial work.

[2] Mr and Mrs Ching lodged a claim with this Tribunal claiming that the designer Girish Regmi, the Auckland Council, and the alleged builder, Eng Kiong Choo, were each liable for the full costs of the remedial work, consequential losses and damages. Mr Regmi subsequently made a successful application to be removed as a respondent to the claim.

[3] Shortly before the hearing, counsel for Mr and Mrs Ching and the Council filed a memorandum recording their agreement on the Council's liability and on quantum. I excused counsel for Mr and Mrs Ching from attending the hearing and the claim instead proceeded on a formal proof basis based on the evidence filed, the WHRS assessor's report, and the transcript of a witness summons hearing held on 14 August 2013. At this hearing, the directors of the development company, Mr Mohammed Turkmani and his brother, Mr Adnan Turkmani, gave evidence about their own and Mr Choo's involvement in the construction of the house.

[4] Ms Harrison and Ms Lydiard appeared for the Council at the hearing and addressed me on the issues of defects, damage, remedial scope, contribution, and the liability of Mr Choo.

[5] The issues I need to address are:

- a) What were the defects which caused moisture ingress?
- b) What is the appropriate cost of the remedial work?
- c) Was Mr Choo the builder of the house? If so, did Mr Choo breach a duty of care owed to Mr and Mrs Ching?
- d) What is the quantum of Mr and Mrs Chings' loss?
- e) What is the correct apportionment of contribution between Mr Choo and the Council?

[6] Before I address the framed issues, I record that the affidavit of Aaron Sewell on the hearing file deposes that Mr Sewell personally served the claim documents on Mr Choo. Mr Choo has been provided with all further relevant documents including notice of the hearing on 12 March 2014. He has not responded to the claim and did not attend the hearing.

WHAT WERE THE DEFECTS CAUSING MOISTURE INGRESS?

[7] Harry Young, the Ministry of Business, Innovation and Employment assessor produced a report on the house following an investigation he undertook in 2012. Martin Hill, Mr and Mrs Chings' expert filed a brief concerning defects at the house based on his desktop review of the WHRS assessor's report and visual and destructive investigation carried out in October 2013 to examine issues identified during the desktop review. Stuart Wilson, the Council's expert, filed a brief addressing the remedial scope annexed to which was a defects responsibility table. In this table Mr Wilson described and commented on the building defects and stated his opinion regarding the responsibility of the Council and builder for each defect. Mr Wilson did not undertake any independent investigation of the house. He relied on the investigations carried out by Mr Young and Mr Hill.

[8] A number of defects were identified by Mr Young and Mr Hill. However there were two primary defects which have caused the need for remedial work. These are:

- The uncapped deck balustrade leaking at the top and saddle junctions.
- The deck cladding is in contact with the deck tiles so that water cannot drain out of the balustrade.

[9] The first defect mentioned above concerned the uncapped balustrade top which is on the deck on the western elevation of the house. In his report the assessor noted that the balustrade leaked and that water entered it at the uncapped top. He noted that water had damaged the deck and wall frame cladding, linings and content. He also noted that water went into the unflushed saddle junction with the wall from the cladding above

which has led to damage in the cladding, framing, carpet, gib wall and the ceiling lining in the lower floor bedroom.

[10] In his brief, Mr Hill noted this defect and recorded that there was visible water staining and mould growth affecting the sealing lining either side of the deck coinciding with the balustrade and cladding junctions. Mr Hill referred to photographs 1.1-1.4 in his brief which illustrates this. Mr Wilson commented on this defect in his defect responsibility table. He stated that there is a lack of fall to the top surface balcony balustrade which consequently allows moisture to pond and ingress at any cracks or pinhole penetrations in the texture coating and paint finish. He also stated that gaps have formed between the fibre cement sheet to the balustrade and the timber facing which provides paths for moisture ingress.

[11] The second major defect concerns the deck cladding which is in contact with the deck tiles.

[12] The installation of the cladding hard down on to the horizontal surface of the deck is exacerbated by the presence of a bead of sealant. In the defect responsibility table Mr Wilson noted that sealant applied between the deck tiles and the weatherboard cladding and the tile upstand blocking the base of the fibre cement sheets, prevents any unplanned moisture from draining away. Mr Wilson identified both this defect and the balustrade capping defect as necessitating, on their own, a full reclad of the north and western elevations including deck repairs.

[13] Both Mr Young and Mr Hill were of the opinion that the two defects discussed above have, alone, caused the need for the northern and western elevations to be reclad and the deck on the northern elevation repaired.

[14] I accept the evidence before me concerning the defects and the evidence of Mr Hill, Mr Wilson, and the assessor's view that these defects have resulted in need to reclad the northern and western elevations of the property and to remediate damaged timber framing. No evidence to the contrary was filed.

WAS MR CHOO THE BUILDER OF THE HOUSE?

[15] Mr Choo was the director and shareholder of Charlie Choo Builders Limited (now struck off). This company was named as the builder of the dwelling on a fax to the Council at the commencement of the construction. However Mr Choo was named personally as the builder on the advice of completion of building work that was filed with the Council.

[16] Mr Mohammed Turkmani gave evidence at the witness summons hearing that Turkmani Development Limited engaged Mr Choo to build the dwelling and that Mr Choo was personally on site during the building of the dwelling and that he installed the cladding and the windows. Mr Turkmani was unable to recall whether he dealt with Mr Choo personally or as the representative of a company, but confirmed that Mr Choo actually built the house with the assistance of employees.

[17] It is well established that builders owe a duty of care to the future owners of houses they build.¹ A director of a building company can be personally liable in circumstances where the director was in control of a building site and assumed personal responsibility for its oversight.²

[18] After considering the evidence of Mr Turkmani and the fact that Mr Choo was named as a builder on the completion of building advice, I find that it is established, on the balance of probabilities, that Mr Choo was the builder of the dwelling, that he controlled the building site, and was responsible for the supervision of his employees on site. It follows that he owed a duty of care to Mr and Mrs Ching.

DID MR CHOO BREACH THE DUTY OF CARE HE OWED TO MR AND MRS CHING?

[19] I have noted above that there were two primary defects which caused the need for remedial work. These were the uncapped deck balustrade and the installation of the cladding in contact with the deck tiles. I have accepted evidence that Mr Choo installed the cladding. By failing to ensure that there was sufficient clearance between that cladding and the

¹ *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).

² *Body Corporate 199348 v Nielsen* HC Auckland, CIV-2004-404-3989, 3 December 2008.

deck, he breached the duty to take reasonable care. I also consider that as the builder he was responsible for the uncapped deck balustrade defect. By creating this defect or allowing it to be created he breached the duty to take reasonable care that he owed to Mr and Mrs Ching. Both breaches have resulted in damage to Mr and Mrs Ching.

WHAT IS THE QUANTUM OF MR AND MRS CHINGS' LOSS?

[20] Mr and Mrs Ching filed a brief of evidence from David Howard in which Mr Howard estimated the cost of the remedial work required (the recladding of two elevations and repair to a deck). In a schedule attached to his brief he estimated this cost to be \$208,680 GST exclusive.

[21] In addition to the cost of carrying out remedial work Mr and Mrs Ching had sought:

General damages	\$15,000.00
Loss of Rent	\$15,015.00
Cost of Repairs to date	\$7,805.72
Carpet repairs	\$1,265.00

[22] The Council filed a brief of evidence from their quantity surveyor, James White. In this brief Mr White disputed various aspects of Mr Howard's estimate and some of the consequential costs claimed. The quantum agreed on by the Council and Mr and Mrs Ching was \$216,468.49 calculated as follows:

Remedial Costs:	\$184,392.15
Consequential Costs:	\$8,450.00
Repairs to date:	\$8,626.34
General Damages:	\$15,000.00
Total Quantum:	\$216,468.49

[23] Having read the evidence of Mr Howard and Mr White I am satisfied that the claim is proven to the extent of \$216,468.49. The brief of

Mr Ching sets out at some length the distress and worry caused to him and his wife as the result of the ownership of a leaky home. I am satisfied that an award of general damages in the sum of \$15,000 is warranted.

WHAT IS THE CORRECT APPORTIONMENT OF CONTRIBUTION BETWEEN MR CHOO AND THE COUNCIL?

[24] The Council has conceded that it breached the duty of care it owed to Mr and Mrs Ching. I have found that Mr Choo also breached the duty of care he owed to Mr and Mrs Ching. Both of them are tortfeasors or wrongdoers, and are liable to Mr and Mrs Ching in tort for their losses to the extent outlined in this decision.

[25] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 (the Act) provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, s 90(1) of the Act enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[26] Under s 17 of the Law Reform Act 1936, any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable. Section 17(2) sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for damage.

[27] At the hearing, Ms Harrison submitted that the contribution of the Council should be set at 20 per cent and that Mr Choo's contribution should be 80 per cent. Subsequent to the hearing she filed written submissions in support of this proposition in which she addressed various precedent decisions where the Council's contribution in leaky building cases had been set at 20 per cent and also distinguished the number of cases that exist where this contribution has been set at a higher figure. A copy of the written submissions were delivered to Mr Choo's address.

[28] Ms Harrison submits that Mr Choo was primarily responsible for the creation of the defects that have caused damage to Mr and Mrs Ching,

while the Council was negligent in not identifying these defects during its inspections.

[29] In a leading case concerning the liability of a builder, *Dicks v Hobson Swan Construction Limited*³ the High Court apportioned 80 per cent of liability to the building parties and 20 per cent to the Council. This apportionment reflects that made by the Court of Appeal in *Mount Albert Borough Council v Johnson*.⁴ In *Todd on Torts* the author notes the generally accepted allocation of responsibility between builder and Council as 80 percent/20 percent. I accept Ms Harrison's submission and determine that given the respective roles and responsibilities of the Council and Mr Choo for Mr and Mrs Chings' loss, the contribution for each should be 80 per cent from Mr Choo and 20 per cent from the Council.

CONCLUSIONS AND ORDERS

[30] The claim is proved to the extent of \$216,468.49. For the reasons set out in this determination I make the following orders:

- i. The Auckland Council is ordered to pay David and May Ching the sum of \$216,468.49 forthwith. Auckland Council is entitled to recover a contribution of up to \$173,174.79 from Eng Kiong Choo for any amount paid in excess of \$43,293.70.
- ii. Eng Kiong Choo is ordered to pay David and May Ching the sum of \$216,468.49 forthwith. Mr Choo is entitled to recover a contribution of up to \$43,293.70 from Auckland Council for any amount paid in excess of \$173,174.79.

[31] To summarise the decision, if the two respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants.

Auckland Council	\$43,293.70
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³ *Dicks v Hobson Swan Construction Limited (in liquidation)* 2006 7 NZCPR 881.

⁴ *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

Eng Kiong Choo	\$173,174.79
TOTAL	\$216,468.49

[32] If Auckland Council and Mr Choo fail to pay their apportionment, the claimants can enforce this determination against either of them up to the total amounts they are each ordered to pay in paragraph [30].

DATED this 31st day of March 2014

M A Roche
Tribunal Member