IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2013-100-000026
[2013] NZWHT AUCKLAND 27

BETWEEN	POWELL HOLDINGS LIMITED Claimant
AND	STEPHEN GREENING First Respondent
AND	HUTT CITY COUNCIL Second Respondent

Hearing:	Held on the papers
Appearances:	Claimant represented by its directors First respondent represented himself A Cornor for the second respondent
Decision:	21 October 2013

CORRECTED FINAL DETERMINATION
Adjudicator: M A Roche

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[1] The claimant in this case is Powell Holdings Limited. Its directors are Craig Young and Megan Powell who will be referred to in this decision as the claimants.

[2] In 2002 the claimants purchased 1A Mulberry Street from its developer, Stephen Greening. Before signing the purchase agreement they obtained a pre-purchase inspection report. In 2005 they applied for a weathertightness assessor's report after becoming concerned about moisture ingress. Although the assessor found no high moisture readings, he concluded that moisture ingress could occur due to inadequate sealing of the exit point of cantilevered floor joists to the bedroom deck and leakage through French doors to the bedroom in extreme wind conditions.

[3] The assessor recommended minor repairs to solve the floor joist defect and to raise the deck door threshold. When the claimants carried out this work, an additional minor defect was discovered. This was a failure to seal the cladding penetrations made for cables to outdoor lights. This had allowed moisture ingress resulting in timber damage below the level of the lights.

[4] The claimants have claimed the cost of the repairs from Stephen Greening and from the Hutt City Council. Both Mr Greening and the Council have disputed their liability for the claimants' loss.

[5] The issues I need to determine are as follows:

a) What are the defects?
b) What damage resulted from these defects?
c) Is the developer, Mr Greening liable for the defects?
d) Did the Hutt City Council breach its duty of care to the claimants in granting building consent, carrying out inspections and issuing a code compliance certificate?
e) Were the claimants responsible for any of their loss?

WHAT ARE THE DEFECTS?

(A) Cantilevered floors joists penetrating cladding

[6] The assessor noted that the floor joists to the bedroom deck were inadequately sealed where they passed through the cladding. He considered that the cantilevered joists would absorb and transfer water to the lounge ceiling framing and linings. He recommended that the deck boards be replaced with plywood and a waterproof membrane be installed and run up behind the cladding. Although no elevated moisture readings were taken in this area, the repair was recommended to avoid future damage.

[7] The Council has submitted that the absence of damage means that the inadequately sealed joists were not a defect. However, given that the repair was recommended by the assessor in order to avoid future damage I am satisfied that it is a defect or deficiency as defined in s 8 of the Weathertight Homes Resolution Services Act 2006 (the Act). The Tribunal has jurisdiction under s 50(e) of the Act to award damages in relation to deficiencies that are likely in future to allow damage as well as deficiencies actually causing damage.

(B) Leakage through the French doors

[8] In his report the assessor noted that there was leakage through the French doors in extreme wind conditions due to wind exposure and the lack of soffits. It was noticed that the carpet of the main bedroom just inside the French doors showed signs of minor water staining/damage. The assessor recommended the raising of the doors in the course of the repair of the cantilevered joists to provide the 100mm threshold required by the Building Code to create a break between the bedroom floor and balcony landing and help with drainage. This was done as recommended.

(C) Unsealed cable penetrations behind exterior wall lights

[9] During the course of repairs it was discovered that the cable penetrations for external lights were unsealed and water tracking behind the lights had resulted in water damaged timber. Following discovery of

this defect, additional sections of the lounge wall were opened to assess damage. Following the drying out of the framing and replacement of damaged dwangs, the wall linings were reinstated and the light fittings replaced and sealed.

WHAT DAMAGE RESULTED FROM THESE DEFECTS?

[10] As noted above, the floor joist defect and the French door defect raised issues of future likely rather than present damage. The damage that is attributable to these defects is therefore the cost of their repair. The exterior wall light defect resulted in timber damage and necessitated further investigation, timber replacement, and wall lining replacement, as well as the replacement of the light fittings themselves.

[11] The claimants have claimed a total of $18,181.00 being the sum of the building work, architect fees and Council fees in respect of the repair work for all three defects. The claimed sum is supported by receipts and quotations. The claim is for significantly more than the assessor's estimate of $3,300 made in 2005.

IS THE DEVELOPER, MR GREENING, LIABLE FOR THE DEFECTS?

[12] Stephen Greening was the developer of the house. Developers owe a non-delegable duty of care to future owners to see that proper care and skill is exercised in the building of houses. Accordingly developers are liable for defects whether or not they personally created them.[1] Mr Greening is liable for the defects that can be attributed to a lack of skill and care in building. I consider that all three identified defects fall into this category.

[13] In his submission to the Tribunal Mr Greening asked to be removed from the claim. His position was that responsibility for the defects rested with the Council who approved the design and carried out inspections. He also submitted that the repairs amounted to betterment and that the damage was in part attributable to the actions of the claimants in failing to clean the weather drainage strip to the door which would have allowed water to drain.

[1] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

[14] The issues of betterment, lack of maintenance and Council liability will be considered later in this decision. Although each of these issues may reduce the quantum of damages awarded and be relevant to the apportionment of responsibility of Mr Greening, none of them negate the liability of a developer. As developer, Mr Greening will liable for the full amount of the established claim.

Did the Hutt City Council breach its duty of care to the claimants when granting building consent, carrying out inspections and issuing a code compliance certificate?

[15] The Council did not deny that it owed the claimants a duty of care in issuing a building consent, inspecting the building work during construction and issuing a code compliance certificate. However it denied that it breached this duty and submitted that its actions were reasonable.

(a) The consent

[16] The issues raised by the granting of consent have not been addressed in detail by the parties who have concentrated on the issue of whether reasonable care was taken while performing inspections. Given my findings in respect of the Council's liability in respect of inspections, it is unnecessary to consider this issue. I do note however, that it is reasonable for a Council to assume, in issuing building consents, that the work will be carried out in a manner that complies with the Building Code and that it is reasonable for Council officials to assume that builders will refer to known manufacturers' specifications.[2]

The Inspections

[17] The Council inspected the joist/wall junction detail on 15 August 2000. The inspection notes included the comments "aspects of external cladding discussed. Flashing and deck level. Manufacturers installation [sic] instructions to be applied."

[2] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC); *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*) [2010] NZCA 64, [2010] NZLR 486.

[18] Counsel for the Council, Ashley Cornor, submits that while it is difficult to discern what was discussed in relation to the detail, it clearly received explicit attention with the implication being that whatever approach was ultimately adopted was satisfactory to the building inspector. It is suggested that this is borne out by the fact that there is no evidence the joist/wall junction failed and allowed water ingress into the house. It is submitted that in these circumstances the Council was not negligent in the conduct of its inspection of this detail.

[19] I do not accept this submission. Although the problem with the joist/wall junction detail was noted by the inspector, no flashing or other detail was installed to prevent moisture travelling from the joists into the house. There is no indication that the building inspector re-examined the junction to ensure that whatever solution had been agreed had been carried out. Having noted an absence of weatherproofing on what the Council has conceded was a risky detail and having acknowledged that the plans referred to a weatherproofing detail that appears not to have been installed, I do not accept that the standard of reasonable care was met. Accordingly I find the Council liable for this defect.

The French doors

[20] Similarly, the Council inspector failed to notice that the Building Code requirement for a 100mm barrier between the bedroom and deck floors was not met. This was breach of the standard expected from a reasonable inspector and the Council is liable for this defect.

The exterior light detail

[21] In submissions the Council notes that the plans for the dwelling did not show the position or manner of installation of the exterior lights and that it was reasonable for Council to assume the person installing the exterior lights would ensure the associated cable and screw penetrations were appropriately sealed in accordance with good trade practice. It is further submitted that, assuming the lights were installed at the time of the final inspection, the associated penetrations into or through the supporting wall cladding would have been obscured from view by the light units. A building

inspector would therefore have been unable to detect whether these penetrations were properly sealed in the course of a visual inspection.

[22] Neither the claimants' pre-purchase inspector nor the WHRS assessor detected this defect. Mr Cornor submits that it follows that the Council's building inspectors could not reasonably have been expected to identify it. It is submitted that the Council's duty of care does not extend to identifying defects that cannot be discovered in the course of a visual inspection (as opposed to destructive or invasive testing).

[23] I accept this submission. There is no record of the date of installation of the external lights and it is clear that a visual inspection could not have revealed the unsealed penetration behind the lights. I find that it was not unreasonable for the Council to have failed to identify this defect on inspection. Accordingly the Council is not liable in respect of the damage attributed to this defect.

WERE THE CLAIMANTS RESPONSIBLE FOR ANY OF THEIR LOSS?

[24] The following affirmative defences have been raised by Stephen Greening and the Council:

- Betterment
- Failure to mitigate
- Contributory negligence/Intervening Act

Betterment

[25] In 2005 the assessor estimated that the cost of the repairs he recommended would be $3,300. The work was carried out in 2010 and cost $18,181.00 including Council fees. It is suggested in the Council's submissions that this disparity indicates that there has been betterment however, no evidence was provided in support of this proposition. The scope of works was expanded by the discovery of the external light defect and associated damage. In addition the original 2005 estimate would necessarily have increased by 2010. I find that betterment is not established.

Failure to mitigate

[26] There are two aspects to this. First, Mr Greening alleges the claimants failed to clean out the weather drainage strip to allow water to drain from the door. Secondly, it is suggested that leaving the recommended repairs undone for five years resulted in an increase in scope. There is no evidence before me supporting the proposition that the claimants failed to maintain the weather drainage strip. Even if there were, there is no evidence that this increased the cost of repairs. Very little damage was associated with the cantilevered joist defect and the French door defect. Both were corrected to avoid future likely damage. It follows that the scope of this repair work was not increased by the delay.

[27] The exterior light defect was associated with damage to timber. However, as will be seen later the claimants have stated that the cost of repairing this damage was negligible. The claimants have denied that delay increased the scope of work and provided some explanations for the five year gap between the issue of the assessor's report and the completion of the remedial work. There is no evidence establishing an increase of any significance in this scope due to the delay and I find that this ground is not made out.

Contributory negligence/ Intervening act

[28] Prior to purchasing the house the claimants obtained a pre-purchase inspection report. This report noted that the timber joist support to the deck penetrated the cladding system and recommended that the junction be inspected regularly to ensure that it did not become a point of water ingress.

[29] After receiving the report, the claimants contacted the Council concerning its contents. Craig Young, stated in an email that he did this because he had hoped the Council may have had on file some record of a weatherproofing detail around the cantilevered joists as the "report had indicated some concern over ongoing weathertightness". The Council's response was a letter to Megan Powell, from the Council's building inspection's manager, Mr Williamson. Mr Williamson stated:

> I have read the very comprehensive report compiled by Joyce Group Limited. You must decide for yourself whether you are prepared to accept the items detailed A-J for what they are or negotiate with the vendor accordingly.

[30] The letter from Mr Williamson also noted that the Council does not carry out a clerk of works role while during the construction period.

[31] Mr Cornor submits that the claimants purchased the dwelling with the knowledge that there was some risk associated with the joist/wall junction detail and that they took a calculated risk in this regard. He submits that the claimants' knowledge should be considered to be the operative cause of any loss the claimants have incurred as a result of the detail.

[32] In response, the claimants state that they brought the issues raised in the pre-purchase inspection report to the notice of the Council. Advice or comment was sought, however no immediate concerns were raised by the Council about the report. Mr Young also submitted that the purchase proceeded in reliance on the code compliance certificate. The position of the claimants is that despite their knowledge of the defect, they were able to rely on the CCC.

[33] The difficulty with Mr Young's submission is that the Council was under no duty to advise or comment on the pre-purchase inspection. The letter from Mr Williamson made it clear that the problems identified by the report were for the claimants themselves to assess.

[34] I accept the Council's submission that the claimants' knowledge and their reliance on their own judgment broke the chain of causation between the respondents and the claimants' loss in respect of the joist defect. No leaking or hidden damage was caused by the defect. The claimants proceeded to purchase the property despite the defect being identified in their pre-purchase report. It is not possible to assert reliance on a CCC to guarantee the absence of defects when such defects are identified prior to purchase.[3]

[3] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479; *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* SC [2010] NZSC 158 at [79], [83].

[35] Because of this finding, neither Mr Greening nor the Council are liable in respect of damage that is attributable to the joist defect. As noted earlier, the Council is not liable in respect of the light fitting cable penetration defect. However, both the Council and Mr Greening are liable in respect of the French door defect.

[36] I asked the claimants to provide a breakdown of repair costs in respect of the three defects. This breakdown was circulated to the respondents who provided no comment. In the absence of any other evidence concerning quantum or the cost breakdown I accept the claimants' breakdown and will rely on it.

[37] In the breakdown Mr Young stated that there were no additional costs incurred for the repairs relating to the leaks around the light fittings and if scoped he would expect these costs to be minor. In respect of the other defects he provided the following breakdown:

Cantilevered joists/deck	$9,286.20 (70%)
French doors	$3,979.80 (30%)

[38] I have already found that neither the Council nor the developer, Mr Greening, are responsible for the claimants' loss in respect of the cantilevered joists. Their liability is confined to the repair cost of the French doors.

[39] The cost of building consent and architect fees are to be added to the builder's cost in respect of the French doors. The architect fees were $1,406.25. In accordance with the breakdown provided by Mr Young I allocate 30 per cent of this cost to the French door defects being $421.86. Two invoices have been provided in respect of building consent for the repairs. These total $595. I allocate 30 per cent of this cost to the French door defect ($178.50).

[40] A payment of $2,913.75 was made to Class Exteriors in respect of external rendering. In the breakdown, Mr Young suggested that this cost be divided evenly between the two main defects. This is reasonable given that a significant amount of this work would have been related to the French doors. Accordingly I allocate $1,456.88 of this cost to the French door defect.

[41] The total damages incurred in respect of the French door defect are as follows:

Building costs	$3,979.80
Architect fees	$421.86
Building consent fees	$178.50
Class Exterior rendering costs	$1,456.88
Total	**$6,037.04**

WHAT CONTRIBUTION SHOULD THE LIABLE RESPONDENTS PAY?

[42] Section 72(2) of 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) 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.

[43] 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. The basis of recovery of contribution provided for in s 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[44] Section 17(2) of the Law Reform Act 1936 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 the damage.

[45] Both the Council and Mr Greening are liable for the full amount of the established claim. Mr Cornor has submitted that 80 per cent of the claim should be apportioned to Mr Greening and 20 per cent to the Council. It is submitted that this apportionment is consistent with established

precedent as to the relative liability of territorial authorities established in *Mount Albert Borough Council v Johnson.*[4] I accept this submission and find that the apportionment of 80 per cent to the developer and 20 per cent to the Council is fair given the developer's profit motive that underpins his non-delegable duty of care.

CONCLUSION AND ORDERS

[46] The claim by Powell Holdings Limited is proven to the extent of $6,037.04. For the reasons set out in this determination I make the following order:

i. The Hutt City Council is to pay Powell Holdings Limited the sum of $6,037.04 forthwith. The Council is entitled to recover a contribution from Stephen Greening of up to $4,829.63 for any amount paid in excess of $1,207.40.

ii. Stephen Greening is ordered to pay Powell Holdings Limited the sum of $6,037.04 forthwith. Mr Greening is entitled to recover a contribution of up to $1,207.40 from the Hutt City Council for any amount paid in excess of $4,829.63.

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

First Respondent – Stephen Greening	$4,829.63
Second Respondent – Hutt City Council	$1,207.40

[48] If either of the parties listed above fail to pay its or his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [47] above.

M A Roche
Tribunal Member

[4] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).