IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2013-100-000005
[2014] NZWHT AUCKLAND 6

BETWEEN	KAREN DAWN DICKSON, LESLIE NORMAN AUSTIN AND SUSAN LAUREL AUSTIN as Trustees of the NORMANDY TRUST Claimants
AND	GEOFFREY LYN HOUGHTON First Respondent
AND	PETER FRANCIS CHIBNALL (Removed) Second Respondent
AND	ARCHIBALD GORDON BRODIE (Removed) Third Respondent
AND	VERO INSURANCE NEW ZEALAND LIMITED (Removed) Fourth Respondent

Hearing: 22 April 2014

Appearances: L Austin in person
G Houghton in person respondent

Decision: 22 May 2014

FINAL DETERMINATION
Adjudicator: M A Roche

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[1] Leslie and Susan Austin had a house built at 1 Centennial Place, Campbells Bay in 2000. It is a leaky home. The Austins cannot make any claim in respect of their house's construction because that work is time barred. Neither can the Austins claim in respect of work and events that occurred prior to November 2001, because that period is covered by a settlement they received from Vero Insurance.

[2] Geoffrey Houghton was the director of Ikotec Limited (in liquidation), the company that supplied and arranged the installation of roof shingles at the house. He visited the leaking house on one occasion and arranged for the successful repair of a drip edge defect pointed out to him by Mr Austin. He did not carry out a detailed inspection of the roof at this time and was probably not qualified to do so. He was a salesman rather than a professional roofer.

[3] Mr Austin telephoned Mr Houghton on a number of occasions between 2001 and 2004 to complain about roof leaks.

[4] The Austins claim that Mr Houghton breached a duty of care owed to them relating to his ongoing role as the person they dealt with at Ikotec after the roof leaks started. They say that Mr Houghton exercised sufficient control in respect of their roof problems to give rise to a duty of care on his part. Mr Houghton denies that he owed or breached any such duty.

[5] The issues I need to address are:

i. Did Mr Houghton owe a duty of care to the Austins in respect of the problems they experienced with their roof?

ii. If so, did he breach this duty of care?

iii. If so, what damage was caused to the Austins?

Background

[6] The Austins moved into their house in August or September 2000. A code compliance certificate was issued in August 2001.

[7] In late winter 2000 a "catastrophic" leak occurred at the house. Mr Austin contacted Mr Houghton. Mr Houghton came out to the house to look at the problem which was the result of a drip edge defect that was causing water to ingress through a ventilation gap. Mr Austin had sealed a small area of this gap and showed this to Mr Houghton. Mr Houghton agreed that the drip edge needed replacement and subsequently arranged for Ikotec subcontractors to carry out this work pursuant to the Ikotec warranty.

[8] Sometime after Mr Houghton's visit, Mr Austin sealed the entire ventilation gap in an attempt to stop the leaks. It is accepted that this resulted in the overheating of the roof and voided the warranty for the shingles provided by the Canadian roof shingle manufacturer.

[9] Although the original drip edge related leak was now resolved, other roof-related leaks continued to occur. Mr Austin believes that Mr Houghton may have come to the house to look at the problems on other occasions but he cannot be sure. He telephoned Mr Houghton on a number of occasions between late 2000 and 2004 to complain about leaks. This resulted in a waterproofing company General Manukau Limited attending the house some time in 2001 and carrying out some remedial work. Mr Austin stopped telephoning Mr Austin in 2004 after realising that Mr Houghton was not going to help.

[10] In August 2010 the Austins applied to the Department of Building and Housing for an assessor's report.

[11] The assessor found that there were a number of building defects at the house that allowed water ingress and that, as a result, the house required extensive remedial work. One of these defects was attributable to the original roofing work. The "kick out" to the ends of the apron flashings

were inadequately formed which allowed moisture to drain in behind the cladding.

[12] After receiving the assessor's report, the Austins obtained a report from another building expert, Barry Gill. Mr Gill commented that the inadequately formed kick outs to the end of the apron flashings was the most damaging defect at the house.

[13] As noted above, the original construction work was limitation barred. The Austins filed a claim in the Tribunal against three parties allegedly involved in failed remedial work. These were Mr Houghton, Mr Chibnall, an architect, and Mr Brodie, a plasterer. The insurer of Ikotec and/or Mr Houghton, Vero Insurance New Zealand Limited, was also joined as a respondent to the claim.

[14] The Austins settled their claim against all respondents except for Mr Houghton prior to the hearing and proceeded against Mr Houghton alone. Counsel for the Austins withdrew prior to the hearing but before doing so confirmed that Mr Houghton could not be liable for acts and omissions carried out during the period he or Ikotec were covered by Vero Insurance as the Austins had accepted a settlement payment from Vero covering this period (November 2000 - November 2001).

[15] Mr Austin considers that Mr Houghton should have taken responsibility for the remedial work and should have arranged for a proper inspection of the roof which would have discovered the apron flashing defects and resulted in the design of a remedial solution.

[16] In his brief, Barry Gill stated that in his opinion, Mr Houghton and Ikotec are responsible for the defects associated with the roofing works, in particular, the incorrectly formed apron flashings and subsequent failed remedial works together with all associated damage. Mr Gill went on to say that although the amendment to the drip edge recommended by Mr Houghton together with sealing carried out by Mr Austin stopped water ingress at that location, Mr Houghton, as a roofing professional, should have carried out a visual inspection to all other roofing works as a minimum requirement to check that no other defects existed. Mr Gill also stated that

in his opinion Mr Houghton should have attended the site personally after being informed of [further roof leaks] and that failure to do so indicated a lack of professionalism and a reluctance to correctly address defective work.

DID MR HOUGHTON OWE A DUTY OF CARE TO THE AUSTINS?

[17] The existence of a duty of care is established by enquiring whether, in all the circumstances, it is just and reasonable that a duty be imposed. There is a two stage framework for determining this. First is the consideration of whether the loss was foreseeable and whether there is a sufficient relationship of proximity between the wrongdoer and the plaintiff. Second is the identification of any policy considerations which ought to negate or limit the scope of the duty or the class of persons to whom it is owed.[1]

FORSEEABILITY

[18] Given that Mr Houghton did not return to the property after winter 2000 and neither inspected the roof nor designed any remedial solution for it, I do not consider it would have been reasonably foreseeable to him that the Austins could suffer harm as the result of his acts or omissions. He took no responsibility for the problems the Austins were experiencing. While this may have left the Austins feeling let down, it cannot be said that they relied on his professional skills or his assessment of the house's weathertightness problems.

PROXIMITY

[19] In order to determine whether there was sufficient proximity between Mr Houghton and the Austins to give rise to a duty of care it is necessary to determine Mr Houghton's role.

[20] Mr Houghton has qualifications in sales and marketing. He did sales and marketing work for a company called Vytec who were the

[1] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA); *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].

importer of asphalt shingles from Canada. Eventually he and his business partner bought the business from Vytec and incorporated Ikotec to continue the importing and installation business. Mr Houghton told the Tribunal that the asphalt shingle roofs were always installed for Ikotec by subcontractors because Ikotec lacked the in-house expertise. He would visit sites where Ikotec roofs were being installed. The purpose of these visits was to check that the subcontractors were present and to check the general neatness and tidiness of the work.

[21] Mr Austin first met Mr Houghton when he called into the Ikotec premises at Glenfield which consisted of a shop and small warehouse space. Through Mr Houghton, Mr Austin entered into a contract with Ikotec for the supply and installation of an asphalt shingle roof. Mr Houghton did not personally install the roof. However, Mr Austin can recall Mr Houghton visiting the site and participating in discussions of a technical nature about the roof which Mr Austin says suggested to him that Mr Houghton's roofing knowledge was reasonably strong.

[22] Mr Houghton does not recall returning to the Austins' home to look at a roof leak in winter 2000. However, he accepts that he may well have done so. Mr Austin told the Tribunal that on the occasion of Mr Houghton's visit, both men stood on the balcony and examined the problematic drip edge. The apron flashings were not visible from the balcony and the apron flashing defect remained undetected.

[23] No one carried out a detailed investigation of the causes of the leaks at the Austins' home until they applied for an assessor's report in 2010. As noted above, the apron flashing defect was then discovered by the assessor and confirmed to be the major source of water ingress by Mr Gill.

[24] At the hearing Mr Houghton stated that he did not have the appropriate qualifications or trade skills to take responsibility for the remediation of the Austins' roof and that the design and detailing of remedial work was beyond the resources of himself and Ikotec.

[25] Mr Houghton's acceptance of a number of phone calls from Mr Austin between 2001 and 2004 does not create the requisite proximity. Neither does the sending out of General Manukau on one occasion. This occasion, in any case, was clearly within the period for which Vero has accepted liability and which is outside the ambit of this claim. In the circumstances I do not consider that there was sufficient proximity between Mr Houghton and the Austins to give rise to a duty of care.

[26] Although it may be arguable that the Austins had a claim in contract or tort against Ikotec, this does not mean that Mr Houghton, the sales and marketing person, personally owed a duty to them either as a director or as a person who fielded phone calls.

[27] Mr Gill's view regarding Mr Houghton's responsibility was made in the absence of any reference to Mr Houghton's qualifications or the actual role (or lack of role) he played in respect of the leaks. Given the facts of Mr Houghton's involvement established at the hearing, little weight can be given to Mr Gill's opinion. He criticised Mr Houghton for a lack of professionalism and a reluctance to correctly address defective work. This criticism has little if any relevance to the question of proximity and reasonable forseeability examined above.

POLICY CONSIDERATIONS

[28] Having found that Mr Houghton did not owe a duty of care to the Austins, it is unnecessary to identify the policy considerations which might negate or limit the scope of any such duty.

DAMAGE

[29] Even though I have found that there was no duty of care owed by Mr Houghton to the Austins I will consider the issue of damage in any case. If a breach of a duty of care had been made out, it would be necessary to determine whether it can be established that damage resulted from this breach.

[30] It has already been noted that the original construction work at the house is limitation barred. Section 91(2) of the Building Act 1991 provides that civil proceedings relating to building work may not be brought against any person ten years or more after the date of the act or omission on which the proceedings are based. The Austin's house was completed more than ten years before they applied for a weathertight assessor's report. Therefore any acts or omissions in the original building work which led to damage in the house were done outside the ten year limitation period.[2] It has also been noted that the Austins accepted a settlement from Vero in respect of the period up to November 2001 when Vero's cover of Mr Houghton/Ikotec ceased.

[31] Any breach of duty for which the Austins can claim damages would need to have occurred after November 2001. It also would need to have resulted in damage that is different from and separate to the damage caused by the limitation barred construction defects. Loss or damage that has been caused by acts or omissions cannot be re-caused.[3]

[32] In a series of procedural orders the Austins were made aware of the need to identify and provide evidence of damage flowing from post-construction events as opposed to loss flowing from the original limitation barred construction. They were directed by the Tribunal to identify and provide evidence of such damage.[4] The loss flows from the original defective construction which is limitation barred. There is no evidence of additional loss occurring because of the failure to adequately inspect and diagnose the roofing issues.

[33] In the Austins' statement of claim it is alleged that during the repair work period there were observable defects that should have been apparent to Mr Houghton or his nominated roofing repair crew. The claim goes on to identify the damage caused by the roofing defects and to quantify the cost of repair. The claim does not however distinguish in any way between damage caused during the limitation period by the limitation barred apron flashing defect and any other damage. The full cost of repair is claimed.

[2] Section 37 of the Weathertight Homes Resolution Services Act 2006.
[3] *Johnson v Watson* [2003] 1 NZLR 626 (CA)
[4] Procedural order 3 dated June 2013, procedural order 6 dated 4 July 2013, procedural order 9 dated 17 September 2013.

The Austins have failed to identify any loss caused to them outside the limitation barred period. Therefore, even had a breach of duty been made out, the claim would have failed as there is no evidence that such a breach caused identifiable damage.

[34] The Austins are victims of the leaky building saga that has blighted the lives of countless New Zealanders. The distress caused to them as a result of finding themselves the owners of a leaky home is clear. However, they have failed to establish that Mr Houghton owed and breached a duty of care to them and, even if he had, have failed to establish any damage arising from such a breach. Accordingly, their claim against Mr Houghton is dismissed.

DATED this 22nd day of May 2014

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MA Roche
Tribunal Member