IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2007-100-000042

UNDER	the Weathertight Homes Resolution Services Act 2006
IN THE MATTER	of an Adjudication Claim
BETWEEN	**PETER BRIAN DOWLING and ALESSANDRA ZECCHINI** Claimants
AND	**JACOBSEN CREATIVE SURFACES LTD** First Respondent
AND	**MAPEI NEW ZEALAND LTD** Second Respondent
AND	**NEIL ROLFE trading as CREATIVE FLOORING** (Removed) Third Respondent
AND	**DARRELL COX and MICHAEL FERRIS trading as CREATIVE BUILDING** (Removed) Fourth Respondent
AND	**B.W. AGENCIES LIMITED** Fifth Respondent
AND	**BRENT WORTHINGTON** Sixth Respondent

Dates of Hearing:	27 and 28 March 2008
Appearances:	Peter Dowling and Alessandra Zecchini
	Andrew Commons for the first respondent
	Andrew Swann for the second, fifth and sixth respondents
Decision:	17 April 2008

FINAL DETERMINATION
Adjudicator S. Pezaro

BACKGROUND

[1] This claim arises from the renovations that the claimants, Peter Dowling and Alessandra Zecchini carried out on their home between July 2000 and 2003. The plans were prepared by an architect, John Anderson. The work involved extending the kitchen and living area and constructing a new deck on the Western side of the house, above the extended kitchen area.

[2] Mr Anderson's plans specified a Butynol membrane for the new roof and deck but the claimants changed this specification and decided to tile the new deck. The new roof over the kitchen area was surfaced with a liquid membrane and the decks had tiles laid over a liquid membrane on top of a ply substrate. Two other existing balconies, on the north and south sides of the house were also tiled in the same manner.

[3] The claimants' brief dated 19 February 2008 sets out the chronology of events that led to the claim. In summary, each of the decks that were tiled, and the new roof, leaked. The location of the leaks and the damage that they caused were identified in the report of the WHRS assessor, Mr Biggelaar. The claimants have relied on Mr Biggelaar's report as evidence of the location and cause of the leaks, the scope of repairs required to remedy the defects and the damage, and the cost of remedial work.

[4] The claimants' brief of evidence and statement of claim sets out the history of the original work and the claimants' attempts to remedy the leaks. The total amount claimed is $72,467.20. This sum calculated as follows: $35,923.64 for repairs completed and $10,864.00 for repairs yet to be completed, $1,679.56 for loss of balcony tiles, and general damages of $24,000.00.

THE PARTIES

[5] The claimants originally named four respondents. The first respondent, Jacobsen Creative Surfaces Ltd ("Jacobsens"), is alleged to have recommended the tiler, Neil Rolfe trading as Creative Flooring. The claimants allege that Jacobsens and the second respondent, Mapei New Zealand Ltd ("Mapei NZ"), supplied Mr Rolfe with the liquid membrane, Mapelastic, which was applied as waterproofing to the kitchen roof and the three deck areas that have leaked. It is agreed that Mapei NZ was not incorporated until 7 October 2002 and therefore Mapei NZ cannot have any liability for product supplied to the claimants before this date.

[6] The claimants named Mr Rolfe as the third respondent to their claim. Mr Rolfe contracted with the claimants to supply and install the membrane and tiles which the claimants say he purchased from Jacobsens.

[7] The claimants did not provide an address for service for Neil Rolfe. They gave his address as 'Queensland'. They also gave a former address in Henderson but they knew that he no longer resided at that address. The Tribunal therefore could not serve Mr Rolfe with the claim or any documents related to the proceedings and on 14 December 2007 in Procedural Order No.8 I issued a direction that unless an address for service was provided for Neil Rolfe by 5 February 2008, he would be removed from the proceedings. I also directed that any party providing an address for service other than a New Zealand address for Mr Rolfe would be required to effect personal service on him. No address was provided for Mr Rolfe and on 7 February 2008 I removed him from the proceedings.

[8] The claimants named as fourth respondents, Darrell Cox and Michael Ferris trading as Creative Building, citing the defects that

were identified in the WHRS assessor's report as attributable to the fourth respondents.

[9] Mr Cox and Mr Ferris applied for removal and by letter dated 26 October 2007 the claimants consented to their removal. In Procedural Order No.3 dated 13 November 2007 I granted the application by Mr Cox and Mr Ferris for removal on the basis of this consent and because no other party had opposed this application for removal.

[10] Jacobsens subsequently applied to re-join Mr Cox and Mr Ferris and to join as respondents B.W. Agencies Limited and Brent Worthington. I initially declined this application as it was out of time and, if granted, would mean that the timetable set for the claim would have to be abandoned. However the claimants, in an email dated 27 November 2007, subsequently consented to the late filing of this application. The claimants supported the application to join B.W. Agencies Limited and Brent Worthington but opposed the application to re-join Mr Cox and Mr Ferris. In Procedural Order No 7 dated 30 November 2007 I granted the application to join B.W. Agencies Limited and Brent Worthington and declined the application to rejoin Mr Cox and Mr Ferris. The claimants subsequently called Mr Cox and Mr Ferris as witnesses.

[11] I granted the application to join B.W. Agencies Limited and Brent Worthington as the fifth and sixth respondents to these proceedings. The claimants did not pursue a claim against either of these parties and the only claim against the fifth and sixth respondents was the cross-claim filed by Jacobsens.

[12] The claimants have no claim arising from defective workmanship as the tiler, Neil Rolfe, was removed and the fourth respondents, the builders who constructed the kitchen extension and

laid the substrates upon which the tiles were laid, were also removed.

THE RELEVANT LAW

[13] Mr Dowling and Ms Zecchini have had difficulty in clearly stating the legal basis for their claim and producing a statement that fairly informs the respondents of the legal and evidential basis of the claims against them. I endeavoured, during conferences prior to the hearing, to explain to the claimants what was required in this regard, however, while the Tribunal has an inquisitorial role, it cannot assist one party to the extent of providing legal advice. I make reference to this issue now in order to explain the manner in which I have set out the relevant law.

[14] This claim is based in the tort of negligence and on the Consumer Guarantees Act 1993 ("the CGA"). The CGA provides consumers with a right of redress against suppliers and manufacturers in respect of any failure of goods or services to comply with the guarantees provided under the CGA. There is no dispute that the liquid membrane is an item ordinarily acquired for household use and this is evident from the fact that it was supplied in conjunction with tiles intended for domestic use. I therefore find that the claimants are consumers in relation to the supply of the liquid membrane. The final paragraph of the claimants' closing submissions was *"…our claim is based on the Consumer Guarantees Act 1993"*. This seemed to indicate that the claimants had abandoned the claim in tort, however, for the reasons given above, I am treating this as an error on the part of the claimants and have regarded the claim as being founded both in tort and the CGA.

[15] I also record that the claimants stated on page 2 of their opening statement *"We are also prepared to refer to the Fair Trading*

Act and are happy to follow your guidelines Ma'am". At this stage, of course, it was too late for the claimants to introduce a new cause of action.

[16] I therefore interpret the legal basis for the claim as follows. First the claimants say that Jacobsens negligently advised them to use Neil Rolfe as a tiler and that his workmanship was defective, giving rise to a claim against Jacobsens in tort.

[17] The claimants also claim that Jacobsens and Mapei NZ negligently recommended and supplied the Mapelastic liquid membrane used to waterproof their western balcony and the northern balcony. The claimants submit that the Mapelastic membrane failed, causing water ingress and damages, and that this failure is a breach of the guarantee of acceptable quality in s 7 of the CGA. The claimants argue that they have a right of redress under s 25(a) of the CGA against Jacobsens and Mapei NZ as manufacturers for the damage and loss that occurred as a result of the membrane failure.

[18] The claim against Mapei NZ is that Mapei failed to provide a membrane that was fit for the purpose for the southern balcony and failed to give adequate advice on rectifying the problems with the western balcony and kitchen roof.

[19] In order to prove the claim against Jacobsens for negligently recommending Neil Rolfe, the claimants need to prove that Jacobsens recommended Neil Rolfe for the relevant work, and that they relied on this recommendation to engage Neil Rolfe to carry out the work that is the subject of this claim. If they can satisfy these two requirements, the claimants must then prove that the work done by Neil Rolfe was defective.

[20] In order to prove the claims under the CGA against Jacobsens and Mapei NZ, the claimants need to prove, first, that

either or both of these respondents are deemed by s 2 of the CGA to be the manufacturer of the membrane and, second, that the membrane failed to comply with the guarantee of acceptable quality.

JACOBSENS' RECOMMENDATION OF NEIL ROLFE

[21] The question for the Tribunal to address is whether Jacobsens recommended Neil Rolfe such that, as a result of that recommendation, Jacobsens are liable in tort for recommending a tradesperson who failed to carry out the work to the required standard.

[22] The claimants stated in their brief, and Ms Zecchini confirmed in evidence, that when they first visited Jacobsens showrooms in 1998 they sought advice on tiling and waterproofing bathrooms. They did not seek advice at that time on tiling or waterproofing any external areas. Neil Rolfe's name was given to them along with other names from a list of recommended tilers that Jacobsens held. The claimants then contacted those tilers whose names they had been given, interviewed them, and decided to engage Neil Rolfe to complete the work.

[23] Mr Rolfe tiled a new bathroom area for the claimants in 1998 and they were very satisfied with his work. The claimants then engaged him to tile a second bathroom in 1999. They stated that they were very happy with the professionalism and quality of the work completed by Mr Rolfe.

[24] The claimants did not contact Jacobsens again before they carried out the renovations that are the subject of this claim. I therefore find that the claimants' decision to engage Neil Rolfe for the external tiling work was based on their experience of his work in their

two bathrooms and did not rely on any advice or recommendation made by Jacobsens.

[25] Even if Mr Rolfe had not carried out the bathroom tiling before he carried out the external tiling, I am satisfied that the claimants gave Jacobsens the clear impression that they were seeking a tradesman to carry out internal work and not external work. For these reasons Jacobsens has no liability for the claimants' decision to engage Mr Rolfe for the work that is the subject of this claim and no responsibility for any defective work performed by Mr Rolfe.

THE STATUS OF THE FIRST AND SECOND RESPONDENTS AS MANUFACTURER

[26] The only basis for a claim against the first and second respondents is if those respondents are deemed to be a manufacturer in accordance with the definition in section 2 of the CGA. I therefore consider whether the following definition of 'manufacturer' applies to Jacobsens or Mapei NZ:

> **S 2 manufacturer** means a person that carries on the business of assembling, producing, or processing goods, and includes-
>
> (a) any person that holds itself out to the public as the manufacturer of the goods:
>
> (b) any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods:
>
> (c) where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods.

[27] The relevant part of this definition is subsection (c) which requires consideration of the following definition of an ordinary place of business in New Zealand:

> **S 2 Ordinary place of business in New Zealand**, in relation to a manufacturer, does not include a New Zealand subsidiary of a foreign manufacturer:

[28] A plain reading of 'ordinary place of business in New Zealand' must imply some physical presence that can be identified as business premises. Section 2 of the CGA defines ordinary place of business in New Zealand as not including a New Zealand subsidiary of a foreign manufacturer. The definition of 'business' in section 2 of the CGA is 'any undertaking in the course of which goods or services are required or supplied'.

Jacobsens

[29] Mr Commons, for Jacobsens, argued that, at the time that Jacobsens supplied Mapei products, either Mapei NZ Ltd or BW Agencies Ltd or Brent Worthington was the manufacturer at the relevant time for the purposes of the CGA. The basis of this argument is that all product distributed by Jacobsens was purchased from the agent for Mapei Spa (Italy) which was either BW Agencies Ltd or Brent Worthington. Ian Denzyer, the General Manager of Jacobsens, gave evidence that all purchase orders for Mapei were sent to Mr Worthington although Jacobsens paid Mapei Spa directly. Mr Denzyer said that Mr Worthington received a commission on each order and that the product ordered was sent from Italy directly to Jacobsens.

[30] There is no evidence that Brent Worthington or BW Agencies Ltd supplied Mapei product directly to tradespeople or the public, or that either entity acted as anything other than an agent or source of technical advice for Mapei Spa in New Zealand. The fact that trade evenings were held at Jacobsens and that tradespeople purchased Mapei product from Jacobsens leads me to find that Jacobsens operated the ordinary place of business in New Zealand for Mapei

Spa until the time when it lost the right to supply Mapei product. It is not necessary for the claimants to prove that Jacobsens had the exclusive right to distribute Mapei products in order to fall within the definition of a manufacturer but the fact that the right was not exclusive makes it more difficult for the claimants to prove that Jacobsens was the source of the product at the relevant time.

[31] For the reasons given I find that Jacobsens was the manufacturer of Mapei product until it lost the agency in 2002 for Mapei products in New Zealand. After this date the manufacturer for the purposes of the CGA was the second respondent Mapei NZ.

THE BRAND OF LIQUID MEMBRANE APPLIED

[32] The next question is whether either the first or second respondent supplied the liquid membrane that was used on the claimants' dwelling to Mr Rolfe.

[33] As stated the claimants assert that, at different times, Jacobsens and Mapei NZ supplied the liquid membrane to Neil Rolfe. Jacobsens deny supplying this product to Mr Rolfe and Mapei NZ denies that Mapelastic was used on the south balcony, the only area where product was supplied after Mapei NZ was incorporated.

[34] The claimants have not been able to produce any documentary evidence to show what product, if any, the first and second respondents supplied to Neil Rolfe or what type of liquid membrane Mr Rolfe applied to their dwelling. They state that Neil Rolfe told them that he sourced the membrane and tiles from Jacobsens and later from 'the supplier'. Mr Biggelaar, the WHRS assessor, stated under examination by Mr Swann that he assumed that it was Mapei product but could not be certain.

[35] At paragraph 4 of their closing submissions the claimants submit that the lack of evidence that Jacobsens and Mapei NZ supplied the product to Mr Rolfe cannot be given any weight by the Tribunal. The onus is on the claimants to prove that the membrane was supplied, at the relevant times, by Jacobsens and Mapei NZ and without such proof the claimants have no claim under the CGA.

[36] However Jacobsens failed to produce the records that are relied on by its witnesses. Tony Park relied on these sales records when he wrote to Mr Dowling on 30 November 2006, after visiting the dwelling on 20 November 2006:

> Regarding the waterproofing issues to your deck at the above address we would advise as follows. From your advice regarding the applicator of the waterproofing as being Creative Flooring using Mapei waterproofing products, upon checking our records, we can find little if any purchases of Mapei products by Creative Flooring over the said period of 2000/2001.

[37] Mr Denzyer referred to these records when, in evidence at the hearing, he stated that Jacobsens' has *"…a half a million dollar computer system and retains all data for 10 years"* and that sales records showed no purchases of the Mapelastic membrane to Creative Flooring in 2000 and 2001. If this issue was material to the outcome of this claim I would have required Jacobsens to produce the relevant records. Given my finding on the cause of the water ingress, it is not necessary to make a finding on the source of supply of the waterproofing membrane. However for completeness I address the question of supply in relation to Mapei NZ.

[38] Mapei NZ has not called any witnesses or given any evidence in these proceedings. The claimants' evidence is that the representative of Mapei NZ, Glen Obery, advised them and Neil Rolfe on repairs to the Southern and Western decks and therefore I find that Mapei NZ supplied the membrane applied to these areas after the visit by Mr Obery on 14 March 2003.

CAUSE OF THE DEFECTS

[39] The only cause of leaks in this claim that can sheet home any liability to either the first or second respondent is product failure and Mr Biggelaar accepted that there can be only three reasons for the water ingress in the claimants' property - either a failure to properly prepare the substrate on which the liquid membrane and then the tiles were laid; a failure to apply the product correctly; or a failure of the membrane itself. I therefore address the question of whether any or all of the damage caused by water ingress was a result of failure of the liquid membrane.

[40] As stated, the claimants relied on the evidence of Mr Biggelaar who stated that he was not a waterproofing expert in terms of application and that he did not have the expertise of Mr Park with regard to liquid membranes. None of the other witnesses who appeared for the claimants had any expertise in the application of liquid membranes therefore I have not given any weight to their evidence in this respect.

[41] In his report Mr Biggelaar stated that the primary cause of water ingress on the south facing balcony, the north facing balcony and, to some extent, on the main balcony and the kitchen roof was the failure of the liquid membrane system. However, in evidence Mr Biggelaar could not substantiate these findings.

[42] Under cross-examination by Mr Commons, Mr Biggelaar stated that he did not have the expertise to distinguish between water ingress resulting from a failure in the application of the membrane, a failure in the preparation of the substrate, or a failure in the membrane itself. There is evidence that tends to suggest defects in the installation and preparation of the substrate and the application of the membrane, however the claimants chose not proceed with their claim in this regard. There is no evidence which could support a

finding that an inherent failure or defect in the liquid membrane caused leaking in a particular area of the dwelling.

[43] I therefore find that even if the claimants had been able to satisfy the Tribunal that the product used in the relevant areas of their home was Mapelastic, and was supplied by the first or second respondents as manufacturer, they have failed to prove that the membrane was defective or that it failed to the extent that the failure can be linked to a particular aspect of the damage and the remedial work.

[44] The first and second respondents therefore have no liability for the claimants' loss and I dismiss this claim.

DATED this 17th day of April 2008

_____

S. Pezaro
Tribunal Member