IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000018
[2010] NZWHT AUCKLAND 6

	BETWEEN	NOEL DEAN AND DYMPNA DUNWORTH Claimants
	AND	NEIL MCLACHLAN First Respondent
	AND	DVK ROOFING AND WATERPROOFING CO LIMITED Second Respondent

Hearing:	24 February 2010
Appearances:	Claimants – Treasa Dunworth First Respondent – Self represented Second Respondent – No appearance
Decision:	18 March 2010

FINAL DETERMINATION
Adjudicator: P A McConnell

CONTENTS

INTRODUCTION

[1] Noel Dean and Dympna Dunworth are the owners of a house at 56 Bell Terrace, Onetangi, Waiheke Island. They purchased the property as a holiday home and also as a future retirement home. When they purchased the property they were looking for a modern low-maintenance house and did not want the stress and hassle of dealing with updating and redecoration. Unfortunately rather than obtaining a low-maintenance stress-free property they experienced issues with leaking shortly after purchase. Leaks occurred from the roof deck area and from around the outside fire place. The leaks have been remedied at the cost of $87,355.24.

[2] The claim partially settled at mediation. As a consequence several respondents were removed and the hearing proceeded against Neil McLachlan and DVK Roofing and Waterproofing Co Limited only. DVK Roofing and Waterproofing Co Limited was the company that installed the membrane roof system. Neil McLachlan, the claimants allege, was the developer of the property.

THE ISSUES

[3] The issues I need to decide are:

- What are the defects that caused the leaks?
- Is DVK Roofing and Waterproofing Co Limited (DVK) responsible for the defects and consequential damage?
- Was Neil McLachlan a developer?
- What is the quantum of damage the liable respondents should pay?

MATERIAL FACTS

[4] Ms Dunworth and Mr Dean decided to purchase the property in Bell Terrace in November 2004. The dwelling at that stage was in as new condition. Extensive alterations had been carried out in 2003 with the Code Compliance Certificate for those alterations being issued on 4 August 2003. Mr Dean and Ms Dunworth live in Ireland and purchased the property as they planned to come out to New Zealand every year to holiday. They also intend it to be their retirement home. Between holiday periods their intention was to rent out the property. The settlement of the purchase of the property took place on 24 February 2005 when Mr Dean and Ms Dunworth were in New Zealand. They left on 1 April 2005 and tenants moved into the property.

[5] They first became aware of leaks when they received an email from the tenants on 8 June 2005 informing them that there had been a leak in the main living room. They subsequently received an email stating that a builder who inspected the property had lifted two tiles and found that the membrane under the tiles had failed. The claimants then commissioned a report from Trevor Ashman and in consultation with him arranged for appropriate remedial work to be undertaken. The remedial work was carried out between September 2006 and January 2007.

[6] The major construction work on the property took place in 2003. There was at that stage an older house on the section that was completely remodelled, renovated and extended. Hanley Hall Properties Limited was the owner of the property at the time. The sole director of Hanley Hall Properties Limited (Hanley Hall) is Neil McLachlan. Neil McLachlan is an interior designer who did some of the concept design work and was also involved in the interior design of the property. He states that the dwelling was originally developed to be a home for him and his partner. They intended to initially rent the property from Hanley Hall and then subsequently purchase it from the company. This did not eventuate due to cost overruns. As they could not afford to live in the property, it was put on the market once construction was completed.

[7] The construction work was carried out by MAJA Construction Limited (MAJA) which is now in liquidation. Mark Armstrong, one of MAJA's former directors, gave evidence that MAJA was contracted by Hanley Hall to carry out and supervise the alterations and additions. MAJA was involved in the physical building work, the co-ordination of the sub-trades and the overall running of the job. In particular MAJA was responsible for engaging and contracting all the workers involved on site including DVK.

[8] DVK provided and installed the waterproofing membrane on the roof deck. It took no part in these proceedings although it was served with the claim, the notice of hearing, the Procedural Orders setting timetables and notice of all other events.

WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS

[9] The claimants' Bell Terrace property was a well built property apart from the roof deck and outdoor fireplace. Leaks were isolated to these regions of the dwelling. The roof deck area was built over part of the house and leaks through the deck caused water ingress to

the dwelling. Mr Ashman's report and the evidence of Grant Payne, as to causes of leaks were unchallenged at the hearing.

[10] Mr Payne carried out the remedial work after being provided with a copy of Mr Ashman's report. His uncontested evidence, which I accept, was that there were four defects with the roof that contributed to the water ingress. The membrane roof system failed as, in his opinion, it ought not have been used at that roof pitch in that situation. There were also defects within the roof cavity including insufficient pitch, insufficient nogs and no ventilation. The third defect was that the parapet capping was not built to specification, being flat rather than sloping out, and this resulted in water pooling on the top. Installation of the parapets was not carried out in a workmanlike manner.

[11] The fourth defect relates to the installation of the outdoor fireplace. It was installed after the roof membrane was laid and the membrane was cut in order to complete installation. This method of installation was such that water ingress was inevitable particularly as the flashing around the fireplace on the roof terrace was inadequate.

Is DVK Roofing and Waterproofing Co Limited responsible for the defects and consequential damage?

[12] Section 74 of the Act confirms that a party's failure to act or participate in the hearing does not affect the Tribunal's powers to determine the claim against it. Moreover section 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act or attend the hearing. Based on sections 74 and 75, I will therefore determine DVK's involvement and liability based on the available information.

[13] DVK was contracted to provide and install the membrane to the roof deck. The work was carried out by Igor Arakelian who signed a producer statement on behalf of DVK Roofing and

Waterproofing Co Limited. DVK was subcontracted by MAJA to do this work as it had done work for MAJA in the past and MAJA understood DVK was a professional and competent company. I accept that DVK, as a qualified and professional trade involved in the construction of dwellings, owed the claimants a duty of care as subsequent owners, to ensure that the work it completed complied with the requirements of the Building Code.[1]

[14] I also conclude that DVK Roofing and Waterproofing Co Limited did not carry out the waterproofing work in a good and tradesman-like manner and as a result the roof deck leaked causing damage to the property. I accordingly conclude that DVK Roofing and Waterproofing Co Limited is liable to the claimants for the full amount of the claim established.

Was Neil McLachlan a Developer?

[15] The claimants allege that Mr McLachlan was the developer of the property at the time the alterations and extensions were carried out. The Building Act 2004, although not definitive gives some useful guidance as to the definition of "a residential property developer". For the purposes of that Act, a residential property developer is defined at s 7as:

> "A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
> (a) Builds the household unit; or
> (b) Arranges for the household unit to be built; or
> (c) Acquires the household unit from a person who built it or arranged for it to be built."

[1] *Body Corporate No 189855 v North Shore City Council* (*Byron Avenue*) HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J; and *McGregor v Jensen* WHT TRI-2008-100-94, 24 July 2009.

[16] A helpful definition of a developer can also be found in *Body Corporate 188273 & Anor v Leuschke Group Architects Limited & Ors:*[2]

> "[32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops."

[17] Harrison J also observed that the word developer is not a "term of art or a label for ready identification", unlike a local authority builder, architect or engineer. He regarded the term as "a loose description, applied to the legal entity which by virtue of its ownership of the company and control of the consent, design, construction, approval and marketing process qualified for the imposition of liability in appropriate circumstances". It is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of care on the developer. Whether someone is called a site manager, project manager or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[18] The claimants allege that it was Mr McLachlan who was the human being who on behalf of Hanley Hall took responsibility for the direction and supervision of the development of this dwelling. Ms Dunworth submitted that the claimants were not intending to "pierce the corporate veil" in that their case was not founded on the allegation that Mr McLachlan assumed personal liability in his role as director of Hanley Hall. The claimants' case is that Mr McLachlan was the developer.

[19] Mr McLachlan's evidence is that he, on behalf of Hanley Hall contracted MAJA to carry out the construction work and contract and supervise the sub-trades. Mr Armstrong confirms his company had the overall running of the job. He also said in evidence that whilst Mr McLachlan made occasional site visits to check on progress he did not make any decisions about construction or technical detailing and did not supervise or contract the sub-trades. Mr Armstrong confirmed Mr McLachlan's evidence that he was away from Auckland a great deal during the building process and had no active involvement in the construction or its supervision. Mr McLachlan submits that if there was a developer it was either Hanley Hall or MAJA.

[20] The claimants submit that the amount being paid to MAJA was insufficient to cover supervision. However they produced no evidence to support this submission. Nor did they provide any direct evidence that Mr McLachlan had greater involvement in the construction process than what he and Mr Armstrong stated. They did not purchase the property directly from Hanley Hall and had no connection with the property during the construction process. In opposing Mr McLachlan's removal the claimants referred to information provided to them by Jeff Mann. They did not however produce an affidavit from him or call him as a witness in the hearing. Accordingly I will give no weight to this hearsay evidence introduced in their opposition.

[21] The claimants also referred to an article published in Alfresco magazine in 2004 which refers to Mr McLachlan being involved in the design of the building and refers to the Bell Terrace property as the house that Mr McLachlan had just built. Mr McLachlan submits that factual conclusions cannot be reached based on an article by a journalist when the text was neither written by or approved by him. He also submits that the inclusion of the Bell Terrace dwelling on his

[2] HC Auckland, CIV-404-404-2002003, 28 September 2007, Harrison J.

website relates to the interior design features of the dwelling only and not its construction.

[22] The claimants also refer to in *Young v McQade*[3] when Judge Barber upheld the decision of the WHRS that Ms Young acted as a developer. He noted that she had dealt with the building consent requirements, contacted the Council regarding inspections and engaged a labour-only builder for limited tasks without any project management tasks. However the claimants have produced little evidence that Mr McLachlan was involved in any of these tasks. Mr Armstrong's evidence is that MAJA was contracted to provide supervision work. They were the ones that were primarily responsible for complying with the building consent requirements and contacting the Council regarding inspections.

[23] In deciding whether Mr McLachlan was the developer, the relevant consideration is what his function was in the development process. From the evidence presented it has not been established that Mr McLachlan was the human being who took responsibility for giving the type of directions necessary to supervise the project. Conversely in his role as director of Hanley Hall he engaged appropriately qualified and professional builders to build and supervise the project. The evidence does not establish he engaged or personally supervised the sub-trades. He made design and decor decisions but there is little evidence that he was involved in other construction-related decision making or supervision. The level of supervision Hanley Hall arranged was adequate for a project of this size. It is relevant to note that the construction failures relate to a limited area and there is no suggestion that other aspects of the construction work are defective.

[24] Harrison J in *Leuschke Group Architects Limited* also looked at the proposition that a director of a corporate entity could assume personal responsibility to third parties irrespective of whether he or

she was acting as a director or pursuant to any other form of agency. In those cases control of the development was not in itself sufficient to establish liability. There needed to be evidence of the director's assumption of a degree of personal responsibility for an item of work which subsequently proved to be defective.

[25] In *Body Corporate No 199348 v Nielsen,*[4] Heath J accepted that the role of a developer included the type of management required to ensure the building work was completed in accordance with the Building Code. Whilst this was in the context of a multi-unit development, he concluded that planning, quality control and providing onsite direction and checking were key elements of the developer's role. In concluding that Mr Nielsen was the developer, significance was placed on the fact that Mr Nielsen was intimately involved in the project, was responsible for giving day-to-day instructions on the work to be undertaken, was instrumental in arranging for Mr Skerrat to have appropriate trades on site at relevant times and was involved in important decisions affecting the value of the completed units.

[26] Mr McLachlan had very few of these duties and was also away for much of the construction period engaged in filming a television programme. Most of Mr McLachlan's documented involvement in the project was in his role as director of Hanley Hall. It was in this capacity he signed the application for building consent and other documentation relating to the consent process. While there is evidence that he attended to payments of some accounts and dealt with account queries from some contractors there is no evidence that he had any onsite supervisory involvement or responsibility.

[27] I accordingly conclude that the claimants have failed to establish that Mr McLachlan was either the developer or project

[3] [2005] BCR 673.
[4] HC Auckland, CIV-2004-404-3989, 3 December 2008

manager. There is accordingly no basis on which I can conclude that he owed the claimants a duty of care. The claim against Mr McLachlan accordingly fails.

QUANTUM

[28] The claimants are seeking $129,167.90 calculated as follows:

Cost of repairs after allowance for amount received in partial settlement	$67,355.24
Specialist advice and report	$2,312.72
Loss of rental at 9 months	$19,499.94
General damages	$40,000.00
TOTAL	**$129,167.90**

[29] There was no dispute with the amount claimed for remedial work. It appears that appropriate and reasonable deductions have already been made for matters that could amount to betterment or extend beyond what was reasonably required to fix leaks. I also accept that the $2,312.72 for Mr Ashman's advice is appropriate to award.

[30] In relation to the claim for general damages I note that the dwelling is in part a rental property and the claim also includes loss of rent. In addition the leaks in the dwelling were in limited locations only and the remedial work was less extensive than is often required. In recent High Court decisions the Court has set the level of general damages for investment properties at $15,000.00 - $20,000 jointly to the claimants. I therefore conclude that the appropriate award of general damages in this case is $20,000.00.

[31] I further accept that the property had been rented out for $500.00 per week and that the tenants gave notice due to the water ingress issues. It was reasonable in the circumstances for the claimants to carry out repairs before re-tenanting the property. I do

not however accept that the full nine months requested should be awarded. Part of the inability to rent the property was the difficulty in getting tenants for shorter periods when the claimants were going to return to live in the property over the summer. Loss of rental is awarded for the period taken to carry out the remedial work. Loss of rent at $500.00 per week for five months amounting to $10,500.00 is accordingly established.

[32] The claim has accordingly been proved to the value of $100,167.96 calculated as follows:

Balance remedial costs	$67,355.24
Remedial specialist	$2,312.72
Loss of rent	$10,500.00
General damages	$20,000.00
TOTAL	**$100,167.96**

CONCLUSION AND ORDERS

[33] The claim by Noel Dean and Dympna Dunworth is proven to the extent of $100,167.96. For the reasons set out in this determination, I make the following order:

i. DVK Roofing and Waterproofing Co Limited is to pay Noel Dean and Dympna Dunworth the sum of $110,167.96 forthwith.

ii. The claim against Neil McLachlan is dismissed.

DATED this 18th day of March 2010

_____

P A McConnell

Tribunal Chair