

## **SUMMARY**

**Case:** Findlay & Anor v Auckland City Council & Anor

**File No:** TRI 2008-100-000034/ DBH 03882

**Court:** WHT

**Adjudicator:** KD Kilgour

**Date of Decision:** 9 September 2009

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### **Background**

The claimants are the trustees of the Lee Findlay Family Trust governed solely by one of the trustees, Mr Findlay. His co-trustee, Mr Sandelin did not take part in this claim. Mr Findlay sought damages to compensate the cost of remedial work he undertook and general damages against the Auckland City Council for certifying that the building complied with the Building Act 1991, and against Mr Slater, a carpenter employed by Mr Findlay on a labour-only basis to carry out the carpentry component of the building works and allegedly acted as site foreman and supervisor of the build.

### **Summary of Facts**

- Late Aug 1995 Mr Findlay purchased the section and the Lee Findlay Family Trust was later formed. The Trust acquired title to the property. Mr Findlay and Mr Sandelin were trustees
- 1995 A quotation given by Leuschke Group Architects was substantially lower than two other quotations and therefore Mr Findlay engaged Leuschke to design the dwelling. Leuschke was also engaged to carry out all dealings with the Council and obtain the necessary building consent. Even though Leuschke's quote included construction supervision, Mr Findlay did not engage Leuschke for such Building consent issued by the Auckland City Council
- March 1996 Construction was carried out
- Mid-1996 to early 1997 Mr Findlay and his family moved into the dwelling
- Early Feb 1997 Mr Findlay noticed a leak and so he engaged a builder who was working on the fences at the time to advise and repair the leak. Targeted repairs were carried out. Mr Findlay noticed dampness in the same area some years later and deterioration in other parts of the dwelling
- Approx Aug 1998
- Early 2005 Mr Findlay engaged Prendos Ltd
- Sep 2005 Mr Findlay to lodged the present claim

### **Quantum**

#### *Remedial costs*

The claimants completed the remedial work which involved a full reclad of the home. All the experts agreed that the house required a full reclad. As a result the quantum claimed for those repairs, which was not disputed, was \$445,420.42:

- Building consent \$ 4,605.50
- Works insurance \$ 807.46
- Prendos Ltd report for remedial work \$ 6,215.23
- Project management costs \$ 44,448.33

• Reclad costs	\$387,789.79
• Deck tiles	\$ 1,314.11
• Painting report	\$ 240.00

### *General damages*

The Tribunal held that it is statutorily barred from making an order for general damages in favour of a Trust as the individual trustees are not the owners of the home or claimants in this claim. The claim for general damages was therefore declined.

### *Interest*

The Tribunal held that the justice of the claim enables the Tribunal to exercise its discretion to order interest. The Tribunal therefore ordered interest on the remedial costs from 7 May 2008 (date the claim was filed with the Tribunal) until the date of this determination at the rate of 4.7% being \$27,913.00

### **Limitation**

The Tribunal found that the leak that was noticed about 18 months after occupation was not sufficiently concerning as to call for an expert. The Tribunal therefore found that it was reasonable for Mr Findlay to believe that the leak had been fixed with targeted repairs and therefore the leak was not sufficient to put the claimants on notice that the house was a leaky home. The limitation defence therefore failed.

### **Summary of Decision**

#### *Liability of Auckland City Council – territorial authority*

Whilst the Tribunal accepted that Mr Findlay's role in the construction was significant, his role did not negate the duty of care owed to him as an owner-occupier of a newly built residence. The Tribunal therefore found that the Council owed a duty of care to the claimants as owners of the subject dwelling.

#### *i) Issue of building consent*

In following *Sunset Terraces*, the Tribunal found that the claim against the Council for approving the plans failed.

#### *ii) Inspections*

The Tribunal found that aspects of the Council's inspection regime failed to detect significant water ingress defects. Despite the Council's failure to notice the defects, it still issued a Code Compliance Certificate and by doing so, it was negligent. If the defects were captured and remedied at the proper time of construction, there would have been a targeted fix or partial reclad at the time a Notice to Fix should have been issued by the Council and accordingly the repair costs would have been considerably less. But no such notice was given and therefore targeted repairs were not carried out. The Council did not have a sufficiently effective approval and inspection regime to detect the significant water ingress problems and therefore it failed to carry out adequate and satisfactory inspections. Its errors were causative of the major defects and therefore the Tribunal found the Council liable for the full amount of the claim.

#### *Liability of Mr Slater – labour-only carpenter*

The Tribunal and found that Mr Slater was employed as a labour-only carpenter with no project management/supervisory/site management role. Instead Mr Slater solely agreed to undertake a labour-only carpentry role and to do just what he was directed to do by the plans and specifications. He was paid an hourly rate of \$25.00 and a lesser sum by cash thereby reflecting that no supervision was involved. The Tribunal therefore held that Mr Slater had no supervisory or managerial role. The Tribunal also found that although Mr Slater owed Mr Findlay a duty of care to carry out his

contractual obligations, it was not shown on the balance of probabilities that Mr Slater breached his labour-only contract or was negligent. He therefore had no responsibility for the defects in the build of the home.

### Contributory Negligence

- The Tribunal made a determination of the extent of Mr Findlay's responsibility based on the work he carried out rather than in relation to a label used to describe the role of an individual in a residential building development.
- The Tribunal distinguished *Riddell v Porteous* on the following grounds:
  - Unlike Mr Porteous, Mr Slater did not depart from the plans and specifications
  - The co-ordination of the trades was critical in the present case but Mr Findlay chose to directly contract with each trade involved to ensure that he retained control over and have more input into the quality of the build
  - Contributory negligence was not pleaded in *Riddell v Porteous*
- The experts' evidence suggested that the lack of proper management of the build, particularly co-ordination and sequential application and supervision of the trades significantly contributed to the defects.
- The whole object was to build the home as economically as possible but by doing so Mr Findlay failed to take reasonable care in looking after his and his Trust's interests with the building project.

Accordingly the Tribunal found that by contracting the trades involved and without engaging someone of competence to supervise their construction work, Mr Findlay assumed responsibility for the build's management. The carelessness of Mr Findlay was causative of the damage in the sense that it contributed considerably to the building defects and the resulting damage. The Tribunal therefore held that Mr was contributorily negligent to the extent of 85%.

### Conclusion

The Tribunal established that the claimant Trust was entitled to claim \$71,000.02:

Remedial costs	\$445,420.42
Interest at 4.7% from 7 May 2008 to 9 September 2009	<u>\$ 27,913.00</u>
<b>Subtotal</b>	<b>\$473,333.42</b>
Less 85% for contributory negligence	-\$402,333.40

The Tribunal did not find Mr Slater liable in either tort or contract for the work he carried out. The claims against him were therefore dismissed.

However the Tribunal found that the Council breached its duty of care in tort and was therefore liable for the losses suffered by the claimant Trust. The Tribunal therefore ordered the Council to pay the claimant Trust \$71,000.02