IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-101-000023
[2011] NZWHT AUCKLAND 43

	BETWEEN	GRANT D WAKELIN AND PATRICIA J WAKELIN AND LPT TRUSTEES NO.30 LIMITED as Trustees for the GET IN & WALK TRUST Claimants
	AND	TAUPO TEXTURE COATINGS LIMITED First Respondent
	AND	MARSHALL WATERPROOFING NZ/AUS LIMITED Second Respondent
	AND	TODD ELLIOTT BUILDERS LIMITED Third Respondent
	AND	TAUPO DISTRICT COUNCIL (Removed) Fourth Respondent
	AND	ADR CONCEPTS LIMITED / FOREVER ARCHITECTURE LIMITED (Removed) Fifth Respondent

Hearing:	6 and 7 April 2011
Final Submissions Received:	6 May 2011
Appearances:	Claimants – self represented Mr W T Nabney, counsel for the first respondent Mr K Catren, counsel for the second respondent Third respondent – no appearance
Decision:	8 September 2011

FINAL DETERMINATION
Adjudicator: P J Andrew

CONTENTS

INTRODUCTION

[1] In 2008 the claimants converted two stand-alone units on land in Taupo into one new family home. As part of the reconfiguring, a large deck was created. A layer of Protecto Wrap AFM-WM membrane (i.e. anti-fracture membrane – waterproofing membrane) (AFM membrane) was installed on top of a tile and slate underlay to form part of the surface of the deck.

[2] The claimants say that in choosing an AFM membrane, they relied on promotional advertising material produced by the manufacturer which is said to have included a warranty that they would have a high quality waterproof product. They also say they relied on representations from the installer, that once installed, they would have a fail-safe product.

[3] The first respondent, Taupo Texture Coatings Limited (TTC), supplied and installed the AFM membrane. The second respondent, Marshall Waterproofing Limited (MWL), was the importer and wholesale supplier who onsold the membrane to TTC. The third respondent, Todd Elliott Builders Limited (TEBL), was the builder who erected the substrate to the deck.

[4] The deck now leaks and this has caused damage to the substrate below. The entire deck needs to be replaced.

[5] The claimants contend that the principal cause of the leaks is the AFM membrane which was either itself defective or installed in a defective manner.

[6] The claimants sue TTC and MWL for breach of obligations under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986. In particular it is alleged that the AFM membrane was not of acceptable quality and/or not reasonably fit for purpose.

[7] The claimants also sue TEBL in negligence contending that a complete lack of control joints in the substrate and the popping of the fixing nails, contributed to the problem of water ingress.

[8] A total sum of $305,374.40 is sought by way of damages.

THE ISSUES

[9] The critical issues the Tribunal must determine are:

a) What were the causes of the leaks to the deck, and in particular was the AFM membrane itself defective?
b) The liability of TTC, the first respondent, and in particular whether it breached its obligations under section 29 of the Consumer Guarantees Act 1993;
c) The liability of the second respondent, MWL, as the manufacturer of the AFM membrane, under the Consumer Guarantees Act 1993;
d) The liability of the third respondent, TEBL, in negligence;
e) The quantum of damages and whether there should be any reduction in damages because of contributory negligence by the claimants.

FACTUAL BACKGROUND

[10] The reconfigured single dwelling has three levels. The upper deck, the subject of this claim, is very large (approximately 98 square metres) and is located on the third level of the north and west elevations.

[11] The building consent for the project was issued on 27 September 2009 and the building works commenced the following month. The design was undertaken by ADR Concepts Limited, the fifth respondent, removed from the proceedings.

[12] The building consent was granted for the installation of a butynol membrane over a ply substrate to be screwed in place onto the sub framing of the main deck. However, the deck was never constructed in the manner approved. A Code Compliance Certificate was never issued for the work.[1]

[13] TEBL, the third respondent, was engaged by the claimants as the builder and project manager to undertake the extensive renovation and re-modelling work.

[14] The deck was constructed with timber framing and plywood substrate, and a Hardie's tile and slate underlay fitted on top of the plywood.

[15] A layer of the Protecto Wrap AFM membrane was installed on top of the tile and slate underlay. A cementicius screed was then installed on top of the AFM and tiles then installed on top of the screed.

[16] The AFM membrane was specifically designed for waterproofing decks and use under ceramic thin-set tiles. The anti-fracture aspect is said to reduce the likelihood of cracking due to building movement.

[17] The AFM membrane is self-adhesive on the underside with a "peel and stick" release film protecting the adhesive surface. The film is removed during installation.

[18] The product is normally installed by trained and experienced applicators. The specifications require movement control joints in the substrate which must be carried through to the tiled finish. The specifications also require a minimum fall on decks of 1 in 60.

[1] See Procedural Order No 5 [8 September 2010] at [38] where the fourth respondent, the Taupo District Council, was removed from the proceedings for these reasons.

[19] The AFM membrane is 1mm thick and consists of a fabric reinforcement surface laminated to a modified rubberised asphalt adhesive membrane. It comes in rolls of 900mm wide. The rolls are joined by the 50mm "peel and stick" side overlap strip. When the laps are rolled together, they form a solid asphaltic bond.

[20] The product system includes a proprietary solvent-prima which is painted on the substrate and allowed to go tacky before the membrane is rolled onto it.

[21] The second respondent, MWL, imported rolls of the AFM membrane from Protecto Wrap USA in early December 2006. They were subsequently purchased by TTC. TTC is a certified installer of Protecto Wrap New Zealand.

[22] At a meeting in December 2006 Mr Todd Elliott introduced the claimants to Mr Steve Amrein of TTC. At that time the claimants were given an AFM advertising brochure put out by MWL. The brochure, produced in 2006, describes the Protecto Wrap AFM membrane as "the essential waterproofing membrane designed to protect your tile investment from unsightly and unhygienic cracking. The brochure also refers to a 15 year warranty.

> **15 YEAR WARRANTY**
>
> AFM-WM has a 15-year product warranty. When the certified installer has completed the installation, a warranty remittance is issued by the installer and lodged on a database.
>
> This procedure gives the owner peace of mind that their best interests are being looked after.

[23] The 2006 brochure also described the membrane as "100% waterproof; with the added bonus of being a crack suppression system."

[24] In a number of prominent places the brochure makes it clear that the product must be installed by certified Protecto Wrap installers. The claimants contend that they placed great reliance on the representations contained in the brochure, including a 15 year warranty, in making the decision to use the AFM membrane.

[25] The claimants dealt solely with TTC, believing that there was benefit in having a single contractor.

[26] During the meeting in December 2006 Mr Steve Amrein made a telephone call to MWL to ascertain whether it was acceptable for him to install the AFM membrane on top of the tile and slate underlay. He was advised by MWL that it was acceptable.

[27] In early January 2007, Mr Todd Elliott of TEBL stopped working on the project and had no further involvement with any aspects of construction. From mid to late January the AFM membrane was installed by TTC. The membrane was not flood tested immediately, as required by the specifications. The tiler, Mr Rihari commenced laying the tiles on the deck before TTC had completed laying the membrane. At that time Mr Todd Elliott's father was working on the house.

[28] In early February 2007 TEBL was replaced by Klein Builders Limited (KBL). That company carried out construction work during the month of February 2007.

[29] Shortly after commencing work, KBL noted that there were faults with the construction of the dwelling and in particular a lack of steel beams to support the upper level. The SHS steel posts had no point loads and were only fixed to the bottom plates with two coach screws in each.

[30] As part of the process of remedying these defects, KBL propped and braced the deck. The deck, which by that time had been fitted with the AFM membrane, was raised some 15-20mm. The consequences of the raising of the deck and its effect on the AFM membrane are in dispute; so too is the degree to which it was raised. In February 2007, TTC returned to the site to redo the waterproofing membrane on the re-designed gutters that had been installed by KBL.

[31] In approximately May 2007 the claimants noticed that water had begun to enter through the master bedroom wardrobe ceiling. They believed at the time that a window was the cause of the leak.

[32] In both June and October 2007 Mr Rihari, who originally installed the tiles of the deck, removed and replaced some cracked tiles.

[33] In August 2007 TTC began installing the texture coating to the dwelling.

[34] In about October 2007 the claimants discovered that there were multiple leaks in areas directly beneath the deck. The claimants met with TTC and MWL at various times over the next 10 months in order to ascertain the reasons for the leaks are to reach agreement on a solution.

[35] In approximately March 2008 Mr Steve Amrein of TTC returned again to the site, at the request of the claimants and KBL, to attempt to resolve the issue of the leaks with the deck. Mr Amrein removed some tiles from the deck and then resealed the membrane.

[36] In June 2008 TTC was advised that there was still leaking problems with the deck. Mr Amrein then met with the claimants together with Mr Andrew Klein and Mr Kerry Temple and Mr Sean

Lett of MWL. Holes were cut in the ceiling under the deck to see if the water ingress point could be identified. Having believed they had located the ingress point, TTC agreed to lift tiles in the relevant area and redo the waterproofing. MWL agreed to supply the materials. TTC then went ahead and laid new waterproofing over the top of the existing membrane.

[37] Mr Wakelin contacted TTC some six weeks later to advise that the deck had leaked in a different place – i.e. in the area where TTC had not relaid membrane.

[38] There was then a further meeting on site in August 2008 involving the claimants, Mr Kerry Temple of MWL, Mr Andrew Klein, Mr Steve Amrein and Mr Darren McCutchen of ADR. At that time MWL took some samples of the AFM membrane which were then sent to the USA for testing. There was discussion at that meeting about whether the membrane could have been part of a faulty batch. In September 2003 MWL received a letter (by email) from Protecto Wrap in Colorado USA which contained advice on the testing of the samples of the membrane that had been sent to them. The claimants did not see this letter until after their claim had been filed in the Tribunal. The letter from Protecto Wrap stated:

> We have looked at retained samples of AFM-WM product lot numbers sent to you in March, April and June 2007 and find them to be in spec. The overlapping area meets or exceeds our minimum requirements and the thickness is right on the mark.
>
> When we first received the samples of the overlap from you, there appeared to be some sort of solvent contamination present that had a liquefying effect on the seam. This could have been from possibly covering wet or uncured prima. When covered with our AFM-WM this would have encapsulated the live solvents beneath the membrane allowing it to slowly chemically attack the rubberized asphalt adhesive. It also appeared that the seams might have been primed and covered with live solvents present.

> The underlayment board seams might have had live prima solvents dripped between the boards causing this appearance. The other samples of membrane adhesive appeared to have some top marks which could have been from covering live solvents also.
>
> This would explain the deck leaking after a long period of time as the solvent from the prima would have not been able to cure beneath the membrane and they would then slowly eat away at the adhesive.
> Seam contamination from outside sources during installation could also have an adverse effect on the overlap.
>
> We apologise for any problems you are experiencing without AFM-WM. We have not charged anything in our formulation or manufacturer of our AFM-WM and have not had any such complaints on the product. It seems odd that the product did waterproof for 16 months and then it started leaking. The fore mentioned slow chemical attack makes sense with the problems you are experiencing.
>
> An infrared camera could possibly pick up where the water entry is coming from and infrared cameras have been used to locate difficult to detect leaks in roof decks in the United States before. This might be something you want to look into before destroying the entire deck.

[39] Sometime in 2008 MWL updated and produced a new advertising brochure for the AFM membrane. The new version contained a photograph of the claimants' deck. In a letter dated 5 November 2008 the claimants' solicitors advised MWL's solicitors that no permission had been given for the use of the photographs. The claimants sought to have MWL withdraw the brochure from circulation. By letter dated 28 November 2008 the solicitors of MWL replied to the claimants' solicitor and advised that the 2008 brochure, which used the unauthorised photograph of the deck, had been withdrawn, the information replaced and that no further brochure using the Wakelin's deck would be used.

[40] In November 2008 TTC again returned to the site and began lifting further tiles in a further attempt to try and identify and resolve the ongoing leaking. Mr Amrein then advised the claimants that he had concerns about continuing to patch up the deck because of what he believed was the ongoing effect of nails protruding through the membrane.

[41] In December 2008 TTC's insurance company denied a claim made by TTC in relation to the claimants' deck.

[42] In April 2009 the claimants filed a claim with DBH. The assessor visited the site in May 2009 and his report was issued on 31 July 2009.

THE CLAIM

[43] Throughout the evidence and submissions the claimants have sought to emphasise that in purchasing the AFM membrane from TTC and engaging it to install the product, they relied on representations both from TTC and those contained in the MWL brochure of 2006. The claimants say that these assurances and representations provided them with an integrated solution, a "clear and strong responsibility chain" in the event that there was any defect or problems with the membrane. This factual context is the basis for the principal contention that they were given a 15 year warranty in relation to both the product itself and its installation. This warranty was described by the claimants as an "integrated system warranty".

[44] Both TTC and MWL challenge these claims. They contend that neither the product nor its installation caused any leaks or problems. It is contended that while MWL does provide a product warranty in certain circumstances, there was no product warranty given in this case. It is also contended by the respondents that the only installation warranty provided by TTC related to the texture coating and not to the AFM membrane.

[45] TTC and MWL deny they have any liability at all to the claimants under the Consumer Guarantees Act 1993 or otherwise.

ISSUE ONE – The causes of the leaks to the decks

[46] The assessor, Mr David Lewis, and Mr Rex Moyle, expert witness for TTC and MWL, gave concurrent expert evidence on the issue of the causes of the leaks to the decks. This included discussion of the obviously important evidence from Protecto Wrap USA, which discusses the matter of solvent contamination.[2]

[47] The expert panel also referred to the report from Cove Kinloch dated December 2008, commissioned by the claimants. However, the author of that report, Mr Johnny Aitken, was not called to give evidence.

[48] The assessor was of the view that the leaking to the deck was the result of failed lapped joints in the AFM membrane and/or nails (i.e. the fixing nails of the tiles and slate substrate) popping and penetrating the membrane. His opinion was that there may well have been solvent, dust or water contamination during the process of installing the membrane – although he indicated that water or dust contamination was the more likely. Mr Lewis rejected the idea that the propping up of the deck by KBL had compromised the watertight integrity of the membrane. He also claimed that a proper flood test of the membrane, carried out within 24 hours of it being installed, would likely have revealed a contamination issue. Such a test was never carried out.

[49] Mr Moyle, on the other hand, rejected the view that there was contamination of any kind during the process of installing the membrane. In Mr Moyle's opinion, the leaks to the deck were more likely to have been caused by a combination of a number of key

[2] See [38].

factors, entirely independent of the AFM membrane itself. These defects included:

- inadequate falls to the deck;
- an absence of movement control joints in either the timber structure, the plywood substrate or the tile and slate sheets that were fitted on top of the plywood under the membrane;
- the penetration of the membrane by the fixing nails of the tile and slate;
- the random cracking of the tiles; and
- Mr Moyle was also of the view that the raising of the deck by Klein Builders Limited must have had an adverse impact on the completed deck as a whole.

[50] Mr Aitken of Cove Kinloch concluded that there had been a breakdown of the membrane longitudinal lap joints caused by not applying the JS 160 H Mastic to all overlaps and joints as required by the technical literature.

[51] In addressing the critical issue of whether there was contamination that affected the watertight integrity of the membrane, I note that there was very clear and compelling evidence that there were a significant number of membrane joints which could be easily pulled apart – and that this was contrary to all orthodox expectations about the performance of the product. The assessor, Mr Darren McCutcheon (an impressive witness), Mr Aitken and Mr Andrew Klein all referred to the joints easily peeling apart. Mr Aitken who carried out his own adhesive test, found “the joint easy to peel back and water had permeated between the upper and lower longitudinal junctions”.

[52] Mr McCutcheon discussed the meeting of 6 August 2008 (recorded in the file note of MWL) attended by Mr Amrein of TTC and

Mr Kerry Temple of MWL, and noted that all seemed to agree that the main reason for the water leak was most likely membrane failure. Mr McCutcheon noted that MWL was concerned at what they had all observed and took samples to send to the USA for testing. That of course resulted in the letter from Protecto Wrap USA dated 23 September 2008.

[53] The assessor, who was generally of the view that the AFM membrane is a very good product, noted that there had been separation of the overlap joints (i.e. at the adhesive to adhesive junction) at the very point where they would normally be very difficult to prise open.

[54] In my view the balance of the evidence supports a finding that one of the principal causes of leaks to the deck was contamination of some kind to the lapped joints of the AFM membrane during the installation process. In this regard, I prefer the evidence of the assessor, Mr Lewis, to that of Mr Moyle. My reasons for this finding is as follows:

a) Mr Moyle's evidence was based in large part on his own observation that the join he uncovered was solid and sound. In my view there is clear evidence of a significant number of failed lapped joints and the factual basis of Mr Moyles' analysis and opinion was limited and not entirely accurate.
b) In his written brief of evidence Mr Moyle claimed that there is "simply no evidence" to support the proposition that leaking was due to contamination. However, that is not correct. There is evidence of contamination, albeit contested, from Protecto Wrap USA. Although he referred to the Protecto Wrap letter in his oral evidence, Mr Moyle, somewhat surprisingly, makes no specific reference to it in his main written brief of evidence. There

is only cursory reference to the Protecto Wrap USA analysis in his site visit report dated 8 July 2011.

c) Although not in itself conclusive, the letter of Protecto Wrap USA, the manufacturer with international expertise, has expressed a view, following some analysis, that there was contamination. This evidence cannot simply be dismissed as inconclusive (as Mr Moyle suggested) but must be considered in the context of all the other evidence.

d) Mr Moyle, in rejecting the Protecto Wrap findings, also noted that solvent contamination is permanent. However, that surely was something that the manufacturer of the product would have been aware of.

[55] I also note that Mr Moyle visited the site and carried out his inspection some 12 months after the assessor (July 2010). The assessor made three site visits in May 2009.

[56] I reject the contention advanced by the TTC and MWL that the lifting of the tiles by Mr Rihari, before the leaks were discovered, was a substantial cause of the leaking to the deck. I accept that Mr Rihari was a very experienced tiler and well aware of the need to take great care in lifting and replacing cracked tiles. In my view the lifting of the tiles does not explain the number of failed lapped joints as observed by the various witnesses.

[57] As for the issue of the impact of raising the deck, I accept the evidence of Mr Klein, the person in charge of the deck raising, that the propping and bracing did not move the structure more than 15-20mm. There is, however, insufficient and inconclusive evidence (particularly in the absence of any engineering evidence) as to whether this would have compromised the weathertight integrity of the membrane in any material way. Even if Mr Moyle is correct in his contention that the raising of the deck must have had some adverse

impact on the deck leading to its "eventual failure" such conclusion does not negate or undermine my finding that there was contamination to the membrane during the installation process and that this was a principal cause of the leaks. Mr Moyle was careful in how he described the impact of the raising of the deck and at best it might be said that the raising (which Mr Klein described as propping and bracing) might have been a further contributing factor to the failure of the membrane.

[58] In addressing the issue of the cause of the leaks, it is important to record that the evidence does not support a finding that the AFM membrane itself, as imported and then supplied to TTC, was defective. The lapped joints of the installed membrane system were rendered defective because of failures in the process of installation. This issue is addressed further in relation to the liability of MWL.

[59] I am also satisfied, based essentially on the uncontested evidence of Mr Lewis and Mr Moyle that there were significant other defects in the construction of the deck that can properly be categorised as deficiencies in terms of the definition of that term in section 2 of the Weathertight Homes Resolution Services Act 2006 (the 2006 Act). That extended definition refers to deficiencies in design, construction or alteration of materials that has enabled or is likely in future to enable, water penetration. These further defects conclude:

a) The popping of the fixing nails in the tile and slate underlay leading to penetration of the membrane. As Mr Moyle noted, it is well known that nail type fixings will move and work their way out of the substrate sheet material which is why screw fixing is specified for exterior decks.

b) In addition, the decision to use the tile and slate underlay was very poor judgement; tile and slate underlay is designed for interior use only and this is abundantly apparent from the relevant literature.
c) A complete absence of movement control joints in either the timber structure of the deck, the plywood substrate or in the tile and slate sheets that were fitted on top of the plywood under the membrane. Movement control joints were particularly important for this deck given its very large size.

[60] There was no agreement between the assessor and Mr Moyle on whether a lack of fall to the deck contributed or would have contributed to water ingress. I am not in a position in this case to express a concluded view on that issue. However, it is clear that the deck was built with inadequate fall and that the design and construction of the new deck will need squarely to address the issue of fall.

ISSUE TWO – The Liability of Taupo Texture Coatings Limited

[61] In addressing the issue of the liability of TTC I must first determine some factual matters in dispute relating to the representations said to have been made to the claimants by Mr Steve Amrein of TTC as part of their decision to purchase the membrane product from him.

[62] Mr and Mrs Wakelin, the claimants, presented as very careful and credible witnesses. I accept their evidence that they did some considerable "homework" in coming to their decision to use the AFM membrane. I also accept the evidence that Mr Amrein represented to them that they would be provided with a fail-safe product. Mr Amrein said to the claimants that in the event that there were

problems with the membrane once installed, that TTC and/or MWL would fix it.

[63] Mr Amrein also provided the claimants with the 2006 brochure published by MWL and in the circumstances it was entirely reasonable and understandable that the claimants believed that they had both an installation and a product warranty. On all these factual issues, I prefer the evidence of the claimants, to that of Mr Amrein.

[64] To some extent the evidence of Mr Amrein himself is consistent with the contention that he represented to the claimants that they would be provided with a fail-safe system. To his credit, Mr Amrein made considerable efforts to try and ascertain the cause of the leaks and to offer his services to remedy any difficulties. Perhaps inevitably, relations with the claimants ultimately soured.

(a) Consumers Guarantees Act 1993

[65] The claimants, whilst not legally represented, have correctly identified the Consumer Guarantees Act 1993 (the 1993 Act) as the key basis of their claim against TTC. It is the 1993 Act, rather than the Fair Trading Act 1986, which is of most relevance to this claim.

[66] In my view the 1993 Act clearly applies in this case. The claimants were consumers, as defined in section 2, who purchased goods and services from a supplier, namely TTC. I am satisfied that the membrane is properly to be regarded as falling within the definition of "goods" in section 2. In this regard the contention advanced by TTC that the membrane should be regarded as "part of a whole building" and thus falls within the exception of the definition of "goods", is rejected. It is consistent with the scheme and purpose of the Act to treat the membrane as a separate "good". In any event, the claim against TTC on the facts as I have found them, relates to the issue of services rather than goods.

[67] The section of the 1993 Act that is of most relevance to this case is, in my view, section 29. That section reads:

> **29 Guarantee as to fitness for particular purpose**
>
> Subject to section 41, where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be—
>
> (a) reasonably fit for any particular purpose; and
>
> (b) of such a nature and quality that it can reasonably be expected to achieve any particular result,—
>
> that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that—
>
> (c) the consumer does not rely on the supplier's skill or judgment; or
>
> (d) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

[68] Section 33 provides for exceptions to rights of redress against suppliers in relation to services. Section 33 reads:

> **33 Exceptions to right of redress against supplier in relation to services**
>
> Notwithstanding section 32, there shall be no right of redress against a supplier under this Act in respect of a service or any product resulting from a service which fails to comply with a guarantee set out in section 29 or section 30 only because of—
>
> (a) an act or default or omission of, or any representation made by, any person other than the supplier or a servant or agent of the supplier; or
>
> (b) a cause independent of human control.

[69] There is relatively little jurisprudence on the interpretation and application of section 29. I have relied upon a number of academic journal articles to distill the following principles:[3]

a) Section 29 imposes strict liability on suppliers of services where previously there would have been no liability without proof of negligence.

[3] Annie Fraser "The Liability of Service Providers under the Consumer Guarantees Act 1993" (1994) 16 NZULR 23; Kate Tokeley "Leaky Buildings: The Application of the Consumers Guarantees Act 1993" (2003) 20 NZULR 478.

b) The expression “particular purpose” in section 29(a) is not limited to a special purpose, but includes what is variously referred to as the normal, general, or common purpose.
c) Where a service results in the production of a tangible finished product, the normal purpose of the product can usually be easily implied. This means that where the supplier has or ought to have actual knowledge of the consumer’s purpose, because the purpose is a common purpose, there is no need for express notification to the supplier of a consumer’s expectation that the service will be fit for its common purpose.
d) The supplier is not liable for breaches of a guarantee that are completely beyond his or her control (section 33).

[70] In applying section 29 to this case, I find that the claimants have established that TTC, the first respondent, breached obligations to them under that section and that they are entitled to an award of damages from TTC under section 32, to repair the deck.

[71] The claimants contracted with TTC to supply the AFM membrane and to apply its services to installing the membrane on the deck. The product that resulted from the services was intended to be a waterproof membrane system, the AFM membrane rolls having been glued and laid on the deck. The claimants made clear to TTC that they wanted a fail-safe waterproof product. In any event, the ordinary purpose of a waterproof membrane, that it be waterproof, can readily be inferred in the circumstances.

[72] The product that resulted from the services provided by TTC was not reasonably fit for the particular purpose for which it was supplied. The lapped joints failed because of contamination of some kind during installation and the deck leaked. The claimants did not receive the waterproof membrane system they had contracted to have installed. The claimants relied on the skill and judgement of

TTC and it was entirely reasonable for them to do so. Neither of the exceptions in section 33 applies.

[73] The representations made to the claimants by TTC, namely that they would be provided with a fail-safe system, strengthens the claimants' claim that there has been a breach of section 29.[4] The legislation is intended to protect the rights of consumers and to ensure that representations about quality, made by suppliers and others, are honoured. A right of redress is provided for breach of such representation.

[74] While I have found the claimants have established that TTC is liable to them under section 29 of the 1993 Act, the claim under section 28, namely an allegation of a breach of the guarantee of reasonable care and skill, must be dismissed. The evidence establishes that there was contamination caused to the AFM membrane during the installation process. However, the claimants have failed to establish to the requisite standard of proof, namely the balance of probabilities, that the contamination was due to an absence of reasonable skill and care by TTC.

[75] Understandably the claimants have raised legitimate questions about the installation process and exactly how the contamination occurred. The claim based on section 28, however, must fail because of an absence of reliable expert evidence establishing a lack of reasonable care and skill by TTC. While the evidence of the assessor supports the finding of a breach of section 29, it falls short of supporting a finding of a lack of reasonable care and skill under section 28. Having said that, I am satisfied that the contamination was a matter within human control and the exception of section 33 does not apply.

[4] *Cooper v Ashley and Johnsons Motors Limited* [1997] DCR 170.

[76] I further note that neither the assessor nor Mr Moyle supported the conclusion reached by Mr Aitken of Cove Kinloch that TTC had not applied the JS 160 H Mastic to all the overlaps and joints.

[77] The assessor was critical of TTC for failing to conduct a flood test on the membrane immediately after having laid it. However, there is inconclusive evidence as to whether this would have made any difference. The evidence relating to solvent contamination suggests that the contamination may have occurred over a period of time and that a flood test within 24 hours of the membrane being laid may not thus have revealed the problem.

[78] The criticism made by TTC that it should not have accepted the tile and slate substrate, upon which the membrane was laid, should likewise be dismissed. Mr Amrein acted reasonably and prudently in telephoning the experts, MWL, to check if the membrane could be laid on a tile and slate substrate. He was also advised by Mr Todd Elliott of TEBL that a substrate of this kind was quite acceptable. Having been advised by MWL, the experts, (and also by the builder) that the substrate was acceptable, there was in my view no breach of section 28 in then proceeding to lay the membrane.

[79] For the same reasons that I reject the claim under section 28 of the 1993 Act, I also conclude that the claim in negligence against TTC must fail.

ISSUE THREE – The Liability of Marshall Waterproofing Limited

[80] The claimants repeat the claim of an integrated product and installation warranty as the principal basis of their cause of action against MWL. In their closing submissions they have referred to a "promissory advertising warranty".

[81] In Procedural Order No 5, the previous adjudicator, Mr C Ruthe held that the claim against MWL under the 1993 Act that it was a “supplier”, should be struck out. That was because MWL does not fall within the definition of supplier in section 2. There is no valid basis for me to revisit that finding.

[82] I accept the arguments of MWL that there was no contract between the claimants and MWL and that there was no breach of any product warranty. I have of course already concluded that the product itself was not defective. I similarly reject the argument made by the claimants that the 2006 advertising brochure gave rise to an installation warranty. MWL is not bound by any representations that TTC may have made.

[83] I also accept the submission of Mr Catren, for MWL, that there was no “promissory advertising warranty”.

[84] While MWL was not the “supplier” under the 1993 Act, it was, however, the importer of a product made overseas. It thus falls within the definition of “manufacturer” in section 2. Under the 1993 Act, consumers do in certain circumstances have a right of redress against manufacturers despite an absence of privity of contract.

[85] Section 25 of the 1993 Act provides for a right of redress against the manufacturer for a failure to comply with a guarantee as to acceptable quality or a failure to comply with any express representations in terms of section 14.

[86] I find, however, that there has been no breach of section 25 in this case by MWL. There has been no breach of the guarantee of acceptable quality (neither the membrane itself nor any associated product manufactured by MWL was defective) and no breach of any express guarantee made by MWL in its 2006 brochure. The brochure itself made it clear that the 15 year warranty applies only to

"products" and not to installation. Installation was the sole responsibility of TTC, an independent entity.

[87] The 15 year warranty clause in the brochure refers not only to an "certified installer" but to "a warranty remittance" issued by the installer which is lodged on a database. It appears that in this case no such remittance was issued and nothing lodged in any database. While the reasons for this were not made fully explicit to me, I note that on the facts that I have found, this is of no legal consequence.

[88] On the issue of liability of MWL I conclude that all claims against it must be dismissed. None of the causes of action against MWL have been made out.

ISSUE FOUR – The Liability of Todd Elliott Builders Limited

[89] The claimants sue TEBL in negligence contending that it was the project manager and builder and that it owed and breached duties of care to them in relation to the construction of the substrate to the deck.

[90] TEBL did not appear at the hearing and the only evidence produced in support of its defence to the claim was an affidavit of Mr Todd Elliott dated 10 June 2010. That affidavit was filed in support of an unsuccessful application for removal as a party to the proceedings.[5]

[91] The claim against TEBL therefore has essentially proceeded by way of formal proof. However, I have had regard to the earlier affidavit and materials filed by TEBL.

[5] See *Get In and Walk Trust v Taupo Texture Coatings Limited &* Ors WHT TRI-2010-101-000023, Procedural Order No 2, 14 July 2010.

[92] I accept, without reservation, the evidence of the claimants that TEBL was both project manager and the builder. I have no reason at all to doubt the veracity of their testimony.

[93] I have of course already concluded that the popping of the fixing nails in the tile and slate underlay either led (or would have led) to penetration of the membrane and that there was a complete absence of movement control joints in either the timber sub-structure of the deck, the plywood substrate or in the tile and slate sheets that were fitted on top of the plywood under the membrane. In my view these material defects were deficiencies in terms of section 2 under the 2006 Act.

[94] On the basis of the essentially unchallenged evidence of the assessor and Mr Moyle I am satisfied that TEBL, which was clearly responsible for these two particular defects, owed and breached duties of care to the claimants by failing to construct the substrate with reasonable care and skill. The workmanship generally by TEBL was clearly very poor (i.e. well below the standard of a reasonable and prudent builder) and the claim in negligence for these two particular defects I have identified, is made out.

[95] I now turn to consider the issue of the quantum of damages for which both TEBL and TTC are liable.

ISSUE FIVE - Quantum

(a) Costs of Repairs

[96] In his report, Mr Lewis, the assessor, estimated the remedial costs for repairing the damage caused by leaks to the deck to be $108,764 (including GST). This included a small amount for future likely damage.

[97] The claimants provided costs estimates from two local builders, namely Bonzai Holdings Limited and Klein Builders Limited. The Bonzai Holdings Limited estimate is for $225,500.25 (including GST) and the Klein Builders Limited's estimate is $209,287.50.

[98] The respondents, TTC and MWL, called evidence from Ms Michelle Wacker, director of Crother and Company Limited, quantity surveyors of Tauranga. Her estimated costs of repairs including GST are $90,045.00 (i.e. $78,300.00 plus GST).

[99] Ms Wacker presented as a careful and competent witness. I accept there is merit to her contention that both the Bonzai Holdings Limited and the KBL estimates have over estimated the costs of scaffolding, solid plastering and the replacement and reinstallation of the stucker doors. I also accept that their provision for compact sheets, to replace the plywood, constitutes betterment. New plywood (i.e. like-for-like) would definitely be cheaper.

[100] Both the assessor and Mr Moyle were of the view that the remedial works should take no longer than 8-9 weeks. If the work proposed by the claimants' advisers (with timing and scope adjustment as suggested by both Mr Moyle and the assessor) were carried out, then Ms Wacker's estimate (including an allowance for design and consents, in response to Tribunal questions) would be $120,080.00.

[101] I find the more reliable and accurate evidence to be that of Ms Wacker. I conclude that a fair and reasonable quantum for the cost of repairs would be $120,080.00. This includes provision for a temporary internal wall protection and for the need for more expensive external (i.e. outside Taupo) experts to remove and reinstall the stucker doors. No deduction should be made for repairing the inadequate fall to the deck. These costs are an

inevitable and necessary aspect of having to replace the membrane and repair the damage caused by the leaks.

(b) Accommodation Costs

[102] The claimants have sought costs for alternative accommodation for the duration of the remedial works.

[103] I accept that it is entirely reasonable for the claimants and their family to have to move out of their home while extensive repairs are carried out to the deck. The deck is in close proximity to a number of the bedrooms and the main living area.

[104] Evidence was produced to the Tribunal that the average weekly rental in Taupo for a house large enough for the claimants and their family would be $500 per week.

[105] In my view the claimants should be awarded costs of $5,000 for alternative accommodation, being a weekly rental of $500 for ten weeks overall remedial works.

(c) General Damages

[106] The claimants and in particular, Mrs Wakelin, who suffers from poor health, have suffered considerable stress and anxiety as a result of the leaks to the deck and the ongoing problems and tensions associated with trying to seek a solution.

[107] Ellis J in *Lee Findlay v Auckland City Council*[6] concluded that the Court of Appeal decision *Byron Avenue*[7] confirms that the guidelines for awarding general damages in leaky building cases are $25,000 per dwelling for owner-occupiers.

[6] *Lee Findlay v Auckland City Council,* HC Auckland CIV-2009-404-6497, 16 September 2010.
[7] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

[108] In my view the claimants should be awarded the sum of $25,000 by way of general damages.

(d) Contributory Negligence

[109] The contentions made by TTC and MWL that the claimants were contributory negligent have no merit. Ill advised or unwise decisions do not necessarily amount to contributory negligence and in any event, any contributory negligence must be causal and operative of the damage.[8]

[110] In my view, the claimants, in difficult circumstances, acted reasonably. Their conduct did not fall below the standard reasonably expected of persons in their position, namely homeowners with no building experience or training.

TOTAL QUANTUM

[111] The claimants have established the claim to the amount of $150,080.00, which is calculated as follows:

Costs of repairs	$120,080.00
Alternative accommodation	$5,000.00
General damages	$25,000.00
TOTAL	**$150,080.00**

[112] In my view the sum of $150,080.00 can properly be categorised as damages reasonably foreseeable as a result of the failure by TTC to meet the guarantee under section 29 of the 1993 Act (see section 32(c)). In relation to TEBL the sum of $150,080.00 is recoverable under the orthodox test of the measure of damages for claims in tort.

[8] *Lee Findlay v Auckland City Council*.

What contribution should each of the two liable parties pay?

[113] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal may determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a court of competent jurisdiction could make in relation to the claim in accordance with the law.

[114] Ellis J in *Lee Findlay* held that apportionment is not a mathematical exercise but a matter of judgment, proportion and balance.

[115] In my view, TTC and TEBL should make equal contributions to the total quantum sum recoverable (i.e. 50% each). While the degree of fault by TEBL may be greater, TTC, having made clear representations about a fail-safe system, should be required to make good for a breach of those representations.

CONCLUSION AND ORDERS

[116] The claim by the claimants, Mr and Mrs Wakelin as trustees for the Get in and Walk Trust is proven to the extent of $150,080.00. For reasons set out in this determination I make the following orders:

a) The first respondent, Taupo Texture Coatings Limited, is to pay the claimants the sum of $150,080.00 forthwith. Taupo Texture Coatings Limited is entitled to recover a contribution of up to $75,040.00 from the other liable respondent, namely Todd Elliott Builders Limited, for any amount paid in excess of $75,040.00.

b) Todd Elliott Builders Limited, the third respondent, is ordered to pay the claimants the sum of $150,080.00 forthwith. Todd Elliott Builders Limited is entitled to

recover a contribution of up to $75,040.00 from Taupo Texture Coatings Limited for any amount paid in excess of $75,040.00.

c) The claim against the second respondent, Marshall Waterproofing NZ/AUS Limited, is dismissed in its entirety.

[117] To summarise the decision, if both Taupo Texture Coatings Limited, the first respondent, and Todd Elliott Builders Limited, the third respondent, meet their obligations under this determination it will result in each of them paying to the claimants the sum of $75,040.00.

[118] If any of the two liable respondent parties listed above fail to pay their apportionment, this determination may be enforced against any one of them to the total amount they are ordered to pay in paragraph [116] above.

DATED this 8th day of September 2011

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P J Andrew
Tribunal Member