



SUMMARY

Case: Hamblyn v Auckland City Council

File No: TRI 2009-100-000039/ DBH 05653

Court: WHT

Adjudicator: S Pezaro

Date of Decision: 6 November 2009

Background

This decision was based on the claimants' unit constructed together with 3 other units. The plans for these units were identical however the deck on the claimants' unit was larger than the other three units and it was this deck that caused the defects

Facts

- November 2002 and June 2003: the unit was constructed.
- 10 August 2003, the claimants signed an agreement for sale and purchase with Lattitude 91 Design and Build Ltd which is now in liquidation
- 14 August 2003: the first respondent, Auckland City Council issued a Code Compliance Certificate and settled in October 2003
- Mid-January 2008: the balcony on the top floor dropped on one corner. The claimants therefore filed for adjudication under the Act

There was agreement that the claimants' deck was not constructed in accordance with the consented plans. The claimants repaired the balcony based on recommendations by the WHRS assessor who estimated the repairs at \$32,000 incl GST. The claimants claimed a total of \$40,776.45 for repairs, interest and general damages against:

- The Council for negligently carrying out its inspections and issuing the Code Compliance Certificate
- The second respondent, Mr Vaughan who carried out the building work
- The third respondent, CT Vaughan (2003) Ltd which Mr Vaughan claimed he worked for at the time of construction

Mr Vaughan and CT Vaughan neither filed responses nor appeared at the hearing apart from an application for removal filed by CT Vaughan which was dismissed.

Decision

Liability of the Council

The Tribunal did not accept that a Council inspector can discharge his duties by inspecting a "sample" of units in a development in lieu of others. The Tribunal further stated that even if it did accept that argument, it would not assist the Council because the deck was so clearly different in size from that of the other units that it would not be reasonable for a Council officer to rely on an inspection of other units to ensure that the claimants' deck was properly constructed. Once the actual difference in size between the plans and the deck as built and compared with the other units was observed a reasonable inspector would have undertaken further investigations. The Tribunal also found that it would not be reasonable for the Council to rely on the producer statement, nor was there any evidence of such. The Tribunal therefore held that the Council was liable for the full amount of the claim.

Liability of Mr Vaughan and CT Vaughan Ltd

As these parties failed to participate during the proceedings, the Tribunal drew inference regarding their involvement based on the available information and pursuant to s 75 of the Act. The Tribunal found that the evidence established that CTV Vaughan carried out the work on the property including the deck in question and is therefore responsible for the work it undertook that led to the defects. Regarding Mr Vaughan, the Tribunal found that Mr Vaughan was the builder on site with the responsibility of ensuring that the construction of the deck was carried out in accordance with the building requirements. The Tribunal also found that Mr Vaughan presented himself as an experienced builder and therefore should have been aware that the deck was not built in accordance with the plans and that the bearer did not comply with the required standards. The Tribunal accordingly concluded that both Mr Vaughan and CT Vaughan owed the claimants a duty of care to carry out the construction to the appropriate standards and in breaching that duty, they are therefore jointly liable for the claimants' loss.

Quantum

The Tribunal concluded that the claimants were entitled to claim \$49,298.07 for the following reasons:

- **Repairs:** The Tribunal found that the claimants were entitled to claim the full costs of repairs claimed – ie \$40,776.45 which included the fee for obtaining the WHRS report (\$500)
- **Loss of rent:** The Tribunal found that it was not the intention of the Building Act to make territorial authorities liable for economic loss arising from the time taken to process applications for consent for remedial work. This claim was thereby dismissed
- **General damages:** The sum of \$700 for general damages was not contested and so it was awarded in full
- **Interest:** Interest was calculated from the date of payments for the remedial work to the date of determination, being \$1,521.62

Apportionment of Liability

As the defect was due primarily to the work of the builder and to a lesser extent the Council officer's failure to detect the defect, the Tribunal apportioned liability at 40% to the Council and 60% jointly and severally to Mr Vaughan and CT Vaughan. As the claimants did not claim against CT Vaughan, they are entitled to recover only from the Council and Mr Vaughan

Result

All respondent were found liable for the loss suffered by the claimants and as a result:

- The Council was ordered to pay the claimants \$49,298.07 and entitled to recover a contribution from Mr Vaughan and CT Vaughan for any amount paid in excess of \$19,719.23 but not exceeding \$29,578.80
- Mr Vaughan was ordered to pay the claimants \$49,298.07 and entitled to recover a contribution from the Council for any amount paid in excess of \$29,578.80

Therefore if each respondent meets their obligations they would each pay:

- Council \$19,719.27
- Mr Vaughan \$29,578.80