

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-100-000011
[2011] NZWHT AUCKLAND 41**

- BETWEEN RODNEY JAMES HOOKER, JANIS LOUISE HOOKER and VALLANT HOOKER TRUSTEES LIMITED as trustees of the RODNEY JAMES HOOKER FAMILY TRUST and the JANIS LOUISE HOOKER FAMILY TRUST
Claimants
- AND STEPHEN MOYLE, MARLENE MOYLE and CAMERON MCGREGOR as trustees of the MOYLE FAMILY TRUST
First Respondents
(REMOVED)
- AND STEPHEN MOYLE and MARLENE MOYLE
Second Respondents
(REMOVED)
- AND AUCKLAND COUNCIL
Third Respondent
(REMOVED)
- AND BRIAN WRIGHT trading as WRIGHT DESIGN
Fourth Respondent
(REMOVED)
- AND J D ARMSTRONG DESIGN & BUILD LIMITED
Fifth Respondent
(REMOVED)
- AND JOHN ARMSTRONG
Sixth Respondent
(REMOVED)
- AND PETER ARMSTRONG BUILDERS LIMITED
Seventh Respondent
(REMOVED)
- AND R & B PLASTERING LIMITED
Eighth Respondent

AND BARRY RUSSELL BROWN
Ninth Respondent

AND CLIFFORD BYRNE and LAURA
BYRNE
Tenth Respondents
(REMOVED)

AND PETER THOMAS ARMSTRONG
Eleventh Respondent
(REMOVED)

Hearing: 31 May 2011

Appearances: Ms C G Taylor, for the claimants
Mr D Schnauer, for the eighth and ninth respondents

Decision: 5 September 2011

FINAL DETERMINATION
Adjudicator: R M Carter

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INTRODUCTION

[1] Mr and Mrs Hooker's and Vallant Hooker Trustees Limited's claim against R & B Plastering Limited and Mr Brown arises out of work that Mr Brown and his company carried out on their house in Point Chevalier when it was built in 2000/2001. Mr and Mrs Hooker purchased the house in 2004. In 2009 they decided to replace the roof because it was almost flat and they wished to replace it with a sloping roof. During that process they discovered that the house they had bought was a leaky home. That was confirmed in an eligibility report prepared for the Department of Building and Housing.

[2] Mr Hooker acted quickly and arranged for plans to be drawn up and for consent to be obtained to repair the dwelling. The repairs were carried out in 2010. The remedial cost claimed is \$346,715.34 plus other costs of \$56,583.90, which totals \$403,299.24. (A total of \$404,529.24 in the claim appears to be mistaken.) The claimants also seek general damages of \$40,000.00.

[3] The claimants lodged a claim in the Weathertight Homes Tribunal. A number of further parties were joined to the claim.

[4] Following mediation in October 2010, the claimants settled with all respondents except with the eighth and ninth respondents, R & B Plastering Limited and Mr Brown, who did not attend and had taken no part in the proceedings up to that point. The claimants then proceeded with their claim against the eighth and ninth respondents.

[5] In his witness statement of 12 April 2011 Mr Hooker wrote that the claimants seek full liability from the eighth and ninth respondents of \$404,529.24 being the repair costs incurred and \$40,000.00 for emotional distress. He wrote that the claimants will give full credit for the sum received from the other respondents, \$280,000.00, and sought payment of the balance.

[6] Mr Brown engaged Mr Schnauer and tried to reach a settlement of this claim and three other such actions in which Mr Brown was a respondent. However Mr Brown was unable to reach any settlement and so he applied by way of debtor petition to be declared bankrupt the day before the hearing of this claim took place. Mr Brown was then adjudged bankrupt on 3 June 2011 at the Auckland High Court. The assets of R & B Plastering Limited were to be sold to a company run by Mrs Brown who would continue to employ Mr Brown as a plasterer.

THE CLAIM AGAINST R & B PLASTERING LIMITED AND MR BROWN

[7] In his opening remarks, Mr Schnauer acknowledged that some liability was likely to arise. In her opening submissions on behalf of the claimants, Ms Taylor submitted that this was a case where the assumption of control on site by the director of a company gave rise to a personal responsibility. That was not disputed. However because (to put it briefly) Mr Schnauer said that Mr Brown sought to minimise any award, and the claimants on the other hand sought to maximise it, the Tribunal heard evidence from Mr Hooker and the expert engaged by the claimants Mr Neil Alvey, and Mr Brown.

[8] Mr Schnauer stated that as Mr Brown was facing bankruptcy as the hearing approached, it was better for him to spend what money he had to try to reach a settlement rather than spending it on preparing for the hearing. That was a reasonable course of action to take, and in the interests of justice I gave permission for Mr Brown to give oral evidence at the hearing even though he had not filed a written response or a witness statement before it. Mr Schnauer also made submissions.

[9] Mr Hooker said tenders were called and a contract was entered into to remediate the house. He himself arranged for the builder and other contractors to carry out the repairs. The actual cost of the repairs was not challenged at the hearing, except for the amount claimed to replace the roof, which Mr Schnauer argued was betterment. Mr Schnauer also argued that as Mr and Mrs Hooker were trustees, some of the consequential losses claimed, in particular for rental accommodation, should not be compensated for. I return to those matters later in the determination.

What were the defects and damage?

[10] Mr Alvey, who is an experienced building surveyor, gave evidence about the defects and damage they had caused. Mr Alvey stated that there were two principal or primary defects. The first was a parapet that ran around the whole of the top of the house. The parapet had a flat top and the membrane had been penetrated where wire mesh had been attached. Mr Alvey said that the parapet had failed and that the defective parapet alone caused the need for a re-clad.

[11] Mr Alvey also said that the windows had failed on all elevations because a drip edge (a sill flashing lip) had been cut off and buried in the plaster. This had allowed water to flow into the plaster, causing decay. This was also a cause of widespread timber damage and was the second reason, of itself, why the house needed to be re-clad.

[12] Mr Alvey also described other secondary causes of damage which were at various locations but not on all elevations. I accept Mr Alvey's expert evidence in these respects which was comprehensive and credible.

Did R & B Plastering Limited and Mr Brown breach their duties of care to the claimants?

[13] Mr Brown accepted that he had not checked adequately, thereby missing that the window sill flashings had been cut short. They were hidden behind paper and lap (mesh). When he called for a council inspection, he did not see the flashings cut short. The first coat of plaster (applied by employees) would have filled the flashing. Mr Brown acknowledged that this was a lapse of judgement on his part.

[14] Concerning the flat topped parapet, Mr Brown stated that when he raised the issue, the builder told him that they were going to have another sheet of butynol laid over them. Mr Alvey and Mr Hooker strongly challenged the credibility of this statement. I consider the parapet further below.

Did any breach of duty cause or contribute to leaks and damage?

[15] Having regard to the written and oral evidence, I conclude that R & B Plastering Limited did breach its duty of care because it failed to ensure that the shortened drip edges were not buried beneath the plaster when the plaster was applied. This is so even though the drip edges were not cut short by R & B Plastering Limited. Mr Brown acknowledged this was something important that he missed.

[16] As far as the parapet is concerned, Mr Hooker said that the quantity surveyor's quote for replacement of the roof with a sloping roof was for not much more than the cost of retaining and remediating the parapets. Mr Alvey said that the existing roof had a limited life span and required a lot of maintenance.

[17] However there was no direct evidence contradicting what Mr Brown said the builder said to him, namely that the parapet was to be covered with another layer of membrane, which would have prevented water penetration. Mr Alvey was sceptical about that and said he had never seen it. Mr Brown said his own home was an example and had never leaked. As there was no direct evidence contradicting Mr Brown's evidence, I accept it and I do not make any finding of liability for the defective parapet.

[18] While the plastering contract was with R & B Plastering Limited, Mr Brown acknowledged he bore some personal responsibility for the plastering work. Mr Brown's involvement and responsibility were such that he would have been held jointly and severally liable for the defective plastering at the windows and the damage that resulted, necessitating a full re-clad, and the cost of repair.

[19] However, the Insolvency Act 2006 provides that an order cannot be made against a bankrupt without leave of the High Court, and so I make no order or award for damages against Mr Brown personally. I also observe that Mr Brown's financial circumstances were not unknown to Mr Hooker before the hearing. He decided to proceed with the adjudication, as he was entitled to do, in the knowledge that Mr Brown was on the verge of bankruptcy.

Are there amounts that should be deducted from the amount claimed?

[20] A number of issues arise as to whether R & B Plastering Limited should be found liable for the whole amount claimed.

The roof

[21] Mr Hooker stated that the amount spent to replace the near flat roof with a conventional sloping roof, \$40,000.00, was not much more than the cost would have been to repair the parapet. He

submitted that the new roof should be included in the claim. He considered that the weathertightness would be improved to a degree.

[22] However I consider that the amount spent on the roof replacement should be deducted as betterment. This is because it was Mr Hooker's prior intention to replace the roof with a sloping roof. He was dissatisfied with the near flat roof because he often had to get up and remove the leaves from the gutters within the parapets, which he disliked doing. It was when steps were under way to replace the roof and paint the house that it was discovered that this was a leaky home.

[23] Further, what R & B Plastering Limited did at the windows contributing to damage on the walls had nothing to do with the roof being replaced. R & B Plastering Limited was the plasterer, not the roofer, and, given my findings as regards the parapets, has no liability for the roof replacement.

Other expenses and the claim for stress

[24] The Court of Appeal in *Sunset Terraces*¹ made it clear that the owners of leaky homes are entitled to compensation (where it is proved) whether they are trustees or not. The Court does not differentiate between trustees and non-trustee occupiers.

[25] The Courts have held that the guideline for awards for stress is \$25,000.00 per dwelling unit. That being the case, an appropriate award for stress in Mr and Mrs Hooker's case is \$25,000.00, \$15,000.00 less than the amount of \$40,000.00 claimed. I do not make any deduction for the other expenses that Mr Schnauer challenged, and all the other ancillary and consequential costs claimed are reasonable.

¹ *Sunset Terraces* [2010] NZCA 64.

The settlement

[26] Separate from those particular issues, Mr Hooker argued that the Tribunal should make an award for the whole amount claimed of \$404,529.24. Mr Hooker confirmed that the settlement amount, \$280,000.00, had been paid to the claimants by the other parties. However he submitted that the amount which should be awarded was a separate matter from the amount the claimants could recover. Ms Taylor and Mr Hooker said that if the official assignee made a distribution, it would be better for the claimants if the whole amount, to which the claimants believe they are entitled, is awarded.

[27] Mr Schnauer challenged that reasoning, and I do not accept it for the following reasons. In *Petrou v Weathertight Homes Resolution Service*² the Council had agreed to continue with the claimants' claim against the remaining parties, following a partial settlement. Randerson J held that the Council was able to do so in the same way an insurer can once it has paid out an insured. The Court held that the proper course was for an amended claim to be filed in the name of the original claimants, setting out their total losses, acknowledging the amount received from the settling parties and claiming the balance from the remaining respondent. The Council could also claim amounts by way of contribution from the other parties.

[28] Deducting a settlement amount already received in calculating quantum has also been endorsed by the High Court in *Coughlan v Abernethy*.³ In that case the Council settled with the claimants and withdrew from the adjudication. White J held that the Tribunal was correct to deduct the amount paid in settlement from the total claim and not to attempt to include the Council in any apportionment of the amount awarded amongst jointly and severally liable parties.

² HC AK CIV 2009-404-1533, 24 November 2009.

³ HC AK CIV 2009-404-2374, 20 October 2010.

[29] In summary, as the claimants have been paid \$280,000.00, it would be inappropriate to make an award as if they had not been. This award cannot be for more than the amount still owing to the claimants that can be enforced.

[30] Further the claimants agreed to withdraw their claims against all other parties when they settled with them. At the hearing, R & B Plastering Limited and Mr Brown, as the remaining respondents, acquiesced in that, so they are not in a position to seek a contribution from any other respondents who are now removed as a result.

CONCLUSION AND AWARD

[31] For the reasons set out I conclude that the claimants are entitled to an award against the ninth respondent R & B Plastering Limited of \$108,299.24. This is made up as follows:

Building costs	\$346,715.34
Plus consequential costs	<u>\$56,583.90</u>
Total costs	\$403,299.24
Less roof replacement	<u>\$40,000.00</u>
Net costs	\$363,299.24
Plus general damages	<u>\$25,000.00</u>
Total damages	\$388,299.24
Less settlement amount paid	<u>\$280,000.00</u>
AWARD	<u>\$108,299.24</u>

[32] I accordingly order R & B Plastering Limited to pay Rodney James Hooker, Janis Louise Hooker and Vallant Hooker Trustees Limited the sum of \$108,299.24 forthwith.

DATED this 5th day of September 2011

R M Carter

Tribunal Member