IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2007-100-000054

UNDER	the Weathertight Homes Resolution Services Act 2006
IN THE MATTER	of an Adjudication Claim
BETWEEN	**SUSAN ABBEY JONES**
	Claimant
AND	**ROSS SIRCOMBE**
	First Respondent
AND	**CRAIG ROBERTSON**
	Second Respondent
AND	**KAIHU VALLEY SAWMILL LTD** (Removed)
	Third Respondent
AND	**BRUCE JOSEPH MORRIS trading as DARGAVILLE ITM**
	Fourth Respondent

Hearing:	19 March 2008
Appearances:	G.Swanepoel for the claimant P. Byers representing the fourth respondent
Decision:	3 April 2008

FINAL DETERMINATION
Adjudicator: R M Carter

BACKGROUND

1. The claimant Ms Jones had her beachside property at 30 Whangaumu Street, Whangarei, upgraded in late 1999. The first and second respondents, Mr Sircombe and Mr Robertson, carried out the building work, and the building materials were supplied by the Kaihu Valley Sawmill shop in Dargaville, later known as Dargaville ITM. The fourth respondent, Mr Bruce Morris, owns the shop.

2. At that time, iron roofing was apparently considered unsuitable for harsh environments. In a letter dated 18 July 2004 to the Roofing Association of NZ Inc, Ms Jones wrote:

> "In 1999 we majorly renovated the above property, converting from a beach house to a home.
>
> "We live on the beach front and had concerns about a product, durable enough, to roof with. We were looking at the idea of long run iron, but had heard a nail scratch would evolve to rust very quickly and were discussing this with our builders, Messrs Ross Sircombe and Craig Robertson, when they recommended a product, Onduline.
>
> "The builders had used this product on several occasions on the West Coast and we decided if it could withstand the conditions there, it would certainly be an asset on the East Coast.
>
> "Friends had used it, as had neighbours of theirs, and the only detrimental thing we heard was that the only colour to get was the black, as the other colours leached, and one grew fungi.
>
> "This was very important to us as we are reliant on tank water.
>
> "We opted for the Black, understanding it would – over time mellow to a charcoal colour.
>
> "Virtually all our supplies come from the then Kaihu Valley Sawmill – now an ITM store, Dargaville."

3. These details were repeated in summary in Ms Jones' statement which accompanied the amended application for adjudication filed by Mr Swanepoel on 15 February 2008.

4. In her statement, also dated 15 February 2008, Ms Jones stated:

> "We had discussion with the builders about what roofing product they felt best suited our environment (being right by the sea). The plans had long run iron recommendation, but at that time there was a lot of controversy regarding paint failure and we wanted the least possible maintenance. The builders introduced the idea of Onduline – product they had applied before on the West Coast, and which they thought was ideal for our circumstances.
>
> "Two things we were advised of though were:
> (a) colour choice
> (b) expect a certain amount of leaching of colour from the product for approximately six months, by which time it should settle.
>
> "We chose the black believing this would mellow to a charcoal colour eventually. We then ordered it from (Kaihu Sawmill) i.e. Bruce Morris (now Dargaville ITM)."

5. No sooner had the renovations been completed, including re-roofing with Onduline, than problems arose with significant discolouration of the tank water coming from the roof. Ms Jones complained to the Kaihu Valley Sawmill shop and they passed on the complaint to the wholesaler, Super Frasers Limited.

6. In May 2000 Super Frasers Limited offered Ms Jones compensation of $500.00 or to pay for the product to paint the roof if the discolouration did not dissipate over the next five months. Ms Jones rejected the offer of $500. 00 for what she wrote was a $6,000.00 roofing product.

7. In 2003 Ms Jones and her husband Mr Denham noticed a leak in the lounge. The builders re-nailed some of the roof. In May 2004 they had another leak, in the garage.

8. A building officer from the Whangarei District Council wrote that it was difficult to determine whether staining of the building paper was due to condensation, or to water travelling through the roofing material or whether the paper was wet when the roof was installed. He wrote that further investigation was required.

9. At the end of 2004 the importer of Onduline, C.V Marketing Ltd, wrote to Ms Jones criticising aspects of the installation of the roof. C.V. Marketing wrote that repairs costing $2000.00 were required to make good these failings and damage, to make the roof comply with the manufacturer's specification, before repainting. C.V. Marketing asserted the roof was in good condition for its age and had lost none of its integrity.

10. Ms Jones invited Mr Ian Beattie, a Member of the NZ Institute of Building Surveyors Inc, to report on the whole building - walls, windows and roof. His report is dated 21 November 2005. It states that the Onduline roofing material had ceased to provide a weatherproof roofing medium and its replacement was necessary to retain the structural integrity of the dwelling. It had also contaminated the water supply, which was another reason why it needed to be replaced.

11. Ms Jones had the property re-roofed in August 2005. Mr Beattie saw the Onduline roof when it was in place and when it was removed, to be replaced by Colorsteel.

12. In June 2006 Ms Jones lodged a claim with the Weathertight Homes Resolution Service and an assessor's report was prepared. In his report dated 8 September 2006, the WHRS assessor adopted Mr Beattie's findings about the Onduline roof.

THE ADJUDICATION HEARING

13. Ms Jones settled her claim against the first and second respondents at mediation in late 2007. Accordingly in her amended application for adjudication, she proceeded only against the fourth respondent, Mr Bruce Morris. (The third respondent, Kaihu Valley Sawmill Limited, which is legally separate from the Sawmill shop in Dargaville itself, had been removed from the proceedings as it was not involved.)

14. The adjudication hearing was attended by Ms Jones as claimant with her counsel Mr Swanepoel, and Mr Byers, who is a chartered accountant, represented the fourth respondent Mr Bruce Morris, who owns the Kaihu Valley Sawmill shop which was the supplier of the roofing material.

15. Present as witnesses were Mrs Jones' husband, Mr Brian Denham, and Mr Beattie, their expert. Also present was Mr Keven Morris, the fourth respondent Mr Bruce Morris's brother, who manages the Kaihu Valley sawmill itself and who helped with parts of the re-construction work as a friend of the family.

16. The essence of Mr Swanepoel's submissions was that Mr Bruce Morris had supplied a product to Ms Jones which had completely failed, and that as a result he was liable to Ms Jones for breach of warranty under the Consumer Guarantees Act 1993.

17. The claim was for replacing the roof, it was in relation to potable water, it was for professional services (Mr Beattie's costs and legal costs), and it was for general damages, as follows:

a.	Replacement - Colorsteel, flashings	$13,484.09
b.	One bale of Batts (replacement)	$ 89.99
c.	Delivery of Batts	$ 40.09
d.	Check wiring at time of re-roofing	$125.21
	Replacement costs	$13,739.38

18. Also claimed were laboratory quality tests $166.63, and tank water $340.00; $56.25 being half the cost of initial legal advice; $1,043.75 being half Mr Beattie's costs for his report, and the cost of his appearance at the tribunal; $100.88 being half the cost of toll calls in relation to the roof problems; and $5,000.00 general damages for stress and mental anguish under section 50(2) of the Weathertight Homes Resolution Services Act 2006.

19. The total amount claimed was $15,446.89 plus the $5,000.00 general damages. (This does not include Mr Beattie's expenses for attending the hearing.)

20. Ms Beattie stated in evidence that the deterioration was significantly greater than he would have expected. Moisture was coming down through the roofing material on to the building paper (which was supposed to prevent moisture getting up onto the roof). Water was tracking through the corrugations of the roof.

21. Mr Beattie said that while some shortcomings in the installation of the roof (by the first and second respondents) had not helped, they did not contribute to the loss of rigidity and weathertightness failure of the roofing material, which had occurred regardless of installation.

22. Under the Building Code, roofing and cladding were meant to last 15 years minimum. No specific maintenance regime was provided in the product information. Painting the roof would have increased its longevity. Mr Beattie said he would repaint a roof every five years especially when the roof was collecting water.

23. Mr Denham said that they did not paint the roof when the importer recommended it (in 2003) because the importer's representative said they should prepare the roof by waterblasting it. But Mr Denham thought the roof was by then as thin as cardboard and it would cause

further damage. Also he said that a certificate had stated there would be nil maintenance. Mr Denham showed me where he said the surface on the top of the Onduline had worn or washed away.

24. Mr Byers submitted that the shop did not stock the product, it simply ordered it in and delivered it, that the claimant should have painted the roof, that there were leaks over a very limited area, and that there was an element of betterment in the claim.

25. Mr Bruce Morris gave evidence of having donated his time and helped out in various ways when the house was being rebuilt. He estimated his help had a value of $4,000 to $5,000.

RELEVANT STATUTORY PROVISIONS

26. The Consumer Guarantees Act 1993 includes the following:

2. Interpretation

(1) In this Act, unless the context otherwise requires,-…

Goods-

(a) means personal property of every kind (whether tangible or intangible), other than money and choses in action; and

(b) includes-

(i) goods attached to, or incorporated in, any real or personal property;

(ii) ships, aircraft, and vehicles;

(iii) animals, including fish:

(iv) minerals, trees, and crops, whether on, under, or attached to land or not:

(v) gas and electricity:

(vi) to avoid doubt, water and computer software; but

(c) despite paragraph (b)(i), does not include a whole building, or part of a whole building, attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation.

…

Supplier-

(a) means a person who, in trade,-

(i) supplies goods to a consumer by-

(A) transferring the ownership or the possession of the goods under a contract of sale, exchange, lease, hire, or hire purchase to which that person is a party; or

(B) transferring the ownership of the goods as the result of a gift from that person; or

(C) transferring the ownership or possession of the goods as directed by an insurer; or

(ii) supplies services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person); and…

Section 6

6 Guarantee as to acceptable quality

(1) Subject to section 41 of this Act, where goods are supplied to a consumer there is a guarantee that the goods are of acceptable quality.

(2) Where the goods fail to comply with the guarantee in this section,-

(a) Part 2 of this Act may give the consumer a right of redress against the supplier; and

(b) Part 3 of this Act may give the consumer a right of redress against the manufacturer.

Section 7

7 Meaning of acceptable quality

(1) For the purposes of section 6 of this Act, goods are of acceptable quality if they are as-

(a) Fit for all the purposes for which goods of the type in question are commonly supplied; and

(b) Acceptable in appearance and finish; and

(c) Free from minor defects; and

(d) Safe; and

(e) Durable,-

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to-

(f) The nature of the goods:

(g) The price (where relevant):

(h) Any statements made about the goods on any packaging or label on the goods:

(i) Any representation made about the goods by the supplier or the manufacturer:

(j) All other relevant circumstances of the supply of the goods….

Section 16

16 Circumstances where consumers have right of redress against suppliers

This Part of this Act gives a consumer a right of redress against a supplier of goods where the goods fail to comply with any guarantee set out in any of sections 5 to 10 of this Act.

Section 18

18 Options against suppliers where goods do not comply with guarantees

(1) Where a consumer has a right of redress against the supplier in accordance with this Part of this Act in respect of the failure of any goods to comply with a guarantee, the consumer may exercise the following remedies.

(2) Where the failure can be remedied, the consumer may-

- (a) Require the supplier to remedy the failure within a reasonable time in accordance with section 19 of this Act:
- (b) Where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time,-
  - (i) Have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
  - (ii) Subject to section 20 of this Act, reject the goods in accordance with section 22 of this Act.

(3) Where the failure cannot be remedied or is of a substantial character within the meaning of section 21 of this Act, the consumer may-

- (a) Subject to section 20 of this Act, reject the goods in accordance with section 22 of this Act; or
- (b) Obtain from the supplier damages in compensation for any reduction in value of the goods below the price paid or payable by the consumer for the goods.

(4) In addition to the remedies set out in subsection (2) and subsection (3) of this section, the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.

Section 20

20 Loss of right to reject goods

(1) The right to reject goods conferred by this Act shall not apply if-

- (a) The right is not exercised within a reasonable time within the meaning of subsection (2) of this section; or

(b) The goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a person other than the supplier or an agent of the supplier; or

(c) The goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or

(d) The goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them…

(2) This section applies notwithstanding section 37 of the Sale of Goods Act 1908.

Section 21

21 Failure of substantial character

For the purposes of section 18(3) of this Act, a failure to comply with a guarantee is of a substantial character in any case where-

(a) The goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) The goods depart in one or more significant respects from the description by which they are supplied or, where they were supplied by reference to a sample or demonstration model, from the sample or demonstration model; or

(c) The goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied or, where section 8(1) of this Act applies, the goods are unfit for a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit, and the goods cannot easily and within a reasonable time be remedied to make them fit for such purpose; or

(d) The goods are not of acceptable quality within the meaning of section 7 of this Act because they are unsafe.

27. Section 56A of the Sale of Goods Act 1908 states:

56A Exclusion where Consumer Guarantees Act 1993 applies

Nothing in section 10 or in sections 13 to 17 or in section 38 or in section 54 of this Act shall apply to any supply of goods to which the Consumer Guarantees Act 1993 applies.

DECISION

28. Mr Swanepoel submitted that Section 50 of the Weathertight Homes Resolution Services Act 2006 sets out what may be claimed. Section 50 states that a claim may be for deficiencies that enabled water to

penetrate the dwelling house, the actual penetration, damage or loss as a result, loss of value, and future deficiencies likely to enable water to penetrate the house.

29. Mr Swanepoel submitted that there was an implied warranty under the Sale of Goods Act 1908 and that if that Act does not apply, the Consumer Guarantees Act 1993 does.

30. In my view the provisions of the Consumer Guarantees Act 1993 ("the Act") do apply in this case. The definition of "goods" is such that, while the provisions of the Act do not apply to a whole house, the components of a house are covered. In my view the Onduline roofing material falls within the definition of "goods" in the Act.

31. Mr Swanepoel submitted that Section 6 of the Consumer Guarantees Act 1993 provides a guarantee of "acceptable quality", and that section 7 defines quality and sets out the test for acceptable quality. Ms Jones' claim is under the provision for a guarantee of acceptable quality under section 6, not under the guarantee as to fitness for a particular purpose under section 8.

32. Mr Swanepoel submitted that a claim for breach of the warranty (guarantee) as to quality can be brought against the supplier. Further he submitted that the defect was of a "substantial character" as defined by section 21 of the Act and, accordingly, the claimant is entitled to reject the goods or claim damages under section 18(3) and (4).

33. Mr Beattie gave evidence that the roof's durability had become severely compromised. I accept that the roofing material failed and not merely where there were leaks in the lounge and garage. I accept that the roof had to be replaced in its entirety and that that was due to a failure of durability. Durability is one of the requirements for goods to meet the test of acceptable quality as it is defined in section 7.

34. One must also consider the other factors in section 7 when deciding whether the requirements of acceptable quality are met. These factors or relevant considerations are in subsection (1), paragraphs (f) to (j), as follows:- the nature of the goods, the price, any statements on the packaging or label, any representation by the supplier or manufacturer, and any other relevant circumstances of the supply of the goods.

35. Mr Byers stated that the claimant Ms Jones had approached the shop with a view to its providing the necessary building material. He submitted that she was her own “head contractor”, and at no time sought the advice of the retailer as to the preferred roofing material that might be used. It was the builders who recommended the product. The shop did not stock Onduline and never had, and it was at the specific request of the claimant that the product was ordered in. It was then received and dispatched to the building site.

36. Ms Byers submitted that at all times the fourth respondent acted in good faith, promptly referring the complaint to the Onduline supplier (wholesaler). Mr Keven Morris provided free labour to assist with the building project (water tank excavations and ceiling installation). At all times the supplier sought to assist and accommodate any reasonable request.

37. At the hearing it was submitted that the builders suggested, rather than recommended, the Onduline. Ms Jones, when swearing that her personal statement which accompanied the amended application for adjudication was true, confirmed that all her written statements on file were true. So I find that the builders recommended, rather than merely suggested, the Onduline.

38. So the claimant Ms Jones is claiming that the guarantee of acceptable quality applies, and the costs of remedying the fault with the Onduline should fall on the supplier, notwithstanding that it was a product that

the supplier did not stock or recommend, and was in fact recommended to her by others.

39. However these do not appear to be “other relevant circumstances of the supply of the goods” that I can take into account, under section 7(1)(j). The circumstances of supply that can be taken into account relate to the quality itself, not the wider, surrounding circumstances.

40. For those reasons I accept that the goods were not of acceptable quality in so far as they were not as durable as a reasonable consumer fully acquainted with them would regard as acceptable, according to the section 7 test. (They were also unsafe.)

41. I also accept, in the light of Mr Beattie’s evidence, that there was a failure of substantial character, under Section 21(a) - a consumer fully acquainted with the nature and extent of the failure would not have bought the goods.

42. This enables the consumer to reject the goods or obtain damages in compensation for any reduction in value below the price paid for the goods (section 18(3)). (The right to reject the goods did not apply because they had been incorporated into the house and could not be removed without damaging them - section 20(1)(d).)

43. In addition the consumer may obtain damages from the supplier for any loss or damage to the consumer resulting from the failure (other than the reduction in value) that was reasonably foreseeable (section 18(4)).

44. The cost of the Onduline, referred to in the original claim, was $4,790.44, the ridging $1,355.40, the eve filler $155.25 and the nails $419.18. These figures are largely supported by the GST exclusive figures in the Kaihu Valley Sawmill shop’s invoice. They total $6,720.27.

45. That is the maximum that can be claimed for damages for the reduction in value of the goods below the price paid, and I award that amount.

46. Mr Swanepoel made the point that the labour costs of replacing the roof, (almost $3,000.00), have not been claimed.

47. Nor do I find, on balance, that Ms Jones was contributorily negligent or failed to mitigate the loss. Ms Jones understood that there would be gradual discolouring, but had expected not to have to paint the roof. She and Mr Denham dealt with the water contamination by filtering it. When the roof leaked in 2003, Mr Denham thought it was too thin to waterblast.

48. However I decline to award the whole difference between the cost of the Onduline, $6,720.27 and the cost of the Colorsteel replacement, $13,739.38, by way of ‘damages for loss resulting from the failure which was reasonably foreseeable as liable to result from the failure’ (section 18(4)).

49. This is because I accept Mr Byers’ submission that there is an element of betterment in this claim, which I think is considerable, in so far as the cost of the Colorsteel was twice the cost of the Onduline, and came with explicit warranties for 15 years from when it was installed, in 2005. For that reason I award $8,000.00 in total damages for the failed roofing material itself.

50. I also award $89.99 for the Batts that were water damaged and $40.09 for their delivery. That is $130.08. I decline to award the $125.21 claimed for the wiring to be checked when the roof was replaced, as the wiring was not damaged.

51. I also decline to award the amounts claimed for the laboratory tests and the replacement tank water after it was emptied and cleaned, for the following reasons.

52. Section 90(1) of the Weatheright Homes Resolution Services Act 2006 provides that the Tribunal may make any order that a court could make in relation to a claim. But section 50 provides that a claim may be for any remedy that may be claimed in a court of law for or in relation to the penetration of water into the building concerned.

53. There is insufficient evidence for me to find that the discolouration and contamination of the water by the Onduline as it ran into the tank was due to a penetration of water into the building concerned, whereas the leaks, and damage to the batts and building paper, were due to water going through the Onduline.

54. Section 91 of the Weathertight Homes Resolution Services Act 2006 provides that costs and expenses of adjudication proceedings may be awarded against any party if that party has caused them to be incurred unreasonably by bad faith or by making allegations that are without substantial merit. Otherwise the parties must meet their own costs and expenses.

55. There is no bad faith here and there are no allegations lacking in substantial merit (by any party). Therefore I cannot award the small claim for half the costs of the initial legal advice Ms Jones took, as that is part of the process, albeit right at the beginning of it. Nor can I award Mr Beattie's expenses at the hearing (if they were to be provided to me).

56. I do award the $100.88 claimed towards the cost of toll calls, as I understand they were calls to Dargaville and other persons rather than for the adjudication, and I award the half share of Mr Beattie's report, $1,043.75, which was prepared to obtain definitive advice well before

the claim to the Tribunal was lodged. These two amounts come to $1,144.63.

57. Ms Jones has also claimed damages of $5,000.00 for the high levels of stress and mental anguish she suffered. This claim was made after the amended application for adjudication of $15,446.89 was lodged.

58. Mr Swanepoel submitted that, after the claimant raised the issue with the fourth respondent at the outset, other than advising the national distributor, he failed to take any further steps to remedy the defects. This caused Ms Jones stress and anguish, and cost Ms Jones and Mr Denham their friendship with Mr Keven Morris. Mr Swanepoel submitted that had the matter been appropriately resolved in 1999 by Mr Bruce Morris, that would not have happened.

59. However I decline to make an award of general damages. This part of the claim was lodged late. That aside, while I accept that this dispute has had unfortunate consequences of the kind Mr Swanepoel describes, those consequences have not been shown to be severe enough, or are not of a kind that would justify an award.

60. In summary, I award $8,000.00 damages for the roof, $130.08 for the Batts, and $1,144.63 for pre-adjudication expenses. This is $9,274.71 in total. The fourth respondent is to pay the claimant that amount within 14 days of this determination.

61. Section 92(1)(c) requires that, as the Tribunal has determined that a party is liable to make a payment, the statement that follows must be included. It sets out the consequences if no steps are taken by the liable party in relation to a subsequent application to enforce the determination.

Dated the 3rd day of April 2008

R M Carter

Tribunal Member

Statement: The Tribunal has ordered that the fourth respondent is liable to make a payment to the claimant. If the fourth respondent takes no steps to the pay the claimant the amount ordered, the claimant can take steps to enforce the determination in accordance with law. These steps can include making an application for enforcement through the Collections Unit of the Ministry of Justice for payment of the full amount which the party has been found liable to pay.

There are various methods by which payment may be enforced. These include:

- An attachment order against income
- An order to seize and sell assets belonging to the judgment debtor to pay the amounts owing
- An order seizing money from bank accounts
- A charging order registered against a property
- Proceeding to bankrupt or wind up a party for non-payment.