IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000089
[2011] NZWHT AUCKLAND 49

BETWEEN	STUART RALPH MACFARLANE AND JANENE TILLA MACFARLANE Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	ANTONY DAVID WEBBER Second Respondent
AND	FREDERICK PETER GARTON Third Respondent
AND	BAYS PLUMBING LIMITED (Removed) Fourth Respondent

Hearing:	6 September 2011
Appearances:	C McLean for the claimant Second respondent - self-represented Third respondent - self-represented
Decision:	20 October 2011

FINAL DETERMINATION
Adjudicator: S Pezaro

BACKGROUND

[1] This claim was bought by Stuart and Janene MacFarlane for the estimated cost of repairing their home which is a leaky building. Prior to adjudication the MacFarlanes and the first respondent, Auckland Council, and the fourth respondent, Bays Plumbing Limited (Bays Plumbing), entered into a settlement agreement dated 12 May 2011. Under this agreement the claimants subrogated their rights in the claim to the Council and the Council advanced to the MacFarlanes the sum of $160,000. Bays Plumbing and the MacFarlanes settled for a payment of $20,000 by Bays Plumbing which was therefore removed from the proceedings. The claim proceeded to adjudication against Antony David Webber, the second respondent, and Frederick Peter Garton, the third respondent.

THE CLAIM

[2] In their amended statement of claim dated 15 July 2011 the MacFarlanes claimed that Mr Webber and Mr Garton were liable as builders and/or head contractors and/or project managers for the weathertightness defects. At the relevant time Mr Webber and Mr Garton traded as T & R Builders Limited and Mr Webber prepared the plans and specifications for the house. The MacFarlanes purchased the property during construction and settled their purchase on 13 July 2001 after the Code Compliance Certificate was issued by the Council. In August 2008 Mr and Mrs MacFarlane became concerned about leaks and obtained a report from Cove Kinloch Consulting Limited before filing their application with the Weathertight Homes Resolution Services on 5 August 2009. On 20 October 2009 T & R Builders Limited was struck off the Companies Register.

THE DEFECTS

[3] For evidence of the defects the MacFarlanes relied on the WHRS assessor's report prepared by Richard Angell and a report prepared by Prendos. Appendix B to the amended statement of claim lists the defects identified by Mr Angell. The respondents did not call any expert evidence and did not dispute these defects or the estimated costs of repair. In evidence Mr Angell said that the primary cause of water ingress was the roof to wall junction and the cracking of the cladding and that, although the joinery was a less significant defect, it was still a primary defect. He said that the penetrations through the cladding were secondary defects. I accept the undisputed evidence of Mr Angell and find that the defects identified in his report caused water ingress to the MacFarlanes' dwelling.

REMEDIAL COSTS AND DAMAGES

[4] For evidence of the estimated remedial costs the MacFarlanes relied on the tender process carried out by Prendos. Based on the lowest tender received from PJ Exteriors Limited they claim a total of $242,154 for remedial costs, consent and professional fees, consequential losses and general damages.

[5] At hearing on 6 September 2011 I raised the issue of betterment and on 9 September 2011 Mr McLean, counsel for the Council, filed a memorandum setting out the MacFarlanes' accepted deductions for external painting, interior painting and the carpet. In closing submissions Mr McLean included a schedule showing a deduction of $22,769.62 for betterment. I accept this deduction as being reasonable. I also accept the undisputed calculation of repairs and consequential costs. The claim for general damages is not disputed and based on the evidence of Mr and Mrs MacFarlane I am satisfied that an award of damages of $25,000 is reasonable and consistent with previous decisions of this Tribunal and the courts.

THE LIABILITY OF ANTONY WEBBER AND FREDERICK GARTON

[6] Mr Webber and Mr Garton filed almost identical briefs of evidence. Their main defence appears to be that it was the Council which approved the plans, carried out the inspections and issued the Code Compliance Certificate. Further they said that they had offered $15,000 in settlement and were unable to make any further offer. They denied any liability for defects caused by ground clearance as they said that the MacFarlanes raised the ground level during landscaping. They also alleged that the MacFarlanes failed to carry out the required maintenance however they adduced no evidence in support of this allegation.

[7] Mr Webber and Mr Garton appeared and gave evidence at the hearing. Mr Webber accepted that he designed the dwelling, was on site and involved in the construction. He said there was no difference between the work that he carried out and the work that Mr Garton did on site. Mr Webber said that he supervised the subcontractors and that he called for the final inspection. He accepted that he did not obtain a guarantee from the roofer, despite being required to do so by the specifications. Mr Webber stated that he and Mr Garton designed the valley gutters on site in consultation with the roofer and that they did not install kick-out flashings. Mr Webber and Mr Garton installed the cladding and the joinery and Mr Garton accepted that although the specifications required head and sill flashings, only head flashings were installed.

[8] Surprisingly Mr Webber said that he had not read the WHRS assessor's report. However, he said that he did not cause the defects associated with the ground clearance on the north and east of the property or the damage caused by the installation of the satellite dish. Mr Webber accepted that he was on site when the plumber carried out his work and that he could have seen that there was no sealant around the penetrations caused by other contractors.

[9] Mr Garton accepted that he installed the cladding and the joinery and was involved with the hidden valley gutters. He also agreed that the Harditex was installed with no inseal, contrary to the Harditex specifications.

[10] The main defects in the cladding were the lack of control joints and the failure to install the cladding according to the specifications. Mr Angell said that the installation of the head flashings was faulty but if sill flashings had been installed the damage would have been reduced. Mr Angell's evidence was that even if the roof to wall junction damage had not occurred the dwelling would still require a reclad as a result of the other defects.

[11] The fact that the inspections were passed by the Council does not reduce either Mr Webber or Mr Garton's liability. They personally designed and built the MacFarlanes' dwelling and managed the construction. Mr Webber and Mr Garton personally assumed the responsibilities of a project manager/head contractor and builder and therefore personally owed the MacFarlanes a duty of care in these roles.[1] I am satisfied that they breached this duty by causing weathertightness defects and the resulting loss to the claimants.

QUANTUM

[12] The MacFarlanes have proved their claim to the sum of $204,862.38 calculated as follows:

Quantum	
Repair costs	
Actual cost of repairs from tender (incl GST)	$192,867.50
Council consent fees	$4,505.00
Prendos (incl GST)	$35,717.00

[1] *Bowen v Paramount Builders (Hamilton) Ltd* [1975] 2 NZLR 546.

Cove Kinloch Consulting Ltd	$860.00
Moisture Detection Company Ltd	$1,812.50
Consequential and/or associated costs	
Rent	$5,880.00
Moving costs	$990.00
General damages	$25,000.00
	$267,632.00
Less betterment	($22,769.62)
SUBTOTAL	**$244,862.38**
Less sum paid by Bays Plumbing Ltd	($20,000.00)
TOTAL	**$224,862.38**

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[13] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can 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 a claim in accordance with the law.

[14] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[15] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[16] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[17] The Council submits that Mr Webber and Mr Garton should be apportioned at least 80% of the MacFarlanes' losses as they were the individuals responsible for the design and construction of the dwelling and managed the subcontractors. The Council submits that its liability should be between 15-20% which is consistent with the decisions of *Mt Albert Borough Council v Johnson,*[2] *Dicks v Hobson Swann Construction Limited*[3] and *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*)[4]. Of these decisions *Sunset Terraces* was the only one where the Council had less than 20% liability. In the MacFarlanes' case there were significant variations between the construction and the plans which the Council should have detected. I have therefore apportioned liability at 20% to the Council.

[18] I see no reason to distinguish between the liability of Mr Webber and Mr Garton. They were equally involved in the construction and I therefore apportion their liability to the claimants at 40% each.

CONCLUSION AND ORDERS

[19] For the reasons given I make the following orders:

i. Auckland Council and Antony David Webber and Frederick Peter Garton are jointly and severally liable to pay the claimants, Stuart Ralph MacFarlane and Janene Tilla MacFarlane, the sum of $224,862.38.

[2] *Dicks v Hobson Swan Construction Ltd (in liq)* HC Auckland, CIV-2004-404-1065, 22 December 2006.
[3] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

ii. The Auckland Council's contribution is set at $44,972.48 being 20% of the sum of $224,862.38 for which it is jointly and severally liable.

iii. The Auckland Council is entitled to recover from Antony David Webber and/or Frederick Peter Garton any amount that it has paid to the claimants over and above the sum of $44,972.48.

iv. Antony David Webber and Frederick Peter Garton are jointly and severally liable to pay the claimants, Stuart Ralph MacFarlane and Janene Tilla MacFarlane, the sum of $179,889.90 immediately being 80% of the sum of $224,862.38.

v. Antony David Webber is to pay the claimants, Stuart Ralph MacFarlane and Janene Tilla MacFarlane, the sum of $89,944.95 immediately being 40% of the amount for which he is jointly and severally liable and is entitled to recover from Frederick Peter Garton any amount paid over $89,944.95.

vi. Frederick Peter Garton is to pay the claimants, Stuart Ralph MacFarlane and Janene Tilla MacFarlane, the sum of $89,944.95 being 40% of the amount for which he is jointly and severally liable and is entitled to recover from Antony David Webber any amount paid over $89,944.95.

DATED this 20th day of October 2011

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S Pezaro

Tribunal Member

[4] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008.