



SUMMARY

Case: McGregor v Jensen

File No: TRI 2008-100-000094/ DBH 00971

Court: WHT

Chair of Tribunal: PA McConnell

Date of Decision: 24 July 2009

Background

Due to defects in the construction of the house, damage ensued. The remedial work included a complete reclad however further work is still required to repair leaks associated with masonry block retaining walls. The claimants (Trust) alleged that the third respondent, Auckland City Council, the eighth respondent, Mr Boyd, the ninth respondent, Mr Halliday and the tenth respondent, Mr Hay are responsible for the defects and the resulting damage:

- Auckland City Council local authority which did inspections during construction and issued the code compliance certificate
- Mr Boyd and Mr Halliday labour-only subcontractors that carried out building work
- Mr Hay plasterer subcontracted to inspect the cladding and undertake texture coating and painting

The fifth, eleventh and the twelfth respondent, who were involved in earlier remedial works associated with the deck, reached a settlement prior to the hearing. As a result, the claim did not proceed against those parties and defects in relation to the deck did not form part of this adjudication

Facts

- Prior to the sale of the house to the claimants, the vendors engaged Concept Design and Development Ltd to provide simple concept plans to building consent stage. After the purchase, Mrs McGregor purchased the plans from Concept Design
- The dwelling was built as a home for one of the claimants, Mrs McGregor. The other claimants, Messrs Smith and Phillips are owners of the property in their capacity as the executors of the late Mr McGregor's estate
- November 1997: the Trust contracted Woodtec to construct the dwelling of which the first respondent, Mr Jensen was a director and the project manager. The construction work was carried out by Woodtec employees along with subcontractors including Messrs Boyd, Halliday and Hay. Messrs Halliday and Boyd were working in a partnership which was contracted on a labour-only basis to undertake the carpentry
- Mr Hay was engaged by Woodtec to inspect the cladding after it was installed and to carry out the plastering and texture coating of the property. Mr Jensen in his evidence stated that he contracted Mr Hay as he was an expert in the Harditex system and that he relied on his expertise.
- 4 April 1998: construction was sufficiently completed and Mrs McGregor moved in
- 15 May 1998: final inspection was carried out with a further check in December 1999

- 28 July 2000: CCC was issued
- Shortly after moving in Mrs McGregor had problems with leaks
- September 2001: Mrs McGregor claimed on the Masterbuild guarantee but they only accepted the claim relating only to the deck and arranged for repairs for the deck between September and December 2001. Those repairs did not fix the problems
- May 2003: the Trust applied to the WHRS. The assessor's report concluded that the house was a leaking home and that the Trust had an eligible claim.

In 2006, Mrs McGregor engaged CoveKinloch Consulting Ltd to assess the defects and repairs needed. Following their advice recladding work was undertaken. All the remedial work has now been completed apart from re-waterproofing block work walls.

Decision

Liability of the Auckland City Council

The Tribunal held that the Council was negligent at the building consent stage as there were no specifications provided for the curved windows and the lack of detailing for the flashings partly caused the claimants' loss. The Council therefore did not have reasonable grounds on which it could be satisfied that the Code could be met regarding the installation of the curved windows. The Tribunal also held that the Council was negligent in failing to identify certain defects and given the extent of the damage caused by the defects, the Council contributed to the defects requiring a full reclad of the house and therefore it was jointly and severally liable for the full amount of the claim.

Liability of Mr Boyd and Mr Halliday – labour-only subcontractors

The Tribunal found that the only potential area of liability for Messrs Boyd and Halliday related to the joinery installation. Although Messrs Boyd and Halliday were contracted on a labour-only basis and had no responsibility for the supervision of other workers, the Tribunal found that they both owed the claimants a duty of care due to the following:

- Messrs Boyd and Halliday's both had completed formal training and have been building for 3 to 5 years
- They had gone into partnership as builders and held themselves out as having the necessary skills to undertake construction work on dwellings
- Even though they worked under the supervision of Mr Jensen, they were contracted on a fixed rate contract to complete the majority, if not all of the carpentry work

The Tribunal found that Messrs Boyd and Halliday breached their duties by failing to properly install and weatherproof the windows and for negligently carrying out the construction work without consulting the appropriate technical literature. As both Messrs Boyd and Halliday contributed to the defects requiring a full reclad of the house they were therefore jointly and severally liable for the full amount of the claim.

Liability of Mr Hay – plasterer

Although Mr Hay did not attend the hearing or any of the case conferences, the Tribunal found him liable for negligently carrying out the work which caused the defects. Even if it were established that Mr Hay's company was contracted to do the work, it was clear that Mr Hay was the person who actually carried it out. He was therefore personally negligent for the defective work and thereby liable for the full amount of the claim.

Quantum

The Trust established its claim to the extent of \$292,518.34 calculated as follows:

• Re-cladding work (less \$100,000 settlement)	\$230,518.39
• Consequential losses	\$ 4,840.94
• Interest	\$ 32,159.01
• General damages	\$ 25,000.00

The Tribunal held that there was a legitimate claim for general damages on the part of Mrs McGregor as she is an owner in her personal capacity together with Messrs Smith and Phillips as executors of her late husband's estate

Contribution

The parties that undertook the work should have a greater responsibility than the Council certifying the work. Mr Hay was thereby attributed the greatest responsibility for the defective work as he inspected the cladding prior to plastering, inadequately sealed the windows and gave specific advice to Messrs Boyd and Halliday that head flashings were not required. His contribution was accordingly set at 60%

The responsibility of Messrs Boyd and Halliday responsibility related only to the installation of the windows. Their apportionment was also reduced by the actions and advice of Mr Hay who they reasonably considered to be an expert in Harditex. Their joint contribution was therefore set at 20% (10% each) and the Council 20%

Result

Based on the Tribunal's findings of liability, the following payments are to be made:

- The Council are to pay the Trust \$292,518.34 and is entitled to recover a contribution of up to \$234,014.68 from Messrs Boyd, Halliday and Hay for any amount paid in excess of \$58,503.66
- Mr Boyd is to pay the Trust \$292,518.34 and is entitled to recover a contribution of up to \$263,266.50 from the Council and Messrs Halliday and Hay for any amount paid in excess of \$29,251.84
- Mr Halliday is to pay the Trust \$292,518.34 and is entitled to recover a contribution of up to \$263,266.50 from the Council and Messrs Boyd and Hay for any amount paid in excess of \$29,251.84
- Mr Hay is to pay the Trust \$292,518.34 and is entitled to recover a contribution of up to \$117,007.34 from the Council and Messrs Boyd and Halliday for any amount paid in excess of \$175,511

If the respondents meet their obligations each will pay the following to the claimants:

- Council \$ 58,503.66
- Mr Boyd \$ 29,251.84
- Mr Halliday \$ 29,251.84
- Mr Hay \$175,511.00