IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2009-101-000029
[2010] NZWHT WELLINGTON 3

BETWEEN	DEANE AND LORAINE MILNE Claimants
AND	HAYDN LODGE First Named First Respondent
AND	DEBRA LODGE – SCHNELLENBERG Second Named First Respondent
AND	WELLINGTON CITY COUNCIL Second Respondent and Cross Claimant

Hearing: 18 November 2009

Appearances: David Heaney, Counsel for the Assignees
First Respondents, Self-Represented

Decision: 2 March 2010

AMENDED FINAL DETERMINATION
Pursuant to s92(2), Weathertight Homes Resolution Services Act 2006
Adjudicator: R Pitchforth

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INTRODUCTION

[1] The claim concerns the responsibility of an amateur builder who, in his view, is unfairly sued for the cost of remediation of his work. The Wellington City Council has already reached a settlement with the claimants the terms of which gave the right to the Council to pursue the claim against the other respondents.

SUMMARY OF THE FACTUAL BACKGROUND

[2] The parties to this claim are:-

Claimants -	Mr Dean Richard Milne and Mrs Loraine Milne
First Respondents -	Mr Haydn Andrew Lodge and Mrs Debra Ann Lodge-Schnellenberg, original owners and vendors
Second Respondents -	Wellington City Council, territorial authority

[3] Haydn Lodge and Debra Ann Lodge-Schnellenberg (the Lodges), purchased a building site at 6 Tolhurrst Street, Hampton Gate, Johnsonville in 1999. Mr Lodge had an ambition to build a family home but realising that he had no skills or building background, he created a scheme whereby he could participate in the construction of the house as fully as possible, notwithstanding his limitations.

[4] The Lodges entered into a contract with Kensway Homes Limited (Kensway) for a consented design kitset house that was to be assembled on the site. Mrs Lodge-Schnellenberg agreed to the floor-plan, colours, cabinetry and furnishings. She then spent her time in full time employment and did not take part in the construction of the house.

[5] Kensway issued tender documents and received quotes. They advised Mr Lodge to accept certain quotes and vouched for the standard of work of the subcontractors. Kensway also obtained the building

consent and managed the supply of building materials to the site so that they were delivered on site on time. Kensway provided Mr Lodge with two copies of the building plans that had been sent to the Council for consent purposes. There was no documentation from the suppliers or manufacturers.

[6] Mr Lodge contracted with Peter Nichol for professional building advice while he was constructing the home. Mr Nichol is a Master Builder who worked for Nationwide Certifiers as a Building Inspector. Mr Nichol provided tutorials on various aspects of the building to ensure that Mr Lodge was able to carry out the work properly. Mr Nichol also did some work himself. A sample of the work was then checked by the building inspector for the second respondent, Wellington City Council, the local authority. Mr Lodge then built the dwelling based on the information he had received.

[7] The Council conducted normal inspections. The Council's later inspections found eight items which needed correction after which a Code Compliance Certificate was issued on 9 March 2001.

[8] The Lodges decided to move and placed the property on the market. The agreement for sale and purchase included a requirement that the outstanding work was done and a Code Compliance Certificate obtained. The purchasers were the claimants, Deane Richard Milne and Loraine Milne (the Milnes).

[9] The Milnes obtained a pre-purchase inspection report that indicated a small number of minor matters which would need attention. The property was sold and possession taken on 6 April 2001.

[10] Early in 2008 when the Milnes were doing some minor repairs they became aware of signs of leakage. They lodged an application with the Weathertight Services Group on 7 January 2008.

[11] An assessor made a preliminary inspection to ascertain if the claim was eligible. The current assessor then made a report which was given to the Milnes in December 2008. The Milnes then instructed counsel and the application for adjudication was filed on 27 May 2009. The Milnes claim that as a result of the construction defects they had suffered loss and damage and seek $401,052.20 for repair and ancillary costs and interest. The Lodges deny liability.

Mediation

[12] As part of the Tribunal's processes, the claimants and the Council attended mediation on 4 November 2009.

[13] Following mediation the Council and the claimants entered into an agreement which was produced at the hearing by Mr Cody, the responsible Council officer. The main terms of the agreement were that in consideration of $210,000.00 the claimants settled their claim in full against the Council. It was also agreed that the Council would be placed in the same position as an insurer making a payment to a claimant under an insurance policy and would therefore be entitled to pursue the claim against the other parties. As a result, counsel for the Council conducted the claimants' claim in this case.

[14] In *Petrou v WHRS* HC Auckland, CIV-2009-404-1533, 24 November 2009, the matter of whether the Tribunal can deal with assigned claims was argued on judicial review. It was alleged that the effect of the settlement agreement was to assign absolutely the claimants' claim to the respondents to the settlement and therefore the issue was whether the Tribunal had the jurisdiction to deal with claims brought by respondents to a settlement agreement since only owners of dwellinghouses could bring or pursue claims under the Act.

[15] After an explanation of the difference between an assignment of a chose in action and the doctrine of subrogation, Randerson J stated that:

> [31] … I am satisfied that the deficiencies of the pleading are capable of remedy in order to be consistent with the terms of the settlement agreement. The proper course is for an amended claim to be filed by [the claimants] in their name alone setting out their total losses, acknowledging the $275,000 received from [the respondent parties to the settlement] and claiming the balance of $143,968 from [the remaining respondent]. The adjudicator would then decide the issue of liability and quantum under s29(1).[1] If liability is established, it would be necessary for the adjudicator to make a finding as to the full extent of the losses sustained by [the claimants] (before allowing for the $275,000 paid) so [that the respondents parties to the settlement] may properly pursue their cross-claim.
>
> [32] The cross-claim should also be amended so that the [respondent parties to the settlement agreement] may pursue contribution or indemnity from [the remaining respondent] under s29(2)[2] for the $275,000 they have paid. In view of the settlement [the claimants] have reached with the [respondent parties to the settlement], the [claimants] could not recover any further sum against those parties. It is not possible therefore for the [respondent parties to the settlement] to include in their cross-claim against [the remaining respondent] any greater sum than the $275,000 paid plus costs. [The remaining respondent] is not bound to accept that the $275,000 paid to [the claimants] by the [respondent parties to the settlement] was a proper and reasonable settlement for them to reach. It remains open to him to dispute that issue.

[16] In following the approach taken by Randerson J in *Petrou,* the proper course in these circumstances is for the claim to be amended setting out the total losses but acknowledging the $210,000 received from the Council and claiming the balance of the claim from Mr and Mrs Lodge. If liability is established it will then be necessary for me to make a finding as to the full extent of the losses sustained by Mr and Mrs Milne (before allowing for the $210,000.00 paid) and then deal with the cross-claim made by the Council.

THE ISSUES

[17] The issues I need to determine are:

- What are the defects that caused the leaks to the dwelling?
- What work is required to repair the damage to the dwelling?
- What is the reasonable cost for carrying out repairs to the dwelling?

[1] Weathertight Homes Resolution Services Act 2002. The equivalent provision being s72(1) of the Weathertight Homes Resolution Services Act 2006.
[2] Weathertight Homes Resolution Services Act 2002. The equivalent provision being s72(2) of the Weathertight Homes Resolution Services Act 2006.

- Do Haydn Lodge or Debra Lodge-Schnellenberg owe the Milnes a duty of care, and if so have they breached that duty of care?
- Is the Council entitled to a cross-claim against the Lodges?

THE DEFECTS AND DAMAGE

[18] The items that the Milnes alleged were constructed in breach of the duty of care and were inadequate and/or incorrectly installed include the following:-

- roof flashings;
- balustrade/wall junction;
- plywood cladding system;
- fibre cement cladding system;
- clearance between the plywood and fibre cement cladding systems at various levels;
- stormwater drainage;
- window and door joinery in the plywood and/or fibre cement cladding systems;
- weathering details.

The Assessor's Report

[19] The WHRS assessor found that leaks were occurring due to the following:

(a) Window leaks:

- Window head flashings are inadequate and poorly installed with unsealed ends and an absence of turndowns.
- Jamb flashings are omitted providing open pathways for water ingress.
- Omitted sill flashings allow water entering from above to be channelled behind the cladding and not to the exterior.

- Construction details shown in the manufacturer's Shadowclad technical specifications have not been followed.

(b) Cladding issues:

- No Z flashings were installed at the bottom of the sheet cladding.
- The cladding fails to give adequate protection to the boundary joists by not extending below the boundary joist.
- Moisture is being trapped and able to ingress behind timber blocking and boundary joists from where it is able to ingress into the particle board flooring, sub floor framing and timber wall framing on the east elevation.
- The omission of any primer or sealer (which is recommended in the manufacturers' technical specifications) to the bottom edge and the back of the Shadowclad sheet cladding (recommended in the BRANZ Guide). This is likely to be contributing towards moisture ingress by capillary action.
- Construction details shown in the manufacturer's (Shadowclad) technical specifications have not been complied with.

(c) Moisture is entering behind the external corner timber battens by means of capillary action and gravity as a result of:

- No metal flashing installed behind the cladding which would allow moisture to drain to the exterior.
- Timber battens' profiles have no weather grooves to prevent capillary action.

(d) There are two points of water entry:

- Between barge fascia; and
- At gaps in the sealant which has been applied at the batten/cladding junctions.

(e) Construction details shown in the manufacturer's (Shadowclad) technical specifications have not been complied with.

(f) Moisture is entering between the cladding and the garage door frame where the fibre cement cladding is inadequately sealed between the frame and cladding. There is severe decay in the timber lintel.

[20] The damage that has been caused by the leaks includes:-

East Elevation

- Extensive damage to framing above garage door
- Light decay to timber window wall framing in master bedroom
- Severe decay in timber framing above the entry door which can be seen to extend into the particle board flooring
- Entry door framing, probably to bottom plate
- Wall framing in the garage which returns into the entry access
- Boundary joist immediately below the external cladding and along the wall where balcony is located with possible damage to particle board floor.
- Significant moisture levels in balcony balustrade indicating decay.
- Sub-floor wall framing show evidence of decay in whole wall

South Elevation

- Light to moderate decay around garage and bathroom windows

West and North Elevation

- Damage to wall where deck is located with probable damage to particle board floor

North Elevation

- Damage from water ingress extends to corner studs

[21] The assessor was of the view that these leaks would continue if they are not dealt with and there would be more extensive damage.

[22] The Council did not indicate its view having settled the claim.

[23] The Lodges accepted that the assessor's statement of damage was factually correct though they did not accept that they were responsible for the damage.

[24] As the Lodges did not dispute the findings of the WHRS assessor in his report, I accept that the defects outlined in that report are what has caused the water to ingress into the dwelling.

SCOPE OF REPAIRS

[25] The assessor recommended recladding the building. This will require replacing the decayed framing, replacing the boundary floor joists for the deck, flashing roof to wall junctions and windows, replacing decayed slats on the deck, reconstructing the balcony/deck balustrades and painting the cladding. He also recommended replacing reveals for the windows and the installation of sill trays and wind seals around all windows. Internal repairs include replacing skirting, timber mouldings around windows and replacing plaster board linings 150 mm from the floor. The west and north walls of the garage require recladding.

[26] The assessor's estimate for repairs was $183,408.00 including GST. This was supported by a quantity surveyor's estimates based on the assessor's report.

[27] Although the Lodges do not accept that the repairs were necessary due to any negligence on their part, they did not dispute this assessment of the repairs.

[28] Accordingly, I accept that the work set out in the scope of repairs, as outlined by the WHRS assessor is necessary to repair the defects and damage occurring to the dwelling.

THE CLAIM

[29] The Milnes claimed that the Lodges owed them a duty of care to ensure that the construction of the dwelling would be carried out in a thorough and tradesmanlike manner and in accordance with the Building Act 1991, the Building Regulations 1992, and the New Zealand Building Code 1992, other relevant standards and good trade practice.

[30] The Milnes sought $401,052.20 from the Lodges and the Council:-

• Cost of structural repairs	$374,602.20
• Repairs to floor coverings light fittings, window coverings and furnishings	$10,000.00
• Insurance	$1,200.00
• Five months accommodation during reclad	$7,500.00
• Storage	$850.00
• Moving and retrieval	$1,900.00
• Electricity disconnection	$1,000.00
• Lost income from time off work	$ 4,000.00
Total	**$401,052.20**

[31] By way of an explanation of the differences between the assessor's report and claim for damage Mrs Milne said that the claimants had also instructed Mr Wutzler, a remediation expert, to make a report. It

contained Mr Wutzler's view of the repairs that would be required and his reasons for them.

[32] The respondents were not provided with an opportunity to question the report as it was not tendered in evidence.

[33] Mr Wutzler had instructed Mr White, a quantity surveyor engaged by the claimants, to provide costings based on information provided by Mr Wutzler. Mr White appeared as a witness but declined to discuss the scope of work in his report as that was an area outside his scope of expertise. The list of work to be done was the responsibility of Mr Wutzler in his expert capacity.

[34] As no evidence or report by Mr Wutzler was presented to the Tribunal, the Tribunal was restricted from considering the estimates of the remedial costs based on that report. The schedule prepared by Mr White cannot be used apart from issues raised that were within his knowledge. It does, however, explain the difference between the assessor's assessment of the damage and repair and the amount the claimants have claimed.

[35] As I heard evidence from the claimants and the assessor and not from the witness on whose evidence Mr White prepared his assessments, I will make this decision on the evidence that was supported by the primary witnesses or accepted without protest. I accordingly accept the costings provided by the WHRS assessor of $183,408.00 including GST as being an accurate assessment of the amount it will cost to repair the damage occurring to the dwelling.

Variations to the Claims

[36] At the hearing further losses were claimed on behalf of the Milnes.

Repairs to Interior Decorating and Furnishings

[37] Mrs Milne sought recompense for repairs to floor coverings, light fittings, window coverings and furnishings, all amounting to $10,000.00.

There is no detailed evidence tendered for this claim but some damage was accepted as inevitable. It was not accepted that the claimants should have ‘new for old’. It is unusual for light fittings to need replacement unless there is evidence that they have been affected by water ingress. Other items are likely to be partway through their life having probably been in place since the beginning of 2001. There will be an element of betterment in the replacement. In the absence of further information I estimate and deduct the depreciation at 50% and the light fittings at $500.00. I award $4,500 under this head.

Insurance

[38] Mrs Milne sought $1,200.00 for insurance.

[39] Building insurance was not allowed for in the assessors’ QS report. Such insurance however is a standard cost for building repairs and therefore I allow this claim.

Accommodation

[40] Mrs Milne sought $7,500.00 for five months accommodation costs during the recladding process.

[41] The quantity surveyor has estimated that the time during which protection is required is two months. Accommodation for that time would be reasonable. The claim is for $425.00 per week. I allow for some extra time over and above the time needed for protection. I award three months being $ 5,525.00.

Storage

[42] Mrs Milne sought $850.00 being the costs of storage during the repairs. The amount claimed is for a longer period than necessary. I award three months at $185.00 per month, $555.00.

Moving and Retrieval

[43] Moving and retrieval costs of $1,900 are claimed. I accept this as being a reasonable amount.

Electricity Disconnection

[44] Mrs Milne sought an electricity disconnection fee of $1,000.00 but with no detailed information as to charges.

[45] It is likely that the electricity will remain connected to the house while the builder is working there. There is no explanation as to why it needs to be disconnected during repairs nor why the disconnection fee is so high. Any electricity is part of the building costs and part of the contract price. This claim is declined.

Time off Work

[46] Mr Milne sought $4,000.00 plus GST for time off work. As this claim included GST which would indicate that the claimant is self-employed. There was no evidence of an hourly rate or the proper rate for whatever work Mr Milne does. No outline of what time is required to supervise professional packers, builders, etc was provided nor was a reason why they should be supervised to the extent to justify this amount. The claim is declined.

General Damages

[47] Mrs Milne gave evidence that they had paid $35,207.86 in legal costs and have estimated a liability for a further $50,000.

[48] The Milnes have also suffered stress through delays in having the matter heard, lack of ability to obtain a mortgage for a leaky home, delayed surgery for Mr Milne's back due to uncertainty of hearing dates, the strain of preparing for the hearing, the need to look at documents rather than enjoy family life and distress that there were allegations that the claim included elements of betterment.

[49] There was a significant time between the receipt of the report and the application for adjudication. This was a matter in the hands of the

claimants. Since the filing of the application there has been no delay by the Tribunal.

[50] No details were given of the lack of finance or how it affected the claimants. There was also nothing to show that the surgery was related to the leaky home. Most of Mrs Milne's evidence in support of the claim for general damages related to the stress and cost involved in the adjudication proceedings.

[51] In *Rowlands v Collow*[3] Thomas J distinguished between stress from the damage and stress damages due to going to a hearing:

> Mr Delany acknowledged that the practice in New Zealand, at least since *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150, 163, has been to award general damages in tort for annoyance, frustration, discomfort and inconvenience. However, he pointed out that the cases to date appear to have been concerned with damage to dwellinghouses where unreasonable living conditions have been inflicted on the owners. The focus has been on the disruption caused to daily domestic life. Nevertheless, I do not consider that the fact it is a driveway and not a dwellinghouse which is in issue in this case alters the basic principle. People whose lives are disrupted by the construction of a defective driveway can also suffer distress and anxiety.
>
> However, Mr Delany correctly warned me against awarding damages relating to distress and anxiety caused by the "frustration and hassle" which inevitably arise out of a breach of contract or tort or are associated with Court proceedings. He further submitted that there was little or no evidence of distress or anxiety on the part of the owners which can be attributed to Mr Collow's design of the driveway or, I imagine he would argue, his supervision or lack of it.

[52] The stress due to the preparation for the hearing was discussed in *Stevenson Precast Systems Ltd v Kelland:*[4]

> [80] The remaining periods for which she claims from March 2000 to July 2001 are all related to preparation for trial, correspondence with lawyers, discussions

[3] [1992] 1 NZLR 178 (HC), 209.
[4] HC Auckland, CP303-SD01, 9 August 2001, Tompkins J.

> with experts, preparing briefs and attendance at the trial. I am satisfied that the claim for this latter period cannot be allowed. The law does not permit recovery for time spent by a party in preparation for litigation, on the basis that such a loss is not a reasonably foreseeable consequence of the breach of contract.
>
> …
>
> [104] In her evidence relating to general damages, she referred to her involvement in preparation for the present Court proceedings. For the reasons I have already expressed in para [80], I disregard this element entirely. Just as time spent on preparation for litigation is not compensatable, nor is the stress and worry inevitably involved in a claim of this kind.

Accordingly the stress relating to the hearing process, whilst acknowledged, cannot be taken into account in assessing general damages.

[53] The High Court has accepted that it is proper to make awards for general damages for those owning and occupying leaking homes of between $20,000.00 and $25,000.00 per claimant. As the majority of the evidence in support of the claim for general damages related to the stress of the adjudication proceedings, which I cannot take into account, it is appropriate for general damages to be awarded at the lower end of this range. On that basis I award $20,000 to each claimant, a total of $40,000.

[54] Accordingly, with the adjustments, the claim for repairing the damage and meeting the other claims of the Milnes is:-

Repairs to floor coverings light fittings, window coverings and furnishings	$4,500.00
Insurance	$1,200.00
Five months accommodation during reclad	$5,525.00
Storage	$550.00
Moving and retrieval	$1,900.00
Electricity disconnection	$0.00
General damages	$40,000.00
Lost income from time off work	$0.00
Assessor's claim	$183,408.00
Total	**$237,083.00**

[55] The total claim for which evidence is provided is therefore $237,083.00.

The Deck

[56] It was accepted at the hearing that the Milnes had made alterations to the deck and balustrade which the assessor had ascribed to the Lodges. The deck is designed to allow water to pass through it. The deck is exposed to the elements and has no enclosed building beneath it. In this sense it does not leak. This was acknowledged by other parties.

[57] The cost of replacing the deck of $12,045.00 and the accompanying percentages for preliminary and general, overheads, margin and contingency for the deck being $3,493.05 are therefore disallowed being a total of $15,538.05 plus GST, a total of $17,480.31

[58] The Lodges and other witnesses explored the question of the cost of remediation with cavity walls rather than reinstating the present system. Consensus was reached that the difference would amount to about $2,000 and was not material.

Summary of Quantum

[59] Based on the findings outlined in [55] above being $237,083.00 less the cost of replacing the deck at $17,480.31, I accept that the proper amount of the claim for remedial costs and associated professional fees is $219,602.69.

DO HAYDN LODGE OR DEBRA LODGE-SCHNELLENBERG OWE THE MILNES A DUTY OF CARE, AND IF SO, HAVE THEY BREACHED THAT DUTY OF CARE?

[60] It is clear from Mr Lodges' evidence, which was given in a clear and open way, that Mr Lodge undertook this project to fulfil an ambition. He had no practical experience and relied on others to guide him and the Council to confirm his building practices. Mr Lodge was ignorant of building practices and unaware of many of the requirements of the

Building Act 1991, the Building Code and the manufacturer's recommendations.

[61] The Lodges' evidence showed that many of the faults in this building were condoned by the Council. This is no doubt reflected in the agreement made at mediation. For instance, a window was installed without sealant on each side of the window and without sill flashings. The Council inspector examined it and accepted the method of installation. Mr Lodge then installed the other windows in an identical fashion.

[62] The assessor's evidence was that the flashing ends were not turned down or sealed. The Lodges however produced evidence that turning down powder coated aluminium extruded flashing is not recommended by the manufacturer.

[63] Mr Lodge used *No More Gaps* where he thought sealant was required. At the time, he submitted, it was an approved filler. The Council's witness did not disagree.

[64] Sill flashings were recommended by the manufacturer but apparently not required by the Council at that time. In addition the vendor of the kitset house did not supply a garage door flashing and the Council did not comment that it was not installed.

[65] The assessor criticised the lack of Z flashings but Mr Lodge says the plans and the Council itself did not require them. He further submitted that the Council accepted the roof to wall junction detail. This was not contested.

[66] Mr Lodge showed that the causes of leaks identified by the assessor ([19] above) were generally as a result of work done by him after he had obtained approval from a council officer that if the work was done in that way it would be code compliant and satisfactory.

[67] The Council did in fact accept this work as code compliant and satisfactory.

[68] Accordingly, Mr Lodge was not negligent in

- not turning down the top flashing ends,
- using 'No More Gaps' as a sealant,
- failing to install sill flashings or a garage door flashing,
- not installing Z flashings
- constructing the roof to wall detail.

[69] However in New Zealand, it is well-established law that builders and developers owe a duty of care to people whom they should reasonably expect to be affected by their work. Builders, developers and head contractors can therefore be liable under the tort of negligence at the suit of owners of buildings which have been constructed in a negligent, defective, or unworkmanlike manner.[5]

[70] There is no difference when the builder is the owner of the house and is an amateur builder. In *Chase v de Groot* [1994] 1 NZLR 613 Tipping J said at 619:-

> *Summary to this point*
>
> Before going on to look more closely at the suggested "pure economic loss" defence raised in this case, I venture to sum up the position reached on the New Zealand authorities which I have mentioned. I expressly leave aside for the moment the scope of the duty of care in a case such as this so far as the nature of the loss is concerned.
>
> I look first at Mr de Groot's position. In this respect the law can be stated as follows:
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> 1. The builder of a house owes a duty of care in tort to future owners.

[5] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406, 417-418. See also *Body Corporate 202254 v Taylor* (2008) 12 TCLR 245 (CA) at [125] where Chambers J summarised the law as being clear that if a builder carelessly constructed a residential building, thereby causing damage, the owners of the building could sue the builder in negligence.

> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.
>
> 3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners.
>
> 4. If the owner/builder is building the house for someone else under a building contract, it is the law of contract not the law of tort which will govern the relationship of the parties. The contract will normally contain an implied term equivalent to the tortious duty unless it is specifically excluded or limited.

[71] I have acknowledged and accepted that Mr Lodge was an amateur builder. He is in the same position as Mr de Groot in the case under discussion.

[72] However, as Tipping J points out in *Chase v de Groot*, there was another relationship in this case, that of parties to a contract.

[73] Mrs Milne, in an affidavit of 21 August 2009, says:-

> 4. … We, of course, were not around throughout the building of the house but we were made aware of the construction process through our dealings with the First Respondents and their real estate agent at the time of purchase
>
> 5. We first met the LJ Hooker real estate agent in January 2001. Her name was Jannie Dahm…
>
> 6. Jannie on multiple occasions mentioned how 'Debra and Haydn built the house themselves and were now moving up to Masterton'.
>
> …
>
> 10. It was quite clear to both my husband and me that both the First Respondents had been involved in the building process…

11. Mr Lodge's name appears as 'Owner' on the Application for a PIM &/or Building consent on page 49. Mr Lodge's name also appears as 'Owner' on the Application for the Kerb Crossing on page 54. Again, Mr Lodge's name appears as 'Owner' on the Application for Earthworks Consent on page 55.

[74] The Affidavit continues to show that the purchasers knew that Mr Lodge had been the builder.

[75] The situation is again similar to that of Mr de Groot in *Chase v de Groot* (supra). Tipping J set out the position on p 620 as:-

> In terms of the foregoing principles Mr de Groot as owner/builder owed a duty of care to future owners when he was building the house. Its scope, ie whether it extended to pure economic loss, has already been touched on and will be discussed further below. Mr de Groot was building for himself. Thus no question of any contract with the first potential future owners, the Chases, arose at that stage. This case is therefore not one which truly raises a question of concurrent liability in contract and tort. By the time the contract of sale to the Chases came to be signed Mr de Groot was already in breach of his duty of care, if it existed. Again, I say that without prejudice to the scope of that duty. If the duty was of such scope as would otherwise make Mr de Groot liable for the loss suffered by the Chases, the essential question is whether by means of the contract of sale he clearly excluded his liability. If the Chases have suffered otherwise recoverable loss they are entitled to appropriate damages unless by their contract they have precluded themselves from recovery.

[76] The Milnes produced the agreement for sale and purchase showing that the purchasers knew that they were purchasing from the builder/vendor. They even required certain work to be done to be completed. They also made the contract conditional upon obtaining a satisfactory builder's report.

[77] There was nothing in the contract excluding the builder's liability in relation to the building process.

[78] Although Mr Lodge feels that he is innocent and blameless, the evidence is clear that he was significantly involved in the construction of the dwelling. Despite complying with the Council's directions and building in the way that they approved, Mr Lodge did construct a dwelling which leaked. In that he was negligent and must take responsibility.

[79] Before he completed the building he knew that it would be sold and occupied by subsequent owners.

[80] I find that Mr Lodge did owe the Milnes a duty of care as the builder of the dwelling. I further conclude that he breached the duty of care and is accordingly liable for the amount of the claim as set out in [55] above.

[81] As stated at [4] above, Mrs Lodge-Schnellenberg's only involvement was to agree to the floor-plan, colours, cabinetry and furnishings. She then spent her time in full time employment and was not involved in the construction of the house. I am therefore satisfied from the evidence that Mrs Lodge-Schnellenberg took no part in the negligent construction. She accordingly does not owe the Milnes a duty of care and the claim against her is accordingly dismissed.

SUMMARY OF AWARD

[82] The amount of proven damages is $219,602.69 as outlined at [59] above.

[83] The Council have paid $210,000.00 to the claimants.

[84] After deducting the amount already paid by the Council the outstanding amount is reduced to $9,602.69. This is subject to any apportionment as set out below.

[85] The claimants are accordingly entitled to an award of that amount.

APPORTIONMENT OF BLAME

[86] The evidence is clearly that Mr Lodge constructed the building. Before he undertook a new part of the process he obtained approval from the Council and then proceeded to install the parts of the building in the way in which it had been approved.

[87] Mr Lodge was constructing a house without the requisite skill and knowledge. He accepted that and in turn relied on the Council to provide approval and to ensure that the work was properly done. He would have done whatever the Council required.

[88] As outlined above, Mr Lodge was responsible for the quality of the house and due to his ignorance in building matters it leaked. He was therefore negligent and responsible for the resultant leaky home.

[89] The Council witness acknowledged that the Council had differing regimes. They would not expect to closely inspect a building designed by an architect, supervised by an engineer and built by a builder with a reputation in the same way as they would inspect an amateur home builder. They are not clerks of works, but they do have a responsibility to ensure that whatever the skill of the builder the resultant building is code compliant. If an amateur builder is involved this may mean more detailed inspections. In this instance the Council inspector was invited to see what was being proposed and to view a sample of the work. It was known that whatever was approved would be reproduced. For instance, if one window installation was approved all the windows would be installed in the same way.

[90] The Council failed to ensure that the building was constructed to the standard required by the Building Code.

[91] A just and equitable division as provided for in s 17(2) Law Reform Act 1936 is essentially a question of fact.

[92] Having heard the evidence I consider the Council and Mr Lodge are equally to blame and are jointly and severally liable. Any amount over 50% paid by any party is recoverable from the other party.

CROSS-CLAIM BY THE COUNCIL

[93] Wellington City Council has filed a cross claim against Mr Lodge for the amount of $210,000 being the amount of its settlement with the claimants.

[94] Based on the finding made at [92] above, Mr Lodge must reimburse the Council for 50% of their payment to the Milnes, namely $105,000.00.

COSTS

[95] There is no indication that any party has behaved in such a way that the costs provisions of the Tribunal would be triggered.

SUMMARY & ORDERS

[96] The claim against Debra Lodge-Schnellenberg is dismissed.

[97] Haydn Andrew Lodge is ordered to pay Deane Richard Milne and Lorraine Milne the sum of $4,801.35 forthwith being half of the balance of the claim not paid to the Milnes by the Council.

[98] Haydn Andrew Lodge is further ordered to pay the Wellington City Council the sum of $105,000.00 forthwith.

[99] The Council, having settled its claim with the claimants, is not liable to make any further payment to the claimants.

DATED this 2nd day of March 2010

Roger Pitchforth
Tribunal Member