IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-101-000030
[2012] NZWHT AUCKLAND 14

BETWEEN	KAREN & IAN O'CONNOR Claimants
AND	MACDEE MCLENNAN CONSTRUCTION LIMITED First Respondent
AND	DUNCAN MCLENNAN Second Respondent
AND	PORIRUA CITY COUNCIL Third Respondent
AND	GERRY KNOL Fourth Respondent

Hearing: 23 June 2011

Appearances: P Robertson for the claimant
G Reeves for the first and second respondent
P Robertson for the third respondent
G Knol the fourth respondent

Decision: 6 March 2012

FINAL DETERMINATION
Adjudicator: R Pitchforth

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BACKGROUND

[1] The claimants are the owners of 3A Cromarty Place, Papakowhai Porirua. There is no dispute that it is a leaky home. The house was built in 1997-98.

[2] The first respondent, MacDee McLennan Construction Limited and the second respondent, Duncan McLennan were respectively the builder and the director responsible for the work. They provided a statement of defence. At the hearing they accepted the outcome of the hearing and took no further part in the process. The Tribunal was advised that MacDee McLennan Construction Limited was insolvent. Mr Reeves appearing for these two parties was given leave to withdraw.

[3] Gerry Knol who was involved in the cladding of the house was the fourth respondent. He unsuccessfully applied for removal and took no further part in the hearing.

[4] At mediation in November 2010 the Council denied liability but agreed to settle the claim against them for $405,000.00 inclusive of GST. The other parties did not settle with the claimants. The claimants agreed to assign all their causes of action and rights in the litigation and their full entitlement to recover damages against the other parties to the Council. The Council continued its claim for a contribution from the other parties and said that the assignment allowed the Council to continue the litigation in the name of the claimants and the Council.

[5] This approach has inherent difficulties as an assignment of the claim means that the owners no longer are parties. In *Petrou v Weathertight Homes Resolution Service*[1] the Council entered into a similar agreement; some of the wording was identical. Randerson J said that the pleadings could be amended to overcome the difficulty. I follow this example and proceed on the basis that the claimants seek $538,665.70 of which the Council has paid $405,000.00. In the event that the claim is proved the award can be made against the liable parties for the balance of the claim of $133,665.70. The Council will then be in a position to pursue its cross claim against the other respondents for a contribution or an indemnity up to the sum of $405,000 that it has paid.[2]

[6] With the benefit of the assessor's report the claimants sought repairs following damage from leaks from building defects outlined in that report.

[7] Mrs O'Connor gave evidence for the claimants at the hearing. She provided further evidence of the devastating effect that purchasing a leaky home has had on their lives, health, level of anxiety, social life, emotional state and financial situation. They have been put to extra expense as a result.

ACQUISITION AND CONSTRUCTION OF BUILDING

[8] In 1997 the claimants were invited by Mr McLennan (trading as MacDee McLennan Construction Limited) to consider buying 3A Cromarty Place. The claimants were aware of building issues relating to leaky homes and sought assurances concerning some of the construction matters. In particular they were concerned about using fully treated timber for framing, a cavity behind the external cladding and deck coating. The assurances sought were given.

[1] Petrou v Weathertight Homes Resolution Service HC Auckland, CIV-2009-404-1533, 24 November 2009.
[2] Section 90(3) Weathertight Homes Resolution Services Act 2006.

[9] The claimants agreed to purchase the building to be constructed on the site on 27 September 2000. The construction took place. The claimants undertook the internal painting, arranged for the ceramic tiles to be laid and provided curtains. Settlement occurred on 13 August 2001.

EARLY LEAKS

[10] Later in August 2001, after settlement, there were three small leaks which were fixed during the maintenance period. In March 2002 a leak developed in the deck above the third bedroom. Mr McLennan reapplied the deck sealant. A few months later there was a leak in the top corner of the lounge which was repaired by Mr McLennan applying sealant.

[11] The claimants sought an opinion from Joyce Group following publicity of the leaky homes issue. Two further leaks were identified, one under the master bedroom window and the other where the pergola pole met the uncapped balustrade. Mr McLennan repaired them by applying silicone. The same report suggested that the house was built of untreated timber.

[12] In February 2004 a leak developed through the window in the lounge during a storm. Mr McLennan repaired it with silicone. In 2006 the claimants noted leaks in the lounge window and in the roof over the dining room, rust spots in the roof and a crack in the cladding. The claimants decided to repaint the exterior which they did between January and April 2007. Further cracks appeared in the exterior walls. Interior paint began to peel.

THE ASSESSOR'S REPORT

[13] The claimants lodged a claim with the WHRS on 21 April 2008. The assessor found that the house leaked:

> 15.2 **Where and why does it leak?**
> 15.2.1 Joinery transitions – no protective flashings or in seal – insufficient head flashing detail – in variance with manufacturer's specifications.
> 15.2.2 Flat topped balustrades – no protective flashings or slope – in variance with specifications and plans.

15.2.3 Flat topped roof parapets – no protective flashings or slope – in variance with specifications and plans.
15.2.4 Barge facia ends – failure to carry out flashing over barge end.
15.2.5 Northern deck pergola fixtures - inadequate detail and protection.
15.2.6 Cladding to ground at the garage – poor installation in variance with manufacturer's specifications.
15.2.7 Garage door – incorrect ground height- section of floor too high.
15.2.8 Northern and southern corner windows – inadequate detail in variance with manufacturer's specifications.

[14] Damage included extensive timber decay, stachybotrys fungi, possible internal lining cracking and damaged skirting in two rooms. Recommended repairs were:

- strip the cladding;
- remove the joinery;
- inspect for decay and replace decayed wood where required;
- treat remaining timber framing;
- reinstate cladding with a drained cavity system;
- repair base plate framing and hidden joinery;
- ensure adequate continuation of the upstand;
- replace required deck membrane;
- reinstall joinery with suitable flashings;
- form deck balustrade tops in accordance with the manufacturer's instructions with required flashings;
- texture and paint the outside; and
- reinstate and paint internal linings.

[15] An extended roof flashing was also recommended. Outside the garage door there was to be a channel with a drained outlet and refinishing of the concrete. The claimants repaired the dwelling incurring various costs. These and other items were claimed as damages as set out below.

[16] The first and second respondents collectively accepted responsibility for the building. They referred to matters for which they relied on Mr Knol. They were:

a) Application of the finishing plaster and failure to apply the required paint which was to act as a waterproof membrane.
b) Failure to finish polystyrene plant on bands into a slope when plastering.

DAMAGES

[17] Remediation costs of $352,170.85 including GST were not contested. At a total cost of $128,536.25, (which is not contested) the claimant consulted:

a) Helfen Ltd;
b) Craig & Coltart;
c) Roy Taylor Engineering Ltd; and
d) Beagle Consultancy Ltd.

[18] Costs as a consequence of remediation included:

a) cost of alternative accommodation;
b) decorating costs;
c) installation of a heat pump;
d) repairs;
e) cost of replacing model train layout timber supports; and
f) cost of maintaining power to the site for the builder.

[19] Mrs O'Connor said that they were required to move out and find alternative accommodation. They rented a caravan and other accommodation. Some of the rental accommodation did not allow the dog to remain on site during the day so dog day care was arranged. The rental accommodation was also under repair with no laundry facilities. Washing was taken to a laundry service. The telephone number at the rental location was different to the home number. The two numbers were tied together but the costs doubled.

[20] The claimants obtained further loans from the bank with increased bank costs and interest.

[21] The claimants incurred extra medical costs as a result of living in a leaky home.

[22] The amounts claimed were:

Remediation costs	$	352,170.85
Consultant costs	$	128,536.25
Rental accommodation	$	8,250.00
Relocation	$	2,610.36
Bank fees	$	3,051.00
Decorating	$	2,237.14
Repairs	$	6,785.13
Heat Pump	$	5,297.00
Dog day-care	$	4,387.50
Medical expenses	$	340.47
Sub-Total	$	513,665.70
General damages	$	25,000.00
Total	$	538,665.70

[23] The amount of $352,170.85 included an acknowledgment of $46,030.44 for betterment.

[24] In the alternative the claimants sought $330,000 for diminution in value. However, the claimants cannot claim both and proceeded on the claim for damages as set out above.

[25] Mr Robertson for the claimant conceded that the accommodation for pets and medical costs were not recoverable as a matter of law or were too remote.

[26] The heat pump appears in both the remediation costs and the supplementary list so is deleted from the supplementary list.

[27] Mrs O'Connor gave evidence of the impact on her health and the effect on her husband. There was a negative emotional impact once they learned of the leaks and both have been anxious concerning the leaks and the repairs. Their social life has been affected. Due to the financial pressures they could not attend their niece's wedding in Melbourne.

[28] The general damages originally claimed were accepted as being in excess of the $25,000.00 per unit that usually applied.

[29] Generally an award of $25,000 per unit for occupiers is made based on the decisions of William Young P and Baragwanath J in the Court of Appeal in *O'Hagan v Body Corporate 189855* [3], *Mok v Bolderson,* [4] and *Cao v Auckland City Council* [5]. Accordingly, the appropriate joint award to the claimants for general damages is $25,000 for anxiety, disappointment, physical inconvenience and mental distress.

[30] I award the following (all amounts include GST where appropriate):

Remediation costs	$	352,170.85
Consultant costs	$	128,536.25
Rental accommodation	$	8,250.00
Relocation	$	2,610.36
Bank fees	$	3,051.00
Decorating	$	2,237.14
Repairs	$	6,785.13
Sub-Total	$	503,640.73
General damages	$	25,000.00
Total	$	528,640.73

[31] A number of items were claimed as costs. Section 91 of the Weathertight Homes Resolution Services Act 2006 only allows the award of costs if there was bad faith on the part of a party or there were allegations without substantial merit. That section does not apply in this case. The application for costs is declined.

[32] The respondents MacDee McLennan Construction Limited, Duncan McLennan, Porirua City Council and Gerry Knol are jointly and severally liable to the claimants $528,640.73. The claimants having received $405,000.00 from the Council, the other respondents are jointly and severally required to pay $123,640.73 to the claimants.

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[3] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 [Byron Avenue].
[4] *Mok v Bolderson* HC Auckland, CIV-2010-404-7292, 4 April 2011.

APPORTIONMENT AMONG RESPONDENTS

[33] The Council seeks a contribution from the other respondents. Although it admitted that it owed a duty of care it said that it was not negligent because the plans were sufficient for the issue of consent; the inspections carried out were to the appropriate standard and none of the defects which caused leaks could have been found by inspection. Damage was caused by variations from the manufacturer's recommendations, undetectable matters such as the deck membrane being too thin and lack of good trade practice.

[34] The Council said that Mr McLennan is liable for all the losses claimed because of his role in project management, for his building work and as a developer which is the total cost of the claim. Mr Knol is liable for losses flowing from his management of the cladding work, his on site involvement and therefore the cost of recladding. However, having read the assessor's report I find that the faults listed by the assessor would have been visible to the inspectors at the time. The Council are also liable for the damage.

[35] Mr McLennan was primarily responsible for the defects. Mr Knol was responsible for some of the defects as a consequence of the cladding work that he did. The Council was in a position to inspect the defects found and should have done so.

[36] I apportion the responsibility between the parties as 70% to Mr McLennan , 20% to the Council and 10% to the plasterer, Mr Knol.

SUMMARY & ORDERS

[37] The Porirua City Council, having settled with the claimants for $405,000.00, is not required to make any further payment.

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[5] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093,18 May 2011.

[38] The Porirua City Council is entitled to recover a contribution of up to $299,271.86 from Duncan McLennan and Gerry Knol.

[39] Duncan McLennan and Gerry Knol are to pay the claimants the sum of $123,640.73 being the balance between the established damages ($528,640.73) and the amount already paid to the claimants by the Council. Any amount up to $370,048.51 not paid to the claimants by Mr McLennan is to be paid to the Council by way of contribution. Any amount up to $52,864.07 not paid to the claimants by Mr Knol is to be paid to the Council by way of contribution.

[40] Duncan McLennan and Gerry Knol are accordingly ordered to pay the Porirua City Council the sum of $299,271.86 by way of contribution in accordance with their respective apportionments.

[41] To summarise the decision, if the respondents meet their obligations under this determination they would pay the claimants:

a.	Second respondent, Mr McLennan	$370,048.51
b.	Third respondent, Porirua City Council	$105,728.14
c.	Fourth respondent, Gerry Knol	$ 52,864.07
	Total	$528,640.72

[42] The claimants may enforce this determination against the second and fourth respondents up to the amounts that they are ordered to pay in paragraph [40]. The Council is similarly able to enforce the determination against Mr McLennan and Mr Knol up to the full amount of their contributions.

DATED the 6th day of March 2012 .

Roger Pitchforth
Tribunal Member