



SUMMARY

Case: Philpott v Zderich

File No: TRI 2009-100-000076/DBH 01947

Citation: [2011] NZWHT Auckland 16

Adjudicator: Peter Andrew

Date of Decision: 21 March 2011

Background

The claimant brought the claim in regards to her home which she purchased in 1999. A number of the respondents were removed prior to the hearing and the only remaining claims are against:

- The third respondent, Mr Jones, the project manager.
- The fourth respondents, Mr Ryan and Mr Ferris, company directors and cladding installers

Facts

- 27 August 1996: Building consent issued.
- 1996: House built by Mr Jones.
- 31 August 1999: Code Compliance Certificate issued.
- 1 September 1999: House purchased by Ms Philpott.
- 2003: The claimant discovered house was leaking.
- November 2003: Claim filed with the WHRS.

Summary of Decision

The third respondent, Mr Jones, project manager.

Mr Jones accepted that he was the builder and the person in overall charge of the project for the house. The Tribunal considered that the evidence clearly established that Mr Jones owed and breached duties of care to the claimant in failing to construct a weathertight home.

The Tribunal rejected the submission that Mr Jones was a developer and as such owed a non-delegable duty of care. The deciding factor in reaching this conclusion was that Mr Jones built the home with the intention of living in it, which he then did for a short while. However, the finding that Mr Jones was not a developer was of little consequence as he was found to be liable for the full cost of the re-clad for his negligence as a builder.

The fourth respondents, Mr Ryan and Mr Ferris, company directors and cladding installers.

Regarding the liability of Mr Ryan, the Tribunal concluded that there was insufficient reliable and probative evidence on the critical evidence of what he did or did not do in relation to the defective installation of the cladding system to support a finding that Mr Ryan owed the claimant a duty of care. However, the Tribunal did accept the allegation that Mr Ryan owed a duty of care in relation to flashings in the fascia – parapet area as he assumed personal oversight and control of this area. Whilst the

Tribunal accepted that a duty of care was owed, it did not consider that Mr Ryan had breached the duty in any way. As such the claim against Mr Ryan was dismissed.

The evidence relied on by the claimant to establish her claim against Mr Ferris was essentially the same as that relating to Mr Ryan. As such, there was also a lack of sufficiently reliable and probative evidence to establish that Mr Ferris personally owed and breached a duty of care to the claimant. The claim against him was also dismissed.

Quantum

Repairs

The Tribunal was satisfied that the amount claimed by the claimants for the cost of repairs of \$275,350 (\$281,470 with increased GST) was reasonable.

Consequential Damages

The following further costs were also approved:

- Independent supervision of repairs \$9,120
- Accommodation \$12,600
- Furniture removal \$4,600
- Storage \$1,200
- Furniture return \$2,400
- Insurance \$1,200
- Landscape removal and replacement \$5,500

General Damages

The Tribunal was satisfied that the claimant was entitled to an award of general damages of \$20,000.

Summary of Quantum

The Tribunal held that the following damages are established:

- Cost of repairs \$281,470
- Associated expenses/costs \$46,620
- General damages \$20,000
- **Total** **\$348,090**

Failure to mitigate loss

It was submitted that there was significant and unreasonable delays on the part of the claimant in getting the house repaired and as such the claimant failed to mitigate her loss. However, the Tribunal was of the view that the claimant acted reasonably in difficult circumstances and that given her difficult financial circumstances it is not surprising that there was delay in getting the claim to adjudication. The contention that there was a failure to mitigate loss was rejected.

Result

The third respondent, Mr Jones, was ordered to pay to the claimant the sum of \$348,090. The claims against both of the fourth respondents, Mr Ryan and Mr Ferris, were dismissed.