

## SUMMARY

**Case:** River Oaks Farm Ltd & Ors v Olsson & Ors (Ingodwe Trust)  
**File No:** TRI 2008-101-000052/DBH 05463  
**Court:** WHT  
**Adjudicator:** CB Ruthe  
**Date of Decision:** 5 August 2009

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### **Background**

The claimants are the trustees of the Ingodwe Trust that owns the subject property. About a year after the property was purchased, the claimants noticed a leak. The first WHRS assessor's report was completed in 2005 indicating minor problems with remedial work estimated at \$12,000. Repairs were carried out on the property however the building continued to leak. Due to a settlement reached between the claimants and the third, ninth and tenth respondents, the claimants brought the present claim against the remaining respondents:

- Trustees of the Picollo Trust (previous owners)
- Mr Olsson (builder/project manager and a trustee of the Picollo Trust)
- Mr Jarman (labour-only builder)
- Mr Sweetman (applicator of waterproofing membranes for remediation)
- Maxi Holdings Ltd (authorised applicator of Equus products for remediation)
- WB Holland & Ors trading as Holland Beckett (claimants' conveyancing solicitors)
- Mr Marchesan (plasterer)
- Mr Moran (employee of Maxi Holdings Ltd)

### **Claim**

The claimants claimed the full amount of \$772,559.00 broken down as follows:

- Remedial costs                 \$678,332
- Consequential losses       \$ 34,227
- General damages              \$ 60,000

#### *Remedial Costs*

After a conservative allowance of \$16,000 was made for betterment, the Tribunal held that the reasonable cost of repair is \$392,000

#### *Consequential Losses*

The claim for consequential loss is made up of the cost of alternative accommodation for 30 weeks at \$850 per week (totalling \$25,500). The Tribunal allowed 13 weeks with storage for 3 months. The Tribunal therefore concluded that the claimants are entitled to claim \$10,327 based on the following:

- House warrant of fitness   \$2,327
- Alternative accommodation (13 weeks @ \$500per week)   \$6,500
- Storage (3 months at \$500 per month)                                \$1,500

#### *Failed Remediation*

The Tribunal concluded that the sum for Mr Sweetman's ineffective repair work was held at \$1,600

### *General Damages -trustees*

The claimants sought general damages in the sum of \$60,000. But because the Trust owns the property, rather than Mr and Mrs Thurnell who are individual trustees of that Trust, the Tribunal concluded that it has no jurisdiction to award general damages for individuals who are not owners

### *Contributory Negligence*

The Thurnells contributory negligence was assessed at 15%

### *Failure to Maintain*

There was no evidence to support the assertion that the claimants failed to recoat the guttering system with a Chevaline Dext membrane at the earliest opportunity as a temporary repair and to undertake a repaint. Other allegations relating to maintenance were also not considered of sufficient weight to be taken into account.

The Tribunal therefore concluded that the claimants were entitled to claim the amount of \$343,347 consisting of:

• Failed remediation	\$ 1,600
• Damages	\$392,000
• Consequential losses	<u>\$ 10,327</u>
<b>Subtotal</b>	<b>\$403,927</b>
• Less contributory negligence	<u>\$ 60,588</u>
<b>Total</b>	<b><u>\$343,347</u></b>

### *Settlement*

A settlement of \$30,000 was reached with the third, ninth and tenth respondents. This sum was therefore deducted as is the \$1,600 for apportionment purposes. The amount to be apportioned between the remaining parties was therefore \$311,747

## **Summary of Decision**

### *Liability of Picollo Trust - Project Manager*

In negligence, the Picollo Trust conceded that it had a role in the development and therefore the Tribunal found the Picollo Trust liable in negligence, albeit to a limited extent through its inadequate supervision. As the claim against the Picollo Trust was proven, the Tribunal held that there was therefore no need to consider the claim based on an alleged breach of contract, as the outcome would still be the same

### *Liability of Mr Olsson – Builder/Project Manager*

The Tribunal found that Mr Olsson undertook this project with an eye on the budget and at the same time striving to achieve an imposing building. He assumed the responsibility of the project management and supervision by taking on the role normally undertaken by an architect. By engaging Mr Jarman as a labour-only contractor, thus saving the supervision fees and margins payable when the builder is hired to take overall responsibility for a project, he came to shoulder this responsibility. The Tribunal therefore concluded that Mr Olsson has liability due to his negligence as the supervising builder

### *Liability of Mr Jarman – labour only carpenter*

The Tribunal accepted that there were no building defects in the work undertaken by Mr Jarman. The only issue was whether he had a supervisory role. The Tribunal accepted Mr Jarman's evidence that he was employed as a labour-only carpenter with no project management role. He was not personally responsible for any of the faulty workmanship that led to leaks and therefore he had no liability.

### *Liability of Mr Sweetman – Applicator*

The Tribunal found that Mr Sweetman was not negligent in agreeing to Mr Olsson applying the final coat in accordance with the suppliers/manufacturers instructions. However there was sufficient evidence in finding that there was a contract between him and the claimants for remediation and because that remediation failed, Mr Sweetman was liable in the sum of \$1,600.

### *Liability of Maxi Holdings Ltd – Remediation Applicator*

Maxi Holdings Ltd was engaged to undertake remediation at the request of Mr Olsson and/or the Picollo Trust. However the Tribunal found that the only loss is that suffered by Mr Olsson who paid for an ineffective remediation but such loss was of his own making as he specifically directed the scope of the work. In relation to the issue of the producer statement, the Tribunal found that Maxi Holdings was not responsible for the producer statement. The claims against Maxi Holdings were therefore dismissed.

### *Liability of Mr Marchesan – Plasterer*

Mr Marchesan took no part in these proceedings. Based on the evidence before the Tribunal, Mr Marchesan was found responsible for faults attributable to plastering defects.

### *Liability of Mr Moran – Employee of Maxi Holdings Ltd*

The Tribunal held that Mr Moran was not negligent for proceeding to do the limited work he was contracted to do. Further there was no evidence to suggest that Mr Moran knew or ought to have known the repairs would inevitably fail and was thereby negligent. The claim against Mr Moran was therefore dismissed.

### *Liability of Holland Beckett – Claimants’ Solicitors*

The Tribunal concluded that Mr Collett attended to all matters that fairly and reasonably arose in carrying out the claimants’ instructions, which did not include giving advice on structural or watertight matters. The Tribunal accepted the “Eades Test “ was appropriate to establish liability. Further on the facts, the Tribunal found that Mr Collett was not negligent in failing to recommend a pre-purchase inspection report be obtained and that the chances of the claimants accepting advice to make the contract subject to a pre-purchase report was extremely low. The Tribunal therefore held that the causation of loss has not been established on the evidence produced and therefore the claim against Holland Beckett was dismissed.

## **Result**

The Picollo Trust, Mr Olsson, Mr Marchesan and Mr Sweetman were held liable for their negligence. Mr Sweetman however was only liable in relation to the failed remediation work and is therefore only liable to the claimants in the sum of \$1,600. The remaining liable respondents are therefore jointly and severally liable for the entire amount of the claim of \$311,747. In terms of contribution then, the Tribunal made the following apportionments:

- Mr Marchesan 70%
- Picollo Trust 5%
- Mr Olsson 25%

These respondents were thereby ordered to make the following payments:

- Picollo Trust \$15,587
- Mr Olsson \$77,937
- Mr Sweetman \$1,600
- Mr Marchesan \$218,223

## **References to Legislation**

Weatheright Homes Resolution Services Act 2006 s72, s72(2), s73(1)(a)  
Law Reform Act 1936 s17

## **References to Cases**

Riddell v Porteous [1999] 1 NZLR 1  
Bowen v Paramount Builders (Hamilton) Ltd & Anor [1977] 1 NZLR 394  
Wilson & Anor v Welch & Ors (WHT, DBH 04734, 28 March 2008, Adjudicator P McConnell)  
Lester v White [1992] 2 NZLR 483  
Chase v De Groot [1994] 1 NZLR 613  
Body Corporate 183523 & Ors v Tony Tay & Associates Ltd & Ors (HC, Auckland, CIV 2004-404-4824, 30 March 2009, Priestley J)  
Body Corporate No. 189855 & Ors v North Shore City Council & Ors (Byron Ave) (HC, Auckland, CIV 2005-404-5561, 25 July 2008, Venning J)  
GW Atkins Ltd v Scott (1980) 7 Const LJ 215  
Gilbert v Shanahan & Ors [1998] 3 NZLR 528  
National Home Loans Corp v Giffin Couch & Archer [1997] 3 All ER 808  
Clark Boyce v Mouat [1993] 3 NZLR 641  
Bristol & West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698  
Crocombe v Devoy (HC, Auckland, CIV 2005-470-905, 29 November 2006, Lang J)  
Frost & Sutcliffe v Tuiara [2004] 1 NZLR 782  
Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] EWCA CIV 17  
Allied Maples v Simmons [1995] 1 WLR 1602  
Invercargill City Council v Hamlin [1996] 1 NZLR 513  
Axa v Cunningham [2007] EWHC 3032 (QB)  
Brown v Heathcote County Council [1982] 2 NZLR 584  
Darbishire v Warran [1963] 1 WLR 1067  
Ruxley Electronics & Construction Ltd v Forsyth [1996] AC 344  
Dicks v Hobson Swan Construction Ltd (in liq) & Ors (2006) 7 NZCPR 881  
Stevenson Precast Systems Ltd v Kelland [2001] BCL 807  
Warren & Mahoney v Dynes (CA, 49-88, 26 October 1988, Richardson, McMullin & Bisson JJ)  
Bevan Investments Ltd v Blackhall and Struthers (2) [1978] 2 NZLR 97  
Bellgrove v Eldridge (1954) 90 CLR 613  
The Contradictors v Attorney-General 15 PRNZ 120 (PC)  
Manuel & Ors v Waitakere City Council (WHT, TRI 2007-100-30, 28 February 2008, Adjudicator S Lockhart QC)  
La Grouw v Cairns (2004) 5 NZCPR 434  
Hearn & Ors v Parklane Investments Ltd & Ors (Interim Determination) (WHT, TRI 2008-101-45, 30 April 2009)  
Patel v Offord & Ors (HC, Auckland, CIV 2009-404-301, 16 June 2009, Heath J)

## **Other References**

Matthew Conaglen "Shams, Trusts and Mutual Intention" (2008) NZLJ 227