IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2007-100-000027
[2010] NZWHT AUCKLAND 1

BETWEEN	WILLEM JAN ROEST and INEKE JOANNA ROEST Claimants
AND	COTTLE DESIGNER HOMES LIMITED (In Liquidation) First Respondent
AND	AUCKLAND CITY COUNCIL (Removed) Second Respondent
AND	ROCKCOTE ARCHITECTURAL COATINGS (NZ) LIMITED (In Liquidation) Third Respondent
AND	RICHARD PETER ELLIOT (Not Served) Fourth Respondent
AND	VALERIE JOY COTTLE Fifth Respondent
AND	GRANT MALONE Sixth Respondent
AND	ROBERT MEDEMBLIK (Removed) Seventh Respondent

Hearing: 19 and 20 January 2010

Appearances: B. Cash, for the claimants
Fifth respondent, self represented
Sixth respondent, self represented

Decision: 12 February 2010

FINAL DETERMINATION
Adjudicator: S Pezaro

CONTENTS

BACKGROUND

[1] On 8 December 2002 Willem Roest and Ineke Roest (the claimants) purchased the dwelling at 2 Sylvia Road, St Heliers, from Valerie Cottle, the fifth respondent. Shortly after they took possession of the property the claimants discovered cracks in the cladding of the garage wall. They contacted Rockcote because Mrs Cottle had left them Rockcote's contact details. Rockcote carried out various repairs however in early May 2004, after heavy rain, water came through the living room wall and ceiling on the north elevation. Part of the roof was subsequently repaired however a further leak appeared a year later after heavy rain and Mr and Mrs Roest contacted Neil Summers for advice. Mr Summers recommended that the

claimants apply to the Department of Building and Housing for a WHRS report. This report by Darin Devanny (the Devanny report) was issued on 20 June 2006 and the claimants filed for adjudication on 13 July 2007.

[2] The claimants commenced remedial work around November 2007 and completed this work, now referred to as the first stage of remedial work, in July 2008. The first stage of remedial work was supervised by Mr Summers who identified additional defects as the work progressed. As a result, the claimants applied for an addendum report which was completed on 17 October 2008. The addendum report prepared by Neil Alvey identified additional defects to those in the Devanny report and recommended a full reclad. The second stage of repairs based on the addendum report is in progress.

[3] The claimants rely on the evidence of Neil Summers and the addendum report for evidence of defects, and for proof of quantum on the actual cost of the first stage of repairs and the cost estimate by Kwanto Quantity Surveyors in the addendum report. Neither Mrs Cottle nor Mr Malone called any expert evidence to challenge the evidence of Mr Alvey or Mr Summers or the joint leaks list that these experts prepared prior to hearing. The claimants rely on this defects list to prove the cause of damage, repair costs and liability for particular defects.

[4] The standards in force when this dwelling was constructed were set by the Building Act 1991 (the Building Act). Section 7 of the Building Act required that all building work for residential properties comply with the Building Code which was part of the regulations enacted by the Building Act. The Building Code set functional and performance requirements for all building work. For the purposes of this claim the relevant clauses of the Building Code are clauses B2 (durability) and E2 (external moisture).

THE PARTIES

[5] Grant Malone, the sixth respondent, was the builder. At the time of construction Mrs Cottle was one of two directors of Cottle Designer Homes Limited. Mrs Cottle said that the other director was her son, Brent Cottle, who took no part in the running of the business. Cottle Designer Homes Limited went into liquidation after these proceedings had commenced. The second respondent, Auckland City Council, was removed from the proceedings because a private certifier carried out the inspections. The third respondent, Rockcote Architectural Coatings (NZ) Limited, is the company that supplied the plaster system and is now in liquidation. The fourth respondent, Richard Peter Elliot, is named as the licensed applicator of the Rockcote system however Mr Elliot could not be served. The seventh respondent, Robert Medemblik, was the designer. He was removed from these proceedings as there was no evidence that his design failed to meet the standards of the time.

QUANTUM

[6] The claim for remedial costs is $385,548 being the total remedial cost estimated by Kwanto Limited in Mr Alvey's addendum report. The actual cost of the first stage of remedial work is $217,748.93. The estimate for the second phase of the remedial work indicates that the actual cost of all repairs will exceed the sum estimated in the addendum report by approximately $119,000. The claimants are not claiming the full amount of the cost to remediate the property and therefore say that there should be no deductions for betterment. Mr Alvey's opinion at hearing[1] was that the Kwanto estimate was light and that the costs claimed were reasonable although he stated that the cost of remediation could have been reduced if the extent of the damage had been discovered at the outset. However as the fifth and sixth respondents have not challenged the quantum or produced any evidence to suggest that the amount claimed for remedial cost is not

[1] Transcript of hearing 19 January 2010 at 11.00 am.

reasonable I accept the estimate provided in the addendum report. For these reasons the claimants are entitled to the full amount claimed for repair.

THE CLAIMS

The claim against Valerie Cottle

[7] The three claims against Valerie Cottle are in contract for breach of the vendor warranties and in negligence as a developer and as the director of Cottle Designer Homes Limited.

The claim in contract

[8] Clause 6.2(5)(d) of the Agreement for Sale and Purchase (ADLS Seventh Edition (2) July 1999) provides that:

> **6.0 Vendor's warranties and undertakings**
>
> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (d) All obligations imposed under the Building Act 1991 were fully complied with.

[9] The claim is that Mrs Cottle has breached the vendor's warranty because the dwelling does not comply with the requirements of the Building Act 1991.

[10] As Mr Cash acknowledges in his submissions there is no case law directly analogous to the present situation. However he submits that the claim succeeds if the claimants demonstrate that Mrs Cottle was the vendor and 'caused or permitted to be done' the relevant work. There is no issue that the relevant work required a permit and building consent nor is it disputed that there are defects which amount to breaches of the Building

Code. The two issues for determination in relation to this claim are whether Mrs Cottle owned the house during the period of construction and if she did whether she is in breach of the vendor warranties as a result.

Liability of Valerie Cottle

[11] Mr Roest stated that the property was marketed as a home that Mrs Cottle had built for herself with the implication that as a well-known developer she would have taken particular care in constructing her own home. At the hearing Mr Roest produced sketch plans which Mrs Cottle had provided to him (Exhibit 1). On these plans Mrs Cottle had sketched her ideas for the furniture and layout of the home and on the back of the plans she had calculated a budget for the construction and certain items of furniture. Mrs Cottle accepted that she had made the notes on the plans. The claimants submit that these plans show that Mrs Cottle was customising the design to her own requirements, using her experience as a developer, and that she was actively involved in the construction.

[12] Mrs Cottle's defence to this claim is that she did not own the house during the period of construction. She says that although the house was designed for her and she intended it to be her own home, prior to the start of construction she decided that the home was for Cottle Designer Homes Limited and would be sold at the conclusion of the project. Mrs Cottle says that the property was transferred to the company but she changed her mind again when construction was complete and the property was transferred back to her. She then lived in the house for three years before selling it to the claimants. Mrs Cottle has not provided any evidence to support her defence. There are no documents or records showing any transfer of the dwelling between her and Cottle Designer Homes Limited. Despite referring to her daughter's part in this decision making process Mrs Cottle has not called her daughter to give evidence.

[13] Although the site was originally owned by Cottle Designer Homes Limited Mrs Cottle has not produced any evidence to show the date of

transfer to her. Apart from the building consent issued by the Auckland City Council which names Cottle Designer Homes Limited all other relevant documents including the application for building consent, the specifications, the consent drawings, the gas fitting certificate and the producer statement design refer to Valerie Cottle and not the company. For these reasons I do not accept Mrs Cottle's assertion that she did not own the dwelling during the period of construction. I find that she was the owner at all relevant times.

[14] In *Tabram v Slater & Ors* WHT TRI-2007-100-41, 17 April 2009, a vendor who was found to be the head contractor/project manager and had not followed the plans and specifications was held liable for breach of clause 6.2(5)(d). In Mrs Cottle's case there is no allegation that any of the defects arose from a failure to follow the plans or specifications however Mrs Cottle was the decision maker behind the project. All invoices came to her and there is no suggestion that anyone else had any influence over the scope of works, the manner in which the construction proceeded or the materials used.

[15] On her own evidence, Mrs Cottle decided which contractors to use and it was her decision that there would be no on-site supervisor or project manager. For the reasons that follow, this decision caused the relevant defects and I am satisfied that Mrs Cottle is liable for causing or permitting work to be carried out which was in breach of the Building Act. Mrs Cottle is therefore liable to the claimants in contract for the cost of remedying this breach of the vendor's warranty which is the full cost of the remedial work of $385,548.

[16] As a result of this decision I am not required to determine the claims in tort against Mrs Cottle. However, the unchallenged evidence of the experts is that every defect is attributable to a lack of supervision of the method and sequence of construction. Despite Mrs Cottle's assertion that she always engaged the same core team of contractors and was entitled to rely on them, she confirmed that she had not used the Rockcote system or the roofer before. It was Mrs Cottle who decided not to engage a site

supervisor or project manager and no one else would have made this decision and there is clearly merit in the claims that she was negligent.

The Claim against Grant Malone

[17] Mr Malone was the builder who constructed the property. He says that he did this work on a labour-only basis. Although Mrs Cottle said that Mr Malone had overall responsibility for the building work,[2] she agreed that he did not have responsibility for other subtrades and accepted that he was on a labour-only contract. Mrs Cottle produced a list of the work that she says Mr Malone carried out.[3] Mrs Cottle said that although she no longer had Mr Malone's contract for 2 Sylvia Road, she found other similar contracts and compiled the list of his work from those contracts. Neither Mrs Cottle nor Mr Malone has been able to produce any invoices or documentation for Mr Malone's work. However Mr Malone accepts that he carried out the work listed by Mrs Cottle and that[4]:

- He invoiced Cottle Designer Homes Limited;
- He didn't recall discussing the job with anybody;
- There was no schedule for the job;
- He personally gave his invoices to Mrs Cottle;
- Mrs Cottle was the only person he dealt with in relation to this project.

[18] Under cross examination by Mr Cash, Mr Malone stated that he had built houses which he had sold for profit. He accepted that there was an extra cost to building if a project manager was engaged. Mr Malone also accepted that the construction had some complex features, in particular the dormer windows and that there were defects in the construction. Mr Malone said that he had worked on several other projects for Mrs Cottle but

[2] Transcript of evidence given on 22 June 2009.
[3] Doc 9 in claimants' bundle.
[4] Transcript of evidence given on 22 June 2009.

had not worked with the roofer (ANZA) or the plasterer before and had no experience or knowledge of the Rockcote plaster system.

Did Mr Malone owe a duty of care to the claimants?

[19] Mr Cash submits that there is clear authority that builders of domestic residences owe a duty of care to subsequent owners to carry out their work to the appropriate standard. I accept this submission based on the decision in *Byron Avenue*[5] where Venning J considered the same question:

> "[296] For the sake of completeness I confirm that I accept a tradesman such as a plasterer working on site owes a duty of care to the owner and to the subsequent owners, just as a builder does."

[20] Mr Malone accepts that he is an experienced builder. It is apparent that he did not consider he required any supervision on the job as he stated that he employed people to work with him whom he described as 'carpenters, probably an apprentice and maybe a hammer-hand'[6]. Mr Malone carried out his work as an experienced builder taking full responsibility for interpreting the plans and specifications provided and making all necessary decisions in relation to the manner in which his work was carried out and arranging the preline, footings and slab inspections. I conclude that Mr Malone owed the claimants a duty of care.

Did Mr Malone breach the duty of care owed to the claimants?

[21] I have considered whether Mr Malone is liable for those defects attributed by the experts to the builder in the defects list. The most significant defect is the lack of an outlet from the internal gutter to the external rainwater head (defect 1). Mr Alvey described this as primarily a sequencing defect. He said that the barge fascias which Mr Summers says block the gutter were installed in accordance with the plans but that this

[5] *Body Corporate No 189855 v North Shore City Council (Byron Ave)* HC Auckland CIV-2005-404-5561, 25 July 2008, Venning J.
[6] Transcript of evidence given on 22 June 2009.

detail was never going to work. In Mr Summers' opinion a competent builder would not have built the box gutter in the manner that it was constructed.

[22] Mr Alvey's evidence on this defect is based on Mr Summers' photographs. Mr Summers was the only witness in a position to photograph or inspect the gutter as this area was prepared for remedial work. There are no photographs that show the depth of the gutter and Mr Malone contended that the gutter was not below the fascia board but flush with it. Mr Alvey said that the structure of the gutter was not completely clear because it was blocked by debris however he thought that the presence of debris indicated that the fascia was marginally higher than the gutter. Mr Alvey said that this situation could be contributed to by the barge tile.

[23] There is insufficient evidence of the construction of the internal gutter to attribute liability for this defect to Mr Malone. I am satisfied that this defect is the result of a sequencing issue and lack of supervision of the relevant trades. Mr Malone had no responsibility for supervising the other contractors and therefore it would not be reasonable to expect him to control the sequence of construction of the gutter. This defect is an example of the effect of Mrs Cottle's failure to ensure adequate site supervision and project management.

[24] The other defects which Mr Alvey and Mr Summers have attributed to Mr Malone are defects 5, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19 and 21. Mr Malone denies that he fixed the pergola to the cladding (defect 17). He says that he left site before this was installed. Mrs Cottle states that she cannot remember who installed the pergola. As both Mr Alvey and Mr Summers considered that it was possible that the pergola was installed either after the plaster was finished or possibly before the final coat, I accept Mr Malone's evidence that he had left site by this time and did not install the pergola.

[25] Defect 5 is the installation of the curved dormer windows on the north, west and south elevations. Mr Alvey and Mr Summers said that the failure to provide a means of disposal for storm water run-off and inadequate flashing installation caused damage. Mr Alvey said that the lack of any means of diverting runoff from the roof was a design defect which required significant remedial work on the roof but would not on its own have necessitated a reclad. In Mr Alvey's opinion the designer should have considered this issue.

[26] Mr Summers said that the problem with the dormer windows was the manner in which the windows were framed up so that when the tiles were laid moisture gathered at the junctions. However Mr Summers accepted that the windows were constructed in accordance with the plans. He said that in order to remedy this defect the dormers were re-designed to lengthen the curves so that they drained onto the roof. Mr Summers described this defect as a defect in construction which did not allow the tiler to do his job properly.

[27] Mr Malone disputes liability for this defect because he says he built the structural framing of the dormer only and the roofer applied the curved plywood and the membrane. Mr Summers' opinion is that it would be unusual for the roofer to install the ply however in the absence of any evidence to contradict that of Mr Malone I accept that he did no more than construct the framing for these windows. On the basis of Mr Summers' description of the work required to remedy this defect I am satisfied that the primary cause of this defect was the design. This is a defect that would have been identified by a competent project manager or site supervisor. Mr Malone was not in that role and therefore has no liability for this defect.

[28] Defects 11 - 15 relate to the master bedroom deck on the north elevation however Mr Malone has no liability for defects 14 and 15. Mr Alvey said that defects 11 – 15 made some contribution to the need to reclad the north elevation and that defect 16 which is the embedment of the barge fascias required a partial reclad of the north elevation. Defects 11, 12 and 13 which are attributed to Mr Malone are the flat top timber capping on the

balustrade, the penetrations through the balustrade, the lack of capillary break between the timber capping and the balustrade cladding and the lack of saddle flashing to the balustrade/roof junction.

[29] Mr Malone disputed liability for these defects. He relied on the Devanny report which stated that there was membrane present under the capping on the balustrade whereas Mr Summers and Mr Alvey believe there was none. However it was Mr Alvey's evidence that even if membrane had been present, the nails penetrating the timber capping would have punctured any membrane and allowed water ingress. In addition, the balustrade was flat topped and did not comply with the BRANZ recommendation of a 50 degree fall. The experts accept Mr Malone's submission that this fall was not a requirement at the time however their evidence is that this was good practice. Therefore I am satisfied that a competent builder would have constructed the balustrade with the recommended fall. For these reasons I am satisfied that Mr Malone caused the defects identified as 11, 12, and 13.

[30] Mr Malone also disputed liability for the embedded barge fascias (defect 16). Mr Summers said that there was so much damage around the left end of the balustrade that it was impossible to tell what had caused it but he believed that the barge fascias had contributed. Mr Alvey said that he believed the problem with the barge tiles caused water ingress which travelled down to the bottom plate however he said that there were four sources of water ingress to this area - the barge tiles, the embedded fascias, the ground level and the door frame of the garage separating. Mr Alvey believed that the fascias were the most likely cause of the severe damage. Mr Malone installed the barge fascias and I am satisfied that the expert evidence and the photographs taken by Mr Summers demonstrate the damage caused by this work.

[31] Mr Summers agreed with Mr Alvey who said that defects 18, 19 and 20 were systemic failures that required a total reclad. Mr Malone is not responsible for the sill flashing (defect 20) but the experts do attribute liability to the builder for the head flashings which were installed over the building

wrap on all elevations (18) and the lack of stop ends to the curved head flashings (19). Mr Summers agreed with Mr Alvey that, although stop ends were not common practice at the time of construction, it was common practice at that time to use stop ends on curved flashings.

[32] In his brief of evidence, Mr Malone did not deny installing the head flashings but stated that he had been unable to locate any photographs of the damage. In Mr Summers' reply brief he identifies his photographs 5, 7, 11, 12 and 31[7] as demonstrating the damage caused by defect 18. I am satisfied that the experts have identified the damage caused by this defect and find Mr Malone liable for defects 18 and 19.

[33] Mr Malone disputes liability for the inadequate ground clearance, defect 21, which according to the experts' defects list affects all elevations. Mr Malone accepts that he installed the hardibacker sheets but says that the Rockcote representatives had sole responsibility for the plastering and the roofer was responsible for lapping the membrane over the hardibacker. Mr Alvey agreed with Mr Malone that the landscaper would need to take into account the proximity of the hardibacker to the ground. However Mr Alvey said there there was a need to retain the front (south) elevation, to avoid the cladding being embedded in the ground.

[34] Mr Summers' view was that it was not reasonable to expect a landscaper to know about ground levels although he did not provide any evidential basis for this opinion. However there is no evidence of the ground level at the time that Mr Malone installed the cladding and the claimants carried out landscaping after they purchased the property. Neither of the experts could determine the depth of the hardibacker when it was installed. According to Mr Alvey the main ground level issues occur at the three elevations involving the garage. He said that on the north elevation the main ground level issue was the posts embedded in the concrete however this defect is not being remediated. Mr Alvey said that the ground

[7] Tab 32 in claimants' bundle.

level was not a significant defect and it was more likely that water had travelled down to the bottom plate as a result of other defects than wicked up from the ground. Taking into account the high ground level on the south side, the absence of any evidence of the ground level at the time that the hardibacker was installed or the extent to which landscaping done by the claimants may have affected the ground level, I am not satisfied that there is sufficient evidence to show that the installation of the hardibacker caused the lack of ground clearance. For these reasons I conclude that Mr Malone is not liable for this defect.

Liability of Grant Malone

[35] Mr Summers and Mr Alvey agreed that defects 18, 19 and 20 were systemic failures requiring a total reclad on the elevations on which they occurred. Defect 19 was present on the north, south and west elevations and defect 18 was present on all elevations therefore the defects for which Mr Malone is liable meant that each elevation needed to be reclad. Although I found Mr Malone not liable for the installation of the pergola and the lack of ground clearance and there was no claim in respect of defects 14 and 15, the damage caused by these defects is indistinguishable from the damage caused by Mr Malone. Mr Malone is therefore liable for the cost of recladding.

[36] The claimants are not claiming the cost of the roof from Mr Malone as they accept the roof was not his responsibility. I have found that Mr Malone is not liable for the defects in the internal gutter and dormer windows and have considered whether the cost of repairing these items can and should be separated from the other repair costs for the purpose of determining Mr Malone's liability to the claimants. The claimants have not provided any evidence that demonstrates what proportion, if any, of the cost of remedying these items relates to recladding. From the evidence of Mr Summers on the remedial work required and the description of remedial works on the defects list I am satisfied that the work required in respect of these two defects was predominantly re-design and repair of items other

than the cladding and joinery for which Mr Malone is liable. For these reasons I find that Mr Malone is liable for the cost of remedial repairs less the cost of the roof, internal gutter and dormer windows, a total of $188,871.75 calculated as follows:

Total Repair Cost	$385,548.00
Less	
Roof	($88,723.25)
Internal Gutter	($88,676.00)
Dormer Windows	($19,277.00)
Total	**$188,871.75**

GENERAL DAMAGES

[37] The claimants claim $25,000 each in general damages. Mr and Mrs Roest have remained in the property during the remedial work. By doing so they have saved the expense of relocating but have suffered stress and inconvenience throughout the period of repair. There has been no challenge to this claim from the fifth or sixth respondents. The recent High Court decision of Woodhouse J in *White v Rodney District Council*[8] confirmed that an award of general damages is appropriately set between $20,000 and $25,000 in cases of this type. For these reasons I am satisfied the claimants are entitled to an award of damages as claimed, in total $50,000.

INTEREST

[38] The claimants claim interest pursuant to clause 16 of schedule 3 of the Weathertight Homes Resolution Services Act 2006 which gives the Tribunal power to award interest at the 90 day bill rate plus 2%. Interest is calculated at the rate of 4.76%[9] on the sum of $217,748.93 being the cost of the first stage of remedial work from 31 July 2008 and on the balance of

[8] HC Auckland, CIV 2009-404-1880,19 November 2009, Woodhouse J.
[9] 90 day bill rate of 2.76% plus 2%

$167,799.07 claimed for the second stage of remedial repairs from 30 September 2009. Interest payable on the total repair cost is $18,935.10 calculated as follows:

		Days	Interest Cost
Stage 1 Remedial work from 31 July 2008	$217,748.95	562	$15,959.03
Stage 2 Remedial work from 30 September 2009	$167,799.07	136	$2,976.07
		Total	**$18,935.10**

SUMMARY OF QUANTUM

[39] Neither of the respondents filed cross-claims and as I have found Mrs Cottle liable in contract there is no question of apportionment of liability between the respondents. Interest awarded on the amount of repair costs payable by Mr Malone is $13,842.59 calculated from 31 July 2008. The total payable by each respondent is calculated as follows:

Valerie Cottle	
Repairs	$385,548.02
Interest	$18,935.10
General Damages	$50,000.00
Total	**$454,483.12**

Grant Malone	
Repairs	$188,871.75
Interest	$13,842.59
General Damages	$50,000.00
Total	**$252,714.34**

ORDERS

[40] Valerie Cottle is to pay the claimants, Willem Jan Roest and Ineke Joanna Roest, the sum of $454,483.12 immediately.

[41] Grant Malone is to pay the claimants, Willem Jan Roest and Ineke Joanna Roest, the sum of $252,714.34 immediately.

[42] The total amount enforceable by the claimants is $454,483.12.

DATED this 12th day of February 2010

_____

S Pezaro
Tribunal Member