CLAIM NO: TRI-2007-101-14

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of an adjudication

BETWEEN	**David Edmund Norman Wallis and Andrew John Dexter Guest as Trustees of The Seaview Trust**
	Claimants
AND	**Wet-Seal NZ Ltd**
	First Respondent
AND	**Murray Searle**
	Second Respondent
AND	**Mark Spiekerman**
	Fourth Respondent

DECISION

DATED 21st August 2007

Parties

1. The claimants David Edmund Norman Wallis and Andrew John Dexter Guest are trustees of the Seaview Trust (the trust). By a notice dated 1 May 2007 they appointed Richard May as the representative of the trust.
2. The first respondent Wet-Seal New Zealand Limited (Wet-Seal) is the supplier of sealants and the franchiser of sealant businesses in various parts of New Zealand. Mr. Andrew Davie of Treadwells appeared on instructions from Wet-Seal.
3. The second respondent Murray Searle was the original owner of the property which is the subject of the dispute and the builder or clerk of works for its construction. Mr. Searle appeared in person.
4. The third respondent was removed at a preliminary conference on 20 July 2007.
5. The fourth respondent Mark Spiekerman was the applicator of the sealant.

Application

6. On 8 September 2005 the claimant applied to the Weathertight Homes Resolution Service to have a claim accepted in relation to the damage.
7. In September 2005 Murray Humm was appointed as an assessor and conducted an assessment. He made his report on 1 November 2005 stating that in his view the dwellinghouse met the criteria set out in s 7(2) of the Weathertight Resolution Services Act 2002. It was a dwellinghouse built within the prescribed period (10 years), was a leaky building and damage had occurred as a result of it being a leaky building. He found that it met the criteria for eligibility of claims for mediation and adjudication services provided for in the Weathertight Homes Resolution Services Act 2002.
8. In May 2007 the Seaview Trust applied for adjudication with the Weathertight Homes Tribunal.
9. On 6 June 2007 Roger Pitchforth was appointed as the Tribunal Member to hear the claim.
10. On 9 July 2007 there was a preliminary conference. Applications for removal by Wet-Seal New Zealand Limited and Murray Searle were declined. A similar application from the Kapiti Coast District Council was deferred for lack of supporting evidence. Mr. Spiekerman attended this preliminary conference and indicated that he would seek removal from the proceedings and the substitution of Spiekerman Trading Limited (in receivership). He took no further steps in the proceeding.

11. On 20 July 2007 there was a second preliminary conference and all parties consented to the removal of the Council as a party. A removal order was made accordingly.

The building

12. The claimant owns a property at 14 Garden Road, Raumati Beach, Kapiti Coast.

13. The house was built between September 1999 and July 2002 when a code compliance certificate was issued.

14. The house was built under the direction of then owner, Murray Searle, who was a developer and quantity surveyor trading as Classic Homes. He acted as his own clerk of works.

15. Mr. Searle was building the home for his own use and was concerned about possible leakage. He decided that in order to protect the house from breaking down in the event of leakage he would use tanalised timber and the best quality product on his deck.

16. The house was to have two decks. A builder under Mr. Searle's supervision installed the plywood bases of the decks. No particular check was made of the fall. Mr. Searle was not concerned about some ponding as the seal should not leak; it was marketed as useable in swimming pools. There was no comment from the Council in relation to the fall. The assessor found that the fall was not sufficient and not in accordance with the plans.

17. The consented drawings specified 1.5 mm Butynol or Dec-k-ing waterproof membrane on the balcony decks.

18. Mr. Searle made inquiries about both products and formed the view that the products were not suitable. He was particularly concerned that the effect of salt on these products could adversely affect their properties. He discussed the matter with the Kapiti Coast District Council.

19. Mr. Searle met Mr. Spiekerman on a couple of occasions to discuss the Wet-Seal product and the process. After perusing the information available Mr. Searle decided that Wet-Seal would be a better product for the deck.

20. At the time the BRANZ Appraisal Certificate No 327 for the Wet-Seal Waterproofing membrane stated:

    The Wet-Seal system has been appraised for use as an internal wet area waterproofing membrane for floors, walls and shower bases that are to be tiled.

21. The Wet-Seal product was used for these purposes inside the house.

22. The same Wet-Seal product was used on the deck. The product appraised under certificate 372 was not appraised for external use. At the time of

construction the Wet-Seal did not have an appraisal certificate covering its use on exterior decks.

23. Mr. Spiekerman, or his employee under his supervision, proceeded to lay a Wet-Seal membrane on the deck.

24. Mr. Searle asked Mr. Spiekerman about the need for the construction of control joints to take account of movement, expansion, contraction and earthquakes. He was assured that they were not needed. (The subsequently issued BRANZ Appraisal Certificate No 486 (2005) for the Wet-Seal waterproofing membrane for external decks and balconies provides, in 2.4, for movement and control joints in the substrate to be carried through to the tile finish.)

25. Mr. Spiekerman provided a guarantee. The guarantee and all the information relating to the deck were lodged with the Kapiti Coast District Council. That material can not now be found.

26. At the conclusion of the construction Mr. Searle was happy with the results.

27. The trust took over the property in December 2004.

28. There was no dispute that the waterproofing membrane applied to the deck had failed to prevent moisture penetrating through the plywood substrate. It had bubbled up and was not flexible. It was also accepted that minimal fall in the deck may also have contributed to the problem.

29. The damage caused by the failure included water damage to the ceiling in bedroom 3, tiles losing adhesion to the membrane and the waterproofing membrane and ply substrate cracking where substrate movement occurred.

Repairs

30. It was agreed that Mr. Searle had been helpful in relation to the investigation of the leak and the discussion about the repairs.

31. Mr. Bronson representing Wet-Seal took off the tiles, ground off the solvent and applied new solvent. This was a dirty and time-consuming task which took some weeks. The tiles used on the first occasion could not be cleaned economically.

32. Wet-Seal provided a new sealant with a polyurethane base rather than the previously used epoxy resin.

33. The value of the work done by Wet-Seal was not quantified by the parties but it was accepted that the assessors' estimate of the value of work to be done at $46,563.00 was reasonable. There was some disagreement between the parties as to the percentage of the value represented by Wet-Seal's work but it was agreed that it was substantial.

34. The claimant trust paid for repairs to the internal damage.

35. A tiler subsequently laid the tiles for a total of $19,429.17.

36. The new deck with tiles is entirely satisfactory. The trust has a 15-year warranty from Wet-Seal.

37. The trust is claiming from the respondents jointly and severally $19,429.17 being the cost of the tiling.

Liability

37. As previously discussed, the cause of the leak into the dwelling was first the lack of fall on the deck and second the application of a sealant to the deck which failed.

Mr. Searle's liability

38. Mr. Searle submitted that he was not personally responsible for the costs involved following the leak as he had relied on others to provide expertise and process.

39. In relation to the deck there were no other parties to these proceedings who could have been responsible for the fall on the deck.

40. Mr. Searle gave evidence that having decided that the Butynol or Dec-k-ing waterproof membrane was unlikely to survive the salt spray he relied on Mark Spiekerman's advice that Wet-Seal would be a suitable waterproof application.

41. The relationships between Mr. Spiekerman, Wet-Seal and the various companies were not clear to Mr. Searle at the time that he made the contract and received the guarantee. The documentation relating to the contract was lodged with the Kapiti Coast District Council for the purposes of gaining approval of the process.

42. Mr. Searle had two relationships with the trust. First, he was the vendor of the property that he had used as a residence. Second, he was the builder of the dwelling.

43. The agreement for sale and purchase was not provided in evidence and no information was supplied as to representations or special clauses.

44. Whatever duty Mr. Searle had in contract, he had a duty in tort to exercise reasonable care to achieve a sound building. In the words of Baragwanath J in *Dicks* (supra) [32] the duty was owed as developer (*Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234), and as builder (*Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394 (CA));

45. The trust is entitled to an award against Mr. Searle for $19,429.17 being the cost of the tiling because he breached that duty of care.

Wet-Seal and Spiekerman's liability

46. Wet-Seal was a party to these proceedings. It offered no evidence but did submit a copy of the franchise agreement with Spiekerman Trading Limited.

47. The franchise agreement is 56 pages long and Mr. Searle did not know of its existence or content at the time of contracting. By clause 39 of the franchise agreement the governing law of the contract was the law of New South Wales.

48. Wet-Seal submitted that the document shows that Wet-Seal had appointed Spiekerman Trading Limited as a franchisee. The other parties did not dispute this.

49. Wet-Seal submitted that clause 33 of the franchise agreement excludes it from liability. That clause reads:

> 33.1 The Franchisee and the Franchisor agree that they are independent contractors and the Franchisee is not and shall in no event hold itself out as an agent of the Franchisor for any purpose. The Franchisor shall not be obligated or bound by any agreements, representations or warranties made by the Franchisee nor shall the Franchisor be obligated or liable for any costs, claims, demands, penalties or damages to any person or property directly or indirectly arising out of the operation of the Franchised Business whether caused by the Franchisee's negligent or willful action or failure to act or otherwise, provided that the Franchisor is not in substantial breach of this Agreement.
>
> 33.2 The Franchisee agrees to indemnify the Franchisor against and to reimburse the Franchisor for all such obligations, costs, claims, penalties and damages for which it is held liable and for all costs incurred by it in defence of any such claim brought against it or in any action in which it is named as a party including without limitation, legal fees, costs of investigation and the proof of facts, court costs, other litigation expenses, travel and living expenses provided the Franchisor is not in substantial breach of this agreement. The Franchisor shall have the right to defend any such claim.

50. This clause, being in a contract between Wet-Seal and its franchisee, is not helpful in determining the relationship between Mr. Searle and Wet-Seal.

51. The agreement provides for the grant of a franchise that gave *'the right to operate exclusively within the territory during the term using the intellectual property, the franchise system and the franchise image following - (no image included). The installation and/or application of the authorised products and related products for customers in the territory'.*

52. The exclusiveness was confined to the territory, the licence to use the marketing and other assets of the franchisor were non-exclusive. The use of the signs relating to Wet-Seal was prescribed. Marketing was managed by Wet-Seal.

53. Purchase of materials and supplies was controlled by the franchisor, Wet-Seal. The franchisee was forbidden to sell any other goods or materials.

54. Clause16 of the franchise agreement details the payment system for work done by the franchisee**:**

> 16.1 The Franchisor will produce for submission and submit to customers of the Franchisee all invoices in respect of work done by the Franchisee in the Franchised Business based upon the reports provided by the Franchisee to the Franchisor. Such invoices will be issued in the name of the Franchisee, but will

> require all payments to be forwarded to the Franchisor as the nominee of the Franchisee.

55. Taking into account the terms of the franchise agreement and Mr. Searle's evidence I find it not surprising that he believed that he was dealing with Mr. Spiekerman as an agent of Wet-Seal. The branding was that of Wet-Seal, payment was to Wet-Seal and there was nothing to indicate that Wet-Seal would not take responsibility for its product. I find that Mr. Spiekerman was Wet-Seal's agent.

56. Wet-Seal owed a duty to the trust in tort and Mr. Searle in both contract and tort and breached its duty to provide a sound waterproof membrane for the decks.

57. I find Wet-Seal is jointly and severally liable with the other respondents to the trust for the full amount.

58. At the preliminary meeting Mr. Spiekerman submitted that he should not be involved in this matter as he was a director of the company, Spiekerman Trading Limited, a company now in receivership. The implication in his submission was that directors are immune from suit.

59. As Stevens J said in *Hartley v Balemi & Ors* CIV 2006 – 404-002589, Auckland High Court, 29 March 2007, para [92] when discussing the role of a builder who happens to be a director of a company.

> However, personal involvement does not necessarily have to mean that physical work needs to have been undertaken by the director – that is just one potential manifestation of actual control over the building process. Personal involvement and the degree of control may also include, as in *Morton* itself, administering the construction of the building. Therefore, the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the process or any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence, liability, should that duty of care be breached.

60. Mr. Davie submitted that Mr. Spiekerman should be found personally liable for the faulty work. He referred to *Dicks v Hobson Swan and Others* (CIV 2004-404-1065, decided December 2006).

61. Mr. Spiekerman was involved in the recommendation of the process, the supply of the materials and the application of the membrane on the deck. He was acting as a Wet-Seal sales representative and applicator of the product rather than a director of a company. I adopt the reasoning in *Dicks* (supra), paras [35-63] and apply the test in *Hartley* (supra). He owed a duty of care to the trust in tort and Mr. Searle in contract and tort which he did not discharge. I therefore hold that Mr. Spiekerman is personally liable to the trust in tort

62. Mr. Spiekerman is jointly and severally liable with the other respondents to the trust for the full amount.

Accordingly I find that:

63. All respondents are jointly and severally liable to the trust for the full amount of the claim, namely $19,429.17.

Allocation of proportion of liability

64. I received submissions from counsel encouraging me to follow *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 and the cases which followed it down to the most recent, *Dicks*. As between the respondents, s 17 of the Law Reform Act 1936 requires an allocation of responsibility. It reads:

> 17 Proceedings against, and contribution between, joint and several tortfeasors :
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

……

> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

65. Mr. Searle has two areas of responsibility. The first is as builder and clerk of works in which capacities he did not ensure that the fall on the substrate of the deck was adequate. The second was in contracting with Wet-Seal or its agent but not obtaining a waterproof membrane on the deck.

66. All parties acknowledged that Mr. Searle did his best to rectify the problem, provided advice and took an active interest in the remedial work required to make the dwelling watertight.

67. The assessor estimated the cost of correcting the lack of fall at $8,500. Although in the final result a different system for creating fall was used, the costs were equivalent. I therefore find that Mr. Searle's share of the repairs as between parties is $8,500.

68. Mr. Searle is to indemnify Wet-Seal and Mr. Spiekerman to the value of $8,500 being the amount of the claim less the value of the work in replacing the tiles over the membrane.

69. The balance of the amount, $10,929.17, is the responsibility of Wet-Seal and Mr. Spiekerman.

70. It was acknowledged that Wet-Seal actively became involved in the remedial work, removed the tiles, cleaned off the failed membrane and replaced it. No charge was made for this work but evidence was given that it took a

considerable time and effort. Wet-seal submitted that there should be some credit for this work in any final analysis.

71. The final claim is only about 40% of the assessor's estimate of $52,383.38 (including GST) for the reparation. The value of the difference between the estimate and the claim fairly represents the contribution already made by Wet-Seal to the repairs.

72. I cannot apportion the percentage of liability between Wet-Seal and Mr. Spiekerman for two reasons. First, neither party gave evidence relating to their relationship and the allocation of responsibilities between them. Second, clause 54 of the agreement between Wet-Seal and Spiekerman Trading Limited provides a precondition of mediation in the event of a dispute and no evidence was provided as to the satisfaction of that precondition.

73. Wet-Seal and Mr. Spiekerman being jointly responsible for the failure of the membrane are also liable to Mr. Searle in tort as well as for breach of contract in failing to provide a waterproof membrane for the decks.

74. Wet-Seal are jointly and severally liable to indemnify Mr. Searle for $10,929.17 being the amount of the claim less the assessed value of the failure to provide fall on the decks.

As between the respondents:

75. Mr. Searle is responsible for $8,500.

76. Wet-Seal and Mr. Spiekerman are jointly and severally liable for the balance of $10,929.17.

Costs

77. No determination of costs is made under s 91 of the Act.

Orders

78. Murray Searle, Wet-Seal New Zealand Limited and Mark Spiekerman are jointly and severally liable to the trust for the sum of $19,429.17.

79. Murray Searle is responsible for $8,500.00 and the other respondents are entitled to indemnity from him for this amount of the total sum.

80. Wet-Seal New Zealand Limited and Mark Spiekerman are jointly responsible for $10,929.17 and Murray Searle is entitled to indemnity from them for this amount of the total sum.

81. If any respondent pays more than the amount allocated to them to the claimant he or it shall be entitled to recover that amount from the other respondents.

I order payments to be made accordingly.

Consequences for paying parties

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82. Pursuant to s 92 the respondent parties who have been found liable to make a payment are advised that the following appendix sets out what may be the consequences if they take no steps in relation to an application to enforce this determination

Roger Pitchforth
Tribunal Member

NOTICE

The Tribunal in this determination has ordered that one or more parties is liable to make a payment to the claimant. If any of the parties who are liable to make a payment takes no steps to pay the amount ordered the claimant can take steps to enforce this determination in accordance with law. This can include making an application for enforcement through the Collections Unit of the Ministry of Justice for payment of the full amount for which the party has been found jointly liable to pay. In addition one respondent may be able to seek contribution from other respondents in accordance with the terms of the determination.

There are various methods by which payment may be enforced. These include:

- An attachment order against income
- An order to seize and sell assets belong to the judgment debtor to pay the amounts owing
- An order seizing money from against bank accounts
- A charging order registered against a property
- Proceeding to bankrupt or wind up a party for non- payment

This statement is made as under section 92(1)(c) of the Weathertight Homes Resolution Services Act 2006.