



SUMMARY

Case: Sell & Anor v Harris & Ors
File No: TRI 2008-101-000001/ DBH 02592
Court: WHT
Adjudicator: P McConnell
Date of Decision: 13 May 2009

Background

The claimants filed a claim in the Tribunal for damages arising from their leaky home. In seeking an award of \$285,160.88 for the loss they suffered, the claimants pursued claims against the first respondent (Mr Harris - builder), the second respondent (Auckland City Council - territorial authority), the third respondent (Mr Tribe – builder's assistant), and the fourth respondent (Mr Smith – concrete layer).

Summary of Facts

The claimants purchased land with the intention of constructing a home on it and so in 1996, the claimants engaged a draftsman to design a house and on 14 August 1996, the claimants applied for a building consent based on those plans and specifications. The Council issued a building consent on 10 December 1996.

While the claimants sought quotes, their friends recommended Mr Harris and so on 22 August 1996 Mrs Sell and Mr Harris met to discuss the proposed project. From their discussions it was agreed that Mr Harris would build the home for \$25,000 and that the claimants would pay for all materials and any subcontractors direct. No detailed written contract was signed but Mr Harris subsequently signed the notation in Mrs Sell's analysis book confirming the contract price of \$25,000 (incl. GST).

The building work commenced on 17 September 1996 and to assist with the building, Mr Harris engaged Mr Tribe. Mr Harris arranged for Mrs Sell to pay Mr Tribe directly on the basis of timesheets confirmed by Mr Harris and that the payments made to Mr Tribe were to come out of the \$25,000 contract price.

During construction, Mr Harris was absent from the site for about 2½ weeks. By the time Mr Harris left, the external construction was largely completed and so while Mr Tribe continued to work on the property that work mainly consisted of internal fit outs. Mr Harris arranged for the Council to carry out inspections. Four or five inspections were carried out while Mr Harris was engaged on site and all these inspections were passed as no issues were noted at the time.

The building work was largely completed in early January 1997 and the claimants moved into the house. Between 1998 and 1999, the claimants arranged for a number of inspections. However each inspection identified various outstanding items. By February 2004, the claimants arranged for the Council to carry out a second final re-check of the property, as they believed that all outstanding items had been resolved; and so a cladding inspection was carried out on 26 May 2004. By that stage however the Council had changed its policy in relation to monolithic plaster houses and as a

result, the inspection failed because of the lack of cavity and the ground level issues. A notice to rectify was therefore issued to the claimants in June 2004.

The claimants engaged Prendos Ltd in February 2005 for independent advice and in April 2005, the claimants applied to the WHRS for an assessor's report. Both reports concluded that their home was leaky and required remedial work. The claimants decided to proceed with the remedial work before progressing with their claim in the Tribunal. Remedial work was carried out in 2008 and the respondents were notified and given an opportunity to inspect the dwelling before and during remedial work.

Claim

The claimants claimed the total amount of \$285,160.00 made up as follows:

Cost of repairs

All parties agreed that a complete reclad was the only acceptable solution. The claimants had also deducted the cost of the work that was associated with the extensions and other matters that were not necessitated by the leaks. However due to disputes regarding the cost of painting, the substitution of cedar weatherboards as cladding material, and architects and associated fees, the amount claimed by the claimants for repairs was reduced to \$188,505.04.

(i) Painting costs

The claimants conceded that painting costs should be deducted as the house was due for a repaint at the time the weathertightness issues became apparent. The claimants accordingly agreed that the exterior painting cost of \$10,773.56 should be deducted from the amount claimed. The Tribunal refused to make a further deduction for the cost of painting in relation to the scaffolding required for that work as there was no additional scaffolding cost incurred that related to the painting.

(ii) Substitution of cedar weatherboards as cladding material

The Tribunal accepted on the evidence that there is only a slight additional cost when total systems are compared for cedar weatherboards over monotek. This additional cost however would have been more than accounted for by the fact that the exterior wall area of the dwelling had reduced by approximately 10 square metres as a result of the additional work which the claimants are not claiming. The Tribunal therefore refused to make a further deduction for this item.

(iii) Architects and associated fees

The experts agreed that the expert fees claimed should be reduced by \$1,181.25 as that amount related to the work done for the personal variations.

Stigma

The Tribunal noted that the problems claimants face in stigma claims are:

- Monolithically clad homes may attract stigma or reduction in value due to the cladding material itself regardless of whether they leaked. In this case the claimants chose to build, or in other cases chose to purchase, this type of home
- Proof of actual loss: a number of factors affect the purchase price or value of properties. In a rising market, or where there is a shortage of homes, an appropriately remediated formerly leaky home may attract very little, if any, stigma or reduction in value. However in a depressed market, this factor may have more

relevance and mean a lower price could be obtained. Until the claimants sell their property at a loss it is difficult to establish loss and therefore very difficult to conclude that there is any loss due to stigma

In any event, the claimants significantly reduced any potential stigma damage by changing the cladding material and so the Tribunal concluded that the claimants failed to establish any diminution in value of their property due to stigma. This part of the claim was therefore dismissed.

Interest

It was acknowledged that the amount claimed for interest should be reduced by \$1,053.09 being the interest accrued on the money borrowed to undertake personal adjustment. This accordingly reduced the amount of the claimants' interest claim to \$10,647.94. Added to that amount however was a sum of \$402.83 being interest from 1 to 13 May 2009 (date of this determination) on remedial costs established at \$188,505.04. Therefore the amount for interest of \$11,050.77 was established.

General damages

The Tribunal accepted that Mrs Sell has had health issues as a direct result of the stress of dealing with the fallout of the leaky home issues. It was also accepted that the family has undergone considerable discomfort, upheaval and distress in living in the home in less than ideal circumstances while the remedial work was being carried out. Guided by the decisions of the High Court, the Tribunal held that it an award of \$25,000 jointly to the claimants was appropriate.

Contributory negligence

Whilst the manner in which the handrails were installed on the decks had been a significant contributing issue to the house leaking, the claimants were not negligent in this regard. This was because they engaged professionals to do the work and got the method of installation approved by the Council before getting the work done, and checked off by the Council's inspector upon completion. The Tribunal accordingly concluded that the respondents failed to establish that there was any contributory negligence on the part of the claimants in relation to handrails.

As for the landscaping however, the Tribunal accepted that the claimants either carried out some of the landscaping work or engaged contractors to do that work at their instruction. From that work the ground levels were built up higher after construction ended and as a result the claimants contributed to their loss. This work was not found to be a significant contribution and therefore the Tribunal reduced the amount of the damages by 10% of the total amount of the claim.

Summary of claim

The claimants were therefore entitled to claim the amount of \$202,100.23 as follows:

• Remedial costs	\$188,505.04
• Interest	\$ 11,050.77
• General damages	\$ 25,000.00
• <i>Less 10% for contributory negligence</i>	<u>\$ 22,455.58</u>
Total	<u>\$202,100.23</u>

Summary of Decision

The roles of Mrs Sell and Mr Harris

The Tribunal accepted that Mrs Sell obtained quotes, ordered materials, organised and paid the contractors, arranged for the contractors to be on site at appropriate

times, applied for the building consent and arranged insurance for the construction site. However Mrs Sell did not provide any onsite supervision but contracted Mr Harris to build the house and provide onsite supervision. The Tribunal therefore held that Mrs Sell did not assume the role of head contractor, supervisor, or project manager, as she was not responsible for, or in charge of, the construction side of the project. Instead, Mrs Sell contracted Mr Harris to build the house and supervise the construction. Mrs Sell's role in relation to the construction therefore did not negate the duty of care owed to the claimants by any of the other parties in this claim. In addition, there was no evidence Mrs Sell did, or failed to do, anything that contributed to or caused the dwelling to leak in relation to her role in the initial construction work. Nor did her role raise issues of contributory negligence on the basis she gave insufficient attention to what was being done by each of the contractors given the Tribunal's conclusion that she contracted Mr Harris to provide onsite supervision.

Liability of Mr Harris (Builder)

(i) Claim in contract

An oral agreement between Mrs Sell and Mr Harris established that Mr Harris was to build the dwelling in accordance with the plans and specifications as well as provide onsite supervision for the project. It was therefore, at least, an inferred term of that agreement that the construction work and supervision would be done competently and in accordance with standard building practices. A number of elements indicated that Mr Harris' workmanship did not comply with good practice of the day, and contributed to the dwelling leaking. Based on those defects the Tribunal held that Mr Harris breached his contract and so was liable for the full amount of the claim (\$202,100.23).

(ii) Claim in tort

The evidence established that the house was a leaky building and it did not comply with the Building Code. The Tribunal found that the combined defects, which Mr Harris was responsible for, would have required a reclad of the dwelling. The Tribunal therefore held that Mr Harris was negligent and in breach of the duty of care he owed to the claimants and so was liable for the full amount of the claim (\$202,100.23).

Liability of Auckland City Council

(i) Building consent process

The Tribunal held that the Council had reasonable grounds on which it could be satisfied that the provisions of the Building Code could be met if the building work was completed in accordance with the plans and specifications and technical literature. The Tribunal therefore concluded that although the Council owed a duty to the claimants at the building consent stage, the claimants had not proved negligence on the part of the Council at that stage of the process.

(ii) Inspection process

Even though the final inspection failed due to the Council's change in policy regarding monolithically clad homes, the record of that inspection suggested that in all other respects the dwelling passed its final inspection. This suggested that had it not been for the change in policy, a Code Compliance Certificate would have been issued. The Council however missed the defects and the departures from the plans, or failed to pay any attention to them and accordingly the Council's negligence was a substantial and material cause of the loss suffered by the claimants. By not establishing or following an inspection regime capable of identifying key waterproofing issues, the Council was jointly and severally liable for the full amount of the claim (\$202,100.23).

Liability of Mr Tribe

Mr Tribe was engaged to assist Mr Harris with the building work and worked under the supervision of Mr Harris, even though Mrs Sell paid him. On the evidence however, it was impossible to determine whether Mr Tribe personally undertook any of the

defective work. There was accordingly no evidential basis for attributing liability for the alleged defects to Mr Tribe. The claimants therefore had not discharged the onus of proving that Mr Tribe was negligent and so the claim against him was dismissed.

Liability of Mr Smith

Mr Smith was served with the proceedings and was sent notices of all hearings and conferences held in relation to the claim, but he did not participate in the proceedings or attend the hearing. His failure to participate however did not affect the powers of the Tribunal to draw inferences from his non-participation and determine a claim made against him based on the information available (section 74 and 75 of the 2006 Act). The Tribunal accepted that Mr Smith was responsible for the cladding being embedded into the driveway that was a material cause of the dwelling leaking and therefore the loss subsequently suffered by the claimants. Mr Smith was therefore negligent in laying the concrete and so the Tribunal assessed his joint and several liability at 25% of the amount claimed (\$50,525.05).

Result

The Tribunal set the Council's contribution at 20% and the contribution of Mr Smith at 15%. The Tribunal therefore concluded that Mr Harris is entitled to a contribution of 35% from the Council and Mr Smith, the Council is entitled to a contribution of 80% from Mr Harris and Mr Smith, and Mr Smith is entitled to a contribution of 10% from Mr Harris and the Council. Therefore if all respondents meet their obligations under this determination, this will result in the following payments to the claimants:

First Respondent	\$131,365.14
Second Respondent	\$40,420.05
Fourth Respondent	<u>\$30,315.04</u>
Total amount of this determination	<u>\$202,082.23</u>