**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI 2010-100-000003**
**[2011] NZWHT AUCKLAND 63**

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| BETWEEN | STEVEN MCANENEY and KEIKO MOCHIZUKI<br>Claimant |
| AND | AUCKLAND COUNCIL<br>First Respondent |
| AND | CHRISTOPHER and CHRISTINE STEVENS<br>(Settled)<br>Second Respondent |
| AND | CAMPBELL LAYNE KELLS<br>Third Respondent |
| AND | IRMAC BUILDERS LIMITED<br>(in Liquidation)<br>Fourth Respondent |
| AND | MANIA CORPORATION LIMITED<br>(in Liquidation)<br>Fifth Respondent |

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| Hearing: | 7 November 2011 |
| Appearances: | Ms S Macky for the claimants and for the first respondent |
| Decision: | 22 November 2011 |

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**FINAL DETERMINATION**
**Adjudicator: K D Kilgour**

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**CONTENTS**

[1] Sometime in 1995 or early 1996 Campbell Layne Kells, the third respondent, together with Gabrielle Karen Kells acquired a freehold block of land at 21 Inkerman Street, Onehunga. On 4 April 1996 Mr Kells applied to the Auckland Council, the first respondent, for building consent to construct three town houses on the land. Building consent was issued to Mr Kells who then built three town houses including 21B Inkerman Street, Onehunga which was bought by Steven McAneney and Keiko Mochizuki, the claimants, in March 2007. The claimants took possession on 21 April 2007 and the following weekend discovered that they owned a leaky home. On 18 June 2007 this claim was lodged with the Department of Building and Housing. The application for adjudication was filed on 17 February 2010 after remedial work had been completed. The claimants are seeking damages for remedial costs, consequential expenses, interest, and stress and inconvenience totalling $319,659.55.

[2] The parties went to mediation in September 2010. As a result the claimants settled on 22 September 2010 with Auckland Council and the second respondents, the vendors, Christopher and Christine Stevens. Mr Kells attended the mediation but did not appear at the hearing or file any response or evidence.

[3] The claim against Mr Kells is that as developer he owed them a non-delegable duty of care. The amount claimed is $319,659.55. The claimants thereby seek the balance of their claim of $87,659.55 from Mr Kells which is the difference between their total claim of $319,659.55 and $232,000.00 they received in settlement.

[4] The Auckland Council claims a contribution from Mr Kells pursuant to section 17(1)(c) of the Law Reform Act 1936 and to section 72 of the Weathertight Homes Resolution Services Act 2006 on the basis that the Council and Mr Kells are concurrent tortfeasors to the claimants. The Council has paid $180,000.00 in settlement to

the claimants which the Council submits is in excess of its liability to the claimants.

## ISSUES

[5] The issues to be determined by this Tribunal are:

- Did the home suffer from defects in construction that have caused leaks?
- Was Mr Kells a developer and responsible in a non-delegable basis for the defects in construction?
- Was the remedial work carried out by the claimants appropriate to fix the defects and were the repair costs reasonable?
- What is the Council's responsibility?
- What is the contribution and/or apportionment of liability between the Council and Mr Kells?

## FACTUAL BACKGROUND

[6] Three townhouses were built on the property by Mr Kells who then crossed leased each as a separate residence for sale. The claimants' home was built between 7 June 1996 and 28 August 1997. Mr Kells controlled the building and called for 17 of the 25 Council inspections.

[7] Mr Kells sold the home on completion as is evidenced from the Certificate of Title. The home was built with the defects mentioned below and as a result did not comply with the Building Code.

[8] The claimants purchase agreement was conditional upon the claimants being satisfied with a building inspection report which they obtained and which concluded that the home was generally in good condition.

[9] Mr McAneney said that they discovered leaks in the garage below the deck. After making some enquiries of the real estate agent and the Stevens, it became evident that some repairs had previously been carried out to the deck by the Stevens. The deck repairers were the fourth and fifth respondents who were both corporate entities which went into liquidation in March 2011.

[10] Following receipt of the WHRS assessor's report on 12 December 2007, the claimants engaged Prendos Limited who reported in May 2008 after undertaking a full destructive inspection of the home. It concluded that more extensive repair work was required than had been concluded by the WHRS assessor. Prendos Limited designed a scope of remedial works and tendered the remedial work to the market. Three tenders were received and Prendos advised the claimants to proceed with PJ Exteriors Limited. At that stage of development the claimants lost confidence with Prendos and engaged Maynard Marks to advise further, to negotiate a remediation contract with PJ Exteriors Limited and to project manage the repair work. Maynard Marks undertook such work. The remediation was carried out to the home between April and July 2009. The overall cost of the repair work was in line with the Prendos estimate. The claimants borrowed to fund the remedial work. They lived in alternative accommodation for four months while the remedial work was undertaken.

**Did the home suffer from building defects causing it to leak?**

[11] David Templeman, the WHRS assessor, undertook visual and invasive inspections of the home on three occasions in late 2007 and reported in December 2007 with his findings of the building deficiencies he attributed to causing water ingress.

[12] Prendos reported on 26 May 2008 following a more extensive and invasive investigation, and Maynard Marks expert Stuart Wilson reported in October 2009 with yet a further assessment

of the building defects. All three reports identified similar building defects all attributed to workmanship deficiencies as causing water ingress. Mr Templeman and Mr Wilson gave evidence concurrently at the hearing. They were largely in agreement on all matters. The building defects identified are best summarised and explained in Mr Wilson's report at page 2.3 headed "Table of Key Watertightness Defects". That section of Mr Wilson's report, which Mr Templeman agreed with, clearly explains the defects, damage and breaches of the applicable technical literature and the relevant Building Code clauses. The principal building defects identified as causing water ingress are:

a) leaking aluminium joinery mitre joints and insufficient flashings to plaster cladding;
b) insufficient cladding clearance around ground floor area and the deck area;
c) inadequate installation of deck waterproof membranes; and
d) flat plastered horizontal surfaces to solid plaster cladding to deck balustrades and penetrations through flat plastered services for handrail fixings (Mr Wilson said it was difficult to separate the damage resulting from defects C and D).

[13] In addition, the experts agreed on three secondary defects, which if isolated defects could have been remedied with targeted and/or partial repairs. The secondary defects were:

i. timber weatherboards and fascias buried in plaster cladding without any form of flashing or waterproofing of junctions;
ii. inadequate weatherproofing of cladding junctions that lapped appropriately installed back flashings to deflect moisture; and

iii. inadequately formed penetrations through the plaster cladding system including the electric metre box, taps, drainage pipes and overflow outlet penetrations.

[14] Clause E2 of the Building Code requires that homes be constructed to provide weathertightness and clause B2 states that the construction methods shall be sufficiently durable to ensure the home satisfies the functional requirements of the Code throughout the life of the home. Mr Templeman and Mr Wilson stated that the above listed building defects infringed both clauses E2 and B2 of the Building Code.

[15] I am satisfied from the findings of Mr Wilson's report, with which Mr Templeman agreed, and his own report, the Prendos report, and the evidence of Mr Wilson and Mr Templeman at the hearing, that the above listed defects clearly caused water ingress and damage to the home.

**Remedial Work**

[16] The Prendos and Maynard Marks reports, and ultimately, the evidence of Mr Wilson, with whom Mr Templeman agreed, concluded that a total reclad of the home was required because of these defects and the resulting damage they caused.

[17] I accept the evidence of Mr Wilson and Mr Templeman that the remedial work required the home to be fully reclad. Mr Templeman's agreement with Mr Wilson's conclusions was assisted by the fact that Mr Templeman was involved with remediation advice and oversight at the adjoining townhouse which he was working on at the time the claimants' home was being remediated. So he observed aspects of the home in its un-clad state.

[18] Mr Templeman's experience with remediation work allowed him to state that he was satisfied with the remedial costings produced by Mr Wilson.

## MR KELL'S RESPONSIBILITY

[19] The claimants and Council submitted through Ms Macky that Mr Kells was at all material times the developer of the home as he was responsible for the design and building of the home as part of the three townhouse development at 21 Inkerman Street, Onehunga.

[20] The Court of Appeal decision in *Mt Albert Borough Council v Johnson*[1] is authority for the proposition that a developer owes a non-delegable duty to an intended owner of a home to properly supervise the construction of the home. Cooke J, and with whom Somers J joined with Richardson J in agreement:[2]

> We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.

[21] Harrison J in *Body Corporate 188273 v Leuschke Group Architects Limited* defined a "developer" as:[3]

> A developer, and I accept there can be more than one, as the party sitting at the centre of and directing a project, invariably for its financial benefit. It is the entity that decides on the builder and any other professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all the important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[1] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
[2] At [241].
[3] *Body Corporate 188273 v Leuschke Group Architects Limited* (2007) NZCPR 914 at [34].

[22] Ms Macky submitted that the test set down in *Mt Albert Borough Council v Johnson* includes changing the landscape (such as was done at 21 Inkerman Street) and subdividing and building houses for financial return. She submitted that that was exactly what Mr Kells did in this case. I agree. The evidence before me establishes that Mr Kells owned the land at 21 Inkerman Street. He caused the building of three townhouses for sale because he applied for the building consent, was in control of the development by calling for a number of the material Council building inspections during construction (the evidence of Mr Templeman and Mr Wilson was that generally a person in control of the building project calls for Council inspections). He sold the home shortly after construction having "subdivided" the title by way of cross leasing the three townhouses. And, evidence given by Andrew Ferguson, a Council legal officer called by Ms Macky to give evidence stated that having looked through Council property records he found that Mr Kells had developed many residential properties in the Council's jurisdiction since 1994.

[23] Associate Judge Doogue in *Body Corporate 187820 v Auckland City Council*[4] stated that in his analysis of cases concerning the liability of developers in negligence to purchases of leaky homes shows two essential considerations giving rise to the non-delegable duty of care:

i. direct involvement in the construction by way of planning, designing, supervising or directing the building work; and
ii. being in the business of developing residential buildings for profit.

[24] I am satisfied Mr Kells meets both such considerations. Mr Kells fits the definition of "developer" which the Courts have adopted. I am satisfied Mr Kells had overall control of the building of the

claimants' home. He owed the claimants a non-delegable duty of care to ensure the construction of a sound and weathertight home.[5] The experts were in agreement that the home was not constructed weathertight and was not Code compliant. Mr Kells acted in breach of his duties. He cannot escape liability by saying that he relied on other parties who directly caused the loss. For these reasons the claimants succeed in their claim against Mr Kells.

[25] Whilst Mr Kells took no part in the hearing he did "flag" a limitation defence in his letter of 9 August 2010. Ms Macky in her closing submissions addressed this issue and satisfied me that the defence is not tenable. Mr Kells as the developer owing a non-delegable duty of care to owners has a responsibility to present a Code compliant residence to the buyer. Mr Kells failed in this responsibility.

[26] I find that Mr Kells is jointly and severally liable to the claimants for the full amount of the established claim.

## QUANTUM

### Repair Costs

[27] In May 2007 Prendos estimated the cost of repairs to correct the water ingress problems and to prevent future likely damage would be approximately $225,000. The claimants sought further advice about repairs from Maynard Marks which identified the same building defects. Maynard Marks was instructed by the claimants to proceed with project managing the remedial scope of works tendered for by PJ Exteriors Limited and the finalised remediation costs were $251,309.07. Mr Templeman had no issue over the remedial costs and stated that in his expert view the actual repair costs were reasonable.

[4] *Body Corporate 187820 v Auckland City Council* HC Auckland, CIV-2004-404-6508, 26 September 2005.

[28] Accordingly I conclude that this home required a full reclad and that the repair costs expended by the claimants of $251,309.07 were fair and reasonable.

**Consequential Costs**

[29] The claimants also seek consequential costs of $18,350.48. These costs consist of:

i. alternative accommodation of $4,663.00;
ii. consequential costs (valuation costs, insurance and legal costs on settlement) $2,542.60;
iii. lost income from a Korean student having to relocate $4,085.00; and
iv. borrowing remediation costs of $7,059.88.

[30] There is no objection to these charges and I again determine that they are appropriate, fair and reasonable.

**General Damages**

[31] The claimants claim $25,000 each for general damages as a result of owning and living in a leaky home. Mr McAneney only gave evidence.

[32] The Court of Appeal's decision in *Byron Avenue* confirmed the availability of general damages in leaky building cases and held that in general the usual award for occupiers was $25,000 per dwelling.[6] This approach was affirmed by Ellis J in *Findlay v Auckland City Council*[7] and by Andrews J in the recent decision of *Cao v Auckland City Council*[8]. Andrews J stated that judgments

[5] *Spargo v Franklin* HC Tauranga, CIV-2010-470-0091, 9 November 2011 Potter J.
[6] *Byron Avenue* [2010] NZCA 65 at [153].
[7] *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010.
[8] *Cao v Auckland City Council*, HC Auckland, CIV 2010-404-7093, 18 May 2011.

since the Court of Appeal's decision in *Byron Avenue* have awarded general damages on a "per unit" basis and that was what was intended by the Court of Appeal as general guidance.

[33] I am satisfied from Mr McAneney's evidence that the demands placed on he and his wife caused by owning a leaky home justifies an award of general damages. But having only heard from Mr McAneney and having regard to other such cases I believe I have insufficient evidence to justify an award of general damages at the upper level of such awards. I accordingly determine that the claimants are entitled to general damages of $20,000.

**Summary of Quantum**

[34] I therefore determine that the claimants have proven their claim to the extent of $289,659.55 based on the following amounts:

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| Actual repair costs | $251,309.07 |
| Consequential costs | $18,350.48 |
| General damages | $20,000.00 |
| **TOTAL** | **$289,659.55** |

**CONTRIBUTION**

[35] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[36] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable. The basis of recovery or contribution is provided for in section 17(1)(c) as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is … liable in respect of the same damage, whether is a joint tortfeasor or otherwise…

[37] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[38] The first respondent, the Auckland Council, claims a contribution from Mr Kells on the basis that the Council and Mr Kells are concurrent tortfeasors. However, before an apportionment can be made, the Tribunal must assess the extent of the Council's breach and liability, if any.

**Council's responsibility**

[39] The Council's officers inspected the construction work on the home between June 1996 to September 1997 and eventually issued a final Code Compliance Certificate on 20 September 2002 having earlier issued an interim Code Compliance Certificate on 29 August 1997. The law regarding a local authority's duty of care in this area is now clearly understood and most particularly set down in Heath J's decision, affirmed by the Supreme Court, in *Sunset Terraces* at [409]:[9]

> The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard.

[9] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3239, 30 April 2009, Heath J [Sunset Terraces].

[40] Accordingly, a local authority can be liable to owners and subsequent purchasers of residential properties for defects caused or not prevented by its building inspector's negligence.

[41] Mr Wilson who was a Council officer for Auckland City Council in 2004, and Mr Templeman, both stated that the defects should have been identified during Council's inspections. Having regard to their evidence I find the Council's inspection regime should have detected that there were:

a) insufficient flashings to plaster cladding;
b) insufficient cladding clearances to adjacent surfaces;
c) penetrations through plastered services for the fixing of the metal handrails to the deck balustrade walls; and
d) inadequately formed penetrations through the plaster cladding system.

[42] Mr Ferguson, manager of leaky building claims at Auckland Council, gave evidence that he undertook a legal analysis of the Council's exposure and concluded that the Council would have had an exposure to liability for the losses claimed by the claimants on a joint and several basis.

[43] In accepting the evidence of Mr Ferguson, I determine that the Council breached its obligations to the claimants by not identifying a number of defects present in the home during the inspection process and that it issued a Code Compliance Certificate when reasonable grounds did not then exist for it to be satisfied that the building work complied with the Building Code. Accordingly the Council's breaches amounted to negligence and caused the claimants' losses.

**Apportionment**

[44] Ms Macky submits that the authority supporting the level of apportionment of liability to developers that the Council relies upon

are *Mt Albert Borough Council v Johnson* where there was a finding against the developer of 80% and *Sunset Terraces* where there was a finding of 85% against the developer. Ms Macky submits that based on those current authorities the Council's liability ought not to extend beyond 20% for the losses claimed and in this claim the Tribunal ought to award against Mr Kells in the Council's favour a contribution being 85%. It is also noted that it is well established that the parties undertaking the work or overseeing the work as a developer should bear greater responsibility than those certifying the construction work. This was because a local authority is not a clerk of works or a project manager.

[45] Mr Kell's involvement in the construction of the home which resulted in weathertightness defects has caused a full reclad. Ms Macky submitted that Mr Kells' liability to the Council should be up to 85% of that sum, and that would be in line with the Court's findings in the decisions of *Mt Albert Borough Council, Sunset Terraces* and *Dicks v Hobson Swan Construction Limited (in liquidation).*[10]

[46] I am of the view that both Mr Kells and the Council during their respective oversight of the construction work had opportunity to prevent the workmanship deficiencies causative of the defects. However the primary cause of the successful claimants' loss was poor building workmanship and Mr Kells is the person who owed a non-delegable duty to ensure the construction work was carried out properly and thus is primarily to blame. I am persuaded by Ms Macky's submissions and given that Mr Kells has provided no response, the Council should be entitled to a significant contribution from the developer.

[47] I conclude that the Council in failing to detect the defects and in issuing a Code Compliance Certificate was negligent and that the appropriate apportionment between the Council and Mr Kells is 85%

[10] *Dicks v Hobson Swan Construction Limited* (in liquidation) (2006) 7 NZCPR 881.

to the developer and 15% to the Council. As the Council has paid $180,000, its claim for contribution against Mr Kells is now established in the sum of $153,000 i.e., being 85% of the Council's settlement sum.

**Summary of Mr Kells' contribution**

[48] I determine, because of my findings above, that Mr Kells is liable to Mr McAneney and Ms Mochizuki for $57,659.55 being the difference between the amount that the claimants recovered in settlement ($232,000) and the amount of the overall claim being $289,659.55. In addition the Council has successfully established the claim for contribution of $153,000 against Mr Kells.

[49] There is no need for the Tribunal to consider the contribution to settlement made by the second respondents as no request was made by that party to this proceeding.

**Conclusion and Orders**

[50] The claimants' claim is appropriate to the extent of $289,659.55. For the reasons set out in this determination I make the following orders:

i. Mr Kells is ordered to pay the claimants the sum of $57,659.55 forthwith.
ii. Mr Kells is ordered to pay by way of contribution under section 17 of the Law Reform Act 1936 to Auckland Council the sum of $153,000 forthwith.

[51] To summarise the decision, if Mr Kells meets his obligations under this determination, this will result in the following payments being made by Mr Kells to the:

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| Claimants | $57,659.55 |
| Auckland Council | $153,000.00 |
| **TOTAL** | **$210,659.55** |

**DATED** this 22 day of November 2011

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K D Kilgour

Tribunal Member