

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-100-000091
[2012] NZWHT AUCKLAND 13**

BETWEEN	PETER JAMES ADAMS AND SUSAN MARGARET ADAMS Claimants
AND	TERRENCE EASTHOPE First Respondent
AND	AUCKLAND COUNCIL (Removed) Second Respondent
AND	RONALD STEVENSON Third Respondent (Removed)
AND	MICHAEL RAMSEY (Removed) Fourth Respondent
AND	COLIN SAYLES Fifth Respondent

Hearing: 21 February 2012

Appearances: J P Wood and T J Rainey for the claimants
No appearance by first and fifth respondents

Decision: 2 March 2012

FINAL DETERMINATION
Adjudicator: P A McConnell

[1] In 1993 Peter and Susan Adams purchased a property in Waiheke which they subsequently renovated and extended. Even before the end of the maintenance period leaks occurred and despite various repair attempts further and more widespread leaking occurred. Mr and Mrs Adams filed an application with the Department of Building and Housing in late 2002 and the assessor's report confirmed that they had a leaky home and found the claim was eligible in relation to the alteration.

[2] Mr and Mrs Adams have completed the remedial work and they are claiming the balance of the costs, after accounting for amounts received in settlement, from Terrence Easthope and Colin Sayles. Mr Easthope was a director of the building company that carried out the alteration work and Mr Sayles was the on-site supervisor and builder engaged by the building company.

[3] Mr Easthope and Mr Sayles did not attend the hearing and neither has filed a response or defence to the claim. The Tribunal file confirms they have both been served with notice of the proceedings as well as notice of the hearing dates. The claims against them accordingly proceeded by way of formal proof, largely based on the witness statements and documentary evidence that have been filed.

[4] In determining Mr and Mrs Adams claim the main issues I need to decide are:

- What are the defects that caused the damage?
- Does Mr Easthope owe the claimants a duty of care? If so has a breach of that duty of care caused the claimants loss?
- Does Mr Sayles owe the claimants a duty of care? If so has a breach of that duty of care caused the claimants loss?

- What is the appropriate quantum to award?
- What contribution should Mr Sayles and Mr Easthope pay?

WHAT ARE THE DEFECTS WHICH HAVE CAUSED LEAKS?

[5] The experts largely agreed on the construction defects that existed and what the main defects were that had caused leaks.

[6] The major issue with the alterations related to the way the deck was constructed. The most substantial cause of the water ingress in this area was that the membrane was penetrated with the deck fixing nails. Other contributing deck defects were inadequacies in the installation of the liquid applied membrane and the cladding being taken hard down to the deck surface. Lack of slope to the deck was also identified as a defect but it would be unlikely to have caused any damage if the other defects had not also existed.

[7] In addition to the deck defects there were defects with the roof, the joinery installation and the cladding. No jamb or sill flashings had been installed to the joinery units and no control joints had been installed within the cladding. The liquid applied membrane on the upper facade roof was inadequately installed and the drainage outlets from the roof were undersized.

TERRENCE EASTHOPE

[8] Mr Easthope's company, Gemini Construction Limited, was contracted, on a full build and supervise contract, to complete the building work after the initial foundation, retaining walls and water tank work was done. The issue in this claim is whether Mr Easthope personally owes the claimants a duty of care.

[9] The effect of the incorporation of a company is that the acts of its directors are usually identified with the company and do not give rise to personal liability. However, the courts have for some

time determined that while the concept of limited liability is relevant it is not decisive. Wylie J in *Chee v Stareast Investment Limited*¹ concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[10] In *Morton v Douglas Homes Ltd*,² Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. In *Dicks v Hobson Swan Construction Ltd (in liq)*,³ Baragwanath J concluded that as Mr McDonald, the director of the building company, actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks, the home owner, a duty of care.

[11] The Court of Appeal in *Body Corporate 202254 v Taylor*⁴ considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson*.⁵ It held that the assumption of responsibility test promoted in that case was not an element of every tort. Chambers J expressly preferred an “elements of tort” approach and noted that assumption of responsibility is not an element of the tort of negligence. In *Hartley v Balemi*,⁶ Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building. Stevens J observed:⁷

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 and of 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.

¹ *Chee v Stareast Investment Limited* HC Auckland, CIV-2009-404-5255, 1 April 2010.

² *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).

³ *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC).

⁴ *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 (CA).

⁵ *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

⁶ *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007.

⁷ At [92].

[12] The claimants allege that Mr Easthope was the natural person who exercised control over the building work and that he was negligent in failing to ensure that the dwelling was built in accordance with the Building Code. Mr Adams says that Mr Easthope together with Mr Sayles assured him that the workmanship of their home was of high standard. Mr Adams also recounts occasions when he met with Mr Easthope on site and also gives evidence of Mr Easthope personally carrying out some of the construction work.

[13] Section 75 of the Act provides that I may draw inferences from parties' failure to act and determine claims based on the available information. In this case Mr Easthope has been served with the proceedings and he has not filed a response nor has he challenged the claims being made against him. I am therefore entitled to infer that Mr Easthope does not refute the allegation that he controlled the building work and therefore owes Mr and Mrs Adams a duty of care. I have found that the established defects with this home include workmanship issues that would generally be the responsibility of the builder. While it is arguable that Mr Easthope may not be responsible for the liquid applied membrane installation all other defects relate to construction work most likely carried out by Mr Easthope or other employees of his company. In particular the key defects with the deck are the responsibility of the builder.

[14] I accordingly conclude that Mr Easthope owed the claimants a duty of care and that he breached that duty of care to the extent that he is liable for the full amount of the established claim.

COLIN SAYLES

[15] Mr Sayles was the site co-ordinator for Gemini throughout the majority of the construction work. He undertook building work himself and supervised the other employees and contractors of Gemini. It is now well established that builders and site co-ordinators

who supervise construction work owe owners a duty of care.⁸ I am also satisfied that Mr Sayles breached the duty of care he owed the claimants in allowing the dwelling to be built with the defects that have caused leaks. In particular Mr Sayles was negligent in fixing the deck nails though the liquid applied membrane, not ensuring control joints were incorporated into the cladding and in taking the cladding hard down to the deck surface.

[16] I accordingly conclude that Mr Sayles is jointly and severally liable together with Mr Easthope for the full amount of the established claim.

QUANTUM

[17] Following an experts' conference convened before the settlement conference agreement, the Council and the claimants agreed that the appropriate quantum for the remedial work required was \$180,000. I have considered all the quantum evidence that has been provided and accept that \$180,000 is the actual and reasonable cost of the remedial work required to remedy the established defects.

General damages

[18] Mr and Mrs Adams are seeking \$25,000 in general damages. The Court of Appeal in *Sunset Terraces* and *Byron Avenue*⁹ agreed that the appropriate measure depends on individual circumstances but for owner-occupiers the usual award would be in the vicinity of \$25,000. I accept that Mr and Mrs Adams have both suffered considerable stress and difficulty as a result of having a leaky home and in carrying out the remedial work. I accordingly accept that it is appropriate to award general damages of \$25,000.

⁸ *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394.

⁹ *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486. *O'Hagan v Body Corporate 189855 (Byron Avenue)* [2010] NZCA 65, [2010] 3 NZLR 486.

Interest

[19] Mr and Mrs Adams are also seeking interest of 4.78 percent per annum¹⁰ on both the remedial costs plus general damages awarded from the date the repairs were substantially completed which was 18 October 2006. I accept it is appropriate to award interest on the established costs of the remedial work from 18 October 2006 but I do not consider it appropriate to award interest on the general damages awarded. The reason for this is that the claimants are largely responsible for the long delay between the completion of the remedial work and the claim being filed with the Tribunal.

[20] Interest therefore accrues at \$23.57 per day from 18 October 2006 through to the date of this decision. \$23.57 times 1963 days amounts to \$46,267.90.

Conclusion

[21] The amount therefore that has been established is \$201,267.90 which is calculated as follows:

Remedial Work	\$180,000.00
Interest	\$46,267.90
General Damages	<u>\$25,000.00</u>
	251,267.90
Less settlement amount	<u>\$50,000.00</u>
Total established	<u>\$201,267.90</u>

¹⁰ Being the 90 day bill rate of 2.78% plus 2% as per clause 16 of Schedule 3 to the Weathertight Homes Resolution Services Act 2006.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[22] I have found that the first and fifth respondents breached the duty of care they each owed to the claimants. Both of them are tortfeasors or wrongdoers, and are liable to the claimants in tort for their losses to the extent outlined in this decision.

[23] Section 72(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of 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.

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

[25] Given the respective roles and responsibilities of Mr Easthope and Mr Sayles, and the responsibility each has for the claimants loss, I conclude that the contribution for each of them should be set at 50%

CONCLUSION AND ORDERS

[26] The claim by is proven to the extent of \$201,267.90. For the reasons set out in this determination I make the following orders:

- i. Terrence Easthope is ordered to pay Peter James Adams and Susan Margaret Adams the sum of

\$201,267.90 forthwith. Terrence Easthope is entitled to recover a contribution of up to \$100,633.95 from Colin Sayles for any amount paid in excess of \$100,633.95.

- ii. Colin Sayles is ordered to pay Peter James Adams and Susan Margaret Adams the sum of \$201,267.90 forthwith. Colin Sayles is entitled to recover a contribution of up to \$100,633.95 from Terrence Easthope for any amount paid in excess of \$100,633.95.

[27] To summarise the decision, if the two respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

Terrence Easthope	\$100,633.95
Colin Sayles	<u>\$100,633.95</u>
Total amount of this determination	\$201,267.90

[28] However if the first or fifth respondents fail to pay their apportionment, the claimants can enforce this determination against either of them up to the total amounts they are ordered to pay in paragraph [26] respectively.

DATED this 2nd day of March 2012

P A McConnell, Tribunal Chair