

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-101-002
[2012] NZWHT AUCKLAND 31**

BETWEEN	LAI HING WONG LEE Claimant
AND	WELLINGTON CITY COUNCIL First Respondent <u>(Settled and Discontinued)</u>
AND	GARY ADRIAN KOORNNEEF Second Respondent

Hearing: 5 July 2012

Appearances: P Cheng for the claimant
G Koornneef self represented

Decision: 13 July 2012

**FINAL DETERMINATION
Adjudicator: P A McConnell**

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[1] In 1998 Hing Lee had a house built on a section she owned at 23 Derry Hill. Unfortunately the house leaked from shortly after Mrs Lee and her family moved in. After the house was remediated Mrs Lee filed a claim against the Wellington City Council and Gary Koornneef.

[2] Mrs Lee settled with the Council at mediation and now seeks \$123,006.57, the balance of the remedial costs, together with general damages of \$25,000.00 from Mr Koornneef. Mrs Lee says that Mr Koornneef, trading as Phoenix Construction, built the dwelling and he is therefore responsible for her loss. Mr Koornneef however says that it was Phoenix Construction & Developments Limited that was contracted to build the house. He accepts that he was a director of that company but says he was not directly involved in the construction of the house. He accordingly denies any personal liability.

[3] The issues I therefore need to decide are:

- Did Mrs Lee contract with Mr Koornneef or with Phoenix Construction & Development Limited (Phoenix) to build the house?
- Does Mr Koornneef personally owe Mrs Lee a duty of care?
- Has any negligence on the part of Mr Koornneef caused or contributed to Mrs Lee's loss?

BACKGROUND

[4] In 1997 Mrs Lee employed Mr Jazbani to draw plans for a dwelling on the land she had purchased on 23 Derry Hill, Churton Park. Mr Jazbani completed the plans and lodged an application with the Wellington City Council for building consent. Mr Jazbani also arranged with Mr Koornneef for Phoenix to undertake the

construction work. Mrs Lee understood that they had worked together on other projects.

[5] Mr Koornneef submitted the quotation for the building contract on Phoenix Construction & Developments Limited letter-head which he signed on behalf of the company. He also says that a Master Build Guarantee was entered into naming Phoenix Construction & Developments Limited as the builder. The progress payment accounts were headed "Phoenix Construction" without reference to a limited company. These were sent through to Mrs Lee's solicitor who paid them by cash cheques from funds in his solicitor's trust account.

[6] The agreed contract value was \$282,261.38 and appears to have covered almost all of the construction work including electrical, plumbing, roofing, kitchen joinery, painting, gib stopping, earthworks, texture coating right down to heating and a vacuum system.

[7] Mrs Lee and her family moved into the completed house in May 1998 and defects began to appear almost straightaway. Leaks appeared in the conservatory, the bathroom, the ceiling of the garage, the dining room and in various other locations. Despite repeated efforts to fix the leaks they continued. Mrs Lee engaged various people to investigate the causes of leaks and in July 2004 lodged a claim with the Weathertight Homes Resolution Service.

[8] At the end of 2006, Mrs Lee found a builder who was willing to provide a quote for the work to be done and Dollar Te Hau commenced work on the property in April 2007. Once the cladding had been removed it was discovered that the damage was more extensive than what was anticipated. The total cost of Mr Te Hau's work was \$150,446.87. In addition Mrs Lee incurred \$14,449.70 in failed or temporary repairs prior to Mr Te Hau's work.

[9] Mr Koornneef accepted Mrs Lee's home was a leaky home and does not challenge, nor has he called any evidence to dispute, the quantum being claimed by Mrs Lee. Based on the information contained in the assessor's report and the affidavit of Mr Kopua, I accept that the quantum being claimed has been established. The defects in the construction of the dwelling include:

- Incorrect jointing of cladding boards resulting in water entry through the cladding.
- Fixing, nail and pinholes in the coating.
- Water entering the bottom of the walls at the junction between the cladding and the Traffiguard.
- Water entering at the roof glazing above the family room through a complicated junction where the roof glazing joins the roofing membrane at an angle.
- The south wall has no proper overhang or drip edge provided between the cladding and the edge of the floor slab.
- Water was entering through the folded joints at the end of the capping flashing over the parapet walls.
- In the area of bedroom 3, water entering behind the window and accumulated on the ceiling.
- Incorrect installation of waterproof membrane above the garage.
- Inadequate affixing of the balconies. The master bedroom balcony was joined to the wall without a watertight seal or any sealant to prevent water entry. Nails were also driven directly into the exterior cladding resulting in extensive damage.
- The flashings on the house were not installed correctly.
- The framing timber was not always the correct size, in some places the timber was smaller than what was needed.
- There was a 35 mm difference or lean in the main dining room.

- There was no drainage provided on the south wall of the house.

WAS THE BUILDING CONTRACT WITH MR KOORNNEEF PERSONALLY OR WITH PHOENIX CONSTRUCTION & DEVELOPMENTS LIMITED?

[10] Mrs Lee says that her architect arranged for Mr Koornneef of Phoenix Construction to do the construction work. She stated in paragraph [5] of her affidavit dated 10 February 2012 that she was not aware that Mr Koornneef was a director of Phoenix Construction & Developments Limited and that she believed she was contracting with Mr Koornneef who was trading as Phoenix Construction.

[11] Mr Koornneef however states that he was contracting through his company and says that this is evidenced by the fact that the letter of offer was put on the company letterhead and was signed by him on behalf of Phoenix. Whilst the progress payments accounts were just headed 'Phoenix Construction' this was common practice in the building industry and was based on accounting practices from other companies. He however stated that the invoices would have been on company letterhead and that there was also a Master Build Guarantee entered into where the builder was stated to be Phoenix Construction & Developments Limited.

[12] I am satisfied that Mrs Lee knew, or should reasonably have known, that the building contract was not with Mr Koornneef personally but with his company. When I put to Mrs Lee a copy of the letter dated 26 September 1997 in which Phoenix submitted its quotation for the construction contract she accepted that it was on company letterhead and that she knew that Mr Koornneef was contracting through a company. Other documents that still exist also show that the subcontractors knew they were contracting to a

company as they were addressed to Phoenix Construction & Developments Limited.

[13] While Mr Koornneef was Mrs Lee's contact person, it was Mr Koornneef's company that contracted to build the house. The key documentation was completed on company letterhead, or in the name of the company, and there were no reasonable grounds for Mrs Lee to conclude she was contracting personally with Mr Koornneef.

DOES MR KOORNNEEF PERSONALLY OWE MRS LEE A DUTY OF CARE?

[14] The effect of 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 & Ors*,¹ concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[15] In *Morton v Douglas Homes Ltd*,² Hardie Boys J concluded that where a company director has personal control over building work he or she can be held personally liable. This is an indicator of whether or not his or her personal carelessness is likely to have caused damage to a third party. In *Dicks v Hobson Swan Construction Ltd (in liq)*,³ Baragwanath J concluded that as Mr McDonald 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 a duty of care.

¹ *Chee v Stareast Investment Limited Anor* 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 liq)* (2006) 7 NZCPR 881 (HC), Baragwanath J.

[16] In *Hartley v Balemi*,⁴ 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. The Court of Appeal in *Body Corporate 202254 v Taylor*⁵ has also more recently considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson*.⁶ 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 the tort” approach and noted that assumption of responsibility is not an element of the tort of negligence.

[17] If an element of torts approach is adopted in this case, what needs to be considered is whether the elements of the tort of negligence are made out against Mr Koornneef. In *Hartley v Balemi*, Stevens J observed⁷:

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.

[18] Mrs Lee says that Mr Koornneef was solely in charge of the project and had overall responsibility. Mrs Lee also said that she visited the site on almost a daily basis during construction and that on most occasions Mr Koornneef was there. She was however unable to clearly identify any particular thing she saw him doing on site. Mr Koornneef denies he was on site on anything like a daily basis. His undisputed evidence is that at the time his company agreed to build this house it employed approximately 40 direct employees including eight foremen running different parts of the

⁴ *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007.

⁵ *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17 (CA).

⁶ *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA).

⁷ Above n 4 at [92].

business and building sites and one project manager. In addition Phoenix used a number of sub-contractors for specialist work.

[19] Mr Koornneef accepts that Mr Jazbani, Mrs Lee's architect, approached him to see if his company would build the house. As he had no builders available he agreed to contract some builders recommended by Mr Jazbani on a labour only basis, to do the building work. Phoenix also organised most of the sub-contractors and materials. The construction work was done by the labour only builders with the assistance of subcontractors and one of Phoenix's foremen on site part-time doing a lot of the site work. Phoenix's project manager called in every day, as he did on each job it had on at the time.

[20] Mr Koornneef had completed a building cadetship with Fletcher Construction in quantity surveying and was Fletcher's estimator for five years. His role in Phoenix included negotiating contracts, pricing the work, sub-letting the trades, organising progress payments throughout the project and dealing with customers during the construction process.

[21] With Mrs Lee's house Mr Koornneef quoted for the work on behalf of the company and administered the contract. He organised the sub-trades and dealt with payments to sub-contractors and issued the progress payment claims. He was also the person from Phoenix who dealt with Mrs Lee.

[22] The only evidence there is of Mr Koornneef being on site building or supervising is Mrs Lee's recollection that he was present on site on most occasions when she visited. Mr Koornneef accepts he visited the site about once a week to see where things were up to and to answer any questions. He however did no building work and it was not his role to check the workmanship of the sub-contractors on site. His foreman and project manager were both regularly on site

and Mr Jazbani had a monitoring role. Mr Jazbani not only visited the site and signed off each of the progress payments but was also involved in resolving issues that arose particularly relating to the design implementation.

[23] While I accept Mrs Lee recollects meeting Mr Koornneef on site, I am not satisfied he was on site on a daily basis or that he controlled the construction work. I note that the house was built more than 15 years ago and Mrs Lee is unable to recall anyone else who was on site or, in any more than in very general terms, what Mr Koornneef was doing when she visited the site. She was unable to answer a question put to her as to whether she ever saw Mr Koornneef wearing a builder's apron. It is more likely than not that Mrs Lee recollects Mr Koornneef being on site more often than he was because he was the contact person at Phoenix.

[24] In order for Mr Koornneef to be personally liable there needs to be evidence that he personally carried out or controlled some aspect of the construction work that is associated with the defects. Mrs Lee has not pointed to anything specific Mr Koornneef did which is linked to the defects that caused leaks. Therefore I am not satisfied that Mrs Lee has established that Mr Koornneef personally built the house or that he personally supervised or controlled the construction work. I accept Mr Koornneef's evidence that his role was not one of project manager, builder or site supervisor. Others were employed by Phoenix to carry out these roles.

[25] Mr Cheng however argued that as Mr Koornneef controlled Phoenix he personally owes Mrs Lee a duty of care. He submitted that Mr Koornneef was the one who employed or approved the employment of staff and subcontractors, and that control of the company was sufficient to establish that Mr Koornneef owed a duty of care.

[26] In *Body Corporate 188273 v Leuschke Group Architects Lts*⁸ Harrison J, relying on *Morton*, rejected the submission that control of the development on its own is enough to establish liability. In that case the director, Mr Cooper, prepared budgets and established a framework for the project, arranged bank facilities, provided a personal guarantee, participated in the resource consent process, invited tenders, appointed contractors, engaged a coordinator and was responsible for financial and marketing aspects of the project. This was not however sufficient to establish he personally owed a duty of care. Harrison J stated:⁹

There must be evidence of the director's assumption of a degree of personal responsibility for an item of work which has subsequently proved to be defective".

[27] In *Drillien v Tubberty*¹⁰ Faire AJ found that Mr Tubberty, the main director and shareholder of a building company with a similar role to that of Mr Koornneef, did not exercise a sufficient degree of control to owe a duty of care. Mr Tubberty's role in that case was limited to co-ordinating building supplies, arranging plans and building consents and paying for materials and labour.

[28] Other than the fact the house leaked Mrs Lee has provided no evidence that Mr Koornneef was negligent in controlling the company. There is no evidence that he employed inappropriately qualified staff or that he was remiss in the way sub-contractors were engaged. There is no evidence, nor was it alleged, that there was an inadequate management or supervision structure in place with the company. To the contrary Mr Koornneef's evidence is that the company had appropriate checks and balances in place with the company employing both a project manager and a number of site supervisors.

⁸ *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR.

⁹ *Ibid* at [61].

¹⁰ *Drillien v Tubberty* (2005) 6 NZCPR 470.

CONCLUSION

[29] The defects with this property relate to design and workmanship issues and were not caused by the way Mr Koornneef ran his company. In other words there is no causative link between any of Mr Koornneef's acts or omissions and the defects in this property that resulted in leaks. While there is evidence of workmanship issues arising on site there is insufficient evidence that Mr Koornneef personally carried out or controlled the defective construction work, or that his role in the company resulted in defects. Other than the fact the house leaked, there is no evidence that the contractors Mr Koornneef engaged, on behalf of his company, were not competent in general. Nor is there any evidence that Mr Koornneef was remiss or negligent in the way he went about the contractual negotiations with Mrs Lee or with any subcontractors.

[30] I therefore conclude that Mr Koornneef does not personally owe Mrs Lee a duty of care. Even if Mr Koornneef owed such a duty there is no evidence that he breached any duty of care owed. Mrs Lee has failed to establish any causative links between Mr Koornneef's actions, or inactions, and the defects with this dwelling that have caused leaks. The claim against Mr Koornneef is accordingly dismissed.

Dated this 13th of July 2012

P A McConnell
Tribunal Chair