IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000028
[2010] NZWHT AUCKLAND 28

BETWEEN	STUART ALEXANDER FORREST AND FIONA WELSH Claimants
AND	KAMARA DEVELOPMENTS LIMITED (Removed) First Respondent
AND	WAITAKERE CITY COUNCIL Second Respondent
AND	KEVIN HERRING (Removed) Third Respondent
AND	TIM RUDOLPH Fourth Respondent
AND	ANN MARIE FARMER (ROLLINSON) (Removed) Fifth Respondent
AND	COOPER ROOFING LIMITED (Removed) Sixth Respondent
AND	JOHN ALLISON TAYLOR (Removed) Seventh Respondent
AND	JOHN WILLIAM POPE (Removed) Eighth Respondent
AND	LINCOLN ALUMINIUM LIMITED (Removed) Ninth Respondent

Cont...

AND	HAMISH KENNETH DOUGLAS FROST (Removed) Tenth Respondent

Hearing:	14 September 2010
Counsel Appearances:	Ms S H Macky, counsel for the claimants and the second respondent.
Appearances:	WHRS Assessor, Mr Neil Alvey Mr Stuart Forrest, claimant Ms Fiona Welsh, claimant Ms Ann Rollinson, fourth respondent and principal of first respondent Mr Hamish Frost, tenth respondent Mr Malcolm McCluskey, officer for second respondent Mr Tim Rudolph, fourth respondent Mr Louis Rudolph
Decision:	5 October 2010

FINAL DETERMINATION
Adjudicator: K D Kilgour

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INTRODUCTION

[1] In 2001 the first respondent, Kamara Developments Ltd (KDL) and its principal, the fifth respondent Ms Anne Rollinson, developed a block of land into four residential sections in Kamara Road, Glen Eden. They then caused the building of a home at 29C Kamara Road. That home was acquired by the claimants in late 2001 which they subsequently discovered to be a leaky home. Accordingly, this claim was lodged on 12 January 2006, and the application for adjudication filed with this Tribunal on 23 April 2009, whereby the claimants seek damages for repair costs, consequential costs, interest and stress and inconvenience.

[2] The claim went to mediation in January 2010 from which settlement negotiations emanated. As a result of those negotiations, the claimants entered into a settlement agreement on 26 March 2010

against all respondents except the fourth respondent, Mr Rudolph. Even though Mr Rudolph participated at the mediation, he did not engage in the settlement negotiations and has throughout these proceedings been unrepresented by counsel.

[3] The claimants have continued to pursue their claim in negligence against Mr Rudolph on the basis that as the labour-only builder, he ought to be held responsible for the losses they have suffered over and above the amount of $175,000.00 they have received in settlement. The claimants thereby seek the balance of their claim of $67,401.49 from Mr Rudolph which is the difference between their total claim of $242,401.49 and $175,000.

[4] In addition, the second respondent, Waitakere City Council, claims a contribution from Mr Rudolph pursuant to section 17(1)(c) of the Law Reform Act 1936 on the basis that the Council and Mr Rudolph are concurrent tortfeasors to the claimants. The Council has paid $85,000 in settlement to the claimants which the Council submits is in excess of its liability to the claimants.

FACTUAL BACKGROUND AND CLAIM

[5] In February 2001 KDL through its principal, Ms Rollinson, applied to the Waitakere City Council for a building consent to construct a residential dwelling on its land at 29C Kamara Road, Glen Eden, Auckland. After the Council approved and issued the building permit on 1 March 2001 KDL and Ms Rollinson then engaged Mr Rudolph as a labour-only builder to undertake the building for the concerned dwelling.

[6] Between March 2001 and 19 October 2001 the Council carried out inspections of the building work and issued a Code Compliance Certificate on 23 October 2001. On 13 December 2001 the claimants purchased the home from KDL.

[7] In 2005 the claimants encountered water ingress problems with their home and lodged their claim with the Department of Building and Housing on 12 January 2006. They seek additional losses of $28,097.98 for consequential costs incurred with the remedial work, plus interest on monies borrowed to undertake the remedial work of $8,899.83. A claim of $60,000 for general damages is also sought.

[8] Mr Rudolph admits that he was engaged by Ms Rollinson as a labour-only builder to build the claimants' house. He states that he undertook the work under instructions from Ms Rollinson who arranged for the purchase and supply of the necessary building materials required by him. Although Ms Rollinson engaged the other trades involved in the building of the house, Mr Rudolph was responsible for coordinating the attendance of most of the other trades when he required them. Essentially Mr Rudolph considers that he has no liability to the claimants because he was engaged on a labour-only basis and the Council had inspected and "signed off" his building work.

PRINCIPAL ISSUES

[9] The principal issues which I must determine are:

a) What are the building defects that have caused leaks?
b) What is Mr Rudolph's responsibility?
c) What is the quantum of damages?
d) What is the contribution and/or apportionment of liability between the Council and Mr Rudolph?
e) What is the Council's responsibility?

DEFECTS

[10] The principal building defects identified as causing water ingress in both the assessor's report and the Prendos report of

September 2007 relate to aspects of the building work that Mr Rudolph was involved in. These defects include:

a) No vertical movement control joints in the eterpan cladding. The texture coated fibre cement cladding showed signs of cracking at sheet joints due to a lack of vertical joints properly installed by the builder.
b) Flat top deck balustrades with no cover flashings or waterproofing membrane. The flat topped balustrade walls were originally constructed with no metal cover flashings or any apparent underlying waterproofing membrane.
c) No adequate flashing between the deck balustrade and walls of the house. The builder failed to install a proper flashing junction.
d) Inadequate deck drainage with no overflow. The deck was built with inadequate drainage and an undersized drainage outlet with no overflow.
e) Inadequate ground clearances.
f) Timber deck installed hard up against the cladding. The builder has constructed the timber slat section of the deck by fixing it hard up against the cladding and there was significant evidence that water entry had occurred as a consequence.
g) Excessive gaps between the head flashings and cladding and no head flashings to above garage door. The head flashings to the powder coated aluminium joinery had excessive gaps, were slotted through the fibre cement sheets and were not sealed. The head flashings to all windows were too deep and posed a risk of leaking under high wind pressure during rainstorms. No sill flashings were installed.

[11] Clause E2 of the Building Code requires that homes be constructed to provide weathertightness and clause B2 of the same Code 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 Alvey, an experienced weathertightness building surveyor stated that the above listed building defects infringed both clauses E2 and B2 of the Building Code because of the construction of the home. I accept the expert evidence of Mr Alvey.

[12] In his submissions Mr Rudolph sought to challenge these defects and findings. But at the hearing he did not challenge the evidence of Mr Alvey, nor did he adduce any contrary evidence challenging the defects. Instead Mr Rudolph came to the hearing prepared to only plead that as a labour-only builder he had no responsibility. Mr Rudolph did however admit that he constructed all the identified defects except for the inadequate ground clearances which was principally contributed to by the landscaper and driveway contractor after Mr Rudolph had completed his building work.

[13] Based on the evidence I accordingly find that although Mr Rudolph is not responsible for the inadequate ground clearances, he is however responsible for all of the other defects identified (albeit somewhat less than initially considered) relating to aspects of the building work which he admitted he was involved with and carried out. I am satisfied from the findings of damage outlined in the WHRS assessor's report and the Prendos report and as stated by Mr Alvey at the hearing, that those defects clearly caused water ingress and timber decay.

Remedial Work

[14] The Assessor's report, the Prendos report and ultimately the remediation builder all concluded that a total reclad of the house was required because of these defects and the resulting damage they caused. In particular, Mr Alvey determined that most of the damage was caused by the installation of the joinery and the deck construction. Mr Alvey stated that a full reclad was definitely

necessary on the east, north and south elevations. Whilst the west elevation could probably have allowed for targeted repairs, Mr Alvey stated that an additional cost for reclad of the west elevation was negligible and it would have been difficult and not cost-effective to attempt to flash the new cladding to the existing cladding.

[15] As the abovementioned causes of the leaks have allowed moisture ingress and resulting damage requiring a full reclad, I therefore accept the evidence of Mr Alvey that the remedial work required that the house be fully reclad.

MR RUDOLPH'S RESPONSIBILITY

[16] Mr Rudolph was engaged by Ms Rollinson and Kamara Developments Limited as a labour-only builder to undertake the building work for the house at 29C Kamara Road, Glen Eden. The contract which Mr Rudolph had with Ms Rollinson stated that he would be paid on completion of the "floor complete", "roof on", "closed and ready for pre-line inspection" and "completion". There is no contractual nexus between Mr Forrest, Ms Welsh and Mr Rudolph. As a result the relationship between the claimants and Mr Rudolph could only be one of a common law duty of care to ensure that the building work which Mr Rudolph carried out and/or co-ordinated was completed to good trade practices, with due care and skill and in a manner that would secure weathertightness and Building Code compliance.

[17] Ms Rudolph under questioning by me admitted that as an experienced 28 year builder his role always has been to build a weathertight cladding to envelope a residential dwelling. He said that he always followed material suppliers' assembly instructions. However when questioned over installing the Eterpan cladding at the concerned dwelling, Mr Rudolph conceded that he failed to install expansion joints as required by the manufacturer. But Mr Rudolph who admitted to building all the impugned water ingress defects

steadfastly deemed that he did not have any responsibility to the claimants as he was simply a labour-only builder.

[18] At the beginning of the hearing I allowed Mrs Carol Rudolph to withdraw as a witness as she wished to be her husband's representative. Mrs Rudolph thereby conducted the hearing acting as her husband's representative and support person. At the conclusion of the hearing Mr and Mrs Rudolph both indicated that they had no closing submissions other than what they had stated at the hearing. Subsequently I allowed Mr Rudolph an indulgence to file written closing submissions after the hearing. In a memorandum dated 28 September 2010 Mrs Carol Rudolph duly filed a memorandum which purported to introduce new evidence and to challenge the experts' evidence and those of the Council's witnesses.

[19] Mr Rudolph had ample opportunity before and during the hearing to address the matters which he and his wife now seek to so address. At this very late stage of the proceedings, I have not considered, and, indeed it will now be inappropriate to consider, such evidence. Notwithstanding that I have not considered such evidence, I can state that the substance of such submissions would not have altered this determination.

[20] Ms Macky for the claimants and the Council submitted that in *Bowen v Paramount Builders (Hamilton) Ltd*[1] the Court of Appeal held that "contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work". I agree with that submission.

[21] Ms Macky also referred me to the decision of *Body Corporate 202254 v Taylor*[2] where Chambers J stated:

[1] [1977] 1 NZLR 394.
[2] [2008] NZCA 317.

> [125] The law in New Zealand is clear that if a builder carelessly constructs a residential building and thereby causes damage, the owners of the residential building can sue the builder in negligence...
>
> ...
>
> [128] In short, there is nothing in principle preventing a builder owing a duty of care to subsequent owners of the building. Of course, in the present case, Mr Taylor did not "build" the villas on his own. Others will have helped. But that will not prevent Mr Taylor being liable in negligence. It is enough if *his* conduct 'is a contributory cause; [it does not need to be] in some sense a main or primary cause".

[22] The situation is no different where the builder involved is a labour-only builder such as Mr Rudolph has been with this house build. Support for this proposition is readily found in the cases of *Riddell v Porteous*[3] and *Boyd v McGregor*,[4] where the courts rejected the submission that a builder who is engaged on a labour-only basis somehow has diminished responsibility for his defective building work. A copy of the *Boyd v McGregor* decision was given to Mr Rudolph at the beginning of the hearing for his reading and understanding of the liability of labour-only builders.

[23] The Court in *Boyd v McGregor* dismissed the submission that a label, such as labour-only, applied to a building party should determine their legal liability. The "labour-only" epithet does not in any way reduce a builder's liability. The Judge in *Boyd v McGregor* referred to the Court of Appeal's decision in *Riddell v Porteous* which held that while the contractual terms of a builder's contract is relevant, a labour-only builder is still required to meet the requirements of the New Zealand Building Code and good building trade practice.

[24] Based on these case law authorities, I accept that The law in New Zealand is clear that if a builder (whether on a full contract or labour-only) carelessly constructs a residential building and thereby

[3] [1999] 1 NZLR 1.
[4] HC Auckland, CIV-2009-404-5332, 17 February 2010, H Williams J.

causes damage, the owners whether original or subsequent purchasers of that house can sue the builder in negligence. Mr Rudolph, as a labour-only contractor, was engaged to undertake the building work for the house and thereby owed a duty of care to Mr Forrest and Ms Welsh in carrying out that work.

[25] The evidence during the proceeding and at the hearing clearly established that Mr Rudolph carried out the significant aspects of the building work which caused the defects has caused water ingress and the resulting damage requiring remediation with a full recladding of the home. I therefore find that with the exception of the inadequate ground clearances Mr Rudolph was responsible for constructing all of such defects in breach of the duty of care he owed to the claimants. As these defects have caused the claiamnts' loss, I conclude that Mr Rudolph is therefore jointly and severally liable to the claimants.

QUANTUM

Repair Costs

[26] On 14 August 2007 Mr Alvey estimated that the cost of repairs to correct the water ingress problems and to prevent future likely damage would be approximately $133,757.00. The claimants obtained further advice about repairs from Prendos Ltd on 25 September 2007 which identified the same building defects causing water ingress problems. However Prendos estimated the remedial costs to be approximately $211,965.60 (exclusive of GST). In late 2008, the claimants had the house remediated by Reinstate Ltd which amounted to a total cost of $145,403.95 (including GST).

[27] Mr Rudolph stated that he thought the cladding costs were excessive and produced material quantity estimates from Pine Pac Building Centre in an attempt to support his opinion of excessive repair costs. One of his concerns was that the betterment or owner's choice category of costs were not excluded. Moreover

notwithstanding Mr Rudolph's evidence that he never returned to the property to inspect the remedial work, he nevertheless advanced remedial suggestions and quotations at the hearing without any expert evidence or building site involvement to support his view.

[28] Mr Alvey had no issue over the remedial costs and stated that in his expert view the actual repair costs were most reasonable. Mr Alvey stated that whilst the remediation was not like for like as there was some additional extensions to the decks and the closing in of the deck on the eastern elevation and the eterpan cladding was replaced with weatherboard, such changes would have added minimal additional costs.

[29] I therefore accept the evidence of Mr Alvey and I am satisfied that the total repair costs claimed by the claimants do exclude owner's choice or betterment. Accordingly I conclude that this home required a full reclad and that the repair costs expended by the claimants of $145,403.95 is a fair and reasonable cost.

Consequential Costs and Bank Charges

[30] The claimants also seek consequential costs of $28,097.88 and bank borrowing charges of $8,899.83. There was no objection to these charges and I again determine that they are fair and reasonable.

General Damages

[31] The claimants seek general damages of $60,000 ($30,000 each). Whilst there has been some debate as to whether damages should be awarded on a per dwelling or per owner basis, Ellis J recently concluded in *Findlay Family Trust*[5] that the *Byron Avenue* appeal[6] confirmed the availability of general damages in leaky

[5] *Findlay & Anor as Trustees of the Lee Findlay Family Trust v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.
[6] [2010] NZCA 65.

building cases in general was $25,000 per dwelling for owner-occupiers.

[32] Both Mr Forrest and Ms Welsh advanced compelling evidence of the stress, ill health and anxiety they have suffered as a consequence of owing a leaky home. I accept that the claimants are entitled to general damages for stress, anxiety and inconvenience and loss of enjoyment of their property and accordingly determine that the claimants are entitled to a total of $25,000 for general damages which is the quantum in line with the above mentioned "tariff".

Summary of Quantum

[33] I therefore determine that the overall claim should be for the sum of $207,401.66 based on the following amounts:

Actual repair costs	$145,403.95
Consequential costs	$28,097.88
Bank interest and charges	$8,899.83
	$182,401.66
General damages	$25,000.00
	$207,401.66

CONTRIBUTION

[34] 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.

[35] 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 of 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 as a joint tortfeasor or otherwise…

[36] 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.

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

Council's Responsibility

[38] The Council officers inspected the construction work between 26 March 2001 and 19 October 2001 and issued on 23 October 2001 a Code Compliance Certificate for the house. The law regarding a local authority's duty of care in this area is now clearly understood and most particularly set down in *Sunset Terraces*:[7]

> [409] 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.

[39] 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.

[40] Based on the defects identified above and the evidence before the Tribunal, I find that the Council's inspection regime should have detected that:

- vertical movement control joints in the eterpan cladding were not constructed,
- there were flat top deck balustrades with no cover flashings or waterproofing membrane,
- inadequate flashings between the deck balustrades and the walls, inadequate deck drainage,
- the timber deck installed hard up against the cladding,
- the excessive gaps between the head flashings and the cladding,
- no head flashing over the garage door; and
- the inadequate ground clearances.

[41] Mr McCluskey, as manager of leaky building claims at the Waitakere City Council, gave evidence in these proceedings. He is a lawyer and is experienced in assessing litigation risk and undertaking legal analysis of the Council's exposure in leaky building claims. Mr McCluskey's evidence is that he undertook a clear legal analysis of the Council's exposure in this claim and indicated that the Council would have had an exposure to liability for the losses claimed by the claimants on a joint and several basis.

[42] In accepting the evidence of Mr McCluskey, I determine that the Council breached its obligations owed to the claimants by not identifying a number of the defects present in the house during its inspection process and that it issued a Code Compliance Certificate in October 2001 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.

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[7] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV2004-404-3239, 30 April 2008, Heath J.

Apportionment

[43] Ms Macky submitted that based on the current authorities such as *Dicks v Hobson Swan Construction Ltd (in liq)*[8] and *Byron Avenue* the Council's liability ought not to extend beyond 20% for the losses claimed. It is also noted that it is well established that the parties undertaking the work should bear a greater responsibility than those certifying the construction work. This is because a local authority is not a clerk of works or a project manager.

[44] Mr Rudolph's involvement in the construction of the home which resulted in weathertightness defects has caused a full reclad. Ms Macky advises that the Council has paid $85,000 to the claimants in its settlement of this claim. She submitted that Mr Rudolph's liability to the Council should be 80% of that sum, and that would be in line with the court's findings in the decisions of *Dicks* and *Byron Avenue.*

[45] I conclude that the Council's inspections in failing to detect such defects and in issuing a Code Compliance Certificate was negligent and the appropriate apportionment between the Council and Mr Rudolph is 80% to the builder and 20% to the Council. The Council's liability to the claimants is established to the sum of $41,480.33. As the Council has paid $85,000 to the claimants, its claim for contribution against Mr Rudolph is now established in the sum of $43,519.67.

Summary of Mr Rudolph's Contribution

[46] I determine because of my findings above that Mr Rudolph is liable to Mr Forrest and Ms Welsh for $32,401.66 being the difference between the amount that the claimants recovered in settlement ($175,000) and the amount of the overall claim being

[8] (2006) 7 NZCPR 881.

$207,401.66. In addition the Council has successfully established the claim for contribution of $43,519.67 against Mr Rudolph.

[47] Ms Macky submitted that there is no need for the Tribunal to consider the contributions to settlement made by the other parties. I agree with that submission as no such request was made by any of the other parties to this proceeding.

CONCLUSION AND ORDERS

[48] The claimants' claim is appropriate to the extent of $207,401.66. For the reasons set out in this determination I make the following orders:

i. Mr Rudolph is ordered to pay the claimants the sum of $32,401.66 forthwith.
ii. Mr Rudolph is ordered to pay by way of contribution under section 17 of the Law Reform Act 1936 to the Waitakere City Council the sum of $43,519.67 forthwith.

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

Claimants	$32,401.66
Waitakere City Council	$43,519.67
Total	**$75,921.33**

DATED this 5th day of October 2010

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K D Kilgour
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.