IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000096
[2012] NZWHT AUCKLAND 42

BETWEEN	MAUREEN TAYLOR Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	STEWART COX and GAYLE COX Second Respondents
AND	LESLIE PATTERSON ENGLAND Third Respondent

Hearing: 6 September 2012

Appearances: D Barr and K Lydiard for the first respondent

Decision: 13 September 2012

FINAL DETERMINATION
Adjudicator: P R Cogswell

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Background

[1] Maureen Taylor is the owner of a property at 17 Angel Way, Stanmore Bay, Whangaparaoa. She purchased the property from Hibiscus Coast Properties Limited, a company which is now struck from the Companies Office Register.

[2] Ms Taylor discovered that her home was leaking and registered a claim with the Weathertight Homes Resolution Service (WHRS). That claim was held to be eligible. An assessor's report was completed.

[3] The assessor's report concluded that there were a number of construction defects in the property including:

(a) Inadequate installation of the cladding through lack of movement control joints, poorly formed external corners and poorly formed vertical cladding joints resulting in cracking.
(b) Inadequate installation of the door and window joinery.
(c) Insufficient coating protection.
(d) Insufficiently constructed cladding base detail including a lack of cladding and floor clearances to the adjacent ground.

[4] The assessor was of the opinion that, as a result of those defects, the house required a full reclad to its external walls incorporating a drained cavity system and the replacement of decay damaged timber framing.

[5] The Council applied to join the second respondents, Gayle and Stewart Cox to this claim. The Council's application alleged that

the second respondents were developers in their personal capacity and, as such, owed a non-delegable duty of care to Ms Taylor.

[6] I ordered that the joinder application be put on notice to the second respondents so that they may indicate their position on the application. The second respondents took no steps in relation to the joinder application and by Procedural Order 3 I ordered them to be joined to this claim as respondents.

[7] I considered the following factors to be supportive of an argument that the second respondents could be liable to Ms Taylor personally as developers:

(a) The evidence provided by Ms Taylor at the preliminary conference as to her personal observations of and discussions with Mr and Mrs Cox to the effect that they were personally carrying out construction work on the property and were personally involved in the marketing for sale of the property.
(b) The apparent involvement of Mr Cox personally in the acquisition and subsequent development of the original site.
(c) The involvement of Mrs Cox in the completion of the application for building consent made by their company, Hibiscus Coast Properties Limited.
(d) The reference to Mr Cox as being the "owner/developer/contractor in the Firth design certification dated 18 September 2000. [1]

[8] Following the second respondents' failure to provide disclosure of documents as ordered by Procedural Order 3, a witness

[1] WHRS assessor's report, 22 July 2011 at [44].

summons hearing was convened. Mr and Mrs Cox appeared in answer to their witness summons.

[9] A transcript of the witness summons hearing was produced. In that witness summons, Mr Cox identified the third respondent, Leslie England as the person responsible for carrying out the building work at Ms Taylor's property. Mr Cox confirmed that Mr England was responsible for installing the cladding sheets, installing the joinery and was involved in a project management or supervisory role during construction.

[10] There was some mention of the possibility that this work was conducted through a company owned or controlled by Mr England. Mr Cox made it clear that Mr England personally carried out the work.

[11] Accordingly, by my Procedural Order 5, I ordered that Leslie Patterson England be joined to this claim as a respondent.

[12] Neither the second or third respondents have subsequently taken any steps in this claim. They have not filed responses to the claim as ordered. They have not given discovery of documents as ordered. They have filed no evidence in opposition to the claims against them.

[13] At a mediation conducted on 10 May 2012, the Council proceeded to mediate in their absence. It reached a settlement with Ms Taylor and the settlement agreement has been produced to the Tribunal in this claim. Neither the second or third respondents attended the mediation. Neither has made any comment about the reasonableness of the settlement reached.

[14] I have read the settlement agreement. As is material to this claim, the settlement agreement provides that:

(a) The Council is to pay the sum of $165,000 to Ms Taylor in full and final settlement of the claims between her and the Council.

(b) The Council is subrogated to the rights of Ms Taylor and is entitled to continue with her claims and/or make claims as if it was the claimant against any of the second or third respondents.

[15] There is jurisdiction to bring a subrogated claim on this basis as was recognised in the High Court decision of *Petrou v Weathertight Homes Resolution Services*. [2]

[16] The Council provided an affidavit affirmed by Malcolm Winston McCluskey. He is a Council Officer. His affidavit gives his opinion that the settlement reached between the Council and Ms Taylor was a reasonable one in all the circumstances. I have no grounds or reason to disagree with that view.

[17] The hearing was convened on 6 September 2012. The Council appeared through Mr Barr and Ms Lydiard. There was no appearance by or on behalf of either the second or third respondents. Mr Barr handed to me a letter received by his firm from the second respondents that morning. The letter was received as an exhibit in this claim. Other than advising Mr Barr that the second respondents are in a bad financial position, the letter does not take issue with any of the allegations against them in this claim.

[2] *Petrou v Weathertight Homes Resolution Services* HC Auckland, CIV-2009-404-1533, 24 November 2009.

The claims

[18] Pursuant to its rights of subrogation the Council filed an amended statement of claim dated 8 June 2012. The claims brought by the Council are that:

(a) The second respondents were property developers and as such owed a non-delegable duty of care to Ms Taylor to exercise reasonable care in the construction of the dwelling and/or to ensure that the dwelling was constructed in a proper and workmanlike manner and in accordance with the requirements of the Building Code.

(b) The third respondent was at all material times the builder, the head contractor, site supervisor and project manager in relation to the construction of the dwelling.

[19] The Council seeks to recover a contribution from the second and third respondents pursuant to s 17 of the Law Reform Act 1936 and/or s72 of the Weathertight Homes Resolution Services Act 2006.

[20] The Council seeks a contribution of $132,000.00 from the second and third respondents, which is 80 per cent of the $165,000.00 paid in settlement to Ms Taylor.

Service

[21] The second respondents attended a witness summons hearing on 12 April 2012. They had been served with the necessary documents and were aware of this proceeding.

[22] No correspondence sent on behalf of the Tribunal to Mr and Mrs Cox has been returned. They have simply chosen to take no steps to defend their position. Were there any doubt about that, the letter sent to Mr Barr commences by referring to the above claim and the hearing date.

[23] I find, therefore, that the second respondents were properly served in terms of s 117 of the Act.

[24] The third respondent has taken no steps whatsoever in response to this claim. The Council has filed an affidavit by Paul Desmond Warren Culliford which sets out the steps taken by the Council to effect service on the third respondent.

[25] Significantly, a courier package delivered on 2 August 2012 to the third respondent by the Council to the address of 1835 East Coast Road, Silverdale was not returned.

[26] Mr Culliford's affidavit appends to it a certificate of title for the address 1835 East Coast Road, Silverdale. That certificate of title was obtained on 31 August 2012 and records the third respondent as the registered proprietor of that property.

[27] The case manager has confirmed to me that some letters addressed to the third respondent at 1835 East Coast Road, Silverdale were returned to the Tribunal. However, letters addressed to the third respondent at 1835 East Coast Road, Redvale, Dairy Flat, Auckland have not been returned. They include a letter entitled "Notice of Service on Respondent" (which attached various relevant documents including a CD of all case documentation to that date), a letter enclosing Procedural Order 7 which allocated the hearing date and the Notice of Adjudication Hearing.

[28] Accordingly, I find that in terms of s 117 of the Act, the third respondent has been properly served.

Determination of claim against the second respondents

[29] In terms of ss 74 and 75 of the Act, the second and third respondents' failure or refusal to act in opposition to this claim does not affect my ability to determine the claims brought against them. In terms of s 75, the second and third respondents' failure to act allows me to draw from that failure any reasonable inference I think fit and to determine the claim on the basis of the information available to me.

[30] I turn now to the claim against the second respondents. Mr Barr has identified that the issue in relation to the second respondents' potential liability is whether they were personally involved and in control of the development in terms of the test set out for directors of development companies in *Body Corporate 199348 v Neilsen.*[3] The question to be asked is whether the Coxs' personally exercised sufficient control to assume responsibility for the development as a whole.

[31] Mr and Mrs Cox were in the business of developing houses, in the Whangaparaoa area through their company Hibiscus Coast Properties Limited. Mr Cox advised me at the witness summons hearing that the company had developed some 56 houses in that subdivision.

[32] The personal involvement of Mr and Mrs Cox in the development of the property is clear from the evidence before me. I return again to my comments at para [18] of Procedural Order 3. I now find those factors proven. I consider that I am entitled to do that

[3] *Body Corporate 199348 v Neilsen* HC Auckland, CIV 2004-404-3989, 3 December 2008.

based on the evidence before the Tribunal at the hearing and based on my ability to draw an inference against Mr and Mrs Cox as a result of their failure to take any steps in opposition to the allegations against them.

[33] Mr Barr has also drawn to my attention the decision of the High Court in *Bergin v North Shore City Council.*[4] At para [15] of his submissions, Mr Barr summarised the role taken by Mr and Mrs Cox in relation to that development.

[34] Mr Barr has asked that I infer from Andrews J's findings that the second respondents must have taken a similar role in relation to Ms Taylor's property.

[35] I would be reluctant to infer from the facts of a different case in a different subdivision what steps or role the second respondents had in relation to Ms Taylor's house. While I suspect that the second respondents would likely have taken similar steps in relation to the development of the subject subdivision and in particular Ms Taylor's home, I consider that based on the evidence currently before the Tribunal, I do not need to rely on that inference to find the allegations against Mr and Mrs Cox as developers personally to be proven.

[36] Another factor which supports my finding is the change in the cladding used on this home. The consented plans show that the dwelling was to have brick veneer. However the final house as built was clad with Harditex. I agree with Mr Barr's comment in his submissions that such decisions regarding changes to the cladding of the dwelling being constructed are normally made by development companies. It would be unlikely for the builder to unilaterally make such a significant change.

[4] *Bergin v North Shore City Council* HC Auckland, CIV-2006-404-2295, 5 April 2007.

[37] In this case, Mr and Mrs Cox were the controlling minds of Hibiscus Coast Properties Limited. They were its only directors. They can, therefore, have been the only parties to have directed the change in cladding and I find that they directed the change in the cladding from the consented plans to the use of Harditex.

[38] The installation of the Harditex is one of the numerous items of defective construction identified by the assessor. I find therefore, that they were responsible for the election to change the cladding from brick veneer to Harditex. The incorrect installation of Harditex is a major cause of water ingress at this house.

[39] Accordingly, based on the evidence before the Tribunal on this claim and drawing an inference against the Coxs' arising from their failure to attend the hearing, I find the claims against the Coxs' proven.

Determination of claim against the third respondent

[40] The third respondent carried out and supervised the building work and construction of this dwelling. Mr Cox confirmed that Mr England was the person who carried out the construction of Ms Taylor's home and, in particular, that he installed the cladding, installed the joinery and performed an onsite supervisory role during construction.

[41] The assessor's report establishes that the dwelling was defectively constructed and in particular identifies:

(a) Incorrect fixing of the Harditex sheets.
(b) Absence of control joints; and
(c) Incorrect installation of the joinery;

as construction defects that led to water ingress and damage to Ms Taylor's home.

[42] Cases such as *Bowen v Paramount Builders (Hamilton) Ltd* [5] have established without doubt the proposition that trades people, including builders, owe a duty of care to purchasers to take reasonable care when carrying out building work to avoid foreseeable loss to others arising out of defective construction.

[43] In failing to fit the Harditex sheets correctly, failure to install control joints and failing to correctly install the joinery, the third respondent fell below the standard of a reasonable builder at the time of construction. I draw these findings based on the assessor's report which was received into evidence without challenge and also from the evidence of Mr Cox given at the witness summons hearing. Finally, I also draw an inference in terms of s 75 against Mr England on those issues.

[44] Accordingly, I find that the Council has proven its claims against Mr England.

Remedial costs and damage

[45] I have already concluded that a settlement entered into between the claimant and the Council was a reasonable one.

[46] The Council in its submissions states that based on cases such as *Mount Albert Borough Council v Johnson*[6], a fair apportionment between a developer owing a non-delegable duty of care and a territorial authority is four-fifths to the developers and one-fifth to the territorial authority (generally known as the "20 per cent

[5] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
[6] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

rule”). I agree with Mr Barr that there is no reason to depart from the established authorities in this case.

[47] Similarly, the third respondent is in the position of having full responsibility for the construction of this dwelling. He is therefore fully responsible for the defects and damage arising from that negligent construction. If the second respondents were not a party to this claim, the Council would be entitled to a contribution of 80 per cent from the third respondent.

[48] Accordingly, I find that the Council is entitled to a contribution to the extent of 80 per cent of the settlement sum paid (being the sum of $132,000.00) from the second and/or third respondents, provided that the net recovery shall not exceed $132,000.00.

[52] I see no reason to distinguish between the liability of Mr and Mrs Cox and Mr England. They were equally involved, in different roles, in the construction and I therefore apportion their liability to the claimants at 50 per cent each of the amount they are to pay.

Conclusion and Orders

[53] Gayle Cox and Stewart Cox on the one hand and Leslie Patterson England on the other are jointly and severally liable to pay to the Council the sum of $132,000.00 immediately. Gayle Cox and Stewart Cox are entitled to recover any contribution from Leslie Patterson England for any amount paid by them in excess of $66,000.00. Leslie Patterson England is entitled to recover a contribution from Gayle Cox and Stewart Cox for any amount paid by him in excess of $66,000.00.

[54] In summary, if both the second and third respondents meet their obligations under this determination, the following payments will be made by them to Auckland Council:

(a) Gayle and Stewart Cox - $66,000.00;
(b) Leslie Patterson England- $66,000.00.

[55] If the second or third respondents fail to pay their apportionment, the Council may enforce this determination against any one of them up to the total amount payable, being $132,000.00.

DATED this 13th day of September 2012

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P R Cogswell
Tribunal Member