

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000057
[2012] NZWHT AUCKLAND 26**

BETWEEN	JING HUANG Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	MOON YIN KEUNG Second Respondent
AND	OWEN LAMB Third Respondent

Hearing: Wednesday 7 March 2012

Appearances: Mr G Shand counsel for the claimant
Ms Harrison and Mr Barr for Auckland Council first
respondent
Mr Lamb, third respondent (together with Mrs Lamb)

Decision: 25 May 2012

DETERMINATION

(Claim by Auckland Council, First Respondent against Mr Owen
Lamb, the Third Respondent)

Adjudicator: P J Andrew

INTRODUCTION

[1] In a determination dated 16 March 2012 the Tribunal, by consent, entered judgement against the Auckland Council, the first respondent, in the sum of \$340,000. The Auckland Council conceded liability for substantial defects in construction as set out in the claimant's statement of claim of 28 June 2011. This included defects with window flashings, balustrades and the deck.

[2] Auckland Council now seeks a contribution from Mr Lamb, the third respondent, pursuant to section 72(2) of the Weathertight Homes Resolutions Services Act 2006 and for the sum of \$272,000. That represents 80% of the sum of \$340,000.

[3] Mr Lamb and his brother were labour-only builders. Mr Lamb acted under the instruction of the project manager and site supervisor.

[4] Mr Lamb accepts that he owed a duty of care to the claimants to exercise reasonable skill and care in the building work that he carried out. However, he denies that he breached any such duty causing loss to the claimants. In other words, he says he was not negligent in any way for the work that he did and is thus not liable to make any contribution to the Council.

[5] The critical issues the Tribunal must determine are whether Mr Lamb breached any duty of care in relation to the particular defects in construction for which the Council has already accepted liability.

MATERIAL FACTS

[6] The claimant's house at Ngake Street, Orakei, Auckland, was built in 2001. It was constructed with stucco cladding over a rigid

barrier direct fixed to the timber framings. It has aluminium exterior joinery and enclosed a cantilevered balcony. A pergola was attached.

[7] The developer of the property was Moon Yin Keung, the second respondent. However, steps taken to serve her with a copy of the proceedings have been unsuccessful.

[8] Mr Lamb and his brother worked on site between October 2000 and February 2001 and between them were paid in total approximately \$45,000 for their labour only services. They were directly responsible to Mr Henry Huang who was the project manager and site supervisor. Mr Huang engaged all the sub trades and Mr Lamb and his brother.

[9] Mr Lamb is an experienced builder. He had been recommended to Mr Huang by a previous client.

[10] Mr Lamb installed the windows, including the jamb sill and head flashings. He installed the roof framing and installed the parapets. He framed up the balcony balustrades and cladded them with building paper and hardibacker. The stucco plasterer and painter then took over the remaining of the exterior work. Mr Lamb also erected the substrate to the deck, sealed the meter box and installed the pergolas. At Mr Henry Huang's request he called for the Council inspections over the period October 2000 to February 2001.

[11] The claimants purchased the house in 2008 for \$740,000. They did not obtain a pre-purchase inspection report. In November 2010 they filed a claim with DBH.

[12] In his report of 31 January 2011 the accessor, Mr Warren Nevill, recorded that there was widespread cracking within the stucco cladding. He concluded that the dwelling, of complex and high risk design, has suffered from widespread moisture ingress caused by a

number of systematic design and construction deficiencies. These deficiencies included stucco reinforcing exposed on the rear face of the plaster, no packing spacers at the cladding removal site, variation in plaster thickness and lack of installation of adequate control joints. All of these particular defects relate to stucco cracking. In addition there were deficiencies with the window flashings.

[13] The deficiencies have resulted in extensive areas of decay to the timber framing. Mr Nevill recommended that the dwelling be fully re-clad with the estimated costs to be \$376,334.

THE CLAIM AGAINST MR LAMB

[14] The Council contends that Mr Lamb was responsible for the following defects in construction causing water ingress;-

- a) Ineffective jamb flashings.
- b) Lack of stop ends to sill flashing.
- c) Head flashings did not extend a minimum of 30mm past the window frame.
- d) Balustrades are not flashed/capped and have a slope of less than 15 degrees.
- e) The fall of the deck is less than three degrees.
- f) No saddle flashings at the parapet to wall junctions.
- g) No flashings to the meter box.
- h) The pergola is nailed through the stucco.

[15] The Council contends that these defects have caused widespread damage, requiring a full re-clad. On this basis, and having regard to the relative degrees of responsibility, the Council seeks an 80 per cent contribution from Mr Lamb.

THE EXPERT EVIDENCE

[16] There was substantial consensus between the two experts, the assessor, Mr Nevill and Mr Gillingham, expert witness for the Council, that the items listed in paragraph [14] above, were in fact defects in construction that have contributed to substantial moisture ingress. There was likewise no dispute between the experts that the house needs a full reclad.

[17] Mr Nevill identified a deficiency with the jamb flashing in an isolated spot but was not in a position to say whether such deficiency was typical of the jamb flashings throughout the dwelling. Mr Gillingham was of the view that the issue with the jamb flashing was probably widespread throughout the dwelling. However, they both agreed that this defect was not a major contributing factor of moisture ingress.

[18] The major contributing factor to moisture ingress around the joinery was that the system for fixing the ends of the sill flashing did not work. The sill flashings were encapsulated into the absorbent stucco material. Not only were there no stop-ends on the end of the sill flashing (allowing water to migrate) but the fibre cement Hardibacker material is absorbent. Once an area of stucco becomes wet, the moisture is transferred through to the framing.

[19] Mr Nevill was of the view that the cladding system used here, namely face-fixed rigid back stucco over untreated timber, was a system that did not work and could never have worked. Mr Gillingham, who was more circumspect on this matter noted that this system was banned by the Auckland City Council in 2003 although that banning was subsequently overruled. Mr Gillingham accepted that the system was far from perfect. He acknowledged that the building was high risk in design, with stucco plaster on untreated framing.

[20] Mr Nevill and Mr Gillingham also noted that there was an amendment to the acceptable solution E2/AS1 in 2004 which required all stucco applications to be over a drained ventilated cavity. This was provided for by way of an interim amendment E2 with immediate effect from 9 February 2004. The interim amendment dealt specifically with the use of solid plaster (stucco) cladding on timber framing.

[21] In condemning the face-fixed ridged back stucco system Mr Nevill noted that the BIA had been slow to acknowledge problems with the system, despite the known practical difficulties experienced by the building industry in working with it.

[22] I accept that there is considerable force to the views expressed by Mr Nevill, a very experienced and highly regarded assessor. There is also support for those views in the general findings of the *Hunn* report and the jurisprudence of the Court of Appeal in the *Sunset Terraces* litigation.¹

[23] I also note that in 1996, the BRANZ Good Stucco Practice Guide referred to “stucco failures” in the following manner:-

“2.3 Stucco Failures”

“2.3.1 Unfortunately, failures of stucco have occurred and, even more unfortunately, it is extremely difficult to determine why one job is satisfactory while the next one, apparently done in the same manner, fails miserably. The absence of proper site records often makes it almost impossible to determine the cause of failure, which may result from a single factor or a combination of many different factors.”

¹ *North Shore City Council v Body Corporate 188529* [2010] NZCA 64; see in particular the conclusions of Arnold J who referred to the general moral responsibility and failings of the BIA which had the power to eliminate or reduce practices that produced leaky home syndrome -albeit that the BIA has no legal liability for its failings.

[24] That same document also stated that applying stucco is highly skilled work in which the finished quality relies greatly on the plasterer.

[25] Mr Nevill noted in his report that there were “marked” variations in plaster thickness particularly in conjunction with poorly placed reinforcing. The defects for which the Council has accepted liability include those relating to the application of the stucco plastering.

MR LAMB’S EVIDENCE

[26] Mr Lamb presented as a very experienced builder. He was a credible witness. He produced a number of references testifying to his competence as a builder.

[27] Mr Lamb reported directly to Mr Henry Huang, the site supervisor and project manager. Mr Huang organised all of the materials and in Mr Lamb’s words “ran the whole job.” Mr Huang gave instructions to and supervised all of the sub-trades on site. Mr Lamb had no responsibility for any of the duties carried out by Mr Huang.

[28] If there were any changes from the building plans, Mr Lamb would always discuss these with Mr Huang.

[29] Mr Lamb contends that the need for a full reclad has risen because the direct fixed stucco cladding system was flawed and could never have worked. He accepts there was some departure from the technical literature, including a decision not to create head flashings that extended a minimum of 30mm past the window frame. In making this decision, a deliberate one, Mr Lamb says he was relying on discussions and recommendations he had and received from Council building inspectors on other similar jobs, where it was

recognised that this was not required. Mr Lamb was also of the view that this requirement did not work for a design (as here) involving face fixed rather than recessed windows.

[30] Mr Lamb referred to some six to eight houses where head flashings did not extend a minimum of 30mm beyond the end of the window frame and said that there had never been any failures or problems. Mr Lamb further said that he specifically discussed the issue of the 30mm extension of head flashings with Mr Huang and pointed out to him what the technical literature required. He also told Mr Huang that Council inspectors had accepted and approved head flashings that did not extend beyond the 30mm. Mr Huang instructed Mr Lamb to install the flashings as he did, namely without their extending a minimum of 30mm past the window frame.

[31] Mr Lamb said that there was a particular reason why the ends of the sill flashings were not turned up, namely because they would encapsulate into the plaster and the corner of the plaster would break off. He claimed that if the jamb flashings stopped short of the sill flashing, sealant would prevent a moisture path developing along the sill flashing and directly into the framing.

[32] In his evidence, Mr Lamb gave a demonstration, using a model, and explained that subsequent to his involvement someone had put sealant in the bottom channel (not him) located underneath the sill of the joinery. This resulted in the blocking of water, and then building up and tracking over the back of the plaster jointers.

[33] Mr Lamb pointed out that the design of the house provided for eyebrow details over all the windows, which when installed with a drip edge, provided additional protection to the window head areas. However, Mr Huang instructed that eyebrows should be put on the windows on the front elevation only. Mr Lamb was not aware that

only the front elevation windows had eyebrows until he subsequently went back on site after his work had been completed.

[34] In relation to saddle flashings, Mr Lamb accepts that he did not install any, but says that they were not required at the time.

[35] In relation to construction of the substrate to the deck, Mr Lamb explained that he was unable to create a greater degree of fall because of a steel beam provided for in the plans. He specifically discussed this issue with Mr Huang and suggested to him that one option for creating a greater slope for the deck substrate was to lower the ceiling down to the underside of the beam. However, Mr Huang did not accept this and instructed that the ceiling should be in the same line.

[36] Mr Lamb also discussed the issue of the slope of the balustrade and capping to the balustrade with Mr Huang. Mr Huang was adamant that it was for the plasterer to create the slope to the balustrade and he rejected Mr Lamb's suggestion that the balustrade should have a metal cap flashing over it.

BREACH OF THE STANDARD OF CARE

[37] Mr Lamb has correctly and responsibly accepted that he owed the claimants a duty of care to exercise reasonable care and skill as a builder, in carrying out the building work he performed. The law does not accept that labour-only builders are exempt from duties of care of this kind.²

[38] The standard of reasonable care and skill is to be applied in light of the particular circumstances of the case in hand. Evidence of common practice in an industry or of accepted professional standards may be helpful in determining whether a defendant has

² *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010.

been negligent. The courts treat such evidence as important but not decisive. Ultimately the court itself must determine the question of negligence as a fact in all the circumstances.³

[39] I accept the submission of Ms Harrison for the Council that the systemic failings of the direct fixed stucco cladding system (as identified by Mr Nevill) do not provide Mr Lamb with an unassailable defence. However, in my view, these systemic failings are part of the factual circumstances of this particular case that I can have regard to in determining whether Mr Lamb has been negligent in the manner alleged.

[40] I now turn to consider each of the defects listed in para [14] above, and whether the Council has established that Mr Lamb breached his duty of care, resulting in loss to the claimants.

No Effective Jamb Flashings

[41] In closing submissions, Ms Harrison chose to deal with the lack of effective jamb flashings together with the lack of stop-ends to the sill flashings. In relation to both these alleged defects the Council contends that Mr Lamb failed to install the sill and jamb flashings correctly, that this led to moisture ingress and was a breach of his duty to act with reasonable skill and care. The Council submits that this was not in accordance with;-

- a) Good trade practice; and/or
- b) The performance requirements of the Building Code, in particular E2; and/or
- c) An acceptable solution or a BRANZ appraised alternative solution.

³ Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington 2009) at 7.4 page 385; see also *Auckland Council v Ryang* HC Auckland, CIV-2011-404-2570, 28 September 2011.

[42] I am not satisfied that the Council has established that the alleged deficiency with the jamb flashings were widespread across the dwelling or a material cause of moisture ingress.

[43] Mr Nevill identified a deficiency with the jamb flashing in an isolated spot but, as indicated above, was not in a position to say whether such deficiency was typical of the jamb flashings throughout the dwelling. He was also of the view that any deficiencies with jamb flashings were not a major contributing factor to the water ingress problems.

[44] Mr Gillingham expressed the view that he had “no reason to believe” that the deficiency with the jamb flashing wasn’t typical across the dwelling. In Mr Gillingham’s view, defective jamb flashings were a widespread problem.

[45] Both Mr Nevill and Mr Gillingham are experienced practitioners and have obviously given careful consideration to their respective positions. Mr Nevill, the accessor, spent more time on the property investigating the overall issue of weathertightness than Mr Gillingham did. Mr Gillingham did not investigate any additional windows beyond those examined by Mr Nevill. Ultimately, in my view the evidence is inconclusive as to how widespread problems with the jamb flashings were and whether this was a major cause of water ingress, in any event. I conclude that the Council has not discharged the burden of proof that it carries in relation to the allegation of defective jamb flashings. This particular claim is thus dismissed.

Lack of Stop-Ends to Sill Flashings

[46] It is important to put this allegation, and indeed, all of the particular claims of negligence against Mr Lamb, in context.

[47] Mr Lamb was a labour-only builder, not responsible for general quality control or oversight of the whole project. He did not apply the stucco plastering which the assessor identified as a major problem. He acted under the direction of Mr Huang and conscientiously and properly raised issues of building construction with him. This included issues relating to window flashings. He was not the only labour-only builder on site. He worked together with his brother.

[48] Mr Nevill, the assessor, said that over the nine odd years that he has been a DBH assessor, and inspecting or carrying out testing of numerous houses, he has never come across turn up stop-ends on sill flashings. The building industry, Mr Nevill said, was simply not using them. The BRANZ Stucco Good Practice Guide 1996 reinforced the need for window flashings with stucco, but neither that document nor the 4251 Stucco Standard, mentioned turn ups on the end of sill flashings. This requirement was expressly set out in a bulletin BRANZ put out in 1998, but this was in relation to all forms of cladding. The need for stop-ends was not really reinforced, according to Mr Nevill, until a new E2AS1 Third Edition came out in draft form in 2004.

[49] Mr Nevill accepted that a lack of stop-ends had contributed to water ingress. However, in his view the more significant failing was the direct fixed stucco cladding system itself. He said that even “if you did it the way that the detailing showed you, it was going to fail.” Mr Nevill, correctly in my view, noted that the BIA was very slow to take action to address the faulty system.

[50] Having regard to all these circumstances, including Mr Lamb’s limited role, the lack of awareness in the industry generally about the need for stop-ends on sill flashings, and the significant problems with this cladding system generally, I conclude that the

Council has not established that Mr Lamb breached the relevant standard of care in failing to install stop-ends to sill flashings.

[51] In reality, a significant reason why this house leaked is because of the failure of the stucco cladding system that was used.

Head Flashings Do Not Extend a Minimum of 30 mm beyond Each Side of the Framing

[52] The Council again contends that the failure by Mr Lamb to install head flashings a minimum of 30mm beyond each side of the framing was in breach of his duty to act with reasonable skill and care and in accordance with:-

- a) Good trade practice; and/or
- b) The performance requirements of the Building Code, in particular E2; and/or
- c) An acceptable solution or BRANZ appraised alternative solution.

[53] Mr Lamb, who was aware of the importance of window flashings, made a deliberate decision not to extend the head flashings a minimum of 30mm beyond each side of the framing. He expressly discussed this issue with Mr Huang. He also understood that all of the windows would have eyebrows to provide additional protection.

[54] Mr Lamb genuinely believed that his alternative approach was the best way to avoid moisture ingress. He had discussed his approach with Council inspectors on previous jobs and they had regarded his approach as acceptable practice. In this case Auckland City Council inspectors passed all the inspections and ultimately issued a CCC. The fact that building work has been passed by a Council building inspector does not ordinarily mean that a claim in

negligence against the builder cannot be sustained. However, in this case, it was reasonable and understandable that Mr Lamb should have relied on the specific advice of building inspectors who were frequently inspecting this particular method of construction (which was essentially not working).

[55] While a failure to install head flashings that extended in the manner required did contribute to moisture ingress, this was again one aspect of an overall wider problem, namely a fundamentally flawed system. It was problems with that system which lead Mr Lamb to taking a different approach.

[56] Having regard to all these particular factors, I am not satisfied that the Council has established that Mr Lamb breached the relevant standard of care in the manner alleged. The claim in relation to head flashings is also dismissed.

Balustrades Are Not Flashed/ Capped and Have a Slope of Less Than 15 Degrees

[57] In reliance on the evidence of Mr Gillingham, the Council contends that there was an awareness in 2001 that a drainage slope was preferable to a flat top (on a balustrade). The BRANZ Stucco Good Practice Guide recommended a 15 degree slope. Mr Gillingham accepted that even though flat tops were common, that does not mean they were appropriate, particularly where the plasterer was left to form the slope with the plaster, and the balustrade handrail penetrated the stucco (as happened here).

[58] Mr Nevill did not open up the top of the balustrades. When he was drilling down into it he found a metal product which he assumed was a metal capping beneath the stucco cladding – but this unfortunately did not discharge to the exterior. When asked if the flat tops of the balustrade contributed to the damage, Mr Nevill

replied that it was “a system that didn’t work.” He also accepted that had there been a slope then the water would have run off more easily.

[59] Mr Lamb specifically discussed the balustrade with Mr Huang, the project manager. Mr Huang directed that it would be for the plasterer (not Mr Lamb) to form a slope on the balcony balustrades. Mr Huang specifically rejected Mr Lamb’s recommendation that the balustrade should have a metal cap flashing over it. As far as Mr Lamb knows, no metal cap flashing was installed anywhere on the balustrades.

[60] In these circumstances, and having regard to the clear directions given to Mr Lamb by Mr Huang, the person in charge, I am not satisfied that the Council has established that Mr Lamb breached the relevant standard of care in relation to the balustrades. Flat tops were common at the time and the direction Mr Huang gave to Mr Lamb was not such that Mr Lamb should have walked away and refused to carry out the work.

[61] This particular claim is also dismissed.

Fall of Deck Less Than Three Degrees

[62] In reliance on the evidence of Mr Gillingham, the Council contends that it was good trade practice to provide a pitch to the deck and that the lack of pitch here would have indirectly contributed to the damage because the water would not have been able to readily drain between the tiles and deck membrane. It is contended that in failing to provide the requisite degree of fall Mr Lamb breached his duty to form the decks with reasonable skill and care.

[63] Mr Nevill was of the view that in light of the problems arising from the faulty application of the liquid membrane and tiles to the

deck (for which Mr Lamb was not responsible) that the lack of slope to the deck probably made no difference. Lack of fall will allow ponding which will promote the premature deterioration of the membrane. However, it was the faulty liquid applied membrane rather than the lack of fall, which was the real cause of the deck failure in this case.

[64] Mr Lamb discussed the issue of the fall of the deck with Mr Huang. He was unable to create a greater degree of fall to the deck substrate because of a steel beam provided for in the consented plans. Mr Huang specifically rejected Mr Lamb's suggestion as to how this difficulty might be overcome – i.e. lowering down the ceilings.

[65] In all these circumstances, and in particular given the direction of Mr Huang, Mr Lamb's limited role and the lack of any real causative effect of this defect, I am not satisfied that the Council has established that Mr Lamb either breached the relevant standard of care and/or that such breach caused damage in any real way. Accordingly, this particular claim is also dismissed.

No Saddle Flashings at Parapet to Wall Junctions

[66] The Council accepts that in 2001 there was no specific requirement to install saddle flashings. However, it contends that Mr Lamb (who acknowledged that there were no saddle flashings) still had an obligation to ensure that this junction, formed by him, was weathertight. A lack of saddle flashings is said to have likely contributed to current and/or future damage.

[67] Mr Gillingham accepted that the expectation in 2001 was that the stucco plaster with a paint finish would provide the weather protection. Mr Nevill again described this as a system that has

subsequently been established does not work. He noted that saddle flashings were not routinely used by the building industry in 2001.

[68] The Council argues that Mr Lamb was on site installing the pergola after the plaster had been finished, and would (and should) have been aware that at that time this vulnerable parapet to wall junction was only protected from the weather by the paint finish to the stucco plaster.

[69] However, in my view, in having regard to all the circumstances, including a lack of a specific requirement in the technical literature, industry practice and Mr Lamb's role, I am not satisfied that the Auckland Council has established that Mr Lamb breached the relevant standard of care in failing to install saddle flashings at the parapet to wall junctions. This claim against Mr Lamb is also dismissed.

Isolated Defects

[70] The Council accepts that the nailing of the pergola to the stucco, the lack of flashings at the meter box and the lack of protection to the lower boundary joist by the installation of white synthetic building wrap, are all isolated defects and in contrast to the other defects raised, relatively less significant.

[71] Mr Lamb said in evidence that he was well aware of the options that Mr Gillingham discussed in relation to the installation of the pergola (i.e. that the pergola features be spaced off the wall to allow for drainage over the wall face- which was not done). Mr Lamb discussed these with Mr Huang who directed him to install the pergola in the manner in which he did. Mr Nevill said that his own view of how the pergola should have been fixed (cavity, fixings with proprietary sealing washers) was very much influenced by knowledge learnt since 2001.

[72] In relation to the lack of flashings to the meter box, Mr Lamb maintained that flashings were not a requirement at the time and that in any case he sealed the meter box to the hardibacker in preparation for the plasterer, who should have provided a secondary sealant between the meter box and the plaster.

[73] Mr Gillingham's evidence was that it was thought at the time (2001) that sealant would be adequate but we now know that it was not. Mr Gillingham accepted that the sealant would have had to have been meticulously applied on the face of the stucco to be effective.

[74] Mr Nevill accepted that it was always an option to seal or flash and the New Zealand Standard for Stucco Plaster specifically provided for flashings around meter boxes (albeit that it was not mandatory). He also noted that he had never seen any meter boxes flashed in this way in the era in which this house was built.

[75] On the issue of lack of white synthetic building wrap, Mr Nevill was of the view that this was not the cause of moisture ingress in and around the lower boundary joist but that such a failure was occurring somewhat higher up the walls. He agreed with Mr Lamb that it was not mandatory to have building wrap between the framing and the hardibacker. In answering a specific question put to him by Mr Lamb, Mr Nevill accepted that the lack of building wrap has not caused any of the leaking issues.

[76] In all these circumstances, including industry standards at the time, Mr Lamb's role, the directions given by Mr Huang and the problems with the system overall, I am not satisfied that the Council has established that Mr Lamb breached the relevant standard of care in relation to these isolated defects. Accordingly, the claims related to the isolated defects are dismissed.

CONCLUSION

[77] All of the claims by the Council, the first respondent, against Mr Owen Lamb, the third respondent are dismissed.

DATED this 25th day of May 2012

P J Andrew
Tribunal Member