IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000019
[2012] NZWHT AUCKLAND 46

BETWEEN	KEVIN LESLIE WOOTEN AND ELVA LYNNE WOOTEN AND NIKKI BURLEY TRUSTEES (2004) LIMITED Claimants
AND	BRENT TONY DORR First Respondent
AND	WALTER MERVYN ASHMAN Second Respondent (Removed)
AND	JOHN PAUL KANE Third Respondent

Hearing: 24 September 2012

Appearances: N Smith, counsel for the claimants.
No appearance from the first and third respondents.

Decision: 2 October 2012

FINAL DETERMINATION
Adjudicator: K D Kilgour

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BACKGROUND

[1] The claimants, Kevin Leslie Wooten, Elva Lynne Wooten and Nikki Burley Trustees (2004) Limited jointly purchased a section at 199C Ocean Beach Road, Mount Maunganui in early 2002 with the intent of building a home for Kevin and Elva Wooten.

[2] The Wootens engaged Brent Tony Dorr to build and supervise construction of the home. Mr Dorr engaged the subcontractors including John Paul Kane, the third respondent, to undertake the waterproofing on the top deck and all the tiling work on the two decks.

[3] The house was built between April 2002 and April 2003. The Wootens took occupation in May 2003.

[4] Soon after moving in the Wootens noticed water entering through the lounge ceiling during a heavy storm. They contacted Mr Dorr and he and the roofer inspected the problem and they both attended to remedial work. What followed were several years of regular leaks appearing at different locations around the lounge/living room area directly below the top floor deck. On each occasion, Mr Dorr was approached for assistance but became less co-operative and more evasive. After consulting a building friend they lodged a claim on 10 February 2010 under the Weathertight Homes Resolution Services Act 2006 (the Act). After receiving the assessor's report (which confirmed they had a leaky home), they engaged a designer to provide design work for the remediation scoped by the assessor in his report.

[5] Before commencing the remedial work the Wootens contacted Mr Dorr and Mr Kane to inform them that they were commencing remedial work and to invite them to the site during such

work. The remedial work was completed in July 2011 and the Tauranga City Council issued a code compliance certificate for that work on 26 September 2011.

[6] In April 2010, Mr and Mrs Wooten moved out of the house after purchasing a motel business. They then rented the home to their son and his friends. The tenants remained in occupation throughout the remedial work but paid a reduced rental.

[7] The claimants are seeking recovery of the remedial costs of $173,731, lost or reduced rental costs of $5,460 (calculated at a per weekly rental reduction of $260 for 21 weeks), interest on the remedial costs and general damages from Mr Dorr, the builder and Mr Kane, the tiler.

[8] Mr Dorr and Mr Kane did not attend the hearing and neither has filed a response or defence to the claim. I am however satisfied that Mr Dorr and Mr Kane have both been properly served with notice of the proceedings as well as notice of the hearing dates. The claims against them accordingly proceed by way of formal proof, largely based on the witness statements and documentary evidence that have been filed and the evidence given at the one day hearing by Mr Wooten and the experts Jerome Pickering, the assessor and Frans Boucken, the claimants' remediation expert.

ISSUES

[9] In determining the claims brought by the claimants, the issues I need to decide are:

- What building defects caused the damage?
- Does Brent Dorr owe the claimants a duty of care? And, if so has a breach of that duty of care caused the claimants' loss?
- Does John Kane owe the claimants a duty of care? And if so, has a breach of that duty of care caused the claimants' loss?

- What is the appropriate level of damages to award?
- What contribution should Mr Dorr and Mr Kane pay?

WHAT BUILDING DEFECTS CAUSED THE DAMAGE?

[10] The experts were unanimous on the construction defects that existed. The major issues were with the two decks which Mr Pickering and Mr Boucken agreed were poorly built. The most substantial cause of the water ingress was from the top deck.

[11] The construction defects can be summarised as follows:

- Upper deck floor
    i. Inadequate clearance between the deck and the cladding.
    ii. Deck tiles water logged because of an inadequate fall to the water outlets on the upper deck which was also poorly constructed.
    iii. Breakdown of the liquid applied waterproofing membrane (inadequately applied).
    iv. Balustrade posts fixed into top of texture coated upstands without any waterproofing or sealing treatment.
    v. Inadequate flashed/sealed roof/wall junction over the lounge area on the north elevation.
    vi. Inadequate flashing roof/wall junction on the south east corner.
- Middle floor
    vii. Inadequate thresholds/inadequate clearance between deck and cladding.
    viii. Numerous deck tiles water logged and loose as a result, inadequate fall to the water outlets, which were poorly built.

[12] Both decks had inadequate slope. The assessor recommended targeted repairs including the top deck to be reconstructed, the waterproof membrane re-done with an adequate fall to the deck surface to reduce ponding and additional drainage channels to be included and the gap between the bottom of the cladding and the deck tiles to be increased. He also recommended that the fixing of the stainless steel handrail posts be altered so that their fixing did not penetrate the top surface of the deck upstands.

[13] The assessor's suggested remedial works for the flat roof above the office was eventually redesigned by the remedial designer and builder such that with the consent of the neighbour, the "day lighting encroachment" was accommodated with extending of the roof. Both experts concluded that this was not betterment but was the most appropriate and proper repair.

[14] The Tauranga City Council required greater remediation to the middle floor deck than that suggested by the assessor's scope of works. Given that deck had insufficient fall to the water outlets and to prevent any possible future damage, it became necessary to remove all tiles, increase the slope and then retile. Mr Boucken explained that the changed remediation of the flat roof above the office and the added repair to the middle floor deck was what increased the remediation costs from those estimated by the assessor.

[15] The building defects that caused the damage, I accept as those agreed to by the experts. I also accept the appropriate repair option was the remedial works undertaken by the claimants under the advice and direction of their remediation expert Mr Boucken.

[16] I accept Mr Wooten's evidence that Mr Dorr was engaged by the claimants on a full build contract to project manage and build their home. Mr Wooten stated that he agreed a margin with Mr Dorr for the supervisory role and the disclosed invoices from Mr Dorr to the Wootens clearly illustrate that margin, at a rate of six per cent, which was an addition on all such invoices.

[17] The law is clear. In *Bowen v Paramount (Hamilton) Limited*[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 who may or should reasonably expect to be effected by their work." Chambers J stated in *Body Corporate 202254 v Taylor:*[2]

> 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...

[18] The burden of proof in a civil case lies with the claimant and it is discharged by providing sufficient evidence to satisfy the Tribunal, on the balance of probabilities.[3]

[19] Mr Boucken's evidence is clear and unequivocal that the established defects were all workmanship failings. Both he and Mr Pickering were of the view that the decks, the principal cause of water ingress, were poorly constructed and so too was the flat roof area above the office, on the top floor.

[20] Section 75 of the Act provides that I may draw inferences from a party's failure to act, and, determine claims based on the

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1 *Bowen v Paramount (Hamilton) Limited* [1977] 1 NZLR 394 (CA).
2 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [125] and [128].
3 Donald L Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [3.2].

available information. In this case, Mr Dorr has been served with proceedings. He has not filed a response, nor has he challenged the claims made against him. I am therefore entitled to infer that Mr Dorr does not refute the allegation that he built and project managed the construction of the Wootens' home and therefore owes the claimants a duty of care. I have found that the established defects with this home are essentially workmanship issues that would generally be the responsibility of the builder.

[21] It is arguable that Mr Dorr may not be responsible for the liquid applied membrane installation, but it was clearly applied on the ill prepared deck substrate, which was the responsibility of Mr Dorr. All the defects that relate to construction work carried out were done by or under the supervision of Mr Dorr. In particular, the key defects with the top and middle decks are the responsibility of the builder.

[22] I accordingly conclude that Mr Dorr owed the claimants a duty of care and that he breached that duty of care to the extent that he is jointly and severally liable for the full amount of the established claims.

JOHN KANE

[23] Mr Wooten's evidence is that Mr Dorr engaged the subcontractors including John Kane. Mr Kane was engaged to undertake the tiling and to carry out the waterproofing under the tiles on the upper deck. Mr Kane applied the waterproofing membrane to the upper deck and laid the tiles on both decks. Both Mr Boucken and Mr Pickering stated that the waterproofing membrane and the tiling were not properly installed.

[24] The claimants' case is that the tile and waterproof contractor, John Kane was responsible for all but two of the defects. These defects arose in part through a want of care on the part of Mr Kane.

Mr Kane is jointly and severally liable to the claimants for the costs of rectifying those defects as a concurrent tortfeasor.

[25] The legal position of the tile and waterproofing contractor is the same as other contractors involved with the building of a residential property.

[26] I accept Mr Smith's submissions that a subcontractor is liable for damage done to a home by reason of that construction and the standard of care required of a subcontractor, such as Mr Kane in performing his trade, is the care reasonably to be expected of skilled and informed members of his trade, judged at the time the work was done.[4]

[27] Mr Pickering and Mr Boucken agreed that Mr Kane should not have been satisfied with the tiling surface that Mr Dorr presented to him. They both said that once he installed the tiling he was deemed to be satisfied with that surface and that a reasonably competent tiler should not have laid the waterproofing membrane and then the tiles on a surface which had an inadequate fall to poorly constructed outlets and the application of the tiles would have illustrated the lack of clearance of the cladding to tile surface.

[28] Mr Boucken said, and Mr Pickering agreed, that Mr Kane had no responsibility for the poor construction and resulting defects from the flat surface of the roof above the office on the upper deck, although this contributed to the same damage.

[29] Section 75 of the Act allows me to draw inferences from Mr Kane's failure to act and to determine claims based on the available information. I am entitled to infer that Mr Kane does not refute the

[4] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [7.2.02].

allegations that he undertook the tiling and waterproofing membrane to the top deck and the tiling to the middle deck and therefore owes the claimants a duty of care.

[30] I have found that the established defects with the waterproofing and the tiling of the decks were workmanship issues undertaken by Mr Kane. They were key defects. I accordingly conclude that Mr Kane breached that duty of care he owes to the claimants to the extent that he is jointly and severally liable for the full amount of the established claim.

QUANTUM

[31] No evidence has been provided refuting the remedial costs of $173,731. I am satisfied from Mr Boucken's evidence as to why the amount was in excess of Mr Pickering's estimate. Mr Pickering did not express any concern with the actual remedial costs after learning of the addition to his scope of works.

[32] Accordingly, I accept that the sum of $173,731 is the actual and reasonable costs of the remedial work required to remedy the established defects.

GENERAL DAMAGES

[33] Mr and Mrs Wooten are seeking $25,000 in general damages. The Court of Appeal in *Sunset Terraces*[5] and *Byron Avenue*[6] agreed that the appropriate measure depends on individual circumstances but for owner occupiers the usual award would be in the vicinity of $25,000.

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

[34] I accept that Mr and Mrs Wooten have both suffered considerable stress and difficulty as a result of having a leaky home and in carrying out the remedial work. Their counsel Mr Smith submitted that they can still be described as owner occupiers, even though they are no longer living in the property, as it has become their home. However they were no longer living in the property when the remedial work was done and in addition the defects did not require a full reclad.

[35] Mr and Mrs Wooten therefore have not suffered the full extent of the stress and anxiety occasioned by either needing to vacate or have remedial work being carried out around them. I therefore conclude that it is more appropriate to award general damages of $15,000.

INTERESTS AND LOSS OF RENTAL

[36] Mr and Mrs Wooten are seeking interest on the remedial costs. Mr and Mrs Wooten and their new motel business funded the remedial costs and so they lost the use of that money from completion of their remedial work through to the issue of this determination.

[37] I accept it is appropriate to award interest on the established costs of the remedial work at the current 90 day bill rate plus two per cent which equates to 4.65 per cent or $694 per month.

[38] I accept it is appropriate to award interest for the period from the beginning of July 2011 through to the date of this decision (16 months) which equates to $11,109.

[39] The claimants are seeking recovery of lost rental, or, more properly reduced rental, for the period of the remedial works. Mr Wooten says that due to the remedial works the claimants were required to reduce the rental on the property by 50 per cent

throughout the period of remediation. The lost rental costs were $5,460 being $260 per week being 21 weeks. I conclude it is appropriate to award the loss of rental of $5,460.

CONCLUSION

[40] The amount of the claim that has been established is $205,300 which is calculated as follows:

Remedial works	$173,731
Rental reduction	$5,460
Interest	$11,109
General damages	$15,000
TOTAL	**$205,300**

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[41] I found that the first and third 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.

[42] Section 72(2) of the 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, s 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.

[43] Under s 17 of the Law Reform Act, 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. Mr Boucken and Mr Pickering stated that 90 per cent of the defects were associated with the decks. They agree that 10 per cent only was not attributable to the tiler and these defects related to the roof and flashings.

[44] Mr Boucken said, and Mr Pickering agreed that, based on his general impression of the overall costs and damage he concluded that the contribution between the builder and the tiler would be 80 per cent by the builder and 20 per cent by Mr Kane.

[45] Given their respective roles and responsibilities each has for the claimants' loss and accepting the expert evidence of Mr Boucken and Mr Pickering, I conclude that the contribution for each should be 80 per cent from Mr Dorr and 20 per cent from Mr Kane.

CONCLUSION AND ORDERS

[46] The claim is proven to the extent of $205,300. For the reasons set out in this determination I make the following orders:

i. Brent Tony Dorr is ordered to pay Kevin Leslie Wooten, Elva Lynne Wooten and Nikki Burley Trustees (2004) Limited, the sum of $205,300 forthwith. Brent Dorr is entitled to recover a contribution of up to $41,060 from John Paul Kane for any amount paid in excess of $164,240.

ii. John Paul Kane is ordered to pay Kevin Leslie Wooten, Elva Lynne Wooten and Nikki Burley Trustees (2004) Limited, the sum of $205,300 forthwith. John Kane is entitled to recover a

contribution of up to $164,240 from Brent Dorr for any amount paid in excess of $41,060.

[47] 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:

Brent Tony Dorr	$164,240
John Paul Kane	$41,060
Total Amount	**$205,300**

[48] However, if the first and third 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 paragraphs [46] and [47] respectively.

DATED this 2nd day of October 2012

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K D Kilgour
Tribunal Member