SUMMARY

Case: Tabram & Anor v Slater & Ors
File No: TRI 2007-100-000041/ DBH 05001
Court: WHT
Adjudicator: S Pezaro
Date of Decision: 17 April 2009

Background
The claimants, Mr and Mrs Tabram, filed a claim in the Tribunal for damages arising from weathertightness defects to their property. Their claim was for damages in contract based on the sale and purchase agreement and in tort against the first respondents, Mr and Mrs Slater (Slaters), who built the home and sold it to the claimants. The claimants also claimed against the designer, the second respondent (Ojo Limited) in tort. By way of cross-claim, the Slaters claimed against Ojo Limited, and the fourth respondent, Mineral Plaster Technologies Limited (Mineral Plaster) – the company that issued a producer statement for the plaster cladding.

Summary of Facts
- February 2001: Mr Slater applied to the Rodney District Council (Council) for building consent
- 21 June 2001: Council issued building consent
- June 2001 – May 2004: period of construction. During this time Approved Building Certifiers Limited carried out inspections and issued a building certificate for the work confirming that it met the requirements of the building code
- 18 May 2004: the Council issued a Code Compliance Certificate
- 12 August 2005: the Slaters entered into an agreement with the claimants for the sale and purchase of the dwelling
- 20 November 2005: sale and purchase settled
- About April and/or May 2006: claimants discovered water ingress and cracking
- 28 August 2006: claim filed with the WHRS
- 2 November 2006: WHRS assessor's report completed

Claims
The claimants' claim in contract and tort against the Slaters were that:
- the Slaters breached their vendor warranties under clause 6.2(5) of the contract for sale and purchase in respect of the building works
- the Slaters were the head contractors/builders of the house and that Mr Slater exercised control over its construction in such a manner as to attract a non-delegable duty of care imposed on residential property developers.

Against Ojo Limited, the claimants and the Slaters claimed that:
- As the designer of the dwelling, Ojo Limited breached its duty to exercise reasonable skill and care in preparing plans and specifications for the dwelling and that deficiencies in the design caused the weathertightness defects in the house

The Slaters claimed that Mineral Plaster negligently issued a workmanship guarantee for the plaster cladding.

Experts' Conference
An Experts' Conference produced an agreed leaks list which identified the location of damage to the dwelling and each of the defects causing that damage. Although all the experts agreed that each wall was damaged, there was a dispute amongst them as to whether a full reclad was needed. Based on the evidence, the Tribunal found that the Council was unlikely to issue consent for a targeted repair and that it was reasonable for the claimants to repair on the basis of a full reclad. Even if targeted repairs were advised, a partial reclad would be unlikely to reduce the cost of remedial work.

Claim for Repairs
The claimants claimed the sum of $375,731.29 to carry out repairs on their property. Based on the evidence provided to the Tribunal by way of estimates, the Tribunal was satisfied that bar deductions for betterment, the remedial costs incurred by the claimants were fair and reasonable for the work carried out.

Betterment
Deductions in the amount of $7,015.00 were made for betterment due to the following:

- There was evidence that the stone cladding on the pillars cost more than the standard cladding that was used on the rest of the property. It was estimated that the reasonable cost for re-cladding those posts is $1,540 and therefore a deduction of $2,585 was made for betterment
- The painting of the interior of the property was approximately 2 years old when the remedial work was carried out. On the basis that interior paintwork lasts approximately 5 years, the Tribunal deducted 40% from the $8,575.00 for the cost interior painting was reduced to $5,145.00.
- The only expert evidence that addressed the exterior paintwork opined that the exterior paint should generally be expected to last 10 years. As it had been 6 years since the cladding was replaced, the Tribunal deducted 40% from $2,500

Interest
The claimants claimed interest of $18,207.33 on two loans they took out to cover the cost of repairs. Based on the Tribunal's power to award interest at a rate not exceeding the 90-day bill rate plus 2% (clause 16, Part 2 of Schedule 3 of the WHRS Act 2006), the Tribunal calculated that the amount of interest payable was $13,626.85

Summary of Decision
Amendment to pleadings
Counsel for the Slaters objected to the claimants' amendment to their pleadings in their opening submissions. Counsel correctly identified the change from the statement of claims that relied on clause 6.2(5)(d) of the agreement for sale and purchase (7th edition) to reliance in the opening submissions on sub-clauses (b) *and* (d) of that clause. Although counsel for the claimants had not applied to amend the pleadings and offered no explanation for the amendment, the Tribunal was satisfied that the meaning of clause 6.2(5)(d) is broader than and inclusive of, the work referred to in clause 6.2(5)(b). It was therefore held that while it was accepted that the amendment at the closing stage of the proceedings by the claimants' counsel was inappropriate, the amendment to the pleadings did not introduce a new cause of action and therefore no prejudice arose from allowing the amendment to stand.

Liability of the Slaters in contract – vendor
The claimants claimed that the Slaters are in breach of the warranties under clause 6.2(5)(b) and (d) of the agreement for sale and purchase. In cross-examination, Mr Slater accepted that he:

- made changes without consulting the designer
- substituted a different cladding material from the one specified in the plans
- did not provide the cladding installer with the plans or specifications approved for the building consent
- constructed the roof and altered the roof design
- build the decks and parapets flat despite the plans requiring a slope
- designed the handrails

Each of the areas where Mr Slater made changes was identified by all the experts as a cause of water ingress, including the expert giving evidence for the Slaters. The Tribunal therefore found that the Slaters breached the vendor warranties in the standard agreement for sale and purchase. The defence of waiver was dismissed as was the defence of contributory negligence as the Slaters' breach of contract was not a result of negligence. The damages awarded in contract were therefore awarded in full with no deduction for contributory negligence.

Liability of the Slaters in tort – developer/head-contractor/builder/project manager
Mr Slater accepted that he organised all the contractors who worked on the house and gave them instructions and undertook remedial work on the roof when it failed. In making those decisions and exercising such a degree of control over the construction, the Tribunal found that Mr Slater acted as head –contractor/builder or project manager and therefore attracted a non-delegable duty of care to the claimants as subsequent purchasers. By altering or failing to follow the plans and relevant specifications, substituting materials, and failing to consult with Ojo Limited about those changes, the Slaters, as head contractors/project managers, were negligent in relation to the construction of the dwelling and thereby breached their duty of care to the claimants.

Contributory Negligence
The respondents argued that the chain of causation was broken as the claimants purchased with actual knowledge of the defect(s), or in circumstances where they ought to have used their opportunity of inspection to discover the defect(s). This defence particularly focused on the effect of a pre-purchase inspection report obtained by a prior prospective purchaser, which was very detailed and identified most of the weathertightness defects concerned. In determining the effect of the report, the Tribunal took into account the following relevant factors:

- the level of general knowledge about leaky buildings in August 2005 – ie there was extensive publicity in 2005 of leaky buildings
- the information contained in the report
- the comments made by Mr Slater about the report
- the documents produced by Mr Slater when the report was discussed – ie Mr Slater showed Mr Tabram and a friend with some building experience, a producer statement and a workmanship guarantee for the plaster cladding system. The Tribunal found that Mr Slater must have known that those documents were false because he supplied the cladding materials and knew that a different system was used. As a result, the Slaters' claim failed against the Mineral Plaster issuing the producer statement
- the options available to the claimants when they received the report – ie Mr Slater reassured Mr Tabram and his friend that the issues raised in the report were only matters of maintenance. Mr Slater accepted that it was reasonable for Mr Tabram

to feel reassured. As a result, the Slaters' claim that the claimants were so negligent that that they should bear the whole loss could not succeed.

The Tribunal found that the claimants were negligent in not investigating further the issues raised in the report. It would have been reasonable for them to either contact the report writer or another expert for an opinion on the implications of the report, particularly since the claimants knew another prospective purchaser had cancelled her agreement on the basis of the same report. The Tribunal therefore found that the claimants acted negligently and in following the decisions of the High Court, the level of contributory negligence was set at 25%.

Liability of Ojo Limited - designer
As Mr Slater accepted that all departures from the design were his responsibility the Tribunal found that none of the causes of damage identified by the experts could be attributed to Ojo Limited. The claimants' claims as well as the claims by the Slaters against Ojo Limited were therefore dismissed.

Liability of Mineral Plaster
The Tribunal found that Mr Slater knew that the producer statement obtained from Mineral Plaster was false. On that basis, the Tribunal was satisfied that Mr Kathagen, who signed the producer statement on behalf of Mineral Plaster, was not aware that the information in the statement presented to him for signing was false. The Slaters claim against Mineral Plaster therefore failed.

General Damages
The claimants claimed general damages of $25,000 (or $12,500 each). Based on the recent award issued by the High Court for general damages of $25,000 per occupier to plaintiffs involved in leaky building claims, the Tribunal awarded that sum to the claimants.

Result
The Tribunal ordered the Slaters to pay the claimants the sum of $407,343.14 immediately. That sum was calculated as follows:

- Damages in contract $368,716.29
- Interest $13,626.85
- General damages $25,000.00

The claims against Ojo Limited and Mineral Plaster were dismissed.