

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**CLAIM NO: TRI-2007-100-000037**

**UNDER** the Weathertight Homes Resolution  
Services Act 2006

**IN THE MATTER** of an Adjudication Claim

**BETWEEN**

**GRAHAM OWEN  
THOMPSON and TUPUNA  
MARIE THOMPSON**

Claimants

**AND**

**ROBERT SYDNEY LOVE**

Respondent

Decision: 7 March 2008

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**FINAL DETERMINATION**  
**Adjudicator: S Pezaro**

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## **Background**

[1] This claim was filed with the Weathertight Homes Resolution Service on 22 December 2005. The WHRS Assessor visited the site on 14 February 2006 and the claim was found eligible on 15 March 2006. The claim was registered with the WHRS on 10 April 2006 and later withdrawn and re-filed with the Weathertight Homes Tribunal on 9 August 2007.

[2] The sum originally claimed was \$27,200.00 plus GST, based on the WHRS assessment of the repair costs, and the cost of an independent assessment of \$1,750.50 plus GST, a total of \$28950.50 plus GST.

[3] On 2 November 2007 the claimant reduced the sum claimed for repairs to \$12,400.00. Mediation was scheduled for 12 December 2007.

[4] The amended statement of claim further reduced the sum claimed to \$3,954.38. I then cancelled the mediation, as it was no longer cost effective. Counsel for both parties consented to the claim being determined on the basis of written submissions. Counsel for the claimant declined the opportunity to file a reply to the response to the claim.

## **The Claim**

[5] The respondent, Robert Love, built the house for the claimants and construction was completed in March 1996.

[6] I have adopted the chronology set out in the respondent's submissions, apart from the date when damage was discovered. It seems as if there is an error in paragraph 7 of the respondent's submissions because, although the respondent states that the

claimant contacted him in 2004, the correspondence referred to in this paragraph is dated 2003. I therefore take 2003 as the year when the claimants noticed water damage.

[7] At paragraph 8(a) of the statement of claim the claimant sets out the damage that the respondent is alleged to have caused. The claim is that water damage was caused by the respondent's failure to adhere to proper construction practice and to follow the manufacturer's guidelines during the construction of the home:

(8) That the water damage was caused by the respondent's failure to adhere to proper construction practice and to follow the manufacturer's guidelines during the construction of the home in the following manner;

(a) Incorrect installation of apron flashing at roof level with the flashing terminating behind the exterior cladding and allowing water ingress to wall above and surrounds of the French doors in the master bedroom.

### **The Issues**

[8] The issues that I have addressed are:

(a) Has the dwelling-house been penetrated by water because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration?

(b) Has the dwelling-house suffered damage as a consequence of its penetration by water?

(c) Is any or all of the damage due to a failure by the claimant to mitigate their loss or to contributory negligence?

[9] I accept the submission of Ms Malone that consideration needs to be given to whether there was undue dampness in order to justify a finding that there has been a breach of E2.3.2 of the Building

Code which was the applicable regulation at the time of construction. E2.3.2 provides that:

Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

[10] Adjudicator D.M. Carden, in the decision *The Residential Trust v Manson Developments Limited*, 31 March 2005, appended to the respondent's submissions, addressed this issue. I adopt his reasoning and am satisfied that E2.3.2 of the Building Code was not intended to prevent all water penetration. The question for this Tribunal is therefore whether there was undue dampness or water penetration as a result of a defect in the installation of the apron flashings.

[11] The issues that I have addressed are whether water has penetrated the dwelling as a result of any defect in the apron flashing, whether there was undue dampness as a result of the defect and whether that particular defect is attributable to the respondent's work.

### **The Evidence**

[12] The evidence that I have considered in assessing the cause of the damage is the report prepared for the claimant by Advanced Building Solutions ("ABS"), the invoice for \$3,954.38 issued in December 2007 by Packard Contracting Limited detailing the repairs that were carried out on the claimants' property and the evidence provided by the respondent.

[13] The sole ground for the claim is now the installation of the apron flashing which is not referred to in the assessor's report. The ABS report concluded that although the installation of the windows did not follow good trade practice, the windows did not contribute to the defects and that the ranchslider installation was not at fault.

Therefore the claimant is not relying on the assessor's report. For this reason, I have not given great weight to the WHRS report.

### **Liability for the Apron Flashing**

[14] Mr Love admits that the apron flashing terminated behind the exterior cladding but says that he did not install the apron flashing and that he followed proper construction practice. Mr Love says that the apron flashing forms part of the roof, which was installed by Carter Holt Harvey and that Carter Holt Harvey followed accepted trade practice at the time. Mr Love states that, at the time of construction, the apron flashings were not required to turn up at the end.

[15] Mr Love has not provided any evidence to show who installed the roof or that the claimants contracted with Carter Holt Harvey for the installation of the roof rather than with him. In fact neither party has provided any contract relating to this work. Therefore while Carter Holt Harvey may have installed the roof, it is more likely that they did so under a contract to Mr Love as the builder of the project than under a contract with the claimants. I therefore find that Mr Love is liable under his contract with the claimant for any defects in the installation of the apron flashing.

### **Water Penetration**

[16] I now consider whether there has been water penetration of the dwelling. The ABS report dated 6 June 2007 states that:

- “There were signs that condensation has been an issue in the dwelling, particularly in the living room and master bedroom. However, if condensation was the main issue for the rotting sills this would be a widespread problem....”

- “It is concluded that the window condensation tray either filled with condensed water or blown water is held in the tray....water held in the condensation tray has the ability to run through into the end grain of the untreated jamb liners”
- “...that failure has not occurred to the base of the ranchsliders in the dining and lounge area which have the same orientation as the windows that have shown failure. These ranchsliders have a different type of drainage system...therefore no failure would be expected.”
- “We believe that the water ingress is occurring at roof level where the apron flashing is terminating behind the cladding allowing roof water to enter.”

[17] The respondent submits that the evidence clearly points to internal condensation and a failure to maintain the property and/or wear and tear of the ranchslider as the causes of water ingress. I note that the claimants told the ABS report writer that they had observed water blowing in through the manufacturing holes to the condensation tray.

[18] However, I do not accept that the evidence leads to the conclusion that either condensation or water blowing into the condensation tray was the only source of dampness in the dwelling. I find that water also entered at the point where the apron flashing terminated behind the cladding. I therefore find that the cause of the water ingress was a combination of water either condensing or blowing into the condensation tray, and not being removed, and water entering from the roof area.

### **Was there Undue Dampness?**

[19] The question raised is whether the water entering as a result of the flashing caused undue dampness. The ABS report writer took non-invasive readings. The only area where he identified elevated levels was on the right hand side of the ranchslider in the master

bedroom. This reading was taken in June 2007. On 28 September 2007 Mr Love visited the property with an insurance assessor, Terry Burgess, who inspected the property and took photographs.

[20] Mr Burgess' photographs do not show any decayed timber in the area of the master bedroom ranchslider although the WHRS assessor reported decay in the linings, some deterioration in the framing in this room (para 5.3.3) and pockets of moderate to advanced rot (5.3.4). The WHRS moisture readings were 16.9% in this area which is within the lowest range, indicating that decay is unlikely.

[21] I am not satisfied that there was undue dampness and therefore find that the respondent has not breached the Building Code. I therefore dismiss the claim. However, even if I had found that there was undue dampness there is insufficient evidence to prove that the dampness was caused to any significant extent by the installation of the apron flashing rather than the condensation.

### **Costs**

[22] The respondent has applied for costs. Pursuant to s 91 of the Weathertight Homes Resolution Services Act 2006 the Tribunal has the power to award costs if it considers that a party has caused those costs to be incurred unnecessarily by bad faith or allegations that are without substantial merit.

[23] The respondent submits that the claimants knew when they filed their application with the Tribunal that their claim had no merit as, by this time, they had obtained the ABS report. I have found that the ABS report is not as conclusive, with respect to the cause of water ingress, as the respondent claims. If the claimants had not sought this report, the claim would have proceeded on the basis of the WHRS assessment on which the claimants were entitled to rely.

The ABS report was commissioned and paid for by the claimants. As a result, the respondent has had the benefit of facing a substantially reduced claim. The respondent was only required to make written submissions after the claim had been reduced to its final amount. While I accept that there have been costs incurred by the respondent that are out of proportion to the sum at issue, I am not satisfied that this claim was so lacking in merit that the claim should not have been filed or that the claimants can be found to have acted in bad faith. For these reasons the application for costs is dismissed.

### **Orders**

[24] The claim by Graham Owen Thompson and Tupuna Marie Thompson is dismissed.

[25] The claim by the respondent for costs is dismissed.

**Dated** this 7<sup>th</sup> day of March 2008

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S. Pezaro  
Tribunal Member