



SUMMARY

Case: White & Anor v Rodney District Council & Anor

File No: TRI 2007-100-000064/ DBH 01814

Court: WHT

Adjudicator: K Kilgour

Date of Decision: 4 March 2009

Background

This determination is based on a claim filed by the claimants filed against the Rodney District Council (Council) and Mr and Mrs Kerkins (Kerkins) as vendors and project managers/developers/head-contractors of the subject dwelling. However due to the passing away of Mr Kerkins, Mrs Kerkins remains as a respondent jointly and severally in her personal capacity and as sole trustee of her late husband's estate.

Summary of Facts

The Kerkins jointly purchased a vacant section and later obtained a building permit on 16 June 1993 to have the subject dwelling built. Construction began in June 1993 and the Kerkins later occupied the house from early 1994. A Code Compliance Certificate was also issued for this house on 30 November 2001.

On 15 December 2001, the Kerkins entered into an agreement with the claimants for the sale and purchase of the house. This agreement was conditional upon the claimants acquiring finance sufficient to complete the purchase and a satisfactory LIM from the Council. Both these conditions were satisfied prior to settlement on or about 25 January 2002.

The claimants were new immigrants to New Zealand but had previously owned two houses in Britain. Their experience had taught them the importance of obtaining a building survey report to acquire mortgage finance for home purchasing. However this was not the case in New Zealand. Nevertheless, the claimants engaged Mr Jordan to carry out a building inspection. The report, dated 24 January 2002 raised a number of significant water ingress concerns however the agreement for the purchase of the dwelling was already unconditional.

Mr Jordan provided the claimants with an outline specifying the required remedial work. In May-June 2002, the claimants took action by obtaining building quotations to carry out the remedial work on the decks. Each quotation was in the vicinity of \$19,000. At that time, the claimants had the financial resources to carry out the remedial work but they failed to do any such work. The Kerkins denied liability when contacted by the claimants' lawyer. The claimants therefore filed proceedings with the WHRS on 7 November 2003.

Claim

The claimants alleged that the Council is liable for:

- Negligently issuing the building consent, inspecting the building work, and issuing the Code Compliance Certificate; and

- For negligent misstatement in the Code Compliance Certificate

The claimants no longer pursued the claim against the Council regarding the issue of the building consent, as that claim is now time-barred

Against the second respondent, the claimants alleged that:

- The second respondent negligently carried out their role as the developer, head-contractor, and project manager; and
- Breached their contractual obligations in the agreement for sale and purchase, specifically under clause 6.2(5)

The claimants therefore claimed for \$475,758.64 in the following amounts:

- Remedial work (quoted by Mr Ranum) \$401,000
- Consequential losses \$14,758.64
- General damages \$60,000 (\$30,000 each)

Remedial costs

After considering the evidence of the WHRS assessor and the respondents' experts, the Tribunal found on balance that Mr Ranum's costings were unrealistically too high. The Tribunal therefore concluded that the costs of the necessary remedial work to restore the house to weathertight code compliant dwelling to be \$250,000 (ex GST)

Consequential losses

The sum of \$14,758.64 was made up of the following amounts:

- Fees for lodging the building consent \$832.64
- Alternative accommodation \$9,900
- Additional utility charges \$1,826
- Storage costs \$2,200

As there was no serious challenge to any of these amounts, the Tribunal upheld these amounts to the full extent

General damages

The Tribunal accepted that the claimants have suffered stress, anxiety, inconvenience and disruption as a result of their home being a leaky building. However, the Tribunal held that the claimants' failure to take prompt remedial action contributed to the deterioration of their house as well as the stress, anxiety, inconvenience and disruption they have suffered. An award of \$30,000 each for general damages was therefore held to be overly generous. Therefore in upholding the claim for general damages, the Tribunal stated a more modest award of \$10,000 was more realistic and better recognises the degree of stress, anxiety, inconvenience and the loss of enjoyment of their home, given their own contribution to the problem.

Overall, the claimants were entitled to claim for the sum of \$316,002.68 being:

- Remedial work \$281,250.00 (incl. GST)
- Consequential losses \$ 14,752.68
- General damages \$ 20,000.00 (\$10,000 each)

Mitigation of loss

The evidence determined that apart from lodging a claim with the WHRS, the claimants took no effective steps to mitigate the loss they suffered. Their failure to remedy the defects when they were financially able to do so meant that the remedial costs have over time increased significantly. The Tribunal therefore found that the

claimants failed to mitigate their loss and thereby reduced the total amount of the claim by 45% - ie \$142,201.20 (45% of \$316,002.38)

The Tribunal also held that the *volenti* principle was not applicable for the evidence did not conclude that the claimants received the Jordan Report or knew of the deck defects before they settled the purchase and took possession of the house.

Contributory negligence

The law is reasonably clear that homeowners are not negligent by failing to obtain a pre-purchase inspection. Therefore failure to make the purchase agreement conditional on a favourable building or pre-purchase inspection was not sufficient to establish contributory negligence in this case. That defence advanced by the respondents therefore failed.

Summary of Decision

Liability of the Council

a) *Negligence*

There was sufficient consensus amongst the experts to conclude that the Council was negligent in failing to detect the significant faults with this house, all of which were breaches of the Building Code. The two principal construction defects (the decks and the roof parapet cladding) were definite construction departures from the permitted plans and the Council missed both defects or failed to pay any attention to them. These were significant causes of water ingress, and Mr Jordan detected both and alluded to both as water ingress problems just two months after the Council's inspection. Due to such negligence, the Tribunal therefore determined that the Council was jointly and severally liable for 100% of the total amount of the claim

b) *Negligent misstatement*

The Tribunal held that the evidence did not support the claim of negligent misstatement by the Council. The claimants' evidence was that in deciding to declare the purchase agreement unconditional they relied on the Code Compliance Certificate (even though the house was not code compliant). Yet they still instructed their conveyancing lawyer to render their contract of purchase unconditional when they had only received an incomplete LIM omitting reference to the existence of a Code Compliance Certificate. This claim therefore failed.

Liability of the second respondent, Mrs Kerkin

a) *Claim in contract*

The Tribunal found that the Kerkins were head-contractors and or project managers. Whilst they were not developers, for they built this house for their own occupation, they nevertheless controlled the building project and attempted to finish the house themselves. They also directed or allowed significant departures from the permitted plans. The evidence concerning the significant sources of the leaks also indicated that this house had been leaking before the Kerkins sold it. As the genesis of the leaky dwelling, the Tribunal held that Mrs Kerkin (jointly and severally in her personal capacity and as sole trustee of her late husband's estate) breached her warranty in the sale and purchase agreement and was therefore liable for the full amount of the claimants' claim.

b) *Claim in tort*

The Tribunal found that the Kerkins were negligent and in breach of their non-delegable duty of care to subsequent owners. The evidence established that the house was a leaky building and that it did not comply with the building code. Therefore as project managers, the Kerkins must therefore carry the burden of responsibility to ensure that their engaged contractors achieved the required standards. The Kerkins' breach of such a non-delegable duty of care caused the losses and damages suffered by the claimants. It was therefore found that the second respondent is liable in negligence for the full amount of the claim.

A "limitation defence" was submitted on behalf of the second respondent stating that the construction of the decks was carried out "over 10 years ago". However there was no evidential support that the decks were completed in 1993 and so this defence failed.

c) *Second respondents' cross-claim against the Council*

The second respondent claimed that the Council owed the Kerkins duties to exercise reasonable skill and care in performing its statutory functions. However in finding that the Kerkins were the head contractors and supervisors of the construction of the subject dwelling and indeed, the genesis of the leaky house, the second respondent cannot therefore succeed in a claim against the Council, for damages.

Result

The Council was ordered to pay the claimants the sum of \$173,801.48 (being \$316,002.68 less failure to mitigate reduction of \$142,201.20)

The second respondent was ordered to pay the claimants the sum of \$173,801.48 (being \$316,002.68 less failure to mitigate reduction of \$142,201.20). The second respondent was also liable to the claimants for that same amount for her breach of the contractual warranty.

As concurrent tortfeasors, the Tribunal held that the Council is entitled to a contribution of 70% from the second respondent in respect of the amount the second respondent has been found jointly liable for.

The second respondent is therefore entitled to a contribution of 30% from the first respondent in respect of the amount the Council has been found jointly liable for.

Therefore if the 2 respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

- Council \$52,140.44
- Second respondent \$121,661.04