IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000121
[2013] NZWHT AUCKLAND 23

BETWEEN	MICHELLE ANNE BREBNER AND DARCY RAYMOND WENTZEL Claimants
AND	LUONIE BETH COLLIE First Respondent
AND	AUCKLAND COUNCIL (Removed) Second Respondent

Hearing Date: 10 July 2013

Appearances: MC Josephson and NJ van der Wal for the Claimants
M Paddison for the First Respondent

Decision: 15 August 2013

FINAL DETERMINATION
On matters referred back from the High Court

Adjudicator: M A Roche

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[1] Ms Collie had a house built between 2002 and 2004 which the claimants purchased in 2007. The house leaked. In 2010 the claimants filed a claim in the Tribunal against Ms Collie in tort and in contract for breach of a warranty contained in the agreement for sale and purchase. Following a hearing I issued a determination finding that although the house had weathertightness defects and required significant repair, Ms Collie was not liable to the claimants in tort or in contract.

[2] The claimants appealed to the High Court. Justice Peters upheld all the factual findings made by the Tribunal and the finding regarding the claim in tort. She also upheld a finding that had the claim in tort been established, the degree of contributory negligence on the part of the claimants would be high. In respect of the contractual claim she found that failure to complete the works in accordance with conditions 14 and 16(e) of the building consent gave rise to a breach of warranty.

[3] Condition 14 required the house to be constructed in accordance with NZS 3604:1999 which required joints between windows and doors to be made weatherproof. I found that two windows installed in the polystyrene cladding breached this requirement but that the defect was not universal. In addition, the two floor to ceiling windows on the north and south west walls breached the requirement.[1] Condition 16 related to floor level clearances. This condition was breached in a discrete area (the south west chimney wall) where the cladding was taken down to the paving.

[4] In her judgment, Peters J summarised the events that occurred after the agreement was signed but before it was declared unconditional.[2] She noted that a builder's report was obtained by the claimants pursuant to a special condition inserted in the agreement (cl 15). The builder's report identified matters of concern as to weathertightness including deficiencies in the installation of the joinery and the failure to comply with ground clearances required by the consent.[3]

[1] *Brebner v Collie* [2012] NZWHT Auckland 15 at [41]-[43].
[2] *Brebner v Collie* [2013] NZHC 63 at [80]-[89].
[3] Above n 2 at [26] and [84].

[5] The report led to correspondence between the parties' solicitors. The claimants' solicitor wrote to Ms Collie's solicitor recording the claimants' understanding that Ms Collie would rectify the defects referred to in the builder's report. Ms Collie's solicitor replied to the effect that Ms Collie would not be undertaking any remedial work apart from the reinstallation of a TV aerial and asked whether the claimants accepted the report or whether they wished to withdraw from the agreement. The reply was a handwritten fax stating "we are unconditional".

[6] Peters J has referred three issues back to the Tribunal for determination. These are:

i. The quantum of damages that flow from the breach of the vendor warranty as a result of the lack of compliance with conditions 14 and 16(e) of the building consent.

ii. The consequential losses/general damages, if any, that should be awarded to the claimants.

iii. Whether events after the execution of the agreement and prior to it being declared unconditional preclude the claimants asserting a breach of warranty or recovering for any such breach.

[7] The issues I need to determine are:

i. Did the events after the execution of the agreement constitute a waiver by the claimants of the vendor warranties?

ii. If the events constituted a waiver, what were the relevant notice requirements and were they fulfilled?

iii. If there was no waiver, what damages should be awarded to the claimants for the established breaches of warranty?

iv. What consequential and general damages, if any, should be awarded?

Did the events after the execution of the agreement and prior to it being declared unconditional preclude the claimants asserting a breach of warranty or recovering for any such breach?

[8] Ms Paddison for Ms Collie argues that these events constitute a waiver by election of the vendor warranty. Mr Josephson for the claimants argues that they do not. Election by waiver is concerned with the treatment of a party's choice between alternative rights or remedies available in a particular situation.[4] Ms Paddison relies on the fact that the builder's report identified the ground clearance defect and that the windows did not have flashings or sealant. She says that the claimants were therefore aware of the facts constituting the breach of warranty found by Peters J and that they elected to declare the agreement unconditional in the knowledge that Ms Collie had refused to repair the defects identified in the report. She submits that in doing so the claimants elected to abandon or forbear a claim for those defects under the vendor warranty instead of pursuing their other option of not accepting the condition of the house and cancelling the contract.

[9] A number of High Court cases touch on the effect of a purchaser's knowledge on vendor warranties. In *Spicers Paper (NZ) Ltd v Whitcoulls Group Ltd*[5] Master Kennedy-Grant expressed the view that actual knowledge is required before the right to sue for breaches of warranty is lost as a result of due diligence. Put another way, this proposition is that a party who acts with knowledge of the facts giving rise to a breach cannot sue for that breach.

[10] The *Spicers Paper* decision was referred to by Wylie J in *Singh v Rutherford.*[6] In that case it was held that inadequately conducted due diligence will not prevent a purchaser suing for breach of warranty. This was qualified by the proviso that the due diligence does not expose the error in the warranty prior to confirmation.

[4] *Nectar Ltd v SPHC Operations (New Zealand) Ltd* HC Auckland, CL 20/02, 7 May 2003 at [116].
[5] *Spicers Paper (NZ) Limited v Whitcoulls Group Limited* HC Auckland, CP181/94, 8 September 1994 at [27].
[6] *Singh v Rutherford* [2012] NZHC 380, (2012) 10 NZBLC 99-702 at [43].

[11] Two High Court cases concerning the inter-relation between conditional clauses and the vendor warranty in sale and purchase agreements were discussed at the hearing. In *Ford v Ryan*[7] MacKenzie J held that the vendor warranty was breached because, contrary to the warranty and unknown to the purchasers, no code compliance certificate had been issued for the dwelling. In addition, he held that the vendor warranty could be relied on notwithstanding that prior to declaring the agreement unconditional, the purchasers obtained a builder's report which identified most of the deficiencies preventing the issue of a CCC. MacKenzie J did not consider that the purchaser's knowledge of the defects relieved the defendants of their obligations under the warranty. However this knowledge was held to be relevant to the issue of the relief which might be available for the breach of the warranty.[8] MacKenzie J awarded no damages to the purchasers, a result that he said was not unjust given that they were aware of the significant defects they were complaining of when they purchased the house.

[12] Mr Josephson submitted that *Ford v Ryan* was authority for the proposition that the purchaser's knowledge or otherwise of any existing defects at time of purchase is not relevant because contributory negligence and *volenti non fit injuria* are not defences to contractual claims. It is correct that these defences are unavailable in contract. However MacKenzie J carefully examined whether the real estate agent's knowledge that there was no CCC could be imputed to the purchasers before commenting that in any case the requirement that waiver be by notice had not been satisfied. Knowledge was also, as noted above, relevant to the issue of damages.

[13] In *Shek v Goodwin* Paterson J found that notice that a structural report condition was satisfied or waived constituted a waiver of the parts of any warranty that overlapped with the matters that would have been covered by such a report.[9] In his text, *Sale of Land*, Dr McMorland expressed the view that *Shek* represents a principled approach and that the

[7] *Ford v Ryan* (2007) 8 NZCPR 945 (HC).
[8] Above n7 at [33].
[9] *Shek v Goodwin* HC Auckland, AP101/SW00, 1 November 2000.

decision in *Ford v Ryan* appears to have been made without the benefit of the citation of *Shek*.[10]

[14] Dr McMorland states that where there is a contingent condition relating to the quality of a dwelling, and there is an overlap between any of the warranties in clause 6.2(5) of the sale and purchase agreement and the matters covered by the condition, a notice of satisfaction with the condition operates as a waiver of any rights for breach of those warranties in respect of the same matters.

[15] At the hearing counsel, like Dr McMorland, viewed the *Shek* and *Ford v Ryan* decisions as conflicting. Unsurprisingly Ms Paddison took the view that *Shek* was the preferred authority on the issue while Mr Josephson argued for the approach taken in *Ford v Ryan* should be followed. It was Mr Josephson's position that the effect of *Ford v Ryan* was that the vendor warranty was unaffected by the builder's report clause. In the alternative, he argued that if the McMorland/*Shek* position prevailed, there was an insufficient overlap between the content of the builder's report and the breaches of the vendor warranty identified by Peters J to give rise to a waiver.

[16] Mr Josephson submitted that pursuant to *Shek,* a waiver will only operate to the extent that there is an overlap between the content of the report and the warranties. The joinery defect that has been found to breach the vendor warranty is a failure to comply with cl 11.6.1 of NZS 3604: 1999. This requires joints between windows and cladding to be made weatherproof by a combination of various options that are set out in the Standard.

[17] Mr Josephson argues that cl 11.6.1 of NZS 3604 is performance based rather than prescriptive. Therefore the absence of flashings and other issues noted in the report with respect to the windows does not identify a breach of cl 11.6.1 because these components are not mandatory, rather they are among the options that could be employed to ensure weathertightness. The breach of the clause is the weathertightness failure itself.

[10] DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at 351, 353.

[18] I do not accept this highly technical argument. The building report noted that the windows lacked flashings which assist to drain any water leaks to the outside. Another option to comply with cl 11.6.1 is the use of sealant. The report noted the absence of sealant in some instances, the retrospective application of sealant in others, the reliance on sealant where flashings are absent and the cracking at the interface of the aluminium joinery and plaster system at another location where pressure on the aluminium frame was observed to open a fine crack between the two. Weathertightness concerns regarding the window/cladding junctions were clearly raised in the building report. The failure of the junctions to be weathertight is the breach of the vendor warranty complained of. I find that the content of the report and the warranty overlap.

[19] I also consider that *Shek* and *Ford v Ryan* can be distinguished from each other. In *Ford v Ryan* although the purchasers had some knowledge of defects they did not have knowledge that no CCC had been issued at settlement. The absence of the CCC constituted the breach of warranty. In *Shek*, the purchasers waived their right to be satisfied with a structural report on the house and then claimed structural problems were a breach of warranty. I consider that the facts in *Shek* are closer to those in the present case than those in *Ford v Ryan*.

[20] Following *Shek* and the dicta in *Spicers Paper* and *Singh v Rutherford* I find that there was a waiver of the warranty with respect to the window/cladding junctions and the ground clearance defect subject to any notice requirements.

What were the relevant notice requirements and were they fulfilled?

[21] I turn now to the issue of the notice requirements, if any, that existed in respect of the waiver and whether they were met. In *Ford v Ryan,* MacKenzie J held that the circumstances did not come within 8.7(6) of the agreement which required that the waiver of any condition must be by notice. MacKenzie J did not consider the distinction between terms and conditions and whether clause 8.7(6) applied to section 6 of the agreement (vendor's warranties and undertakings) or was confined to section 8 (conditions and mortgage terms).

[22] At the hearing, Mr Josephson agreed that the vendor warranty was not a condition but rather a term of the agreement. It follows that the provision regarding notice for the waiver of conditions does not apply. Notwithstanding this, the common law requires notice of waiver in the form of an unambiguous representation, a clear and deliberate communication on the part of the party that is forgoing the benefit.[11] The sale and purchase agreement required at cl 1.2 that notices relevant to the agreement be served in writing.

[23] In this case, unlike *Ford v Ryan*, correspondence followed the receipt of the builder's report. As noted earlier, the claimants' solicitor wrote to Ms Collie's solicitor recording the claimants' understanding that Ms Collie would rectify the defects referred to in the builder's report. Ms Collie's solicitor advised that Ms Collie would not be undertaking this remedial work and asked whether the claimants accepted the report or whether they wished to withdraw from the agreement. The reply was a fax stating "we are unconditional".

[24] Mr Josephson suggested that the mechanism by which the vendor warranty could have been waived would have been by deed. He submitted that the correspondence did not satisfy the notice obligation because it did not constitute a clear statement that any vendor warranties were waived. Ms Paddison argued that any applicable notice provisions were satisfied as the correspondence between the parties which constituted the waiver by election was in writing in accordance with the requirements for notices in the agreement. She also argued, in reliance on *Bangerter v Retail on Main Ltd*, that it is not required that a notice expressly use clear wording that a condition is waived. Rather, a notice stating certain matters which give rise to an implication a condition is waived would suffice.[12] The Privy Council case of *Neylon v Dickens* similarly found that conduct (the lodging of an application) could constitute an unambiguous representation sufficient to establish waiver.[13]

[25] On my reading of the solicitors' correspondence, it is clearly represented that Ms Collie was not going to be responsible for the defects

[11] *Neylon v Dickens* [1978] 2 NZLR 35 (NZPCC).
[12] *Bangerter v Retail On Main Ltd* (2005) 6 NZCPR 499 (HC) at [41]
[13] Above n 11 at 38.

identified in the builder's report, and that the claimants accepted this and the condition of the house. To the extent that the defects identified in the report overlap with the vendor warranties I find that the correspondence constituted a sufficiently clear and unambiguous representation that those warranties were waived. I find that both the requisite election and clear communication which are required to constitute waiver of the relevant vendor warranties are established.

What damages should be awarded to the claimants for the established breaches of warranty?

[26] If I am wrong and there was no waiver, I will consider what damages the breach of the warranty gives rise to.

[27] In *Marlborough District Council v Altimarloch Joint Venture Limited*[14] Tipping J made a number of comments regarding damages. He observed that the key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. He said the reference to reasonableness has echoes of mitigation as a plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps.[15] Later he commented:

> It is not as if the purchaser elected to settle with knowledge of the shortfall. If that had been so, the position as regards the proper measure of loss may have been different.[16]

[28] Woodhouse J discussed Tipping J's observations in *Johnson v Auckland Council*[17] and stated that the assessment process requires consideration of what is reasonable from the point of view of the defendant as well as that of the plaintiff.[18]

[29] In contract, the measure of damages is the amount which will restore the plaintiffs to the position they would have been in had the breach

[14] *Marlborough District Council v Altimarloch Joint Venture Limited* [2012] NZSC 11, [2012] 2 NZLR 726.
[15] Above n 14 at [156].
[16] Above n 14 at [168]
[17] *Johnson v Auckland Council* [2013] NZHC 165.
[18] Above n 17 at [148].

of contract not occurred. As MacKenzie J noted in *Ford v Ryan*[19] while this measure can be simply stated, its ascertainment in particular cases can be difficult.

[30] The difficulty in assessing damages in *Ford v Ryan* arose from the fact that the breach of warranty was the lack of a CCC on settlement. The requirements of the Building Code had changed between 2000 when the contract was made, and 2007, when the High Court decision was issued. The exterior cladding work that was required to enable a CCC to be issued in 2007 was different from that which was required when the agreement was entered into. MacKenzie J noted that the provision of the cladding system required in 2007 was not what was contracted for and that, in the circumstances, the performance of the contractual condition was now impossible.

[31] In this case, it is the claimants' position that, in order to remedy the breach of the vendor warranty, it is necessary to demolish and rebuild the balconies, and to re-roof and re-clad the house with a new cladding system which incorporates a ventilated cavity. They claim the cost of this work as damages. However, the claimants contracted to buy a house without a ventilated cavity system, at a time when the Council was no longer issuing CCC's for non-ventilated systems. This is why Ms Collie applied to the DBH for a determination that a CCC should be issued for the house. The claimants were in possession of the DBH report regarding Ms Collie's dispute with the Council which recorded the existence of the non-ventilated cladding system on the house before they entered into the sale and purchase agreement. They used the concerns noted in the DBH report as a bargaining tool when negotiating the purchase price.[20]

[32] At the hearing Mr Josephson submitted that *Ford v Ryan* could be distinguished from the present case because in *Ford v Ryan* the breach of the warranty was "crystallised" on the day the contract settled due to the lack of the CCC. In the present case, the warranty related to a weathertightness performance requirement. Mr Josephson suggested that even had the windows been weathertight at settlement, their subsequent failure was covered by the warranty. He also submitted that remedy of the

[19] Above n 7 at [45].
[20] Above n 1 at [123] and [146].

warranty was still possible in this case as opposed to the situation in *Ford v Ryan*.

[33] I do not accept the distinction Mr Josephson makes. In *Ford v Ryan* the plaintiff contracted to buy a house with a certain type of cladding. The contract warranted that a CCC had been issued for this cladding. MacKenzie J held that the plaintiffs were not entitled to the cost of providing a different type of cladding which would enable the issue of a CCC in 2007.

[34] Here, the claimants contracted to buy a monolithically clad house without a ventilated cavity. The contract warranted that the building consent had been complied with. That warranty included a requirement that the joinery/cladding junctions be weathertight. The breach of the warranty was established in respect of four windows and a discrete section of ground clearance.[21] The claimants are seeking to be provided with a house that is re-roofed and fully reclad following the installation of a ventilated cavity, and the remediation of the joinery and associated timber damage. I do not consider that this will restore them to the position they bargained for in 2006 when they contracted to buy a house with a considerably less desirable cladding system. It will put them in a much better one. Essentially, they will be provided with a different house.

[35] Craig Sharrock, a quantity surveyor, gave evidence for the claimants at the first and second Tribunal hearings. His evidence at the second hearing was that the quote for $350,384.14 that he had provided for all the repair work at the first hearing should be reduced to $345,165. The difference between the two quotes is that the revised quote excluded repair work to the chimney. His evidence was that the revised quote provided for repair work necessary as a result of the accepted breaches of NZS 3604:1999 and ground clearances.

[36] In his evidence, Mr Sharrock stated that the cladding/ground clearance issue itself did not affect quantum.

[37] In contrast, expert evidence for Ms Collie was given by Daniel Johnson, quantity surveyor. In a brief provided for the hearing, Mr Johnson

[21] Above n1 at [41], [43], [91]-[92]. Above n 2 at [73]-[76].

estimated that the cost of repairing the defects which breached the warranty was $20,000.

[38] The difference between the estimates provided by Mr Sharrock and Mr Johnson reflects the entirely different remedial scopes upon which those estimates are based. Mr Sharrock's is based on fixing every defect and re-roofing and recladding the house with a ventilated cavity, minus the cost of repairing the chimney. Mr Johnson's appears to be based on only the repair of the elevations where the four problematic windows identified in the Tribunal determination are located and the installation of a concrete nib to address the discrete cladding/ground clearance issue.

[39] The Tribunal finding regarding the windows set into the polystyrene cladding (EFIS) is set out at [39]-[41] of the determination. I did not accept that the defect was universal as there was evidence before me that Mr Dibley had investigated an EFIS window for DBH and found it to have appropriate flashings and to be weatherproof. The evidence only established that two windows had been installed defectively. No further evidence regarding this defect was presented at the hearing although shortly before the hearing Mr Dibley had inspected the property, taken moisture readings and prepared a report which was not relied on by the claimants.[22]

[40] Mr Johnson did not appear at the Tribunal, Mr Josephson having previously advised that he did not wish to cross-examine him. Mr Sharrock did. He was asked by Ms Paddison whether consent was likely to be issued by the Council for targeted repairs, that is, repairs involved less than a full reclad of the property. Mr Sharrock advised that this was not his area of expertise. There was therefore no evidence before me on this issue.

[41] I have already found at paragraph [34] above that awarding the cost of a reclad with a ventilated cavity would place the plaintiffs in a different position to that which they bargained for. In addition, I have difficulty accepting the amount being claimed (the cost of a full reclad minus repairs to the chimney), when the established breaches of the vendor

[22] Above n1 at [48].

warranty are confined to the condition of four windows and a limited area of ground clearance.

[42] A difficulty in assessing damages in this case arises from the fact that relatively little of the damage to the house is linked to the defects covered by the vendor warranty. There was a paucity of evidence linking damage with defects and defects with warranty provisions at the first Tribunal hearing. For example, there was evidence of severe decay in a balcony wall but no evidence allowing a finding to be made as to its cause.[23] Although it was found that the defects and damage were such that a full re-clad of the house was required, it was not established that the defects which breached the vendor warranty themselves necessitated the re-clad.

[43] There were a large number of claimed defects listed in the statement of claim however, at the first Tribunal hearing, no evidence was produced to support the existence of these defects or their link to damage.[24] There were clearly additional defects which have caused damage which were not identified by the Tribunal or the High Court as breaches of the vendor warranty.[25]

[44] In addition, a major "defect" identified by the assessor and discussed at the Tribunal hearing was extensive cracking on most elevations. In his report, the assessor apportioned 75 per cent of the cost of repair to this cracking. At the Tribunal hearing there was no evidence presented of the causes of cracking other than that caused by the defects identified in the decision. It was certainly not established that moisture ingress caused by the four windows caused all or even most of the cracking to which no definitive cause was attributed.

[45] I do not accept that the cost of repairing, re-cladding and re-roofing the claimants' house, less an allowance for the chimney, is the correct measure of damages for the breaches of the vendor warranty identified in the High Court decision of Peters J. Peters J noted the loss caused by the failure to comply with the two consent conditions was likely to be less than

[23] Above n 1 at [45].
[24] Above n 1 at [52]-[53], above n2 at [31].
[25] Above n 7 at [49].

the full cost of the remediation.[26] However, apart from the modest deduction for the chimney, the amount claimed is essentially the same and goes far beyond the cost of remediating the identified breaches of the conditions.

[46] An alternative measure of damages to compensate for the breach of the vendor warranty would be to have regard to the difference in value between:

a) the house as it was when the contract was entered into with four window/cladding junctions and an area of ground clearance that breached the vendor warranty; and

b) the same house, without the defective window/cladding junctions and ground clearance defect.

[47] Although the parties were invited to file evidence and submissions addressing this difference[27] neither did so and I have no evidence before me that would enable me to assess this difference in value.

[48] The onus is on the claimants to establish damage resulting from the breach of warranty. I do not accept that the evidence they have presented is an appropriate or a correct measure of that damage. This is because it reflects the damage to their house as a whole (minus the chimney) rather than the damage caused by the two areas in which the vendor warranty has been found to be breached.

[49] As noted above there is no evidence regarding the difference in valuation. I am left with Mr Johnson's estimate of the cost of remediating the windows and ground clearance. Although it is not established that consent would be available to carry out this work alone, I consider that Mr Johnson's figure is the appropriate measure in the circumstances.

[26] Above n 2 at [77].
[27] WHT Directions regarding matters remitted back to the Tribunal, 13 March 2013.

What consequential and general damages, if any, should be awarded?

[50] In the determination I accepted that consequential losses of $37,593.48 would be incurred when the house was reclad. It is not accepted that these costs should be awarded for the limited damage caused by the warranty defects. The $20,000 estimated by Mr Johnson is 5.7 percent of the original estimate by Mr Shorrock. I consider a reduction by the same proportion should be made in respect of the consequential damages. 5.7 percent of the claimed consequential loss figure is $2,142.82.

[51] The last issue referred back to the Tribunal by Peters J was an assessment of general damages. The claimants sought an award of $25,000 to each of them under this head. Ms Paddison submitted that pursuant to decision of the Court of Appeal in *Bloxham v Robinson,* general damages are not a recognised remedy for a breach of contract.[28] I accept that *Bloxham v Robinson* applies in this case and that general damages are not available. However, even if they were available I would have declined to award them in the circumstances of this case. While I accept that ownership of a leaky house has caused considerable stress and anguish to the claimants, I do not consider that this is a result of any wrongdoing on the part of Ms Collie who did all she could to ensure that the house complied with the statutory and regulatory regime.[29] The claimants failed to protect their own interests and in taking the "leap of faith"[30] described by one of them, became the authors of their own misfortune. I would not exercise my discretion to award general damages against Ms Collie in these circumstances.

Conclusion as to Quantum

[52] If damages were awarded the quantum has been established to the amount of $22,142.82 which is calculated as follows:

Remedial work	$20,000.00
Consequential damages	$2142.82.

[28] *Bloxham v Robinson* (1996) 7 TCLR 122.
[29] Above n 1 at [117].
[30] Above n 1 at [140].

General damages	Nil
TOTAL	$22,142.82

CONCLUSION AND ORDER

[53] The claim against Ms Collie for breach of contract fails because the claimants waived the vendor warranty in respect of the content of their builder's report which included identification of weathertightness issues concerning the windows and a non complying section of ground clearance.

DATED this 15th day of August 2013

M A Roche
Tribunal Member