IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000054
[2011] NZWHT AUCKLAND 66

BETWEEN	R.H. LUNKEN, J.M. LUNKEN AND KINGDON TRUSTEES LTD (as trustees for the RON LUNKEN FAMILY TRUST) Claimants
AND	HAYWOOD CONSTRUCTION LIMITED First Respondent
AND	TONNI DE GEEST Second Respondent
AND	ARCHI-TECHNICS DESIGNERS LIMITED (Removed) Third Respondent
AND	AUCKLAND COUNCIL Fourth Respondent

Hearing: 5, 10 October 2011

Appearances: I. Williams for the claimant
S. Robertson for the first and second respondents
P. Robertson for the fourth respondent

Decision: 8 December 2011

FINAL DETERMINATION
Adjudicator: S Pezaro

BACKGROUND

[1] This claim was brought by Ronald Lunken, Jane Lunken and Kingdom Trustees Limited as trustees of the Ron Lunken Family Trust (the Trustees). The Trustees purchased the land at 15 Hoani Glade in September 1997 and entered into a contract with Haywood Construction Limited (Haywood), the first respondent, for a house to be built for Mr and Mrs Lunken. Mr and Mrs Lunken first noticed leaking in 2007 and the claim was found eligible on 17 April 2008.

[2] The application for adjudication was filed on 14 May 2010 and the Trustees obtained alternative costs for repair and replacement. After removing the cladding they decided to demolish and replace the existing dwelling and claimed $460,512.50 for the cost of this work, consequential losses of $29,250 and general damages.

[3] Prior to hearing the Trustees reached an agreement with the fourth respondent, the Auckland Council, whereby the Council admitted liability for the alleged defects and consented to judgment being entered against it for the agreed sum of $300,000, subject to contribution being sought from Haywood and Tonni de Geest, the second respondent. Mr de Geest is one of two directors of Haywood. The other director is his wife, Jennifer de Geest.

[4] Haywood took no steps in these proceedings. Mr S. Robertson, counsel for Haywood and Mr de Geest, confirmed prior to the hearing that neither Haywood nor Mr de Geest challenged the alleged defects or the amount claimed. Mr Robertson advised that he did not seek to examine the WHRS assessor, Jerome Pickering, or the Trustees' expert, Craig Turner. However I directed Mr Pickering to attend the hearing to answer any questions put to him by counsel for the Trustees or the Council. Peter Gillingham gave evidence for the Council on whether a person performing the same

functions as Mr de Geest ought to have noted building defects during construction and what action should have been taken to resolve any defects. Mr Lunken and Mr de Geest were the only factual witnesses.

THE CLAIM

[5] The claim against Haywood is in contract and tort. Mr Lunken says the contract was partly written and partly verbal and that Haywood was responsible for both design and construction. It is claimed that Haywood breached clause 2 of the contract by failing to carry out the construction to the required standards and by breaching its duty of care as the builder.

[6] The Trustees and the Council claim against Mr de Geest in tort as the project manager on the ground that Mr de Geest personally assumed the role of project manager and was responsible for supervising and co-ordinating the construction. In opening Mr Williams confirmed that the Trustees also maintain their claim that Mr de Geest was the developer.

[7] The specific allegations against Mr de Geest are that he:

- liaised with the designer to finalise the plans and specifications, and provided the detail for the broad proposal provided by Mr Lunken;
- selected the exterior cladding;
- liaised with the window designer to specify the design of the flashings;
- liaised with the contractor installing the glass balustrade;
- failed to get a producer statement for the liquid applied membrane on the roof or to ensure that this membrane was applied by an approved applicator; and

- failed to detect the construction defects when he was on site, in particular the lack of clearance between the cladding and the ground, and the lack of fall to the decks.

Defects and damage

[8] The WHRS report and the claimant's expert report are unchallenged. I accept therefore that the defects that are identified in these reports and pleaded in the Statement of Claim are proved to have caused damage. Those defects are:

a) improperly constructed roof, parapets, deck balustrades, and joinery;
b) improperly installed cladding;
c) inadequate clearance between the cladding and the ground and deck levels; and
d) improperly installed glass balustrades.

[9] I am satisfied that the loss resulting from these defects is proved to the extent of $300,000 as claimed.

THE ISSUES

[10] The issues that I need to determine are:

a) the liability of Haywood;
b) whether Mr de Geest personally owed a duty of care to the claimants and if so, whether that duty was breached;
c) if Mr de Geest did owe a duty which was breached, what loss, if any, has resulted for the claimants; and
d) the apportionment of liability.

THE LIABILITY OF HAYWOOD CONSTRUCTION LIMITED

[11] As the builder and head contractor, Haywood is liable in contract and tort for the proven defects and the resulting loss to the claimant. Accordingly Haywood Construction Limited is liable for the sum of $300,000.

DID MR DE GEEST OWE A DUTY OF CARE?

[12] It is claimed that Mr de Geest owed a duty as developer and as project manager. A developer owes a non-delegable duty of care whereas to be found liable as project manager, Mr de Geest must have carried out or supervised building work which was defective and caused weathertightness defects.

RELEVANT LAW

[13] A person who manages construction owes the same duty as any other contractor or sub-contractor whose role is capable of affecting the quality of the construction. However whether any liability arises requires an enquiry into the responsibilities, actions and omissions of the person.[1]

[14] The degree of control test, applied in *Morton v Douglas Homes Ltd,*[2] is the relevant test for determining whether a personal duty of care was owed for building work and, if so, whether or not any negligence attracts personal liability. Hardie Boys J concluded that control does not arise from the position of director, but rather the fact of control, however derived, may create the duty.[3] The question is whether Mr de Geest committed the elements of the tort.[4]

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[1] *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-004-3535, 22 December at [102].
[2] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[3] At [595].
[4] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC); *Body Corporate No 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC).

[15] Mr P. Robertson submits that the position of Mr de Geest is similar to that of Mr Lee in *Lee v Ryang.*[5] Mr Lee was found liable as project manager after being in charge of the site, selecting and sequencing the subcontractors. However the issue in *Ryang* was not whether Mr Lee was the project manager. Mr Lee accepted that he performed this role but appealed to the High Court, after failing to appear before this Tribunal, on the ground that his contract protected him from liability. *Ryang* therefore does not assist the Council's case against Mr de Geest.

[16] In *Hartley v Balemi*[6] the High Court upheld the adjudicator's decision that a director who was personally involved in day-to-day decisions which led to the relevant defects was personally liable. Similarly, in *Body Corporate No 199348 v Nielsen,*[7] a director was found personally liable where he attended the site for at least one or two hours each day in builder's clothes, gave instructions on a daily basis to the site manager, and was responsible for supervising construction work and ensuring that work was carried out in accordance with the plans and specifications.

[17] However in *Drillien v Tubberty*[8] the High Court found that a director whose involvement was limited to organising what was necessary for specific contractors to do their work but left those subcontractors to build themselves was not personally liable. In *Leuschke* Harrison J considered the liability of a director who prepared budgets, arranged finance and tenders, and exercised control through the office of director. His Honour found that there was no evidence that the director was involved in the actual building process or had knowledge of the defects in design or construction

[5] *Lee v Ryang* HC Auckland, CIV-2011-404-2779, 28 September 2011.
[6] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.
[7] *Body Corporate No 199348 v Nielsen* HC Auckland, CIV-2004-404-3989, 3 December 2008.
[8] *Drillien v Tubberty* (2005) 6 NZCPR 470 (HC).

and therefore concluded that there was no causal link between this director's power of control and the particular defects.[9]

[18] In *Body Corporate 183523 v Tony Tay & Associates Limited*[10] Priestley J considered whether Tony Tay was personally liable for work carried out by Tony Tay and Associates Limited (TTA), a company of which he was the managing director and majority shareholder. Priestley J concluded that, as a general rule, directors facing claims arising from leaky buildings will be exposed to personal liability where the companies involved are one person or single venture companies or where there are factual findings that the director was personally involved in relevant aspects of the design, construction or building supervision.[11] His Honour concluded that there was no evidence that Mr Tay was personally involved to that extent.

Liability as developer

[19] In *Leuschke* Harrison J said:

> [31] The word 'developer' is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which **by virtue of its ownership of the property** and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.
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> [32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for is town financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is

[9] *Body Corporate No 188273 v Leuschke Group Architects Ltd*
[10] *Body Corporate 183523 v Tony Tay & Associates Ltd* HC Auckland, CIV-2004-404-4824, 30 March 2009.
[11] At [156].

> responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.[12] (*emphasis added*)

[20] In reliance on [32] above, Mr Williams submitted that ownership was not critical to the concept of a developer. However, it is clear from the preceding paragraph that this description is premised on ownership of the property. The significance of ownership for the role of developer was accepted by Potter J in *Spargo v Frankin and Anor as Trustes of the Kereopa Whanau Trust*[13] where the fact that the Spargos did not own the property at any point was a significant factor leading to the conclusion that they were not developers.

[21] While I accept that there are cases, such as a purchase 'off the plans' when it is reasonable to conclude that a party who did not own the property during construction was the developer, I conclude that ownership of the land, or a financial interest, at some point prior to or during construction is required in order to find that a party is the developer.

[22] In Mr de Geest's situation, there are further factors that undermine the allegation that he was the developer. The Trustees selected Haywood as the builder whereas a party buying from a developer has no such choice. Although Haywood selected the architect, there is nothing to suggest that the Trustees could not have done so and it is accepted that Mr and Mrs Lunken provided at least a broad proposal for the design. I conclude that the degree of control exercised by Haywood over this construction was no more than that of any other builder engaged to carry out construction under a full contract. I conclude that Haywood performed the role of head building contractor but was not the developer. For these reasons

[12] *Body Corporate No 188273 v Leuschke Group Architects Ltd* at [31]-[32].
[13] *Spargo v Frankin and Anor as Trustes of the Kereopa Whanau Trust* HC Tauranga CIV-2010-470-91, 9 November 2011.

the claim that, as director of Haywood, Mr de Geest was the developer does not succeed.

Liability as project manager

[23] During the hearing, the terms 'project manager' and 'foreman' were used to describe a person on site and supervising construction. Mr Gillingham described the person looking after a site as the project manager and said that a site would be well-run if there was a specific person with this role. Mr Gillingham used the title 'foreman' to describe a carpenter in charge of a team. On the other hand, Mr de Geest described a 'foreman' as someone who could take charge of the site and delegate work. This level of responsibility is more usually attributed to a project manager and is consistent with Mr Gillingham's description of a project manager. I have considered the evidence given by Mr de Geest on the role of the foreman in this light.

[24] The issue I need to determine is whether Mr de Geest was personally involved in the construction, either by directing building work or taking responsibility for the manner in which the construction was carried out, such that he owed a personal duty of care to the claimants. This step requires an assessment of the facts and an examination of the responsibilities attached to the particular functions Mr de Geest performed.

[25] The Trustees and Council rely on Mr de Geest's training as a carpenter, his building experience and his financial interest in the construction as factors that support attribution of a personal duty of care. Mr P. Robertson submits that even if there was another person on the site who was responsible for quality control, Mr de Geest had the knowledge and the authority to direct parties, including the foreman. It is submitted that Mr de Geest exercised control over the building work by:

- attending site at least every second day;
- selecting, engaging and paying the subtrades;
- arranging for materials to be delivered to the site;
- booking all Council inspections apart from those relating to plumbing and drainage; and
- assuming the role of contact person for the claimants during construction.

The evidence

[26] Mr de Geest accepts that it was his role as managing director of Haywood to assess and discuss progress with the foreman in order to schedule the subcontractors, order and purchase materials on behalf of Haywood, and link with the claimants. Mr de Geest said that Ralph Maxwell, an employee of Haywood, was the foreman responsible for this site. It has been established that Mr Maxwell was on site until after the foundations were complete but left due to illness. Mr de Geest said that Haywood employed another foreman to replace him although Mr de Geest could not remember his name. Mr Maxwell was not asked to give evidence on his role on site and I accept Mr de Geest's evidence that Mr Maxwell was the foreman. It is therefore likely that when he left another foreman was engaged.

[27] The Council records show that Mr de Geest signed the application for building consent, his phone number was given as the contact for inspections and that he booked several inspections. However Mr Gillingham accepted that the person who books inspections is not necessarily the person in attendance for those inspections. The fact that Mr de Geest signed the building consent application and provided his contact number is consistent with his role as director of Haywood.

[28] In evidence Mr de Geest confirmed that he priced the work and had to know what type of cladding and windows would be used

in order to do so. Mr de Geest accepts that he was on site frequently and that he was the intermediary between Mr and Mrs Lunken and the architect. He also accepts that Archi-Technics Designers Limited (ADL) prepared plans for the purpose of costing only. However there is no evidence that Mr de Geest provided any detail for the plans or specifications.

[29] In his witness statement dated 29 July 2011 Mr Lunken said that during the construction period, which was about seven months, he called at the site regularly during and after working hours. He said that between him and his wife they would have called at the site three or four times a week at the very least while work was being carried out. Mr Lunken said that the only person regularly on the site apart from Mr de Geest was his son. He said that there were various other carpenters who were contractors on the site over the construction period, all seemingly engaged by and responsible to Mr de Geest.[14] Mr Lunken said that he did not recall dealing with a person on site who was either the foreman or the project manager.

[30] However under cross-examination Mr Lunken accepted that he was overseas for periods during the construction and that he did not see Mr de Geest physically building or supervising any of the construction. Mr Lunken said that he saw Mr de Geest communicating with his son who was a builder on site however Mr Lunken did not know the content of the conversation. Although Mr Lunken or his wife stated that they were on site regularly they have not given any evidence of Mr de Geest controlling, supervising or performing relevant work.

Summary and conclusions

[31] The functions that Mr de Geest accepts that he performed are comparable to those of Mr Tay who was found not to be personally liable for work carried out by his company. Although Mr

[14] At [23] of the Affidavit.

Tay visited site only occasionally and had no day-to-day involvement with the construction or in the preparation of the plans, there are several similarities between their roles:

- they were both managing directors and majority shareholders of the company that carried out the construction contract;
- they liaised directly with the client and negotiated the contract;
- they organised subcontractors and had a degree of control over the scheduling and payment of contractors;
- both had relevant building qualifications, Mr Tay as an architect and Mr de Geest as a carpenter; and
- their companies had other projects under construction at the same time, although I accept that TTA was a larger operation.

[32] The allegations against Mr de Geest are set out in [7] above. Although the plans provided for building consent did not specify the type of cladding, the details of the window design or flashings, or the detail for installation of the glass balustrade, there is no evidence that Mr de Geest provided any of this detail or that, if he was involved, he was acting as anything more than a conduit for the information. Even if Mr de Geest did select the type of cladding, it was the installation and not the type of cladding that caused the defects. The evidence adduced does not support the allegations made or establish that Mr de Geest performed any task related to the alleged defects.

[33] For these reasons I am not satisfied that Mr de Geest carried out any relevant role in the construction, other than as a director of Haywood. The fact that he was on site frequently is consistent with his role as managing director of a small construction company but not sufficient to support a finding that he owed a personal duty of care. Even if a duty were owed, and I accepted that Mr de Geest

performed the work alleged in [7] above, I am not satisfied that a causative link has been demonstrated between this work and the relevant damage.

Costs

[34] In closing Mr S. Robertson asked that I indicate in this decision whether there are grounds for a departure from the presumption in the Act that each party meets its own costs. An application for costs on the grounds of bad faith would not succeed in this case. The only ground for an award of costs would be that the claimant knew this claim lacked substantial merit and pursued litigation in defiance of common sense.[15] This is a high threshold which is unlikely to be reached if the evidence required testing. If Mr de Geest intends to apply for costs, any application is to be filed by 14 December 2011 and any opposition to costs by 21 December 2011.

Apportionment

[35] The Council submits that its liability should be 20% which is consistent with the decisions of *Mt Albert Borough Council v Johnson,*[16] *Dicks v Hobson Swann Construction Limited*[17] and *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*)[18]. I accept that this is reasonable and have therefore apportioned liability at 20% to the Council and 80% to Haywood.

[36] For the reasons given I make the following orders:

i. Auckland Council and Haywood Construction Limited are jointly and severally liable to pay the claimants,

[15] *Trustees Executors Ltd v Wellington City Council* HC Wellington, CIV-2008-485-000739, 16 December 2008.
[16] *Dicks v Hobson Swan Construction Ltd (in liq)* HC Auckland, CIV-2004-404-1065, 22 December 2006.
[17] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.
[18] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008 [*Sunset Terraces*].

Ronald Lunken, Jane Lunken and Kingdom Trustees Limited as trustees of the Ron Lunken Family Trust, the sum of $300,000.

ii. The Auckland Council is entitled to recover from Haywood Construction Limited any amount that it has paid to the claimants over and above the sum of $60,000.

iii. Haywood Construction Limited is liable to pay the claimants, Ronald Lunken, Jane Lunken and Kingdom Trustees Limited as trustees of the Ron Lunken Family Trust, the sum of $240,000 immediately being 80% of the sum of $300,000.

iv. The claim against Tonni de Geest is dismissed.

DATED this 8th day of December 2011

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S Pezaro
Tribunal Member