

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-101-000040
[2013] NZWHT AUCKLAND 11**

BETWEEN	MARGARET DIANNE DWAN (9 Olympic Lane) Claimant
AND	PARK NO 3 TRUST C/- PHILIP JOHN DUNCAN (<u>Removed</u>) First Respondent
AND	CHRISTCHURCH CITY COUNCIL (Subrogated) Second Respondent
AND	ASPECT CONTRACTORS LTD (<u>Removed</u>) AND MARK VAN DEN DORPE Third Respondent
AND	WENBORN PLUMBING (DAVID ANDREW WENBORN) (<u>Removed</u>) Fourth Respondent
AND	RITE-VIEW ALUMINIUM LTD (<u>Removed</u>) Fifth Respondent

Hearing: 24 October 2012

Appearances: S Macky for the Claimant and Second Respondent

Decision: 16 April 2013

FINAL DETERMINATION
Adjudicator: R Pitchforth

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THE CLAIM

[1] Margaret Dianne Dwan is the owner of 9 Olympic Lane, St Albans, Christchurch, a leaky home purchased in 2006. Ms Dwan noted water ingress from the garage roof. Remedial works were carried out to the roof, but this did not fix the leaks. There were soon leaks in other parts of the property. Negotiations to repair them were unsuccessful.

[2] Ms Dwan applied to the Department of Building and Housing for an assessor's report which found leaks and recommended that the building should be reclad. The property was reclad and an application for adjudication was filed.

[3] Ms Dwan gave evidence to support the losses claimed.

[4] Citywide Builders Ltd charged \$109,546.71 for the recladding repairs. Formally proved consequential costs of \$33,988.55 included house checks from an inspection company, plans and specifications, project management, building incidentals and legal fees relating to the remediation. (The \$900.00 claimed for filing fees is disallowed).¹

[5] Margaret Dwan said that she suffered incredible stress and constant worry as she lived with the knowledge of the leaks and ongoing damage for five years from 2007–2012. She was worried about her health and safety and that of visitors and also had financial concerns.

[6] The Court of Appeal in *Byron Ave*² provided a guide for damages in such situations at \$25,000 for an owner occupier in Ms Dwan's circumstances. I find that her evidence shows she is entitled to this level of damages.

[7] Ms Dwan obtained an overdraft from her bank resulting in interest charges of \$22,449.27 up to the date of settlement with the other parties. Ms Dwan was no longer able to let a room for home-stay purposes and her loss of rent was \$9,600.00.

[8] Ms Dwan's claim was settled with other parties on 5 May 2011.

¹ Section 91(2) Weathertight Homes Resolution Services Act 2006: each party bears their own costs.

² *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 at [129].

[9] Mr van den Dorpe was not a party to the settlement. He was the plasterer alleged to be responsible for the damage arising from the faulty cladding. Mark van den Dorpe did not file a final response and he took no part in the hearing of this matter. Mr van den Dorpe had previously provided affidavit evidence for an unsuccessful removal application which I have taken into account despite him not being available for questioning.

[10] Ms Dwan subrogated her claim to the Christchurch City Council as part of the settlement. She claimed the difference between the settlement and the claim as follows:

Remediation	
Repairs to house	\$ 109,546.71
Consequential costs	\$ 33,988.55
Lost income	\$ 9,600.00
Interest to 30 May 2011	\$ 22,449.27
General damages	<u>\$ 25,000.00</u>
Amount of claim	\$ 200,584.53
Less settlement received	<u>-\$ 138,333.33</u>
Balance of claim	\$ 62,251.20

[11] Mr van den Dorpe did not oppose the quantum of the total claim.

[12] The Council sought from Mr van den Dorpe \$130,000.00 being the amount that it paid in settlement to Ms Dwan.

ISSUES

[13] The issues I was asked to determine were:

- (a) What were the defects causing loss?
- (b) Did Mr van den Dorpe owe the current owner a duty of care and if so did any breach of that duty cause or contribute to loss?
- (c) What damages should Mr van den Dorpe pay to the claimant?
- (d) Is the Council entitled to a contribution from Mr van den Dorpe?

What were the defects causing loss?

[14] The assessor found that water had entered the wall cavities due to the manner of the construction of the cladding system and poorly installed inter-storey joints damaging the interior wall linings, trim and causing toxic mould growth. Faulty saddle flashings allowed gravitational and capillary drive water to enter the wall cavities.

Plastering

[15] Mr Milsom, a registered building surveyor who supervised the remediation of the building, examined the cladding and in his opinion both the cladding substrate and the plastering work were installed and carried out inadequately which led to extensive water ingress and damage. Mr Milsom's view was that the materials were not at fault so it was an issue relating to plaster application.

[16] Mr Milsom referred to Nuplex Industries Flexicote product manufacturer technical data at clause 5:

5 Surface preparation

It is the licensed contractor's responsibility to inspect all areas which are to receive the Flexicote coating and report unsatisfactory conditions to the main contractor. Listed below are detailed specifications for preparing the various substrates....

It was therefore the licensed contractor's job to inspect and ensure the substrate on which the plastering was to be carried out was adequate and complied with the Building Code and to decline to plaster it until it was satisfactory. It is the plasterer's responsibility to follow the instructions, use the technical data sheet information and inspect the area to be plastered otherwise the plaster will fail. If the head contractor refused to remedy the default the plasterer should walk off the job. Even if he did not have a contract to install the flashings he still had a responsibility not to plaster before the defect was remedied.

[17] Mr Young, the assessor, said that that Mr van den Dorpe had not done the things that he should have. He referred to the BRANZ Certification for the Multiplast product appraisal which describes the Harditex jointing and finishing

system as part of a whole system rather than a substrate that someone puts plaster on. The Good Practice Guide (Stucco) issued by BRANZ in April 2001 elaborates on this. Both were current when the house was built. He should check flashings, jointing and all the things that Mr Milsom has mentioned. It is a mirror of the Multiplast specification. The specification refers to the Hardie's specification for the substrate and that product has details which should have been followed and were not. Nuplex is a different system but it is still a backing and plaster system. The Guide provides that once stopping work has started, the applicator is deemed to have accepted that the fibre cement installation is suitable for the specified joint finish. Mr van den Dorpe as a licensed applicator should have known that good trade practice included the BRANZ instructions and Nuplex instructions.

[18] Mr van den Dorpe knew the substrate was unsatisfactory and told the builder. Mr Young and Mr Milsom said that Mr van den Dorpe, having told the head contractor that things were missing and being told to carry on, should have refused to plaster.

[19] Despite these obligations and knowledge of the substrate deficiency Mr van den Dorpe negligently proceeded to plaster over the defects hiding some of the causes of damage.

Windows

[20] There were a number of issues in relation to the windows. First, sill trays required by the consent drawings, Sill Detail /1:2, were missing.³ This defect caused damage because the moisture that penetrated the exterior envelope would not be collected by the sill tray and directed to the outside of the building. Mr van den Dorpe said that flashings were excluded from the contract and were the responsibility of the builder. The expert evidence confirmed this, but said that Mr van den Dorpe should have complained about this and required the builder to remedy the fault before plastering.

[21] The junctions between the jambs and sill flashings were not sealed. Mr Milsom said this was as a result of an inadequately installed substrate. He said the plaster was applied over the defect. Mr Young, the assessor, said that the jamb and sill flashing had not been sealed with an approved sealant as required by the

³ Assessor's report at 9.3, 10.3, 11.3, 12.3.

Consent Drawings PVC Flashing Detail.⁴ The repairs would have taken about an hour and cost about \$50.00 in sealant.

[22] Twenty per cent of the bottom corners of the flashings leaked. None were properly sealed and the paint and plaster which did stop water entry would have failed in time. The west facing toilet window on the back of the garage had leaked on both corners as did the middle bedroom window on the north face. The south facing stair landing window had also leaked.

[23] The gaps between the bottom flange of the windows and the sill flashings were sealed preventing drainage. Mr van den Dorpe confirmed that he filled up to and sealed around the windows. The assessor said that the junction where the leg of the window sills overlapped the sill flashings was designed to be left unsealed to allow any moisture to drain; in all cases the junction was sealed preventing drainage.⁵ There was damage on every elevation.

[24] Mr Milsom said that this was Mr van den Dorpe's responsibility and was a primary cause of water damage as moisture that entered the structure was not able to drain away resulting in damage to the timber framing.

[25] In relation to the windows the cumulative effect of the defects was substantial damage requiring a re clad of the building. Mr van den Dorpe was partly responsible for this as he should have either repaired the substrate or declined to plaster over the substrate defects. To plaster over the defects and to accept incorrect sealant application was negligent and a breach of his duty of care to the owners.

Control joint problems

[26] There were three substrate installation control joint faults causing moisture ingress into the timber framing. Some of the corners had leaked. The lack of vertical control joints required by the consent drawings was a defect resulting from the builder's inadequate installation of the substrate. This defect may not have been visible to Mr van den Dorpe at the time. The horizontal inter-floor control joints were incorrectly installed. The cladding moved and opened up the joints which were a primary cause of moisture ingress into the timber framing

⁴ Assessor's report at 9.3, 10.3, 11.3, 12.3.

⁵ Assessor's report at 9.3, 10.3, 11.3, 12.3.

necessitating a reclad. The butt joints of the inter-floor control joint PVC moulding were not sealed or flashed which was a direct cause of moisture ingress into the timber framing. Mr van den Dorpe would have been able to see that there were no back flashings and the joints were not sealed. The corner joints to the inter-floor control joint PVC moulding were not sealed and Mr van den Dorpe would have been able to see that. Mr van den Dorpe should have complained about lack of control joints. In each case there would have been thermal movement which would have resulted in leaks as a result of subsequent cracking.

[27] Mr van den Dorpe noted the lack of control joints at the time and referred it to the builder who told him to carry on with the coating.

[28] Mr Milsom considered it to be Mr van den Dorpe's responsibility to ensure appropriate flashings were in place and penetrations of the cladding were properly sealed when carrying out plaster work. Mr van den Dorpe said his own method was to use 75 mm meshed tape folded round the corners to achieve the finish but the builder chose to have angles fitted by a different contractor.

[29] I find that the builder who applied the substrate wrongly and Mr van den Dorpe who plastered over the faulty substrate were both responsible for the defects.

Mesh

[30] Mr van den Dorpe should have used four mm mesh which would have been of a sufficient size for the plaster to be squeezed through the mesh. He used one mm mesh. This meant little plaster went through the holes so that it was improperly bonded. As sheet joints were not sealed and the small mesh would not allow the correct bond there were leaks. This was a factor in plaster failure.

The Harditex sheets were incorrectly laid out

[31] The assessor said that the Harditex sheet configuration was not in compliance with the James Hardie Technical Information. It appeared to him that the detail submitted to the Council was a drawing extracted from the James Hardie Harditex Cavity Construction General Specification which had been amended by omitting some details.⁶

⁶Assessor's report at 9.3, 10.3, 11.3, 12.3.

[32] Although Mr van den Dorpe said that the Harditex was not installed by him, Mr Milsom said that as the plasterer, he should have ensured that the cladding substrate was properly installed before carrying out plastering.

[33] This defect only allowed water ingress where the plaster had cracked and there were no high moisture readings. It was caused by the installer of the Harditex cladding incorrectly joining sheets over the corners without vertical control joints. Eventually the cracking would let water in. Mr van den Dorpe is also liable for this defect as he should have refused to plaster over an observed fault.

Parapet tops

[34] Another faulty substrate issue was that the parapet tops were flat when they should have been sloped. There was no proper and effective saddle flashing installed at the junctions between the parapets and the wall. The interior construction of the parapets under the metal capping diverted water into the building rather than outside. The parapet capping was fitted before the plastering and unprotected sealant had failed. The plastering should have been completed before the capping was installed. This was a primary source of water ingress. Messrs Milsom and Young thought that Mr van den Dorpe should have objected to plastering after the capping installation as he could not get the plaster behind the capping.

[35] Responsibility should be shared between the builder and Mr van den Dorpe because both were involved in constructing a defect which leaked. The builder should bear the greater responsibility for constructing an unsatisfactory parapet with defective substrates and capping it before plastering. However Mr van den Dorpe should have objected to plastering over such a defect.

There were no diverters at the bottom of the apron flashing

[36] Mr Milsom said that a lack of diverters at the bottom of the apron flashings was a substrate issue causing water ingress. Due to a lack of diverters on the house water flowed down the roof and behind the cladding. The flashing went behind the cladding and the water went with it. Water caused major damage requiring framing replacement. Mr van den Dorpe was responsible for plastering over an obvious defect and should have declined to do the work until the diverting work was done.

The meter box and extractor fans penetrated the walls and were not flashed or sealed

[37] Mr Milsom said that Mr van den Dorpe would have been responsible for sealing the meter boxes but the builder was responsible for sealing the extractor fans. The water ingress was minimal.

[38] Messrs Milsom and Young thought that defects that had not leaked were a source of future likely damage.

Did Mr van den Dorpe owe the current owner a duty of care and if so did any breach of that duty cause or contribute to loss?

[39] Mark van den Dorpe plastered the house. Ms Dwan said that he owed her a duty of care to ensure that the substrate on which he was to carry out his plastering work had been installed with all reasonable skill and care in accordance with the Building Code, the Building Act 1991 and in accordance with the manufacturer's literature. He had a duty to ensure that all his plastering work was carried out with skill and care but he breached that duty by failing to ensure that the substrate was properly installed and not carrying out the plaster work with reasonable skill and care.

[40] Mr van den Dorpe said that he never saw the Christchurch City Council documentation so denied deviating from it. Mr van den Dorpe's affidavit evidence was that he was a one man band doing painting and decorating work. He contracted with the builder to do the plaster coatings on 9 Olympic Lane based on a quote for applying the plaster coatings and painting as directed. The quote was on a per square metre basis.

[41] Mr van den Dorpe said that he relied on the Council's pre-plaster check as approving the state of the building for plastering and that there is no evidence that the work that he did do was the cause of weathertight issues. There was no evidence that the Council indicated any concern if it inspected the substrate before plastering.

[42] Many of the defects on their own would have been sufficient to find that the plaster was negligently applied. Cumulatively there is overwhelming evidence

that the plaster was applied negligently and was the cause of significant leaks which required a reclad of the house. Mr van den Dorpe was responsible for these plastering defects.

[43] In *Bowen v Paramount Builders (Hamilton) Limited*⁷ the Court of Appeal said that all builders are subject to a duty to use reasonable care to prevent damage to persons who they should reasonably expect to be affected by their work. This has been extended to specialist contractors who carry out work on a building.⁸ A plasterer owes such a duty.⁹

[44] Mr van den Dorpe owed Ms Dwan a duty of care to ensure that the substrate was adequate and that the plaster was installed in accordance with the manufacturer's instructions. He failed to do that and was negligent.

[45] There is no doubt that Mr van den Dorpe was negligent and accordingly is one of the parties who are jointly and severally liable to the claimant for the defects arising from the defective cladding.

What damages should Mr van den Dorpe pay to the claimant?

[46] I find that the claimed damages of \$200,584.53 were proved. The other parties have accepted this amount in their settlement. Mr van den Dorpe has never contested the amount of the claim.

[47] Ms Dwan has already received \$138,333.33 from the other parties for their share of liability. In making this claim the most that she can receive is \$62,251.20. However, in reaching a settlement with the other parties, she has accepted that she can only recover from Mr van den Dorpe the amount which he should pay towards his overall share of the amount claimed.

⁷ *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).

⁸ *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-004-3535, 22 December 2008 at [105].

⁹ *Body Corporate 189855 v North Shore City Council* HC Auckland, CIV-2005-404-5561, 25 July 2008 at [296].

Is the Christchurch City Council entitled to a contribution from Mr van den Dorpe?

[48] To answer this question I need to consider the evidence of the contributions to the problem by the parties discussed in evidence.

[49] The Council provided evidence from Ms Owles, a Council officer that the Council would have relied on the warranties provided by Nuplex in issuing the code compliance certificate. Mr Milsom said that in his view the warranty from Nuplex dealt with the materials only. I agree that the warranty relied on does not cover workmanship, only materials. There was no evidence that the materials were faulty. The warranty was insufficient for the Council to rely on for workmanship issues.

[50] There was no evidence that the Council had conducted inspections of the substrate before plastering or the plastering itself.

[51] As between the parties only the Council seeks to recover the balance of the claim which it has paid to the claimants. The Council submitted that Mr van den Dorpe should be liable for 80 per cent of the claim based on *Mt Albert Borough Council v Johnson*.¹⁰

[52] As the Council relied on a materials only warranty when issuing its code compliance certificate as to the plastering and had not conducted inspections it was a major contributor to the problem. I assess the Council's share of liability at 25 per cent. It breached its duty of care to carry out inspections with reasonable skill and care.

[53] The builder was responsible for the defective substrate and failed to prepare it properly for Mr van den Dorpe. The builder had not remedied the substrate problems when they were drawn to his attention but had instructed Mr van den Dorpe to plaster over the defective substrate. There were other defects caused by the builder for which Mr van den Dorpe was not immediately responsible. The builder's negligence was a major contributor to the damage and I assess the builder's contribution at 55 per cent.

[54] Mr van den Dorpe had a substantial responsibility for plastering a badly formed substrate in a manner which would cause leaks. This amounted to a

¹⁰ *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

significant factor. I assess his liability to contribute to the cost of the damage at 20 per cent share of the total proved, namely \$40,116.91.

[55] As Margaret Dwan sought \$62,251.20 which exceeds the amount of Mr Van den Dorpe's contribution there is no balance amount to be paid by Mr van den Dorpe to the Christchurch City Council.

ORDERS

[56] Mr van den Dorpe is ordered to pay \$62,251.20 to Margaret Dwan forthwith.

DATED the 16th day of April 2013.

Roger Pitchforth

Tribunal Member