

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-101-000030
[2011] NZWHT AUCKLAND 67**

BETWEEN	KAREN & IAN O'CONNOR Claimants
AND	MACDEE MCLENNAN CONSTRUCTION LIMITED First Respondent
AND	DUNCAN MCLENNAN Second Respondent
AND	PORIRUA CITY COUNCIL Third Respondent
AND	G KNOL Fourth Respondent

Hearing: 23 June 2011

Appearances: P Robertson for the claimant
Reeves for the first and second respondent
P Robertson for the third respondent
G Knol the fourth respondent

Decision: 9 December 2011

FINAL DETERMINATION
Adjudicator: R Pitchforth

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BACKGROUND

[1] The claimants are the owners of 3A Cromarty Place, Papakowhai Porirua. There is no dispute that it is a leaky home. The house was built in 1997-98. Building consent was issued on 9 June 1997 and a Code Compliance Certificate issued on 18 May 1998.

[2] The first respondent, MacDee MacLennan Construction Limited and the Second respondent, Duncan MacLennan were respectively the builder and the director responsible for the work. They provided a statement of defence. At the hearing they accepted the outcome of the hearing and took no further part in the process. Mr Reeves appearing for these two parties was given leave to withdraw.

[3] Gerry Knol was the fourth respondent. He unsuccessfully applied for removal and took no further part in the hearing.

[4] Prior to the hearing the third respondent, the Porirua City Council, settled its claim at mediation with the claimant. It continued its claim for a contribution from the other parties. By an agreement in November 2010 the claimants assigned to the Council all their causes of action and rights in the litigation and their full entitlement to recover damages against the other

parties. This allowed the Council to continue the litigation in the name of the claimants and the Council.

[5] With the benefit of the assessor's report the claimant sought repairs following damage from leaks from building defects outlined in that report.

[6] Mrs O'Connor gave evidence at the hearing. The claimants provided further evidence of the devastating effect on their lives, their health, their level of anxiety, social life, emotional and financial impact of the consequences of having purchased leaky home. They have been put to extra expense as a result.

ACQUISITION AND CONSTRUCTION OF BUILDING

[7] In 1997 the claimants were invited by Duncan McLennan (trading as MacDee Construction) to consider buying 3A Cromarty Place. The claimants were aware of building issues relating to leaky homes and sought assurances concerning some of the construction matters. In particular they were concerned about using fully treated timber for framing, a cavity behind the external cladding and deck coating. The assurances sought were given.

[8] The claimants agreed to purchase the building to be constructed on the site on 27 September 2000.

[9] The construction took place. The claimants undertook the internal painting, arranged for the ceramic tiles to be laid and provided curtains. Settlement occurred on 13 August 2001.

EARLY LEAKS

[10] Later in August 2001 there were three small leaks which were fixed during the maintenance period.

[11] In March 2002 a leak developed in the deck above the third bedroom. Mr McLennan reapplied the deck sealant.

[12] A few months later there was a leak in the top corner of the lounge which was repaired by Mr McLennan applying sealant.

[13] The claimants sought an opinion from Joyce Group following publicity in relation to leaky homes. Two further leaks were identified, one under the master bedroom window and the other where the pergola pole met the uncapped balustrade. Mr McLennan repaired them by applying silicone. The same report suggested that the house was built of untreated timber.

[14] In February 2004 a leak developed in the window in the lounge during a storm. Mr McLennan repaired it with silicone.

[15] In 2006 the claimants noted leaks in the lounge window and in the roof over the dining room. Rust spots in the roof and a crack in the cladding were also noted. The claimants decided to repaint the exterior which they did between January and April 2007.

[16] Further cracks appeared in the exterior walls. Interior paint began to peel.

THE ASSESSOR'S REPORT

[17] The claimants lodged a claim with the WHRS on 21 April 2008.

[18] The assessor found that the house leaked:

15.2 Where and why does it leak?

15.2.1 Joinery transitions – no protective flashings or in seal – insufficient head flashing detail – in variance with manufacturer's specifications.

15.2.2 Flat topped balustrade – no protective flashings or slope – in variance with specifications and plans.

15.2.3 Flat topped roof parapets – no protective flashings or slope – in variance with specifications and plans.

15.2.4 Barge facia ends – failure to carry out flashing over barge board

15.2.5 Northern deck pergola fixtures - inadequate detail and protection.

15.2.6 Cladding to ground at the garage – poor installation in variance with manufacturer’s specifications.

15.2.7 Garage door – incorrect ground height- section of floor too high.

15.2.8 Northern and southern corner windows – inadequate detail in variance with manufacturer’s specifications.

[19] Damage included extensive timber decay, stachybotrys fungi, possible internal lining cracking and damaged skirting in two rooms.

[20] Recommended repairs were:

- strip the cladding,
- remove the joinery,
- inspect for decay and replace decayed wood where required,
- treat remaining timber framing,
- reinstate cladding with a drained cavity system,
- repair base plate framing and hidden joinery,
- ensure adequate continuation of the upstand,
- replace required deck membrane,
- reinstall joinery with suitable flashings,
- form deck balustrade tops in accordance with the manufacturer’s instructions with required flashings,
- texture and paint the outside,
- reinstate and paint internal linings.

[21] An extended roof flashing was also recommended. Outside the garage door there was to be a channel with a drained outlet and refinishing of the concrete.

[22] The claimants repaired the dwelling incurring various costs. These and other items were claimed as damages as set out below.

[23] At mediation the council denied liability but agreed to settle the claim against them for \$405,000.00 inclusive of GST. The other parties did not settle with the claimants.

[24] As a result of an assignment of the claim the council seeks to recover all or part of the amount paid in settlement and the balance of the claim for the claimants.

[25] The first and second respondents, collectively referred to here as the builders, accepted responsibility for the building.

[26] The builders referred to matters for which they relied on Mr Knol. They were:

- a) Mr Knol, a specialist applicator, applied the finishing plaster but did not apply the required paint which was to act as a waterproof membrane.
- b) Polystyrene plant on bands were fixed square upon advice from Mr Knol. He was to finish into a slope when plastering.

DAMAGES

[27] Remediation costs of \$352,170.85 including GST were not contested.

[28] The claimant consulted:

- a) Helfen Ltd,
- b) Craig & Coltart,
- c) Roy Taylor Engineering Ltd,
- d) Beagle Consultancy Ltd,

at a total cost of \$128,536.25. This amount was not contested.

[29] Costs as a consequence of remediation included:-

- a) Cost of alternative accommodation,
- b) Decorating costs,
- c) Installation of a heat pump,
- d) Repairs,
- e) Cost of replacing model train layout timber supports.
- f) Cost of maintaining power to the site for the builder

[30] Mrs O'Connor said that they were required to move out and needed alternative accommodation. They rented a caravan and other accommodation. Some of the rental accommodation did not allow the dog to remain on site during the day so dog day care was arranged.

[31] The rental accommodation was also under repair with no laundry facilities. Washing was taken to a laundry service. The telephone number at the rental location was different to the home number. The two numbers were tied together but the costs doubled.

[32] The claimants have had to obtain further loans from the bank with increased bank costs and interest.

[33] The claimants have incurred extra medical costs as a result of living in a leaky home.

[34] Mrs O'Connor gave evidence of the impact on her health and the effect on her husband. There was a negative emotional impact once they learned of the leaks and both have been anxious concerning the leaks and the repairs. Their social life has been affected. Due to the financial pressures they could not attend their niece's wedding in Melbourne.

[35] Generally an award of \$25,000 per unit for occupiers is made based on the decisions of William Young P and Baragwanath J in the Court of Appeal in *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] NZLR 445 [Byron Ave], *Mok v Bolderson* HC Auckland CIV 2010 404 7292, 20 April 2011 and *Cao v Auckland City Council* HC Auckland CIV-2010-404-7093, 18 May 2011. Accordingly, the appropriate joint award to the claimants for general damages is \$25,000 for anxiety, disappointment, physical inconvenience and mental distress.

[36] Accordingly I award the following:

Remediation costs	\$ 352,170.85
Consultant costs	\$ 128,536.25

Rental		
accommodation	\$	8,250.00
Relocation	\$	2,610.36
Bank fees	\$	3,051.00
Decorating	\$	2,237.14
Repairs	\$	6,785.13
Heat Pump	\$	5,297.00
Dog day care	\$	4,387.50
Medical expenses	\$	340.47
Sub-Total	\$	513,665.70
General damages	\$	25,000.00
Total	\$	538,665.70

[37] A number of items were claimed as costs. Section 91 of the Weathertight Homes Resolution Services Act 2006 only allows the award of costs if there was bad faith on the part of a party or there were allegations without substantial merit. That section does not apply in this case. The application for costs is declined.

ORDER FOR PAYMENT

[38] The liable respondents, MacDee McLennan Construction Limited, Duncan McLennan and Gerry Knol are jointly and severally liable to the claimants for \$538,665.70. This amount is to be paid to the Porirua City Council pursuant to the assignment to it of the claim. Any amount received over \$405,000.00 will be paid to the claimant by the council.

APPORTIONMENT AMONG RESPONDENTS

[39] As there was no evidence from any of the liable respondents as to the extent of the respective work done by Mr Knol and the builders I am not able to apportion responsibility between them for the payment of the awarded amount. If any of the liable respondents wishes me to make an order they should give notice to the other respondents and the Tribunal by 21 December 2011 and file affidavit evidence in support by 31 January 2012. The other

respondents will have 15 working days to reply and then, if justified, an apportionment can be made.

[40] Apportionment issues do not affect the respondents' liability to pay the damages forthwith.

DATED the 9th day of December 2011.

Roger Pitchforth

Tribunal Member