IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000033
[2011] NZWHT AUCKLAND 59

BETWEEN	SANDRA CLARE MACKENZIE Claimant
AND	CHRISTCHURCH CITY COUNCIL First Respondent
AND	P P LIMITED Second Respondent
AND	GRANT MACKINNON Third Respondent
AND	PETER WYNYARD Fourth Respondent
AND	DARRYN SHEPHERD Fifth Respondent
AND	FIREPEL KIDD LIIMTED Sixth Respondent

Hearing On the papers as it is a lower value claim

Decision: 27 October 2011

AMENDED FINAL DETERMINATION
Adjudicator: P A McConnell

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[1] Sandra MacKenzie claims $12,713.42 for the remedial work to fix the leaks in her apartment, $25,000 general damages and interest, from the other parties to this claim. Christchurch City Council was the territorial authority that issued the building consent, carried out the inspections and issued a Code Compliance Certificate. The Council however says that most of the issues with Ms MacKenzie's apartment could not have reasonably been detected by their inspectors. Grant MacKinnon was the director of Wakefield Apartments Limited, the developer of the complex. Mr MacKinnon denies any personal liability as he says he had no personal involvement with any of the defects which caused leaks.

[2] PP Limited, formerly known as Shepherd Construction Limited, was the company contracted to build the apartments. Mr Shepherd is its director and he personally carried out some of the construction work. He however submits that the work undertaken by both him and his company has not failed and the workmanship is of a good standard. He says the deficiencies with this building were caused by other contractors. In particular Mr Shepherd says that Firepel Kidd Limited provided and installed the specialist fireproof sealant to the joints on the fire aprons which have leaked. Firepel however submits that it has no knowledge or record of carrying out any work on this complex.

[3] Peter Wynyard was a director of the design company. He denies that there is any causative link between his design work and the leaks in the dwelling.

[4] The issues I therefore need to decide are:

- What has caused the leaks?
- Did Christchurch City Council breach any duty of care it owed Ms MacKenzie in carrying out its inspections and issuing a CCC?

- Was the work done by PP Limited and Darryn Shepherd causative of leaks?
- Did Grant MacKinnon personally owe the claimants a duty of care as a developer or in any other capacity?
- Is there a causative link between Peter Wynyard's design work and the leaks?
- Did Firepel Kidd undertake any work on this complex?
- What are the appropriate remedial costs and level of general damages to award?

WHY DOES THE DWELLING LEAK?

[5] Ms MacKenzie's unit is on the upper floor of the three storey apartment complex known as Wakefield Apartments. In 2007 Ms MacKenzie noticed some damage to the edge of one of the fire aprons and in 2008, when painters were working on the building, one of the painters put his foot through the fire apron. The builder who inspected the damage confirmed that the fire apron had been constructed using untreated timber which had rotted.

[6] Ms MacKenzie then obtained a WHRS assessor's report. The assessor confirmed that there was damage to the three fire aprons on the south east elevation. The damage was a result of inadequate weatherproofing of the junctions and undue reliance on silicone sealant. He also considered that there was potential for future damage to the deck at the north eastern elevation as a result of movement in the plywood sheet substrate.

[7] Subsequent to obtaining the assessor's report Ms MacKenzie also experienced a leak through the roof. She engaged Yes We Can to identify the causes of that leak and to suggest the work that needed to be done to remedy it.

Fire aprons

[8] The assessor recorded there was obvious decay and also high moisture readings associated with the wooden framed and cement fibre sheet cladded fire aprons below the windows of the apartment. Moisture was getting in through the silicone sealed joint between the top and side sheets of the cement fibre sheet cladding and also at the wall junction joint between the plaster cladding and the cement fibre sheet cladding. There was no flashing between the underside of the window and the cement fibre sheet cladding and this provided a further point of water ingress. The assessor concluded that a total reliance on silicone sealant to prevent moisture ingress at these junctions was inadequate due to the standard thermal movement in the timber framing.

[9] No party disputes the assessor's findings as outlined above. In addition I note that the 1998 version of E2AS1 provided that the use of sealant was only appropriate where it was not directly exposed to sunlight or weather and was easy to access and replace (reference 3.2.1). The use of sealant as a method of waterproofing third floor fire aprons, exposed to sunlight and weather, was therefore not appropriate.

[10] Based on the evidence provided I conclude that the defects in relation to the installation of the fire aprons that caused leaks were:

- Inappropriate reliance on sealant for weatherproofing;
- Failure to flash between the underside of the window and the cement fibre cladding; and
- Plaster being installed hard down onto the membrane top of the fire apron.

Guttering and roofing

[11] An issue of future likely damage was identified in the Yes We Can report in relation to the roof. Water was not draining away down the pipes and where the water was pooling there appeared to be imperfections in the waterproofing membrane which allowed the water to run down the inside of the exterior tilt slab walls. In addition the TV aerial had been screwed directly through the roof cladding with very poor application of sealant.

[12] I do not know who installed the TV aerial or when it was installed. There is no evidence on which I could conclude that any of the parties to this claim are responsible for any damage that has been caused by the installation of the aerial.

[13] In addition Yes We Can has not identified the causes of the water pooling or the imperfections in the waterproofing membrane. Even if I were to assume it is a result of inadequacies in either the membrane or the application of the membrane, the membrane supplier and installer are not parties to this claim. There is no evidence on which I could conclude that any deficiencies would have been identifiable on a visual inspection at the time the dwelling was built. There is accordingly no evidence of any negligence on the part of any parties to this claim in relation to the roof. This part of the claim is therefore dismissed.

Dampness to internal tilt slab concrete wall

[14] When Ms MacKenzie had the internal wall painted after purchasing the unit the painter had a lot of difficulty trying to get paint to dry on the north and south points of the wall. Moisture reappeared on this wall in 2009. Ms MacKenzie got a Resene expert to moisture test the wall and then had it repainted with a paint to seal the wall. The cost of this work was $609.75.

[15] The Yes We Can report says the dampness is a result of the roof leaks. Therefore this claim also fails for the same reasons as outlined in paragraph [13].

Deck

[16] The assessor identified movement of the substrate to the deck as being an issue of future likely damage. In his opinion movement in the plywood substrate would eventually weaken the membrane which would inevitably result in water ingress and damage. However there is no evidence as to what caused the movement in the substrate nor has it been established that the movement was caused by the poor workmanship of those involved in construction. Yes We Can, who carried out the remedial work to the deck, have provided no evidence of defects that were uncovered when the membrane was removed. The only work it did in relation to the deck substrate was to rescrew with stainless screws. Therefore, while I accept there is an issue of likely future damage, there is no information to establish it is the responsibility of any of the parties to this claim.

HAS THE COUNCIL BREACHED THE DUTY OF CARE IT OWES MS MACKENZIE?

[17] Ms MacKenzie says the Council failed in the exercise of its statutory function in relation to the inspection of the building work and the issuing of the CCC. The Council accepts it owes Ms MacKenzie a duty of care but submits that, with the exception of not noticing that the plaster was installed hard down onto the membrane top of the fire apron, it acted prudently and reasonably in carrying out its inspection process and issuing a CCC for the Wakefield Apartments.

[18] The standards by which the conduct of a council should be measured are set out in *Askin v Knox*[1] where Cook P concluded that a council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act or omission was said to take place.

[19] The obligation on councils is to take all reasonable steps to ensure that the building work is being carried out in accordance with the consent and the Building Code. It is not an absolute obligation to ensure the work has been done to that standard as councils do not fulfil the function of a clerk of works.

[20] I agree with Mr Calvert, the Council's expert, when he says that some of the issues with the fire aprons could not reasonably have been detected by the Council inspectors. However he accepts that the Council officer should have noticed that the plaster was installed hard down onto the membrane top of the fire apron. I also accept this was contrary to good building practice and it has contributed to the water ingress. In addition the Council should not have been satisfied that the use of sealant was an appropriate method of weatherproofing the relevant junctions as its use in this situation was not in accordance with E2AS1. I therefore conclude that the Council is liable for the cost of repairs to the fire aprons.

WAS MR MACKINNON A DEVELOPER AND DOES HE OWE MS MACKENZIE A DUTY OF CARE?

[21] Ms Mackenzie and the Council say that Mr MacKinnon, together with Wakefield Apartments Limited, was a co-developer of the Wakefield Apartments. They say that, as such, he owes a non-delegable duty of care to the claimant in respect of the defects that were created. Mr MacKinnon denies that he was either a developer

[1] *Askin vKnox* [1989] 1 NZLR 248 (CA).

or a project manager and says he only ever acted on behalf of the company.

[22] There is no doubt that Wakefield was the developer. However, it is necessary to make a finding as to whether Mr MacKinnon was a co-developer and whether his actions as the 'human face' of Wakefield were the actions of a developer per se. This is important as a developer has a non delegable duty of care.[2] A director who is not a developer may still be liable but their negligence must arise from their actions and be established on the facts.

[23] In *Body Corporate No 188273 v Leuschke Group Architects Ltd* [3] Harrison J noted that, the term "developer" is not a term of art or a label of ready identification like a builder or an architect. He characterised the developer (of which he accepted there can be more than one) as the party who sits at the centre of, and directs the project, almost always for its own financial benefit, who decides on and engages the builder and others, and has the power to make all important decisions. He went on to say that policy demands that the developer owes actionable duties to owners of the buildings it develops.

[24] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not necessarily give rise to personal liability.[4] As noted by Priestly J in *Body Corporate 183523 v Tony Tay & Associates Ltd*,[5] the mechanism by which a limited liability company makes decisions, commitments, and enters into legal relationships, is through the physical actions of its directors.

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[2] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 2345 (CA) at 240-241.
[3] *Body Corporate No 188273 v Leuschke Group Architects Ltd)* (2007) 8 NZCPR 914 (HC).
[4] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).
[5] *Body Corporate 183523 v Tony Tay & Associates Ltd* HC Auckland, CIV 2004-404-4824, 30 March 2009 at [150].

[25] Limited liability does not provide company directors with a general immunity from personal liability and where a company director exercises personal control over a building operation he or she may owe a duty of care, associated with that control.[6] Priestly J noted in *Tony Tay* that the directors of one person or single venture companies are more likely to be exposed in leaky building claims[7].

[26] In *Hartley v Balemi*[8] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building. The Court of Appeal in *Body Corporate 202254 v Taylor*[9] considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson.*[10] It held that the assumption of responsibility test promoted in *Trevor Ivory* was not an element of every tort. Chambers J expressly preferred an "elements of tort" approach and noted that assumption of responsibility is not an element of the tort of negligence.

[27] If an element of torts approach is adopted in this case what needs to be considered is whether the elements of the tort of negligence are made out against Mr MacKinnon personally. The existence and extent of any duty of care owed by Mr MacKinnon in respect of the construction of the complex is therefore determined by a consideration of his role and responsibilities.[11] Whether he assumes the role of developer or project manager is a question of fact to be determined on the evidence of what he actually did.

[28] Mr MacKinnon clearly made important decisions in respect of the development, choosing the architect and the builder and contracting with them on behalf of Wakefield. However, it is his case

[6] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[7] Ibid at [156].
[8] HC Auckland, CIV-2006-404-2589, 29 March 2007.
[9] *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17 (CA).
[10] [1992] 2 NZLR 517 (CA).
[11] *Auckland City Council* v *Grgicevich* HC Auckland, CIV-2007-404-6712, 17 December 2010 at [72]-[75] ; *Chee v Stareast Investments Limited* HC Auckland, CIV-2009-404-5255, 1 April 2010.

that he did these things as an officer of Wakefield and not on his own behalf. The Council submits that there is some confusion as to the different entities associated with different parts of the development process primarily based on the fact that there were two producer statements addressed to Grant MacKinnon Developments Limited. No company of this name has ever existed. However Mr MacKinnon says there are only two such documents among thousands and that it was never issued to him or Wakefield but only to the Council. He says that the company issuing it has now acknowledged it made a mistake.

[29] The only allegation Ms MacKenzie makes against Mr MacKinnon is that he was negligent in engaging the builder and the designer. The problem with this allegation is that there is no evidence that Wakefield or Mr MacKinnon were negligent in their selection of the designer and builder. To the contrary the evidence is that Mr Shepherd and his company were respected builders in the Christchurch area. There is accordingly an insufficient causative link between the decisions Mr MacKinnon made in appointing the head contractors and the defects that have caused leaks.

[30] The Council submits that as Mr Mackinnon was on site regularly he must owe a duty of care. Other than Mr Shepherd's evidence that Mr MacKinnon was on site regularly there is no evidence that he took a hands on role in the construction of the complex. He had no responsibility for the organisation or supervision of the construction work. Mr Shepherd's company had this responsibility as it was engaged on a full build and supervise contract and it engaged the sub-trades. Mr MacKinnon did not personally carry out work on the house and he did not supervise or have day to day involvement with the construction. His role was an administrative one performed on behalf of Wakefield. No personal carelessness on his part caused harm to the Ms MacKenzie. There is no evidence anything Mr MacKinnon actually did was negligent or caused the leaks.

[31] Whether I adopt the assumption of responsibility test or the element of torts approach I conclude that it has not been established that Mr MacKinnon personally owes Ms MacKenzie a duty of care. The claim against Mr MacKinnon is accordingly dismissed.

WAS MR WYNYARD NEGLIGENT AND IF SO HAS HIS NEGLIGENCE CAUSED OR CONTRIBUTED TO THE LEAKS?

[32] Ms MacKenzie submits that Peter Wynyard was the designer of the complex and as such he owed her a duty of care to exercise all reasonable care and the discharge of his duties relating to the design of the dwelling. She further submits that Mr Wynyard was negligent in providing consented plans that failed to include proper weathertightness details for the apron flashing and a more substantial material for the water collection trough on the roof. Such negligence, she submits, contributed to the lack of weathertightness identified by the experts.

[33] The claim against Mr Wynyard is in relation to the design work up to the building consent stage only. While Mr Wynyard contracted through a company he does not deny he owed Ms MacKenzie a duty of care for the work he did. However he submits that he was not responsible for all of the design work and in particular the details for the fire aprons were done by another employee of the company. Mr Wynyard further says he specified Equus Chevaline Dexx membrane was to be used on the deck and the roof areas and this should also have been used on the fire aprons but it was not. If it had been used as directed he submits the fire aprons would not have failed.

[34] Mr Wynyard's evidence on these issues was not disputed and therefore I conclude that even if there is a causative link between the design of the aprons and the leaks, Mr Wynyard is not liable. Mr Wynyard also refutes Ms MacKenzie's submission that butynol is a

more robust product than the Chevaline Dexx stipulated for the roof areas. Ms MacKenzie has provided no expert evidence to support her submission. In any event there is insufficient evidence to establish that the material itself was inadequate and has contributed to leaks.

[35] I therefore conclude that although Mr Wynyard owed a duty of care to Ms MacKenzie she failed to establish that any negligence on his part contributed to the leaks. The claim against Mr Wynyard is accordingly dismissed.

DID P P LIMITED AND DARRYN SHEPHERD BREACH ANY DUTY OF CARE OWED TO THE CLAIMANT?

[36] P P Limited is the current name of Shepherd Construction Limited, the builder of the property. It became P P Limited on 15 November 2005. P P was contracted by Wakefield to construct the Wakefield Apartments. Darryn Shepherd is the only director of P P and he was actively involved in the construction work on this project. Ms MacKenzie alleges that poor workmanship in the construction of her apartment has been a primary cause of the leaks. In particular she submits that it was negligent of P P and Mr Shepherd to construct the fire aprons without flashings or any other adequate manner of weatherproofing.

[37] Mr Shepherd says that both he and P P have been trading as builders in Christchurch for many years and that the work was competent and of a good standard. He denies that there has been any failure in the work done by P P which has caused the leaks. He says this work is the responsibility of others such as the supplier of the cladding system and its installer, the plasterer, Firepel and the membrane applicator.

[38] In considering potential liability on the part of P P and Mr Shepherd it is necessary to consider the defects that have contributed to the leaks as set out in paragraph [10]. The assessor also states that the fire aprons have been installed with no step downs between the internal floor level and the top of the fire aprons. However there appears to be no evidence in the body of his report that this defect has actually caused water ingress and damage.

[39] The trades primarily responsible for the two established defects are the plasterer and the cladding and LAM installers. As specialised subcontractors neither Mr Shepherd nor his company would necessarily have had a direct supervisory role over their work. It was however the responsibility of P P to construct the substrate and to ensure there were no obvious departures from the plans and the Building Code and to ensure the transition between trades was appropriately sequenced and supervised.

[40] While P P did not carry out the plastering work, or apply the LAM, as the contractor with overall responsibility for the job, it should have detected that the plaster had been installed hard down onto the membrane top and arranged for this to be rectified. It did not do so. In addition it should have ensured flashings were installed at the relevant junctions. It accordingly shares responsibility for these defects together with the Council.

[41] Mr Shepherd is the sole director of P P and he does not dispute that he was the builder on site during the construction of the property. Mr Shepherd has provided no information to suggest that anyone other than he was in charge of the job. There is no mention of a site foreman or project manager other than Mr Shepherd. I therefore conclude that Mr Shepherd is jointly liable with his company as the person responsible for supervision of the work on site.

FIREPEL KIDD LIMITED

[42] Firepel was joined to this claim on the application of Mr Shepherd. Mr Shepherd said that Firepel provided and installed the specialist fireproof sealant to all joints on the apron flashings. He also says they painted the aprons with the fireproof paint. Firepel however says that the company has no record of having done work on the complex in which Ms MacKenzie's unit is situated.

[43] Mr Shepherd produced a spreadsheet which shows an amount of $1,219.72 listed alongside Firepel Kidd dated 19 September 1999. There are no invoices or receipts supporting that spreadsheet nor is there any information on the spreadsheet as to what work or what job the payment related to. There is accordingly no reliable evidence connecting Firepel with relevant work on this complex. I am mindful that the work was carried out 12 years ago and memories fade and are reconstructed over time. While I am not disputing Mr Shepherd genuinely believes Firepel Kidd did this work such a belief is insufficient evidence given the passage of time and the lack of documentary evidence. The claim against Firepel Kidd is accordingly dismissed.

DAMAGES

[44] Ms MacKenzie is seeking $11,663.42 for the cost of repairs together with interest, $150.00 being insurance premium and general damages. The repair costs are calculated as follows:

S B Builders Limited for fire apron work	$8,030.23
Roof and parapets	$1,785.94
Repairs to deck	$1,237.50
Sealing and painting concrete wall	$609.75
TOTAL	**$11,663.42**

[45] No award can be made for repairs to the roof, including the insurance excess, deck repairs or painting as it has not been established that any negligence or deficiencies in the work done by the parties involved in this claim were responsible for any deficiencies that have necessitated the repairs. Some of this work is also ongoing maintenance. The full amount of $8,030.23 for repairing the fire aprons has been established and the Council, P P Limited and Mr Shepherd are liable for this amount.

Interest

[46] Ms MacKenzie also seeks interest on costs incurred in the remedial work. Paragraph 16 of the Third Schedule of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal may order interest at a rate not exceeding the 90-day bill rate plus 2%. The current 90-day bill rate plus 2% is 4.75 % and interest is calculated on the $8,030.23 from 1 May 2009 until the date of this determination totalling $949.91.

General damages

[47] Ms MacKenzie is also seeking general damages of $25,000. While it has been established that the availability of general damages in leaky building cases is generally in the vicinity of $25,000 per dwelling for owner occupiers this is in the context of a leaky homes that have required far more substantial remedial work. White J in *Coughlan v Abernethy*[12] confirmed that standard rates are for general guidance and for the purpose of reducing costs and facilitating consistency. Flexibility is required in the appropriate cases to reflect the particular circumstances and grounds upon which general damages are sought.

[48] Ms MacKenzie has suffered stress and inconvenience due to the leaky issues with her home. However the damage was localised, and while significant to her, at the lower end when compared with other claims. She has a home that had some isolated leaks rather than a leaky home. Awarding general damages almost three times the amount of the established remedial costs would make them punitive rather than compensatory from the respondents' perspective. In these circumstances I conclude that it is appropriate to award $3,500 in general damages.

Summary in relation to quantum

[49] Ms MacKenzie has established the claim to the amount of $12,408.14 which is calculated as follows:

Remedial work	$8,030.23
General damages	$3,500.00
Interest	$949.91
TOTAL	**$12,408.14**

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[50] I have concluded that P P Limited, Darryn Shepherd and the Christchurch City Council are liable for the full amount of the established claim of $12,408.14. Section 72(2) of the Act provides the Tribunal after determining liability to the claimant, should determine what contribution each of the liable parties should pay. There is some difficulty in assessing contributions in this claim as the parties who have actually carried out the majority of the defective work are not parties to this claim. P P Limited was contracted as the head builder and had overall responsibility for the way the complex was constructed. However it and Mr Shepherd's culpability is very

[12] *Coughlan v Abernethy* HC Auckland, CIV-2009-004-2374, 20 October 2010.

similar to that of the Council in that they failed to detect the defective work. In these circumstances I consider they should each pay an equal contribution.

CONCLUSION AND ORDERS

[51] The claim by Sandra MacKenzie is proven to the extent of $12,408.15. Christchurch City Council, Darryn Shepherd and P P Limited are jointly and severally liable for the full amount. For the reasons set out in this determination I make the following orders:

- Christchurch City Council to pay Sandra Clare MacKenzie the sum of $12,408.14 forthwith. Christchurch City Council is entitled to a contribution of up to $6,204.07 from P P Limited and Darryn Shepherd for any amount paid in excess $6,204.07.
- P P Limited and Darryn Shepherd to pay Sandra Clare MacKenzie the sum of $12,408.14 forthwith. P P Limited and Darryn Shepherd are entitled to a contribution of up to $6,204.07 from the Christchurch City Council for any amount paid in excess of $6,204.07.
- The claims against Grant MacKinnon, Peter Wynyard, and Firepel Kidd Limited are dismissed.

[52] To summarise the decision if the three liable parties meet their obligations under this determination it will result in the following payments being made by the liable respondents to this claim:

First respondent, Christchurch City Council	$6,204.07
Second respondent, P P Limited and fifth respondent Darryn Shepherd	$6,204.07

[53] If any of the parties listed above fails to pay their apportionment this determination may be enforced against any of

them up to the total amount they are ordered to pay in paragraph [51] above.

DATED this 27th day of October 2011

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P A McConnell

Tribunal Chair