

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2012-100-000058
[2013] NZWHT AUCKLAND 12**

BETWEEN	ENGELA SOUTH TRUSTEE LIMITED Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	R J NEALE LIMITED Second Respondent
AND	ROBERT JAMES NEALE Third Respondent
AND	JACQUELINE MARGARET NEALE Fourth Respondent

Hearing: 17 April 2013

Appearances: K Kevany for the Claimant
A Hough for the First Respondent
No appearance by Second, Third and Fourth Respondents

Decision: 22 April 2013

FINAL DETERMINATION
Adjudicator: P A McConnell

CONTENTS

Background	3
What was the Neales' role in the construction of the dwelling?	4
Were the Neales developers?	5
Have the Neales breached the duty of care they owe the claimant?	7
What is the appropriate quantum?	7
What contribution should each of the liable parties pay?.....	8
Conclusion and Orders	9

[1] Engela South Trustee Limited is the owner of a property at 47 Panapa Drive, St Johns which is the family home of Kevin and Deborah Kevany. Unfortunately after installing moisture probes in the property in 2006 they discovered that the house leaked.

[2] Further investigations established that there were a number of construction defects which caused the leaks resulting in the need for a full reclad of the home. Engela has completed the remedial work and claims the costs of this work together with consequential costs and interest from the four respondents. Auckland Council was the territorial authority that issued the building consent, carried out inspections and issued a CCC. Mr Kevany says that Mr and Mrs Neale and their company, R J Neale Limited were the developers of the property and that Mr and Mrs Neale project managed the construction and carried out some of the construction work.

[3] Prior to the hearing Mr Kevany reached a settlement with the Council. As a consequence the Council admits liability and consents to judgment being entered against it for the sum of \$350,000. The Council has asked the Tribunal to make orders against the other respondents and is also seeking a contribution of up to 90 per cent from Mr and Mrs Neale and R J Neale Ltd.

[4] The issues I therefore need to decide are whether R J Neale Ltd and Mr and Mrs Neale have breached any duty of care they owe the claimant. If so what is the extent of their liability and what contribution should they pay the Council.

Background

[5] Mr and Mrs Neale and their company were named as respondents when the claim was filed with the Tribunal in July 2012. They were all served with copies of the proceedings but have chosen to take no part other than writing a letter of complaint after being served with a witness summons. They did not comply with the witness summons, nor did they attend any of the conferences, or file a response. They did not attend the hearing.

[6] In Procedural Order 1, I drew Mr and Mrs Neale's attention to ss 74 and 75 of the Weathertight Homes Resolution Services Act 2006. The Tribunal also wrote to Mr and Mrs Neale prior to the hearing again drawing their attention to ss 74 and 75 of the Act. Section 74 provides that a party's failure to act does not affect the Tribunal's powers to determine the claim. Section 75 goes on to say that the Tribunal may draw inferences from a party's failure to act and determine the claim based on the available information.

[7] Mr Hough for the Council submits that the provisions of s 125(3) of the Act require the Tribunal to comply with the District Court Rules in relation to default judgments. However s 125(1) of the Act makes it clear that this section only applies to the practice and procedure of the District Courts in relation to proceedings under the Act and not to the Tribunal. Section 73(1) of the Act provides that the Tribunal is able to set its own process and s 106(1) states that it is for the chair to decide how adjudication services are provided under the Act. In addition the Act contains the specific provisions outlined above as to the powers of the Tribunal to determine cases when parties do not appear or comply with directions made.

[8] I am accordingly entitled to determine this claim based on the information before me and am also entitled to draw any inference I think fit from the fact the Neales have not refuted the factual or legal allegations against them, or appeared to give evidence. The inference I will draw is that the information before the Tribunal accurately portrays the role they had in the development and construction of 47 Panapa Drive.

What was the Neales' role in the construction of the dwelling?

[9] The section at 47 Panapa Drive was originally owned by Mr and Mrs Neale. It was transferred to R J Neale Ltd on 4 December 1996. Mr and Mrs Neale are the only directors and shareholders of R J Neale Ltd. The building consent for the property was issued on 11 January 1996 but it appears from the list of inspections that the construction work did not commence until early 1997. The CCC was issued on 22 December 1997. It was sold to Mr and Mrs Town approximately one year later.

[10] Mr Kevany has provided further information on the Neales' involvement in the construction of his home. This information comes from his neighbours, who lived next door when the house was being built, the previous owners and a plumber colleague of Mr Neale. The neighbours, Mr and Mrs Lovrich, and the former owner, Mr Town, have written letters to the Tribunal.

[11] Based on this information Mr Kevany understands that the Neales developed eight houses in the area in which his house is located and that both Mr and Mrs Neale were actively involved in the construction process. Mr Lovrich advises that Mr Neale was heavily involved in all aspects of the building process and that Mrs Neale was a regular visitor on site giving instructions and directions on certain aspects of the build.

[12] Mr Town stated that the house was approximately one year old when he purchased it and at that stage it had tenants living in it.

Were the Neales developers?

[13] The Council and Mr Kevany allege that Mr and Mrs Neale, together with R J Neale Limited, were co-developers and that Mr and Mrs Neale were the builders, project managers and head contractors.

[14] The Building Act 2004, although not definitive, gives some useful guidance as to the definition of a “residential property developer”. For the purposes of that Act, a residential property developer is defined at s 7 as:

A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:

- (a) builds the household unit; or
- (b) arranges for the household unit to be built; or
- (c) acquires the household unit from a person who built it or arranged for it to be built.

[15] A helpful definition of a developer can also be found in *Body Corporate 188273 v Leuschke Group Architects Ltd*:¹

[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 its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is 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.

[16] Harrison J also observed that the word developer is not a “term of art or a label for ready identification”, unlike a local authority builder, architect or engineer. He regarded the term as:²

A loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design,

¹ *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC).

² Above n1 at [31].

construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

[17] It is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of care on the developer. Whether someone is called a site manager, project manager or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[18] Based on the documentary record and the information provided by Mr Kevany, I conclude that R J Neale Ltd and Mr and Mrs Neale were joint developers of the property at 47 Panapa Drive. As developers they owe the claimants a non-delegable duty of care. R J Neale Ltd was the owner of the land and I am satisfied that Mr and Mrs Neale built the home, or arranged to have the home built for the purposes of selling it. I am also satisfied that they were in trade as this was one of eight properties they developed in a similar way. Mr and Mrs Neale were the ones sitting at the centre and directing the project. They are the people who decided on and engaged any subcontractors and other professional advisors. They were the ones responsible for the implementation and completion of the development process.

[19] In reaching this decision I have considered the only information provided by Mr and Mrs Neale which is that it was their family home. I note that there are a number of court decisions which have concluded that an owner who hires various contractors to build a family home does not become the head contractor, supervisor, developer or project manager.³

[20] I however give no weight to the information contained in the letter the Neales wrote as they have failed to appear at the hearing and did not comply with various directions to attend or file responses. In any event the information before the Tribunal clearly points to this property being built for the purposes of sale for profit rather than being the Neales' family home. While they may have lived in the property for a few months it was only one year old when it was sold to Mr and Mrs Town and their advice is that the property was tenanted at the time they purchased it.

³ *Riddell v Porteous* [1999] 1 NZLR 1 (CA); and *Findlay v Auckland City Council* HC Auckland CIV 2009-404-6497, 16 September 2010; and *Keven Investments Ltd v Montgomery* [2012] NZHC 1596, [2012] NZCCLR 20.

[21] Even if the sole developer was R J Neale Limited, which was the owner of the property at the time the construction work took place, Mr and Mrs Neale were the project managers and Mr Neale was the builder. In that capacity they would also owe the claimants a duty of care although the scope of the duty may be more limited.

Have the Neales breached the duty of care they owe the claimant?

[22] As developers Mr and Mrs Neale and R J Neale Limited owe a non-delegable duty of care. As builders and project managers Mr and Mrs Neale owe a duty of care in relation to the work they did or supervised and controlled.

[23] The defects which caused the leaks to the dwelling include:

- Defective junctions of the storey joint feature band with the wall plaster.
- Window frames buried in the plaster with no flashing or seal at the jambs or sill.
- Lack of adequate ground clearances.
- Failure to install vertical control joints in the cladding.

[24] I am satisfied that these all result from the failure of the work undertaken by Mr and Mrs Neale or failure by them as project managers to ensure the dwelling was built in accordance with the consented plans and good building practice. They should have ensured that the inter-storey feature band was installed correctly, that the joinery was adequately sealed and flashed and that there were adequate breaks between the bottom of the cladding and the ground. In addition they should have ensured there were vertical control joints installed in the cladding. Even if they did not do the work themselves these are all identifiable defects which a competent project manager should have noticed and rectified. These defects have led to damage the extent of which required the property to be completely clad.

What is the appropriate quantum?

[25] Mr Kevany originally sought a total of \$411,476.65 together with accruing interest. This included \$307,357 for the remedial work, \$47,263

for consequential costs and \$56,855 for interest proved to the date of filing. As noted earlier Mr Kevany reached a settlement with the Council setting quantum of \$350,000. I accept that \$350,000 is the reasonable costs incurred by the Engela South Trustee Limited for the remediation of the property and consequential costs.

[26] I therefore conclude that R J Neale Limited, Robert James Neale and Jacqueline Margaret Neale are all jointly and severally liable together with the Council for the amount of \$350,000.

What contribution should each of the liable parties pay?

[27] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[28] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[29] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

Where damage is suffered by any person as a result of a tort... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is... liable in respect of the same damage, whether as a joint tortfeasor or otherwise...

[30] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[31] The Council has accepted liability and I have found the other three respondents are jointly and severally liable for the full amount of the

established claim. The Council submits that its contribution should be set at 10 per cent and that it should be entitled to recover a contribution of up to 90 per cent from the other respondents. Mr Hough submits that as co-developers, project managers and builders Mr and Mrs Neale and their company are the parties primarily responsible for the defects that have caused loss. I accept this submission. It is Mr and Mrs Neale who undertook or controlled the work. In addition not all of the defects would have been readily identifiable by the Council in the inspections it carried out.

[32] I accordingly conclude that the contribution of the Council should be set at 10 per cent and that of the other parties at 90 per cent. I am unable to make a determination as to the respective contributions of the three parties that have not attended the hearing. I accordingly direct that the Council is entitled to seek a contribution of up to 90 per cent from any one of them individually or a combined contribution of 90 percent from all three of the other liable respondents.

Conclusion and Orders

[33] The claim by Engela South Trustee Limited is proven to the extent of \$350,000. For the reasons set out above I make the following orders:

- i. By consent the Auckland Council is to pay Engela South Trustees Limited the sum of \$350,000. The Auckland Council is entitled to recover a contribution from R J Neale Limited, Robert James Neale and Jacqueline Margaret Neale of up to \$315,000 for any amount paid in excess of \$35,000.
- ii. R J Neale Limited, Robert James Neale and Jacqueline Margaret Neale are ordered to pay Engela South Trustees Limited the sum of \$350,000 forthwith.

[34] To summarise the decision, if the four liable respondents meet their obligations under this determination this will result in the following payments being made by the respondents to the claimant:

First Respondent – Auckland Council	\$35,000.00
Second to Fourth Respondents – R J Neale Limited, Robert James Neale and Jacqueline Margaret Neale.	\$315,000.00
	<hr/>
TOTAL	\$350,000.00

DATED this 22nd day of April 2013

P A McConnell
Tribunal Chair