

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2012-100-000094
[2013] NZWHT AUCKLAND 3**

BETWEEN CAMPBELL GERALD ODLIN,
 ELIZABETH MIRIAM ABBOTT, AND
 MICHAEL RALPH ABBOTT AS
 TRUSTEES OF THE ODLIN FAMILY
 TRUST
 Claimants

AND HURUNUI DISTRICT COUNCIL
 First Respondent

**FINAL DETERMINATION
Adjudicator: S Pezaro
6 March 2013**

THE CLAIM

[1] This claim concerns a house in Hanmer Springs built by the Odlin Family Trust for Mr Odlin and Ms Abbott whom I refer to as the claimants. The Hurunui District Council issued the building consent and carried out the inspections required to certify compliance. At the final inspection in 2004 the Council inspector noted two weathertightness defects, a leak in the glazing over the kitchen and defective capping on the balcony. There were also other defects noted and this inspection failed.

[2] Over the next five years the claimants engaged various trades in attempts to address the defects. In 2009, after significant new leaks appeared, the claimants applied for a WHRS report. They engaged an architect to prepare plans for remedial work based on this report and applied for building consent. The house has now been repaired and the builder and window manufacturer carried out remedial work in settlement of all claims against them. The Code Compliance Certificate was issued in 2010.

[3] The only respondent to this claim is the Council. The claim arises from the inspections and there is no claim in relation to the building consent.

[4] The amount claimed is \$15,843.85 for the fees for the WHRS report, the Code Compliance Certificate, and payments to the architect, building surveyor, and project manager. Due to the low value of this claim, the parties agreed that it should be determined on the basis of written submissions.

[5] The following chronology is relevant:

24 July 2003	Building consent issued under 1991 Building Act.
29 July 2004	Notice of incomplete building consent issued advising claimants that building consents approved prior to 1 April 2004 must achieve full code of compliance prior

	to 31 March 2005.
25 August 2004	Final inspection failed.
2004-2009	Claimants engaged tradespeople to address existing leaks in the glass roof of the conservatory and a chimney vent from a roof penetration.
January 2009	Claimants noticed significant new leaks in building interior.
12 February 2009	Application for WHRS report.
24 April 2009	WHRs report issued.
2010	Code Compliance Certificate issued for remedial work (date not provided).
9 October 2012	Application for adjudication filed.

[6] The claim filed on 10 October 2012 did not clearly set out the grounds for the claim against the Council or the particulars of the claim. The most specific description of the claim is at paragraphs [4] and [5] where the claimants state:

4. Although the inspector had reported the existing leaks and identified a critical fault, she then failed to investigate further where she would have found generalized evidence of deficient construction. See (pp.10-25 WSG report).
5. That the final inspection report was released unaltered would indicate that these deficiencies, i.e. of the need for further investigation and checking with the council approved plans, were not detected at Council level. *Thus there was a **systemic** failure of the inspection process requiring the builder to comply with the HDC approved plans, follow the building code, and the cladding manufacturer's specifications. This failure resulted in the likelihood of major leaks being undetected.*

[7] After the preliminary conference I directed the claimants to provide further particulars of their claim, setting out the alleged breaches by the Council and the loss resulting from those breaches. On 30 November 2012 the claimants filed another statement expanding on the defects that they

say the Council inspector should have detected. In this statement they claim that when the inspector noted the problem in the timber capping, she did not check the approved plans which specified Colorsteel capping.

[8] In addition to these two statements, the claimants filed letters from people involved in the remediation describing their work and explaining their fees. Noel Casey, a quantity surveyor, met with the architect and builder to discuss the WHRS report and repair options. Mr Casey did not visit the site or see the plans submitted for building consent. Paul Foley, the architect, prepared the building consent documentation for the remedial work. John Phillips project managed the remedial work.

The Council's response

[9] The Council accepts that it owed a duty of care to the claimants but submits that the claimants accepted an offer to settle the claim for \$9,000 and therefore the claim should be terminated under section 90(6) of the Weathertight Homes Resolution Services Act 2006 (the Act). In the alternative the Council submits that it discharged its duty of care. If found liable, the Council says that the quantum is overstated.

ISSUES

[10] The issues I need to decide are:

- a) Is there a binding settlement between the parties such that the claim should be terminated?
- b) If not, is the Council liable to the claimants?
- c) If the Council is liable to the claimants, what is the extent of the Council's liability?

IS THERE A BINDING SETTLEMENT?

[11] Prior to filing for adjudication, the claimants filed their claim in the Disputes Tribunal. The Disputes Tribunal declined jurisdiction. On 14 June 2012 Kerry Walsh of Hurunui District Council wrote to the claimants offering to settle the claim for \$9,000. The claimants replied on 24 June restating their dispute. They concluded by saying:

... in the interest of limiting further costs in this matter that we, as rate payers, are partially funding, we are prepared to accept your offer of \$9,000.00 as a part contribution to our costs. We will sign a settlement agreement to that effect.

[12] However when the claimants received the written agreement from the Council, they did not agree with the terms and refused to sign it.

[13] For the Council, Mr Hough submits that the claimants' letter, quoted above, constitutes an enforceable agreement between the parties to settle this claim. The Council seeks an order terminating the proceedings pursuant to section 90(6) of the Act.

[14] Section 90(6) provides that:

- (6) If a claim is settled by agreement between the parties before the tribunal's determination is given, the tribunal—
 - (a) must terminate the adjudication proceedings; and
 - (b) if requested by the parties, may record the settlement in the form of a determination on agreed terms.

[15] I do not accept that a claim can be settled by agreement when one party has objected to the terms of that agreement and refused to sign the deed of settlement. The claimants' acceptance of the amount offered by the Council, without an opportunity to consider the terms of the Council's offer, cannot be binding on them. The fact that the Council stated in its offer to the claimants that it required a written agreement to be signed demonstrates that more was required of the claimants to complete negotiations and finalise a settlement than their letter of 24 June 2012.

[16] I therefore conclude that this claim has not been settled by agreement. The submission by the Council that the proceedings should be terminated therefore fails.

IS THE COUNCIL LIABLE TO THE CLAIMANTS?

[17] The Council will be liable to the claimants if it breached its duty to take reasonable care in carrying out the inspections and caused or contributed to loss suffered by the claimants as a result of weathertightness defects. This Tribunal has jurisdiction only to determine claims for damage caused by water penetration. For this reason I have not addressed allegations that the inspector failed to detect other general construction defects.

[18] In carrying out its inspections, the Council ought not to be regarded as a clerk of works or project manager. The Council's duty is to exercise reasonable care when carrying out its inspections, not to ensure that all completed work complies with the Code. The performance of the Council is judged against the standards of the day.¹ The onus is on the claimants to prove that the Council was negligent causing them loss.

[19] The claimants allege that the Council inspector failed to identify the following defects:²

- a) A lack of flashings.
- b) Cladding not fixed correctly.
- c) No horizontal gap in cladding for expansion/contraction.
- d) Butt jointing of vertical joints instead of lapped joints.
- e) Base of cladding not sealed.
- f) Wooden posts and cladding embedded in concrete flooring.

[20] The following extract is described by the claimants as the essential facts of their case:³

1. The inspector identified a critical instance of building shortcoming in the balcony capping thus demonstrating evidence of defective construction at the time of inspection.
2. The inspector did not require compliance with the council approved plans.

¹ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

² At 11(d) of statement filed 30 November 2012.

³ Claimants' Reply to Respondent, filed 20 February 2013.

3. Whilst final Code of Compliance was not sought by the claimants, the one requirement for watertight insurance (a corner plate for the balcony cap) was implemented.
4. This measure proved to be patently inadequate and the building was subject to serious leaks due to failure of the balcony cap and other unrecognized systemic construction faults.
5. The WSG assessor deemed that the HDC was partly responsible for the leaking home because the HDC conducted the inspections and identified the HDC as a party to the claim.

[21] In his report the WHRS assessor identified the following defects as the cause of water penetration:

- a) Cladding – not installed to manufacturer’s specifications; water penetrating under the cover battens around windows, flashings and horizontal cover battens; cover battens lifting due to length and number of fixings and reliance on adhesive sealant.
- b) Balcony cap flashing not installed in accordance with specifications or plans.
- c) Apron flashing at conservatory roof light – flashing is surface mounted and is not detailed or fitted correctly.
- d) Chimney and PVC air vent – leaked and an attempt at repairs carried out. Flashing at roof is compromised where sealant was applied; possible spiral jointed flue installed wrong way up allowing water to enter.
- e) Windows and doors – water entry at window head and potentially at all cover battens around the windows as battens are pulling away from the cladding and window frames.

[22] The cladding defect identified by the assessor incorporates the four cladding defects referred to by the claimants and listed above at [19](b)-(e). The apron flashing defect on the conservatory roof relates to roofing and skylight windows which were installed after 2004 to replace the leaking glass conservatory roof.⁴ The joinery installation defects correspond to the claimants’ reference to a lack of flashings. Although the assessor noted on a photograph that the posts and cladding were

⁴ Statement of 30 November 2012 at [5](a).

embedded in the concrete he did not identify this defect as a cause of current or future likely damage. Therefore this defect is not relevant to Council liability.

Did the Council breach its duty of care?

[23] The claimants say that the Council is liable because the WHRS assessor's report identifies it as a party. However, as the assessor states in his report, his list of parties is not definitive or a judgment as to liability.⁵ I am not bound by the WHRS report but I have considered it as evidence of the weathertightness defects.

[24] The Council inspector identified the incorrect balcony capping flashing and the leaking conservatory/glazing and noted the following defect in the cladding: 'require manufacturer's installation instructions to verify clearances – 20mm measure to schist wall unventilated; gib board touches outer flue instead of 12mm gap'.

[25] The issue I need to determine is whether the Council inspector was negligent in failing to identify the other cladding and flashing defects that the WHRS assessor observed and, if so, whether the Council's failure to identify these defects has caused any loss to the claimants.

[26] The only record of the Council inspections is in the WHRS assessor's report. The first final inspection on 28 May 2004 failed⁶ and a repeat final inspection on 25 August 2004 also failed. The second inspection noted similar defects to the first with the addition of the capping defect. The claimants say that the Council failed to specify a satisfactory solution for the balcony capping. However, it was for the claimants, and/or their builder, to ensure that the issues raised by the Council inspector were addressed and, when they were, to arrange a further inspection by the Council. Neither the inspector nor the Council had any ongoing obligation to provide the claimants with advice or specifications for carrying out the work required to achieve Code compliance and the Council was not under any duty to ensure that the work progressed.

⁵ Assessor's Report dated 24 April 2009 at [16].

⁶ Above n5 at 56.

[27] The second final inspection did not occur until the Council issued the claimants with a notice of incomplete building consent on 29 July 2004. This notice advised the claimants that all consents issued prior to 1 April 2004 must achieve full compliance by 31 March 2005 and that the consequence of failing to do so could be either 'serious rectification' to bring the building works up to current building code requirements or an inability to obtain a final code compliance certificate.⁷

[28] As the claimants did not call for a further inspection before 31 March 2005, they were required to comply with the current building code requirements, not those in force at the time that their building consent was granted. The fact that the Council advised them that this was likely to involve 'serious rectification' implies significant additional costs.

Discussion and Conclusion

[29] Although it is possible that the defects in the cladding and flashing noted by the WHRS assessor were observable at the time the Council officer inspected, I am not satisfied that any failure to identify these defects has caused loss to the claimants.

[30] A further consideration is that the claimants continued to carry out work on the dwelling in the five years between the failed final inspection and the WHRS assessor's investigation. As a result, it is not possible to determine conclusively the extent to which the defects observed by the WHRS assessor were present and observable when the Council inspected in 2004.

[31] Even if the building regulations had not changed and the defects had been detected at the time of inspection, the claimants would have incurred costs in rectifying the defects. Those costs have not been quantified and there is no basis on which I can conclude that any quantifiable loss has resulted from the manner in which the Council conducted its inspections.

⁷ Above n5 at 57.

[32] For these reasons I conclude that the claimants have failed to prove that the Council was negligent and dismiss the claim.

DATED this 6th day of March 2013

S. Pezaro
Tribunal Member