IN THE DISTRICT COURT
HELD AT CHRISTCHURCH

NP 2902/98

BETWEEN	**Hemi TE RAKAU and Pauline TE RAKAU**	
		Plaintiffs
AND	**Geoffrey Paul WAGHORN**	
		First Defendant
AND	**Andrew AITCHESON**	
		Second Defendant

Hearing: 3 & 4 July 2000
Judgment: 3 August 2000
Appearances: Mr H D P van Schreven for Plaintiffs
No appearance for First Defendant
Mr C Hyde for Second Defendant

RESERVED JUDGMENT OF JUDGE C J DOHERTY

Introduction

The plaintiffs claim against the first defendant as the builder, and the second defendant as the plasterer, of a house erected for them at Hokitika in 1996-97. The house was erected pursuant to a contract between the plaintiffs and the first defendant and the total contract price of $354,865.20 was paid. The second defendant was a sub-contractor of the first defendant. The house was

not totally finished and remedial work is required. The first defendant has effectively walked off the job.

The plaintiffs claim that the majority of the remedial work required is because of the failure of the plaster cladding system on the building's exterior. There are other deficiencies allegedly caused by the builder.

The Pleadings

The plaintiffs claim against the first defendant in three causes of action; breach of contract, tort (breach of duty of care) and Consumer Guarantees Act 1993.

As to the first cause of action it was pleaded that the first defendant was in breach of the actual or implied terms of the building contract between him and the plaintiffs that:

a. All building work (including plastering) would be of the highest standard.

b. All building work (including plastering) would be done in accordance with New Zealand Specified Standard NZ 3604:1990 and as amended from time to time.

c. All building work (including plastering) would be completed to a standard which would enable the issue by the Westland District Council of a full code compliance certificate.

The plaintiffs alleged that those terms were breached in the following respects.

1. Metal flashings were not exposed and needed to be refitted to allow separation from the plaster work and an appropriate drip edge.

2. Flashings needed to be fitted to the sides of aluminium doors and windows.
3. Soffit linings and dwangs needed to be removed and refitted with Hardiplank and sealed into the plaster or batten end.
4. Underfloor ventilation in kitchen area needed to be upgraded to enable issue of a compliance certificate.
5. Leaks in verandah and damage caused by leaks required to be repaired.
6. New flashings needed to be fitted for those in contact with solid plaster.
7. All house roofs needed to be repainted due to damage caused by transportation and bad trade practices.
8. The lounge ceiling needed to be repaired and repainted.
9. The leaks and clear light roofing sheets needed to be repaired and ends turned as per good trade practice.
10. The household rainwater supply including piping needed to be cleaned out.

A statement of defence was filed by the first defendant but he did not appear to conduct that defence at the hearing. The matter proceeded by way of formal proof against him. For that reason I do not intend to deal with the second and third causes of action.

As to the second defendant, in the course of the hearing the plaintiffs abandoned certain of the causes of action pleaded against him but continued with a tortious claim in negligence alleging a duty of care and breach of that duty.

The plaintiffs claimed that the second defendant owed a duty of care to take reasonable care in executing the plaster work. On the pleadings the second defendant admitted he owed a duty of care. The plaintiffs claimed the second defendant was negligent and in breach of that duty in the following respects:

a. By failing to ensure that the plastering of the house was to the highest standard as required by the plastering subcontract.

b. By failing to ensure that the plastering on the house was done in accordance with NZ3604:1990. Leave was sought at the hearing to amend the pleadings and the reference to that standard to refer to NZS4251:1974. There is no prejudice to the second defendant in this and leave is granted and the amendment allowed.

c. By failing to ensure that the plastering was of a sufficient standard to enable the issue by the Westland District Council of a full code compliance certificate.

The plaintiffs alleged the negligence of the second defendant resulted in the manifestation of several of the defects alleged to be evidence of breach of contract with the first defendant namely:

1. There was major plaster cracking of the plaster, requiring its removal and the replacement of a total plaster cladding system in relation to areas exposed to the weather.

2. All plaster under verandahs was defective and needed to be replaced.

3. Replastering so as to allow for the finish to replace metal flashings with appropriate drip edge.

4. Plaster around butynol decking needed to be removed and refitted with separation and a drip edge finish.

5. A proportion of the damage to the roof caused by the second defendant and its workmen.

The damages claimed against the first defendant amount to $45,585.41 being:

a. Cost of removing, ($2,407.50) replacing and repairing ($26,777.91) defective plastering.

b. The cost of scaffolding to effect all remedial work ($1,800.00).

c. The cost of supplying and fixing new metal flashings ($2,300.00).

d. The cost of removing existing soffits and ribbon boards and replacing with new ($2,300.00).

e. The estimated cost of repairing defect items namely, roof repaint, lounge ceiling repair and repaint, links and roofing sheets repaired, and household rainwater supply to be cleaned ($10,000.00).

There was also a claim for $30,000.00 general damages for anxiety, worry, stress and inconvenience.

As against the second defendant's plaintiffs claim:

a. The cost of removing ($2,407.50) and replacing ($26,777.91) the defective plastering.

b. The cost of scaffolding to effect all remedial work ($1,800.00).

c. A proportion of the $10,000.00 claimed for a series of defects but confined to the estimated cost of the house roof repaint. At the hearing

this was quantified as being a proportion (being the degree of damage attributable to the second defendant) of $2,500.00.

d. $30,000.00 general damages for anxiety worry stress and inconvenience.

It is clear from the above that the majority of the damages sought relate to the plastering job completed by the second defendant. It is appropriate therefore to deal with the case against the second defendant before turning to the first defendant and then dealing with the issue of damages.

The Evidence

Both plaintiffs gave evidence. Mr Te Rakau concentrated on the relationship they had with the defendants, the difficulties that arose during the contract with the first defendant, the defects as he saw them, the fact that the Westland District Council will not issue a code compliance certificate because of the state of the building and the steps that he took to ascertain the remedial work required. Mrs Te Rakau's evidence concentrated on the issue of general damages and the particular effect on her of the difficulties that evolved between the plaintiffs and the defendants.

The plaintiffs called Mr McGirr, a building consultant and accredited BRANZ advisor. He had been commissioned as an independent expert to assess the property, to report his findings to the plaintiffs and to recommend remedial work. That report dated 30 November 1999 formed the basis of evidence given by Mr

McGirr. His evidence as it related to the plaster work can be summarised as follows:

1. The plaster to the outside of the building had excessive random cracking throughout.
2. The raised plaster trim fitted around the windows and doors had in places separated from the plaster underneath.
3. In places the plaster had delaminated between coats.
4. The sand used in the plaster work showed signs of contamination.
5. In places (around the balcony of the west side of the residence) the plaster was easily rubbed off by hand.
6. The plaster had been fixed hard down without a drip edge to the roof flashing, the concrete path under the verandah and the butynol roofing and deck.
7. The plaster wall to the right of the front door showed signs of dampness which emanated from the plaster fixing to the deck above.

In Mr McGirr's opinion these matters were caused by the following matters either singly or in combination:

1. Lack of expansion joints constructed in the plaster system.
2. Composition of the plaster itself (that is, combinations of contaminated sand and/or appropriate mix ratios of sand to cement).
3. Inappropriate or negligent application of the plaster e.g.
    a. No drip lines.
    b. Plaster being applied hard down to other surfaces.
    c. Plaster applied directly to non-flashed windows and doors.

d. Insufficient "curing" of the plaster.

4. An inappropriate system being applied in the first place, namely two coats of plaster instead of three as required by the building code and NZ4251:1974.

5. Shrinkage between the first and second coats of plaster leading to adherence problems.

Mr McGirr was unmoved in cross-examination as to the causes of the cracking in particular. He said this was so extensive and of such a nature that it reflected the existence of the matters set out in his report, namely, the lack of expansion and contraction joints, the fact that it was applied directly on to flashing soffits and the butynol decking and that there appeared to be considerable shrinkage between the first and second coats. He said that the second coat was easily pried off in places. There appeared to be a delamination between the two coats which had manifested itself in "drumming". He acknowledged that in some places there was a lack of support of the substrate and therefore inappropriate fixing of the substrate which may have meant some movement of it.

The second defendant gave evidence. His evidence was that all of the cracking was caused by the lack of an appropriate fixing of substrate. Mr McGirr disagreed in that in his view, if there was such a problem, the cracking would have manifested itself in the expansion joints (if there had been any) rather than the crazed pattern that was so evident in this case.

As to the delamination, this he said was caused by foreign material in the sand of the top coat and gave examples of pieces of driftwood or stones that he had identified. The second defendant acknowledged that there may have been some contamination of sand but said that could be "spot fixed". The evidence was that the sand for the second coat came from several places, including the balance of that used for the first coat which had been sitting on site for some months.

Mr McGirr also held the second defendant responsible for inappropriate plastering to the exterior windows and doors. He said there was no evidence of side flashings to these openings as the edge of the plaster is easily seen behind the door latch set striker plates. This, he said was evidence of no flashing at all. He said that in his view a competent plasterer should have ascertained from the builder as to whether or not flashings were in place before continuing to plaster.

The second defendant's position was that flashings were not his problem. He explained that there were various methods of flashing which did not necessarily include them being visible prior to plastering. He gave examples of the use of damp proof course being applied behind the ply substrate.

The delamination of trim around doors and windows was caused, in Mr McGirr's opinion, by the lack of mechanical keying to the second coat of plaster. This trim is decorative by nature and generally applied to areas which have been keyed (roughed up) on the underlying plaster work.

As to the issue of the plaster being applied directly to roof flashings and the butynol decking, it was apparent from Mr McGirr's evidence and the photographs in support of it that this had resulted in moisture being taken up by the plaster. Mr McGirr's position was that there should have been an adequate drip line so as to enable separation between the plaster and the surface.

The second defendant's evidence was that he did as he was told by both the builder and the plaintiff, Mr Te Rakau, and that in any event, in his experience, not having a separation was an appropriate way to apply plaster. It should be noted that the allegation of a direct instruction from Mr Te Rakau was not put to Mr Te Rakau in cross-examination. The second defendant's position also was that the problem would not exist if there had been the proper application of a sealant (in the form of a paint system) to the finished plastering job.

Analysis

I preferred the evidence of Mr McGirr in respect of all of these issues. He was not challenged as an expert in the matters upon which he had proffered an opinion. He had also carried out an inspection of the property long after the matters complained about had manifested themselves. In contrast the second defendant has not been back on the property since he left it in or about May 1997. Factors relevant to the discounting of the second defendant's evidence are, firstly, that very fact. I find it difficult to give his evidence sufficient credibility to displace that of Mr McGrirr when he has himself not carried out any inspection of the alleged defects or, alternatively had another qualified witness do so. He was content to ask the Court to infer that as this problem had not

happened to him before, it could not possibly be his fault that it had happened on this occasion.

Secondly, I find it improbable that all of the substrata was improperly affixed, as the second defendant alleges. To accept the second defendant's evidence that would need to become a probability. The only evidence of a lack of substrate fixing causing movement related to one localised area of one of the gable ends of the roof. The evidence is not such as to allow an inference to be drawn that a lack of proper fixing extended any further than this. I also find it improbable that the building inspector would have passed the substrate fixing if the problem was as widespread as it would have needed to be to have been the cause of the extensive cracking of the plaster.

I find on the balance of probabilities, preferring the evidence of the plaintiff, Mr Te Rakau, and Mr McGirr to that of the second defendant, that the problems caused to the plaster work were caused by the negligence of the second defendant in the following respects:

1. Lack of appropriate workmanship causing the plaster to crack in an inappropriate manner because of:
    a. Not applying sufficient expansion or contraction joints and
    b. Using contaminated sand so as to cause delamination and separation between the two coats of plaster.
2. Applying new plaster directly on to surfaces (e.g. roof flashing and butynol balcony) so as to enable capillary action which has allowed water ingress to the plaster itself.

3. Failing to allow proper "curing" of the plaster.

However, on the issue of whether or not a competent plasterer would have investigated the workmanship of the builder to ascertain for certain that the windows and doorways had been properly flashed, I do not believe that the plaintiff has proved on the balance of probability that the second defendant's actions in not doing so were negligent. Firstly, the evidence was that flashing can be done by way of application of damp proof course behind the ply substrate. Second, in this case the evidence was that the building inspector had inspected both the affixing of the ply substrate and the installation of building paper and wire netting preparatory to plastering. In this case Mr McGirr, in response to a question from the Court, said that if there had been such inspections it would be reasonable for a plasterer to carry on without making any enquiry as to the proper flashing of the windows and doorways. In that situation I find that there cannot be any responsibility attached to the second defendant's actions in plastering to the windows or doorways as he was entitled to rely on the builder having appropriately completed flashing.

I also find, on the balance of probabilities, that in order to rectify the defective plaster it will need to be completely removed and replaced. That will require complete replacement of the plaster veneer "system", including building paper and netting. I am satisfied the matter cannot be rectified by patching or partial replacement. In this regard, I accept the evidence of Mr. McGirr.

Liability

As a result of these findings of fact I find for the plaintiffs against the second defendant as to liability in tort, i.e. I find that he breached his admitted duty of care in the manner outlined.

Having made this finding and having considered the other evidence by way of formal proof and, in particular, a report produced by Mr Te Rakau from Mr John Lamorie of New Zealand Building Inspectors Ltd, I am satisfied that the plaintiffs have proved on the balance of probabilities that the first defendant breached the building contract.

Damages

This leaves the assessment of damages.

As against the first defendant I am satisfied by way of formal proof that by virtue of the breach of contract the plaintiffs will have suffered loss by way of the costs necessary to rectify the building. The plaintiffs are entitled to be put in the position they would have been but for the breach. I am satisfied on the evidence produced of quotations and estimates that the damages suffered by the plaintiff and properly recoverable against the first defendant are:

1. Cost of removing, replacing and repairing the defective plastering (so as to comply with the contractual obligations) ($29,185.41).
2. The cost of scaffolding to effect the remedial work ($1,800.00).
3. Cost of supplying and fixing new metal flashings ($2,300.00).

4. The cost of removing existing soffits and ribbon boards and replacing with new ($2,300.00).

5. $10,000.00 being the estimate of costs of repairing:

   a. Roof repaint

   b. Lounge ceiling

   c. Leaks and clear light roofing sheets.

   d. Cleaning household rainwater supply.

I am also of the view that the plaintiffs have proved their claim against the first defendant for general damages, after considering the principles set out in *Bloxham v Robinson* [1996] 2 NZLR 664 and *Rowlands v Collow* [1992] 1 NZLR 178. This is a contract going not only to a commercial relationship for the provision of a dwelling but one which also imports the objects of the provision of peace of mind and personal and familial sanctuary. In such cases, it can be appropriate for there to be an award of general damages.

There is little doubt that that situation the plaintiffs found themselves in has caused them some angst. Mrs Te Rakau, in particular, has required considerable medical intervention over the period September 1997 to February 1999. However, it is not certain to me that all of the anxiety evidenced, and the stresses undergone by, particularly Mrs Te Rakau, can be sheeted home to the first defendant.

There was no evidence from the clinicians she has consulted about the contribution the house situation has made to her medical condition. I note also

that whilst the plaintiffs have been anxious about the state of their home, it has been perfectly habitable, indeed they have been living in it. The problems with the house have not meant any significant disruption to their day to day lifestyle, apart from the leaks in the lounge ceiling.

I find, on the balance of probabilities, that the state of the house and the refusal to rectify the identified problems are contributing causes to their problems and one which has given rise to Mrs Te Rakau seeking extensive medical intervention and having considerable time off work. I think in the circumstances an award of $7,500.00 is just.

As to damages against the second defendant, the matter is not quite as simple. The award for replacement of the plaster work against the first defendant reflects the fact that the first defendant, in order to comply with his contractual obligations, should have provided a three coat finish as required by the New Zealand Standard NZS4251:1974. In fact, the second defendant provided exactly what he contracted to provide with the first defendant, namely a two coat finish. Whilst such an arrangement did not enable the first defendant to comply with his contractual obligations, it was acknowledged by counsel for the plaintiffs in his reply that, as between the plaintiffs and the second defendant, the recovery of damages should reflect the obligations the second defendant had to the first defendant in accordance with their contract. That would require a computation to reflect a two coat remedy as opposed to a three coat remedy upon which the damages of $29,185.41 are sought.

I am not sure that is the correct position at law. The test for the extent of liability in tort is whether the damage that eventuated was reasonably forseeable. If the damage was reasonably foreseeable then a plaintiff can recover for the cost of making good that damage.

In this case it seems to me that if the plaster system was applied negligently (and resulted in the defects which I have found apparent), then it was reasonably foreseeable that the whole of the system would need to be replaced. It would need to be replaced in such a manner as to comply with New Zealand Standard NZS 4251:1974 ie. a three coat finish. The cost of such a remedy is $29,185.41 together with the cost of scaffolding to allow the job to be done.

It may seem harsh that the second defendant should be required to remedy the situation to an extent not contemplated in the contract between him and the first defendant. But that is a matter that could possibly have been dealt with as between them. There is no cross-claim or indemnity claim on the pleadings. At law, as between the plaintiffs and the second defendant, if the duty of care that existed between them is breached, then any foreseeable loss is recoverable.

Damages against the second defendant for rectifying the plasterwork is therefore:

Cost of removal and of reinstatement	$29,185.41
Plus cost of scaffolding	1,800.00
	$30,985.41

I do not find the plaintiffs have proved on the balance of probabilities that the second defendant or his workmen caused or contributed to the roof damage. Mr Te Rakau acknowledged that over the course of the erection of the dwelling, there were several categories of workmen, over and above the second defendant, on the roof. These included the builders, the plumber and a bricklayer. Some had bare feet or felt shoes; other did not. The only direct evidence was that "on several occasions his [the second defendant's] helpers wore footwear." This is not sufficient to found the claim.

As to general damages they cannot be appropriately awarded against the second defendant. Whilst one has every sympathy for the plaintiffs in not being able to entice the second defendant back to rectify the job, he was at that time embroiled in a contractual wrangle with the first defendant, because there was difficulty over payment. He was not prepared to return to the property until those contractual wrangles had been settled. The second defendant's position is different from that of the first in that he had no contractual obligations to the plaintiffs. On the face of it the plaintiffs could never have compelled him to return, their remedy against him being in damages only.

That does not end the issue with the second defendant. He submitted that because the actions of the first defendant in failing to supply appropriate flashings around the windows and doors meant that on the evidence of Mr McGirr appropriate parts of the plaster would need to be removed to inspect and remedy that, then the second defendant should not be liable for damages; the point being that even if the lack of flashings is not the cause of the damage

to the plaster, because they have to be remedied by the plaster being removed and replaced then that is not a cost that should be visited against the second defendant.

Counsel referred to cases such as *Performance Cars Ltd v Abraham* [1962] 1 QB 33, *Gardiner v Metcalfe* [1994] 2 NZLR 8 and *Cutler v Vauxhall Motors Ltd* [1970] 2 All ER 56 in support of the proposition. With respect, this case is different from those cited. I have found as a fact that the cause of the need to remove and replace the plaster is the negligence of the second defendant. It is that negligence that has caused the extensive cracking and failure of the plaster system. It has not been caused by the need to investigate and if necessary, put in the appropriate flashings or refix the substrata. I accepted the evidence of Mr McGirr that it is not appropriate that the damage can be rectified by patching. It will require a total removal. Those findings put this case in a different category to those cited by counsel and I am of the view that the negligence of the second defendant is directly causative of the need to totally remove the plaster and therefore he should be liable for the damages that I have found appropriate.

Interest

There shall be interest on the judgment sums found against each of the defendants in accordance with s62B of the District Courts Act from the date of the filing of the statement of claim until date of judgment.

Costs

Costs are awarded to the plaintiff against each of the defendants. Those can be dealt with by memorandum if not agreed. Counsel should consider the cost schedules in the relevant provisions of the High Court Rules in calculating costs.

Summary

Judgment for the plaintiffs against the first defendant as follows:

1. Special damages - $45,585.41
2. General damages - $7,500.00
3. Interest (as above)
4. Costs (to be agreed or referred back).

Judgment for the plaintiffs against the second defendant as follows:

1. Special damages - $30,985.41.
2. Interest (as above).
3. Costs (to be agreed or referred back).

C J Doherty
District Court Judge

Judgment signed: date: 21 July 2000
time: 12.15 pm

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