

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2008-404-002358

BETWEEN BODY CORPORATE 191608
 First Plaintiff

AND JONTASHYA INVESTMENTS LIMITED, JASMIN
 ARCHER, KOK WAI HOO, WAI LING TAN,
 JULIAN MICHAEL MCNAMARA
 DANIEL IMWANSI OGEMWENVA IKHU-
 OMOREGBE, ROSEMARY ONOJINO IKHU-
 OMOREGBE, ASELA KIRTHI ABAYAKOON,
 HWA SOON PARK NEW ITALIA INVESTMENTS
 LIMITED, SYKD LIMITED, CHIEH-YU LIANG,
 MARK JASON DEMPSEY, MERINDA
 MARGARET DEMPSEY, HUI CHEN, LA WEI
 AND PETER MURRAY VOS
 Second Plaintiffs

AND NORTH SHORE CITY COUNCIL
 First Defendant

AND PATRICK ROKOS AND MILAN HOVORKA
 Second Defendants

AND PAUL CHRISTIAN BAYER
 Third Defendant

AND PAUL WARWICK HARPER
 Fourth Defendant

AND SPOUTING AND STEEL ROOFING WORLD
 LIMITED
 Fifth Defendant

Hearing: 19 February 2009

Appearances: TJ Rainey and AJ Thorn for Plaintiffs
 F Divich for First Defendant

Judgment: 19 February 2009

JUDGMENT OF ASHER J

Solicitors:
Grimshaw & Co. PO Box 6646, Auckland
Heaney & Co. PO Box 105 391, Auckland
Schnauer & Co. PO Box 31 272, Milford, Auckland
McVeagh Fleming, PO Box 300 844, Albany

Preliminary

[1] The first and second plaintiffs seek judgment by way of formal proof against the first-named second defendant, Patrick Rokos. Mr Rokos was served with copies of the statement of claim and notice of proceeding filed in this matter on 28 May 2008. An affidavit of service is on the Court file. Mr Rokos has taken no steps.

[2] This is what is commonly known as a 'leaky home case'. The first plaintiff, Body Corporate 191608 ("the Body Corporate"), is a Body Corporate constituted pursuant to s 12 of the Unit Titles Act 1972 and comprises the proprietors of a 15 unit development at 11 John Jennings Drive, Albany, Auckland. Fourteen of the 15 proprietors are second plaintiffs. One has chosen not to participate in this action.

[3] In August 2008 Mr Rokos, together with the other named second defendant, Milan Hovorka, was the joint proprietor of the property at 11 John Jennings Drive. During 1998 he prepared plans and specifications for the building work necessary to build the units. Some of the work and the applications he did and made were in the name of "MIPA". The evidence indicates that Mr Rokos and Mr Hovorka were in a partnership, and the name MIPA incorporated initials from their names. Mr Hovorka has not been served with the proceedings.

[4] The units were constructed between May 1998 and January 1999. It is the case of the plaintiffs that the units were constructed with serious defects, which led to extensive moisture ingress. Some unit owners have carried out repairs; others have not.

[5] The Body Corporate and the unit proprietors now seek judgment against Mr Rokos by way of formal proof. Other defendants have not been served or are defending the proceedings.

Approach to formal proof

[6] Rule 15.10 of the High Court Rules provides:

15.10 Unliquidated demand

If the relief claimed by the plaintiff is payment of an unliquidated demand in money and the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, the proceeding must be tried to assess damages.

[7] The failure of a defendant to file a statement of defence does not give rise to the entry of judgment by default. The plaintiffs have proceeded on the basis that they must prove the pleaded causes of action and loss, taking into account the decision of Anderson J in *Morahan v Stubbs* (1993) 7 PRNZ 178 at 180.

[8] The plaintiffs have provided extensive affidavit evidence intended to prove all aspects of the claim. I have had detailed submissions from the plaintiffs taking me through that evidence.

Duty of care, breach and causation

[9] I am satisfied from the evidence provided that Mr Rokos was the developer of the property at John Jennings Drive. He, together with Mr Hovorka, was the registered proprietor of the property before the issue of unit titles. The application for building consent was in the name of MIPA Developments. As I have stated, this was not a legal entity and appears to have been the trading name for Mr Rokos and Mr Hovorka. Mr Rokos signed the application for building consent.

[10] I am therefore satisfied that Mr Rokos was one of the developers.

[11] The attachments to the affidavits also reveal that Mr Rokos either in whole or in part was the designer of the townhouse development. His handwriting is on the plans that were prepared and there are references on the plans indicating that they were drafted by MIPA. MIPA is also named as the designer in the building consent application.

[12] Finally, all the evidence of the Council files and the statements of the various deponents indicate that there was no head builder for the development. Rather, the builders appear to have been Mr Rokos and Mr Hovorka, who have then employed specific contractors to do specific tasks.

[13] I consider, therefore, that Mr Rokos was a developer, designer and builder of the development. As a co-developer he owed the plaintiffs a non-delegable duty of care: *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). I am also satisfied that a duty of care extended to subsequent purchasers. Further, as the designer of the units Mr Rokos had a duty of care to the homeowners: *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA). Finally, as the builder he also had a duty of care.

[14] Mr Roko's duty of care as a developer was to ensure that proper care and skill was exercised in the building of townhouses. As a designer there was a duty to exercise proper care and skill in design. As a builder there was a duty to apply proper care and skill to the building processes. In fact the affidavit evidence filed discloses numerous defects in terms of the design and build of the units not in accord with good building practice. The expert building consultant/surveyor, Mr Simon Paykel, has deposed that there were a number of significant defects in the building causing significant moisture ingress, and that they were the result of poor workmanship and/or design. It is Mr Paykel's view that if proper skill and care had been exercised by the developer/designer/builder those defects would not have been present and the units would not have leaked.

[15] I am satisfied that there was a breach of the duty of care, and I am also satisfied that that breach caused the defects that have been set out in the documents provided to me.

Damages

[16] The plaintiffs seek to recover the economic loss they have suffered as a consequence of the building defects. The test to be applied is that set out in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526:

The measure of the loss will be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not.

Economic as well as property damage is recoverable: *Riddell v Porteous* [1999] 1 NZLR 1, 10 (CA). The plaintiffs are entitled to recover the costs of damage to

remedy the defects and stop the leaking even if those efforts are unsuccessful and the ultimate costs may be greater than if no steps to mitigate had been taken: *New Zealand Forest Products Limited & Anor v O'Sullivan* [1974] 2 NZLR 80.

[17] I have affidavit evidence as to the actual amounts spent on repairs so far, and the estimated costs to fix the remaining units. One unit has been fully repaired, four have been partially repaired and nine require full repair. Thus, the losses for the plaintiffs involve an assessment of actual costs incurred and costs that will be incurred.

[18] I have evidence of losses in relation to all of the 14 plaintiffs save for one, Hwa Soon Park. The reason that she has not given evidence is that she does not live in New Zealand and there have been difficulties in obtaining an affidavit in proper form from her. Leave is given to her to seek judgment at a later date against Mr Rokos. The filing of a memorandum with the relevant affidavit will be sufficient, at least in the first instance.

[19] It is easiest to set out the amounts claimed in a tabulated form. These are set out in annexure 'Table 1'.

[20] It can be seen from this table that one unit owned by Franco Godinich has been entirely repaired. I am satisfied that from the material provided to me that the statements as to the actual amounts spent on repairs and consultants are correct, and that the estimates of repair costs and consultant and consent costs are correct.

[21] I am therefore prepared to give judgment to the plaintiffs for the losses so established.

General damages

[22] Of the second plaintiffs, the unit proprietors who are not companies have all claimed general damages. I have no doubt that they are all entitled to general damages to compensate them for distress and anxiety and loss of amenities. The figure of \$25,000 per occupier has been awarded in two recent leaky building cases:

Body Corporate 185960 & Ors v North Shore City Council & Ors HC AK CIV-2006-004-3535 20 December 2008, Duffy J, at [130]; *Body Corporate 188529 (No. 4)* HC AK CIV-2004-404-3230 30 September 2008, Heath J, at [27]. I consider that to be a fair quantum of general damages for plaintiffs who actually reside in the units. Following the practice in other decisions I award those who are not residents and have therefore have not suffered such personal inconvenience and distress, \$15,000 each.

[23] Thus, the following general damages are ordered. These are set out in annexure 'Table 2'.

Interest

[24] The second plaintiffs are all entitled to interest on their expenditure to date. That interest is to run from the date of each particular payment, and to be at a rate of 7 per cent per annum. I fix 7 per cent per annum, which is lower than the prescribed rate in s 87 of the Judicature Act 1908 to reflect the present low interest rates and also to reflect the fact that prior to the last six months, interest rates have been considerably higher.

[25] A detailed schedule setting out the interest calculation relating to the expenditure to date and the date of that expenditure are set out in annexure 'Table 3'.

Costs

[26] The plaintiffs are entitled to costs on a 2B basis. Although I would not normally do so, I have been helpfully provided with a chart setting out a cost calculation which appears to me to comply with the rules. I therefore set out that table as annexure 'Table 4'.

[27] The amount of costs awarded is therefore \$12,720.00 plus disbursements.

Other defendants

[28] This judgment has been given in reliance on unchallenged material provided by the plaintiffs. Ms Divich has appeared for the first defendant, the North Shore City Council, and understandably has asked for it to be made clear in this judgment that what is concluded here is not to be treated as in any way binding on the other defendants. That must be so. There has been no cross-examination of any of the deponents and no contrary submissions provided to me. The evidence has not been fully tested. Therefore, for the avoidance of any doubt, I record that this judgment is not binding on any party, save the plaintiffs and Patrick Rokos.

[29] I should say that Mr Rainey has wholly accepted that this is the position, and expressly disclaimed any intention to use this judgment in proceedings against the other defendants.

Summary

[30] Judgment is now entered in favour of the plaintiffs against Mr Rokos accordingly. The total quantum of special and general damages and interest awarded to each plaintiff is set out in annexure 'Table 5'. Costs are awarded as set out in annexure 'Table 4'.

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Asher J

TABLE 1
SPECIAL DAMAGES – COSTS OF REPAIR

Unit	Owners	Actual costs – repairs	Actual costs – consultants	Estimated costs to complete repairs	Estimated costs to complete – consultants	Total Excluding GST	GST	Total Including GST
Unit A	1/15 Jonthasha Investments Limited			180,953.85	21,748.00	202,701.85	25,337.73	228,039.58
Unit B	2/15 Jasmine Archer			99,615.00	11,980.00	111,595.00	13,949.38	125,544.38
Unit C	3/15 Kok Wai Hoo and Wai Ling Tan			99,615.00	11,980.00	111,595.00	13,949.38	125,544.38
Unit D	Julian Michael McNamara			84,179.00	10,123.00	94,302.00	11,787.75	106,089.75
Unit E	2/13 Daniel Imwansi Oglemwenva Ikhu-Omoregbe and Rosemary Ononjino Ikhu-Omoregbe			99,615.00	11,980.00	111,595.00	13,949.38	125,544.38
Unit F	Jae Chan Chung and Bok Soon Chung			99,615.00	11,980.00	111,595.00	13,949.38	125,544.38
Unit G	1/11 Asela Kirthi Abayakoon (one elevation only)	60,857.24	9,544.47	42,096.00	5,063.00	117,560.71	14,695.09	132,255.80
Unit J	1/9 Franco Godinich - New Italia Investments Limited	102,052.00	12,321.87			114,373.87	14,296.73	128,670.60
Unit K	2/9 Skyd Limited (BUILDERS ESTIMATE)	98,000.00	7,469.11	10,192.89		115,662.00	14,457.75	130,119.75
Unit L	3/9 Chieh Yu Liang			84,179.00	10,123.00	94,302.00	11,787.75	106,089.75
Unit M	1/7 Mark and Merinda Dempsey			99,615.00	11,980.00	111,595.00	13,949.38	125,544.38
Unit N	2/7 Hui Chen and La Wei			99,615.00	11,980.00	111,595.00	13,949.38	125,544.38
Unit O	3/7 Peter Murray Vos (BUILDERS ESTIMATE)	156,822.22	600.00	15,289.33		172,711.55	21,588.94	194,300.50
						1,581,183.98	197,648.02	1,778,832.01

TABLE 2
SUMMARY OF GENERAL DAMAGES

Unit	Proprietor(s)	Amount claimed
B	Jasmine Archer	\$25,000.00
C	Kok Wai Hoo and Wai Ling Tan	\$30,000.00
D	Julian Michael McNamara	\$15,000.00
E	Daniel Imwansi Ogemwenva Ikhu-Omoregbe and Rosemary Onojiino Ikhu-Omoregbe	\$25,000.00
L	Chieh-Yu Liang	\$25,000.00
M	Mark Jason Dempsey and Merinda Margaret Dempsey	\$50,000.00
N	Hui Chen and La Wei	\$30,000.00
O	Peter Murray Vos	\$25,000.00
	Total =	<u>\$225,000.00</u>

TABLE 3
INTEREST INCURRED ON ACTUAL INVOICED COSTS TO 19 FEBRUARY 2009

Unit	Service provider	Invoice No	Date paid	Amount (incl GST)	Days	Rate	Interest	TOTAL
G 1/11 Asela Kirthi Abayakoon	Jason Johnson Builder Ltd	212	1/12/2004	254.25	1541	7	75.14	
	Jason Johnson Builder Ltd	223	22/02/2005	2516.06	1458	7	703.53	
	Jason Johnson Builder Ltd	403	12/02/2007	319.98	738	7	45.29	
	Jason Johnson Builder Ltd	455	3/09/2007	4240.94	535	7	435.13	
	Jason Johnson Builder Ltd		27/08/2008	10867	176	7	366.80	
	Jason Johnson Builder Ltd	260807	30/08/2007	10867.50	539	7	1123.37	
	Jason Johnson Builder Ltd	437	20/09/2007	10000	518	7	993.42	
	Jason Johnson Builder Ltd	438	9/10/2007	17730	499	7	1696.74	
	Jason Johnson Builder Ltd		6/11/2007	11536.66	471	7	1042.09	
	North Shore City Council	222248	4/05/2007	1180	657	7	148.68	
	North Shore City Council	228787	12/08/2007	180	557	7	19.23	
	North Shore City Council	252965	21/04/2008	190	304	7	11.08	
	Chester Consultants Ltd	3301	13/04/2007	833.33	678	7	108.36	
	Chester Consultants Ltd		26/04/2007	3291.67	665	7	419.80	
	Chester Consultants Ltd	3317	26/04/2007	2475	665	7	315.65	
	Chester Consultants Ltd	3331	2/06/2007	712.5	628	7	85.81	
	Chester Consultants Ltd	3865	31/08/2007	1350	538	7	139.29	
	Chester Consultants Ltd	3969	14/10/2007	1040.63	494	7	98.59	
	Chester Consultants Ltd	4360	25/01/2008	511.88	391	7	38.38	
	House Assessments Ltd	569	29/08/2007	1125	540	7	116.51	
	House Assessments Ltd	584	1/10/2007	1035	584	7	115.92	
	Jae Services Rodney	R556	6/01/2008	132	410	7	10.38	
				\$82,389.40			\$8,109.19	\$90,498.59

Unit	Service provider	Invoice No	Date paid	Amount	Days	Rate	Interest	TOTAL
J 1/9 New Italia Investments Limited	Chester Consultants Ltd	1358	15/12/2007	7312.5	432	7	605.84	
	Chester Consultants Ltd		30/08/2008	1000	173	7	33.18	
	House Assessments Ltd	741	15/05/2008	684	280	7	36.73	
	House Assessments Ltd	763	5/06/2008	924.75	259	7	45.93	
	House Assessments Ltd	807	25/07/2008	1253.25	209	7	50.23	
	Peacemaker Developments Limited		20/02/2008	4207.5	365	7	294.53	
	Peacemaker Developments Limited		2/05/2008	107,325	293	7	6030.78	
	North Shore City Council		5/03/2008	2687.6	351	7	180.92	
	Carpet One New Zealand Limited		17/05/2008	3276	278	7	174.66	
				\$128,670.60			\$7,452.79	\$136,123.39

Unit	Service provider	Invoice No	Date paid	Amount	Days	Rate	Interest	TOTAL
K 2/9 SKYD Limited	Architectural Design Studio Limited	136	11/08/2008	562.5	192	7	20.71	
	Architectural Design Studio Limited	140	25/07/2008	1541.25	209	7	61.78	
	Architectural Design Studio Limited	143	25/07/2008	1698.75	209	7	68.09	
	Architectural Design Studio Limited	173	19/09/2008	495	153	7	14.52	
	North Shore City Council	263731	25/09/2008	3788.09	147	7	106.79	
	North Shore City Council	269668	7/12/2008	180	74	7	2.55	
	Peacemaker Developments Limited		11/12/2008	110,515.60	70	7	1483.63	
				\$118,781.19			\$1,758.08	\$120,539.27

Unit	Service provider	Invoice No	Date paid	Amount	Days	Rate	Interest	TOTAL
O 3/7 Peter Murray Vos	House Assessments Ltd		14/11/2008	675	97	7	12.56	
	Peacemaker Developments Ltd		8/12/2008	800	73	7	11.20	
	Peacemaker Developments Ltd		9/12/2008	122,626	72	7	1693.25	
				\$124,101.00			\$1,717.00	\$125,818.00

TABLE 4**COSTS**

Number	Event	Time Allocation Days (or part days)	Daily Rate	Amount
1.	Commencement of proceeding by plaintiff	3	\$1,600.00	\$4,800.00
4.10	Filing memorandum for case management conference or mention hearings	.4	\$1,600.00	\$640.00
4.11	Appearance at Case Management Conference	.3	\$1,600.00	\$480
7.1	Plaintiffs' preparation of affidavits or written or oral statements of evidence to be used at hearing	2.5	\$1,600.00	\$4,000.00
8.	Preparation for hearing if case proceeds to hearing	1	\$1,600.00	\$1,600.00
9.1	Appearance at hearing for principal counsel	.5	\$1,600.00	\$800.00
9.2	Appearance at hearing second counsel (if allowed by Court)	.25	\$1,600.00	\$400.00
	Total			\$12,720.00

TABLE 5
FORMAL PROOF HEARING
TOTAL QUANTUM

Unit	Proprietor(s)	Special damages	Interest on actual invoiced costs to date	General damages
A	Jontashya Investments Limited	\$229,039.58	N/A	N/A
B	Jasmine Archer	\$125,544.38	N/A	\$25,000.00
C	Kok Wai Hoo and Wai Ling Tan	\$125,544.38	N/A	\$30,000.00
D	Julian Michael McNamara	\$106,089.75	N/A	\$15,000.00
E	Daniel Imwansi Ogemwenva Ikhu-Omoregbe and Rosemary Onojiino Ikhu- Omoregbe	\$125,544.38	N/A	\$25,000.00
F	Jae Chan Chung and Bok Soon Chung	\$125,544.38	N/A	N/A
G	Asela Kirthi Abayakoon	\$132,255.80	\$8,109.19	N/A
J	New Italia Investments Limited (Franco Godinich)	\$128,670.60	\$7,452.79	N/A
K	SKYD Limited	\$130,119.75	\$1,758.08	N/A
L	Chieh-Yu Liang	\$106,089.75	N/A	\$25,000.00
M	Mark Jason Dempsey and Merinda Margaret Dempsey	\$125,544.38	N/A	\$50,000.00
N	Hui Chen and La Wei	\$125,544.38	N/A	\$30,000.00
O	Peter Murray Vos	\$194,300.50	\$1,717.00	\$25,000.00
TOTAL		\$1,778,832.00	\$19037.07	\$225,000.00