

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

**CIV 2012-409-1604  
[2014] NZHC 748**

BETWEEN

BRIAN JOHN VIECELI AND  
CHRISTOPHER CAMPBELL  
CARSWELL  
[Discontinued]  
Plaintiffs

AND

CHRISTCHURCH CITY COUNCIL  
First Defendant

GILGAMESH LIMITED  
Second Defendant/Third Party

CLEARWATER RESORT LIMITED  
[Discontinued]  
Third Defendant/Second Third Party

BOFFA MISKELL LIMITED  
[Discontinued]  
Fourth Defendant/Third Third Party

PETER WAYNE O'DONNELL  
[Discontinued]  
Fourth Third Party

IAN JOHN ADAMSON  
[Discontinued]  
Fifth Third Party

Hearing: 7 April 2014

Appearances: C Harpur for First Defendant  
No appearance by or for Second Defendant/Third Party

Judgment: 10 April 2014

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**RESERVED JUDGMENT OF MANDER J**

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[1] In December 2001, John and Margaret Galvin entered into an agreement to purchase a house to be constructed at 41 Harts Creek Lane in the Clearwater Resort near Christchurch. The property was bought in the name of their family trust. The plaintiffs are trustees of that trust.

[2] The second defendant and first third party, Gilgamesh Limited, was the owner and developer of the property, responsible for its construction. It was from Gilgamesh Limited that the property was purchased by the plaintiffs. The first defendant is the Christchurch City Council which has responsibility for the maintenance and enforcement of building standards in the area in which the property was built.

[3] The Council issued a building consent for the property on 21 November 2001. Thereafter, Gilgamesh Limited commenced building and the Council carried out a series of inspections of the property during the course of that construction.

[4] On 30 October 2002, the Council completed the final inspection of the property. It issued a site inspection report dated 30 October 2002. The Council inspection did not identify or detail any defects or issues with the property, apart from noting that a fire certificate was yet to be issued. In November 2002, Gilgamesh Limited through its solicitors notified that a certificate of practical completion had been issued for the property and settlement of the purchase took place later that month.

[5] In 2010, the plaintiffs became aware of problems associated with the weathertightness of properties constructed by Gilgamesh Limited. The plaintiffs also noticed that their property was unusually damp. They instructed a weathertightness expert, Mr Bruce Glennie, to inspect the property and complete a report. He found a number of construction defects which were causing weathertightness problems which required remediation work.

[6] The defects alleged in the construction of the property included:

- (1) The lower end of the gable parapets were very poorly detailed and constructed.
- (2) The metal cappings over the butyl rubber roof edgings had fixings that penetrated down through the rubber membrane.
- (3) The butyl rubber upstands ran up the wall under the plaster finish.
- (4) There was no internal angle moulding under the plaster or movement control joint at the junction of the fibre cement fascia lining with the block wall.
- (5) The fibre cement fascia did not extend down far enough to provide a drip edge.
- (6) There were inadequate clearance levels between the cladding of the property and the ground.
- (7) At the first floor balconies, poor trade practices occurred at the junctions of the different cladding materials.
- (8) The projecting windows were inadequately flashed.

[7] As a result of these identified defects, the plaintiffs undertook remedial work including the following:

- (1) The fibre cement and stucco exterior cladding was removed and new fibre cement cladding installed on a 20 mm minimum drained cavity.
- (2) The existing framing and Gib board was replaced where decay had occurred.
- (3) Colorsteel parapet flashing was installed to the gable end, butynol roof and Dimond Brownbuilt roof.
- (4) A Colorsteel Z flashing was fixed over the stucco plaster behind the new fascia.
- (5) A new Colorsteel ridge capping was installed to extend the existing ridge capping.
- (6) The existing windows were reinstalled and were made weathertight.

(7) A new downpipe was installed and a new storm water drain was constructed.

(8) The existing butynol roofing was repaired and replaced where damage had occurred.

[8] The remedial work was carried out between January and April 2011 at a total cost of \$152,127 including architect's fees, Council fees, builder's fees and painting. In June 2011, the plaintiffs applied for an assessors report for the property from the Weathertight Homes Resolution Service which was subsequently completed in September of that year.

[9] The plaintiffs issued proceedings against the Council and Gilgamesh Limited. Clearwater Resort Limited and Boffa Miskell Limited which it was alleged were respectively the project manager and the planning and design consultant for the development of which the property formed part were also named as defendants.

[10] In respect of the Council it was alleged that, in breach of its duty of care, it was negligent in failing to identify the construction defects when inspecting the property. As a consequence it was alleged the plaintiffs suffered loss and damage. In respect of the developer, Gilgamesh Limited, it was claimed that in breach of its contractual obligations it failed to build the house in a proper and workmanlike manner in accordance with the plans and specifications, and breached its duty of care to the plaintiffs by completing the construction of the property with the identified defects. Similar allegations were made in respect of the third and fourth defendants.

[11] Shortly after the issue of proceedings against the Council, it issued third party proceedings against Gilgamesh Limited as the owner and developer of the property. The Council identified that Gilgamesh Limited owed a non-delegable duty of care to the plaintiffs to ensure that the property was constructed in accordance with the building consent, the Building Act 1991, and in a proper and workmanlike manner. In the event that the plaintiffs established that the property had been built with the defects as identified in its claim, the Council alleged that Gilgamesh Limited had breached its duties of care and that if the Court should find that the Council was

liable to the plaintiffs it would be entitled to a contribution or indemnity from Gilgamesh Limited.

[12] Gilgamesh Limited, in turn, in November 2012 issued third party proceedings against Peter O'Donnell who it was alleged was a director of Summit Homes Limited, the building company contracted by it to carry out the construction of the property and Ian Adamson, an architect employed by Warren and Mahoney Limited which was contracted by Gilgamesh Limited to design the development of which the property was a part. In May 2013, Gilgamesh Limited discontinued its claims against Mr O'Donnell, the fourth third party, and Mr Adamson, the fifth third party.

[13] In August 2013, the plaintiffs and the other parties with the exception of Gilgamesh Limited agreed to mediation. As a result of that mediation, the plaintiffs' claim was settled. The parties to the settlement were the plaintiffs, the Council and the former fourth third party, Mr O'Donnell. A total of \$115,000 was paid to the plaintiffs (\$82,500 by the Council and \$32,500 by Mr O'Donnell). As a result of that settlement the plaintiffs' claim against the Council and other parties was discontinued. The Council discontinued its third party claims, apart from its claim against the developer, Gilgamesh Limited.

[14] The Council's claim against the third party was set down for hearing. The Council served its evidence on Gilgamesh Limited in January 2014. Gilgamesh Limited was to serve its defence to an amended statement of claim and its evidence in February 2014 but failed to do so.

[15] By memorandum dated 26 March 2014, Gilgamesh Limited's solicitors advised that it had been instructed by the sole director of the company to advise that it did not intend to take any further part in the proceeding. Mr Soper, the solicitor on record, confirmed that he no longer had instructions to act for Gilgamesh Limited.

[16] On the Council's application, directions were made that the matter proceed by way of formal proof. Leave was granted for evidence to be adduced by affidavit without the appearance of a witness required for the purpose of cross-examination

under r 9.56 of the High Court Rules. When the matter was called for hearing there was no appearance by or on behalf of Gilgamesh Limited.

[17] In its defence filed in November 2012, Gilgamesh Limited admitted the following:

- (a) It was a property developer in charge of the development of the house situated at 41 Harts Creek Lane, Clearwater Resort, Christchurch.
- (b) It was the owner and developer of the house.
- (c) It owed a non-delegable duty of care to the plaintiffs to:
  - (i) ensure that the property was constructed in accordance with the building consent;
  - (ii) ensure that the property was constructed in accordance with the Building Act 1991;
  - (iii) ensure that the property was constructed in a proper and workmanlike manner.

[18] In support of its third party claim, the Council adduced evidence by way of affidavit from Mr Grant Hunt, a registered building and quantity surveyor. Mr Hunt has some 26 years experience of working in the building industry and is a building expert and qualified consultant who has prepared numerous expert reports regarding specialist building matters, including workmanship and construction costs issues and other issues relating to the New Zealand Building Code. He has provided expert technical reports regarding specific design and code compliance issues, and site problems, including in relation to leaky buildings, and insurance litigation.

[19] Mr Hunt was engaged by the Council to investigate and advise it on the construction defects identified in the plaintiffs' claim. In particular, he was required to review whether construction defects identified by the plaintiffs' expert, Mr Bruce Glennie, were contrary to the Building Code and relevant workmanship standards at

the time of the building consent in 2001; whether damage was likely to have resulted from these construction defects and whether the scope and cost of the remedial work carried out by the plaintiffs was reasonable in the circumstances.

[20] For the purposes of that review, Mr Hunt reviewed the report and photographs prepared by Mr Glennie, the Council's property file, and invoices for remedial work provided to the Council by the plaintiffs. Mr Hunt also inspected the property in June 2011.

[21] As a result of Mr Hunt's review, he was able to endorse the findings of Mr Glennie relating to the identified defects in the construction of the house, the damage suffered as a result and the remedial costs incurred by the plaintiffs.

### **Construction defects**

*Deficiency (a): The lower ends of gable parapets were poorly detailed and constructed*

[22] Mr Hunt confirmed Mr Glennie's findings that the lower ends of the gable parapets of the house were poorly detailed and constructed. There was insufficient coverage of parapet flashing over wall claddings, allowing water to enter. Daylight was visible from inside the roof space. Water also entered at the junction between the stucco plaster and the concrete block wall below. The junction was not flashed. This location was an entry point for water.

*Deficiency (b): The metal cappings of the butynol rubber roof edgings have fixings that penetrated down through the rubber membrane*

[23] Mr Hunt was able, from an examination of photographs taken by Mr Glennie, to conclude that the metal cappings over the butynol roof edgings had fixings that penetrated down through the rubber membrane. Mr Hunt observed that top surface fixings have historically been an entry point for moisture and are now not permitted.

*Deficiency (c): The butynol rubber upstands ran up the wall under the plaster finish*

[24] Mr Hunt observed that the butynol rubber was not sealed into a chase in the concrete block wall. He observed that this detail creates a high risk for water to be

absorbed and to enter between the butynol rubber and the concrete block wall. In Mr Hunt's opinion this is likely to have been a source of water ingress.

*Deficiency (d): The lack of internal angle moulding (back flashing) on the plaster and movement control joints at junction of fibre cement fascia lining of block wall*

[25] Mr Hunt deposes that at the time of the construction of this house it was good trade practice to back flash junctions between different claddings. This however was not done which created a path for water ingress.

*Deficiency (e): The fibre cement deck facing did not extend down far enough to provide a drip edge*

[26] Drip edges establish an interruption to water movement through water tension or capillary action. Mr Hunt notes that it was good trade practice at the time to establish drip edges on horizontal return surfaces. This however did not occur in the construction of this house which led to water ingress.

*Deficiency (f): The inadequate clearance between cladding and ground levels*

[27] Mr Hunt deposes that the New Zealand Building Code had acceptable solutions at the time of the construction of this house regarding clearances to paved and unpaved surfaces. Mr Hunt observed that there was inadequate ground clearance on the east elevation of the house at the projecting window and on the wing walls supporting the north end deck.

*Deficiency (g): The projecting windows were inadequately flashed*

[28] Mr Hunt observed in his affidavit that from the photographic evidence it was apparent that the projecting window was inadequately flashed at the block wall interface. A lack of adequate flashing arrangements at aluminium joinery jams is a noted entry point for water.

[29] In making these findings, Mr Hunt confirmed the construction issues identified by Mr Glennie in his report of 3 May 2010 which was annexed to Mr Hunt's affidavit.



[30] Mr Hunt identified the scope of the work set out in the remediation building consent issued on 16 September 2010 for the purpose of undertaking the necessary repairs to fix the identified defects. On 28 July 2011, the Council issued a code compliance certificate for the completed remedial work. The cost of this remedial work is set out in the invoices of various contractors, annexed to Mr Hunt's affidavit. Mr Hunt deposes that he has reviewed the remedial cost which he states totals \$152,500 and opines that based on the scope of the work undertaken, the cost incurred was reasonable.

[31] Gilgamesh Limited admitted in its statement of defence filed in November 2012 that as the owner and developer of the house it owed a non-delegable duty of care to the plaintiffs to ensure that the property was constructed in accordance with the building consent, the Building Act 1991 and in a proper and workmanlike manner. It has not contested the evidence of Mr Hunt who confirms the building defects identified by the plaintiffs' building consultant, Mr Glennie, they being the same defects referred to in an assessor's report pursuant to the Weathertight Homes Resolution Services Act 2006, annexed to the affidavit of Samantha Owles, an employee of the Council which was presented at the hearing of the Council's third party claim.

[32] I therefore find proved on the balance of probabilities that Gilgamesh Limited breached its duty of care by constructing the house with these identified defects. The evidence adduced by the Council from Mr Hunt in confirmation of the findings of Mr Glennie, which are not contested by Gilgamesh Limited, establishes that the identified defects caused water ingress to the property, damage and ongoing weathertightness problems that required remediation. Mr Hunt's evidence proves that the cost of the remedial work carried out as a consequence was reasonable.

[33] The Council has accepted that a number of the alleged defects existed and were contrary to the building consent, the Building Act 1991 and good trade practice. It acknowledges the affidavit evidence it has filed which supports such findings.<sup>1</sup> It is not contested that, notwithstanding these building defects, inspections carried out

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<sup>1</sup> Memorandum of counsel for first defendant for formal proof hearing against first third party on 7 April 2014 at para 13.

by the Council including a final inspection in November 2002, failed to identify the defects. As a result of its failure to identify the defects or otherwise address issues relating to compliance with the Building Code, it issued an inspection report and failed to take appropriate action to ensure the defects were corrected.

[34] Both the Council and Gilgamesh Limited are therefore liable as joint tortfeasors in respect of damage and loss suffered by the plaintiffs. The Council has discharged its liability to the plaintiffs upon payment of the sum of \$82,500 in settlement of the plaintiffs' claim against the Council. The Council now seeks a contribution of \$70,125 plus interest and costs from Gilgamesh Limited. This sum represents 85% of the amount paid by the Council to the plaintiffs.

[35] Under s 17 of the Law Reform Act 1936, 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, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise. In the Council's submission it has paid a disproportionate share of the remedial costs to the plaintiffs in settlement of their claim having regard to the respective responsibilities and failures of the joint tortfeasors. The Council therefore claims contribution from Gilgamesh Limited.

[36] In seeking an apportionment of the responsibility for liability to be borne 15% by the Council and 85% by the developer, the Council relies upon the approach taken by this Court in *Morton v Douglas Homes Ltd*<sup>2</sup> and *Body Corporate 188529 v North Shore City Council*.<sup>3</sup> Both cases involved damage caused to buildings as a result of defects in the construction work which had not been identified by council inspections. In *Morton v Douglas Homes Limited*, HardieBoys J observed in relation to the issue of apportionment:<sup>4</sup>

The company was clearly the principal wrongdoer. It was its responsibility to comply with the bylaws and the permit conditions. It had no right to rely on the Council's inspector to point out its own defaults. His function was only supervisory (see *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 at p241).

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<sup>2</sup> *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548.

<sup>3</sup> *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479.

<sup>4</sup> Above, n 2 at 613.

[37] In that case, in a situation where only the company (the developer) and the Council were liable this Court apportioned responsibility, 85% to the company and 15% to the Council.

[38] In *Body Corporate 188529 v North Shore City Council*, Heath J observed:<sup>5</sup>

[585] I have no doubt that the primary cause of the successful plaintiffs' loss was bad building. [The developers], as the persons who owned a non-delegable duty to ensure the construction work was carried out adequately, are primarily to blame. The Council, unfortunately, is likely to be left with the sole liability for the loss due to the apparent insolvency of the developer.

[586] The Council should be entitled to a significant contribution from the developer. I apportion responsibility 85% to the developer and 15% to the Council.

[39] I accept the submission made on behalf of the Council that the approach taken in these cases provides appropriate guidance to the apportionment in this case. It is clear that the primary responsibility for the construction defects rested with the developer who owed the non-delegable duty to ensure the construction work was carried out in a proper manner in accordance with the building consent and Building Act 1991, and in a proper and workmanlike fashion. It is the principal wrongdoer. It was no answer to the discharge of its duties to rely on the Council inspections. I therefore accept the Council's submission that in respect of the \$82,500 paid to the plaintiffs in settlement of its claim of negligence, Gilgamesh Limited should contribute \$70,125, representing 85% of the sum paid by the Council to the plaintiffs. I make an order in those terms.

[40] The Council is also entitled to interest on the sum claimed of \$70,125 at the rate of 5% per annum prescribed by s 87 of the Judicature Act 1908<sup>6</sup> from the date of the commencement of the third party proceeding, being 15 October 2012, up until the date of the hearing of this matter, being 4 April 2014, totalling \$5,158.50.

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<sup>5</sup> Above n 3.

<sup>6</sup> Judicature (Prescribed Rate of Interest) Order 2011, promulgated pursuant to cl 4.

[41] Costs are awarded against Gilgamesh Limited on a 2B basis together with reasonable disbursements. Those costs and disbursements are as set out in the cost schedule filed by the Council in the respective amounts of \$18,507 (costs) and \$2,462.05 (disbursements).

Solicitors:  
Heaney & Partners, Christchurch  
Anderson Lloyd, Christchurch