

BETWEEN

AFS

FIRST APPLICANT

AND

AFT

SECOND APPLICANT

AND

ZUD

FIRST RESPONDENT

AND

ZUE

SECOND RESPONDENT

Date of Order:

2 July 2013

Referee:

Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZUE is to pay to AFS and AFT the sum of \$10,063.02 within 28 days.

Facts

[1] On 9 December 2006, AFS and AFT entered into an agreement to purchase the property at [address] from ZUE and ZUD for \$685,000.00. Settlement took place on 16 February 2007.

[2] In 2012, AFS and AFT discovered that the tiling in the shower of the main bathroom had leaked extensively, rotting the surrounding structures. They had no option but to rebuild the affected areas at a cost of \$14,247.47.

[3] AFS and AFT filed a claim against ZUE for this sum. Prior to the hearing, the Tribunal joined ZUD, who was a joint vendor of the property with ZUE, and the tiler, KK, to the claim, being parties that could also be liable and therefore needed to attend.

[4] ZUD filed a counterclaim for her legal fees in taking advice on the matter of \$350.00.

Issues

[5] The dispute raises the following issues:

- (i) Who are the appropriate respondents?
- (ii) Is the claim statute barred, being brought over six years from when the cause of action arose?
- (iii) Can AFS and AFT prove a breach of warranty?
- (iv) If so, how much of the repair cost can be claimed?
- (v) In relation to the counterclaim, are the applicants liable for ZUD's legal fees of \$350.00?

[6] Each is considered in turn.

Decision

Who are the appropriate respondents?

[7] Having considered the evidence presented by each party as to who is liable on the claim, the following has been established.

[8] ZUE is the sole respondent in the proceedings. He is the person against whom the claim was originally filed, and as co-vendor of the property, is liable for any breach of contract.

[9] ZUD was joined as a respondent after the proceedings were filed. She was a co-vendor of the property with ZUE, as the property was being sold due to their separation. However, ZUD must now be struck out as a party as she was joined as a respondent after the limitation period had expired in respect of any claim against her. AFS and AFT did not initially claim against ZUD. I have researched the matter and found that a party cannot be joined if the effect of the joinder is to defeat a party's right to claim the benefit of a statutory limitation: *Registered Securities Ltd (in liq) v Jensen Davies & Co Ltd* [1999] 2 NZLR 686, 691.

[10] Whilst the tiler, KK, was originally joined by the Tribunal after the claim was filed, the company through which he did the work no longer exists and the applicant did not proceed against him.

Is the claim statute barred, being brought over six years from when the cause of action arose?

[11] Whilst the claim was out of time against ZUD, it is not out of time against ZUE.

[12] A claim for breach of contract must be brought within six years from the date on which the cause of action arose (s 4 of the Limitation Act 1950). The cause of action arose in this case when the contract was breached, which, if AFS and AFT prove their claim, occurred

on settlement date. This is so because the warranties that are alleged to have been breached were made “at the giving and taking of possession” (clause 6.2), which occurs on settlement date.

[13] Settlement date was on 16 February 2007. Having received legal advice that they were almost out of time, AFS and AFT filed their claim on 15 February 2013, which was one day short of the expiry of the limitation period.

[14] Often in claims about hidden building defects, a claim is not statute barred until six years from the date on which the damage was discovered (or 10 years from when the work was done, whichever occurs first). However, in this case, whilst ZUE built the house, he did not do the tiling work, and was building the house for himself and ZUD. Therefore, whilst he was a builder and vendor, he was not a “residential property developer” under the Building Act 2004. As a result, the warranties in ss 398 and 399 of the Building Act 2004 requiring the work done on the property to be to specified standards (and the applicable limitation period for those warranties) are not incorporated by statute into the Agreement. As the claim can therefore only be based on breaches of the warranties that were written into the Agreement, the six-year period runs from settlement date, which, as AFS and AFT were advised, left them needing to file their claim before 16 February 2013. Having filed the day before this, they are within the limitation period.

[15] The claim can therefore proceed against ZUE.

Can AFS and AFT prove a breach of warranty?

[17] Clause 6.2(5) of the Agreement states that where the vendor has done work on the property (either themselves or by a contractor) then the required building consent was obtained (cl 6.2(5)(a)); the works were completed in accordance with the consent (cl 6.2(5)(b)); a code of compliance was issued for the work (cl 6.2(5)(c)); and all obligations imposed under the Building Act 2004 were fully discharged (cl 6.2(5)(d)).

[18] Similarly, cl 15.4 of the special conditions inserted by the agent states that the house “complies with the District Council building electrical and plumbing codes and any other applicable code of compliance ...”.

[19] Having heard extensive evidence from the parties and their witnesses over two hearings, I find that ZUE breached cl 6.2(5)(d) of the Agreement at the date of settlement, and is therefore liable on the claim. This is so for the following reasons.

[20] Clause 6.2(5)(d) of the Agreement warrants that “all obligations imposed under the Building Act 2004 were fully discharged”. This clause was breached, as, unbeknownst to ZUE, the tiler probably failed to apply adequate waterproofing (or to use proper waterproofing techniques) under the tiles in the bathroom, which subsequently led to a severe damage over the ensuing six years. The Building Code requires waterproofing to last 15 years (see “Compliance Document for NZ Building Code, Clause B2 Durability”). The waterproofing has not lasted six years. As this most likely cause was a failure in the process used at the time of installation, rather than a later intervening event, I find that “all obligations imposed under the Building Act” were not discharged on the date the warranty was given.

[21] ZUE may also have breached cl 15.4, that “the work done did not comply with any applicable code of compliance”. However, as there is a clear breach of cl 6.2(5)(d), and cl 15.4 is either similar or narrower in extent to cl 6.2(5)(d), there is no need to consider cl 15.4 separately.

[22] I have reached the conclusion that the waterproofing was installed incorrectly for the following reasons.

[23] Firstly, photographs of the damage, and a piece of timber produced from the shower area, established that in less than six years, the timber under the shower and on surrounding walls and flooring had rotted extensively and required replacement. This was not a minor leak in one place. It was a substantial failure which is most likely to have had a widespread cause. On the balance of probabilities, this failure was the waterproofing.

[24] This finding is supported by a number of different pieces of evidence. Firstly, a report from YT, an assessor for YU Insurance, which confirms that the rot has not been caused by leaking pipes, but by a failure in the waterproofing under the tiles.

[25] Secondly, a report from an experienced private building inspector, YY. This reports states that in all likelihood, the leaking was caused by a failure in the waterproofing system, whether it be an insufficient thickness in some areas, inadequate reinforcing on the corners, and junctions and/or inadequate rigidity in the timber shower floor.

[26] Thirdly, a report from YP, the builder who undertook the repairs. This report states that the damage has been done by a “severe failure” of the waterproofing membrane under the tiles.

[27] Finally, evidence from the [region] District Council building inspector, VY. VY could not find waterproofing membrane in the damages timber he inspected, although it is accepted that some was used. VY was unable to say exactly what had caused the damage, but noted that it was unlikely to be a cracked tile given the extent of the rot underneath.

[28] I have had regard to ZUE’s view that there are so many other potential causes that I cannot make a finding it was the waterproofing that failed. Possible other causes include: leaking pipes; a cracked tile; multiple concurrent users putting unreasonable pressure on the subfloor; careless splashing of water out of the wet floor area; careless maintenance work on grouting or sealants that have punctured the membrane, or land movement caused by earthquakes. However, whilst these are possible causes, none were established as probable. An investigation carried out for insurance purposes as soon as the damage was found ruled out leaking pipes. Each of the applicants’ witnesses also stated that out of all of these possibilities, the volume of water required to achieve the extent and placement of the rot in the bathroom, and the age of the rot, led to the conclusion that the waterproofing was the most likely cause. The witnesses were consistent in saying that a cracked tile could not have caused this extent of damage. Had an earthquake been to blame, it was considered that there would have been other signs of surface cracks. The extent of the rot in the walls and floor,

and the distance the water had travelled under the tiles, made careless splashing an unlikely cause. AFS and AFT stated they had never had work done on the bathroom and they had never had groups jumping around in there. The builder stated that the extent of rot would have taken several years to develop, making any cause of early origin. Further, I note that whilst YY was careful in his evidence to state that the cause could not be known for sure, his report points to the waterproofing, and having heard the evidence of YP and gone through all the other possible causes at the hearing, he stated that a failure of the waterproofing was probably, although not certainly, the cause. For these reasons, the weight of evidence established that it was probably an inadequate waterproofing job that was to blame.

[29] I have also had regard to ZUE's view that the warranty in cl 6.2(5)(d) should be viewed as being satisfied so long as all Council processes have been satisfied. In this case, the Council had "signed off" the bathroom at the point of sale, and the only reason the house had not been given a code of compliance was that it was sold unfinished. To this day, it remains unfinished. This is something outside ZUE's control. I agree with ZUE that, as the property was only partly completed on settlement, the warranties in cl 6.2(5)(a) and (c) would not apply. Both parties knew that a code of compliance could not yet be issued for the house. The Council was also satisfied at the time that the work had been done in accordance with the consent (cl 6.2(5)(b)). However, by virtue of clause 6.2(5)(d), ZUE and ZUD warranted that what had been done was not only signed off by Council, but that it was compliant with the Building Act, and would therefore last 15 years. As ZUE acknowledged at the hearing, recent High Court decisions have confirmed that clause 6.2(5)(d) has this wider meaning: *Hoof van Huijsduijen v Woodley* [2012] NZHC 2685; *Keven Investments Limited v Montgomery* [2012] NZHC 1596.

[30] In these decisions, the High Court has pointed out that cl 6.2(5)(d) leaves vendors liable for building defects where a local authority's process has failed and the permit or code compliance certificate has been wrongly granted, even when that vendor has no knowledge of any defect in the construction of the house. Given concerns about the onerous nature of this warranty, the eighth edition (and all subsequent editions) of the standard ADLS Agreement, which was first available in 2007, removed cl 6.2(5)(d). Unfortunately for ZUE, his agent used the seventh edition, in which this clause remains.

[31] For these reasons, ZUE is liable to AFS and AFT, six years after the sale, for a hidden defect about which he had no knowledge and did not personally cause, and because an obsolete, or at least soon to be obsolete, Agreement was used. However, regardless of these circumstances, I have no option but to find he is liable because he is taken to know what he signed, and the new bathroom he sold was not only flawed, but so severely flawed that the failure became structurally apparent within the six year timeframe during which ZUE could be pursued for what he had promised.

How much of the repair cost can be claimed?

[32] I find that ZUE is liable to pay AFS and AFT the sum of \$10,063.02 for the following reasons.

[33] The cost of repairing the framing and retiling the bathroom was \$14,247.47. AFS also spent approximately 50 hours on the bathroom himself, for which an allowance has been made at \$20.00 per hour of \$1,000.00. AFS did not originally claim this, as it would have exceeded the \$15,000.00 jurisdiction, but as the bathroom cost is subject to a deduction for depreciation and betterment which he did not expect, I consider it reasonable that this ought to be factored in, as it was an actual cost that he incurred.

[34] The whole bathroom had to be retiled as the same tiles could not be sourced. ZUE accepted that matching tiles could not be sourced, and I lacked evidence that they could be reasonably matched to avoid re-tiling the whole bathroom.

[35] I have reduced the total costs of \$15,247.47 by 66 per cent to \$10,063.02 to take account of the fact that the bathroom had already been used for approximately six years when it was replaced. Many bathrooms are not replaced for the life of a house, but others are replaced, either through failure or renovation, after 15—20 years, and the warranty would not have been breached had the bathroom lasted 15 years. Whilst deductions for depreciation and betterment are not an exact science, it is fair for a deduction to be claimed to recognise

that ZUE is partly paying for a new bathroom after usage of the first bathroom. I have given the bathroom a notional life of 18 years, as a midpoint between 15 and 20 years.

[36] AFS disputes any betterment on the grounds that he bought a new bathroom when he bought the house, and he should only be put back in the position he would have been in had the bathroom been compliant. However, whilst I acknowledge the financial and personal cost of discovering and rectifying this matter, I am obliged to reflect the usage already obtained of the old bathroom, particularly in light of the relatively short durability requirements of the Building Act 2004 for waterproofing (15 years) relative to the expected life of the house itself (50 years).

In relation to the counterclaim, are the applicants liable for ZUD's legal fees of \$350.00?

[37] After ZUD was joined in the proceedings, she filed a counterclaim for her legal fees in obtaining advice about the claim. This counterclaim is not able to succeed, as there is a bar to the recovery of any costs arising from the hearings except in the limited circumstances set out in s 43 of the Disputes Tribunals Act 1988. Under that section, costs can only be awarded where a claim is vexatious or frivolous, knowingly outside jurisdiction or where proceedings have been unnecessarily prolonged. It is usual for all potentially liable parties to be joined, either at the request of a party, or by the Tribunal. The issue of limitation had not been considered at the time ZUD was joined and, in all other respects, ZUD would have been jointly and severally liable on the claim.

[38] It is worth noting that whilst ZUD could not be named in the final order, she had an equitable interest in the outcome given a subsequent potential liability to indemnify ZUE for her share. For these reasons, it was to her benefit that she was able to participate to the extent she did, and she requested that she be entitled to do so.

[39] In summary, ZUD is not able to claim her legal fees of \$350.00.

Conclusion

[40] For these reasons, an order has been made for ZUE to pay AFS and AFT the sum of \$10,063.02 within 28 days.