

If I had a hammer ...



"If I had a hammer
I would hammer in the morning
I would hammer in the evening
All over this land..."

Pete Seeger / Lee Hayes - 1949

The authors of the Hunn Report in 2002 commented on changes in building practices over the years. They referred to the modern practice of engaging a multitude of "labour-only" subcontractors, inadequate project management and a perception that "no one takes overall responsibility for projects anymore". The authors identified this fragmentation of the building industry as leading to a "collective systems' failure – and buildings that leak"

Two such labour only contractors disputed their liability in a recent hearing of the Weathertight Homes Tribunal. After the tribunal held that they were liable for weathertightness issues caused by their faulty installation of the windows, they appealed to the high court.

The decision of Justice Williams in *Boyd v McGregor* (High Court Auckland, CIV 2009-404-5332, 17 February 2010) sets out a clear rationale for such contractors to owe a common law duty in negligence to current and future owners of a house.

Background

Messrs Boyd and Halliday were contracted to a construction company – Woodtec Projects Limited (in liquidation) to undertake carpentry work on a house being constructed for Mrs. McGregor and

her family trust. Boyd and Halliday, trading in partnership, were on site for several weeks and were paid \$21,000 for carpentry work, including the installation of the windows. At the time of construction (1997 and 1998) both Boyd and Halliday had undertaken carpentry apprenticeships, but neither had any experience of the cladding material used on the house, Harditex.

Mr Jensen, the sole director of Woodtec, was a registered master builder. Mr Jensen was bankrupt by the date of tribunal hearing, but appeared to give evidence. Mr Jensen explained that he had overall control of the project and had left Messrs. Boyd and Halliday on site to complete the superstructure of the house.

The tribunal heard that the windows were installed by Messrs. Boyd and Halliday without any sealant; they were simply nailed into place. Boyd and Halliday gave evidence that they were unsure about the correct way to install windows in a house clad with Harditex. They were not provided with manufacturer's literature or other guidance. They gave evidence, and the tribunal accepted that they took advice from a specialist contractor on site, the texture coating applicator, Mr Hay. He in turn explained that there was no need for the builders to take any particular precautions; he would ensure that the windows were adequately flashed by applying sealant around the windows before spraying the texture coating over the Harditex cladding. Boyd and Halliday did not consult Mr Jensen.

The tribunal concluded that:

- (a) Boyd and Halliday owed a duty of care to Mrs McGregor and her trust; and
- (b) they were negligent because they had not installed the windows in accordance with good trade practice and the requirements of the manufacturer;
- (c) the failure to seal the windows into the walls had caused extensive damage; and
- (d) it was appropriate to apportion 10 per cent of the loss to

each of Boyd and Halliday (total 20 per cent) and 60 per cent to the plasterer. The council was left bearing 20 per cent of the overall loss.

The council was found not to be liable for the damage caused by inadequate waterproofing of the block work basement and subfloor area. The tribunal also accepted that the council had not been negligent for failing to check that sealant had been placed behind the reveals of the windows. This would have placed the council in the role of a clerk of works. The council was found liable for other failings with the cladding.

The Appeal

Boyd and Halliday appealed to the High Court on the ground that no duty of care was owed by them to Mrs. McGregor, that they had not breached any relevant duty of care, and the breaches of duty, if established, had not caused water ingress. Boyd and Halliday argued that they were not the "builders of the house", they were employed on a "labour only basis" to undertake only part of the building work under the supervision of Mr Jensen, and that as contractors the court should not impose a common law duty in favour of the owner, Mrs McGregor.

A builder is a builder...

The court dismissed the submission that the label applied to a building party should determine their legal liability;

"[28]...But the Court's view is that labels are arid grounds for debate: in issue are the functions assumed by those said to be liable, what legal obligations may flow from their assumption of those functions, and whether those

obligations have been breached."

The submission that the "labour only" epithet in some way reduced their liability was also roundly rejected. His Honour held that while the contractual terms of a builder's contract were relevant, a labour only builder was still required to meet the requirements of the building code and good trade practice. He referred to:

"[60] ...the functional aspects of the appellants' position. First – and, almost certainly, foremost – whatever their contractual position and possibility of oversight by Mr Jensen, the appellants assumed responsibility for installing the windows, the faulty installation of which was a prime cause of the house leaking. A competent builder and thus the appellants should have known that good trade practice is to achieve weathertightness and to do that requires the installation of the flashings on the windows even if they were not drawn in the plans.

[61] The cases demonstrate the extent of the appellants' involvement in the building also requires to be taken into account. In that regard, an objective assessment must lead to the conclusion that, weathertightness of a building – whether domestic or commercial – is so inherently part of competent building that those who undertake building work are required to achieve weathertightness as a necessary component and should be visited with responsibility to those who erect buildings or have them erected. Thus they should be held liable if their work fails that fundamental function."

The High Court was also influenced by the relative vulnerability of a property owner. Once the defective flashings were covered up, an owner was

vulnerable in the sense of being unable to discover the lack of weathertightness that resulted. By comparison "competent builders and thus the appellants" should have had the skills required to undertake the work so as to achieve weathertightness.

There were no other issues of policy or proximity that persuaded the court that a duty of care should not be imposed. That duty was to ensure compliance with the New Zealand Building Code and standards applying at the time for the work that they were contracted to undertake.

His Honour discounted arguments that the lack of building experience of Messrs Boyd and Halliday, the absence of effective supervision from Mr Jensen, the potentially ambiguous product literature from the manufacturer and a misdirection from the plasterer exculpated them. Their failure to raise their concerns about the flashing of the windows with Mr Jensen was said to be particularly blameworthy.

What next?

The genie – or more appropriately the snail – is out of the bottle. Those involved in building work face liability for any deficiencies in their work irrespective of their building skills and their contractual status.

On the facts of *McGregor*, the court did not need to consider another concern in the Hunn report, that is the absence of good and effective project management. However, it seems likely that had Mr. Jensen not been bankrupt, he would have been found personally liable for his failure to ensure that his contractors were supervised and were provided with appropriate installation instructions from the manufacturer.

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