

Duty of care



The High Court looked at responsibility in relation to waterproofing defects.

Failed waterproofing causes a flood of costs



WRITTEN BY SAM DORNE

Legal battle over failed waterproofing comes to an end after plaintiffs prove their damages at the High Court in duty of care breach.

Water water everywhere

In the heart of Flat Bush, Auckland, stand the Nikau Apartments – a residential complex where a legal dispute arose between the Body Corporate 462420 and individual unit owners against Terracon Industries Ltd, the company responsible for waterproofing in the construction of the apartments.

The Nikau Apartments were constructed between November 2012 and March 2014. Initially initiated by Mr Dan Li and Mr Guang Yu Zhao, the development was later transferred to MJZ Investment

Limited. The building consent, granted in May 2011 and amended in 2013 and 2014, set the framework for construction.

Terracon, engaged for waterproofing works, played a pivotal role in the construction, as evidenced by producer statements and product warranties. However, subsequent investigations revealed multiple defects in the planter boxes, membrane roof, and balcony decks.

The plaintiffs initiated proceedings against Auckland Council and various parties involved in the design and construction of Nikau Apartments, seeking damages for remediation costs and associated damages. The Council and other parties quickly settled the dispute, and the focus was narrowed down to Terracon Industries Ltd, the third defendant responsible for waterproofing.

After being served the proceedings Terracon did not file a defence or admission. The lack of a defence or any participation from Terracon resulted in the plaintiffs seeking judgment by default. As a result the case proceeded under "formal proof" as per Rule 15.9 of the High Court Rules 2016. This requires a plaintiff to file an affidavit as evidence establishing, to the Judge's satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages.

Defects and damages

The plaintiffs asserted that

Terracon owed them a duty to exercise reasonable skill and care in waterproofing the roof, decks, and planter boxes. The breach of this duty, led to building defects that violated the Building Code and caused substantial damages.

Specifically, the allegations against Terracon revolved around three identified defects in the Nikau Apartments:

1. Water entry through planter boxes and adjacent courtyards (Defect A)
2. Poor installation of the membrane roof (Defect B)
3. Waterproofing to balcony decks not in compliance with consented plans (Defect E).

The plaintiffs' estimated losses exceeding \$5,067,108.69, covering the costs of remedying the defects, consultant fees, additional Body Corporate management expenses, interest, and legal costs.

Evidence

Various experts presented evidence, including Graham Durkin, a chartered building surveyor, and Jacob Woolgar, a chartered and registered building surveyor, which established the defects and their impact. These defects included improper installation of waterproof membranes, inadequate drainage, and deviations from approved plans.

Duty of care

The High Court summed up the well-known principles regarding a duty of care, by stating:

it is well established that a contractor owes a duty to take reasonable care

to prevent damage to persons whom they should reasonably expect to be affected by their work.⁵ The duty includes ensuring compliance with the Building Code, good trade practice, and other relevant statutory requirements. The duty is owed to owners of properties affected by the contractor's work and to subsequent purchasers of such properties who the contractor should reasonably expect to be affected by their work.

The High Court had no issue in finding Terracon in breach of its duty of care by failing to ensure that the waterproofing work met building consent requirements, industry standards, and the Building Code. The defects identified in planter boxes, membrane roofs, and balcony decks were deemed substantial, causing water ingress, structural damage, and potential long-term threats to the building's integrity.

The quantum of damages sought by the plaintiffs was calculated, encompassing remediation costs, professional fees, Body Corporate management costs, and additional expenses. The total estimated cost of remedial works, as assessed by quantity surveyor Paul Ranum, amounted to approximately \$6,986,121 plus GST.

Conclusion

The legal journey of Nikau Apartments unveils the complexities of construction

defects, duty of care, and the interplay among various parties involved in the building process. Terracon's failure to meet industry standards and comply with building consent requirements resulted in significant damages, prompting a detailed assessment of remediation costs. It serves as a reminder of the importance of diligence, compliance, and accountability in the construction industry to avoid protracted legal disputes and ensure the integrity of residential structures.

About the author:

Sam Dorne works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with BDT. He recently returned to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

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