SUMMARY

Case: Abernethy & Anor v Coughlan & Ors
File No: TRI 2009-100-000022/ DBH 01666
Court: WHT
Adjudicator: RM Carter
Date of Decision: 26 August 2009

Background
The claimants, Mr and Mrs Abernethy, own a townhouse that was built in 1994 and they purchased it in 2003. The house is suffering damage from leaks and needs to be reclad. The claimants therefore sought $334,846.10 from all respondents.

Summary of Facts
Mr Coughlan, Mr Humphrey and 2 other people, previously owned the land on which the house is built. The land was then transferred to Stockdale for the development of townhouses in early June 1994, including the subject dwelling. A family purchased the newly built townhouse and lived in it for almost 9 years. In 2003, the claimants wanted to buy the unit. Following on from a report of Mr Beazley (an employee of Futuresafe Building Inspections Ltd – in liquidation), the claimants arranged for various repairs to be made as soon as they purchased it. Some work was done before they moved in but after settlement, the claimants noticed bubbling paint inside near the front door. They then lodged a claim with the WHRS in late October 2003.

Mr Light (WHRS Assessor) investigated and completed his first report on 28 July 2004 concluding that the dwelling was eligible as a leaky building and estimated costs of repair work at $10,597.50 over and above what the claimants had already spent on repairs recommended by Mr Beazley.

The claimants lived in the house for 16 months until January 2005 when they moved to Dubai, at which the property was let. For various reasons, the work Mr Light recommended was not done.

Mr Light later carried out a further inspection and issued a supplementary report on 21 June 2007. He now estimated that the costs of remediation were $115,500.23

Quantum
Repairs
The Tribunal concluded that repairs to the north and east walls should be compensated for but that repair costs to the south and west walls should not be included. Therefore, of the $240,668.06 for repairs and professional fees, the compensable proportion was assessed at 35% (north wall) plus 15% (east wall): 50%, $120,334.03. The Tribunal also accepted the claim for $3,953.04 for costs incurred mitigating their loss

Consequential losses
The Tribunal accepted the figure of $30,225 for consequential losses.

General damages
The claimants had not lived in the dwelling for over 4½ years of the 6 years since they bought the house and had only occupied the house for 16 or 17 months. The claimants however continued to bear the burden of coping with the implications of the dwelling being a leaky building, which has involved stress, inconvenience and worry. Accordingly the Tribunal found that the amount claimed for general damages should be significantly reduced to $7,500 for Mrs Abernethy who born the major share of the burden, and $5,000 for Mr Abernethy.

Contributory negligence and mitigating loss
The Tribunal found that there was an element of contributory negligence by the claimants in regards to Mr Beazley's second pre-purchase inspection report. They knew that the building was built with risky materials; the vendors had badly neglected it; and it was likely that moisture had already penetrated the building envelope. The claimants took a calculated risk that such a building would not turn out to be leaky. Nothwithstanding that the precautions and steps they took were reasonable, the claimants must share in the above costs of it having turned out to be a 'bad buy'.

The claimants decided to live abroad in 2005 when the problems with the house that Mr Light had identified in 2004 were still unresolved. They encountered difficulties engaging tradesmen to carry out repairs. As a result, Mr Light's recommendations were never implemented or fully implemented. The Tribunal therefore found that while they needed to be sure of what needed to be done, the claimants' decision to live abroad must be seen as a factor in the delay in addressing the problems. The Tribunal held that the figure of $167,012.07 should be reduced by 10% - ie $16,701.21

Summary of quantum
The claimants were entitled to the full amount of $60,310.86 made up as follows:

• repairs and professional fees	$120,334.03
• costs incurred mitigating loss	$ 3,953.04
• consequential losses	$ 30,225.00
• general damages	$ 12,500.00
Sub-total	**$167,012.07**
❑ Less 10% for contributory negligence and failure to mitigate	$ 16,701.21
Total	**$150,310.86**

Settlement
The claimants cannot recover more than the amount of $150,310.86 determined. For that reason, the $90,000.00 paid or agreed to be paid by the Council in its settlement agreement with the claimants must be deducted from this amount

Summary of Decision
Liability of Mr Coughlan
- *As project manager*

The Tribunal found that there was insufficient evidence that Mr Coughlan acted as a project manager. The Tribunal therefore held that Mr Coughlan did not personally control, direct or supervise the construction.
- *As developer*

The Tribunal did not accept that Mr Coughlan was a developer, neither personally or apart from his role as a director of Stockdale. The Tribunal also accepted that there are no judgments finding a director negligent and personally liable for omitting to appoint such a person. Mr Coughlan was therefore not found to have breached such a duty to the claimants on those grounds.

- *As architectural designer*

The Tribunal found that if Mr Coughlan had included ventilation holes in his plans they probably would have been incorporated into the building. This omission together with the absence of any reference to the manufacturer's instructions on the plans caused or contributed to the claimants' material losses. The Tribunal therefore held that Mr Coughlan was negligent to the claimants as future purchasers. Based on those reasons, the Tribunal found that Mr Coughlan was jointly and severally liable to the claimants in the sum of $60,310.86 as the designer.

Liability of Mr Humphrey

- *As developer*

The Tribunal did not accept that because Mr Humphrey was a director of Stockdale, who managed the project for Stockdale, that that made Mr Humphrey a developer. Even though the directors acted on its behalf, it did not make him (as a director) personally liable as a developer.

- *As project manager*

The Tribunal accepted that Stockdale and its directors left it to the labour-only builders and other contractors to run the site, and that Mr Humphrey did not manage the project in the sense that he was personally controlling or supervising the site. However the Tribunal considered that Mr Humphrey's appointment to the position of project manager imposed on him a duty of personal responsibility and care. He was paid as an employee of the company to carry out this task. The Tribunal therefore found that as the project manager or administrator, Mr Humphrey was responsible for supervising workmanship unless someone else was appointed to that role. The Tribunal did not consider that the fact Mr Humphrey worked part-time as project manager was sufficient to conclude that he did not owe a duty of care in that capacity. Accordingly Mr Humphrey was held to have breached his duty of care as project manager in not taking steps as project manager to ensure the workmanship on site was adequate. The Tribunal therefore found Mr Humphrey jointly and severally liable to the claimants in the sum of $60,310.86 as the project manager.

Liability of Stockdale Investment Auckland Ltd – developer

Stockdale was the developer, "at the centre of and directing the project", and was responsible to future purchasers accordingly. Where there are defects in the building which have caused damage through leaks, the Tribunal held that Stockdale is responsible for the leaks and damage, where they arise from its negligence. The Tribunal therefore found Stockdale jointly and severally liable to the claimants in the sum of $60,310.86 as the developer.

Liability of Mr Beazley – pre-purchase inspector

The Tribunal found that Mr Beazley was negligent in not identifying the lack of ventilation holes in the base of the building. However the Tribunal did not find that there was a widespread failure on his part in the discharge of his duty to the claimants. The Tribunal did not find that Mr Beazley's conclusion that these were maintenance issues was a negligent failure – there was a widespread lack of maintenance and neglect – or a negligent misstatement or a breach of the Fair Trading Act on his part. On balance the Tribunal did not accept that Mr Beazley was negligent as a pre-purchase inspector in his advice to the claimants, given his brief and the limitation of not doing invasive testing, except for his failure to identify the lack of ventilation to the under-floor space. But even that is mitigated to a degree by his belief that he was unable to remove interior panels to inspect the joists. The Tribunal therefore held Mr Beazley jointly and severally liable to the claimants for $9,046.63 arising from and limited to his failure to identify one important defect as the pre-purchase inspector – ie the absence of vents which could have been remedied in isolation.

Contribution
The Council took a commercial risk in settling with the claimants. It would not be fair on the other liable parties for the Tribunal to now attempt to apportion some of the liability the Council took upon itself to put an end to the claim against it, to them. The Tribunal therefore considered that the only fair and practical course in the circumstances is to leave the Council's settlement out of the apportionment.

The Tribunal found that Mr Coughlan, Mr Humphrey and Stockdale all breached their respective duties of care owed to the claimants and they have all been found liable for the total amount of $150,310.86. Mr Coughlan, Mr Humphrey and Stockdale are jointly and severally liable for the established amount of the claim, for which $90,000.00 must be deducted from that. They are concurrent tortfeasors and therefore each is entitled to a contribution from the others towards the amount of their liability. The Tribunal held that a fair and equitable apportionment was therefore:

Stockdale	45%
Mr Coughlan	20%
Mr Humphrey	20%
Mr Beazley	15%

Result
The claim was proven to the extent of $150,310.86 against Stockdale, Mr Coughlan, Mr Humphrey and Mr Beazley. That amount was reduced by $90,000.00 being the amount the Council has undertaken to pay, leaving a balance of $60,310.86. Based on the findings made above, the Tribunal ordered that:

- Mr Coughlan pay the claimants $60,310.86 and is entitled recover a contribution of up to $48,248.69 from Mr Humphrey and Stockdale including up to $9,046.63 from Mr Beazley, for any amount he pays in excess of $12,062.17
- Mr Humphrey pay the claimants $60,310.86 and is entitled to recover a contribution of up to $48,248.69 from Mr Coughlan and Stockdale including up to $9,046.63 from Mr Beazley, for any amount he pays in excess of $12,062.17
- Stockdale pay the claimants $60,310.86 and is entitled to recover a contribution of up to $33,170.97 from Mr Coughlan and Mr Humphrey including up to $9,046.63 from Mr Beazley, for any amount it pays in excess of $27,139.89
- Mr Beazley pay the claimants $9,046.63

If these respondents meet their obligations under this determination, this will result in the following payments to the claimants:

- Mr Coughlan $12,062.17
- Mr Humphrey $12,062.17
- Stockdale $27,139.89
- Mr Beazley $ 9,046.63