



## **SUMMARY**

**Case:** Allan & Anor v Christchurch City Council & Ors

**File No:** TRI 2009-101-000110/ DBH 04892

**Court:** WHT

**Adjudicator:** C Ruthe

**Date of Decision:** 21 July 2009

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### **Background**

The claimants filed the present claim under the Weathertight Homes Resolution Services Act 2006 against a number of respondents involved in the construction of the subject dwelling. However as some of these respondents have been removed from these proceedings prior to the hearing, this determination deals with the responsibilities of the following respondents:

- First respondent Christchurch City Council
- Second respondent European Plaster & Design Limited
- Third respondent Mr O’Fagan
- Seventh respondent Mr O’Donnell

### **Summary of Facts**

- 2004: claimants looking to purchase a newer home - the subject dwelling was only 4½ years old
- 9 July 2004: claimants took possession
- 2006: claimants’ neighbours told the claimants that they were unable to sell their house due to a negative building inspection report revealing elevated moisture levels. The claimants immediately engaged Property Check Christchurch to undertake moisture readings identifying possible water ingress problems advising the claimants to lodge a claim with the WHRS
- 24 July 2006: claimants lodged a claim with the WHRS
- 30 October 2006: date of WHRS assessor's report
- May 2008: remedial work was carried out prior to this determination amounting to \$114,984.00 Repairs were completed in September 2008 at a cost of \$122,606.78

### **Quantum**

The claimants’ final claim was for \$195,033.41. However for the following reasons, the claimants were only entitled to the amount of \$84,894.00.

#### *General damages*

The Tribunal awarded the claimants \$7,500 each for general damages because with the damages award being \$58,000, an award of \$40,000 would be totally disproportionate given all the relevant factors.

#### *Remedial work*

The claimants completed a full re clad of the property. However the key issue was whether a full re clad of the property was the proven level of the reasonable cost of repair. The Tribunal accepted that whilst a full re clad is a superior solution, the issue was whether it was the only solution which would enable the claimants to be put back

in the position they would otherwise have been in had it not been for the leaks. The Tribunal considered that it was significant that the assessor originally considered targeted repairs to be the appropriate course to follow. After considering all relevant matters, the Tribunal concluded that targeted repairs represented the reasonable cost of repairs and should be used for calculating loss.

#### *Betterment*

The Tribunal accepted that repainting work amounted to betterment as the building was well due for a repaint. The claim was therefore deducted by \$7,125.68 for painting. The net recoverable cost by the claimants was therefore no more than \$58,768.16. The Tribunal noted that the actual painting costs incurred with the full remediation were \$19,670.00 and so this deduction on the basis of a partial reclad was proportionate and appropriate.

#### *Contributory Negligence*

The Tribunal accepted the claimant's evidence that they were not sufficiently aware of the degree of risk they were taking when purchasing their monolithically clad home as to amount to contributory negligence on their part. There was no evidence produced establishing that information on leaky monolithically clad buildings was widely known in Christchurch. The Tribunal therefore held that there was no contributory negligence

#### *Summary of claim*

• Remediation costs	\$58,785.00
• Contract works insurance	\$ 1,259.86
• Interest (to 16 June 2009)	\$ 5,477.39
• Accommodation costs	\$ 4,371.75
• General damages	<u>\$ 15,000.00</u>
	<b><u>\$ 84,894.00</u></b>

#### **Summary of Decision**

##### *Liability of Council – territorial authority*

The Tribunal concluded that the Council would not have issued a Code Compliance Certificate if the inspections had been up to scratch. The Tribunal therefore held that the Council was negligent in this regard.

##### *Liability of European Plaster & Design Ltd – installer of plaster cladding*

The Tribunal concluded that although there was lack of evidence of major damage to the framing where the spouting is embedded into the plaster, the Tribunal held that negligence was established because of the possibility of future damage over a longer timeframe. Allegations relating to the sill flashings and the parapets however were unsuccessful.

##### *Liability of Mr O'Fagan – director of development company/project manager*

Mr O'Fagan was the sole director and principal shareholder of Tui Projects and Developments Ltd (in liquidation), the company that originally purchased the land and developed the site. Based on the facts, the Tribunal considered that Mr O'Fagan has personal liability particularly in light of his direct and pivotal involvement in project managing this project.

##### *Liability of Mr O'Donnell – director of plaster cladding company*

Mr O'Donnell was the director of European Plaster & Design Ltd. Mr O'Donnell set up the company making it clear that this was the vehicle undertaking all plaster cladding business transactions. The claimants pointed out that Mr O'Donnell visited the site and carried out inspections as an employee of the company. Mr O'Donnell however

was not joined as an employee. The Tribunal therefore held that it was the company's responsibility to inspect the project and not Mr O'Donnell

### **Apportionment/Contribution Issues**

- The Tribunal found that the diverter flashings were the major cause of leaks. However the diverter/flashing installer was not a party to these proceedings. The Tribunal therefore held that the developer, Mr O'Fagan, must meet his responsibility. Mr O'Fagan was therefore found liable for 75% of the claim
- The Council's negligence due to various inspection failures was set at 20% and was therefore entitled to a contribution of 80% by Mr O'Fagan
- Mr O'Fagan was entitled to the contribution of 10% from the Council and 15% from European Plaster & Design Ltd
- The Tribunal had already determined that 80% of the causation of leaking can be attributed to the failed spreaders installed by the roofer. Unfortunately the roofer is not a party to these proceedings and therefore this responsibility fell on the developer/project manager, Mr O'Fagan. Mr O'Fagan as the developer would have been held liable for 20% were it not for the responsibility he has for the roofer's negligence. He was therefore held to be 70% liable overall.
- The plastering company was held to be liable for 10%

### **Result**

- The Council breached the duty it owed to the claimants and was therefore jointly and severally liable to pay the claimants the sum of \$84,894.00
- European Plaster & Design Ltd breached the duty it owed to the claimants and was therefore jointly and severally liable to pay the claimants the sum of \$84,894.00
- Mr O'Fagan breached the duty he owed to the claimants and was therefore jointly and severally liable to pay the claimants the sum of \$84,894.00
- Mr O'Donnell was not found negligent and accordingly the claims against him were dismissed

If all the respondents meet their obligations pursuant to the above orders, it will result in the following payments being made by the respondents to the claimants:

• Council	\$16,978.80
• European Plaster & Design Ltd	\$ 8,489.40
• Mr O'Fagan	<u>\$59,425.80</u>
	<u><b>\$84,894.00</b></u>