

**IN THE WEATHERTIGHT HOMES TRIBUNAL  
TRI 2009-101-00022**

<b>BETWEEN</b>	<b>CAREY CLAN TRUST</b> Claimant
<b>AND</b>	<b>REX STILL</b> First Respondent
<b>AND</b>	<b>SUSAN STILL</b> Second Respondent
<b>AND</b>	<b>TAURANGA CITY COUNCIL</b> Third Respondent
<b>AND</b>	<b>CGAF LIMITED T/A BAY INSPECTIONS</b> <b>(Removed)</b> Fourth Respondent
<b>AND</b>	<b>THE BUILDING ADVISORY BUREAU NZ LIMITED (BAB)</b> <b>(Removed)</b> Fifth Respondent
<b>AND</b>	<b>KENRICK BUCKLEY</b> <b>(Removed)</b> Sixth Respondent
<b>AND</b>	<b>WESTERN COATINGS LIMITED</b> Seventh Respondent
<b>AND</b>	<b>JOHN STEWART</b> <b>(Removed)</b> Eighth Respondent
<b>AND</b>	<b>SUCCESS REALTY LIMITED T/A BAYLEYS TAURANGA</b> <b>(Removed)</b> Ninth Respondent

Hearing: 9 December 2009 and 18 December 2009 (final submissions)

Appearances: Mr Mrs Still, Mr Still, Mr Kettelwell & Ms Jones for the Claimants

Decision: 23 December 2009

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**FINAL DETERMINATION**  
Adjudicator: C Ruthe

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## **I. INTRODUCTION**

### **1.1 History**

[1] In February 2007 the Carey Clan Trust purchased 5A Cotter Way, Tauriko, Tauranga from Mr and Mrs Still pursuant to an agreement for sale and purchase, for \$1 million. Mr Still is a plasterer by trade. The Stills built this as their family home. The problems that give rise to this claim relate to materials used and execution by the tradesmen.

[2] Both Mr and Mrs Still made an application for a building consent on 14 May 1999.<sup>1</sup> The house was built over a lengthy period commencing mid 1999. The obtaining of a code compliance certificate took a considerable period of time and was not issued until 13 March 2007.<sup>2</sup>

[3] The claimants purchased the property from the Stills. They obtained a pre-inspection report prior to settlement. Within a short time, they became concerned about the appearance of bubbles on the exterior cladding and noticed water penetrating into the house. This ultimately led to them filing a claim with the Weathertight Homes Tribunal in January 2008.

### **1.2 Parties**

[4] The Carey Clan Trust is the present owner of the property.

[5] Mr Rex Still, the first respondent, was allegedly the builder/ head contractor/ project manager. He and his wife were also the vendors of the property.

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<sup>1</sup> See Appendix D, Assessor's Report.

<sup>2</sup> See n1 above.

[6] Mrs Susan Still, the second respondent, was allegedly a developer.

[7] Tauranga City Council, the third respondent, is the territorial authority who issued the code compliance certificate (this claim settled).

[8] Western Coatings Limited is a plastering contractor owned by Mr Rex Still, and was involved in the plastering work on the property.

### **1.3 Evidence Considered**

[9] In Weathertight Homes proceedings the evidence starts accumulating from the moment the assessor's report is filed and the Chief Executive's determination that it is an eligible claim. The procedures adopted by the Tribunal require all the parties to file statements and responses which become part of the evidential record, subject to any deponent being required to answer questions at the hearing. In this case evidence was given at the hearing by:

- i. Assessor;
- ii. Mr R Carey and Mrs J Carey.

[10] Other evidence considered is set out in Annexure 1.

[11] There was no appearance by either Mr or Mrs Still. Mrs Still had filed an email which was treated as an application for removal. Mr Still attended the teleconference and this application was declined for reasons set out in Procedural Order 2.

[12] The Tribunal had the opportunity of viewing the property and observed all of the defects including external and internal damage to the property.

## II. ISSUES

### 2.1 Partial Settlement

[13] On 8 December 2009, the claimants settled their claim against the Tauranga City Council, leaving their claim against Rex and Susan Still and Western Coatings Limited.

### 2.2 Claim in negligence against Rex and Susan Still

[14] The issue concerning the Stills are essentially identical as the owners of the land on which they built a dwelling at 5A Cotter Way.

- (a) were either or both of the Stills acting as building developers/project managers?
- (b) if so were the Stills negligent?

### 2.3 Claim against Western Coatings Ltd

[15] Was the company in breach of its duty of care by failing to undertake the plastering work with due skill and care?

## III. WHERE DOES THE BUILDING LEAK?

[16] The expert evidence on leaking was given by Mr Alvey, the assessor, who had provided an extensive and comprehensive report on the dwelling. Mr Alvey's summary of defects is as follows (the right hand column lists the paragraph numbers in his report):

	<b>Defect</b>	<b>Ref to Assessor Report</b>
Insufficient	Insufficient clearance has been	12.1.1(2)(h) to

ground clearance of cladding	provided at the bottom of the cladding with the adjacent ground levels creating raised moisture levels in the North (including corridor access to G/S bedrooms), South, and East Elevations.	(j); 15.2.1(i); 15.3.1(i)
Control joints	No vertical or horizontal movement control joints have been provided to the cladding in any of the elevations.	12.1.1(2)(a); 12.2.1(2)(a); 12.3.1(2)(a); 12.4.1(2)(a)
Parapets	Flat topped parapets have been constructed without the provision of a suitable capping in all of the elevations resulting in high moisture readings and decayed timber.	12.1.1(2)(l); 12.2.1(2)(f); 12.3.1(2)(e); 12.4.1(2)(e); 5.2.1(i)
Flashing	Insufficient or inadequate flashings have been installed in multiple affecting the following areas: <ul style="list-style-type: none"> <li>• South elevation – no saddle flashing provided to roof parapet/cladding junction;</li> <li>• South elevation – no flashing provided to the garage doors and electrical meter box;</li> <li>• North elevation, kitchen roof parapet junction with cladding;</li> <li>• West elevation, kitchen roof parapet junction with cladding;</li> <li>• East elevation, bedroom roof parapet junction with upper floor accommodation cladding.</li> </ul>	12.1.2(2)(e); 12.2.2(2)(d); 12.3.1(2)(c), (n) & (o); 12.4.2(2)(j) & (k); 15.2.1(i)
Joinery head	Ends of joinery head flashings have been buried in the cladding in	12.1.1(2)(e); 12.2.1(2)(d);

flashings	all elevations.	12.3.1(2)(c); 12.4.1(2)(c).
Master bedroom deck	<p>Multiple defects with the master bedroom deck including:</p> <ul style="list-style-type: none"> <li>• No overflow provided to the deck;</li> <li>• Clearance between the base of the cladding and the tiled finish to the deck insufficient in places;</li> <li>• Metal balustrading on the master bedroom deck top fixed, also no overflow been provided to allow water drainage.</li> <li>• The curved steel beam supporting the deck structure penetrates the cladding in two locations without provision of suitable flashings.</li> <li>• No suitable drip details provided to the deck beam.</li> </ul>	12.1.1(2)(d), (i), (k), (n), & (r); 15.2.1(i).
Drip Details	No drip details provided between the timber fascia boards and the cladding in all elevations.	12.1.1(2)(b); 12.2.1(2)(b); 12.3.1(2)(b); 12.4.1(2)(b);
Cladding to window clearance	Insufficient clearance has been provided between the base of the cladding/ window surround and the head flashing.	12.1.1(2)(s); 12.2.1(2)(h); 12.3.1(2)(f); 12.4.1(2)(f);
Insufficient or unsuitable drip clearance	No suitable bell-shaped drip detail has been provided to the cladding / window surround adjacent to the window head.	12.1.1(2)(t); 12.2.1(2)(i); 12.3.1(2)(g); 12.4.1(2)(g).



Unsealed fixings/ penetrations	Fixings and penetrations have not been sealed.	12.1.1(2)(m); 12.3.1(2)(l).
Chimney	Multiple defects with the chimney have caused water ingress and damage.	12.1.1(2)(v)-(x), & (z); 12.2.1(2)(g), & (k); 15.2.1(i).
Timber Fascia	Timber fascia boards have been embedded within the solid plaster cladding finish in multiple locations.	12.3.1(2)(r); 12.4.1(2)(h); 15.2.1(i).

#### **IV. CLAIM IN NEGLIGENCE AGAINST MR STILL, FIRST RESPONDENT AND MRS STILL, SECOND RESPONDENT**

##### **4.1 Mr Still**

[17] The evidence before the Tribunal, both by testimony and documentation makes it is abundantly clear Mr Still's involvement in the construction of the house was extensive. He was the project manager and lead developer. He undertook much of the building work, chose most of the materials, engaged and paid all of the subcontractors and was in control of the construction throughout. As noted the construction took place over a very lengthy period of time.

[18] The standard of workmanship in many respects can only be described as appalling. The use of incorrect materials, the application of only one coat of plaster rather than three, the failure to put in membranes where required, the inserting of spouting through plaster work, plastering into spouting, mis-aligned downpipes that directed water away from drainage holes, the creation of drainage holes within the cladding apron of the building, plastering to the base of the foundations without leaving the required 150mm gap, and so badly applying the plaster it bubbled in a multitude of places.

[19] Details of other areas of leaking have already been set out in paragraph [16] above.

[20] Mr Still also breached his duty of care as a director of the seventh respondent. The liability of directors such as Mr Still, whose company is effectively a one-man band, has been dealt with at some length in the recent decision of the Tribunal in *D A and D H Franklin & Ors v L & M Spargo & Ors* WHT TRI 2009-101-15 to 18 (18 December 2009). Mr Still is in an identical position to that of L Mack, the third respondent, in *Mayfair Street Units & Anor v L and M Spargo & Ors* WHT TRI 2009-101-15 and 18, (21 December 2009) ("*Mayfair Street Units*"). The Tribunal concludes that Mr Still was negligent. He is jointly and severally liable for 100% of the claim.

#### **4.2 Mrs Still**

[21] The Tribunal is satisfied that Mrs Still had a role in the project. The clearest evidence is that found in the documentation. This shows that Mrs Still is a joint applicant for the building consent and she was a joint applicant for the subdivision of the property. Various items of correspondence from the building inspectors referred to her. The only inference that could be drawn is that she was also one of the developers.

[22] Both she and Mr Still failed to file a response, comply with any directions with regard to filing of witness statements nor did they appear at this hearing. Mr Still advised the case manager that he and his wife could not be contacted from 10 November 2009 until 5 December 2009.

[23] Section 75 of the Weathertight Homes Resolution Services Act 2006 provides that a Tribunal may draw inferences from party's failure to act, and determine the claim based on the available information. This section is invoked and applies to both Mr and Mrs

Still. They were aware of the claims against them. Mrs Still was a joint applicant for the building permit. Being a family home and not a commercial development, the inference is drawn that she would have had input and involvement in the building project that took place over a number of years. The Tribunal draws the inference she was a co-developer with her husband.

[24] In *Body Corporate 188273 & Ors v Leuschke Group Architects Limited & Ors* (2007) 8 NZCPR 914 (HC), Harrison J stated that a developer owes actual duties to owners as the building develops, a duty that flows on to subsequent purchasers.

**V. CLAIM AGAINST STILLS FOR BREACH OF CLAUSE 6.2(5) OF THE AGREEMENT FOR SALE AND PURCHASE**

[25] Clause 6.2(5) of the agreement provided as follows:

- “(5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:*
- (a) the required permit or consent was obtained; and*
  - (b) the works were completed in compliance with that permit or consent; and*
  - (c) where appropriate, a code compliance certificate was issued for those works; and*
  - (d) all obligations imposed under the Building Act 1991 and/or the Building Act 2004 (together ‘the Building Act’) were fully discharged.”*

[26] The Tribunal has already set out its findings on leaks and damage. All of the faults which have led to leaks were in breach of the statutory obligations imposed by the Building Act 1991.

[27] The vendor warranties have been held to apply in claims including *Tabram v Slater & Anor* WHT TRI 2008-100-00041 (17 April 2009) Adjudicator Pezaro, and in *Tweedale v Pearson & Ors* WHT TRI 2008-101-00067 (1 December 2009) Adjudicator Pitchforth.

[28] The Tribunal holds the vendors Mr and Mrs Still are in breach of this clause and therefore are liable pursuant to the terms of the contract for the damage suffered by the claimants.

## **VI. CLAIM IN NEGLIGENCE AGAINST WESTERN COATINGS LTD, SEVENTH RESPONDENT**

[29] The seventh respondent, Western Coatings Limited, was the subcontractor engaged to undertake the plastering work on the house. This company owed a duty of care to subsequent purchasers to perform its work with due skill and care. The evidence of the defective plastering work set out and detailed in the assessors report and in Annexure 2 clearly establishes that Western Coatings Limited breached its duty of care in performing that building work. Due to its negligence and breach of duty of care, there have been major areas of moisture ingress into the house.

[30] The company is directly responsible for the lack of control joints, insufficient or inadequate flashings, ends of joinery head flashings being buried in plaster, proceeding with plastering with insufficient clearance between the base of the cladding and the head flashings as well as being instrumental in faults concerning the chimney.

[31] The Tribunal assesses this company's liability at 45% of the claim.

## **VII. QUANTUM**

### **7.1 Introduction**

[32] The claimants in their opening submissions dated 10 December 2009 conceded the amount of their claim is limited to their actual economic losses. The cost of remediation as sought considerably exceeded that sum. The Carey Clan Trust conceded \$575,000 is the limit of the general damages that can be awarded. The Trust advised it accepted the loss in value the trust has suffered was reflected in the Quotable Values Report of 1 July 2009 which shows the value of improvements as being \$575,000. This concession turns out to be incidental to the decision on damages.

### **7.2 Evidence**

[33] At the hearing the assessor was questioned on quantum. He was very clear in his evidence that he considered the appropriate range of an area of quantum for remediating this particular dwelling would be within \$430-\$490,000. He stated the Kwanto figures generally proved reliable. He said his firm undertook private remediation work from the aspects of design and supervision and invariably found the Kwanto estimates (this firm apparently undertaking approximately 45% of all estimates in Weathertight Homes cases throughout the country) more within 10-15% either side of the figures they provided. He considered the quotation obtained from Blackie Builders at \$623,390.63 to be very high.

[34] It is noted this was an estimate, it was not the result of any tendering process and Blackie Builders was the only quotation submitted. The Tribunal considers that the claimants need to be able to get the work done in Tauranga and the Blackie quote is one indicator of likely costs. An additional 7.5%, consistent with the assessor's evidence, is allowed. The appropriate level of damages for remediation is \$526,750.00.

### 7.3 Special Damages –Consequential Losses

[35] The High Court has applied a cap to the damages claimed for remedial works and then made awards for consequential losses.

[36] In *Chase v de Groot* [1994] 1 NZLR 613, the High Court In *Taylor v Auto Trade Supply Limited and Anor* [1972] NZLR 102, awarded as such as of architects and engineers fees, and loss of rental.

[37] Counsel for the claimants described the consequential losses as the following:

(a) Temporary alternative accommodation (\$540 pw x24 weeks)	\$13,000.00
(b) Storage costs	\$7,525.00
(c) Repairs of possible damage caused to private land by truck movements	\$25,803.88
(d) Electricity costs during remediation work (\$348.00 per month) for six months	\$2,088.00
Costs for temporary repairs	<u>\$2,520.00</u>
(a) New plans and specifications	\$12,000.00
(b) Building Consent	\$3,500.00
(c) Insurance	<u>\$1,993.35</u>
 TOTAL	 \$68,430.23

#### 7.3.1 Evidence produced in Support

[38] The Trust produced statements to support the claim including rental advertisements supporting the rental figure of \$540.00 a week; carpet quote supporting a claim for \$4150 for the areas of the carpet directly affected by the leaking out of a total re-carpeting cost of \$17,000.00; lane repair costs and other quotes supporting the claim.

### 7.3.2 The Final Claim allowed

[39] The following supplementary expenses the tribunal considers appropriate and these amounts are allowed.

• Remedial costs	\$526,750.00
• Consequential losses set out in [36]	\$ 68,430.23
• TOTAL	\$595,180.23

### 7.4 **General Damages – Claim Abandoned**

[40] The Carey Clan Trust abandoned their claim for general damages for distress and inconvenience acknowledging that the property was owned by the Trust and the Tribunal's decision in *Crosswell & Ors v Auckland City Council* (17 August 2009) WHT TRI 2008-100-107, Adjudicator Lockhart QC made such a finding following earlier decisions by the Tribunal.

## **VIII. COSTS**

[41] Section 91 of the Weathertight Homes Resolution Services Act 2006 states:

### **91 Costs of adjudication proceedings**

(1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—

(a) bad faith on the part of that party; or

(b) allegations or objections by that party that are without substantial merit.

(2) If the tribunal does not make a determination under

subsection (1), the parties to the adjudication must meet their own costs and expenses.

[42] In *Brodav Limited & Ors v Cook Family Trust & Ors* (31 March 2009) WHT TRI 2008-101-59 and 66, the Tribunal gave the consideration to the meaning of bad faith.

[43] The claimants have applied for costs. The Tribunal considers this is a case in which costs should be awarded against the Stills. The Stills have refused to participate in any of the procedures other than apply for the removal of Mrs Still and having the hearing deferred. They did not turn up to the hearing. They did not file any statements. The claimants consider the seeking of a later hearing date was a bad faith exercise, so the Stills could expend on their trip before facing the prospect of a determination against them.

[44] They have put the claimants to extra legal costs and they have acted in bad faith by not being involved and effectively thumbing their noses at the process.

[45] In *Trustees Executors Ltd v Wellington City Council* (16 December 2008) HC Wellington, CIV 2008-485-739, France J, costs were held to be assessable and based on 2B of the District Court Rules 2009 as being appropriate. The claimants have filed a schedule of their costs in accordance with that scale and this comes to the sum of \$9,728.00. This sum is awarded.

## **IX. CONCLUSION AND ORDERS**

[46] The claim is proved to the extent of \$595,180.23 together with costs of \$9,728.00.

[47] For the reasons set out in this determination, the following orders are made:



- i. The first, second and seventh respondents, being respectively Rex Still, Susan Still and Western Coatings Limited having joint and several liability are ordered to pay to the claimants the sum of \$604,908.23 forthwith.
- ii. The first and second respondents are entitled to recover a contribution of up to \$272,208.70 from the seventh respondent. The seventh respondent is entitled to recover a contribution of up to \$332,699.53 from the first and second respondents.
- iii. The claim against the third respondent has been settled.
- iv. The claimants can only seek and obtain the amount from the first, second and seventh respondents up to and including the sum that, together with the settlement sum with the Third Respondent does not exceed \$604,908.23.

**DATED** this 23rd day of December 2009

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C Ruthe  
Tribunal Member