IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000042
[2012] NZWHT AUCKLAND 9

BETWEEN	STUART CLARK and LESLEY DUNNING as Trustees of the CLEARWATER TRUST Claimants
AND	FLORA CREATIVE LIMITED First Respondent
AND	LANDMARK HOMES BOP LIMITED Second Respondent
AND	PAUL CLARKE Third Respondent
AND	TAURANGA CITY COUNCIL Fourth Respondent (Removed)

Hearing:	5 October 2011 and 29 November 2011
Appearances:	Mr R Kettelwell, for the Claimants Flora Creative Limited – no appearance Ms V Whitfield, counsel for the Second and Third Respondents
Decision:	22 February 2012

DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] In 2000, Mr Stuart Clark and Ms Leslie Dunning, the claimants, engaged Landmark Homes Limited, to build their home at Papamoa. In 2005 they became concerned with cracks to the cladding and a rotting window sill. The diagnosis and subsequent remedial works failed to address the fundamental problem, namely that the house had significant water ingress defects requiring a full reclad. The reclad was eventually carried out in 2010-2011 for a total cost of $149,097.42.

[2] In this claim Mr Stuart Clark and Ms Dunning seek to recover from Landmark Homes Limited, now known as Flora Creative Limited (Flora Creative), the first respondent, the total cost of repairs and associated damages. Flora Creative was not represented and the claim against it has essentially been one of formal proof.

[3] Mr Paul Clarke, the third respondent, is the director of Flora Creative and also of Landmark Homes BOP Limited (Landmark BOP), the second respondent. Landmark BOP was created in 2005 as part of a restructuring of the Landmark business.

[4] The claimants contend that Mr Paul Clarke and Landmark BOP failed to diagnose and adequately remediate the defects with their house in 2005 and again in 2007. They seek damages from these respondents for additional losses said to have been caused by delays in carrying out full remedial works. At issue is the nature of the legal duties, if any, that Mr Paul Clarke and Landmark BOP owed to the claimants in relation to the failed diagnoses and remedial works. The calculation of the quantum against these two parties is also in dispute. The parties however agree, that if Mr Paul Clarke and Landmark BOP are liable, then the claimants recovery against them must be restricted to losses that they have incurred over and

above that which had already been inflicted by Flora Creative, the party responsible for the original faulty construction.

[5] Landmark BOP accepts that it acted negligently in relation to the remedial works carried out in 2007. It contends, however, that its liability is limited to $1,831.85.[1]

[6] The following matters remain in dispute and must be determined by the Tribunal:

a) Have the claimants proven their claim for $149,097.42 plus general damages and consequential losses against Flora Creative?
b) Did Mr Paul Clarke personally owe a duty of care to the claimants to administer the day-to-day operations of Flora Creative in such a way as to ensure quality control in the construction of its houses?
c) Did Mr Paul Clarke personally owe and breach a duty of care to the claimants to properly investigate the cause of the problems in 2005 and to give proper advice about remedial works? If so, what was the loss caused and what is the measure of damages?
d) Did Landmark BOP owe a duty of care to the claimants to identify the cause and scope of the weathertight defects and to recommend appropriate remedial works in 2007 – and what was the nature and extent of that duty?
e) Did Landmark BOP breach that duty of care? And if so, what is the measure of damages caused by the breach of duty?

[1] That figure is arrived at by taking the costs that would have been incurred by the claimants in 2007 and the costs that would have been incurred in 2010-2011 in undertaking the same works.

FACTUAL BACKGROUND

[7] The claimants' house, built in 2000, was clad with plastered fibre cement board (direct fixed Harditex sheets). The unchallenged evidence of the assessor, Mr Paul Probett , is that the house as originally constructed, had the following defects:

a) poor construction of kick-outs and diverters;
b) incorrectly executed horizontal joints between fibre cement sheet cladding;
c) absence of adequate control joints;
d) inadequate butt jointing of polystyrene features at parapet level;
e) failure to reinforce polystyrene feature band junctions with the fibre cement wall with fibreglass mesh;
f) incorrect placement of vertical joints at corners of openings – particularly windows;
g) lack of any protective membrane under the wooden capping of the balustrade on the balcony; and
h) defective window installation.

[8] The brother of Mr Paul Clarke was a friend of Mr Stuart Clark and the brother introduced the claimants to Mr Paul Clarke. The claimants decided to use Landmark Homes Limited to construct their house because it was a reputable Tauranga building firm and was also a registered master builder.

[9] In November 2000 Bay Building Certifiers Limited issued a Code Compliance Certificate for the house. In accordance with the building contract, Landmark Homes Limited provided the claimants with a five year Master Build guarantee.

[10] Landmark BOP was incorporated in April 2005 as part of the restructuring of the Landmark business. The name of the original company, Landmark Homes Limited, was changed to Flora Creative

Limited as part of the restructuring. Flora Creative ceased trading at the end of 2005.

[11] In September/October 2005, after they had discovered that the window sill of the master bedroom was soft and crumbling, the claimants contacted Landmark Homes Limited to ask them to address this problem and also the cracks which they had observed in the exterior cladding. Whether there was then a meeting on site between Ms Dunning and Mr Paul Clarke is a factual matter in dispute that I must resolve.

[12] The claimants did not know of the restructuring of the Landmark business until this claim was well underway. Throughout the period 2005-2010 they believed they were dealing with the original Landmark Homes company that had built their house.

[13] By letter dated 6 October 2005, Mr Paul Clarke, wrote to the claimants on Landmark Homes Limited letterhead in the response to the claimants' concerns with the cracks in the cladding. The letter was signed by Mr Paul Clarke, as managing director. Salient paragraphs of that letter read:

> "Further to your telephone call relating to cracks in your exterior cladding and moisture around a master bedroom window I respond as follows:
>
> Your home was constructed in 2000. It appears that thermal expansion and contraction has caused minor cracking to your cladding mainly to the western facing walls.
>
> These cracks are minor and can be repaired by using a flexible sealant massaged into the cracks and then over painted. The over painting will obviously result in highlighting the repair as after five years there would have been fade and wearing out of the paint.-----
>
> We offer to repair the cracks using flexible sealant at our expense in preparation to a repaint of your home. Repainting of the home would be at your expenses.------

> Our construction manager has arranged for our window supplier to check the sealing of one window in the master bedroom to be sure that moisture from the sill mitre is not allowing moisture to be absorbed into the window liner.

[14] The claimants accepted this advice and the sealant was applied to the house as recommended. Landmark Homes Limited honoured its commitment to pay the costs.

[15] In November 2005, Ms Dunning wrote to Mr Paul Clarke and Landmark Homes thanking Mr Clarke for the action taken. Ms Dunning also indicated that she still had concerns about cracks on the front wall of the veranda. The letter went unanswered but for some time after that the claimants believed that the problems had been addressed.

[16] However, in 2006 the claimants discovered that the master bedroom window sill was still rotting. They again contacted Mr Paul Clarke although by this time the new company, Landmark BOP was operational and carrying out the remaining Landmark business.

[17] In April 2006 a foreman from Landmark BOP visited the claimants' house to inspect the window. He advised that he would return to try and rectify the problem by sealing some external cracks. However, he did not return.

[18] Over the next six months, Ms Dunning made determined efforts to ensure that the ongoing problems with the rotting window sill and cracks were addressed.

[19] In early March 2007, the claimants arranged for Mr Frans Boucken, building surveyor, to do a non-invasive moisture check on the walls of their home. Mr Boucken recommended that a full building inspection be undertaken to make sure that there were no

other leaks. He also advised that all rotten timber would need to be removed and replaced.

[20] By email dated 16 March 2007, Anna Zandestra, the manager of Landmark BOP, wrote to the claimants setting out a remedial work plan for their house. The salient paragraphs read:

> Kent is going to go through with you what we propose to do with your dwelling which is the following:
>
> 1. Metalcraft has been faxed the new capping detail for your home and will be over as soon as possible to install this.
> 2. Vaughan has been able to eliminate the fungal growth therefore health hazard according to Frans Brocken has been eliminated.
> 3. Any rot in this area of concern will be replaced with new timber, at this point if you wish to get Frans back for an independent assessment Kent needs to be present so that all parties concerned are together at the same time. This eliminates any confusion and time. The walls will then need to be lined accordingly. This will also incur plastering and painting of this area.
>
> This action will then resolve the problem area of your home.
>
> I am aware of the urgency in this matter and I know that you love your home and want it repaired correctly – which it will be.
>
> I have no doubt in Kent's ability and am more than happy with Frans who we have worked for in the past and continue to work with. Please be assured that Landmark will address this problem in the next week and complete it to your entire satisfaction.

[21] Further repairs were carried out to the claimants' house by Landmark BOP in April and May 2007. This included the relining of a wall with gib, the installation of new cap flashing on the roof parapet and the removal and replacement of damaged timber.

[22] The claimants were dismayed that the remedial works, albeit carried out at no expense to them, had been concluded without them

being given the opportunity to inspect the work. Ms Dunning contacted Landmark BOP about this and was advised that she should trust that the work was done properly because the company was a master build warranty company and the builders were master builders.

[23] In 2009, and in the belief that repairs had successfully remediated the leaks, the claimants transferred their property to their trust. Later that year, while painting the house, Mr Stuart Clark noticed cracks in the cladding had deteriorated. Mr Boucken was again consulted and identified high moisture readings. This led to a claim being filed with DBH. The assessor recommended a full reclad with an estimated cost of $225,334.00.

[24] A full reclad was carried out in 2010-2011 and for a total cost of $149,097.42. Significant savings were achieved because of the prudence and careful steps taken by the claimants.

ISSUE A – Have the claimants proven their claim against Flora Creative Limited

[25] Flora Creative was not represented at the hearing although, Mr Paul Clarke, its director was present in his personal capacity as the third respondent and director of Landmark BOP. Ms Whitfield who appeared as counsel for both Mr Paul Clarke and Landmark BOP confirmed that Flora Creative was unrepresented. Ms Whitfield had no instructions to represent Flora Creative.

[26] I accept the unchallenged evidence of Mr Probett, that the claimants' home had substantial weathertight defects, requiring a full reclad. Mr Browne, the claimants' expert witness, also gave unchallenged evidence on this issue.

[27] There was likewise no dispute that Flora Creative was the company which built the house for the claimants.

[28] On the basis of this evidence and the now well settled law on the legal responsibility of builders to construct sound buildings,[2] I am satisfied that Flora Creative owed and breached a duty of care to the claimants and is liable for the full cost of the reclad. I further accept the again unchallenged evidence of Mr Probett and Mr Browne that the reclad costs of $149,097.42 (allowing for $8,000 betterment) were fair and reasonable. The particular care the claimants took in seeking to reduce the costs of repairs have kept the overall costs to a modest level.

[29] I therefore conclude that the claimants have established the claim against Flora Creative for the cost of repairs in the sum of $149,097.42. I am further satisfied that the additional costs as set out at paragraph 22(a) of the claimants' closing submissions dated 29 November 2011 are fair and reasonable. Flora Creative is thus liable for remedial works and associated costs for the total sum of $164,562.62.

[30] The claimants have also sought general damages of $25,000 from Flora Creative. I accept their evidence that since 2005 they have been living with the anxiety and uncertainty arising from ongoing problems with their home. In order to fund the repair works it was necessary for Mr Stuart Clark to find more lucrative work out of the country, namely in Papua New Guinea, and for him to spend extended periods of time there.

[31] The guideline for awarding general damages in leaky building cases is $25,000 per dwelling for owner-occupiers.[3] I conclude that the claimants should be awarded $20,000 in general damages against Flora Creative. I have set the figure at $20,000 bearing in mind that other parties have caused the claimants stress and inconvenience. The issue of the contribution of those other parties is determined below.

[2] *Bowen v Paramount Builders(Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
[3] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

ISSUE B – Did Mr Paul Clarke personally owe a duty of care to the claimants to administer the day-to-day operations of Flora Creative in such a way as to ensure quality control of the construction of its houses?

[32] In a recent High Court decision *Mackfall v Beattie*[4] it was held that in order to establish personal liability it is necessary to point to a person's actual role in contributing to the defects. Liability does not stem from the status of a director, nor is that status a defence or immunity if the individual is indeed a tortfeasor in his or her own right. The High Court emphasised that the exercise is very much a case specific enquiry, requiring a focus on the actual conduct of the respondent.[5]

[33] In this case the evidence falls well short of establishing that Mr Paul Clarke personally owed a duty of care to administer the day-to-day operations of Flora Creative in such a way to ensure quality control. There was also no tenable evidence that any lack of quality control by Mr Paul Clarke caused any loss. Counsel for the claimants did not pursue this claim with any great enthusiasm or vigour and, in my view, for good reason. This particular claim against Mr Paul Clarke is thus dismissed.

ISSUE C – Did Mr Paul Clarke personally owe the claimants a duty of care in relation to advice given in 2005 about the use of silicone to repair the cracks, and did he breach any such duty? If so, what was the loss caused and what is the measure of damages?

The Factual Context

[34] In determining this issue I must first determine a key factual matter in dispute, namely whether Mr Paul Clarke personally visited the claimants' house in 2005 and advised Ms Dunning on site that as a remedial solution, silicone should be used to repair the cracks in the cladding.

[4] *Mackfall v Beattie* HC Wellington, CIV-2011-485-82, 22 December 2011.
[5] At [64].

[35] I prefer and accept the evidence of Ms Dunning that Mr Paul Clarke visited her house in 2005 and gave the advice, as alleged. Such advice was given after Mr Paul Clarke and Ms Dunning had walked around the property.

[36] Ms Dunning presented as a very careful witness, who has vigilantly pursued this claim for many years. She contacted Landmark Homes Limited in 2005 to express concerns about cracks and a rotting window sill because she was concerned that the five year Master Build guarantee was about to expire. I accept the whole of her account.

[37] I reject the submission made by Ms Whitfield that Ms Dunning retracted her evidence that Mr Paul Clarke advised her on site in 2005 about using silicone to repair the cracks. I accept that Ms Whitfield directly challenged Ms Dunning's recollection in cross-examination and acknowledge that Ms Dunning's reply was that she could not "guarantee 100%" that the meeting took place. However, the test in law is not whether a witness has a 100% guarantee of their recollection of the past events. I find that on the balance of probabilities the claimants have established that Mr Paul Clarke did visit the site in 2005 and gave the advice alleged.

[38] Mr Paul Clarke has no recollection of visiting the house in 2005. He says that if he did so, he would not have given the advice alleged, since he personally did not have the expertise to give it. However, I do not accept that explanation. In my view Mr Paul Clarke down played the extent to which he was aware of problems with leaky homes and his general understanding about remedial solutions. He clearly had some expertise.

[39] Mr Paul Clarke obviously is, and was in 2005, a competent businessman. He has approximately 30 years experience in the construction industry. In 2005 he knew that some of the houses that

his company had built were constructed with materials that can give rise to leaky home issues (that was his evidence). In giving the advice to Ms Dunning, Mr Paul Clarke held himself out as an expert.

[40] On the basis of these facts, the claimants allege that Mr Paul Clarke personally owed them a duty of care to properly diagnose the defects in 2005 and that he was negligent in not doing so. It is said that the advice given about using silicone to repair the cracks was plainly wrong. Mr Paul Clarke denies that he personally owed the claimants a duty of care. He argues that the letter of 6 October 2005 written on Landmark Homes Limited letterhead and signed by him as its managing director makes it clear that it was the company giving advice and not Mr Paul Clarke personally.

The Law

[41] As indicated above,[6] the question of whether a director personally owes a duty of care requires a careful and close scrutiny of the actual role he or she performed. In determining whether the elements of the tort have been established, the factual matrix is all important.[7] The leading decision on the elements of the tort of negligent misstatement is the Court of Appeal decision *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited.*[8] In that case it was held that in the case of negligent misstatement "the proximity enquiry generally focuses on the interdependent concepts of assumption of responsibility by a person with a special skill and foreseeable and reasonable reliance by the plaintiff".[9]

[42] The Court in *Rolls Royce* also noted that liability for negligent misstatement and physical services can overlap.[10] That of course is

[6] At [64].
[7] *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17 (CA); see also, *Chee v Stareast Investments Limited* HC Auckland, CIV-2009-404-5255, 1 April 2010.
[8] *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 (CA).
[9] *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* at [97]; see also North *Shore City Council v Wrightman* HC Auckland, CIV-2010-404-3942, 30 November 2010.
[10] *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* at [98] – [99].

the case here where there was also a physical inspection of the house by Mr Paul Clarke (albeit an external one only) and advice given.

[43] The critical question here is whether Mr Paul Clarke personally assumed responsibility to the claimants, that being an essential element of the tort of negligent misstatement.[11]

Decision

[44] In focussing on the actual role of Mr Paul Clarke, it is clear that he was personally involved in a significant way in giving the advice to the claimants and attending to their problems. Those problems were not confined to one isolated incident of leaks but included more general concerns about cracks in the cladding in other parts of the house including the veranda balustrade. It was Mr Paul Clarke who personally visited the claimants' home, inspected the house with Ms Dunning and then gave advice about the use of silicone. Mr Paul Clarke claims that he had insufficient experience to carry out an inspection and give such advice but I have already found against him on these factual issues. In essence, Mr Paul Clarke held himself out to Ms Dunning as having the necessary expertise to make the diagnosis and provide the advice. It is equally clear that Ms Dunning, was relying and did rely on the advice given, and that Mr Paul Clarke must have known that.

[45] I further note that there had originally been a personal connection between Mr Paul Clarke and Mr Stuart Clark and this is likely to have been a factor in the personal visit by Mr Paul Clarke. There was also good reason for Mr Paul Clarke to have been actively involved giving the imminent expiry of the five year guarantee. He would naturally had been concerned about the financial implications

[11] In a minute issued on 15 December 2012 the Tribunal raised with the parties the issue of whether the claimants had a potential cause of action against Mr Paul Clarke for breach of section 9 of the Fair Trading Act 1986. For reasons set out in a memorandum of counsel for the claimants dated 27 January 2012, the claimants elected not to pursue a cause of action based on section 9.

of any breach of guarantee and also concerned that the company honour it.

[46] The subsequent letter from the company, Landmark Homes Limited, signed by Mr Paul Clarke as managing director and dated 6 October 2005, is not in my view decisive of the issue of whether Mr Paul Clarke personally assumed responsibility to the claimants. It may in fact be that both Mr Paul Clarke and the company owed duties of care. I accept that there are aspects of the letter of 6 October 2005 which tend to suggest that the company was the entity providing the advice. On the other hand, however, the letter does convey a sense of personal involvement by Mr Paul Clarke in ensuring that a remedial solution was provided. Furthermore, Ms Dunning replied to this letter by writing to Mr Paul Clarke. The evidence overall establishes that Mr Paul Clarke was personally very much in control of the diagnosis of the problem in 2005 and the decision of the company to apply the sealant at its own expense. In any event the claimants rely principally on the erroneous advice given on site prior to the letter of 6 October 2005 being written.

[47] On the basis of this factual matrix, I am satisfied that the claimants have established that Mr Paul Clarke personally owed them a duty of care in relation to the inspection and advice about the cracks and the rotting window sill when he visited the site in 2005. Mr Paul Clarke assumed responsibility to the claimants holding himself out as having special skills. There was foreseeable and reasonable reliance by the claimants. In all the circumstances it is fair, just and reasonable to impose a duty of care.[12]

[48] I now turn to consider whether Mr Paul Clarke breached the duty of care (i.e. was his advice negligent) and if so, what loss, if any did that advice cause.

[12] See *Mackfall v Beattie* at para [71] where reference is made to *Johnson v Watson* [2003] 1 NZLR 626 (CA) re duty of care was imposed in relation to repair work.

Breach of Duty of Care

[49] Mr Browne was of the view that faced with the evidence of cracks in the cladding and the rotting window sill, a person with skill and expertise in remediating leaky homes would have raised alarm bells and made a more exacting and careful diagnosis. Advice about filling the cracks with silicone was clearly inadequate. Mr Probett agreed and said that by 2005 the building would have reached a tipping point and an expert with substantial knowledge of leaky homes was required. Mr Moyle, expert witness for Mr Paul Clarke, noted that the Harditex manual at the time recommended silicone as a remedial solution for cracks in the cladding. Mr Moyle further said that the advice given was not perhaps the advice that he would personally have given.

[50] From all this evidence I conclude that Mr Paul Clarke, in holding himself out as an expert on proposing a remedial solution, breached the duty of care owed to the claimants. The diagnosis and advice was not only inappropriate and erroneous but fell below the standard of a reasonable prudent advisor in his position.

Causation and Measure of Damages

[51] In relation to the measure of damages, the parties agree that in the case such as this, where the loss suffered overlays a pre-existing loss (i.e. the original damage was caused by Flora Creative) the proper measure of damages is the additional losses flowing from the further breach i.e. the recovery is restricted to loss over and above that which had already been caused by Flora Creative.

[52] The parties also agree in principle that the additional losses are the increased costs of the remedial works occasioned by delay in undertaking that work. However, what is in dispute is the scope and nature of the remedial works that would have been undertaken in 2005 if a proper diagnosis and advice had been given at that time.

[53] The claimants argue that by 2005 weathertight problems with fibre cement clad homes were well known, and that a proper diagnosis would have led to train of inquiry (including the commissioning of an expert) resulting in a full investigation of the entire house and a full reclad. Mr Paul Clarke challenges that submission and contends that, if there was actionable negligence (which he denies), then the scope of the remedial works that would have been carried out in 2005 would have been significantly less than a full reclad.

[54] The evidence on this issue was somewhat inconclusive. In part this is because there was no clear evidence as to the exact nature of the cracks and problems that were evident in 2005. No expert report was commissioned at that time. I have already accepted Mr Probett's evidence that by 2005 the building had reached a tipping point and that a full investigation should have been recommended. However the claimants have failed to establish that this would have resulted in a full reclad. On the evidence provided, and in particular Mr Probett's view of the high risk and nature of the west wall, I conclude that the negligence of Mr Paul Clarke led to a failure at that time to remediate the west wall. The measure of damages from Mr Paul Clarke's negligence is thus the increased costs between 2005 and 2011 of remediating the west wall of the house. The issue of the quantification of that loss is dealt with separately at the end of this judgment.

ISSUE D – Whether Landmark BOP Limited owed a duty of care to the claimants to identify defects and recommend appropriate remedial works in 2007 and, if so, to what extent?

[55] Landmark BOP was the company that undertook the 2007 repairs. It is agreed between the parties that Landmark BOP owed the claimants a duty of care to take reasonable skill and care in carrying out those works.

[56] The claimants contend that Landmark BOP also owed them a duty of care to identify further defects and recommended appropriate remedial works – and that if such duty had been properly discharged, would have resulted in a full reclad. They contend that not only were the actual remedial works carried out defective but that they have suffered additional loss occasioned by delay as a result of a failure to have the house fully reclad in 2007.

[57] Landmark BOP denies it owed a duty of care to the claimants to identify the full extent of the defects and to recommend appropriate remedial works resulting in a full reclad. It contends that it was in the same position as an ordinary builder attending the site to deal with the single issue of a leaky window sill in the master bedroom. There was no duty, Landmark BOP says, to inspect and/or diagnose other areas of the house unrelated to the leak in the master bedroom window sill.

[58] I reject the argument of Landmark BOP that its duty in relation to 2007 remedial works was confined in the narrow manner contended for. The fundamental flaw in the argument advanced by Landmark BOP is that it was not in the same position as an ordinary builder or tradesman dealing with the single issue of the repair of the window sill. The history and factual context clearly suggests otherwise; I refer in particular to the exchange of email correspondence between Ms Dunning and Landmark BOP.

[59] The claimants, and in particular Ms Dunning, were very vigilant over many years in seeking to ensure that any weathertight issues with their home were just addressed in a proper way. By 2007, when it agreed to carry out remedial works, Landmark BOP received comprehensive and detailed information from Ms Dunning about the history of the problems and what their concerns were. She described the house as a “Landmark house with a leak and it needs to be repaired properly both structurally and aesthetically”. She went

on to note “we plan to live in this house a long time. However if for some reason we decide to sell it I want to provide evidence it is not leaking and that previous leaks have been repaired properly.” The information provided by Ms Dunning to Landmark BOP included advice from Mr Boucken, a building inspector, that a full building inspection be carried out and that all rotten timber needed to be replaced.

[60] Ms Dunning also made it clear in her correspondence with Landmark BOP that there had been previous attempts to rectify problems but that the source of the leak had not been found. The seriousness of the situation was apparent to Landmark BOP following Ms Dunning’s advice on 7 March 2007 of fungal growth and mould on some of the timber framing.

[61] Landmark BOP agreed to carry out the repairs at no cost to the claimants. While legally a separate entity from the original Landmark company (Flora Creative) it obviously felt morally obliged to do so. Ms Dunning who in 2007 assumed that Landmark BOP was the same company that had built their home, dealt with Landmark BOP on that basis and understanding. She naturally assumed that they had a full understanding of the history and background – but in any event her correspondence directly with Landmark BOP set this out very clearly. I do not accept that Landmark BOP was in the position of “a tradesperson” as Ms Whitfield submitted, attending a property for a particular issue.

[62] In my view Landmark BOP agreed in 2007 to undertake remedial works, knowing that the claimants had significant concerns and that Mr Boucken had recommended a full investigation. In the email to Ms Dunning from Anna Zandstra, manager of Landmark BOP dated 16 March 2007, Ms Zandstra noted Ms Dunning’s concern that she wanted their home repaired correctly. Landmark BOP promised to do so. The remedial works actually carried out

included a new cap flashing to the roof parapet, the replacement of timber to the top of the trimmer studs and replacement of rotten timber around the window sill. On all the information made available to Landmark BOP it was reasonably foreseeable that a more extensive investigation was required to address the claimants' concerns.

[63] I conclude that Landmark BOP, as the claimants have argued, owed them a duty of care to identify defects and recommend appropriate remedial works based on a full investigation of the entire house. By 2007 problems with leaky homes were widely known. According to Mr Paul Clarke's evidence when Ms Dunning contacted Landmark BOP in August 2006 with her concerns, Landmark BOP was operating the Landmark business. The Landmark business, including its director Mr Paul Clarke had significant and lengthy experience in the construction industry. In the circumstances it is fair, just and reasonable to impose a more expansive duty of care on Landmark BOP.

Did Landmark BOP Limited breach the duty of care causing loss to the claimants and if so, what is the measure of damage caused by the breach of duty?

[64] I accept and prefer the evidence of Mr Probett and Mr Browne that a full investigation of the house should have been carried out in 2007. By that time problems with leaky homes were well known[13] and Landmark BOP had received comprehensive information from Ms Dunning. The company had obvious experience in the construction industry. Its diagnosis and focus on the window sill was in the circumstances plainly wrong.

[65] I reject the evidence of Mr Moyle on this point. Mr Moyle's position was premised on what I have found to be an erroneous

[13] *Mackfall v Beattie* HC Wellington, CIV-2011-485-82, 17 October 2001.

assumption that Landmark BOP was a mere builder attending the site for a particular issue.

[66] The evidence of Mr Probett and Mr Browne, together with the evidence of the understanding and knowledge of Landmark BOP in 2007 (including its awareness of Mr Frans Boucken's recommendations) support a finding that Landmark BOP was negligent in failing to identify further defects and recommend a full investigation and extensive remedial works. I conclude that Landmark BOP breached the duty of care owed.

[67] On the issue of what loss was caused by the breach, I accept the evidence of Mr Probett and Mr Browne that a full investigation would have led to a train of inquiry and the issue of a building consent, resulting in a full reclad. The measure of loss is thus the increased costs between a full reclad in 2007 as opposed to 2010-2011 when a full reclad was actually carried out.

[68] Mr Moyle was of the view that the general practice in Tauranga in 2007 was that a building consent would not have been required. It was thus argued on behalf of Landmark BOP that in 2007 it would have been unlikely that a building consent would have been applied for and granted and at the most the claimants could establish is that there would have been some sort of targeted repairs. Mr Moyle and Ms Whitfield on behalf of Landmark BOP referred to the 2008 Amendment to Schedule 1 of the Building Act 2004 which is said to have significantly tightened the requirements in relation to building consents for remedial works and changed the previous practice.

[69] While I accept that evidence of practice is relevant, the critical test to be applied is in my view, what a reasonable and

prudent approach would have been in 2007.[14] Mr Moyle in fact accepted that a building consent "should" have been obtained although maintaining his position that on the basis of practice it was not required of that time.

[70] I find that a reasonable and prudent approach would have been to carry out a full investigation and to apply for and obtain a building consent and that this would have resulted in a full reclad. In my view the 2008 Amendment is not decisive of the issue. In any event, that Amendment was intended to clarify a somewhat grey area.

[71] In relation to the cause of action against Landmark BOP I therefore conclude that Landmark BOP owed and breached a duty of care to the claimants to identify further defects and recommend extensive remedial works in 2007. The loss caused by this breach of duty to the claimants was the difference in costs between a full reclad in 2007 and a full reclad in 2010-2011. I now turn to address the issue of quantifying that loss.

ISSUE E – Quantification of the Loss

[72] Expert evidence was given on the issue of quantification of loss by Ms Wacker, expert witness for Mr Paul Clarke and Landmark BOP, and Mr Moyle, Mr Browne and Mr Probett.

[73] There was substantial consensus among the experts that the 2007 remedial works did not accelerate any of the existing damage and did not cause any new defects. I also accept the evidence of Ms Wacker that there would have had to have been a substantial deterioration between 2007 and 2010-2011 for the scope of the remedial works to have been materially different. It may be, as Mr

[14] *Auckland Council v Ryang* HC Auckland, CIV-2011-404-2570, 28 September 2011, at [24]; see also *Body Corporate 208191 v Joyce Building Limited* HC Auckland, CIV-2006-404-005373, 16 December 2011, at [46].

Probett concluded, that the 2007 remedial works did not completely mitigate ongoing damage. However, there is no evidence of substantial deterioration in the damage as between 2007 and 2010-2011. In terms therefore of assessing the quantification of loss I conclude that there has been no change to the scope of works between 2007 and 2010-2011. The issue of quantification of loss is thus confined to the question of what increased costs there have been because of the passage of time.

[74] In dealing with the question of quantification of loss it is of course necessary to distinguish between the liability of Mr Paul Clarke and that of Landmark BOP. The liability of Mr Paul Clarke relates only to the west wall and relatively little evidence was produced about issues affecting the calculation of quantum for limited remedial works that should have been carried out in 2005/2006.

[75] There are a number of critical issues that the experts could not reach agreement on which have a material influence on the calculation of the loss. In reaching my conclusion on quantum I have been greatly assisted by the schedule attached to Ms Wacker's supplementary brief of evidence.

[76] The issues I need to determine in relation to quantification generally, include:

a) whether there was a material change between 2007 and 2010-2011 in the amount of timber that needed to be replaced; and
b) whether a remediation specialist would have been required in 2007.

[77] I note that all experts agreed with Mr Moyle that the likely start dates for remediation works would have been later than the date of diagnosis. In relation to the liability of Mr Clarke therefore the commencement date for quantification of a loss should be 2006. In

relation to Landmark BOP, the commencement date for determining quantum should be October/November 2007.

[78] As to the issue of whether a building consent would have been obtained in 2007, I have already concluded that it would have. I therefore approach the question of quantification on the basis that a building consent would have been obtained in both 2007 and 2011. This means that it is only the increased cost of a building consent that is relevant for the purposes of the Landmark BOP quantum calculation.

[79] The claimants also seek general damages against Landmark BOP and Mr Paul Clarke. However, both Mr Paul Clarke and Landmark BOP say there is no basis for any award of general damages against them (even if liability is established).

Timber Replacement

[80] The claimants have not established that there would have been a material change in the amount of timber replacement as between 2005-2006 and 2010-2011 and/or 2007 and 2010-2011. No real evidence was given about the period 2005 to 2010-2011. In relation to the period 2007 to 2010-2011 Mr Probett and Mr Moyle were of the view that practices had not changed much. I therefore exclude from the quantum calculation any change in the amount of timber to be replaced.

Remediation Specialist

[81] Mr Browne for the claimants contended that prior to 2008 the local authority generally did not require a remediation specialist. This would mean that in 2011 the claimants faced the increased costs of having to engage a remediation specialist.

[82] I find the evidence on this issue to be inconclusive. I conclude therefore that the claimants have not made out a claim for costs associated with a remediation specialist.

GENERAL DAMAGES

[83] I accept that in principle general damages can be awarded against both Mr Paul Clarke and Landmark BOP. In this case the evidence supports the claim that the delay to having the house repaired has given rise to stress and inconvenience to the claimants. I reject the submission of Ms Whitfield that in absence of direct evidence of stress and the like (e.g. medical certificates etc) the claimants have not established a claim for general damages. While general damages can therefore be awarded, I would note, however, that any award of such damages should be proportional to the overall award of damages awarded against any particular party.

[84] I reject the submission of Mr Kettelwell, on behalf of the claimants, that Mr Paul Clarke and Landmark BOP should be jointly and severally liable with Flora Creative for general damages awarded against Flora. The loss for which Flora Creative is responsible is separate and distinct from the losses caused by Mr Paul Clarke and Landmark BOP.

QUANTUM – Mr Paul Clarke

[85] I find Mr Paul Clarke is liable to the claimants in the sum of $9,693.00, being the additional loss suffered by the claimants for his breach of duty of care in 2005. I have taken this figure from the schedule attached to Ms Wacker's supplementary brief of evidence.[15]

[86] In addition, Mr Paul Clarke is to pay to the claimants a sum of $1,500 for general damages.

[15] Supplementary Brief of Evidence of Michelle Wacker dated 18 November 2011 at Annexure B.

QUANTUM – Landmark BOP Limited

[87] I find that Landmark BOP is liable to pay to the claimants the sum of $15,361 for additional loss caused by its breach of duty of care to the claimants in 2007.

[88] The figure of $15,361 consists of the sum of $13,935 (from the schedule to Ms Wacker's supplementary brief of evidence)[16] plus an increase in building consent fees of $1,426.00.

[89] In addition, I conclude that Landmark BOP should pay to the claimants a sum of $3,500 in general damages. In my view the omission of Landmark BOP was more significant than the negligence of Mr Paul Clarke in 2005.

CONCLUSION AND ORDERS

[90] The claim by the claimants, Mr Stuart Clark and Ms Lesley Dunning, as trustees of the Clearwater Trust, is proven against Flora Creative Limited, the first respondent, to the extent of $184,562.62 (being $164,562.62 special damages plus $20,000 general damages).

[91] The first respondent, Flora Creative Limited, is to pay the claimants the sum of $184,562.62 forthwith.

[92] The claim by the claimants Mr Stuart Clark and Ms Lesley Dunning as trustees of the Clearwater Trust against the second respondent, Landmark Homes BOP Limited, is proven to the extent of $18,861 (being $15,361 special damages plus $3,500 general damages).

[93] The second respondent, Landmark Homes BOP Limited, is to pay the claimants the sum of $18,861.00 forthwith.

[16] Annexure B.

[94] The claim by the claimants Mr Stuart Clark and Ms Lesley Dunning as trustees of the Clearwater Trust against Mr Paul Clarke, the third respondent, is proven to the extent of $11,193 (this consists of special damages of $9,693 plus $1,500 general damages).

[95] The third respondent, Mr Paul Clarke, is to pay the claimants the sum of $11,193 forthwith.

[96] I have heard no submissions on the issue of apportionment of liability and whether that issue is of any relevance to this claim. In terms of the overall responsibility of Mr Paul Clarke on the one hand, and Landmark BOP Limited on the other, to the additional loss sustained by the claimants, I would assess Landmark BOP Limited's responsibility to be at least 80% and Mr Paul Clarke's 20%.

[97] Leave is reserved to the parties to apply to the Tribunal for further orders on the issue of apportionment of liability should that be necessary and at all relevant.

CLAIM REMAINS OPEN

[98] At the request of the claimants this claim will not be terminated at this time. The claimants have requested the claim be left open to allow them to pursue the Government's Financial Assistance Package.[17]

DATED this 22nd day of February 2012

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P J Andrew
Tribunal Member

[17] See memorandum of counsel for the Claimants dated 17 February 2012.