

**CLAIM FILE NO:** 00082

**UNDER** The Weathertight Homes Resolution Services Act 2002

**IN THE MATTER** of an adjudication

**BETWEEN** **RICHARD CLOSE** and **SANDRA CLOSE**

Claimants

**AND** **HITEX PLASTERING LIMITED**

First Respondent

**AND** **COPELAND DEVELOPMENTS LIMITED**

Second Respondent

**AND** No Third Respondent, Alistair R Watt trading as A R W Architectural having been struck out

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**DETERMINATION OF ADJUDICATOR  
(Dated 23<sup>rd</sup> June 2004)**

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**1. BACKGROUND**

- 1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS Act"). The claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act on 25 November 2003.
- 1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged in Henderson for 25 February 2004, for the purposes of setting down a procedure and timetable to be followed in this adjudication.
- 1.3 At this Preliminary Conference I was asked by the parties present to issue a Consent Order relating to remedial work to be carried out on the dwelling. Therefore, in my Procedural Order No 2 (dated 5 February 2004) I ordered the parties to co-operate and complete the agreed specified remedial work by 4 March 2004.

- 1.4 The parties encountered some problems when attempting to complete this remedial work, and I extended the completion date from 4 March to 4 April 2004. I was advised on 27 April by the Case Manager for Weathertight Homes Resolution Services ("WHRS") that there were still two small matters to be completed, which caused me to issue Procedural Order No 5 on 28 April 2004. I was told that the leaks had been fixed, but there was some making good to be completed.
- 1.5 In this Procedural Order I gave the Respondents one last opportunity to complete the remedial work. I directed the Respondents to complete the work by 13 May, and directed the Claimants to tell me if the work had not been properly or effectively completed by this date. I gave the Claimants until 20 May 2004 to give written notice to WHRS if the work had not been completed.
- 1.6 On 19 May the Claimants advised WHRS that there were still two small items of outstanding remedial work. Therefore, as I had outlined in my earlier Orders, I gave notice to the parties that I would inspect the work on 28 May, and invited all parties to attend this inspection. I also invited all parties to provide any further submissions, comments or evidence prior to my inspection so that I could consider them.
- 1.7 When I visited the property on 28 May only Mr Close was present. Despite being assured by all parties that all the leaks had been fixed, I noticed that there was still one leak beside a ground floor ranchslider. Mr Close was as surprised as I was to find this leak. He assured me that the Claimants still wanted the Respondents to fix all the leaks despite the time that it was taking.
- 1.8 The Respondents have been asked whether they wished to continue to try and fix this leak, and if not, to make final written submissions. Neither Respondent has indicated that it intends to continue with further remedial work, so that I am now able to prepare and issue a final determination of this claim.

## **2. THE PARTIES**

- 2.1 The Claimants are Richard and Sandra Close, and I will refer to them as "the Owners". They purchased the house and property at 8A Provence Esplanade, Te Atatu Peninsula, Waitakere City, in late 1999. The house was a new house, and they move in in early 2000.

2.2 The First Respondent in this adjudication is Hitex Plastering Ltd, which I will refer to as "Hitex". Hitex supplied and installed the exterior cladding system to the walls. The second Respondent is Copeland Developments Ltd, which I will refer to as "the Developer". The Developer owned the property, organised the design and construction of the house, and sold the end product to the Owners.

### 3. THE CLAIMS

3.1 The claims being made by the Owners are the defects identified by the WHRS Assessor in his report dated May 2003. The claims were quantified as having a total value of \$9,045.00, which included for all remedial work, supervision, contingencies and GST.

3.2 However, as I have already mentioned, the parties agreed to a consent order for remedial work, which was described as:

(a) The First Respondent will inspect all window seals, and seal the head flashings (as identified earlier). The inspection will include all jambs and sills, and any re-sealing that is needed.

(b) The First Respondent will insert permanent probes into the bottom wall plates (at the lower level only) to monitor the moisture levels on the exterior face.

(c) The Second Respondent will back-seal around both ranchsliders (after consultation with the First Respondent). When no evidence of recent water ingress has been ascertained, all rotted framing timber will be replaced (with H3), and all wall linings and trim reinstated, to a level 4 finish and painted to match existing. The carpet smoothedge needs to be replaced, and the carpet re-fixed.

3.3 Both Respondents provided written reports to WHRS explaining the remedial work that was carried out. I do not need to dwell upon the details of these reports as I am satisfied that the work done was entirely consistent with the scope of the remedial work in the consent order.

3.4 However, there is still one defect in the construction which is allowing water to penetrate into the dwelling under certain circumstances. Therefore the only outstanding claim in this adjudication is the sole remaining and unresolved leak.

#### **4. FACTUAL ANALYSIS OF CLAIM**

- 4.1 The water is entering above the head of the ground floor ranchslider at the western end. This is in the same area in which leaks had previously been noticed (refer Assessor's report and Hitex report of 10.3.04).
- 4.2 The leak is only active when strong northerly winds accompany heavy rain, so that the framing is having a reasonable chance to dry out in between, and the damage is not readily apparent. There were no visible signs that the moisture was gaining entry above the level of the first floor, so that the cause of the leak is either at the foot of the first floor ranchslider, or at the head of the ground floor ranchslider.
- 4.3 Hitex has carried out extensive remedial work around both of these ranchsliders. Obviously, something has been overlooked, and further remedial work is necessary. Having considered the opinion of the WHRS Assessor in his report, and the views expressed by the parties in their correspondence and reports, it would be my conclusion that the problem probably lies in the weathering detail to the head of the lower ranchslider. This will need to be reconstructed with either an extended reach overflashing, or an additional drip moulding.
- 4.4 The cost of this remedial work should not be great, as I do not see any need to remove the windows or replace any more framing. The work should be capable of being done from the outside and could cost as little as \$400.00. However, the Owners are entitled to have this remedial work done by other contractors, who may prefer to carry out further investigations before committing themselves to remedial work that will stop this final leak.
- 4.5 After consideration of all the facts, I would find that the Owners could prudently spend as much as \$1,200.00 to stop this leak and make good the finishing works, such as painting and carpet re-fixing. This includes the cost of re-fixing the carpet and completion of the repainting work.

#### **5. LIABILITY FOR DAMAGE**

- 5.1 The Owners' claim against Hitex must be in tort and based on negligence. Their claim against the Developer will be either in contract (for breach of the Sale and

Purchase Agreement) or in tort. As the Owners have not provided the details of their contract with the Developer, I can only consider this claim in tort.

- 5.2 It is well established in New Zealand that those who build houses have a duty of care to subsequent building owners. They have a duty to comply with the requirements of the Building Code. The Building Code requires houses to be constructed so that they do not leak, and thus cause damage by encouraging fungal growth, or water damage to structural framing.
- 5.3 I am satisfied that there is still a leak into this dwelling, and that this leak represents a contravention of the requirements of the Building Code.
- 5.4 **The Developer** I would find that the Developer failed to ensure that the building work on this house was carried out in accordance with the requirements of the Building Code. That failure constituted a clear and unequivocal breach of the duty of care owed to the Owners. The measure of damages should be the reasonable cost to repair the leak, and rectify any damage caused by the leak or the repair work. Therefore, I find that the Developer is liable to the Owners for the damages identified in paragraph 4.5 above, which is \$1,200.00.
- 5.5 **Hitex** I would find that Hitex has failed to ensure that the exterior cladding work on this house was carried out in accordance with the requirements of the Building Code. As with the Developer, this failure was a breach of the duty of care owed to the Owners. The measure of damages is the same as for the Developer, that is a total of \$1,200.00.
- 5.6 **Contribution** The Developer and Hitex are joint tortfeasors in this matter, in that they are both liable to the Owners in the same matter. The Developer did not co-ordinate or supervise the design and construction work with adequate care, which resulted in the leaks. Hitex did not carry out its part of the construction work properly, so that it contributed to the leaks. As joint tortfeasors they are each liable in full for the losses that their negligence has caused.
- 5.7 Our law does allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

Where damage is suffered by any person as a result of a tort ... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is ... liable for the same damage, whether as a joint tortfeasor or otherwise ...

- 5.8 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.
- 5.9 The Developer must shoulder the main responsibility for failing to build in accordance with the Building Code.
- 5.10 The Developer must shoulder the main responsibility for failing to build in accordance with the Building Code. The Developer must know the responsibility for any design problems (such as face fixing of joinery) and any defects in framing work or window installations (which include flashings around windows). Hitex is only responsible for defects or problems with the E.I.F.S. system and its installation.
- 5.11 I am mindful that Hitex has elected to carry out the lion's share of the investigation and remedial work, to an extent that was in excess of its probable contribution to the defects. Based on all of these factors, I would find that responsibility should be apportioned between these two Respondents as 25% to Hitex and 75% to the Developer. Therefore, the Developer should pay \$900.00 to the Owners, and Hitex should pay \$300.00 to the Owners on account of the remaining defects.

## **6. COSTS**

- 6.1 It is normal in adjudication proceedings under the Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the Act, the adjudicator may determine that one party will be responsible for more than its own costs if these costs are unnecessarily caused by bad faith or allegations or objections that are without substantial merit.

6.2 Neither party has sought that I should exercise my discretion to make a determination pursuant to s.43(1) of the Act. I could add that if costs had been sought, then I would not have allowed them. Therefore, I find that the parties to this adjudication will meet their own costs and expenses.

## **7. ORDERS**

7.1 For the reasons set out in this Determination, I determine and order that:

- (a) Hitex Plastering Ltd and Copeland Developments Ltd are jointly and severally liable to pay Richard and Sandra Close the amount of \$1,200.00.
- (b) Hitex Plastering Ltd is entitled to a contribution of \$900.00 from Copeland Developments Ltd, in the event that Hitex Plastering Ltd should have paid \$1,200.00 to Richard and Sandra Close.
- (c) Alternatively, Copeland Developments Ltd is entitled to a contribution of \$300.00 from Hitex Plastering Ltd, in the event that Copeland Developments Ltd should have paid \$1,200.00 to Richard and Sandra Close.

**Dated** this 23<sup>rd</sup> day of June 2004.

**A M R DEAN**  
Adjudicator