



## **SUMMARY**

**Case:** Crosswell & Anor v Auckland City Council & Ors

**File No:** TRI 2008-100-000107/ DBH 04634

**Court:** WHT

**Adjudicator:** SG Lockhart QC

**Date of Decision:** 17 August 2009

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### **Background**

This decision relates to a claim filed by the claimants in the Tribunal under the Weathertight Homes Resolution Services Act 2006 concerning their leaky home and the involvements of the first respondent (Auckland City Council), third respondent (Mr Malone), sixth respondent (Mr Ruffles) and the ninth respondent (Ross Roofing Ltd). All other respondents were previously removed from these proceedings.

### **Summary of Facts**

- June 1996: Mr and Mrs Malone began construction on the subject property
- 20 February 1997: the Council undertook a final inspection upon which it issued a Code Compliance Certificate on 18 March 1997
- 4 March 1998: claimants inspected the property with a real estate agent and signed a sale and purchase agreement with Mr and Mrs Malone on 2 April 1998
- 6 April 1998: claimants obtained an evaluation and a LIM report for the property and on 17 April 1998 the claimants entered into a settlement agreement
- Late 1998: claimants contacted Mr Malone regarding dampness. Mr Malone carried out repairs but the claimants have no knowledge of the repairs performed or the manner in which they were conducted. Such repairs were sufficient to stop the leaks at that time
- June 2002-April 2003: claimants noticed leaks but were satisfied that subsequent repairs in 2003 corrected any problems
- 13 December 2005: claimants established a Trust and transferred the dwelling to that Trust on 5 January 2006
- April 2006: claimants decided to sell the house and engaged JLA Ltd to produce a report on the condition of the house. Report showed evidence of moisture ingress
- Trust immediately filed a claim with WHRS under the 2002 Act
- October 2006: claimants engaged Pacific Environment NZ Ltd to prepare plans for a total reclad of the house, including a drained cavity
- 6 August 2007-14 February 2008: remedial work undertaken
- 24 April 2008: Auckland City Council issued a Code Compliance Certificate

### **Quantum**

All parties agreed that the sum for all the completed remedial work and all consequential costs totalled \$324,419.00. The Tribunal was also required to decide the claimant's additional claim for interest and general damages, and whether the claimants can recover the costs for installing the eaves

### *Eaves*

The claimants claimed the sum of \$27,785 for the eaves. The Council however opposed this claim. All three experts confirmed that the addition of the eaves was not necessary in order to obtain a building consent to complete the remedial work. The Tribunal declined the award for the costs of providing eaves

### *Contributory Negligence*

The Tribunal found that by failing to obtain a pre-purchase inspection report when they were aware of intermittent water leaks over a number of years coupled with their acceptance that they were aware of the publicity of leaky homes in late 2005, the claimants were negligent in failing to take further steps to protect their position. In following the High Court decision in *Byron Ave*, the Tribunal reduced the claimants' claim by 20% for contributory negligence

### *General Damages*

In the Tribunal's jurisdiction, only an owner of a leaky home claim can be a claimant. That meant that individual trustees in the capacity as a tenant or an occupier are precluded from seeking redress for general damages. In following *Byron Ave*, the Tribunal refused the claimants' claim for general damages.

### *Summary of Quantum*

The agreed sum fixed by the experts' decision:

• Repairs	\$324,419.00
• Interest to 17 August 2009	<u>\$ 41,797.98</u>
<i>Subtotal</i>	<u>\$366,216.98</u>
• Less 20% (contributory negligence)	<u>\$ 73,243.40</u>
<b>Total</b>	<b><u>\$292,973.58</u></b>

### **Summary of Decision**

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

The Tribunal found that the Council failed to carry out adequate and satisfactory building inspections and that the failure of the Council's inspections caused considerable water ingress, and it was therefore negligent. Accordingly the Council were held jointly and severally liable for the full amount established.

#### *Liability of Mr Malone – builder/developer*

The Tribunal was entitled to consider and determine Mr Malone's involvement and responsibility based on the information available to the Tribunal, even though he did not participate in the adjudication hearing.

All parties accepted that Mr Malone was the builder of the property and therefore he owed a duty to use care and skill in carrying out the building work and to ensure that the approved documents for construction contained sufficient information. The Tribunal found that Mr Malone's carelessness and negligence was the major reason for the defects and so he was held jointly and severally liable for the full amount of the claim established.

#### *Liability of Mr Ruffles - plasterer*

The Tribunal was entitled to consider and determine Mr Ruffles' involvement and responsibility based on the information available to the Tribunal, even though he did not participate in the adjudication hearing.

The duty of care owed by builders and local authorities to subsequent owners can similarly be applied to other persons whose negligence contributes to a building defect

including plasterers. The Tribunal found that Mr Ruffles was engaged as the specialist contractor who should have not only completed all the cladding and plastering work, but also should have carried out his work in a tradesmanlike manner. The Tribunal held that the defects in the plastering would have been or should have been observed by Mr Ruffles and the defects should have been rectified. Accordingly, the Tribunal was satisfied that Mr Ruffles was significantly responsible for negligent and careless plastering work in the construction and was therefore jointly and severally liable for the full amount of the claim.

#### *Liability of Ross Roofing Ltd (RRL) – roofer*

RRL owed a duty of care to use reasonable care and skill when constructing the roof. The Tribunal considered that the only issue that can result in a finding against RRL is the allegation that it failed to either provide a means of preventing moisture entering the property or alternatively warning Mr Malone of the probable danger if a means of deflection was not provided. The Tribunal found that there can be little doubt that RRL was negligent in this regard, but the Council, Mr Malone and Mr Ruffles should also have queried the lack of a deflector. Having regard to the experts' conclusion that the defects in the roof flashings and fascias would have required a full reclad, the Tribunal held that RRL was jointly and severally liable for full amount of the claim.

#### **Contribution**

As each of the respondents are concurrent tortfeasors and they were each entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal. The Tribunal therefore made determined the following:

- Council           20%
- Mr Malone       50%
- Mr Ruffles       20%
- RRL               10%

#### **Result**

- The claimants' claim was proven to the extent of \$292,973.58
- The Council was ordered to pay the claimants \$292,973.58 and is entitled to recover a contribution of up to \$234,378.87 from Mr Malone, Mr Ruffles and RRL for any amount paid in excess of \$58,594.71
- Mr Malone was ordered to pay the claimants \$292,973.58 and is entitled to recover a contribution of up to \$146,486.79 from the Council, Mr Ruffles and RRL for any amount paid in excess of \$146,486.79
- Mr Ruffles was ordered to pay the claimants \$292,973.58 and is entitled to recover a contribution of up to \$234,378.87 from the Council, Mr Malone and RRL for any amount paid in excess of \$58,594.71
- RRL was ordered to pay the claimants \$292,973.58 and is entitled to recover a contribution of up to \$263,676.21 from the Council, Mr Malone and Mr Ruffles for any amount paid in excess of \$29,297.37
- If each of these respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:
  - Council           \$ 58,594.71
  - Mr Malone       \$146,486.79
  - Mr Ruffles       \$ 58,594.71
  - RRL               \$ 29,297.37