IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-127

BETWEEN	**JOAN ELIZABETH GREATEREX and COLIN DAVID GREATEREX** Claimants
AND	**PETER ROBERT PRESTON** First Respondent
AND	**SARAH ANNE EASTON** Second Respondent
AND	**TIMOTHY CHEVALLIER PRESTON** Third Respondent
AND	**ROBERT FRANK DE VILLIERS Trading as DE VILLIERS DESIGN** Fourth Respondent
AND	**ASHLEY AYLING Trading as FIBREGLASS MOULDINGS** Fifth Respondent
AND	**TONY HERON** Sixth Respondent
AND	**DARRYL JAMES MACKENZIE** Seventh Respondent
AND	**FIXED ABODE LIMITED** Eighth Respondent

Hearing: 3 June 2009

Appearances: J Bierre, for the claimants;
No appearance by third respondent

Decision: 3 July 2009

FINAL DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] The claimants, Mr and Mrs Greaterex are the owners of the home at Corinth Street, Remuera, Auckland. It is a leaky building as defined by section 2 of the Weathertight Homes Resolution Services Act 2006 ("the 2006 Act"). The claimants seek judgment for the sum of $525,420.00. This includes the cost of repairs together with alternative accommodation and relocation costs and general damages of $30,000.00.

[2] Prior to the hearing, the claimants settled their claims with all the respondents, except for the third respondent, Mr Tim Preston. He is alleged to be the builder of the claimants' home and the party said to be principally responsible for its negligent construction.

[3] Following the settlement, the claimants now pursue the claim solely against Mr Tim Preston and for the full amount of $525,420.00. They accept, however, that on execution of any judgement obtained against Mr Tim Preston, they will have to credit the settlement sum received from the other respondents of $205,000.00.

[4] Mr Tim Preston filed a preliminary response to the claim dated 10 March 2009 but chose not to attend the hearing. In his absence the hearing was essentially a formal proof process akin to that followed by the High Court in *Body Corporate 191608 v Jontaeshyan Investments Limited & Ors* (unreported) [19 February 2009] HC ,Auckland, CIV 2008-404-002358, Asher J. The claimants thus proceed on the basis that they must prove the pleaded causes of action and loss in relation to Mr Tim Preston.

THE KEY ISSUES

[5] The issues to address in determining this claim are:

(a) Was Mr Tim Preston the builder of the house and liable for its defective construction;
(b) If so, what is the extent of his liability;
(c) Are the amounts claimed for remedial works and other costs fair and reasonable costs?

BACKGROUND

[6] In early 2003, the claimants purchased the house from the previous owners, namely the first and second respondents, Mr Peter Preston and Ms Sarah Easton. Mr Rob Preston is the brother of Mr Tim Preston.

[7] The claimants obtained a pre-purchase report at the time of purchase which alerted them to some issues but did not identify that the house was a leaky building.

[8] The first and second respondents bought the property, then bare land, in 1997. Building work on the house commenced in 1998/1999.

[9] The fourth respondent, Mr Robert De Villiers, was engaged to produce plans and specifications for building consent purposes. The fifth respondent, Mr Ayling, was contracted to put a fibreglass liner over a number of decks and the roof of the property.

[10] On 19 June 2002, the sixth respondent, Mr Tony Heron, signed a Code Compliance Certificate for the house on behalf of Approved Building Certifiers Limited.

[11] The first and second respondents moved into the house in 2000. In 2002, they repaired a leak in the middle floor of the house but there were no further leaks during the period of their ownership.

[12] Over the period 2003 to 2008, the claimants experienced a number of leaks to the house and engaged various trades people to carry out minor repairs. In 2008, the seventh and eighth respondents, namely Mr Darryl MacKenzie and Fixed Abode Limited, carried out some repairs but the claimants became dissatisfied with their work. On 11 March 2008, the claimants made application to the Weathertight Homes Resolution Services under section 32 of the 2006 Act. Mr Frank Wiemann was then appointed as the assessor and in his report dated 6 May 2008 concluded that the claimants' house meets the eligibility criteria set out in section 14 of the 2006 Act.

THE CLAIM AGAINST MR TIM PRESTON

[13] It is the principal contention of the claimants that Mr Tim Preston was the builder of the house and responsible for the main defects in construction which have caused moisture ingress and damage to the house. The principal defect are said to relate to the following:

(a) The roofing membrane;
(b) The cedar plywood cladding;
(c) The fibre cement cladding;
(d) A number of additional defects that will likely cause future damage.

[14] The claimants allege that the defects to the property and or the required repairs were caused by Mr Tim Preston's poor workmanship and/or failure to adequately control/administer or

supervise the construction of works. They sue him in negligence on the basis of now well settled principles that builders of residential dwellings are liable to subsequent purchasers for defective construction (see *Bowen v Paramount Builders (Hamilton) Limited* [1997] 1 NZLR 394, 406 (see also a summary of the recent principles in *Body Corporate 202254 v Taylor* [2008] NZCA 317 per Chambers J at paragraph 125).

[15] In his preliminary response dated 10 March 2009, Mr Tim Preston accepts that the house was not weathertight and admits that there has been water ingress from the roof and at the upper and mid-floor decks. He denies responsibility for any building work, which allowed the ingress of water.

[16] In his preliminary response, Mr Tim Preston has also challenged the costs of the remedial work as claimed by the claimants, and made allegations of betterment and contributory negligence. He also raises the affirmative defence that the claim against him is time-barred under section 4(1)(a) of the Limitation Act 1950. However, and as noted above, Mr Tim Preston did not appear at the hearing and has provided no evidence in support of the various issues raised.

THE EVIDENCE

[17] At the hearing on Wednesday 3 June 2009, I heard evidence from both claimants, Mr Rob Preston, the first respondent, Mr Simon Paykel, an expert commissioned by the claimants and Mr Frank Wiemann, the assessor.

[18] Mr Paykel and Mr Wiemann gave concurrent evidence. There was no dispute between them as to the principal causes of the leaks to the house. In relation to the question of quantum and whether the amount of remedial works claimed by the claimants is

fair and reasonable the differences between Mr Paykel and Mr Wiemann were relatively insignificant.

[19] The evidence from Mr Rob Preston is critical to my determining the question of the role and thus the liability of Mr Tim Preston.

ISSUE 1 – The Liability of Mr Tim Preston

[20] Mr Rob Preston gave evidence that his brother, Mr Tim Preston, initially found the then vacant section at Corinth Street in 1997. In order to pay a debt to his brother, Mr Tim Preston suggested that he build a house for Mr Rob Preston and his partner, Ms Sarah Easton, the second respondent. As a consequence, Mr Rob Preston bought the land in November 1997. Building work commenced in 1998/1999.

[21] According to Mr Rob Preston, the role of Mr Tim Preston was, in short, to build the house. He was fully involved in the physical work, the engagement of subcontractors and the decisions made on site in relation to various aspects of the building works. During the course of construction, Mr Tim Preston suggested to Mr Rob Preston several changes to the plans which were adopted. They were:

(a) Changing from weatherboards to sheets;
(b) That the long run iron be installed on the garage roof, instead of the fibreglass; and
(c) The deck size be increased.

[22] At a stage when the house was 80% closed-in, Mr Tim Preston came to Mr Rob Preston and said that he believed that he had by that time repaid his debt. He asked Mr Rob Preston what he wanted to do from that point on. They then agreed that Mr Tim Preston would finish the work as a normal contract with Mr Rob

Preston paying his brother for the work performed. From then on, Mr Tim Preston would turn up only occasionally. Mr Tim Preston last worked on the house in 2002. Ultimately, Mr Rob Preston had to attempt to complete some of the work himself.

[23] Mr Paykel, the claimants' expert, produced a document described as a "responsibility table" (exhibit 38). This is a summary of the principal weathertight defects in the claimants' house which have led to significant moisture ingress. Mr Wiemann, the assessor, agreed that Mr Paykel's summary was an accurate recording of the principal weathertight defects and the damage caused.

[24] Exhibit 38 describes in detail the nature of the defects, their causes, the damage it has given rise to and the remedial repairs required. A number of the key defects, so for example deficiencies in the polyester membrane on the roof and balcony, and poor construction of parapet flashing joints, have meant that a recladding of approximately 80% of the dwelling is now required. The poor setting out of plywood sheets (in some instances the sheets did not join over solid timber framing) have meant that a recladding of approximately 70% of the dwelling is now required.

[25] Having heard the evidence of Mr Rob Preston, Mr Simon Paykel and the assessor, I am satisfied that Mr Tim Preston was the builder of the dwelling house and responsible in large measure for the significant defects in construction. Mr Tim Preston's duty of care as a builder was to ensure that proper skill and care was taken in the construction of the house. There is ample evidence to conclude (including exhibits 28, 30, 31, 35 and 37) that Mr Tim Preston breached that duty of care and that this has been the principal cause of the defects set out in exhibit 38. The plaintiffs have established that Mr Tim Preston is liable in negligence to them and that he is the party principally responsible for the defects.

ISSUE 2 – Quantum

[26] Mr Tim Preston is sued as a concurrent tortfeasor and said to be liable in *solidum* for the full amount of damages (with some minor adjustments) caused by the negligence. The in *solidum* rule means that a claimant can sue all or any of the tortfeasors and obtain judgement against each for the full amount of the loss.

[27] However, this does not mean that the claimant can actually recover damages for more than his or whole loss; full satisfaction of the plaintiff's claim bars further proceedings (see *Coleman v Harvey* [1989] 1 NZLR 723; see also *Body Corporate 185960 & Gaitely v North Shore City Council* [28 April 2009] (unreported) HC Auckland, CIV 2006-004-003535 Duffy J.

[28] Because Mr Tim Preston is a concurrent tortfeasor and not a joint tortfeasor, the settlement agreement between the claimants and the other respondents does not operate to release Mr Tim Preston from any liability (see *Body Corporate 185960 & Gaitely* (supra)). The effect of the settlement agreement is, as the claimants accept, that upon execution of any judgement obtained against Mr Tim Preston, they will have to credit him with the settlement sum of $205,000.00, already received.

[29] The general test for damages is that set out in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526:

> "The measure of the loss will be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not."

[30] The claimants are entitled to recover the costs of damage to remedy the defects and stop the leaking even if those efforts are unsuccessful and the ultimate costs may be greater than if no steps to mitigate had been taken: *New Zealand Forest Products Limited &*

Anor v O'Sullivan [1974] 2 NZLR 80; see also *Body Corporate 191608* (supra) per Asher J at paragraph 16.

[31] The damages claimed by the plaintiff are calculated as follows:

2004 – 2006 Repairs	$3,736.33
Deck and framing Repairs	$32,354.48 (this figure has been reduced from $45,175.48 following a settlement between the claimants and the seventh and eighth respondents)
Tarpaulins/protection	$7,983.04
Plans, consents, tenders for full remedial works	$25,679.40
Full remedial works	$398,050.69
Alternative accommodation	$18,750.00
Relocation costs	$8,866.00
General damages	$30,000.00
	$525,419.94

(a) The Full Remedial Works

[32] The full remedial works sum of $398,050.69 has been calculated by the plaintiffs as follows (Table E to the evidence of Mrs Greaterex):

Table E – Reclad, Roof, Finish Decks				
Date	**Who**	**Inv/Ref**	**What**	**$ incl gst**
30/08/2008	Maynard Marks	34	Investigation and report – 50%	4,100.06
29/09/2008	Maynard Marks	46	Investigation and report – 50%, stage 2 decay identification and samples	2,291.63
04/09/2008	Andels Construction	Tender	Lowest tender – reclad, reroof, finish decks	294,362.00

10/2008	Andels Construction	Tender	Variations 1 – 9	48,592.00
09/10/2008	Treescape	Quote	Trim Dutch Elm 2.5m clear of garage roof	495.00
10/2008	Auckland City Council	Est	Additional building consent fee – decay inspections	600.00
10/10/2008	Maynard Marks	Est	Building Contract Administration & Maintenance Plan	35,235.00
10/10/2008	Maynard Marks	Est	Timber Inspection & Analysis	12,375.00
			Total Table E	**398,050.69**

[33] Both Mr Paykel and Mr Wiemann, the assessor, gave evidence on the calculation of the remedial costs. Mr Paykel, the expert witness for the claimants, assisted the claimants with the tender process. As a result of further investigations by Mr Paykel, additional defects were identified resulting in variations 1-9 being added to the total cost of remedial works (i.e. the sum of $48,592.00 in table E above).

[34] Mr Wiemann was of the view that the tender price of $294,362.00 while possibly on the high side, was not unrealistic and generally within the margins of a fair and reasonable cost estimate.

[35] The only real difference between Mr Paykel and Mr Wiemann was in relation to the variations in the tender (i.e. the variations 1-9 giving rise to additional costs of $48,592.00). Mr Wiemann contended that the total cost of $342,954.00 (i.e. $294,362.00 plus $48,592.00 for the variations) was more than he would expect, although he fairly acknowledged that he is not a quantity surveyor and had not undertaken the additional analysis that Mr Paykel had done which had given rise to the tender variation.

[36] As Mr Bierre submitted, the differences between Mr Wiemann and Mr Paykel are relatively insignificant overall (approximately 13%).

[37] There is also merit to Mr Bierre's contention that the tenders would likely be a more accurate measure of the actual costs to be incurred. Mr Wieman fairly acknowledged that to be so.

[38] While I acknowledge the reservations of Mr Wieman, I find that the total sum claimed of $342,954.00 for the tenders to be a fair and reasonable estimate of the proposed remedial works to which the tenders relate (i.e. $294,362.00 plus $48,592.00). The claimants have taken particular care in obtaining tenders and on the evidence produced I find that they are the more accurate estimate of the likely actual costs to be incurred.

[39] As part of the claim for remedial works the claimants seek the sum of $35,235.00 for building contract administration and maintenance plans (see table E above). This sum is for the proposed costs of Maynard Marks to supervise and project manage the remedial works.

[40] Mr Wiemann, the assessor, said in evidence that the Maynard Marks costs were more than he would have expected. Mr Wiemann contended that the proposed project management function could be achieved for approximately $10,000.00 less than the claimants' figure. Mr Wiemann was also of the view that the costs of a maintenance plan (i.e. approximately $1,300.00 out of the sum of $35,235.00) should not properly be treated as remedial works (albeit that such a plan was a prudent suggestion for any homeowner to adopt).

[41] On the basis of the evidence I have heard I conclude that a reasonable estimate for the proposed Maynard Marks project

supervision would be the sum of $30,000.00. In this regard, I accept the evidence of the assessor, that some deduction should be made from the claimants figure of $35,235.00.

(b) Alternative accommodation and general damages

[42] The claimants are entitled to claim and recover costs for alternative accommodation (see *Hartley v Balemi* [29 March 2007] HC Auckland, CIV 2006-404-002589, Stevens J).

[43] I am satisfied from the evidence produced by the claimants that the sum of $18,750.00 is a fair and reasonable sum for alternative accommodation. The amount claimed is consistent with market rental information available on the website of The Department of Building and Housing (i.e. 25 weeks at $750.00 per week).

[44] I am also satisfied, having heard the evidence of both Mr and Mrs Greaterex, that they are entitled to general damages of $30,000.00 (i.e. 2 x $15,000.00) (see *Jontashya Investments Limited* (supra) at paragraph [22].

(c) Other costs claimed

[45] Having regard to the evidence produced by the claimants, (including invoices, quotes and properly sourced estimates) I am satisfied that the amount claimed for repairs (including those carried out in 2006 and deck and framing repairs), plans, consents tenders and relocation costs, are all fair and reasonable amounts.

CONCLUSION ON QUANTUM

[46] I accordingly conclude that the claimants have established their claim to the extent of $520,185.25 which is calculated as follows:

(a)	2004-2006 repairs	$3,736.33
(b)	Deck and framing repairs	$32,354.48
(c)	Tarpaulins/protection	$7,983.04
(d)	Plans, consents tenders for full remedial works	$25,679.40
(e)	Full remedial works	$392,816.00
(f)	Alternative accommodation	$18,750.00
(g)	Relocation costs	$8,866.00
(h)	General damages	$30,000.00
	TOTAL	**$520,185.25**

THE DEFENCES OF MR TIM PRESTON

[47] As indicated, Mr Tim Preston did not appear at the hearing to challenge any of the claimants' evidence. He similarly filed no evidence of his own either in support of the contention that he is not liable or in support of the affirmative defences he has made in his preliminary response (i.e. contributory negligence, betterment and limitation).

[48] I have already found, on the available evidence, that Mr Tim Preston is liable to the claimants for defective building work. I also reject the affirmative defences he has raised; there is simply no evidence to support any of them. In relation to the limitation issue, I accept the evidence of Mr Rob Preston that Mr Tim Preston continued working on the property up until about 2001.

[49] On 2 June 2009 Mr Tim Preston filed a further memorandum (i.e. in addition to his preliminary response) following a pre hearing telephone conference, in which he participated, held on Tuesday 2 June 2009. In that memorandum he advised that he would not be participating in the adjudication.

[50] On the morning of the adjudication the case officer telephoned Mr Tim Preston. He confirmed that he would not be attending the adjudication.

[51] In the memorandum of 2 June 2009 Mr Tim Preston has recorded his objection to Morgan Coakle, solicitors representing the claimants. Morgan Coakle initially represented the first and second respondents in these proceedings but as part of the settlement agreement, represented the claimants at the adjudication. The claimants previous solicitors, Grimshaws, have not had any further involvement with the proceedings following the settlement.

[52] In his memorandum of 2 June 2009, Mr Tim Preston also made the following contentions:

(a) Because the claimants have settled in full (in some form or another) there is nothing left to adjudicate upon;
(b) The first and second respondents are contractually liable to the claimants for the full amount of the claim and it is known that they have sufficient assets to meet the claim;
(c) The other respondents liability is in tort and may or may not be for the full amount of the claim;
(d) There is no reason why the claimants would have compromised the claim against the first and second respondents for less than the full amount and then still proceed against some of the other parties.

[53] Following the hearing, Mr Bierre, counsel for the claimants, filed a memorandum dated 4 June 2009 responding to the claim of a conflict of interest. Mr Bierre has provided full details of the very limited contact his firm has had with Mr Tim Preston and rejected the contention that there has been any breach of the lawyers: Conduct and Client Care Rules 2008 (SR 2008/214).

[54] In my view there is no merit to the allegation by Mr Tim Preston of a conflict of interest. It is thus not necessary for me to determine the effect of any conflict of interest in these proceedings and what powers, if any, the Tribunal might have to deal with such an issue.

[55] As to the relevance and effect of the settlement agreement, I have already referred above to the relevant case law on the liability of a concurrent tortfeasor. The settlement agreement does not release Mr Tim Preston from liability and the claimants are entitled to seek judgment against him for the full amount of the remedial works. There is no basis or evidence to suggest that the claimants are in some way disqualified from electing to proceed as they have done.

[56] I also note that the claimants have disclosed to Mr Tim Preston, on a confidential basis, a further agreement entered into between the claimants and the first and second respondents. A copy of the letter to Mr Tim Preston from the claimants solicitors dated 3 June 2009 enclosing a copy of that agreement, was filed with the Tribunal.

[57] Finally, I conclude that it is not necessary for me to address the question of contribution from the other respondents under section 72 (2) of the 2006 Act – and whether, despite the settlement agreement, I could still order contribution from those other respondents in favour of Mr Tim Preston. The practical effect of the settlement agreement upon execution of the orders I make in these proceedings against Mr Tim Preston, is that his overall responsibility for the judgement sum of $520,185.25 is approximately 61%. In my view this is entirely consistent with my findings that the defective workmanship of Mr Tim Preston has been a significant and principal cause of the damage and loss incurred by the claimants.

CONCLUSION AND ORDERS

[58] Mr Tim Preston, the third respondent, is ordered to pay forthwith to the claimants the sum of $520,185.25.

[59] However, because the claimants have settled with all of the other respondents, they cannot recover from Mr Tim Preston an amount which would cause them to recover more than the total amount of $520,185.25.

DATED this 3rd day of July 2009

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P J Andrew
Tribunal Member