IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000054
[2012] NZWHT AUCKLAND 19

BETWEEN	SANG TAE HAN and EUN SUNG WOO Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	RONALD ANTHONY URLICH and JANICE WILMA URLICH Second Respondents

Hearing: 14 March 2012

Appearances: TJ Rainey for the claimants
F Divich for the first respondent

Decision: 21 March 2012

FINAL DETERMINATION
Adjudicator: M A Roche

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[1] In 2004 Sang Tae Han and Eun Sung Woo bought a house in Remuera which is one of six built in a development carried out by Ronald and Janice Urlich. After learning that other houses in the development were leaking, Mr Han and Ms Woo lodged a claim with the Weathertight Homes Resolution Service. The WHRS assessor concluded that the house required extensive remedial work.

[2] Mr Han and Mrs Woo lodged a claim with this Tribunal claiming that the Auckland Council and the Urlichs are each liable for the full costs of the remedial work, consequential losses and damages.

[3] Shortly before the hearing, counsel for the claimants and the Council filed a memorandum recording their agreement on the Council's liability and on quantum. At a prehearing conference, counsel for Mr and Mrs Urlich advised that they had applied for bankruptcy and were unlikely to attend the hearing.

[4] In the Urlichs' absence, the other parties and their counsel were excused from attending the hearing. The claim instead proceeded on a formal proof basis based on the WHRS assessor's report, the signed witness statements, and the documentary evidence that has been filed.

[5] The issues that I need to address are:

i. What were the defects which caused water ingress?
ii. Did the Urlichs breach the duty of care they owed Mr Han and Mrs Woo as the developers of the property?
iii. Did the claimants contribute to their loss?
iv. What is the appropriate cost of the remedial work?
v. What is the correct apportionment of contribution between the Urlichs and the Council?

WHAT WERE THE DEFECTS CAUSING MOISTURE INGRESS?

[6] Frank Wiemann, the Department of Building and Housing assessor produced a report on the house following an investigation he undertook in 2009. Barry Gill, the claimant's expert also produced a report based on investigation he undertook in 2010. These reports are before me together with a signed statement from Mr Gill.

[7] Mr Gill annexed a defects list to his report setting out the defects identified by both him and Mr Wiemann. These were :

- Failure to provide suitable clearance at the base of cladding.
- Defectively constructed deck including lack of fall to balustrades; lack of flashings; lack of clearance between cladding and deck tiles; lack of fall to deck surface; insufficient overflow outlets; and lack of suitable clearance between internal and external floor levels.
- Incorrectly installed flashing system to the aluminium joinery.
- Penetration of the television cable through the roof finish without the provision of adequate waterproofing protection.
- Chimney installed without provision of adequate flashing at the roof penetration.
- Failure to provide suitable horizontal and vertical control joints.
- Incorrect installation and application of solid plaster cladding including incorrectly spaced mesh reinforcing and poor bonding between plaster layers.

[8] I accept the evidence before me concerning the defects and accept the evidence of Mr Wiemann and Mr Gill that these defects

have resulted in the need to reclad the property and to remediate damaged timber framing. No evidence to the contrary was filed.

[9] In their response to the claim, the Urlichs stated that the television cable defect was created after they had sold the property. I do not attribute responsibility for this defect to them. However, this does not cause any significant difference to the remedial scope.

DID MR AND MRS URLICH BREACH THEIR DUTY OF CARE TO THE CLAIMANTS AS THE DEVELOPERS OF 114C REMUERA ROAD?

[10] In their interim response Mr and Mrs Urlich admitted that they were the developers of the house.

[11] The duty of care owed by a developer was defined in *Mount Albert Borough Council v Johnson*[1] as being a duty to see that proper care and skill are exercised in the building of houses that cannot be avoided by delegation to an independent contractor. I find that proper skill and care was not exercised in the building of the house at 114C Remuera Road. A series of construction defects led to damage and future likely damage and have necessitated extensive remedial work.

[12] I find that Mr and Mrs Urlich are liable to the claimants for the damage created during construction and that they breached their duty of care as developers to them.

DID THE CLAIMANT'S CONTRIBUTE TO THEIR OWN LOSS?

[13] In their interim responses to the claim, the Council and the Urlichs alleged that the claimants had contributed to their own loss by failing to obtain a pre-purchase inspection report and by failing to adequately maintain the house. No evidence was filed in support of

[1] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)

either of these allegations. It is not established that the claimants contributed to their own loss.

WHAT IS THE APPROPRIATE COST OF THE REMEDIAL WORK?

[14] Evidence concerning the appropriate cost of the remedial work was provided in a signed statement by Daniel Johnson who is a quantity surveyor and the director of a quantity surveying consultancy. Mr Johnson had reviewed the documentation relating to the proposed repairs including the architect's scope of works and the three tenders that had been submitted and had prepared a tender evaluation and report. This report recommended acceptance of the lowest tender price and concluded that the total cost of the remedial works was $250,012.13 (excluding GST). This figure did not include project management fees, the cost of timber remediation, design fees and Council charges which had been claimed.

[15] In their joint memorandum, counsel for the claimants and the Council reached agreement on the cost of the repair work being a total sum of $280,000. Having considered all the quantum evidence that has been provided, I accept that this sum is the actual and reasonable cost of the remedial work required to remedy the established defects.

[16] The claimants have also claimed consequential losses arising from the repairs comprising of the cost of alternative accommodation; moving and storage; and defects and damage investigation. The total sum claimed was $29,090.38. This claim was supported by documents filed in the common bundle for the hearing.

[17] The claimants and Council recorded in their memorandum an agreement on the cost of consequential losses being $25,000. I accept that this is the actual and reasonable cost of the consequential losses the claimants will inccur as a result of the remedial work.

[18] The claimants and Council also agreed that the sum of $25,000 in general damages should be awarded. The Court of Appeal in *Sunset Terraces* and *Byron Avenue*[2] agreed that the appropriate measure depends on individual circumstances but for owner-occupiers the usual award would be in the vicinity of $25,000.

[19] I accept that Mr Han and Mrs Woo have both suffered considerable stress and difficulty as a result of having a leaky home and that they will experience significant disruption when the remedial work is carried out. In his signed witness statement Mr Han described the effect that owning a leaky home has had on him and his wife including the physical symptoms Mrs Woo has developed that she attributes to stress. I accept that it is appropriate to award general damages of $25,000. No evidence challenging the quantum claimed or an award of general damages was filed by the Urlichs.

CONCLUSION

[20] The amount that has been established is $330,000 which is calculated as follows:

Remedial work	$280,000.00
Consequential losses	$25,000.00
General damages	$25,000.00
TOTAL	**$330,000.00**

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[21] The Council has conceded that it breached the duty of care that it owed to the claimants when it failed to detect defects during its inspections of the property during construction and have admitted that these defects have caused the need to reclad the house. I have

[2] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486. *O'Hagan v Body Corporate 189855 (Byron Avenue)* [2010] NZCA 65, [2010] 3 NZLR 486.

found that Mr and Mrs Urlich breached the duty of care they owed to the claimants as developers. Both the Council and the Urlichs are tortfeasors or wrongdoers, and are liable to the claimants in tort for their losses to the extent accepted in this decision.

[22] Section 72(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[23] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable. Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[24] Counsel for the Council has submitted that it ought to be apportioned 20% of the liability for the proven claim and that the Urlichs should be apportioned 80%. They rely on a number of leading cases in this area such as *Mount Albert Borough Council v Johnson*[3] and *Byron Avenue*.[4] In the cases they rely on, the Court has apportioned responsibility of 20% or less to the Council and 80% or more to building parties and/or the developer.

[25] Given the respective roles and responsibilities of the Council and the developers and the responsibility each has for the claimants' loss, I conclude that the contribution in this case should be set at 80% for the Urlichs and 20% for the Council.

[3] *Mount Albert Borough Council v Johnson* above N1.

CONCLUSION AND ORDERS

[26] The claim is proven to the extent of $330,000. For the reasons set out in this determination I make the following orders:

i. Ronald and Janice Urlich are ordered to pay Sang Tae Han and Eun Sung Woo the sum of $330,000 forthwith. Mr and Mrs Urlich are entitled to recover a contribution of up to $66,000 from Auckland Council for any amount paid in excess of $264,000.

ii. Auckland Council is ordered to pay Sang Tae Han and Eun Sung Woo the sum of $330,000 forthwith. Auckland Council is entitled to recover a contribution of up to $264,000 from Ronald and Janice Urlich for any amount paid in excess of $66,000.

[27] To summarise the decision, if the two respondents meet their obligations under this determination, this will result in following payments being made by the respondents to the claimants:

Auckland Council	$66,000.00
Ronald and Janice Urlich	$264,000.00
Total of this determination	**$330,000.00**

[28] However if Auckland Council or Ronald and Janice Urlich fail to pay their apportionment, the claimants can enforce this determination against either of them up to the total amounts they are ordered to pay in paragraph [25] respectively.

DATED this 21st day of March 2012

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M A Roche

Tribunal Member

[4] *Body Corporate 189855 v North Shore City Council* HC Auckland, CIV-2005-404-005561, 25 July 2008.