

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000046
[2012] NZWHT AUCKLAND 24**

BETWEEN HEAD HEIGHTS LIMITED
 Claimant

AND AUCKLAND COUNCIL
 First Respondent

Hearing: 6, 14 December 2011

Appearances: M.C. Josephson and G.Lewis for the claimant;
 P.A. Robertson, for the first respondent

Decision: 11 April 2012

FINAL DETERMINATION
Adjudicator: S Pezaro

[1] Melissa Graham and her husband Steven Graham purchased 46 Lagoon Way, West Harbour in 2005. In 2007 they rented out the house and transferred it to their company Head Heights Limited (the claimant). In 2010 when they decided to sell the house, the Grahams discovered it was a leaky building. They filed an application for a WHRS assessor's report and subsequently engaged Prendos New Zealand Limited to do a full report. Head Heights obtained a building consent based on the full re-clad proposed by Prendos and engaged Reconstruct Limited to undertake the remedial work. A deposit of \$30,719.25 was paid. After delays, Reconstruct said it could not fulfil its obligations under the contract and is now in liquidation. In September 2011 the claimant engaged Reliant Residential Limited to carry out the remedial work. Reliant quoted \$164,047 (excluding \$20-30,000 for timber replacement) for a full re-clad and this is the amount now claimed for repairs.

[2] The respondent to the claim is the Auckland Council. The Council accepts that it owed the claimant a duty of care which it breached but disputes the extent of remedial work required and quantum.

[3] The issues that I need to determine are:

- a) The extent of repairs required to remediate the property.
- b) The reasonable cost of those repairs.
- c) Whether there is any betterment.
- d) The claim for costs incurred in mitigation.
- e) The consequential losses; and
- f) Interest.

THE EXTENT OF REPAIRS REQUIRED

[4] There is no dispute that the weathertightness defects are those identified by Neil Alvey, the WHRS assessor. The main defects are the incorrect installation of the roof apron flashings, the parapet/fascia junctions,

the joinery jamb/sill flashing on the east elevation, and the lack of clearance between the cladding and the external ground level. The claimant submits that the only way to properly repair the damage caused by these defects and to ensure that no further damage occurs is to fully re-clad the property. It is submitted that targeted repairs are not possible because the Council will only grant a consent for a full re-clad.

[5] The Council argues that the property can be remediated by a partial re-clad and that a building consent is likely to be granted for such repairs. Evidence on the remedial repairs required was given by Neil Alvey, the WHRS assessor, Roger William (Bill) Cartwright, for the claimant, and Craig Turner for the Council. The claimant did not call evidence from Prendos.

The evidence of Mr Alvey

[6] Mr Alvey conducted two site visits, in September 2010 and February 2011, and issued his addendum report on 6 April 2011. He concluded that the north elevation and part of the east and west elevations (including return walls) required a re-clad but as the southern elevation did not require re-cladding the damage did not warrant a full re-clad.

[7] Mr Alvey identified the criteria that he applied when determining the extent of any future likely damage. These criteria are whether there are any systemic faults in the construction and the likelihood of further damage in the remaining minimum period required by the Building Code. Mr Alvey said that when he inspected the property it was 11 years old. At that stage, where there was no sign of moisture ingress, in his opinion it was not likely that there would be any further damage in the next four years. Mr Alvey explained that he limited his assessment of future likely damage to four years because 15 years was the expected life of the cladding.

[8] A further factor in Mr Alvey's decision that targeted repairs are appropriate was the absence of any systemic fault with the windows which would have affected all elevations. He said that the south and west

elevations had five window openings and, other than a discrete issue with a door, neither his report nor the Prendos report identified any high moisture readings or failure of the window flashings on these elevations. Mr Alvey said he therefore concluded that the windows were performing properly. In his addendum report¹ Mr Alvey provided the results of seven moisture readings, taken on the south elevation. All readings were low.

[9] In addition, Mr Alvey said that the areas not damaged on the southern elevation and the rear of the east and west elevations were raised off the ground over the subfloor.² Mr Alvey therefore concluded that there was no future likely damage on the south, east and west elevations. He said his only reservation was the lack of separation between the deck and the main wall on the south and east elevation. Prendos had noted this as an issue, however Mr Alvey said that he believed that any question of future likely damage was addressed by the scope of works in his report which provided for this deck to be separated from the main wall.

[10] In closing Mr Shand submitted that the Building Code provides the minimum longevity requirement and that Mr Alvey's conclusion that there is no future likely damage because the cladding has a 15 year life is contrary to the technical information issued by BRANZ. However, even if I accept that an assessment of future likely damage should look beyond the minimum life expectancy of the cladding, the claimant has not provided evidence of future likely damage. The only evidence on this issue is that of Mr Alvey and I accept his assessment that no further damage is likely to occur within the life expectancy of the cladding.

The evidence of Mr Cartwright

[11] In his brief of evidence dated 28 October 2011 Mr Cartwright stated that he had been asked to provide an opinion about the performance of the Waitakere City Council during its involvement in construction. In this brief Mr Cartwright set out his qualifications and experience. He has a trade

¹ Addendum report dated 6 April 2100 at page 18 Moisture map 5.

² WHRS addendum report, photographs 3, 4, and 5.

certificate and worked as a builder until 1984. Between 1984 and 2002 Mr Cartwright was employed in various building inspection roles by the Auckland City Council and is now a licensed building practitioner. In his brief he states:

Since 2002 I have worked as an independent building consultant providing consultancy services on all aspects of compliance with the Building Act, the Building Code and all associated documents and standards.³

[12] I am satisfied that Mr Cartwright is qualified to give expert evidence on the practice of council building inspectors and the standard required of council officers when processing building consents and conducting inspections at the time of this construction. However this evidence became irrelevant when the Council accepted liability prior to hearing.

[13] In a second brief filed on 1 December 2011 Mr Cartwright gave evidence in reply to the brief of Craig Turner which addressed the scope of works and betterment. In this reply brief Mr Cartwright compared targeted repairs with a full re-clad. He disagreed with Mr Turner's conclusion that new cladding installed on a cavity could be joined to existing cladding that was not on a drained and ventilated cavity. Mr Cartwright said that he has not seen this detail in the EIFS systems data sheets and Mr Turner did not provide any detail for this junction.

[14] Mr Cartwright then addressed the likelihood of the Council issuing a Code Compliance Certificate for targeted repairs on the claimant's house. He said that the detail required to join new and existing cladding would be an alternative solution which the Council would have to process accordingly. Mr Cartwright says that he is aware that the Auckland City Council stopped issuing Code Compliance Certificates for buildings with face fixed cladding and no drained or ventilated cavity about the end of November 2003. In his opinion it follows that the Council will be even less likely to issue a building consent for targeted repairs for this type of construction or to grant a Code

³ Brief of Evidence of Roger William Cartwright dated 28 October 2011 at [8].

Compliance Certificate for such repairs. Mr Cartwright deposed that he did not know of any instances where such “non-specific design solutions were approved as they could be a source of potential future liability should failure occur”.

[15] Mr Cartwright concluded that targeted repairs to the exterior wall cladding are impractical and that the property requires a full re-clad to remove the potential for future likely failure because “this has been previously demonstrated by numerous claims over dwellings clad in the system and also demonstrated on this very dwelling”.

[16] Mr Cartwright did not qualify himself in either of his briefs to give evidence on the scope of works. In his second brief Mr Cartwright did not comply with the requirements of the Expert Witnesses’ Code of Conduct to provide his relevant qualifications and experience, the ambit and foundation for evidence given, and identify any opinions not fully researched. At the hearing I asked Mr Cartwright to provide the evidential basis for his conclusion that a full re-clad was required. Mr Cartwright said that he had not done a site visit or seen the scope of works based on a partial re-clad. He said that his opinions were based on his work experience with the Council and as a co-owner and director of a building company trying to obtain building consents. He cited as further relevant experience his attendance at mediations and hearings and, until two months prior to this hearing, involvement in filing applications for building consent. Mr Cartwright said that in his experience with other building consent applications it had never been possible to obtain a consent where there was a junction of different materials, such as that advocated by the Council in these proceedings.

[17] While I accept that Mr Cartwright has expertise in Council procedures, I am less satisfied that Mr Cartwright qualified himself to give expert evidence on whether targeted repairs would properly remediate this dwelling. I may have accepted his evidence on the scope of repairs as expert evidence if it had been apparent at hearing that the criteria for giving

such evidence had been met, however this did not occur. Even if I did accept Mr Cartwright as an expert on the scope of repairs, I would give his evidence on this issue less weight than that of Mr Alvey and Mr Turner who conducted site inspections and, in Mr Alvey's case, carried out invasive testing.

The evidence of Mr Turner

[18] Mr Turner gave evidence for the Council on the extent of damage to the property, and the appropriate scope of repairs and cost. Mr Turner's experience includes 35 years in the construction industry, including 15 years of project management. He holds qualifications in quantity surveying and construction management and is a member of the New Zealand Institute of Quantity Surveyors. Mr Turner agreed with Mr Alvey's conclusions regarding water ingress and damage and his conclusion that targeted repairs are appropriate. Mr Turner initially disagreed that the extent of repairs proposed by Mr Alvey was required however at hearing Mr Turner conceded that Mr Alvey's scope provided a 'robust solution'.

[19] On the basis of the evidence of Mr Alvey and Mr Turner I conclude that the claimant's house will be properly remediated with targeted repairs carried out in accordance with the scope of works in Mr Alvey's addendum report.

Can targeted repairs be carried out?

[20] The claimant submits that targeted repairs are not a viable option because the Council may not issue a building consent and, if it did, there is no evidence that the repairs can be actually carried out because the technical information required has not been produced and building companies are unwilling to carry out a partial re-clad.

[21] In evidence Ms Graham said that she approached four building companies and could not get one of them to quote for targeted repairs. It was Mr Shorrocks's evidence as a director of Reliant was that Reliant would

not complete targeted repairs on the property. Mr Shorrocks said that he would not quote for targeted repairs due to the risk, and because he had enough work and did not want the company to take responsibility for any existing cladding that was not replaced. Mr Shorrocks also said that he would not prepare a scope of works based on a WHRS report because he could not sue the WHRS if any problems arose.

[22] The Council also called evidence from Tineke De Villiers who is a building surveyor in the building consents team at the Auckland Council. Ms De Villiers said that she had been processing building consents for four years, is qualified as an architect and has nine years' experience as a building surveyor. Ms De Villiers is responsible for assessing building consent applications and issuing building consents. She said that she processed the building consent application for the remedial work for the claimant's property, based on a full re-clad.

[23] Ms De Villiers deposed that a properly prepared building consent application based on the scope of works in the WHRS report would satisfy the applicable statutory criteria. She said that 90 per cent of applications for a partial re-clad were granted. Ms De Villiers said that the existing cladding (Insulclad) on the south wall would not prevent a consent being issued, even if the existing cladding did not comply with the current standards or the Insulclad specifications.

[24] It was Mr Alvey's evidence that, in his capacity as a remedial building consultant, he has had an application for a partial re-clad accepted. He said that a partial re-clad tends to work only where the dwelling is not a 'box' but is designed with different planes and there are distinct deficiencies that are limited to discrete planes. Mr Alvey said that he took the scope of his repairs to an internal corner in order to deal with a partial re-clad and that joining new to existing cladding was very straight forward on this property because of the architectural breaks.

[25] In relation to the detail required to join the new and existing cladding, Mr Alvey said that although the junction between the cladding was not a standard detail he agreed with Mr Turner's evidence that the junction would work. It was Mr Alvey's view that there was no reason for the 'real world' scope to be any different from that in his assessor's report and that there was no technical barrier to the proposed targeted repairs.

[26] Mr Turner said in evidence that he had contacted the technical advisor for the product Nuplex, now called Graphix, which was a similar system to that proposed in the targeted repairs. Mr Turner's evidence was that he was told by the Nuplex technical advisor that the Nuplex detail had been used with a number of partial re-claddings.

[27] Mr Cartwright has experience as a Council employee processing applications for building consent but he has not done so for the Council since 2002. His experience of filing applications on behalf of clients does not provide the same experience as processing applications on behalf of the Council. The applications that Mr Cartwright files are not necessarily representative of the type and number of applications received by the Council for targeted repairs. I therefore prefer the evidence of Ms De Villiers who is currently employed by the Council to process building consent applications and accept that the Council is currently granting building consents for targeted repairs.

[28] The question of whether a Council would issue a building consent for targeted repairs was considered by Duffy J in *Kilham Mews*.⁴ However, because the evidence of expert witnesses satisfied her that a full re-clad was appropriate, Her Honour was not required to resolve the question of whether a building consent could be obtained for targeted repairs.

[29] The same question was considered recently by the High Court in *Chee v Stareast Investment Limited*.⁵ *Chee* involved an appeal from a

⁴ *Body Corporate 185960 v North Shore City Council (Kilham Mews)*.

⁵ *Chee v Stareast Investment Limited* [2012] NZHC 133.

decision by the Tribunal that although it was reasonable for the property to be re-clad, it was not the negligence of the respondents that caused the need for a full re-clad. Andrews J upheld the Tribunal's decision that the respondents were not required to meet the costs of a full re-clad. However her Honour considered the question of whether targeted repairs could be carried out because the WHRS assessor, Mr Browne, said that he believed that the territorial authority would require re-cladding of all elevations of the house as a condition of the building consent for remedial work.⁶ As the Tribunal had not considered whether the Council would grant a consent for targeted repairs, Her Honour directed the Chees to apply for a building consent for targeted repairs and put the matter back before the Tribunal for a final determination.

[30] The Tribunal considered whether the claimants could obtain a consent for targeted repairs in *Zagorski*.⁷ In this case all but one of the experts agreed prior to hearing that a complete re-clad was required however at hearing some of the experts changed their view. The Tribunal concluded that as the question of targeted repairs arose late in the hearing and the experts had not been able to give a considered opinion on whether the Council was likely to grant a consent for targeted repairs, there was no proper basis on which the Tribunal could make a finding on the extent of repairs required. The question of quantum was therefore adjourned for the scope of works to be determined, either by agreement or an application for building consent.

[31] As Andrews J observed,⁸ the scope of remedial work is not to be determined as if it were a "numbers game". However in this case the only evidence that the Council will not grant a consent for targeted repairs is that of Mr Cartwright and for the reasons given, I prefer the evidence of Ms De Villiers. It is the evidence of Mr Alvey, Mr Turner, and Ms De Villiers that such applications are likely to be accepted. The only evidence based on invasive testing was that of Mr Alvey and as recorded, the claimant did not

⁶ At [99].

⁷ *Zagorski v Wilkinson Building and Construction Limited* [2012] NZWHT Auckland 4 at [145] – [147].

⁸ At [87].

produce any evidence of future likely damage. While I cannot predict what decision the Council will make if an application for targeted repairs is filed, the claimant has failed to satisfy me that the Council is unlikely to grant a consent on this basis.

[32] For these reasons I conclude that the claimant's house can be properly repaired with targeted repairs based on the WHRS scope. I therefore award damages on this basis.

WHAT IS THE REASONABLE COST OF TARGETED REPAIRS?

[33] The evidence of the cost of targeted repairs was given by Mr Alvey, James White for the claimant, and Craig Turner for the Council. These three estimates were all based on the WHRS scope of works. At hearing Mr Alvey added two items to the original estimate - \$7,000 plus GST (\$8,050.00) for consultancy fees, and \$1,832 plus GST (\$2,106.80) for a concrete nib. Mr Turner accepted these additions which are included in the estimates below.

[34] I have compared the three estimates for targeted repairs with the quote for a full re-clad from Reliant, the company engaged by the claimant for the remedial building work.

a) Targeted repairs:

WHRs	\$145,156.80
James White	\$186,947.59
Craig Turner	\$141,016.60

b) Full re-clad:

Reliant:	\$194,047 (including timber replacement)
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[35] As is apparent from these figures, Mr White's estimate for targeted repairs is considerably higher than the other two and only \$7,100 lower than Reliant's quote for a full re-clad. Mr White is a registered quantity surveyor

and director of Kwanto Limited, the company that prepared his estimate. However, after comparing his estimate with the others, including the quote for a full re-clad from Reliant, I am not satisfied that Mr White's estimate for targeted repairs is reasonable. Mr Turner compared the Reliant quote with the WHRS estimate. Mr Turner is a director of Forensic Building Consultants Limited with experience in project management and is also a quantity surveyor. I therefore accept that he is qualified to give evidence on the comparison between the Reliant quote and the WHRS estimate.

[36] Mr Turner calculated that the re-cladding costs in the Reliant quote that are additional to the WHRS scope amount to \$34,088. When this sum is deducted from the Reliant quote, the balance is within \$5,000 of the WHRS costing on a like for like basis, with the WHRS estimate being higher. I accept Mr Turner's calculations and his opinion that the Reliant costings are consistent with the WHRS estimate.

[37] Mr Turner also instructed Hybrid Residential Limited, a remedial building company, to prepare a quote for targeted repairs. However, I have not given Hybrid's quote any weight because Dale Bainbridge, the managing director of Hybrid who gave evidence, did not prepare the quote. He was therefore unable to answer questions about how certain costs were calculated. This has no impact on the evidence that Mr Turner gave on the relativity between the Reliant quote and the WHRS estimate.

[38] Significant variations between Mr White's estimate and the WHRS cost are the difference of \$15,924.70 (incl GST) in the fees allowed for contractors' supervision and remediation specialist, and a difference of \$5,882.30 (incl GST) allowed for design and documentation fees.

[39] A further relevant factor is Mr White's opinion that compared with his estimate of \$6,000 for 40% timber replacement, the sum of \$20-30,000 estimated by Reliant for timber replacement is 'extraordinarily high'. I accept Mr White's estimated cost for timber replacement because it is consistent

with Mr Turner’s opinion that the sum of \$7,452 allowed by Hybrid is reasonable. Accepting Mr White’s calculation of costs for 40% timber replacement, the maximum cost of timber replacement for a full re-clad would be \$15,000. On this basis the Reliant estimate would be reduced by \$15,000 to \$179,047 and Mr White’s estimate for targeted repairs would be higher than the amount claimed for a full re-clad. This comparison indicates that Mr White’s estimate as a whole is not reasonable, even though some of the calculations within his estimate are accepted.

[40] I am not satisfied that Mr White justified the higher estimate in evidence and for the reasons given do not accept his estimate for targeted repairs. I therefore base the costs awarded for targeted repairs on the WHRS estimate, taking into account Mr Alvey’s revisions at hearing. The one cost that I have not accepted in the WHRS estimate is the cost of timber replacement which was \$1,650 for 40% replacement. As this estimate is not consistent with the costs estimated by Mr Turner and Mr White, I have replaced this figure with Mr White’s estimate of \$6,000 plus GST. On this basis the WHRS cost is \$150,159.30 incl GST calculated as follows:

Original WHRS estimate	\$135,000.00
Consultancy fees (7,000 + GST)	\$8,050.00
Concrete nib (1,832 + GST)	\$2,106.80
Timber replacement (6,000-1,650 = 4,350 + GST)	\$5,002.50
Total:	<u>\$150,159.30</u>

Additional repair costs

[41] The Council accepted the cost claimed of the Find a Leak report, the consent applications and insurance but disputed liability to pay the cost of the application to the WHRS for an assessor’s report. The WHRS fee is not a cost of the proceedings. It is payment for the report which is required to determine eligibility. It is therefore a loss for which the Council is liable.

Betterment

[42] The Council submitted that certain items in the Reliant quote amounted to betterment and should be deducted from the claim. In the course of the hearing agreement was reached on some items however, as I have based the sum awarded for targeted repairs on the WHRS estimate, only any items in that estimate which are allegedly betterment have been considered.

- a) Exterior Painting: The claimant accepted that the exterior of the house had not been painted since built and that this cost could not be claimed against the Council. The WHRS estimate allowed for exterior painting in the amount calculated for cladding replacement (Item 23). I am not able to calculate what amount is related to exterior painting and have therefore based the deduction on the cost in the Reliant quote of \$4,902 excl GST. As this cost was for a full re-clad I have deducted 25 per cent. I have therefore deducted \$4227.97 incl GST from the WHRS estimate for external painting. I accept that this calculation is rather arbitrary but the cost to the parties of seeking further evidence on this item is not warranted.
- b) Interior Painting: There is no evidence that the interior had been painted since the house was built and therefore I find that the cost claimed for the interior paintwork is betterment. The WHRS costing included \$1,079 excl GST for interior painting and I have therefore deducted the sum of \$1,240.85 for interior painting.
- c) Change in materials: Mr Turner said that the change proposed by Reliant from EIFS to brick veneer and weatherboard is not required for weathertightness and incurs additional costs. The claimant asserted that these claddings were more reliable and cost no more. As I have awarded the WHRS remedial costs

which are based on EIFS cladding, there is no issue of betterment and, on the claimant's evidence, no additional cost if the cladding proposed by Reliant is used.

d) Removal and reattachment of the timber deck: The Council claims that this work is not necessary to resolve weathertightness issues. I do not accept this submission as Mr Alvey stated that his scope of works for the deck addressed future likely damage and the removal and reinstatement of the deck is provided for in his costings.⁹

[43] I have therefore deducted the sum of \$5,468.82 for betterment from the repair costs leaving a balance of \$144,690.48. The sum awarded for repairs is \$159,907.83, calculated as follows:

Repair costs	\$144,690.48
Council consents	\$5,761.70
Insurance	\$2,415.65
Find a leak report	\$540.00
WHRS report	\$500.00
TOTAL	\$153,907.83

THE CLAIM FOR COSTS INCURRED IN MITIGATION

[44] A claimant has a duty to mitigate his or her loss and the burden of proving that the cost of mitigation resulted from the breach. Costs incurred in mitigation are recoverable from the party that caused the loss, even where attempts to mitigate have failed. The claimant claims \$17,085.82 being the cost of the Prendos report (\$10,882.82) and the balance owing of the deposit paid to Reconstruct (\$6,203) as mitigation costs.

The Prendos Report

⁹ Above at [9].

[45] This claim was found eligible under the Weathertight Homes Resolution Services Act 2006 after a review by the Chair of the decision by the WHRS that the house was built more than 10 years before the claim was filed and that therefore the claim was not eligible. The claimant submits that Prendos was instructed because the claim was found ineligible. However, according to the Prendos report, the brief was to carry out a weathertight investigation of the building, report on the findings and recommend repairs. The Prendos report does not consider when the house was built which was the issue for eligibility. The only reference to the period of construction in the report is the record of the date that the building consent was filed and issued and the date that the CCC was issued. The decision that the claim was eligible turned on the date on which certain inspections were carried out and this information was on the Council file. There is nothing to suggest that the Prendos report was intended to support the application for review of the eligibility decision and no indication in the Chair's decision that the Prendos report was relevant. Further, it appears from a review of the application for an eligibility review, that the report was not submitted with that application.

[46] The assessor was instructed to issue an addendum report before the claimant instructed Prendos therefore there was no apparent need for the claimant to obtain further evidence of defects. The claimant did not call any evidence from Prendos or rely on the Prendos report at hearing.

[47] For these reasons I am not satisfied that the claimant has proved that the cost of the Prendos report was either necessary to mitigate its loss or is a result of the negligence of the Council. I therefore decline to award the fee paid to Prendos.

The deposit paid to Reconstruct

[48] At hearing Ms Graham said that Reconstruct has repaid most of the deposit leaving a balance owing of \$6,203.00. This amount takes into account the plans and specifications provided by Reconstruct. Mr Shand submitted that as the company was being placed in liquidation, the claimant

is unlikely to recover the balance owing which is therefore recoverable for failed mitigation.

[49] I am not satisfied that this sum is a reasonably foreseeable loss of the Council's negligence. The direct cause of the loss of the deposit is the financial position of Reconstruct, not the Council's negligence. Even if I accepted that the loss was caused by the Council, the claimant has not produced any evidence that the balance of the deposit will not be repaid. I am therefore not satisfied that the sum claimed is proved. For these reasons I decline to award the fee paid to Reconstruct.

CONSEQUENTIAL LOSSES

[50] The claimant claims \$24,757.18 for consequential losses.

- a) Loss of rent during remediation: The Council accepts the claim for loss of rent during the 16 week period of remediation at \$475 per week and one week for any maintenance required but disputes the claim for loss of rent for the entire six week maintenance period following remediation. Any maintenance issues that arise after this period are likely to be minor and there is no reason that the property cannot be tenanted once repairs are complete. A claimant who normally resides in a leaky home being remediated returns to that home when repairs are finished and the cost of alternative accommodation is awarded for the repair period only, not until the end of the maintenance period. I therefore award loss of rent for the remediation period of 17 weeks being \$8,075.
- b) Loss of rent during investigation: When the claimant decided to sell the house, the existing tenancy was ended. Ms Graham said that after the leaks were discovered and she obtained the WHRS report, then disputed eligibility, she was unsure if she could tenant the house. Once she was advised that she could do so, the house was re-tenanted at a reduced rental of \$450

per week. The claimant claims 16 weeks loss of rent at \$475 for the period when the house was not tenanted (\$7,600) and 41 weeks for reduction in rent of \$25 per week (\$1,025).

[51] The Council disputes the claim for loss of rent as the property was vacated in preparation for sale, there is no expert evidence to indicate how long it would have taken to sell the property, and no evidence to support the claim that the reduced rent was below market rent. In her brief Ms Graham said that the tenants moved out in August 2010 because she was doing up the house to sell. I note that the tenancy was for a fixed term to 6 September 2010. In evidence Ms Graham said that she would have put the property on the market in February (2011) if it had not been leaky. However a new tenancy started in November 2010 and continued until August 2011 when Reconstruct was due to start the remedial work. The rent reduction is claimed for this period.

[52] If the property was put on the market in February 2011, as the claimant intended, it would then have been vacant during the marketing process and, if sold, to the date of settlement. There is no evidence to indicate how long that might have taken. The claimant benefited by re-letting the property in November 2010, even if at a reduced rental. There is no evidence to support the claim that the rent of \$450 per week paid by these tenants was below market value. I conclude that the claimant has failed to prove that any loss resulted from the property being either vacant or tenanted at \$450 per week, or, if there was any loss, that it is a result of the Council's negligence and not the claimant's decision to sell the property.

[53] Electricity and water bills: The claimant claims a total of \$434.84 for power and water bills paid while the property was vacated on the basis that these costs would have been paid by the tenants. There is no evidence of the final date on which the tenants vacated and, as the bills include the period to the end of August 2010, it is possible that some of the accounts submitted included power or water used by them. Some of the charges appear to be fixed daily charges which are levied regardless of use unless

the service is disconnected. I am not satisfied that either these charges or the inability to recoup them from tenants are foreseeable results of the Council's negligence. This loss is as likely to have resulted from the claimant's decision to vacate the house in preparation for sale. The claim for power and water likely to be used during the repair process is accepted by Council. I therefore award this claim at the rate claimed of \$19.76 per week, a total of \$335.92.

[54] Landscaping: There is no evidence to support the claim of \$500 for landscaping costs therefore this claim is dismissed.

[55] The total awarded for consequential losses is therefore \$8,410.92.

[56] Interest: The claimant claims the interest on a loan taken out in anticipation of repair. However, the claimant could have mitigated this loss by repaying the loan once it was apparent that repair would not start as scheduled and the hearing would proceed on the basis of estimated repair costs. The claimant is entitled to interest at the rate of the 90 day bill rate plus 2% on the costs incurred to date for which the Council is liable. These are the Find a Leak report, the DBH fee for the assessor's report, and the consent fees. For the reasons given, I have not awarded interest on the deposit paid to Reconstruct.

[57] Interest is calculated for five months from 14 November 2011, the date on which the Council's account for \$4,141.70 was issued, this account being the major cost incurred to date. Applying a 90 day bill rate of 2.76%, interest is awarded at 4.76% and is calculated as follows:

Council fees	\$4,141.70
Find a leak report	\$540.00
WHRS report	\$500.00
Total costs incurred	\$5,181.70
Interest	\$102.77

[58] The Auckland Council is therefore liable to pay the claimant the sum of \$162,421.52, calculated as follows:

Repair costs	\$153,907.83
Consequential losses	\$8,410.92
Interest	\$102.77
TOTAL	\$162,421.52

[59] I therefore make the following order:

- i. The Auckland Council is liable to pay Head Heights Limited the sum of \$162,421.52 immediately.

DATED this 11th day of April 2012

S Pezaro
Tribunal Member