IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2010-100-000112
[2012] NZWHT AUCKLAND 38

BETWEEN	ROGER JERZY AND SAMANTHA KAY ZAGORSKI Claimant
AND	WILKINSON BUILDING AND CONSTRUCTION LIMITED First Respondent
AND	ALLIED HOUSE INSPECTIONS LIMITED Second Respondent
AND	AUCKLAND COUNCIL Third Respondent
AND	RICHARD ANDREW JOHN WILKINSON Fourth Respondent
AND	CATHERINE WILKINSON Fifth Respondent
AND	TIMOTHY JOHN BURCHER Sixth Respondent
AND	HITEX BUILDING SYSTEMS LIMITED Seventh Respondent
AND	IAN CONRAD HOLYOAKE Eighth Respondent

Hearing: 31 July 2012

Appearances: Claimants – Stuart Robertson
First Respondent – Carolyn Boell
Second Respondent – Self Represented
Third Respondent – Paul Robertson
Fourth, Fifth and Sixth Respondents – No Appearance
Seventh and Eighth Respondents – Self Represented

Decision: 24 August 2012

DETERMINATION
Dealing with Remedial Scope
Adjudicator: P A McConnell and M A Roche

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[1] Mr and Mrs Zagorski seek damages from the respondents for losses suffered to their home in Meadowbank. After a hearing in November 2011, we determined issues of liability in a decision given on 3 February 2012. We held that Mr and Mrs Zagorski were entitled to recover damages from all of the respondents other than Timothy Burcher. In that decision, we did not make any damages orders as it was uncertain whether a full reclad was required or whether the established defects and damage could adequately be repaired by a partial reclad or more targeted repairs. We noted that an important determinant of this issue was whether Auckland Council would give building consent for targeted repairs or a partial reclad.

[2] The issues of remedial scope and quantum were adjourned to allow Mr and Mrs Zagorski to obtain further expert advice and if necessary, make an application for building consent to carry out repairs to remedy the established defects and repair the damage that had been caused.

[3] Mr and Mrs Zagorski obtained further advice from their expert, Richard Maiden. Mr Maiden's advice was that an application for building consent for anything less than a full reclad would not be accepted by Auckland Council for the dwelling. In the circumstances he did not consider it appropriate to apply for building consent on a targeted basis as he considered this would result in time and cost being wasted.

[4] At a case conference convened on 22 March 2012 all parties agreed that the experts should reconvene at a conference to consider Mr Maiden's report on the scope of repairs to see whether agreement could be reached. It was also agreed that the experts would issue a joint memorandum outlining those aspects of the scope of repairs issue on which they agreed and disagreed and the reasons for any disagreement. If agreement could not be reached, then a further short hearing would be convened to hear further

evidence from the experts in relation to the appropriate remedial scope.

[5] The experts convened in a conference on Thursday 19 April 2012. Attached to Appendix A in this decision is the memorandum from that conference. In summary, Mr Maiden did not resile from his opinion that a full reclad was required. Mr Light, Mr Bayley and Mr Smith were of the opinion that targeted repairs or a partial reclad was all that was required although Mr Light's remedial scope was less extensive than that of Mr Bayley and Mr Smith. Mr Angell considered that the targeted repairs approach agreed to by the majority of experts was the minimum required to repair the established defects but was diffident about whether a partial reclad would be accepted by Auckland Council.

[6] As all experts did not agree on the appropriate remedial scope we convened a further hearing on 31 July 2012 for the experts to give further evidence on their views. At that hearing, the Tribunal allowed Mr Holyoake to call one further expert witness, Mark Hazlehurst. However we did not allow Mr Holyoake or Hitex Building Systems Limited (Hitex) to produce further evidence from Paul Probett and Dr Adrian Spears. Although we had previously ordered that we would not accept this new evidence, and also confirmed that by an oral direction at the hearing, Mr Holyoake in his closing submissions is effectively trying to introduce this evidence. He is also asking that our previous decisions refusing the filing of additional evidence be overturned.

[7] The issues we therefore need to decide are:

- Is it appropriate for the Tribunal to take into account additional evidence from further witnesses?
- What is the appropriate remedial scope to address the defects and damage established in the determination dated 3 February 2012?

Should the Tribunal accept new evidence from the seventh and eighth respondents?

[8] The initial hearing of this claim was completed in November 2011. This was intended to be a final hearing in all matters. However there was a change of opinion by some of the experts during the course of the hearing on the issue of whether the dwelling could be remediated by something other than a full re-clad. We accordingly considered it appropriate to adjourn the issue of remedial scope and quantum until after a decision had been made on defects, damage and the liability of the respondents. A final decision on those issues was given on 3 February 2012. The only remaining issues, as set out above, related to the appropriate scope of the remedial work given those conclusions and quantum.

[9] The parties agreed at the 22 March 2012 case conference that the claim would proceed based on the evidence of the existing experts. This was again made clear to Mr Holyoake at the commencement of the expert's conference on 19 April 2012. On 26 July 2012, two working days prior to the reconvened hearing, Mr Holyoake attempted to file briefs of evidence from three new witnesses, Dr Adrian Spears, Paul Probett and Mark Hazlehurst. In addition he filed a supplementary brief of evidence by Alan Light.

[10] Dr Spears' evidence is primarily on the condition of the framing and is based upon eight samples of drilling he has reviewed. Mr Probett's evidence is expressed to be "strictly in relation to the use and misuse of moisture meters and the effect on results." It is essentially a critique on some of the investigative methods used by other experts and a caution as to the reliability of specific moisture readings. Mr Hazlehurst's evidence is more related to the remedial scope and quantum. However some of his opinion is based on the briefs of Dr Spears and Mr Probett rather than on the basis of the other experts or the Tribunal's conclusion on damage and defects.

[11] On receipt of these briefs, we issued an informal direction that the only witnesses the Tribunal would hear from on Tuesday 31 July 2012, were the experts who gave evidence at the substantive hearing and attended the last expert's conference. Mr Holyoake challenged that decision. We accordingly issued a written order dated 30 July 2012 in which we directed that we would not accept the filing of briefs from additional witnesses. In addition we did not accept the parts of Mr Light's supplementary brief that challenged, or provided further evidence on, issues that have already been determined in the substantive determination.

[12] In that order we noted that the 31 July 2012 hearing was not intended, nor would it be appropriate for it, to provide a further opportunity for any party to produce further or additional evidence on defects and damage. These issues have already been determined and a substantive decision issued. If Mr Holyoake disagreed with the decisions in that determination the appropriate step for him to take was to appeal that decision, as he has done.

[13] We are still of that opinion. It is not appropriate for the Tribunal to re-open the issues of damage and defects when a final decision on those issues has already been made. While Dr Spears and Mr Probett are well qualified to give the evidence they purport to give, the appropriate time for that evidence to have been given was at the substantive hearing. Mr Holyoake had the opportunity to obtain that evidence and call those witnesses at the earlier hearing and chose not to do so. We accordingly see no reason to review our decision refusing to allow this additional evidence after a final determination has been issued on everything other than scope and quantum.

What is the appropriate remedial scope?

[14] This is not a typical leaky home claim. It relates to remedial work carried out and certified in 2004 which involved a total reclad of the house with Hitex cladding.

[15] The present defects and leaks are not systemic and widespread and there are relatively few high moisture readings. The defects that exist are primarily localised and are essentially discrete failures in specific locations in the cladding system, not a systemic problem throughout. This is also a property where the majority of the framing timber is treated and in some cases has been doubly treated with the application of frame-saver during the 2004 remedial work.

[16] While the Hitex cladding system does not have a cavity it has a drainage plain that performs essentially the same function in that it provides ventilation to the cladding system. The cladding itself is non-absorbent which all experts agreed can be joined or remediated in a targeted fashion.

[17] All the experts, with the possible exception of Mr Light, agreed that the areas of failure as determined by the Tribunal are those marked with a lattice structure on plans submitted by Mr Smith at the original hearing. These are all incorporated within the areas shaded in green on the plans, in Annexure A to this decision. The one proviso to that is the claimants say that there are two additional areas where they submit decayed timber has been established.

[18] As the issues with this property are small areas of failure, not widespread or systemic failure, there is a drainage plain and the timber is largely treated, we conclude that something short of a full reclad would be an appropriate option if the Council were willing to issue a consent for that work. Based on the evidence presented we consider it to be more likely than not that the Council would issue a

consent for this work if Hitex were willing to provide a warranty or producer statement.

[19] Mr Holyoake was asked to give evidence as to whether Hitex would be willing to provide such a warranty. Mr Holyoake accepted that Hitex would give a warranty for targeted repairs. Paul Robertson for the Council, then put this question to him:

> And if the work was undertaken by contractors associated with Hitex and the Council required a producer statement to confirm the new sections of the wall are appropriately installed and met the durability requirements to the Building Code and other requirements, would Hitex provide a producer statement in that vein?

[20] Mr Holyoake's answer was "no". He went on to explain that he would not give a warranty unless he was able to carry out further investigations and would only give a warranty to the work he considered was necessary to rectify the problems with this dwelling. He would not give a warranty for the work other experts or the Tribunal considered necessary if he did not agree with it.

[21] While this response might be appropriate if Mr Holyoake was suggesting that the remedial scope should be greater than that being considered by the Tribunal, that is not the situation with this claim. Mr Holyoake is clearly of the opinion that far less extensive repairs are required than what is considered appropriate by all of the experts other than Mr Light. His view is that more minor localised repairs are all that is required together with the installation of further probes and monitoring. While more minor repairs together with ongoing monitoring may have been an appropriate initial step such an approach cannot be a long term solution in the context of this claim.

[22] If anything short of a full reclad is being proposed the work would need to be done by Hitex or the company that now has the right to that product. It comes as a system and it cannot be matched

with other cladding materials. While Hitex has sold the brand to Exterior Finishing Limited Mr Holyoake gave evidence that he would be the person to give any warranty for the Zagorskis' property. In this regard when asked by us whether Exterior Finishing Ltd would be the people giving the warranty for any Hitex cladding he stated:

> This particular one there is an agreement that whatever happens with this claim I will be dealing with it, that's not something they will be dealing with. So I will still be giving the warranty on this.

[23] Mr Holyoake is saying that unless he dictates the ambit of the repairs carried out by the claimants he will not provide a warranty for the work. We do not consider it appropriate for the claimants to be held to ransom by Mr Holyoake in this way. Mr Holyoake has made it clear that he is only likely to give a warranty for remedial work that is significantly less than what all of the other experts, other than Mr Light, agreed was the minimum work required to remedy the defects and damage. It is also significantly less than what we consider appropriate.

[24] Giving Mr Holyoake the responsibility of determining the remedial scope in these circumstances is also not appropriate given the history of this claim since the remedial work was first done. We note that when high moisture readings were obtained from the probes shortly after the re-clad had been completed Mr Wilkinson approached Mr Holyoake as to what would be done. Mr Holyoake's response was to refuse to accept there was anything wrong with the Hitex work and suggest that more probes be installed and that the work be monitored further.

[25] During the course of the hearing, Mr Holyoake produced a recording of a conversation he had with Mr Wilkinson after Mr Zagorski had first raised his concerns about the house with Mr Wilkinson. Mr Holyoake's suggestion at that stage was to retrospectively complete a maintenance plan which Mr Wilkinson

could then put to Mr Zagorski. The defence could then be raised that Mr Zagorski had failed to mitigate any problems by not following the maintenance plan.

[26] During the course of the claim Mr Holyoake had difficulty in accepting there could potentially be issues either with the system or with the workmanship of Hitex employees or contractors. In addition, he refused to accept the validity of most of the expert evidence and described the assessor and the other experts as being "ferocious competitors". His view at least up until the end of the 31 July 2012 hearing was that all that was required was limited remedial work together with ongoing monitoring.

[27] As Mr Holyoake will not give a warranty for the remedial work that either the Tribunal or the majority of other experts consider to be appropriate, it is unlikely that the claimants would be able to obtain building consent for targeted repairs or a partial reclad. In these circumstances we conclude that the only reasonable way for the claimants to remedy the defects with their dwelling is for the property to be completely re-clad.

[28] Even if Mr Holyoake were to resile from the evidence he gave at the hearing we do not consider it to now be reasonable for the claimants to have to deal with him in order to get the remedial work completed. Mr Holyoake's evidence at the hearing was clear and emphatic. He would not give a warranty unless he prescribed the scope and he was the person who would take responsibility for any work to be carried out on the Zagorskis' house. If he were to now retract this evidence we are not convinced any change would be genuine.

[29] The parties agreed at the March 2012 case conference that if we were to determine that a full reclad was required we would not need to hear any further evidence on quantum. All quantum experts gave evidence at the hearing on the cost of a reclad and were questioned on the differences in their estimates. We will accordingly

proceed to make a final decision on the damages to be awarded and the contribution each liable party should pay.

[30] We accept that Mr Holyoake's stance on providing a warranty for any remedial work has almost doubled the damages we would otherwise have assessed for the remedial work. Therefore before completing our decision on quantum we consider it appropriate to provide the opportunity for parties to make further submissions on contribution.

[31] All parties will accordingly have until Friday 7 September 2012 to file any further submissions they wish to make on the issue of quantum and contribution. A final decision on quantum will then be issued.

DATED this 24th day of August 2012

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P A McConnell	M A Roche
Tribunal Chair	Tribunal Member