IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000041
[2010] NZWHT AUCKLAND 20

BETWEEN	JOHANNA MARIA VAN WORKUM, ANDREW FRANCIS VAN WORKUM and NIKKI BURLEY as Trustees of the VAN WORKUM FAMILY TRUST Claimants
AND	AUCKLAND CITY COUNCIL First Respondent
AND	GREGORY TERENCE MIKKELSEN and MERYL JEAN MIKKELSEN Second Respondents
AND	TERRANCE ALEXANDER MIKKELSEN Third Respondent
AND	SCARBO CONSTRUCTION LIMITED Fourth Respondent
AND	ROWLEY J CROWTHER Fifth Respondent
AND	THE SARICH FAMILY TRUST Sixth Respondent
AND	RICHARD LEE WILLIAMS Seventh Respondent
AND	RICHARD DANIEL JUDD Eighth Respondent
AND	GREGORY FREAR WHITHAM Ninth Respondent
AND	PETER JAMES ORR Tenth Respondent

Hearing: 22 March 2010 and 21 June 2010

Appearances: J Carter for the Claimants
Mr Crowther, Self-Represented

Decision: 15 July 2010

FINAL DETERMINATION
Adjudicator: S G Lockhart QC

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INTRODUCTION

[1] The claimants in this claim, Ms Johanna Maria Van Workum, Andrew Francis Van Workum and Nikki Burley as trustees of the Van Workum Family Trust, are the owners of a dwellinghouse situated at 24B Rukutai Avenue, Orakei, Auckland which is currently occupied by Ms Van Workum.

[2] The dwelling was purchased in May 2004 as a family home for Ms Van Workum. However as Ms Van Workum was unable to terminate a fixed term rental contract for another property she was renting at the time, the subject dwelling was rented out for a period of 16 months. As a result, Ms Van Workum did not move into the dwelling at Rukutai Ave until Labour Weekend of 2005.

[3] Not long after moving in, Ms Van Workum realised that the dwelling was leaky and lodged a claim with the Department of Building and Housing on 6 January 2006 whereby the WHRS Assessor concluded in his report that the claim is eligible. Accordingly, claims and cross-claims were made against the ten respondents in this claim.

Mediation

[4] A mediation hearing was held on 15 December 2009 at the office of the Tribunal. All parties to this claim attended the mediation except the fifth respondent, Mr Crowther.

[5] As a result of negotiations, a settlement was reached at the mediation hearing between all parties, with the exception of Mr Crowther. According to the terms of the settlement, it was agreed that the respondents to the settlement will advance a total sum of $212,500.00 (incl. GST) to the claimants in full and final settlement of the claims made against them.

[6] The above settlement does not prevent the claimants from continuing to pursue their claim against the remaining respondent, Mr Crowther as it is a partial settlement of a liability *in solidum*. In accordance with the principles outlined in *Body Corporate 185960 v North Shore City Council (Kilham Mews)*,[1] the claimants are entitled to seek judgment against Mr Crowther for the full amount of the claim. However as noted by Duffy J in *Kilham Mews* and reinforced in *Petrou v Weathertight Homes Resolution Service*,[2] the claimants are entitled to entry of judgment against Mr Crowther for the full amount of the damages claimed. However, since the claimants have already settled with all the other respondents to this claim for the sum of $212,500, the claimants cannot recover from Mr Crowther an amount which would cause the claimants to recover more than the

[1] HC Auckland, CIV-2006-004-3535, 28 April 2009, Duffy J.

total amount of their loss. As a result, the claimants seek an award of damages against Mr Crowther, the sole remaining respondent, for the balance of their claim, $165,733.78 plus $25,000 for general damages

PURCHASE OF THE PROPERTY

[7] After spending two years in Hamilton, Ms Van Workum returned to live in Auckland in July 2003 and in November 2003 she began house hunting. During this time Ms Van Workum saw an advertisement of the property in question and was later taken to view it by Mr Rowley Crowther who was then a real estate agent employed by Harveys Eastern Suburbs Branch. There she was told by Mr Crowther that the property would soon be auctioned.

[8] At the conclusion of the visit, Ms Van Workum explained to Mr Crowther that whilst she was interested in the property, she would want to have a building inspection carried out on the property before making any serious decisions about purchasing it. Mr Crowther however explained that a building inspection would probably take weeks as building inspection companies were backlogged with work and that there would not be time to get one done before the auction.

[9] On several occasions Ms Van Workum specifically asked Mr Crowther whether the dwelling was a leaky home or if there were any issues that she needed to be aware of. Mr Crowther assured her each time that there were no leaky issues and that it was a perfectly sound house. Indeed, Mr Crowther mentioned to Ms Van Workum that there had been other prospective purchasers who had reports done on the property and that none of these reports highlighted any issues. Ms Van Workum never saw these reports as Mr Crowther did not have copies. Instead Mr Crowther gave Ms Van Workum a

[2] HC Auckland, CIV-2009-404-1533, 24 November 2009.

copy of a valuation of the property for $795,000 which had been done several months earlier.

[10] In a later conversation with Mr Crowther, Ms Van Workum said that she could only offer $700,000 for the property. Mr Crowther however said that the vendors would not look at the offer but that he would put it to them anyway. A few days Mr Crowther told Ms Van Workum that the vendors were withdrawing the house from the market after refusing another offer of $750,000. Consequently Ms Van Workum ended her inquiry into the purchase of the property as well as her contact with Mr Crowther.

[11] One evening in early May 2004, Mr Crowther telephoned Ms Van Workum and advised her that the property was to be auctioned the next day and that it would be an opportunity to get a good buy as the vendors desperately wanted to sell the house. Mr Crowther mentioned that the vendors' circumstances had changed dramatically since pre-Christmas due to the sudden death of the vendor's wife a few weeks earlier and that the vendor was now intending to live in Australia with his son. Mr Crowther also mentioned that there would not be many serious bidders.

[12] The next morning Ms Van Workum telephoned her solicitor for advice regarding the purchase of the property. During the discussion Ms Van Workum raised the issue of the possibility of the home being leaky but that the agent had repeatedly assured her that it was not. When Ms Van Workum was asked what advice was given to her by her solicitor she was quite ambiguous. As it is therefore unclear whether or not the solicitor advised Ms Van Workum to purchase the property without a building inspection report, the Tribunal does not place any weight on this telephone conversation.

[13] At the auction Mr Crowther personally introduced Ms Van Workum to Ms Grant, the agent conducting the sale. Ms Van

Workum asked Ms Grant whether the house was leaky or if there were any problems with it, to which Ms Grant replied: “not as far as I am aware”.

[14] At the auction, Ms Van Workum entered into a sale and purchase agreement dated 12 May 2004 for the purchase of the property for $680,000.00. Although ownership of the property transferred to the trustees of the Van Workum Family Trust on 11 June 2004, the house was always intended to be a home for Ms Van Workum. Ms Van Workum however did not move into the house until October 2005 as she was already subjected to a fixed-term rental contract for another property she was renting. During that period, the subject dwelling was rented out for 16 months.

[15] Not long after moving in, Ms Van Workum discovered a puddle of water in the lounge the morning after a very heavy rainfall. After lifting the carpet Ms Van Workum noticed that the floor showed signs of dampness and rotting. As a result, Ms Van Workum got a builder friend to look at the house for her who stated that aside from the dampness on the floor and carpet, there were signs of things being patched up, such as silicone used around the windows in the kitchen.

[16] The claimants filed a claim with the Department of Building and Housing on 6 January 2006 under the Weathertight Homes Resolution Services Act 2002. Accordingly an assessor’s report was returned concluding that the claim met the eligibility requirements under the 2002 Act. An addendum report to the original report was also prepared after the Tribunal accepted the claimants’ application to widen its claim under the 2006 Act.

ISSUES

[17] The issues to be determined by the Tribunal in relation to the claims made against Mr Crowther are:

(a) What are the defects that caused the loss suffered by the claimants?
(b) Should Mr Crowther be responsible for the loss suffered by the claimants?
(c) If so, what is the quantum of damage should Mr Crowther pay?

DEFECTS IN THE PROPERTY

[18] In November 2008, the claimants engaged Maynard Marks Ltd to prepare a report in relation to their weathertightness claim. In March 2009 the report was completed highlighting the various responsibilities and the failure of responsibilities by certain parties, as well as the various defects and damages identified during a site investigation and review of the Council's file. Relying on that report, the claimants' claim the amount of $309,319.88 for remedial works based on the defects outlined at para 41 of its Summary of Claim dated 29 May 2009. According to the claimants, the following defects have caused significant moisture ingress, saturating the timber framing and causing toxic moulds to form:

41.1 Inadequately installed and weatherproofed joinery openings;
41.2 Insufficient internal to external floor level clearances, resulting in cladding finishing in contact with the adjacent surface of the concrete terrace;
41.3 Junctions of differing substrates of the timber framed and concrete masonry areas, including a lack of damp-proof course (DPC) in these locations;
41.4 A lack of movement in control joints, both vertically and horizontally;
41.5 A lack of appropriate weatherproofing of roof to wall junctions;

41.6 Penetrations through the cladding for the installation of roof ventilation grilles lack weatherproof seals and/or flashings;

41.7 The uppermost flat roof butyl rubber membrane;

41.8 Inadequately installed and sealed architectural plant-on details; and

41.9 A lack of an appropriately applied or damaged retaining wall tanking system.

[19] It is noted that the estimates provided by the WHRS assessor for the necessary repairs amount to $254,314.00. However as the defects and their remedial solution were not in dispute between the parties, the defects listed above by the claimants as well as the amount estimated to remedy those defects of $309,319.88 are conceded.

CLAIM AGAINST ROWLEY JOHN CROWTHER

[20] In their Closing Legal Submissions dated 22 March 2010 the claimants allege that real estate agents have both a tortious duty of care to purchasers in respect of advice given by the agent and that they are liable under the Fair Trading Act 1986 (FTA) for misleading conduct or misrepresentations. Based on the conduct of Mr Crowther leading up to the purchase of the dwelling, the claimants seek an order against Mr Crowther pursuant to section 43(2)(d) of the FTA for:

• Remedial costs	$309,319.88
• Consequential costs	$ 68,913.90
Less settlement	- *$212,500.00*
Sub-total	$165,733.78
• General damages	$ 25,000.00
Total	**$190,733.78**

[21] Mr Wilson, a registered building surveyor and a director of Maynard Marks Ltd, was called as a witness on behalf of the claimants. Mr Wilson's evidence specifically related to whether or not the dwelling was or was not a leaky building at the time it was purchased by Ms Van Workum, which was supported by the scientific analysis of 13 samples of timber from areas of the dwelling where vulnerable details existed. That scientific analysis was carried out by Beagle Consultancy which specialises in timber decay in leaky buildings. At paras 18 to 19 of his Brief of Evidence, Mr Wilson opined that:

> 18. Whilst considering the statement provided by Beagle Consultancy, combined with my own observations whilst completing my investigation at the dwelling I consider that there is no question that the dwelling was suffering from moisture ingress at the time the claimant purchased the property and in fact well before this time.
>
> 19. When looking at some of the construction practices adopted and the departure from the relevant technical literature and codes and standards I consider that the dwellinghouse was suffering from leaks and moisture ingress either upon completion of building works or very shortly thereafter.

[22] Mr Crowther did not challenge the evidence of Mr Wilson either by way of a response filed at the Tribunal or at the hearing. The only formal response obtained by the Tribunal from Mr Crowther was an email dated 10 June 2009 explaining the events leading up to the purchase of the dwelling as outlined in full at [7] to [14] above. At the hearing, Mr Crowther expanded on these events in arguing that an award should not be made against him as he was not the real estate agent that sold the property and that in answering Ms Van Workum's queries regarding the condition of the dwelling, he had only passed on the information which the vendors had told him.

[23] The Tribunal notes that as the previous owners of the property were not able to be located, they were not served with these proceedings. As a result, it has been difficult to assess the conduct

of Mr Crowther in the context of the sale of the property to Ms Van Workum in the absence of any evidence from the previous owners who engaged his assistance. In endeavouring to obtain further information as to the knowledge held by the previous owners and Mr Crowther at the time of the sale, the Tribunal summonsed Ms Grant to appear as a witness at a second hearing on 21 June 2010. Although the Tribunal is grateful to Ms Grant for attending the hearing to give evidence in this matter, unfortunately her evidence was not able to further clarify the situation. As a result, the Tribunal makes it determination based on the available but limited information before it about what was known about the state of the dwelling.

Claim in Tort

[24] A common misconception surrounding the issue of whether a real estate agent has responsibility for the loss suffered by owners of defective dwellings is that at the time of the purchase, a real estate agent owes a duty of care to the potential purchaser. In New Zealand however a real estate agent does not owe such a duty to a purchaser for real estate agents are agents acting on behalf of the vendor, not the purchaser.

[25] Generally a vendor will arrange for a real estate agent to assist with the selling his or her property. As a consequence of their engagement, the agent will usually view the property, advise on matters such as marketing strategies and the state of the market, arrange advertising and showing prospective purchasers the property, present the sale and purchase agreement, obtain the parties' signatures and collect the deposit. The example given by the authors of *Consumer Law*[3] is as follows:

> **Example 10.18.** A prospective purchaser P approaches a real estate agent R for assistance in finding a suitable property. R elicits from P information about her financial capabilities and criteria for a property. R

> shows P a property owned by V and listed with R's firm. R passes the information about P to V who uses it in deciding to reject P's offer in the expectation that she will eventually take up the property at the originally offered price. V's strategy is successful.

[26] As indicated by that example, the Tribunal finds that the law in New Zealand is that a real estate agent owes a duty of care to the vendor in assisting with the sale of the property.[4] However it is difficult to see how the same can be said for an agent and a potential purchaser. Such a difficulty was again noted by the authors of *Consumer Law* in pointing out that in New Zealand there is also no requirement that a real estate agent advise the potential purchaser that he or she is solely the agent for the vendor.

[27] Notwithstanding that understanding however, dual agency arrangements have been used in the selling and purchasing of properties whereby a real estate agent acts on behalf of both the vendor and the purchaser. However as indicated in decisions such as *Powierza v Daley*[5] and *BS Developments No 12 Ltd v PB & SF Properties Ltd*[6] a dual agency arrangement is unlikely to be found in the absence of an express undertaking by the real estate agent, particularly where, as usual, the agent is already under contract with the vendor.

[28] There was no evidence before the Tribunal indicating that there was such a dual arrangement between Mr Crowther and the vendors and Mr Crowther and Ms Van Workum. In the absence of such evidence, the Tribunal is satisfied that no such dual agency arrangement was made in the present case and accordingly Mr Crowther did not owe a duty of care to Ms Van Workum in the sale of

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[3] Bill Bevan (ed) *Consumer Law* (LexisNexis NZ, Wellington, 2009) at 10.30.
[4] See also *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 where the Supreme Court confirmed that it is a basic principle of agency law that agents owe duties of a fiduciary nature to their principal and that this obligation applies to real estate agents as much as to any other type of agent.
[5] [1985] 1 NZLR 558 (CA).
[6] (2006) 7 NZCPR 603.

the property. The claim against Mr Crowther in tort must therefore be dismissed.

Claim under the Fair Trading Act 1986

[29] Although it is clear that the claimants seek an order under section 43(2)(d) of the FTA, counsel for the claimants failed to specifically outline the provision(s) of the FTA upon which Mr Crowther is alleged to have breached. Notwithstanding that failure however, the Tribunal understands that the allegation that Mr Crowther is liable for misleading conduct or misrepresentation as set out in counsel's closing submissions is one which generally falls under section 9 of the FTA. As a result, the claimants claim against Mr Crowther under the FTA will be treated as such.

[30] Section 9 of the FTA provides:

> **9 Misleading and deceptive conduct generally**
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[31] There is no real doubt that Mr Crowther was engaged "in trade" for the purposes of section 2 of the FTA, even if he did not receive a commission for the sale of the property.[7] The real matter in dispute however is whether Mr Crowther's conduct and representations to Ms Van Workum were misleading and therefore in breach of the FTA.

[32] Although counsel for the claimants has not pointed to any specific representation or conduct alleged to be misleading, the Tribunal has approached the matter by examining Mr Crowther's

[7] The definition of "Trade" under section 2 of the Fair Trading Act 1986 means, amongst other things, any "Business", which is defined under section 2(a) as meaning "any undertaking that is carried on whether for gain or reward or not".

conduct as a whole and in its context, rather than in isolated parts.[8] In that context, each separate conversation or act undertaken by Mr Crowther at the relevant times therefore has the potential to lead to a breach of section 9.

[33] In the recent Supreme Court decision of *Red Eagle Corporation Ltd v Ellis*[9] it was held:

> [28] … [Section 9] is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer. [Accordingly] there must be an assessment of the circumstances in which the conduct occurred and the person likely to be affected by it.

[34] In *AMP v Heaven*[10] the Court of Appeal enunciated a three-stage test to be applied in determining whether there has been a breach of section 9. This three-stage test involves asking the following questions:

(a) Was the conduct capable of being misleading;
(b) Was the claimant actually misled by that conduct; and
(c) Was it reasonable for the claimant to have been misled by that conduct.

[35] The Tribunal is further guided by the decision in *Goldsbro v Walker*[11]whereby the Court of Appeal stated that the test for "misleading" is determined on an objective basis, namely without

[8] See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) ATPR 40-307 and *Goldsbro v Walker* [1993] 1 NZLR 394 (CA).
[9] [2010] NZSC 20. See also *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454 (HC).
[10] (1998) 6 NZBLC 102,414.
[11] [1993] 1 NZLR 394.

regard to the defendant's intent, exercise of care, or knowledge of falsity.

[36] In the application of those legal principles, the Tribunal makes the following considerations:

(a) Was Mr Crowther's conduct capable of being misleading?

[37] Yes. The Tribunal finds that Mr Crowther's statement assuring Ms Van Workum that there were no leaky issues with the dwelling and that it was a perfectly sound house, is in substance, an expression of opinion as to how potential purchasers would regard the dwelling in its current state. In stating such an opinion however, the Court of Appeal in *Body Corporate 202254 v Taylor*[12] stated that: "If there was not such a proper basis, the assertion was misleading and deceptive."

[38] Mr Crowther has repeatedly stated in evidence that he never saw any of the reports that were obtained by the other prospective purchasers, however there is some debate as to whether he did or not. Nevertheless to accept Mr Crowther's argument would mean that his assurances that the house was not leaky in response to Ms Van Workum's specific reservations were made without any proper basis. Not only were such representations incorrect in light of the unchallenged evidence of Mr Wilson but Mr Crowther also assured Ms Van Workum, with perceived certainty, that the house was perfectly sound in the absence of reading any of the building reports which he knew other potential purchasers had obtained. His continuous effort to encourage Ms Van Workum to purchase the property based on assurances for which he had no proper basis coupled with his statement to Ms Van Workum that there was no time to obtain a building report before the auction, indicates that Mr

[12] [2008] NZCA 317 at [50].

Crowther was unsympathetic to whether or not Ms Van Workum was being misled into the purchase.

[39] It is noted that Mr Crowther did give evidence at the hearing that prior to the purchase, he gave Ms Van Workum a copy of the LIM report for the property. Although Ms Van Workum denies that she received a copy of the LIM report, that LIM report did not identify any building issues with the property in any case. Accordingly little significance, if any, would have been added to Ms Van Workum's decision to purchase the dwelling at its current state even if she had viewed the LIM report.

[40] In these circumstances, Mr Crowther's representations necessarily implied that there was a proper basis for making such a positive assessment. For these reasons, the Tribunal finds that Mr Crowther's conduct was capable of being misleading.

(b) Was Ms Van Workum actually misled by that conduct?

[41] Yes. It is clear that Ms Van Workum was in fact misled by Mr Crowther's representations. The evidence before the Tribunal indicates that when Ms Van Workum was looking for a house to live in, she was looking to purchase a house that was not affected by what is now known as the "leaky home syndrome". Her concerns regarding whether the dwelling in question was a leaky house can be viewed in the number of times she expressly asked Mr Crowther whether the house was leaky. However each time, Mr Crowther reassured her that the house was perfectly sound – an opinion which has been found to have had no proper basis.

[42] The adjudication of the present claim has revealed that not only are the claimants currently suffering from the effects of a leaky home but that that the dwelling had been leaking during the time in which Mr Crowther was representing that it was not leaky.

Accordingly the Tribunal finds that Ms Van Workum was actually misled by Mr Crowther's conduct into thinking that she was purchasing a property that was perfectly sound.

(c) Was it reasonable for Ms Van Workum to have been misled by that conduct?

[43] Yes. With an objective view of the circumstances surrounding the sale of the property to Ms Van Workum, it is not difficult to determine that a reasonable and prudent purchaser in the position of Ms Van Workum would have been misled by Mr Crowther's representations that he or she would be purchasing a dwelling that was free of any weathertightness defects, especially given Mr Crowther mentioned to Ms Van Workum that there was no time to obtain a building inspection report prior to the auction. For these reasons the Tribunal also finds that it was reasonable for Ms Van Workum to have been misled by Mr Crowther's conduct.

(d) Causation

[44] In answering each of the three stages of the test in *AMP v Heaven* in the affirmative, it is essential to determine whether the loss suffered by the claimants is due to Mr Crowther's conduct for the purposes of whether the Tribunal ought to make an order pursuant to section 43(2)(d) of the FTA. That section provides that a Court, and indeed this Tribunal, may make:

> (d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section [that is, a contravention of the Act or involvement in such a contravention] to pay to the person who suffered the loss or damage the amount of the loss or damage.

Accordingly the claimants must show that they suffered loss as a result of Mr Crowther's conduct.

[45] In this case, the Tribunal has little difficulty in discerning the link between Mr Crowther's conduct and the damage suffered by the claimants, as it is clear from the evidence that Ms Van Workum relied on Mr Crowther's representations of the property that it was a perfectly sound house. It is also apparent from the evidence of Mr Van Workum's express queries as to whether the dwelling was leaky that had she known or suspected that there were weathertightness issues with the dwelling, she would not have even bid for it the auction. Accordingly the Tribunal is satisfied that Mr Crowther's conduct and representations caused the claimants' loss.

Summary of Mr Crowther's Responsibility

[46] In conclusion, although the claimants claim against Mr Crowther in tort fails as real estate agents do not owe a duty of care to purchasers, the Tribunal is satisfied that Mr Crowther's conduct and representations leading up to the sale of the property to Ms Van Workum was misleading and thereby caused the loss suffered by the claimants. As a result, Mr Crowther is liable to the claimants for his misleading conduct in breach of section 9 of the Fair Trading Act 1986.

QUANTUM

[47] In seeking an order under section 43(2)(d) of the FTA for Mr Crowther's misleading conduct, the claimants claim that he is therefore liable to pay $190,733.78 based on the following amounts:

• Remedial costs		$309,319.88
• Consequential costs (relocation, storage, investigation reports etc)		$ 68,913.90
Less settlement		- *$212,500.00*
	Sub-total	$165,733.78
• General damages		$ 25,000.00

[48] The amounts claimed for remedial costs and consequential costs were not disputed during these proceedings and therefore the Tribunal accepts that the amounts claimed for those costs are appropriate. For completeness however, the Tribunal recognises that it is unclear from the wording of section 43 as to whether general damages may be awarded to the claimants as compensation, given that "loss" and "damage" are not defined in the FTA. Nevertheless New Zealand case law authority has indicated that general damages may be awarded in these circumstances. For instance, in *Sinclair v Webb & McCormick*[13]Barker J commented that:

> The Act is a piece of consumer protection legislation, designed to provide the Courts with a wide measure of discretion to cover a multitude of situations; … there seems to be no reason to exclude emotional damage from the words "loss or damage". They are as much a loss to the plaintiff as any more quantifiable damage. Indeed, some misleading conduct might put a consumer to an enormous amount of inconvenience and distress with very little financial damage; there seems to be no reason why a plaintiff could not recover "general damages" for distress and inconvenience given the broad scheme of the Act.

[49] Moreover counsel for the claimants submitted that there is no reason in principle why trustees should not be entitled to general damages. In light of the Court of Appeal decision in *Sunset Terraces*[14] and *Byron Ave*,[15] the Tribunal not only agrees with counsel's submissions but also accepts that an award of general damages of $25,000 is reasonable as there is nothing about this claim to suggest the level of general damages should be lower than the amounts previously awarded by the Court of Appeal to owner-occupiers of leaky homes.

[13] (1989) 2 NZBLC 103,605 (HC) at 103,612.
[14] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.
[15] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

CONCLUSION AND ORDERS

[50] Although the claim against the fifth respondent, Mr Rowley Crowther, in tort is dismissed as the claimants have failed to prove that Mr Crowther owed a duty of care to the claimants as a real estate agent, the claim against Mr Crowther for his misleading conduct in breach of section 9 of the Fair Trading Act 1986 is proven to the extent of $190,733.78.

[51] Pursuant to section 43(2)(d) of the Fair Trading Act, the Tribunal orders Mr Crowther to pay the claimants the sum of $190,733.78 forthwith.

DATED this 15th day of July 2010

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SG Lockhart QC

Tribunal Member