IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000010
[2013] NZWHT AUCKLAND 8

BETWEEN	MICHAEL and ADELE COLE Claimants
AND	EURO-ASIA INVESTMENTS CO LTD First Respondent (Settled)
AND	AUCKLAND COUNCIL (formerly NORTH SHORE CITY COUNCIL) Second Respondent (Settled)
AND	REALTY INSIGHT LIMITED Third Respondent
AND	DAVID LEE Fourth Respondent (Settled)
AND	THEOTESTO REYES Fifth Respondent
AND	CITYWIDE BUILDING CONSULTANTS (AUCKLAND) LTD (Removed) Sixth Respondent
AND	RAY RANGI Seventh Respondent
AND	JACK XIANG Eighth Respondent
AND	ALLEN PRESTON Ninth Respondent (Settled)
AND	CHRISTOPHER WERTHMANN Tenth Respondent (Settled)

Decision: 20 March 2013

DETERMINATION ON QUANTUM OF DAMAGES
to be paid by the Fifth Respondent (Mr Theotesto Reyes) and
the Seventh Respondent (Mr Ray Rangi)
Adjudicator: P J Andrew

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INTRODUCTION

[1] This claim has been remitted back to the Tribunal by the High Court following an appeal against the Tribunal's final determination of 19 April 2012.[1] The Tribunal has been directed by the High Court to determine the quantum of damages to be awarded to the claimants against Mr Theotesto Reyes, the fifth respondent, and Mr Ray Rangi, the seventh respondent.

[2] Neither Mr Reyes nor Mr Rangi took any steps to defend the claims against them. On appeal the High Court held that in accordance with s 125(3) of the Weathertight Homes Resolution Services Act 2006 (the 2006 Act) and Rule 12.28 of the District Court Rules 2009, the liability of Mr Reyes and Mr Rangi is not at issue and the Tribunal must proceed on the basis that Mr Reyes and Mr Rangi were negligent in the respects claimed.

[3] This determination deals with the issue of the quantum of damages that the claimants have proven to be consequential on the liability of Mr Reyes and Mr Rangi. In determining that issue, it is necessary to take into account the earlier partial settlement of the claims, in which the first, second and fourth respondents paid to the claimants a total of $181,000.

[4] The claimants have sought the costs of repairs, consequential losses and general damages, totalling $353,922.00.[2] In the alternative, they seek damages on a diminution in market value approach, together with general damages and consequential losses, totalling $292,436.00.

[5] A critical issue I need to address is the appropriate measure of damages; is it the cost of repairs or a diminution in value? I also address the issue of contribution.

[1] *Cole v Xiang* [2012] NZHC 3146; *Cole v Euro-Asia Investments Co Limited* [2012] NZWHT Auckland 25.
[2] This figure includes an amount for stigma of $58,500.

THE FACTS AND THE WEATHERTIGHT DEFECTS

[6] A history of the claimants' purchase of the property and other material background facts are set out at [7]-[27] of the Tribunal's earlier determination of 19 April 2012.

[7] In his original report, the WHRS assessor, Mr Nevill, concluded:

> Widespread and numerous issues lacking in weathertight integrity and standard of workmanship exist over the envelope of this dwelling, many of which contravene building consent documentation and instructions given via inspection field memorandum.
>
> As a result, the cladding, as installed over the cavity system, is likely to be acting on a rain screen principle, i.e. an acceptance that water will gain access past the outer envelope and drain freely within the cavity. The cavity system as depicted in the Building Code compliance document E2AS1 is intended to act in a totally different manner, providing drainage for any moisture which may penetrate the integrity of the building envelope, i.e. on an unintended basis.
>
> It is considered likely, given the deficiencies in the cladding identified, that moisture penetration will be occurring in areas not apparent nor determined, and may exist in the cladding cavity.
>
> Such moisture within the cavity will, in areas, be unable to drain to the exterior due to the incorrect installation of solid horizontal cavity closer battens.

[8] Mr Nevill also concluded:

a) Moisture has breached both cladding detailing and the cavity in two areas of the lounge.
b) Moisture/water damage was apparent at the lounge ceiling and adjacent wall and associated with, inter alia, moisture gaining access at the inadequately and incorrectly installed balustrade and upper level/parapet capping flashings due to a lack of flashing continuity and lack of saddle flashing installation.

c) There was evidence of water damage beneath the front lounge window which might be attributable to a number of deficiencies in the weathertight detailing immediately above and adjacent to that area.
d) Moisture was considered likely to have been or to have had the potential to have entered at all areas lacking in weathertight integrity at window head flashing installations.
e) There was insufficient step down and fall on the main bedroom balcony and in-built gutters. A lack of adequate cladding clearance from balcony tiles and in-built gutters would promote the ingress of moisture via capillary action and wicking.
f) Water has flooded the lower basement level. This is likely to be related to an inadequacy or a lack of detail in the consented retaining wall drainage and tanking provision.
g) There was water ponding against the lower level basement floor slab in close proximity to the cladding base.
h) The base of the weatherboard cladding on the side of the lounge/dining passage door was contained behind the wet decking timber and finished onto the decking stringer.

[9] Mr Grigg, the claimants' expert, concluded that the property had the following defects:

a) No or inadequate flashings or seals at junctions between different types of wall claddings.
b) All claddings were direct fitted to the framing, without any drained cavities.
c) There were enclosed or partially enclosed balconies and decks and these were a major source of leaks. Handrails were fitted via penetrations through the top of the decks.
d) The deck/wall intersections were frequently not properly flashed.

e) Balustrades and parapet tops were often formed without a slope and without waterproofing.
f) There were serious issues with inadequate flashings and sealing around the frames, windows and doors. This included sill and jamb flashings as well as head flashings.
g) A very common water entry location was at the bottom of the roof wall apron flashing where an inadequate kick-out flashing was installed.

[10] The briefs of evidence filed by Mr Grigg also addressed drainage issues. Both Mr Nevill and Mr Grigg were in agreement about the sub-standard level of the storm-water drainage system (or lack of system) at the rear of the property and concerns regarding the source of such surface water. Both witnesses accept that full investigation and remediation of sub-storm water discharge is required.

[11] In a memorandum to the Tribunal dated 7 June 2011, Mr Nevill referred to the following drainage defects as "obvious and apparent":

a) Sub-standard storm-water drainage installation.
b) Lack of effective discharge from behind any lower level retaining wall field drain.
c) Lack of connection to a storm-water system of the down-pipe discharging into ground adjacent to the rear support column.
d) False field drainage pipe discharging into sump.
e) Overall rear drainage pipe provision discharging against neighbouring fence.
f) False (plastic bucket) sump and lack of connection to a storm-system and resultant lack of capacity to drain away.
g) Clean water draining from beneath the slab and within the lower floor level as reported by Mr Grigg.

THE DAMAGE CAUSED BY THE DEFECTS AND THE COST OF REPAIRS

[12] There was disagreement between Mr Grigg and Mr Nevill on the issue of whether the house needs to be fully reclad. Mr Grigg contended

that a full reclad of the existing weatherboard areas of the house would be required. Mr Nevill contended that 83.3 per cent of the weatherboards would need to be replaced. A joint statement was filed by these two witnesses which addressed the differences between them on the issue of damage and the scope and costs of remedial works.

[13] One of the principal reasons why Mr Nevill disagreed with Mr Grigg on the issue of cost and scope of repairs was Mr Nevill's view that many of the drainage defects identified were not weathertight defects and are thus outside the Tribunal's jurisdiction.[3]

[14] The question of whether the drainage defects are deficiencies in terms of the statutory definition of that term in s 8 of the 2006 Act (and thus within jurisdiction), is ultimately a matter for the Tribunal to resolve. Section 8 refers to "any aspect" of design or construction and in my view, given the consumer protection focus of the legislation, s 8, interpreted in the context of the Act as a whole, should not be narrowly construed. On the evidence, I am satisfied that the substantial drainage defects associated with this house are deficiencies in design or construction that have enabled (or are likely in future to enable) the penetration of water into the dwelling. This is apparent from the extensive evidence filed by Mr Grigg.

[15] Mr Nevill also fairly accepted that he cannot claim expertise as an engineer and that a number of the drainage defects raised engineering issues. The claimants produced a report from JH Little & Associates Specialist Consulting Engineers Limited on the issue of the storm-water flooding damage and reinstatement. That report notes that reinstatement would require excavation behind the basement block wall.

[16] The evidence demonstrates that the damage caused by the weathertight defects, including the drainage defects, has been extensive and that if the house were to be repaired, the scope of the remedial works would include engineering and excavation works.

[17] The evidence also establishes that the costs of any remedial works would be in the range $375,000 to $400,000.

[3] Cross examination of Mr Nevill by Mr Baird at Transcript page 224, lines 35-40.

The claims against Mr Theotesto Reyes

[18] The issue of the quantum of damages is to be determined on the basis of the following claims having been established and not requiring formal proof by the claimants.

[19] Mr Reyes was negligent in the following respects:

a) The plans prepared by Mr Reyes had a number of details as to weathertightness which were directly copied from the New Zealand Building Code E2 “external moisture”; as included on drawings WD-01,WD-02, WD-03. They were generic and non-site specific whereas they ought to have been converted and applied to actual site conditions and circumstances.
b) The standard details provided in Mr Reyes’ consent drawings did not cover a number of specific situations that were constructed on site.
c) Mr Reyes’ specification was also deficient because the products specified, such as the roof being custom-run Colorsteel long run metal roofing, did not match with the roofing noted on drawing BC-13. That drawing notes “Certain Teed” asphalt roofing, which is a totally different roofing material to the one installed on site.
d) Inadequate site supervision and guidance.
e) The standard details provided in Mr Reyes’ consent drawings were not constructed on site, such as the inclusion of a deck trough drain, as opposed to the edge gutter in drawing WD-02, the boxed corner detail with scribers in drawing WD-03, but not installed on site. These, and similar design changes, should have been identified by Mr Reyes during his site visits so that compliance was achieved.
f) Mr Reyes should have noted and addressed with the developer the poorly installed flashings at the tops of the brick veneer and weatherboard junctions (both vertically and horizontally), the non-compliance in terms of inside to outside separation distances and the general poor construction on site.
g) When Mr Reyes assumed responsibility for the design of the dwelling, he undertook to provide a set of plans that would

comply with the requirements of the Building Code, particularly clauses B2 “durability”, E2 “external moisture” and E1 “surface water”. Mr Reyes’ plans lacked critical information that could and should have been provided to the developer during site visits.

h) If Mr Reyes had not been engaged to provide further technical information, then he should have made sure that there was sufficient information included within his plans and specifications to cover the critical construction and weathertight issues.

[20] As directed by the High Court, the assessment of damages involves a determination of the quantum of loss attributable to the negligence of the respondent deemed to be liable. Having regard to the evidence of the assessor and Mr Grigg, I am satisfied that the breach of duty of care by Mr Reyes has been a substantial and material cause of the multiple defects in construction identified and the consequential substantial diminution in the value of the house. I conclude that Mr Reyes is jointly and severally liable for the full extent of the loss established.

Claim against Mr Ray Rangi

[21] Mr Rangi was the drainlayer sub-contractor. The issue of the quantum of damages he should pay to the claimants is to be determined on the basis of the following claims having been established and not requiring formal proof by the claimants.

[22] Mr Rangi was negligent in the following respects:

a) Inadequately installed drainage works as evidenced by the retaining wall leaks and the fake garden sump.

b) Mr Rangi was provided “the site plan and drainage” drawing BC-02 prepared by Mr Reyes. As an experienced drainlayer, Mr Rangi should have reviewed drawing BC-02 and if he considered changes to the site plans and drainage drawings were required, he should have sent it back to Mr Reyes for changing. This did not occur and was a serious breach of the duty of care.

c) The changes that were made to the site plan and drainage drawings include:
    i. Installing a downpipe against the brick column noted on plan BC-02 at the northwest corner of the patio, which was not connected to the site storm-water system, even though it extended into the ground.
    ii. Installing the fake garden sump, which was not shown on the drainage plan; and
    iii. The inclusion of sub-drains behind the internal lower level retaining wall was not shown on the drainage plan. This would have been required to have been installed and discharged into a sump, but none was shown in the lower rear garden area and the only one provided was the fake one.
d) The drainage works that were required behind the internal retaining wall were not completed properly as the drainage in that area which should have been installed properly to a standard sufficient to clear water away without difficulty, was not coping with the water which built up and flowed into and from that area of the property.
e) Mr Rangi's amendments to the drainage design failed. An additional drainage pipe from below the timber retaining wall to the northern end of the dwelling was not shown in Mr Reyes' drainage plan.

[23] The evidence, including the detailed reports of Mr Grigg establishes that the drainage defects with this house were substantial and responsible for a significant amount of damage caused (including likely future damage). Significant excavation works are likely to be required to adequately address the drainage issues.

[24] In the circumstances I am satisfied that the breach of duty of care by Mr Rangi has been a substantial and material cause of the full extent of the claimants' loss. Mr Rangi is jointly and severally liable for the full extent of the loss established.

MEASURE OF DAMAGES

[25] It is well established law that the assessment of damages is a question of fact. In the Supreme Court decision *Marlborough District Council v Altimarloch Joint Venture Limited,*[4] Tipping J held:

> [156] It is as well to remember at the outset that what damages are appropriate is a question of fact. There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of case to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. The reference to reasonableness has echoes of mitigation. A plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps.

[26] In a recent leaky home case, the High Court reviewed the various cases on the issue of measure of damages and concluded that in tortious negligence claims the normal or prima facie measure of damage is diminution in value.[5] In that case the measure applied was the difference between the cost of purchase and the market value of the property in its affected state at the date of purchase.

[27] The evidence here clearly establishes that this house was very badly built. The assessor, Mr Nevill, described it as one of the most poorly constructed or poorly finished that he has ever seen. There are substantial problems with the drainage system including unresolved issues about the source of water ingress into the house. Despite the number of investigations by Mr Grigg, there is still uncertainty about how to best address the inadequate drainage protection system behind the retaining wall. On each of his visits Mr Grigg discovered further issues and complications.

[4] *Marlborough District Council v Altimarloch Joint Venture Limited* [2012] NZSC 11, [2012] 2 NZLR 726.
[5] *Johnson v Auckland Council* [2013] NZHC 165.

[28] The location of the house, namely towards the bottom of the valley and below road level with a declining contour from south to north, makes resolution of the drainage issues both more complicated and important.

[29] The claimants have expressed no particular attachment to the house or any desire to stay there long term. That is not surprising, given their predicament. Indeed, in cross-examination, Mr Cole accepted that it would be a good outcome for he and his family if they never saw the house again and instead moved to another properly built house.

[30] Mr Sprague, registered valuer and expert witness for the claimants, expressed the view that a prudent purchaser would not consider that the claimants' dwelling was worth reinstatement given that its residual value (after the cost of remedial work and associated costs together with residual stigma) is lower than its land value. This was based on the following calculation:

Land Value	**$250,000**
Deduct **probable cost of demolition on site works**	**$77,050**
"As is" value	**$172,950**

[31] Mr Sprague was of the view that this type of outcome of "as is" value calculations resulting in a figure below land value, is not unusual. He said that this tends to confirm that in many cases where remediation is involved it seems cheaper to demolish and re-build rather than repair a damaged dwelling.

[32] In the circumstances, I conclude that the sensible and prudent approach would be to demolish the dwelling and to rebuild a new one, rather than carry out significant and costly repairs to the existing structure. I acknowledge that Mr Nevill, a very experienced assessor, expressed the view that it would be an extreme step to demolish the dwelling. However, that view was based on Mr Nevill's opinion that many of the significant drainage issues were not weathertight deficiencies and thus outside the Tribunal's jurisdiction. I have already addressed that issue and reached a different conclusion.

[33] On the cost of repair approach, the claimants have sought damages for remedial costs of $415,036. That figure is similar to the sum of $412,050 said to be the damages resulting from diminution in value.

[34] Having regard to all these different factors, I conclude the appropriate measure of damages in this case is diminution in value. That measure best reflects the extent of loss actually and reasonably suffered by the claimants.

[35] I accept the unchallenged evidence of Mr Sprague, registered valuer, that a diminution in value is to be calculated as follows:

Indicative non-stigmatised current market value of property (assuming no history of defects)	**$585,000**
Deduct – "as is" current market value of land	**$172,950**
Indicative loss on "as is" sale basis	**$412,050**

[36] There was some suggestion during cross-examination of Mr Grigg by Mr Piggin, counsel for the third and eighth respondents, that the figure of $77,050 for the probable costs of demolition, might have been on the high side because it might be possible to keep and reuse some of the retaining works and floor slabs. However, this matter was not seriously pursued. I conclude that this figure should be accepted, given the scale and nature of the drainage problems and the need for them to be comprehensively addressed.

DAMAGES CLAIMED BY THE CLAIMANTS

[37] On the diminution in market value approach, the claimants have sought damages calculated as follows:

Damages for diminution in market value	**$412,050**
Damages for consequential losses	**$1,386**
General damages for distress, anxiety and inconvenience	**$60,000**
Total Damages	**$473,436**
Less: Contributions recovered from the first, second and fourth respondents	$181,000
Total Claimed	**$292,436**

CONSEQUENTIAL DAMAGES

[38] I am satisfied that the total sum of $1,386.04 for consequential losses is fair and reasonable and recoverable from the two liable respondents namely Mr Reyes and Mr Rangi.

GENERAL DAMAGES

[39] The claimants have sought $60,000 general damages (i.e. $30,000 each) for the distress and inconvenience caused by the discovery of defects and damage to their home. In evidence they said they had suffered significant stress and difficulties affecting their whole family. It is submitted on their behalf that an award of $60,000 is in the circumstances, a fair and reasonable figure.

[40] General damages are to be assessed on a per unit basis.[6] The figure of $25,000 is a "general guide" and "rule of thumb" to guide the courts and tribunal in what is ultimately, a matter of discretion.

[41] The claimants both presented as sincere and credible witnesses. I have no doubt that they have suffered real and significant stress as a result of their experiences. That is regrettably not uncommon. In my view, the claimants have not established that this is an exceptional case where a departure from the general guideline figure of $25,000 might be justified. I find that the claimants should be awarded in total $25,000 general damages.

[6] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

TOTAL DAMAGES TO BE AWARDED TO THE CLAIMANTS

[42] The claimants have established that they have incurred total losses of $257,436 consequential on the liability of Mr Reyes and Mr Rangi. This is calculated as follows:

Damages for diminution in market value	$412,050
Damages for consequential losses	$1,386
General damages for distress, anxiety and inconvenience	$25,000
TOTAL DAMAGES	**$438,436**
Less: Contributions recovered from the first, second and fourth respondents	$181,000
TOTAL DAMAGES AWARDED	**$257,436**

[43] During the hearing the Tribunal asked the claimants and counsel, Mr Baird, how it was that the claimants had decided to settle for the sum of $181,000 against the Council and the developer, Mr Lee when the full extent of the loss, as now claimed, is considerably more than that figure.

[44] It was said in reply that at the time of the settlement (September 2009) the claimants were not aware of the nature and degree of the drainage and flooding issues which Mr Grigg identified and diagnosed on subsequent visits to the property. The evidence of Mr Grigg clearly supports that explanation. I also accept the submission of Mr Baird that it is generally not the role of the Tribunal to second guess why claimants have reached a particular settlement and the amount of such settlement. Furthermore, respondents who elect not to participate in a settlement run the risk (which they should "bear") that subsequent investigation will lead to a higher level of damage being identified and proven.

WHAT CONTRIBUTION SHOULD MR RANGI AND MR REYES (THE TWO LIABLE PARTIES) PAY?

[45] Section 72(2) of the 2006 Act provides that the Tribunal can determine any liability to any other respondent and remedies in relation to

any liability determined. In addition, s 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.

[46] Under s 17 of the Law Reform Act 1936 any tortfeasor is entitled to contribution from any other tortfeasor in respect of the amount to which you would otherwise be liable.

[47] Section 17(2) of the Law Reform Act 1936 sets up the approach to be taken. In *Findlay v Auckland City Council*[7] Ellis J held that apportionment is not a mathematical exercise but a matter of judgment, proportion and balance.

[48] There is relatively little evidence available to the Tribunal to reach a particularly informed decision on the issue of contribution. The only witness directly involved in construction was Mr Lee, the fourth respondent. I have already concluded that his evidence was unreliable. However, as is the case with the calculation of damages in formal proof cases, ultimately the Tribunal must simply do the best it can in the circumstances.[8]

[49] I have considered whether the issue of contribution should be deferred to see whether it actually becomes a live issue and if it did, then to give Mr Rangi and Mr Reyes the opportunity to make submissions on the point. However, neither Mr Rangi and Mr Reyes has played any role in these proceedings to date and contribution orders might have some practical application to the claimants in terms of the enforcement of this determination. The claimants have waited a very long time for all matters to be resolved and I therefore conclude that contribution orders should be made at this time.

[50] The evidence satisfies me that the negligence of both Mr Rangi and Mr Reyes has contributed in a significant and material way to the loss established. In the normal course an architect, especially one engaged in supervision on site, might be expected to have greater liability than a sub-contractor drainlayer. However, in this case the drainage problems are

[7] See n 6 above at [87].
[8] *Wordsworth v Purdie* HC Auckland, CIV-2010-404-1933, 25 October 2011 at [28].

substantial and a critical factor in my assessment (supported by expert evidence) that the better approach is to demolish rather than to repair this house.

[51] In all the circumstances, I conclude that Mr Rangi and Mr Reyes should share equally (i.e. fifty per cent each) in contributing to the total quantum figure of $257,436.00.

CONCLUSION AND ORDERS

[52] The claim by Mr and Mrs Cole, the claimants, is proven to the extent of $257,436.00.

[53] For reasons set out in this determination, I make the following orders:

a) Mr Theotesto Reyes, the sixth respondent, is ordered to pay the claimants the sum of $257,436.00 forthwith. Mr Reyes is entitled to recover a contribution of up to $128,718.00 from the other liable respondent, namely Mr Rangi, for any amount paid in excess of $128,718.00.

b) Mr Ray Rangi, the seventh respondent, is ordered to pay the claimants the sum of $257,436.00 forthwith. Mr Ray Rangi is entitled to recover a contribution of up to $128,718.00 from the other liable respondent, namely Mr Reyes, for any amount paid in excess of $128,718.00.

DATED this 20th day of March 2013

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P J Andrew
Tribunal Member