

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI 2009-100-000046
[2011] NZWHT AUCKLAND 65**

BETWEEN	LIANG-YUAN WU AND LING-YU KAO WU Claimants
AND	MANUKAU CITY COUNCIL First Respondent
AND	CRAIG ROBERT MARSHALL Second Respondent
AND	RRL GROUP LIMITED Third Respondent
AND	BERNARD DUFFY Fourth Respondent

Decision: 7 December 2011

FINAL DETERMINATION
Adjudicator: S Pezaro

Background

[1] Liang-Yuan Wu and Ling- Yu Kao Wu filed an application for adjudication on 17 June 2009. The claim was originally against the first, second and third respondents and the fourth respondent was joined on 3 September 2009. All parties attended mediation on 9 December 2009 and the Tribunal was advised that the claim had settled conditionally.

[2] On 21 April 2010 counsel for the claimants filed a memorandum advising the Tribunal that the second respondent, Craig Marshall, had failed to comply with the terms of settlement. The claimants sought judgment against Mr Marshall for the sum of \$422,111.45 being the costs of completing the work that Mr Marshall agreed to carry out under this settlement agreement, less the sum paid by the other respondents.

[3] I set a timetable for Mr Marshall to respond. Liability was not in dispute as Mr Marshall accepted liability in the settlement agreement. I therefore directed that the matter would proceed to hearing only if Mr Marshall disputed the amount claimed. The claimants subsequently filed an amendment to the amount claimed and Mr Marshall has had an opportunity to respond. I provided an opportunity for either party to seek an oral hearing. As they have not done so, I have proceeded to determine this claim on the basis of the written submissions received from both parties.

Quantum

[4] The claimants now seek judgment against Mr Marshall for the amount of \$478,138.00 (after deduction of \$105,000 paid by the first, third, and fourth respondents and inclusive of GST) plus interest from December 2009 at the 90 day bill rate plus 2%. The manner in which this sum is calculated is set out in the claimants' memorandum of 14

October 2011 and includes remedial costs, contingency fee, the Prendos project management fee and costs described as additional costs incurred as a result of the change of engineer and cladding type and Mr Marshall's request.

[5] The claimants state that although it was a term of the settlement agreement that the repair contract would be in accordance with NZS3910, Mr Marshall consistently refused to sign the required documentation. The claimants submit that NZ3910 requires payment only upon receipt of payment certificates from the builder on completion of certain stages of the work. The claimants' remedial consultant, Prendos, would not supervise the work on the basis of progress payments.

[6] The additional remedial costs are the result of engaging a building surveyor and engineering firm, Kaizon Limited, to revise the building contract documentation and a further application for building consent. The claimants state that these costs were caused by a request by Mr Marshall to change the type of cladding and that he caused delay which necessitated new consent applications.

Mr Marshall's Response

[7] Mr Marshall's only dispute with the amount claimed is that he believes that any costs arising from the change in cladding and the engineer's costs should be met by the owner.

[8] In October 2010 Kaizon was instructed by Grimshaw & Co. At that time Grimshaw's acted for Mr Marshall. On 4 October 2010 Mr Lane of Grimshaw's wrote to Neil Alvey of Kaizon asking whether Kaizon would act as a registered building surveyor and/or certified engineer. Paragraph 6(b) of that letter stated that the cost of Kaizon's services would be paid by the owners and not Mr Marshall.

[9] The affidavit of Liang-Yuan Wu filed 17 August 2011 attached the documents relevant to the events leading up to the negotiation of a contract with Kaizon. The revised offer of service dated 5 April 2011 from Kaizon was addressed to the claimants.

[10] A letter dated 17 March 2011 from the claimant, Ming-Yuan Wu, to Mr Marshall's then solicitor, John Burton, confirmed that Kaizon would not undertake the contract on the basis of the solid plaster cladding proposed by Prendos because that cladding was not a proprietary system. The letter records that Kaizon recommended an alternative cladding material.

[11] I conclude that Kaizon entered into a contract with the claimants to supervise the remedial work and that the change of cladding was a term of Kaizon's engagement. While I accept that the claimants engaged Kaizon because Prendos would not supervise the contract on the basis of progress payments to Mr Marshall, as he required, I do not accept that Mr Marshall is liable for Kaizon's fee. The claimants have a duty to mitigate their loss. They could have done so by agreeing to a progress payment schedule. It appears that the reason the claimants instructed Mr Marshall was because Prendos would not agree to any amount being paid to Mr Marshall to cover the cost of materials before he started. Kaizon however would proceed on this basis.

[12] There was no provision in the agreement reached between the parties for progress payments to be made however I am not satisfied that the lack of such a provision means that it is reasonable to sheet home the cost to the claimants of changing their project manager rather than negotiating an agreement to proceed on a progress payments basis with Mr Marshall.

[13] For the reasons given I am not satisfied that the claimants have proved the claim for the Kaizon fees. I note that if they had

done so, the cost of Prendos managing the remedial works would not have been awarded as this would amount to a doubling up of costs for supervision of the work.

Conclusion and Summary

[14] The claimants have proved their claim to the following extent:

Remedial cost (lowest tender)	\$397,385.00
Contingency of 10%	39,738.50
Prendos project management fee	\$30,929.50
	428,314.50
Less contribution from other respondents	-\$105,000
	323,314.50
GST at 15%	48,497.17
TOTAL	323,314.50

Interest

[15] The claimants claim interest from December 2009. The Tribunal has discretion to award interest under clause 16 schedule 3 of the Weathertight Homes Resolution Services Act 2006. I am not satisfied that an award of interest is justified in this case where the claimants have not incurred the cost of remedial work and have received interest on the sum paid by the other respondents since settlement.

Settlement funds

[16] The sum of \$105,000.00 is held in the claimants' solicitor's trust account. Clause 2 of the deed of settlement provided that this sum was to be applied to pay the plasterer's costs and any additional

materials that Mr Marshall may have required when carrying out the work. I therefore direct that this sum is to be applied to the cost of materials for the remedial work.

DATED this 7th day of December 2011

S Pezaro
Tribunal Member