IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-110 and TRI-2012-100-111
[2014] NZWHT AUCKLAND 8

BETWEEN	LINDA JAN HOLLOWAY Claimant – 2A O'Neill Street
	RACHEL DE LAMBERT AND NICHOLAS COLLINS Claimants – 2B O'Neill Street
AND	JENNY GRIEVE AND ALISTAIR ROSS First Respondents
AND	JOHN FRANCIS HEAP Second Respondent
	GEOFFREY LAURENCE Second Respondent
	MARGUERITE SEAGAR Second Respondent
AND	JOHN FRANCIS HEAP Third Respondent
AND	AUCKLAND COUNCIL (Removed) Fourth Respondent
AND	ANDREW PATTERSON (Removed) Fifth Respondent
AND	BRAD RUDDELL (Removed) Sixth Respondent

Hearing: 5 May 2014

Appearances: C Lane for the Third Respondent

Decision: 24 June 2014

FINAL DETERMINATION
Adjudicator: M A Roche

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[1] In 2003 twin townhouses were built at 2A and 2B O'Neill Street, Ponsonby. Jenny Grieve was the beneficial owner of 2A. John Heap, Geoffrey Laurence and Marguerite Seagar (Heap/Seagar) were the owners of 2B. Mr Heap and Ms Seagar are husband and wife. Mr Laurence is a trustee of the John Heap Family Trust. Ms Grieve and Mr Heap shared the costs associated with constructing the townhouses and shared the profits when the townhouses were sold.

[2] Linda Holloway and Rachel De Lambert and Nicholas Collins are the original owners of the townhouses. In 2011, Ms Holloway and Ms De Lambert discovered that the townhouses were leaky homes. The houses have now been repaired and the claimants brought proceedings in the Tribunal against Ms Grieve and Alistair Ross Heap/Seagar, and Auckland Council.

[3] The claimants alleged that Ms Grieve and Mr Heap were developers and as such owed them a duty of care during the construction of the townhouses. Mr Heap agreed that he had been a developer in respect of 2A and 2B O'Neill Street. Ms Grieve denied that she was a developer. She claimed that she intended the townhouse at 2A to be her retirement home and only sold it to Ms Holloway after Ms Holloway made an unsolicited offer to her that she could not refuse.

[4] The claimants settled their claim against Heap/Seagar and the Council. As a term of the settlement the claimants subrogated their claims against Ms Grieve and her nephew, Mr Ross, to Heap/Seagar. Heap/Seagar have discontinued the claim against Mr Ross. They seek contribution from Ms Grieve towards the settlement sum paid by Mr Heap. On behalf of the claimants, Heap/Seagar seeks the balance between the claimants' loss and the settlement sum.

[5] Ms Grieve filed a cross-claim against Mr Heap. She alleged that Mr Heap was the builder/project manager in respect of the townhouses and, as such, owed a duty of care to the claimants. Mr Heap denied that he was the builder or project manager.

[6] The issues I need to address are:

a) Was Ms Grieve a developer?
b) What was the role of Mr Heap?
c) What were the defects?
d) What was the appropriate scope and cost of remedial work?
e) What other damages should be awarded?
f) What, if any, amount should be paid by Ms Grieve to the claimants?
g) What, if any, contribution should be paid by Ms Grieve to Mr Heap?

BACKGROUND

[7] In early 2002, Ms Grieve bought 2 O'Neill Street, Ponsonby. The site was in two titles. Ms Grieve sold 2B O'Neill Street to Heap/Seagar. She transferred 2A O'Neill Street to her nephew, Mr Ross, but remained the beneficial owner.

[8] Ms Grieve and Mr Heap engaged Andrew Patterson to design two matching townhouses for 2A and 2B O'Neill Street. Applications for building consents for the townhouses were made in the name of Mr Ross for 2A and Mr Heap for 2B.

[9] Brad Ruddell and Tony Walker were engaged as builders. They and other contractors were housed at a rental property arranged by Ms Grieve while the townhouses were being built.

[10] Ms Grieve and Mr Heap were both involved with the construction of the townhouses. Ms Grieve made decorating decisions. Mr Heap organised the delivery of materials and the engagement of subtrades. He also assisted Mr Ruddell to lay the torched-on membrane at the rear of the townhouses.

[11] In late 2003 Ms Grieve showed her neighbour, Ms Holloway around the nearly completed townhouses. Ms Holloway purchased 2A prior to its completion for $1.5 million.

[12] Ms Grieve assisted with the marketing of 2B which was sold following its completion to Ms De Lambert for $1.35 million. Code compliance certificates were not issued for the townhouses because risers and handrails for the internal stairs were omitted.

[13] After the sale of both townhouses Mr Heap and Ms Grieve accounted to each other for the expenses they had incurred during construction and the profit made from the sale of the townhouses. Ms Grieve accounted to Mr Heap for half of the $150,000 difference in the sale price of the townhouses and for differences in the costs they had occurred in respect of the townhouses.

[14] Ms Holloway experienced some leaks during an intense storm in 2008. In 2011 she decided to sell the townhouse and applied for a code compliance certificate from the Council. A Council inspector carried out a final inspection of the house. This resulted in Ms Holloway receiving a notice to rectify weathertightness defects. Ms De Lambert's house had similar defects and both claimants applied for assessor's reports in March 2012.

[15] The townhouses were repaired during 2013.

WAS MS GRIEVE A DEVELOPER?

[16] Developers owe a non-delegable duty of care to see that proper care and skill is exercised in the construction of residential dwellings.[1] Two main criteria have been identified in case law for determining whether someone is a developer. First is control of the building process and second is the profit motive.[2] In *Keven Investments Limited v Montgomery*, Woodhouse J suggested that the profit motive in itself could be sufficient to categorise someone as a developer. His Honour suggested that it is the business element which provides the policy foundation for imposing the duty of care.[3]

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[1] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
[2] *Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC); *Body Corporate 188273 v Leuschke Group Architects Limited*, (2007) 8 NZCPR914 (HC).
[3] *Keven Investments Limited v Montgomery* [2013] NZAR 1113 (HC).

[17] Ms Grieve's motivation for her involvement in the townhouse development largely determines whether or not she was a developer. Mr Heap claims that Ms Grieve was motivated by profit and that the two of them shared a common intention to develop the townhouses for sale. Ms Grieve claims that 2A O'Neill Street was constructed to be her retirement home and that it was her intention, while the houses were being developed, that she would live there.

[18] Two competing accounts were presented. Mr Heap and Ms Seagar gave evidence that Ms Grieve approached Mr Heap to partner her in the townhouse development and that Ms Grieve never mentioned to them that she intended to live in 2A. Mr Heap and Ms Seagar gave evidence that it was Ms Grieve's decision to engage Andrew Patterson as the architect for both townhouses and that he was selected because she believed that Andrew Patterson designed townhouses would be sold at a premium.

[19] Mr Heap gave evidence that he agreed to the placement of a shared storm water tank on the section at 2B and that he would not have done this if there had not been a profit share agreement in place. This is because the placement of the tank detracted from the value of 2B. He also gave evidence that Ms Grieve arranged with Andrew Patterson for the size of a bedroom at 2B to be increased in order to increase the value of the completed townhouse. He further gave evidence that a significant sum was paid to him by Ms Grieve in order to settle the equal division of profits between them.

[20] Ms Grieve in her brief says that after selling 2B O'Neill Street to Mr Heap, she accepted his offer to project manage the construction of both townhouses. Briefs filed on her behalf by her nephew Mr Ross and her lawyer Robyn Hopkins both stated that Ms Grieve had intended 2A O'Neill Street to be her retirement home. Neither Ms Grieve nor any of her witnesses attended the hearing. Because there was no opportunity to cross-examine them, the weight that can be placed on their evidence is minimal.

[21] Ms Holloway gave evidence at the hearing. She said that Ms Grieve had mentioned an intention to live at 2A to her. However she also

said that Ms Grieve had no hesitation in selling the townhouse to her and that, rather than Ms Holloway making her an offer that she could not refuse, Ms Grieve named her sale price which Ms Holloway then took some time to consider.

[22] Mr Heap and Ms Seagar appeared at the hearing and were questioned on their evidence. Ms Grieve did not appear so there was no opportunity to assess her credibility. In the circumstances I prefer the evidence of Mr Heap and Ms Segar to that of Ms Grieve.

[23] Having considered all the evidence I am satisfied, on the balance of probabilities, that Ms Grieve acted as a developer in respect of both 2A and 2B O'Neill Street. Her actions overwhelmingly suggest that she was an equal partner with Mr Heap in a development, the purpose of which was to build the houses and sell them for profit. I find it particularly persuasive that the profits and expenses were divided equally between Ms Grieve and Mr Heap. Ms Grieve in her brief said that she paid Mr Heap money after the completion of the project so that she could get on with her life even though she did not agree that she owed him anything. Given the significant sum involved I do not accept this.

[24] Ms Grieve and Mr Heap breached the non delegable duty of care that they owed to the claimants as developers by failing to ensure that proper care and skill was exercised in the construction of the townhouses. This failure resulted in the townhouses being built with weathertightness defects which resulted in loss to the claimants. As co-developers in respect of both houses Ms Grieve and Mr Heap are both jointly and severably liable to the claimants for this loss.

WHAT WAS THE ROLE OF JOHN HEAP?

[25] Ms Grieve claimed that Mr Heap acted as head contractor/project manager during the construction of the townhouses and accordingly owed a duty of care to the claimants. In her brief she said that Mr Heap offered to project manage the construction of the townhouses and that he in fact managed and oversaw construction and made decisions such as on the selection of contractors.

[26] Mr Heap gave evidence that prior to his retirement he was a businessman working in horticulture and the food industry. He had never worked as a builder and had no building qualifications. However, he had assisted with the building of his beach house at Oakura.

[27] Mr Heap claimed that a young builder named Brad Ruddell was engaged as the head builder and that his own role had been to collect materials, make phone calls, and organise inspections. Mr Heap said that Mr Ruddell told him what was required to be ordered and that his only hands-on involvement was when he assisted Mr Ruddell with the application of membrane.

[28] Mr Ruddell was named as a respondent to the proceeding although the claims against him were later withdrawn. He filed an affidavit to support a removal application. In this affidavit he said that he was very young at the time the townhouses were constructed and had only recently completed a certificate in construction. He said that he was hired as a labour-only builder on a fixed hourly wage and that a highly experienced builder, Tony Walker, worked with him on the project.

[29] The account of Mr Heap's role given by Ms Grieve and by Mr Heap does not vary significantly. It seems clear that Mr Heap took control of the logistical aspects of the construction by organising the delivery of materials, organising council inspections, and engaging subcontractors. The dispute between them appears to be whether Mr Heap should be called the project manager of the development.

[30] Ms Grieve may well have considered that Mr Heap was the "project manager" for the townhouses. However "project manager" is merely a title that does not in itself have legal significance. Whether Mr Heap owed a duty of care (in addition to the duty he owed as a developer) depends on what his responsibilities were and what his actions and omissions on the job were.[4]

[4] *Auckland City Council v Grgicevich* HC Auckland, CIV-2007-404-6712, 17 December 2010 at [72], [74].

[31] Mr Heap had no building background and could not have been responsible for the technical quality of the building work. I do not consider that his organisational role gave rise to a duty of care to future owners.

[32] However, neither do I not accept that Mr Ruddell was engaged as the project manager or head contractor. Mr Heap's diary entries show clearly that both Mr Ruddell and Mr Walker were paid $25 an hour for their labour. The equality of this remuneration suggests that their roles were equal. Accordingly, I do not accept that Mr Ruddell was more than a labour-only contractor. At the hearing, Mr Heap gave evidence that Mr Ruddell was paid a larger bonus than Mr Walker at the end of the project to reflect his greater role. However, the $2,000 difference in the size of this bonus does not reflect the level of responsibility Mr Heap claimed that Mr Ruddell took.

[33] It appears that no one involved with the construction of the town houses assumed responsibility for ensuring that the building work was performed with reasonable skill and care. In other words, there was no "project manager" as that term is usually understood. This omission in itself can constitute a breach of a duty of care.[5] I consider that both co-developers bear equal responsibility in this regard. This has no real significance however because, as will be seen later, I consider that Ms Grieve and Mr Heap are equally liable in respect of the development. I do not consider that the role undertaken by Mr Heap should give him a greater liability than that of Ms Grieve.

WHAT WERE THE DEFECTS AT THE TOWNHOUSES?

[34] The claimants filed two briefs of evidence of their expert, Neil Alvey. Mr Alvey is a registered building surveyor, certified weathertightness surveyor and full member of the New Zealand Institute of Building Surveyors. Mr Alvey's company, Kaizon Limited, undertook investigations of the townhouses prior to and during the remedial work. In his brief Mr Alvey stated that systemic deficiencies, high moisture content readings and timber decay were discovered throughout all of the buildings on the two properties and that in order to remediate the damage to the dwellings, full reclads of the dwellings were required. In his brief Mr Alvey listed the

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

defects with the townhouses that caused the need for remediation. These were:

1) Inadequately sealed laps to bitumen flat roof.
2) Inadequately dressed membrane into the pre-formed PVC outlet liner.
3) Screw fixing penetrations through the edge flashing and surface of the bitumen flat roof.
4) Inadequate application of the liquid applied membrane roof.
5) Lack of appropriate weatherproofing of the parapet to flat roof junctions.
6) Horizontal cavity battens blocking the drainage and ventilation of the cavity.
7) Lack of damp proof course between the timber framing and masonry wall.
8) Inadequate clearance between the underside of the fibre cement sheet and external paved ground.

[35] In addition to the above defects unit 2B had a further defect which was an open mitre junction to the timber sill below the corner louvre window.

[36] No contrary evidence was filed by Ms Grieve. I accept that the defects at the property were as described by Mr Alvey in his brief and that the defects gave rise to the need for a full reclad of the townhouses.

WHAT WAS THE APPROPRIATE SCOPE AND COST OF REMEDIAL WORK?

[37] In his evidence, Neil Alvey described the remediation process. Because additional damage was discovered during this process, a series of variations were made to the scope. Expert evidence supporting the quantum claim was filed by the claimants. The quantum expert, Paul Love, explained the tender process for the remedial work in his brief. He explained the variations to the contract that were made during the work. He also explained the betterment calculation that was made. Significant sums were deducted from the cost of the remedial work following the

classification of items as betterment. For example the original cladding was replaced with new weatherboards resulting in a deduction for betterment of $112,504.50 (including GST). Another significant deduction was made in respect of the new joinery that was installed. $36,116.39 was deducted for this.

[38] No evidence challenging the quantum claimed was filed by Ms Grieve. In her brief she disputed the scope and costs of the remedial work carried out and whether proper allowance had been given for what seemed to her to be the substantial betterment which had occurred.

[39] Having considered the evidence of Mr Alvey and Mr Love and noting the substantial deduction that was made for betterment, I consider that the claimed remedial cost of $706,304.67 is established.

[40] Ms Holloway and Ms De Lambert claimed consequential losses of $114,781.02.

[41] The consequential losses claimed are as follows:

Unit 2A		
A	Lost rental income (61 weeks of rental income at $1,100 per week)	$67,100.00
B	Strip and seal the granite floors	$7,774.00
C	Borrowing and bank charges	$7,298.96
D	Contracts work insurance	$1,761.05
E	Professional charges by Fluker Surveying, to survey the position of the walls along the boundaries	$402.50
F	Professional charges by Seagar & Partners to value the property to obtain finance	$713.00
G	The cost of applying for a WHRS Assessor's report	$500.00
	TOTAL	**$85,549.51**

Unit 2B		
A	Alternative accommodation costs (56 weeks of alternative accommodation at $170 per week).	$9,520.00
B	To uplift, store and relay the carpet	$180.00
C	Move furniture into storage	$3,654.00
D	Store furniture	$5,915.00
E	Contracts work insurance	$1,761.05
F	Borrowing and bank charges	$7,298.96
G	Professional charges by Fluker Surveying, to survey the position of the walls along the boundaries	$402.50
H	Cost of applying for a WHRS Assessor's report	$500.00
	TOTAL	**$29,231.51**

[42] The amounts claimed were supported by documents such as invoices and receipts. In addition, Ms Holloway and Ms De Lambert attended the hearing and answered questions about the losses claimed. I am satisfied that the consequential losses claimed have been established and accordingly I award the sum of $114,781.02 being the sum of $85,549.51 in respect of unit A and $29, 231.51 in respect of unit B.

GENERAL DAMAGES

[43] Ms Holloway and Ms De Lambert have each claimed general damages of $25,000. Both Ms Holloway and Ms De Lambert gave details of the stress, disruption, financial pressure and anxiety they had experienced from being embroiled in leaky home claims. Ms Holloway rents her townhouse out and has claimed loss of rental as part of the consequential losses. Ms De Lambert occupies her townhouse and lived as a boarder elsewhere when the townhouse was being remediated.

[44] $25,000 is the amount that the Court of Appeal in *Byron Avenue* confirmed was in the general vicinity available to owner-occupiers.[6] General damages for non-owner occupied properties are usually assessed at a starting point of $15,000. White J in *Coughlan v Abernethy* confirmed that standard rates for general damages provide general guidance for the purpose of reducing cost and facilitating consistency. [7]

[45] There is nothing before me that indicates that Ms Holloway should be awarded general damages above the starting point of $15,000. Her circumstances would seem to be very similar of those of most non-occupier claimants. Likewise, Ms De Lambert's circumstances appear to be broadly similar to those of most owner-occupiers involved in leaky homes claims. I conclude that the appropriate award for general damages is $25,000 in respect of Ms De Lambert and $15,000 in respect of Ms Holloway, a total of $40,000.

INTEREST

[46] The claimants have claimed interest on the total sum of the remedial work and consequential losses ($821,085.69) from the midpoint of the remedial work (31 March 2013) to the date of payment of the partial settlement of $705,000 (20 December 2013). Schedule 3, pt 2, s 16(1) of the Weathertight Homes Resolution Services Act 2006 (the Act), provides that interest can be awarded at the 90-day bill rate (3.3 per cent) at the date of hearing plus 2 per cent (5.3 per cent combined).

[47] The interest claimed is as follows:

> $821,085.69 x 0.053 = $43,517.54 in interest per annum.
> $43,517.54 ÷ 365 = $119.23 in interest per day.
> There are 264 days from 1 April 2013 to 20 December 2013.
> 264 days x $119.23 = $31,476.72
>
> Total interest from 31 March 2013 to 20 December 2013 is $31,476.72.

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[6] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 (*Byron Avenue*).
[7] *Coughlan v Abernethy* HC Auckland, CIV-2009-404-2374, 20 October 2010.

Interest from 21 December until 5 May 2014

[48] The claimants also claim interest on the balance of their claim for the remedial works and consequential losses not covered by the partial settlement. The partial settlement was paid on 20 December 2013. This interest calculation is set out below:

> $821,085.69 - $705,000 = $116,085.69
> $116,085.69 x 0.053 = $6,152.54 in interest per annum
> $6,152.54 ÷ 365 = $16.85 in interest per day
> 136 days from 21 December 2013 to 5 May 2014
> 136 days x $16.85 = $2,291.60

[49] The total interest from 21 December 2013 to 5 May 2014 is $2,291.60. The claimants also claim an additional $16.85 in interest per day until payment.

[50] I accept that the calculations supporting the interest claimed are correct and that it is appropriate to award the amount claimed to the claimants.

[51] The claimants' claim is established to the amount of $894,854.01 as follows:

Item	**Amount**
Remedial Cost	$706,304.67
Consequential Losses	$114,781.02
General Damages ($25,000 to Ms De Lambert and $15,000 to Ms Holloway)	$40,000.00
Interest from 31 March 2013 to 20 December 2013	$31,476.72
Interest from 21 December 2013 to 5 May 2014	$2,291.60
	$894,854.01

WHAT, IF ANY, AMOUNT SHOULD BE PAID BY MS GRIEVE TO THE CLAIMANTS?

[52] The claimants claim from Ms Grieve their total claim of $894,854.01 less the partial settlement of $705,000 paid by the Auckland Council and Mr Heap. The surplus claimed by the claimants from Ms Grieve is $189,854.01. As a developer Ms Grieve owed the claimants a non delegable duty of care and is liable to them for the losses arising from the breach of that duty. Accordingly, she is required to pay them the sum of $189,854.01.

WHAT, IF ANY, CONTRIBUTION SHOULD BE PAID BY MS GRIEVE TO MR HEAP?

[53] Mr Heap claims from Ms Grieve half of the $505,000 paid in settlement to the claimants on 20 December 2013 pursuant to s 17(1)(c) Law Reform Act 1936. He also claims interest on 50 per cent of the $505,000 paid to the claimants from the date of payment.

[54] Mr Heap seeks interest in the following amounts:

a) $4,985.76 until 5 May 2014
b) $36.66 per day from 6 May 2014.

[55] Section 72(2) of the Act, provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) of the Act 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.

[56] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[57] I have earlier found that Ms Grieve and Mr Heap were co-developers and as such were equally liable to the claimants for the losses

they incurred. Given the equal responsibility of Ms Grieve and Mr Heap, it would be fair and equitable for Ms Grieve to reimburse Mr Heap half of the settlement paid to the claimants ($252,500).

[58] Any decision to award interest is a matter of discretion. For reasons which follow I decline to award Mr Heap interest in respect of 50 per cent of the settlement sum he paid.

[59] The balance owed to the claimants after the settlement payments are accounted for is $189,854.01. Ms Grieve has been ordered to pay this sum to the claimants. Had Ms Grieve attended the hearing and pursued her cross-claim against Mr Heap, it is likely that Mr Heap would have been ordered to contribute 50 per cent of this outstanding balance. Ms Grieve declined to attend the hearing and her cross-claim accordingly fails. Given the much greater liability that Ms Grieve will ultimately incur in respect of an equal partnership I consider that it would be unfair to require her to pay a further sum of interest to Mr Heap and decline to order her to do so.

CONCLUSION AND ORDERS

[60] The claimants' claim is proven to the extent of $894,854.01. Of this, the sum of $189,854.01 remains outstanding. For the reasons set out in this determination I make the following orders:

i. Jenny Grieve is ordered to pay the claimants the sum of $189,854.01 forthwith.

ii. Jenny Grieve is ordered to pay John Heap the sum of $252,500 forthwith.

[61] Counsel for Mr Heap, Mr Lane, has indicated that an application for costs will be made following this determination. The following is the timetable for dealing with any application for costs under s 91 of the Act:

- Any application for costs is to be filed by 11 July 2014. The party against whom costs are sought are to file any submissions in opposition by 25 July 2014. The applicant for costs will have until 1 August 2014 to reply.

- A decision will then be made on the papers.

DATED this 24th day of June 2014

M A Roche
Tribunal Member