IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-005255

UNDER	The Weathertight Homes Resolution Services Act 2006
IN THE MATTER OF	an appeal pursuant to s 93 of the Weathertight Homes Resolution Services Act 2006
BETWEEN	JOSEPH CHEE AND MARGARET CHEE Appellants
AND	STAREAST INVESTMENT LIMITED First Respondent
AND	MANUKAU CITY COUNCIL Second Respondent

[Continued over page]

Hearing: 2 and 3 December 2009

Appearances: T J Rainey for the Appellants
D K Wilson for the First and Third Respondents
D Heaney SC and F L McGregor-Tate for the Second Respondent
W A Endean for the Fourth and Fifth Respondents
No appearance for the Sixth Respondent
S McLaughlin for the Seventh Respondent
H L Thompson for the Eighth Respondent

Judgment: 1 April 2010

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 1 April 2010 at 10:00am
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

AND	PATRICK HUNG Third Respondent
AND	TQ CONSTRUCTION LIMITED Fourth Respondent
AND	BRIAN CHARLES TAYLOR Fifth Respondent
AND	SPOUTING AND STEEL ROOFING WORLD LIMITED Sixth Respondent
AND	RAYMOND PHILLIP BROCKLISS Seventh Respondent
AND	CSR BUILDING PRODUCTS (NZ) LIMITED Eighth Respondent

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[1] The appellants, Mr and Mrs Chee, have lodged an appeal against a decision of a member (Mr C Ruthe) of the Weathertight Homes Tribunal ("the Tribunal"), given in the course of adjudication proceedings under the Weathertight Homes Resolution Services Act 2006 ("WHRSA"). Notices of appeal have also been filed by the third respondent, Mr Hung, and by the eighth respondent – CSR Building Products (NZ) Limited ("CSR").

Background

[2] Mr and Mrs Hung, through an entity known as T&P Developments Limited, entered into a contract to purchase a property at 131B Bucklands Beach Road, Bucklands Beach, Auckland. Mr Hung applied for a building consent to erect a residential dwelling on the property in September 2000 and shortly thereafter Stareast Investment Limited ("Stareast") was incorporated. Stareast was nominated as the purchaser and it settled the purchase and took title to the property. It entered into contracts for the construction of the dwelling and the building works commenced in late 2000. They were first inspected by the Manukau City Council ("the Council") on 15 October 2000 and the final inspection was undertaken on 22 June 2001. A code compliance certificate was issued by the Council on 26 June 2001.

[3] The dwelling is a two-storeyed detached building with a pitched concrete tile roof. The external walls are comprised of light timber framing with a direct fixed monolithic external cladding system, namely fibre cement sheeting to which a texture coating system has been applied.

[4] Mr and Mrs Chee, together with their three children, arrived in Auckland in October 2001. They wished to purchase a house as they were migrating to New Zealand. After two weeks of house hunting, they entered into an agreement to purchase the property. The purchase was settled in November 2001 and Mr and Mrs Chee moved into the dwelling permanently in May 2002.

[5] In August 2003, leaks from an upstairs balcony resulted in water damage to a living room below. Other leaks were subsequently discovered.

[6] On 1 November 2007, Mr and Mrs Chee applied for an assessor's report in respect of their home. The report was completed on 29 November 2007. The assessor concluded that the criteria set out in s 14 of WHRSA were met.

[7] Mr and Mrs Chee subsequently sought adjudication of their claims against the various parties who had been involved in the design, construction and certification of the dwelling. Those parties and their roles were as follows:

a) As noted, Stareast initially owned the land at 131B Bucklands Beach Road on which the dwelling was built. It did all things necessary to have the dwelling built and it sold the property to Mr and Mrs Chee. It took no part in the hearing of these appeals.

b) The Council was the territorial authority responsible for issuing the building consent for the construction of the dwelling. It carried out all inspections required in terms of the building consent and it issued a code of compliance certificate in respect of the dwelling.

c) Mr Hung was a shareholder in and a director of Stareast.

d) TQ Construction Limited ("TQ Construction") carried out certain parts of the building work.

e) Mr Taylor was a shareholder in and a director of TQ Construction.

f) Spouting and Steel Roofing World Limited ("Spouting and Steel") supplied and installed the gutters and facia to the dwelling. It did not take an active part in the adjudication and it took no part in the hearing of these appeals.

g) Mr Brockliss was a director and shareholder of a company known as Excel Coatings Limited. Excel Coatings Limited was the cladding

applicator which installed the external cladding and coating system. By the time of the adjudication hearing, it had been struck off the Companies Office register.

h) CSR supplied and installed the roof to the dwelling, including the associated lead flashings.

[8] A member of the Tribunal was delegated to deal with Mr and Mrs Chee's request for adjudication and various preliminary conferences were held. A number of procedural orders were made, and the hearing was scheduled for four days to commence on 2 June 2009.

[9] On 25 May 2009, Mr and Mrs Chee requested the Tribunal to issue witness summons for the various Council officers who had issued the building permit, carried out the inspections, and issued the code compliance certificate for the dwelling. The Tribunal declined to do so.

[10] On 27 May 2009, the Tribunal, through one of its staff, wrote direct to Mr Heaney SC, who represented the Council, to enquire whether the Council would issue a building consent for targeted repairs. Mr Heaney responded to the enquiry in a neutral fashion, noting that the Council was unable to answer the question in advance and that it would need to assess any application when a building consent was sought.

[11] The hearing commenced on 2 June 2009. It took only two days. Mr Chee represented himself. Each of the other parties was represented by counsel. The Tribunal heard oral evidence from 11 witnesses, including five experts.

[12] All of the expert evidence was received on the first day of the hearing. The hearing time was extended until 6:30 pm to achieve this. All experts were sworn in at the same time and they sat as a panel. The assessor, Mr Browne, was also present although it does not seem from the transcript that he was sworn in. The various briefs of evidence were taken as read and the Tribunal then took the experts through each of the topics that it considered needed to be addressed. The experts were asked

to comment on certain issues. Mr Chee and counsel for the other parties were given the opportunity to ask questions.

[13] The evidence of the non-expert witnesses was heard on the following day. Again Mr Chee and counsel were allowed to ask questions.

[14] At the conclusion of the hearing on the second day, and after noting that the evidence had been concluded, the Tribunal invited Mr Heaney to enquire whether evidence that had been given on the second day by Mr Taylor caused the Council's expert, a Mr Bayley, to alter the opinions that he had expressed in his written report and on the first day of the hearing. On 4 June 2009, a signed supplementary statement prepared by Mr Bayley was filed with the Tribunal, addressing Mr Taylor's evidence. Mr Bayley changed his position. He had previously considered that the dwelling required a full re-clad, but in his supplementary statement, he stated that if Mr Taylor's evidence was correct, the dwelling could be repaired by way of targeted repairs. He provided evidence on the cost of those repairs.

[15] On 5 June 2009, the Tribunal issued a memorandum inviting comment on Mr Bayley's supplementary statement by way of further written statements from the other experts and from the assessor. The memorandum recorded that this process had been agreed. The hearing was not reconvened, although the determination issued by the Tribunal records that final submissions were made on 19 June 2009.

[16] The Tribunal's written determination was issued on 21 July 2009.

Tribunal's determination

[17] The Tribunal recorded that the hearing proceeded in an inquisitorial manner. It reviewed the background, identified the parties, and recorded the evidence which it had received, both orally and in writing. It noted that all five experts agreed that the dwelling leaked, but that there was no unanimity as to causation, responsibility, or the appropriate steps for remediation.

[18] The Tribunal then detailed the various sources of water ingress. These included the deck, the ground levels, a curved window on the front-east elevation, horizontal control joints between polystyrene used in the construction and other building elements, the roof junction, vertical control joints, the roof and facia guttering.

[19] The Tribunal reviewed the various claims against each of the respondents and the evidence and held as follows:

a) Leaking had been established and there had been non-compliance with the Building Act. The claim against Stareast in contract must therefore succeed.

b) Mr Hung was the driving force behind Stareast and he had orchestrated the development. He was personally liable as the director of Stareast.

c) TQ Construction was not liable in either contract or tort for any of the failings of the other contractors and each of the relevant construction failures was either not TQ Construction's responsibility, or not a cause of the leaking that was occurring. TQ Construction was not liable.

d) As a consequence, Mr Taylor was not liable.

e) There was sufficient evidence to indicate that leaking attributable to Spouting and Steel was likely to occur in the future. It was liable.

f) The claim against Mr Brockliss personally could not be sustained.

g) There had been negligence in the roofing installation by CSR, exposing Mr and Mrs Chee to loss by way of likely future damage. It was liable.

h) The Council had not been negligent in issuing the initial consent, but had failed to properly inspect the dwelling. The Council was negligent in not having an appropriate inspection regime in respect of the balustrades, the ground levels, and the roof. It was liable.

[20] The Tribunal then considered what was required to put matters right. It noted Mr Chee's submission that a full re-clad was required at a total cost of $443,115.32. The Tribunal then considered whether the defects identified could be remedied by targeted repairs. It noted the various opinions expressed by the experts and the moisture readings undertaken on the dwelling. On the evidence before it, it concluded that targeted repairs would restore Mr and Mrs Chee to the position they would otherwise have been in, save for the leaks. It recorded that it could not make an award simply on the basis that a full re-clad might be the best long term solution but it did observe that any decision on targeted repairs was dependent upon the Council approving the same.

[21] The Tribunal then went on to assess damages. It considered the costs of a full re-clad, and expressed the view that a figure of $216,000 was "a more reasonable quantification" of the costs involved.[1] It then considered the cost of targeted repairs. Mr Bayley's assessment was $90,200. Mr Smith – the expert who gave evidence for Mr and Mrs Chee, assessed the cost of targeted repairs at $266,882. The Tribunal noted that the difference was "striking". It expressed the opinion that Mr Bayley's figures were light, but that Mr Smith's figures were too high. It noted that evidence given by the assessor — Mr Browne — estimated repair costs for the then current damage at $142,000 and at $74,000 for future likely damage. The Tribunal then stated at [102]:

> Taking all the relevant factors into account, the Tribunal considers that an appropriate figure for targeted repairs is $130,000.

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[1] The Tribunal expressed this as being the cost of "targeted repairs" — see [98] — but later, at [105], referred to this figure as being the cost of a full re-clad. It seems reasonably clear from the decision that the Tribunal assessed the costs for a full re-clad at $216,000.

It did not set out in any greater detail why it reached this conclusion. It then considered Mr and Mrs Chee's claims for other losses. There was little dispute in relation to those losses. It then stated at [105] as follows:

> The Tribunal having concluded on the evidence before it that targeted repairs are appropriate makes this finding conditional upon the Council issuing the appropriate building consent. The claimants have the right to come back to the Tribunal to seek damages in the [sum] of $216,000 ... to cover the cost of a full re-clad if the Council refuses to issue a building permit. ...

[22] Mr and Mrs Chee had also sought general damages of $25,000 each. The Tribunal agreed with submissions for the Council that there must be a relationship between the severity of the leaks and the quantum of general damages, and noted that the damage to the house was considerably less than is frequently seen in leaky building cases. It noted that there was no evidence of excessive dampness, or that Mr and Mrs Chee could not meet the cost of the repairs, or that they would lose their home. It also noted that there was no evidence of any significant impairment in their quality of life while the repairs were undertaken. It fixed general damages in the sum of $5,000 for each claimant.

[23] The damages findings were summarised in [115] as follows:

> The Tribunal concludes that the following amounts have been proven and the total award is as follows:

Damages	$115,000.00
General damages	$ 10,000.00
Other losses	$ 16,768.40
Total	$141,768.40

The Tribunal rounded this figure to $141,800.[2] It held that Stareast, the Council, Mr Hung, Spouting and Steel and CSR were jointly and severally liable to pay to Mr and Mrs Chee the sum of $141,800. It then dealt with contribution between those respondents as joint tortfeasors and set out the sums each respondent was entitled to recover from the other respondents found liable to Mr and Mrs Chee.

[2] The Tribunal did not explain why damages were awarded in the sum of $115,000. This is difficult to understand given that it had earlier found that the appropriate damages for targeted repairs was $130,000.

Notices of appeal

[24] Mr and Mrs Chee's notice of appeal raised a number of issues. Broadly, they were as follows:

a) That the Tribunal failed to comply with the principles of natural justice.

b) That the Tribunal was wrong to determine that TQ Construction had no liability for any of the defects.

c) That the Tribunal erred in holding that Mr Taylor and Mr Brockliss were not liable.

d) That the Tribunal was wrong when it determined that the property could be repaired by way of targeted repairs.

e) That the Tribunal erred when it made a conditional finding as to damages.

Mr and Mrs Chee sought that the adjudicator's orders be set aside, and that all respondents be held jointly and severally liable for the costs of a full re-clad in the sum of $361,778, for consequential losses of $21,316.41, and for $25,000 to each of them by way of general damages. In the alternative, Mr and Mrs Chee sought an order referring the matter back to the Tribunal for re-hearing in relation to the quantum of the claim.

[25] Mr Hung appealed on the basis that the Tribunal was wrong to hold that he was personally liable to Mr and Mrs Chee. It was asserted that Mr Hung did not in law owe a duty of care to the appellants. He sought that the order that he is liable to the appellants in the sum of $141,800 be set aside.

[26] CSR's notice of appeal asserted that the Tribunal was wrong to treat it as a tortfeasor jointly and severally liable for the whole of Mr and Mrs Chee's loss. It

argued that the Tribunal erred in adopting a global approach to questions of liability instead of dealing with liability issues on a defect-by-defect basis, and further that the Tribunal was wrong to allocate 10 per cent of the overall responsibility to CSR. It was submitted that the apportionment was arbitrary and unsupported by the evidence. It sought that the order requiring it to pay $141,800 to Mr and Mrs Chee should be set aside, and that orders properly apportioning liability on a defect-by-defect basis should be made.

[27] I propose to deal with the various issues raised by the appeals under the following headings:

a) breach of the rules of natural justice;

b) TQ Construction's liability for the defects;

c) the personal liability of Messrs Taylor, Brockliss and Hung;

d) targeted repairs or a full reclad;

e) conditional award of damages; and

f) CSR's liability.

Given the views I have formed in relation to issue a), and the relief I consider appropriate — a rehearing before the Tribunal — I have refrained from any detailed analysis of the Tribunal's findings in relation to issues b) to f). Rather, my comments are more generalised and they are intended to assist at the rehearing.

[28] Before considering the above issues, it is helpful to address two broader issues raised in the course of the hearing — first, the nature of the right of appeal, and secondly, the statutory context.

The right of appeal

[29] The appeals were sought pursuant to s 93 of WHRSA. Section 93(1) provides as follows:

> A party to a claim that has been determined by the tribunal may appeal on a question of law or fact that arises from the determination.

[30] Pursuant to s 93(2), the appeals were brought in this Court because Mr and Mrs Chee argue that a full re-clad is necessary, and that the damages which should be awarded to them are considerably in excess of $200,000.

[31] The WHRSA does not say that appeals from the Tribunal proceed by way of rehearing. The Court is, however, given wide powers in s 95 of WHRSA. It is implicit that such appeals should proceed by way of a rehearing under r 20.18 of the High Court Rules, and it follows that the approach outlined by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*[3] is apposite. The following principles can be derived from that decision:

a) the appellant bears the onus of satisfying the appeal court that it should differ from the decision under appeal;

b) it is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it;

c) the appeal court has the responsibility of arriving at its own assessment on the merits of the case;

d) no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, for example, credibility is important; and

e) the appellate Judge is entitled to use the reasons of the first instance decision-maker to assist him or her in reaching his or her own

[3] [2008] 2 NZLR 141 (SC) at [4]-[5], [13] and [17].

conclusions, but the weight the Judge places on them is a matter for the Court.

[32] The position is summed up in the judgment of Elias CJ at [16] as follows:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[33] The *Austin, Nichols* approach has been adopted in relation to appeals under s 93 — see for example, *Burns v Argon Construction Ltd*;[4] *Cameron v Stevenson*;[5] *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell*;[6] *Boyd v McGregor*.[7]

[34] In *Hartley v Balemi*,[8] Stevens J held that a Court should be cautious before overturning findings of fact made by an adjudicator. Some of the counsel before me referred to this finding in support of their submissions. I note that this case was decided before *Austin, Nichols*. It has since been cited with approval — see for example, *Harris v Sell & Ors*.[9] For myself, I prefer the broader approach mandated in *Austin, Nichols*. However, given the views I have formed about the appropriate relief on this appeal, it is not necessary for me to consider the issue further, and I do not do so.

[4] HC Auckland CIV-2008-404-7316 18 May 2009.
[5] HC Napier CIV 2009-441-437 5 November 2009.
[6] HC Auckland CIV-2009-404-3118 11 December 2009.
[7] HC Auckland CIV 2009-404-404-5332 17 February 2010.
[8] HC Auckland CIV-2006-404-2589 29 March 2007 at [53].
[9] HC Auckland CIV-2009-404-003465 22 December 2009.

Weathertight Homes Resolution Services Act 2006

[35] The WHRSA is remedial legislation designed to meet what was and still is a serious crisis not only for persons whose dwellings leak, but also for local authorities and others involved in the building industry. Its purpose is to provide the owners of dwellinghouses that are leaky buildings with access to speedy, flexible, cost-effective procedures for assessment and resolution of their claims relating to those buildings — see s 3 of the WHRSA. To this end, the WHRSA establishes the Tribunal.

[36] It is noteworthy that the WHRSA does not compel aggrieved homeowners to seek relief by way of adjudication before a member of the Tribunal. It is open to a claimants to bring proceedings in either the District Court, or in this Court, as the case may be.

[37] Those who choose to bring their claims under the provisions contained in the WHRSA can apply to have their claims adjudicated by the Tribunal. Adjudications are managed so as to best achieve the purposes of the WHRSA — see s 57(1). That section provides that:

> (1) The tribunal ... must—
>
> (a) encourage parties where possible to work together on matters that are agreed; and
>
> (b) use, and allow the use of, experts and expert evidence only where necessary; and
>
> (c) try to use conferences of experts to avoid duplication of evidence on matters that are or are likely to be agreed; and
>
> (d) try to prevent unnecessary or irrelevant evidence or cross-examination.

[38] To the same end, the Tribunal is given extensive powers in dealing with adjudications. Section 73(1) provides as follows:

> (1) The tribunal may do any or all of the following things in relation to adjudication proceedings or the parties to them:

(a) conduct the proceedings in any manner it thinks fit, including adopting processes that enable it to perform an investigative role:

(b) request further written submissions from any party, as long as it then gives the relevant parties an opportunity to comment on those submissions:

(c) request the parties to provide copies of any documents that it reasonably requires:

(d) consider any evidence or orders from a former owner's adjudication proceedings that it thinks relevant and applicable to the claim, as long as it:

    (i) informs the parties that it intends to do so; and

    (ii) gives them the opportunity to comment:

(e) set deadlines for further submissions and comments by the parties:

(f) appoint an expert adviser to report on specific issues, as long as the parties are notified before the appointment is made:

(g) call a conference of the parties:

(h) inspect the dwellinghouse to which a claim relates, as long as the consent of the owner or occupier is obtained before any land or premises are entered:

(i) request the parties to do any other thing during the course of the proceedings that it considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in them:

(j) for a claim whose referral to mediation it has consented to, set a maximum period of mediation shorter than the period stated in section 82:

(k) after considering advice from the mediator, and being satisfied that the parties are near resolution of and likely to resolve their dispute if allowed more time, allow, for a claim whose referral to mediation it has consented to, a maximum period of mediation longer than the period stated in section 82:

(l) issue any other reasonable directions relating to the conduct of the proceedings.

[39] The powers and discretions available to the Tribunal are not however unlimited. There are two important constraints. First, the Tribunal must comply with the principles of natural justice — s 57(2). This is consistent with the right to

justice detailed in s 27(1) of the New Zealand Bill of Rights Act 1990. Secondly, the Tribunal must apply the applicable principles of law — s 90(1).

[40] The WHRSA seeks to encourage a "quick fix" solution for those who elect to have their claims considered by the Tribunal. Those who opt to take advantage of this robust approach cannot in general expect the procedural sophistication inherent in court proceedings. They are nevertheless entitled to expect that the two constraints noted in [39] above will be observed. While it is of course the duty of the Courts to apply legal principles in a way so as to best facilitate outcomes which are orderly, predictable, and cost-effective[10], in my view, the Courts should be slow to conclude that the interests of justice can be sacrificed to the seductive sirens of speed and cost effectiveness — see, for example, *Taefi v Weathertight Homes Tribunal*.[11] The constraints contained in ss 57(2) and 90(1) are of critical importance. The issues the Tribunal deals with are very significant from the point of view of those involved, both emotionally and financially. There is a right of appeal to this Court and the Tribunal is not immune from judicial review.

Procedural errors/breach of principles of natural justice

[41] Mr Rainey, appearing for Mr and Mrs Chee, submitted that the Tribunal breached the rules of natural justice and made various procedural errors, and that its decision was, as a result, unfair. He submitted that the central issue was whether, in the interests of speed, the adjudicator lost sight of the need to determine the claims against all parties on the basis of properly admitted evidence and in a way that was procedurally fair. He raised two specific concerns:

a) whether the procedure adopted by the Tribunal was fair and complied with the principles of natural justice; and

b) whether the Tribunal was bound by the provisions of the Evidence Act 2006.

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[10] *Sunset Terraces* [2010] NZCA 64 at [135].
[11] HC Auckland CIV-2008-404-6709 10 October 2008.

[42] In relation to a), Mr Rainey referred to *Trustees of Rotoaira Forest Trust v Attorney-General*[12] and submitted that the principles espoused in that case are equally applicable to an adjudication held before a member of the Tribunal. He submitted that measured against those principles, the process adopted by the Tribunal in the present case was demonstrably unfair. He asserted that the Tribunal had erred when it refused to issue witness summons when requested to do so by Mr Chee. Further he argued that it failed to accord fair treatment to Mr Chee, given that he was unrepresented. Mr Rainey submitted that the Tribunal acted unfairly in stopping Mr Chee from cross-examining witnesses called to give evidence for the respondents, and in particular that it failed to allow Mr Chee to properly cross-examine the experts in relation to quantum.

[43] In relation to b), Mr Rainey submitted that the Tribunal relied on inadmissible evidence that was not properly before it. He referred to a report on the property prepared by a Mr Back and a Mr McDonald of Drybuild Infrared Solutions Limited (referred to in the decision as the "Dry-Build Report"). He also referred to evidence given by Mr Bayley as to the cost of repairs, which in part was based on a letter from an entity known as Specialized Construction Products Limited dated November 2008, which had been prepared in relation to another adjudication hearing. He challenged the procedure adopted by the Tribunal when Mr Bayley referred to the letter during the course of the hearing, and also the approach taken by the Tribunal in requesting and receiving supplementary evidence from Mr Bayley after the evidence had been completed. He submitted that all of this material was not properly before the Tribunal because it had ignored the provisions of the Evidence Act.

[44] Mr Heaney, for the Council, agreed with Mr Rainey's submissions in relation to the Tribunal's processes. He disagreed, however, that the Evidence Act applies. He pointed out that the Tribunal can adopt an inquisitorial role, and he submitted that this suggests that the rules of evidence were not intended to apply to adjudication proceedings. Mr Wilson, for the first and third respondents, did not take issue with Mr Rainey's submissions in relation to the procedure followed by the Tribunal. Nor did Ms McLaughlin for the seventh respondent, nor Mr Thompson for the eighth

[12] [1999] 2 NZLR 452 (HC).

respondent, although he did query how prejudicial the Tribunal's errors were in context.

[45] Mr Endean, appearing for the fourth and fifth respondents, was the only counsel who took significant issue with Mr Rainey. He did not dispute what had occurred. Rather, he submitted that the directions given to the Tribunal in the WHRSA, and the powers vested in it, compel the conclusion that the Tribunal did not, in the circumstances of this case, breach the principles of natural justice.

[46] Against this background, I turn to consider the principles of natural justice and the alleged procedural errors.

Natural justice

[47] Natural justice is equated with fairness. Indeed the Privy Council has observed that natural justice is "but fairness writ large and judicially": *Furnell v Whangarei High Schools Board*.[13]

[48] Fairness is a concept of wide import, and the content of the principles of natural justice varies according to the context in which they sought to be applied.

[49] In the present case, the principles have to be applied in a way which is consistent with the powers and discretions conferred on the Tribunal by the WHRSA.

[50] It is implicit from the adjudication provisions in the WHRSA that an oral hearing should occur. That is not surprising. An oral hearing will almost inevitably be required where there are disputed facts to be resolved. Otherwise it is difficult to make a just decision on the facts that are in issue. Beyond this, the requirements for a fair hearing are at large. They have, however, been discussed in a large number of cases. One of the leading authorities in this area is the decision in *R v Deputy*

[13] [1973] 2 NZLR 705 (PC) at 718.

Industrial Injuries Commissioner, ex parte Moore.[14] In that case, Diplock LJ, referring to the Deputy Commissioner, noted as follows:[15]

> ... the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing.
>
> In the context of the first rule, "evidence" is not restricted to evidence which would be admissible in a court of law.
>
> ...
>
> These technical rules of evidence ... form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.
>
> ...
>
> The second rule simply requires that a deputy commissioner, in determining an appeal, must give fair consideration to the contentions of all persons who are entitled under the Act and regulations to make representations to him.
>
> ...
>
> Where ... there is a hearing, ... the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to comment upon any such "evidence" and, where the "evidence" is given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case. This in the context of the Act and the regulations fulfils the requirement of the second rule of natural justice to listen, fairly to all sides ...

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[14] [1965] 1 QB 456.
[15] At 488-490.

These observations have been followed in New Zealand: see, for example, *Re Erebus Royal Commission*.[16]

[51] Similar comments were made, albeit in a contractual rather than a statutory context, in *Trustees of Rotoaira Forest Trust*. In that case, Fisher J stated as follows:[17]

> The basic requirements for a fair hearing are usefully summarised by Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* as follows:
>
> **1** Each party must have notice that the hearing is to take place.
>
> **2** Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
>
> **3** Each party must have the opportunity to be present throughout the hearing.
>
> **4** Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
>
> **5** Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
>
> **6** The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."
>
> In addition the arbitrator must confine himself to the material put before him by the parties unless the contrary is agreed. ... This extends to the arbitrator's own opinions, ideas and knowledge where either party might otherwise be taken by surprise to that party's prejudice. If the arbitrator unexpectedly decides the case on a point which he has invented himself he creates surprise and deprives the parties of their right to address full argument to the case which they have to answer... (citations omitted)

[52] In my view, and except to the extent that they are inconsistent with the WHRSA, these various comments are broadly applicable to hearings before the Tribunal. A number of them are expressly reflected in the WHRSA. For example, s 62 of the WHRSA requires an aggrieved home owner to file an adjudication claim. Under s 66, a respondent may file a response and the parties are to get a copy of documents filed and the assessor's report. Section 68(1) states that any party to a

[16] [1983] NZLR 662 (PC).
[17] At 459.

claim that is being adjudicated by the Tribunal may be represented by the representatives, whether legally qualified or not, that the party considers appropriate. Further, any party to an adjudication may give and call evidence — see sch 3, cl 8 — and witnesses have the same privileges as are available in a court of law — s 70.

[53] Some of the other requirements identified in the case law are tempered by the WHRSA. For example, *Trustees of Rotoaira Forest* and other authorities suggest that each party should have a reasonable opportunity to test his or her opponent's case by cross-examining the opponent's witnesses. Indeed, in other contexts it has been held that an oral hearing with witnesses implies a right to cross-examination: see Graham Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) at 13.36 and the cases there cited. The WHRSA, however, contains express provisions in this regard. The Tribunal must try to prevent unnecessary or irrelevant evidence or cross-examination — s 57(1)(d) — and the requirement that the Tribunal comply with the principles of natural justice does not require it to permit the cross-examination of a party or a person — s 57(3).

(a) Witness Summons

[54] Mr Rainey criticised the Tribunal's decision to decline to issue witness summons. He suggested that this breached the principles of natural justice.

[55] The power to issue witness summons is conferred on the Tribunal by sch 3, cl 9 of the WHRSA. The Tribunal, either on application, or of its own volition, may issue a summons to any person requiring that person to attend an adjudication and to give evidence.

[56] Here Mr Chee wished to summon the Council officers who were responsible for issuing the building consent, inspecting the building during construction, and issuing the code compliance certificate. The Tribunal's response was to ask Mr Chee to put in writing the questions he wished to ask the prospective witnesses. Mr Chee responded promptly. He advised that he had not prepared his questions, but indicated that he wished to ask questions in certain areas. He identified those areas in some detail. They included the steps taken by the Council at the building

consent stage, whether the Council had its own inspection regime, why the building work had not been carried out in accordance with the building permit issued, and why a code compliance certificate had been issued despite non-compliance with the building permit. The response from the Tribunal was as follows:

> The adjudicator has read your questions and advises they are really legal submissions in support of your claim against the Council. There would seem to be no benefit to your case by calling any officer of the Council as they would be unlikely to be able to make comment on what are matters of expert interpretation.
>
> The case manager will record these submissions and bring them to the attention of the Tribunal as part of your arguments. The adjudicator does not find justification for issuing a witness summons.

[57] While the Tribunal had a discretion whether or not to issue witness summons, I have some difficulty with the adjudicator's approach to Mr Chee's request. In particular, I cannot see how the adjudicator could, some days before the hearing started, properly categorise the matters Mr Chee wished to raise with the prospective witnesses as being "legal submissions". Mr Chee expressly indicated in his email to the Tribunal that he had not prepared his questions, and that he intended to ask questions relating to the various matters which he set out in his email. The matters raised by Mr Chee were, on their face, relevant to the then pending adjudication. In my view, the adjudicator erred in categorising in advance Mr Chee's potential questions as legal submissions. Further, the adjudicator expressed the view that calling the witnesses would not benefit Mr Chee's case. With respect, that observation was somewhat paternalistic and premature. It was for Mr Chee to determine how to make out his case, not the adjudicator. Nor could the matters that Mr Chee wished to raise be categorised, at least in advance, as being matters of "expert interpretation". Expert opinion can only be based on proven facts. Appropriate questioning by Mr Chee could have drawn out base facts on which the various experts might have been able to express opinions. There was, in my judgment, no proper basis on which the adjudicator could properly, at the time that the request was made, decline to exercise his discretion to issue the summons sought.

[58] The problem came back to haunt the Tribunal during the hearing. At one stage Mr Chee endeavoured to ask questions about the absence of cavity backing. Mr Bayley answered one question based upon his understanding of the facts.

Mr Chee put it to Mr Bayley that he had been to the Council, that he had shown the plans to a Council officer, and that the Council officer had made various comments contrary to the opinions being expressed by Mr Bayley. Mr Heaney objected to these assertions by Mr Chee. The adjudicator advised that he was not treating them as evidence. The Council officer was one of the persons Mr Chee had sought to summons to the hearing. The problem may not have arisen if the Council officer had been before the Tribunal.

[59] In the event, the decision to decline to issue the witness summons was of little moment because the Tribunal found the Council liable to Mr and Mrs Chee.

[60] Notwithstanding this, the Tribunal should be slow to exercise its discretion against a claimant seeking a witness summons unless the summons is likely to be oppressive or an abuse of the Tribunal's hearing processes. This could arise where, for example, the evidence likely to be adduced from the prospective witnesses is unnecessary or irrelevant, where the witness cannot have any knowledge of the matter, or where the summons is sought for a collateral purpose. These examples are not meant to be exhaustive. Otherwise, natural justice and the need for a fair hearing require that a party should have every reasonable opportunity to present evidence in support of his or her case. This may well require that the Tribunal issue a witness summons so that the appropriate evidence is available.

[61] In the circumstances of the present case, the adjudicator, in my judgment, erred in declining to issue the witness summons sought by Mr Chee.

(b) Cross-examination

[62] I now turn to the issue of cross-examination. I have referred to this above at [53]. Essentially, the Tribunal is given a discretion whether or not to allow cross-examination. That discretion must be exercised in an informed and reasoned way. A decision to limit cross-examination made in an arbitrary way, without consideration of the need for cross-examination of a particular witness, is likely to be frowned

upon by the Courts — see, for example, *Badger v Whangarei Refinery Expansion Commission of Inquiry*[18] and *David v Employment Relations Authority*.[19]

[63] It is noteworthy that in the present case the Tribunal did allow cross-examination.

[64] Mr Rainey submitted that Mr Chee was repeatedly cut off when he endeavoured to cross-examine witnesses called to give evidence for the respondents. He referred to a large number of occasions in the transcript where he said this had occurred. I have read the transcript carefully. I make the following comments:

a) Mr Chee's questions were not those which a lawyer would necessarily ask, but by and large they were focused. It is clear that Mr Chee was familiar with the facts in issue and, in broad terms, with the applicable law.

b) Mr Chee was on occasion told by the adjudicator that he did not think that he needed to go into various areas. In my view there was nothing inappropriate in this. The Tribunal was dealing with matters on a topic-by-topic basis and on occasion Mr Chee's questions did stray from the topic under discussion. I note that on one occasion, when the Tribunal was about to direct witnesses to another topic, Mr Chee sought to ask questions on a related topic. The Tribunal allowed Mr Chee to pursue questioning on the related topic, the balustrade, after questions in relation to the deck had been concluded.

c) Generally at the conclusion of each topic, the Tribunal asked Mr Chee whether or not he had finished his questions in relation to that particular topic, and Mr Chee confirmed that he had no further questions to ask.

[18] [1985] 2 NZLR 688 (HC).
[19] [2001] ERNZ 354 (HC).

d) Mr Rainey is correct when he submits that Mr Chee was told by the Tribunal on a number of occasions that his questions were really a matter of submission. This of itself does not indicate any unfair treatment and in my view the Tribunal's observations were consistent with its obligations under s 57(1)(d).

e) On one occasion, the Tribunal asked Mr Chee to write down his questions so that it could look over them, and decide whether or not they added to the case. Again this was not necessarily unfair and it could be seen as consistent with the Tribunal's obligations under s 57(1)(d). Unfortunately, however, the Tribunal did not come back to Mr Chee with its view on his proposed questions. As a result the questions were not asked.

f) On more than one occasion, the Tribunal endeavoured to assist Mr Chee and it directed witnesses to answer Mr Chee's questions.

[65] My impression from reading the transcript is that Mr Chee was treated with courtesy by the Tribunal and that he was in general accorded fair treatment. There are however two areas of significant concern.

[66] The first relates to the quantum of Mr and Mrs Chee's claim. Whether targeted repairs would suffice or whether a full re-clad was necessary was inextricably intertwined with quantum. These were clearly critical issues for all parties. They were discussed by the experts towards the end of the first day of the hearing. The Tribunal asked counsel and Mr Chee whether they wished to ask any of the experts questions in relation to the issue of quantum. Mr Chee asked whether the experts were being recalled the following day. The Tribunal replied that they were not. Mr Chee then indicated that he did have some questions on quantum. The Tribunal asked if he could get through the questions in 10 minutes. Mr Chee advised that he would try. The Tribunal then stated that the experts had expressed their various opinions, that it would look at each opinion and then come to a decision. The adjudicator stated that it might be a matter for submissions. Mr Chee then

indicated that he nevertheless wished to question the witnesses about the costs of replacement cladding. The adjudicator repeated that each of the experts had said what they wanted to say, but acquiesced and allowed Mr Chee to ask some questions on that topic. Mr Chee then started questioning Mr Bayley about the costs of cladding material. After two questions, the Tribunal intervened. There was a brief discussion, and the Tribunal indicated that the Specialized Construction Products letter (see [43]), which had been referred to by Mr Bayley while answering Mr Chee's questions, should be provided to the Tribunal and circulated amongst the experts so that they could comment on it. The adjudicator then asked Mr Chee if there were any other questions he wanted to raise. He noted for the third time that the things Mr Chee wanted to raise were matters for submission. There was then some inconclusive discussion between Mr Bayley, Mr Chee and the adjudicator. In the course of that discussion, Mr Chee put three further questions to Mr Bayley. The Tribunal then intervened again, and told Mr Chee that his expert — Mr Smith — would later have the opportunity to comment. The Tribunal then closed the hearing for the day.

[67] On the following morning when the hearing resumed, Mr Heaney, appearing for the Council, made the following comment:

> Just one other matter, it's just occurred to me we sort of finished under a bit of pressure last night and I'm just a bit concerned that Mr Chee didn't get a chance to ask Mr Bayley about issues of quantum and I'm just getting a little bit uncomfortable that he maybe hasn't had a fair trot there, because if you've seen Mr Bayley's evidence you'll see that he does get into quantum reasonably substantially and I'm quite happy to get Mr Bayley back today for a few minutes so that Mr Chee can talk to him about quantum if you like.
>
> ... I'm just a little bit conscious that he's representing himself and we've got to be a little bit careful to make sure he's given the opportunity to cross-exam ... the correct witnesses and we certainly didn't really give him a fair shot at it last night, I thought.

The Tribunal advised Mr Chee that he should consider over the morning tea break whether he wanted to question Mr Bayley further. The adjudicator reminded Mr Chee that the "arrangement" that had been made the previous evening was that all the quantum figures were in from the various parties. He suggested that Mr Chee should re-read his proposed questions over the morning tea adjournment, and that if he wanted to ask Mr Bayley any further questions, he could be called back.

[68] Mr Chee was then called to give his own evidence and he was questioned. The next witness to be called was Mr Hung. He had filed an amended brief and it was given to Mr Chee immediately before the morning tea break. After the break, Mr Chee was asked whether he objected to Mr Hung's evidence being given in its amended form. The Tribunal did not then or subsequently revisit the issue of whether or not Mr Chee wished to recall Mr Bayley for further questioning.

[69] It is my clear view that the process followed by the Tribunal was unfair to Mr Chee, and that it failed to comply with the principles of natural justice. Issues going to quantum were of critical importance to Mr and Mrs Chee. They were arguing that the property should be completely re-clad. Their expert, Mr Smith, had estimated that the costs involved in that exercise were substantial. The various experts for the respondents took differing views. Some thought that a full re-clad was necessary and others thought that targeted repairs would suffice. A number of the experts had given their opinion on the cost of the works they thought were required.

[70] In my view Mr Chee was not given a reasonable opportunity to test the experts' views in relation to these various issues. The Tribunal purported to allow cross-examination, but in effect no real cross-examination was able to take place. There was simply too little time for that to occur. It is my impression from reading the transcript that the Tribunal had had enough at the end of the first day of the hearing. It was late in the day. The adjudicator repeatedly sought to dissuade Mr Chee from asking any questions in relation to quantum, and to persuade him that it was all really a matter of submission. The Tribunal appears to have been under the mistaken impression that Mr Chee's position was protected if his expert had the right to comment on the issue. As a consequence, it denied Mr Chee the opportunity to test the evidence of the experts called by the other parties. This was in breach of the principles of natural justice, and it was unfair to Mr Chee.

(c) Receipt of further evidence

[71] On the second day of the hearing, the Tribunal heard evidence from a lay witness, Mr Taylor, about certain works that had been carried out on the dwelling.

Mr Bayley had based his initial view that a full re-clad was necessary upon a certain state of affairs. Mr Taylor's evidence suggested that Mr Bayley's understanding in relation to that state of affairs was wrong. After all the evidence had been heard, the adjudicator noted that the parties might wish to get the experts to reconsider their evidence in light of the comments made by Mr Taylor. In particular, the adjudicator thought it would be fair to allow Mr Bayley to reconsider his views. He asked Mr Heaney for his opinion in relation to that possibility. Mr Heaney responded that he would talk to Mr Bayley about the matter, tell him what evidence had been given by Mr Taylor, and get Mr Bayley to prepare a memorandum if the evidence caused him to vary his opinion. The adjudicator then queried whether he could "do it like that [for] all the experts including your expert Mr Chee". Neither Mr Chee, nor any other party, expressly responded.

[72] In the event, after the hearing had finished and the taking of evidence had concluded, Mr Bayley filed an amended brief of evidence. He stated that if the evidence given by Mr Taylor was correct, then he would support targeted repairs rather than a complete re-clad. He attached to his evidence details of various costings for targeted repairs. The Tribunal then issued a memorandum recording as follows:

> On the second day of the hearing the respondent gave uncontested evidence that his company did install control joints but it had erred in failing to rack out the joints and insert a silicon sealant. These facts could have relevance to the experts' views on whether there needs to be a full re-clad. *<u>It was agreed</u>* Mr Bayley would be given the opportunity to give expert evidence, on the significance or otherwise of these new facts. In furtherance of the method of hearing the expert evidence being in panel format where the experts commented on each other's views, *<u>it was agreed</u>* the other experts, including the assessor, would then express their opinion on the remediation issues in the light of the evidence and Mr Bayley's comments. (emphasis added)

Mr Smith filed a response on behalf of Mr and Mrs Chee. He expressed reservations about Mr Bayley's views, and in particular the costings presented by Mr Bayley in his supplementary evidence. I assume that other experts also took the opportunity to file supplementary briefs, although they have not been given to me.

[73] The hearing was not reconvened. Mr Bayley and the other experts who responded were not sworn. Mr Chee was not given the opportunity to put questions

to Mr Bayley about his change of stance and his costings. Nor was he given the opportunity to challenge the views of other experts who responded.

[74] I have read the transcript. There is nothing to suggest that Mr Chee agreed to the procedure adopted by the Tribunal. Indeed, the only party that appears to have commented on procedure was the Council, through Mr Heaney. In my view the Tribunal was incorrect to record in its memorandum that the parties had agreed to permit fresh evidence to be filed after the conclusion of the hearing. There is nothing in the transcript to suggest that was any such agreement.

[75] Again, this process was unsatisfactory and in breach of the principles of natural justice. Without the express agreement of the parties, the Tribunal should not have accepted further evidence after the hearing had concluded. If it required further evidence, it should have reconvened the hearing, sworn the witnesses, asked them to confirm their additional material, and given the parties the opportunity to test it and respond to it — see s 73(1)(b).

[76] As a result of the procedure that was followed, Mr Chee was denied the opportunity to test Mr Bayley's change of stance and the views I assume were expressed by other parties' experts.

The Evidence Act 2006

[77] Despite Mr Rainey's submissions to the contrary, I am not persuaded that the Tribunal is bound by the Evidence Act.

[78] The Evidence Act applies to all proceedings commenced before or on or after the commencement of the Act, except in certain limited situations — s 5(3). "Proceeding" means a proceeding conducted by a court, and any interlocutory or other application to a court connected with that proceeding — s 4. The word "court" is defined to include the Supreme Court, the Court of Appeal, the High Court and any District Court. Statutory tribunals are not expressly included in the definition. While the definition is inclusive rather than exhaustive, there are other provisions in the Evidence Act that suggest that it does not extend to tribunals such as the Tribunal

here in question. Section 152 provides that for the purposes of subpart 1 of part 4 of the Act, the Minister of Justice may, by notice in the *Gazette*, declare any New Zealand tribunal to be a New Zealand Court. This suggests that tribunals do not otherwise fall within the definition of the word "court" contained in the Act — see *Craig v Visiting Justice at Auckland Prison*.[20]

[79] Further, the provisions of the WHRSA are incompatible with a strict application of the Evidence Act. For example, the Tribunal has the power to conduct adjudication proceedings in any manner it thinks fit, including adopting processes that enable it to perform an investigative role. The strict application of the Evidence Act is incompatible with that provision. So is the power vested in the Tribunal to request the parties to provide copies of any documents that it reasonably requires, and the power to consider any evidence from a former owner's adjudication proceedings that it thinks relevant and applicable to the claim.

[80] Accordingly I conclude that the Tribunal did not err when it considered the Dry-Build Report, and when it allowed Mr Bayley to adduce the letter from Specialized Constructions Products dated November 2008 when he was answering a question from Mr Chee. It was open to the Tribunal to receive that material. There is however a caveat. It should have informed the parties that it was proposing to do so, and given them the opportunity to comment on the admission of the material. An adjournment may have been necessary to enable the parties to consider the material and to respond to the Tribunal's proposal. If necessary, the Tribunal should have been prepared to require that the authors of the report, or the letter, present themselves for questioning. That is particularly the case in relation to the Dry-Build Report. That report had been commissioned by one of the parties to the adjudication proceedings and it related expressly to Mr and Mrs Chee's property. In my view the Tribunal did not err in receiving the evidence. It did, however, breach the principles of natural justice in failing to give Mr Chee the opportunity to resist the admission of the additional material, and in failing to ask him whether or not he wished to comment on it, test it, or adduce evidence to rebut it.

[20] HC Auckland CIV-2007-404-5156 6 June 2008 at [21].

[81] For the sake of completeness, I record that there is nothing in the Tribunal's order in *Body Corporate 183920 and Unit Owners of Tuscany Towers v Waitakere City Council*[21] to persuade me to a contrary view.

TQ Construction's liability for the defects

[82] Mr and Mrs Chee assert that the Tribunal was wrong to determine that TQ Construction had no liability for any of the defects. They do not dispute the Tribunal's finding that TQ Construction was a labour-only builder, contracted by Stareast and Mr Hung to carry out the building work necessary to build the house. Mr Rainey submitted, however, that TQ Construction was responsible for various construction defects, including a failure to install cavity battens, the construction of the balustrades, the installation of the windows, and the installation of vertical control joints in the exterior cladding. He submitted that the Tribunal's factual findings in regard to these various matters could not be supported on the evidence.

(a) Cavity battens

[83] The design of the house called for the installation of battens over the timber framing to ensure that the exterior Harditex cladding was kept away from the timber frame. The cladding was to be attached to the battens rather than directly to the building frame, thus creating a cavity between the frame and the cladding. Given the regulations then in force, the Council could not have insisted on a cavity being incorporated into the design of the house. To me this is something of a side issue. The battens were shown on the building plans submitted to and approved by the Council. Those plans formed part of the building permit for the construction of the dwelling.

[84] Mr Taylor gave evidence that the battens were not supplied by Mr Hung, and that as a consequence, they were not installed by TQ Construction. He appears to have assumed that Mr Hung did not want the battens installed.

[21] Procedural Order No 11 WHT TRI-2009-100-38, 10 March 2010.

[85] Mr Taylor's understanding of what Mr Hung did or did not require is of no consequence to the claim in negligence made by Mr and Mrs Chee — *Bowen v Paramount Builders (Hamilton) Ltd*.[22] Once the cavity battens were included in the design of the house, and once that design was approved by the issue of a building permit, TQ Construction was required to construct the house in accordance with the approved plans.

[86] The Tribunal held that the failure to install the cavity battens was irrelevant, and that the absence of the cavity was not a causative factor in the leaking that was occurring. It did, however, observe that the cavity battens would have permitted any penetrating moisture to escape.

[87] Presumably because it concluded that targeted repairs would suffice, the Tribunal did not consider whether TQ Construction's failure to install the cavity battens was a contributing cause to any need to re-clad the property. As noted above, it made a conditional damages award and gave Mr and Mrs Chee the right to come back and seek additional damages if the Council refused a permit for targeted repairs. In the event that Mr and Mrs Chee seek a building permit for targeted repairs, if the Council were to refuse to issue a building permit for those repairs, and if the absence of cavity battens is a contributing cause to the need to re-clad the property, then prima facie it would seem to me that TQ Construction must be under a liability for the resulting loss. This is an issue which can be explored at the rehearing.

(b) Balustrades

[88] This is a purely factual issue. Because I am ordering a rehearing, it is not necessary for me to comment on the balustrades issue.

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[22] [1977] 1 NZLR 394

(c) Windows

[89] It was common ground before the Tribunal that the windows were installed by TQ Construction. In its decision at [19], the Tribunal accepted Mr Bayley's evidence and Mr Brown's moisture readings as being sufficient to prove that there was inadequate sealing resulting in likely future damage from a curved window in the front-east elevation of the dwelling. That finding does not sit well with the subsequent finding at [50] that TQ Construction was under no liability for any of the defects. On its face, there is an inconsistency. Again this issue needs to be revisited during the rehearing.

(d) Vertical control joints

[90] There was a dispute as to whether the joints between the sheets of cladding were bevelled. It was common ground that the edges of the sheets should have been ground back to create an angled recess or bevel. However, some of the expert evidence suggested that the edges of the sheets had not been bevelled, and I am told that there was physical evidence before the Tribunal confirming this. Yet Mr Taylor stated that the control joints, or bevels, were installed by him. The Tribunal did not expressly deal with this dispute in its determination. It appears to have accepted that vertical control joints were installed — see [22] — but noted that the experts failed to agree as to contribution. This is a curious observation. If the joints were installed, contribution would become irrelevant. Presumably, the Tribunal's conclusion that targeted repairs would suffice was made on the basis that vertical control joints were installed — although this is not expressly stated by the Tribunal. Again, these are issues that need to be revisited and that may well be relevant to the wider question — will targeted repairs suffice or is a full re-clad necessary?

The personal liability of Messrs Taylor, Brockliss and Hung

[91] The personal liability of the directors or officers of a builder or developer company in tort to a subsequent purchaser in leaky building cases has been discussed in a large number of recent decisions. Some of these decisions are not altogether

easy to reconcile. As Courtney J has observed, finding a consistent and principled approach has proved difficult: *T & T Drainage Ltd v Rennell*.[23]

(a) The Tribunal's approach

[92] When discussing Mr Hung's position, the Tribunal referred to both — the "assumption of responsibility" test, and the "control of a project" test. It referred to the decision of the Court of Appeal in *Trevor Ivory Ltd v Anderson*[24] and concluded that Mr Hung was personally liable as well as Stareast — see [44] of the Tribunal's decision. The Tribunal stated that it had undertaken a review of the factual matrix, but it did not set out its reasoning or the facts it had reviewed in any greater detail. Nor, in this context, did it refer to the recent decision of the Court of Appeal in *Body Corporate 202254 v Taylor*.[25]

[93] When it was considering Mr Taylor's position, the Tribunal noted its primary finding that his company, TQ Construction, was not liable. It reasoned that, consequently, Mr Taylor was also not liable. The Tribunal then went on to observe that even if it were wrong in holding that TQ Construction had no liability, it would have held that Mr Taylor was not personally liable in any event. The Tribunal set out four reasons for that conclusion. It referred to the *Trevor Ivory* decision and then to the decision in *Body Corporate 202254*. It stated that the principles in *Trevor Ivory* were reaffirmed in *Body Corporate 202254*. The Tribunal commented that Mr Taylor had set up a company that made it plain to all the world that it was the vehicle for all relevant business transactions, and that he had thereby excluded personal liability. The Tribunal held that it had not been proven that Mr Taylor should be in any way personally liable.

[94] When considering Mr Brockliss's position, the Tribunal noted that the legal criteria for establishing personal liability on Mr Brockliss as a director were the same as those that it had set out when considering Mr Taylor's position. The Tribunal

[23] HC Auckland CIV-2009-404-15601 11 March 2010 at [87].
[24] [1992] 2 NZLR 517 (CA).
[25] [2009] 2 NZLR 17 (CA).

then held that, applying the principles set out in *Trevor Ivory* and in *Body Corporate 202254*, the claim against Mr Brockliss in person could not be sustained.

(b) Submissions

[95] Mr Rainey submitted on behalf of Mr and Mrs Chee that the Tribunal's understanding of the Court of Appeal's decision in *Body Corporate 202254* was wrong. He argued that the adjudicator had taken from that decision that where natural persons carry on business through the vehicle of a limited liability company, that limits their liability and excludes the possibility of personal liability. He submitted that that is precisely the opposite of the conclusion reached by the Court of Appeal in *Body Corporate 202254*.

[96] Mr Heaney for the Council agreed with Mr Rainey's submissions, and noted that the portion of each parties' liability needed to be adjusted accordingly. So did Mr Thompson for CSR.

[97] Mr Wilson for Mr Hung noted that the adjudicator found Mr Hung personally liable on what appeared to be two findings — first, that he was the developer as well as Stareast, and secondly, that he was personally liable because he was the driving force behind a small limited purpose company. He submitted that these findings were wrong in law, that the company was a legal entity separate from its directors, and that the acts of a director of a development company in organising contractors and generally controlling the development do not, without more, give rise to a duty of care. He submitted that to find personal liability in negligence a director needs to have involved himself in particular building or development matters, and that these need to have a causative link to the loss. He submitted that there was no such finding by the adjudicator in the present case.

[98] Mr Endean, for TQ Construction and Mr Taylor, defended the Tribunal's primary finding that TQ Construction was not liable, and then went on to note that Mr Taylor was neither the builder nor the project manager. He observed that in any building project, somebody has to be responsible to co-ordinate and supervise the

trades necessary to build the house, and that after hearing and seeing the witnesses, the Tribunal correctly found that that responsibility lay with Mr Hung.

[99] Ms McLaughlin for Mr Brockliss submitted that sub-contractors do not owe a duty of care to subsequent purchasers of a dwellinghouse. First, she argued that there was insufficient proximity between Mr Brockliss's company, Excel Coatings Limited and Mr and Mrs Chee to justify the imposition of a duty of care. She submitted, for Mr Brockliss, that for a director to be personally liable, there needs to be an assumption of responsibility on the part of the director. She asserted that Mr Brockliss was not a joint tortfeasor with his company or with the other respondents. She sought to distinguish *Body Corporate 202254* on its facts. She noted that that case addressed the personal liability of directors of companies who were liable to subsequent purchasers, such as builders, developers or architects. She submitted that there was no such duty owed by Excel Coating Limited as a sub-contractor to Mr and Mrs Chee. In the alternative, she submitted that the Tribunal nevertheless reached the right conclusion that Mr Brockliss did not satisfy the elements of the tort of negligence.

(c) Analysis

[100] I am not persuaded that the Tribunal has dealt with the matter in accordance with the relevant principles of law, as required by s 90(1) of the WHRSA.

[101] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and they do not give rise to personal liability — see *Trevor Ivory Ltd* at 527. However, the concept of limited liability, while relevant, is not decisive. Limited liability limits the financial risk of shareholders to the capital they introduce to the relevant company. It is not intended to provide company directors with a general immunity from tortious liability — see *Body Corporate 202254* at [31].

[102] The Tribunal's observation, in considering the situations of Messrs Taylor and Brockliss, that they had set up the companies as the vehicles for the relevant transactions, does not seem to me to advance matters to any great extent. It fails to

recognise that there are circumstances in which a director may be liable for acts for which the company is also liable.

[103] Those circumstances have been explored in a large number of cases.

[104] In *Morton v Douglas Homes Ltd*,[26] Hardie Boys J expressed the view that if a company director has personal control over a building operation, he or she can be held personally liable. He noted that the relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his or her personal carelessness may be likely to cause damage to a third party, so that the director becomes subject to a duty of care. He observed at 595 that it is not the fact that a person is a director that creates the control, but rather the fact of control, however derived, which may create the duty.

[105] In *Trevor Ivory Ltd* at 527, Hardie Boys J referred to *Morton* as being an example of a situation where the director had assumed responsibility by exercising particular control or control over a particular operation or activity. He observed that personal liability can arise where there is clear evidence that the director is acting not as the company, but as the company's agent or servant. He stated that in such cases the Court looks for an assumption of responsibility — actual or imputed — in order to find personal liability.

[106] In *Morton* the plaintiff was alleging negligence by the director. In *Trevor Ivory Ltd* the plaintiff was alleging negligent misstatement by the director.

[107] The Court of Appeal has recently analysed comprehensively the reasoning in *Trevor Ivory Ltd*. It held by a majority that the case has no application at all to cases in which assumption of responsibility is not an element of the tort — see *Body Corporate 202254* at [34].

[108] In *Body Corporate 202254*, Chambers J expressly, and William Young P and Arnold J implicitly, preferred an "elements of the tort" approach. Ellen France and Glazebrook JJ agreed with the judgments of William Young P and Arnold J.

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[26] [1984] 2 NZLR 548 (HC).

[109] An elements of the tort approach requires as a pre-condition for liability a conclusion that the director assumed personal responsibility for the relevant conduct associated with a presumption against such an assumption where the director was simply acting on behalf of the company — see *Body Corporate 202254* at [29].

[110] Chambers J noted that the plaintiffs in *Body Corporate 202254* alleged that the director was the person who made all the decisions as to how the villas were to be built; he fixed the budget, was personally involved in the preparation of the plans and specifications, selected the exterior cladding system, selected the sub-contractors, told the sub-contractors how to undertake their part of the overall construction and inspected the building works during construction. His Honour took the view that only one cause of action in negligence was required, based simply on what the employee director was alleged to have done as builder and developer. He noted that if he were self-employed, no one would have a moment's doubt about the propriety of the plaintiffs making an allegation based on negligence. He considered that it should make no difference whether or not he was employed at the relevant time, and that the only relevance of his being employed was that his employer may be vicariously liable for his tort. His Honour referred to the decision of Hardie Boys J in *Morton v Douglas Homes Ltd*. He cited the observations noted above at [103].

[111] In the present case, Mr and Mrs Chee alleged negligence by Messrs Hung, Taylor and Brockliss. Assumption of responsibility is not an element of the tort of negligence. Rather, Mr and Mrs Chee had to establish that each of them — Messrs Hung, Taylor and Brockliss — owed a legal duty to take care. They had to show that Messrs Hung, Taylor and Brockliss acted in a way so as to breach that duty of care, that the damage suffered by them was caused by the breach of the duty and that the damage was a sufficiently proximate consequence of the breach so as not to be too remote.

[112] These various issues were not considered at all by the adjudicator. Rather, he assumed that *Body Corporate 202254* affirmed *Trevor Ivory Ltd*. Insofar as the Court of Appeal held that the assumption of responsibility test is not applicable to cases where negligence simpliciter is alleged, it did not do so. Instead, it limited the operation of *Trevor Ivory Ltd*. Further, and as was noted by Priestley J in *Body*

Corporate 183523 v Tony Tay & Associates Ltd,[27] one can detect in *Body Corporate 202254* a willingness on the part of the Court of Appeal to re-examine *Trevor Ivory Ltd* when the opportunity presents.

[113] In the present case, the Tribunal erred in searching for an assumption of responsibility by Messrs Hung, Taylor and Brockliss. Rather, it should have asked itself whether the elements of the tort of negligence were made out against each of them. In doing so, it should have borne in mind the presumption against the imposition of personal responsibility where the director was simply acting on behalf of the company. It should have asked itself whether the director assumed personal liability for the relevant conduct. The "degree of control" test articulated by Hardie Boys J in *Morton* is likely to be of considerable help in answering that question. As Stevens J noted in *Hartley v Balemi*[28], personal involvement does not necessarily mean that the physical work needs to be undertaken by the director. It may include administering the construction of the building. His Honour observed:

> Therefore, the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the process or any particular part thereof. Direct personal involvement may lead to the existence of a duty care and hence liability, should that duty of care be breached.

[114] The Courts have repeatedly emphasised the importance of examining the factual matrix in each case before determining whether a director is personally responsible. Here, there was no careful or detailed analysis of the roles undertaken by Messrs Hung, Taylor and Brockliss.

[115] In my view, the Tribunal should have then asked itself whether or not the elements of the tort of negligence were made out as against Mr Hung. It should have set out what parts of the factual matrix it considered to lead to its conclusion that Mr Hung was personally liable as well as his company.

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[27] HC Auckland CIV-2004-404-4824 4 December 2009.
[28] HC Auckland CIV-2006-404-2589 29 March 2007 at [92].

[116] Similarly, the Tribunal did not carefully examine Mr Taylor's role. The Tribunal did not set out in any detail the factual matrix — nor did it ask itself whether Mr Taylor owed a duty of care to Mr and Mrs Chee.

[117] The same comment applies to the Tribunal's findings made in regard to Mr Brockliss. Again, there was no analysis of the matrix of fact relevant to Mr Brockliss. Further, the Tribunal did not discuss whether or not a sub-contractor can owe a duty of care to subsequent purchasers of a dwelling house. In *Body Corporate 114424 v Glossop Chan Partnership Architects Ltd*,[29] Potter J held that no such duty is owed. Other authorities, however, suggest that such a duty can be owed — see, for example, *Bowen v Paramount Builders (Hamilton) Ltd*.[30] For myself, I do not favour the *Glossop Chan* approach. I note that it has been expressly or implicitly questioned in other cases — see for example *Body Corporate 192346 v Symphony Group*[31] and *Body Corporate 189855 v North Shore City Council*,[32] (affirmed on appeal in *Byron Avenue*[33]), and *Boyd v McGregor*.[34] Moreover the approach taken in *Glossop Chan* is inconsistent with the observations in *Sunset Terraces*. In my view, it is clear that a duty of care can be owed both by head contractors and by sub-contractors to the subsequent purchasers of a dwelling house.

[118] Again the Tribunal will have to consider the personal liability of each of Messrs Hung, Taylor and Brockliss at the rehearing.

Targeted repairs or a full re-clad

[119] The Tribunal's conclusion that the house could be repaired by way of targeted repairs was challenged by Mr Rainey, on behalf of Mr and Mrs Chee. He submitted that the adjudicator's conclusion was not supported by the weight of the evidence which was properly before the Tribunal.

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[29] HC Auckland CP612/93 22 September 1997.
[30] [1977] 1 NZLR 394 (CA).
[31] HC Auckland CIV-2004-404-232 3 November 2005.
[32] HC Auckland CIV-2005-404-5561 25 July 2008.
[33] [2010] NZCA 65.
[34] HC Auckland CIV-2009-404-5332 17 February 2010.

[120] Certainly much of the expert evidence heard by the Tribunal suggested that a full re-clad was necessary. That was the solution preferred by Mr Smith, Mr and Mrs Chee's expert and by the assessor, Mr Browne. It was initially the solution favoured by Mr Bayley for the Council, although he amended his stance in his supplementary memorandum, following Mr Taylor's evidence. Mr Light, TQ Construction's and Mr Taylor's expert, favoured targeted repairs. Mr Paykel, the expert called by CSR, expressed the view that there was insufficient evidence to conclude that a full re-clad was necessary.

[121] I have already expressed the view that the Tribunal breached the rules of natural justice when it failed to accord Mr and Mrs Chee the opportunity to challenge properly the experts on quantum, and when it failed to accord Mr Chee the opportunity to respond properly to the supplementary memorandum put in by Mr Bayley. The issue of whether a full re-clad is necessary, or whether targeted repairs will suffice, is inextricably intertwined with these matters. Whether a full re-clad is necessary needs to be re-addressed at the rehearing, once Mr Chee has had a proper opportunity to deal with the issue and respond to the views of other parties.

Conditional award of damages

[122] The Tribunal's conclusions in relation to damages has been set out above at [21].

[123] The Tribunal, under the heading "Targeted repairs — conditional", concluded that targeted repairs were appropriate, but made that finding conditional upon the Council issuing the appropriate building consent. It recorded that Mr and Mrs Chee have the right to come back to it to seek damages in the sum of $216,000 to cover the costs of a full re-clad if the Council refuses to issue a building permit. As authority for this approach, it refers to an earlier decision of the Tribunal — *Heng v Walshaw*.[35]

[35] WHT DBH00734 13 January 2008.

[124] In my view the Tribunal has failed to apply the applicable principles of law in breach of s 90(1) of the WHRSA.

[125] Damages must be assessed only once in respect of a cause of action, and generally they are awarded in a single lump sum — see Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [25.2.02]. Further, at common law, an award of damages must be made unconditionally, rather than on terms — see *Banbury v Bank of Montreal*;[36] *Blundell v Musgrave*;[37] and *Demetrios v Gikas Dry Cleaning Industries Pty Ltd*.[38] See also *McGregor on Damages* (18th ed, Thomson Reuters, London, 2009) at [1.015(c)].

[126] Despite Mr Endean's submission to the contrary, I am not persuaded that s 90(3) and (4) permit the Tribunal to depart from these fundamental principles. Those subsections read as follows:

> (3) If the tribunal determines that a party to the adjudication is liable to make a payment to another party, the tribunal may make that determination subject to any conditions that the tribunal thinks fit.
>
> (4) The tribunal may determine that the liability of a party to the adjudication depends on another party to that adjudication meeting any conditions that the tribunal may impose.

Section 90(4) deals with liability, not damages. It has no relevance for present purposes. Section 90(3) deals with liability to make a payment, but it proceeds on the assumption that the Tribunal has determined that a party to an adjudication is liable to make a payment to another party. It does not, on its terms, permit the Tribunal to make orders providing for the payment of different sums, depending on which set of circumstances applies.

[127] In my view, the Tribunal's conditional award offends against the principles noted above. I accept that the Tribunal did not know whether the Council would issue a consent for targeted repairs. In those circumstances, it should have issued an interim decision, expressing the view that targeted repairs were appropriate, but declining to make an award of damages. The interim decision should have directed

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[36] [1918] AC 626.
[37] [1956] 96 CLR 73.
[38] (1991) 22 NSWLR 561.

the appellants to make the appropriate application for a building consent, and required them to bring the matter back before the Tribunal when the Council's view was known. The Tribunal should have fixed damages only once it knew whether the Council would issue a consent for targeted repairs.

CSR's liability

[128] In considering CSR's liability, the Tribunal noted at [23] to [24] that damage to the roof, for which CSR was responsible, comprised two defects: first a split in the lead flashing below the bedroom window, and secondly faulty installation of the valley trays. It concluded that the roof leaks contributed 10 per cent of the damage to the house, but went on to observe that the facts were not sufficiently clear to enable it to make an accurate apportionment between the two roof faults. The Tribunal went on at [71] and [72] to note that there were no elevated moisture readings at the roof junction, but that there should be new valley trays in the opinion of three of the experts. It concluded that there was negligence in the roofing installation from CSR, exposing Mr and Mrs Chee to loss by way of likely future damage. It did not specify the level of liability it considered CSR had in relation to the total damage, although when assessing contribution, it did set CSR's responsibility at 10 per cent.

[129] The Tribunal found that CSR breached the duty it owed to Mr and Mrs Chee, and that it was jointly and severally liable to pay them the sum of $141,800 along with the other respondents who were also found liable. It then went on to find that CSR's responsibility, as between the respondents, was 10 per cent of that sum. It held that CSR was entitled to recover a contribution of up to $127,620 from Stareast, Mr Hung, and Spouting and Steel.

[130] For some reason, which is unexplained, it did not hold that CSR was entitled to recover any part of that contribution from the Council.

[131] The effect of the Tribunal's decision is that if all the other respondents default, CSR will be liable to pay the total sum ordered to Mr and Mrs Chee.

(a) Submissions

[132] Mr Thompson for CSR submitted that this was not a case where there had been a general and systemic failure of the building to which the acts or omissions of each of the responsible respondents had contributed. He submitted that the evidence established the existence of a number of discrete defects, each of which had either caused isolated damage, or had the potential to cause future damage, and each of which could be repaired or remedied in isolation from the other. He submitted that the Tribunal erred in principle, and breached s 90(1), by holding CSR jointly and severally liable for the whole of Mr and Mrs Chee's loss. He submitted that this was the case whether or not the dwelling requires a full re-clad.

[133] Mr Rainey for Mr and Mrs Chee submitted that the key question was whether the damage resulting from the defects for which CSR was held liable was divisible from the damage resulting from other defects.

(b) Analysis

[134] At common law, where two or more tortfeasors inflict different damage to the same plaintiff, each is liable only for the distinct damage which each has caused — see *Television New Zealand Ltd v Ah Koy*.[39] If isolation of the damage caused is not reasonably possible, the tortfeasors are considered to have caused indivisible damage together, and where two or more tortfeasors caused the same damage to one plaintiff, they are each liable in full for the entire indivisible loss. It is a question of fact in each case whether the damage can be regarded as indivisible, or whether a rateable division can be made — see *Dingle v Associated Newspapers Ltd*,[40] and see generally Todd at [20.2.02].

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[39] [2002] 2 NZLR 616 (CA) at [31].
[40] [1961] 2 QB 162 at 189.

[135] Tortfeasors who are liable in respect of the same damages could be classified as either joint tortfeasors, or concurrent tortfeasors. Joint tortfeasors commit the same tort in a joint act, whereas concurrent tortfeasors are responsible for different torts in separate acts which together produce the same damage. An example of concurrent tortfeasors are a builder who puts up a defective house and the local authority inspector who fails to discover the defects — *Morton v Douglas Homes Ltd* at 613.

[136] Given the Tribunal's findings, it seems that it was possible to apportion liability according to the areas of leakage. If that is the case, it is preferable to hold CSR liable only for the damage resulting from its negligence. This course has been approved by this Court in other cases — see, for example, *Patel v Offord*,[41] *Harris v Sell*,[42] and *Boyd v McGregor*.

[137] Here, the Tribunal did not ask itself whether the damage suffered by Mr and Mrs Chee was indivisible, or whether a rateable division could be made. In my view the Tribunal should have asked itself this question. It is given express power to do so by s 72(2) of the WHRSA.

[138] Once again, these are issues which will have to be explored at the rehearing.

Relief

[139] Counsel addressed me on the question of the appropriate relief, in the event that one or more of the appeals was allowed.

[140] Section 95 of the WHRS governs the powers of this Court in determining an appeal from the Tribunal. Section 95(1) provides as follows:

> In its determination of any appeal, the court may do any 1 or more of the following things:
>
> (a) confirm, modify, or reverse the determination or any part of it:

[41] HC Auckland CIV-2009-404-301 16 June 2009.
[42] HC Auckland CIV-2009-404-3465 22 December 2009.

> (b) exercise any of the powers that could have been exercised by the tribunal in relation to the claim to which the appeal relates.

[141] As can be seen, there is no express power in the WHRSA permitting this Court to refer the matter to the Tribunal for a rehearing.

[142] Nevertheless, r 20.19 of the High Court Rules states that after hearing an appeal, the High Court may direct that the decision-maker rehear the proceedings concerned. The relevant provisions are as follows:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> (2) The court must state its reasons for giving a direction under subclause (1)(b).
>
> (3) ...
>
> (4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

[143] Rule 20.19 is contained in Part 20 of the High Court Rules. Rule 20.1(1) provides that Part 20 applies to appeals to the Court under any enactment, except for a few detailed exceptions, and r 20.1(3) provides that Part 20 is subject to any express provision in the enactment under which the appeal is brought or sought to be brought.

[144] In my view, r 20.19 applies to the present appeal, and permits me to direct the Tribunal to rehear Mr and Mrs Chee's adjudication application. My reasons for that conclusion are as follows:

a) There is no express provision in the WHRSA precluding the operation of Part 20 of the High Court Rules.

b) In various other cases, this Court has confirmed that the High Court Rules govern appeals from the Tribunal, subject only to modifications contained in the WRHSA — see *Hartley v Balemi*[43] and *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell*.[44] In leaky building cases, the High Court has frequently referred the claim back to the Tribunal — see for example *Cameron v Stevenson*[45] and *Burns v Argon Construction Ltd*.[46]

c) The procedures followed by the Tribunal in the present case are such that there is no proper or reliable evidential foundation on which I can confirm, modify or reverse the Tribunal's determination under s 95(1).

d) If I were to confine myself to the powers conferred by s 95(1)(a), I would have to rehear much, if not all of the evidence. That would be a protracted exercise, and would be wasteful of limited Court time.

e) While this Court on appeal has the powers that could have been exercised by the Tribunal, there would be an uneasy tension between the inquisitorial powers available to the Tribunal, and the adversarial nature of proceedings in this Court.

f) The Tribunal is better placed to deal with the various factual disputes, and to make factual findings in relation to them.

[145] I consider that I have the power to remit the matter back to the Tribunal for rehearing. Further, it is appropriate to do so in the present case for the following reasons:

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[43] HC Auckland CIV-2006-404-2589 29 March 2007 at [41].
[44] HC Auckland CIV-2009-404-3118 11 December 2009 at [18].
[45] HC Napier CIV-2009-441-437 5 November 2009.
[46] HC Auckland CIV-2008-404-7316 18 May 2009.

a) Because of the Tribunal's procedural shortcomings and the breaches of the rules of natural justice which I have identified, there is a dearth of evidence on important and critical issues. A rehearing will best cure these defects.

b) The Tribunal has admitted evidence, without affording Mr and Mrs Chee the opportunity to test that evidence, or to respond to it. Again, a rehearing will best afford them that opportunity.

c) The Tribunal has failed to consider fully various important aspects of the case for example, TQ Construction's liability in the event that a full re-clad is necessary because of the absence of cavity battens; the factual matrix relevant to determining whether or not Messrs Hung, Taylor and Brockliss should be found to be personally liable; and whether or not those matters for which CSR is responsible are divisible from other defects for which others are responsible. Again, these matters can best be explored at a rehearing.

d) There are other aspects of the Tribunal's conclusion which cause concern. It is not clear why it concluded that the appropriate figure for targeted repairs was $130,000. Its decision at [102] simply records the differences between the figures contended for by the experts and the Tribunal's conclusion. There is no analysis of why the figure of $130,000 was appropriate. It is appropriate that the Tribunal should have the opportunity to revisit this issue.

e) Similarly, and as noted above, why the Tribunal then went on at [115] to conclude that damages should be fixed at $115,000 is unclear, at least to me.

f) In any crucial areas the Tribunal has failed to give reasons for its decision, Again this is best cured by a rehearing.

[146] In summary, in my view the adjudication proceedings in the present case have failed the parties. There is insufficient information before me to enable me to properly exercise any of the powers conferred by s 95(1) of the WHRSA. The most appropriate solution is to remit the matter back to the Tribunal for a rehearing.

Conclusion

[147] Mr and Mrs Chee's adjudication claim is remitted back to the Tribunal for rehearing.

[148] I have considered the issue of costs. All parties have to an extent succeeded and of course all were faced with the decision of the Tribunal. It is my preliminary view that costs should lie where they fall. If any party disagrees with that view, then that party is to file and serve a memorandum in relation to costs within 10 working days from the date of this decision. Such memorandum is not to exceed 10 pages. Any other party wishing to take issue with any claim for costs is to file and serve a memorandum in response, also not to exceed 10 pages, within a further 10 working day period. I will then deal with the issue of costs on the papers unless I require the assistance of counsel.

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Wylie J