

Owners faced with a leaking or otherwise defective home are often overwhelmed by the remedial task ahead of them. They generally have little knowledge of how much those works should cost and the processes they should follow to avoid a cost blowout.

A claimant's duty to mitigate damage has been the subject of court battles for years and is now a hot topic in the mediation forum due in most part to the leaky building epidemic and associated remedial works. But that doesn't mean that the duty is well understood; in fact, it's far from it. There will always be a natural tension between a claimant who believes they should be reimbursed for their full costs in remedying construction defects (weathertightness or otherwise) and a defendant who is not prepared to pay more (if anything) than is reasonable for remedial works. The result is, inevitably, conflict over who should have done what and when. This highlights the need for greater understanding by claimants and defendants as to what the duty to mitigate involves, and the consequences of failing to meet that duty. With many parties settling out of court, judicial guidance on this issue in the construction and leaky building area is limited.

In the recent decision of *White & Anor v Rodney District Council & Anor* (High Court, Auckland CIV-2009-404-1880, 19 November 2009, Justice Woodhouse), the Court confirmed that the duty to mitigate requires a claimant to take all reasonable steps to mitigate the loss they have

suffered due to a defendant's wrong. "Reasonableness" is a question of fact to be determined on a case-by-case basis with reference to the particular circumstances of each claimant. The test is not entirely objective – it has long been established that a wrongdoer must take the victim as he or she finds them. If, for example, a claimant does not have the money to mitigate damage in a particular way, that is the wrongdoer's problem. *White* confirms that the duty to take reasonable steps should not be assessed with hindsight and that the threshold for "reasonableness" is not high – recognising that a claimant is usually in a difficult position as a result of the defendant's breach.

### But what is the balance?

The onus rests on the wrongdoer to establish that a claimant has failed to take reasonable steps to mitigate damages. This is not an easy task. A defendant will need to clearly identify what reasonable steps should and could have been taken by a claimant and establish that those steps were not in fact taken. The defendant must also show how those steps would have reduced the actual damage. A defendant will not get home by simply proving that the claimant could have done the remedial works for less; he or she must prove that the claimant acted unreasonably in approaching the remedial task in a particular way, and, as a result, the total remedial cost was more than it should have been.

Defendants commonly point to an owner's failure to commence remedial works within a reasonable time and the failure to approach the remedial works in a proper manner (for example, engaging builders and consultants without appropriate expertise or taking an overzealous approach to the repairs by, say, excessive recladding and timber replacement). The success of these arguments will depend on whether the defendant can prove that a claimant's failure to take these steps was unreasonable (with reference to what steps the claimants were able to and did take) and whether this ultimately impacted on the damage.



**Janine Stewart and Scott Thompson** look at what the duty to mitigate means

# Reasonableness

— not always a black and White issue



### The *White* situation

*White* gives some context to the issues which can be raised in mitigation and the difficulties defendants face in meeting the burden of proof.

The Whites obtained a report in February 2002 which stated that their house was sound apart from issues on one deck. In April 2002, the Whites carried out further investigations and obtained specifications for remedial works to the deck.

The Whites wrote to the defendants in October-November 2002 and noted that the deck would be repaired in the summer months and that they would be issuing proceedings for the recovery of the cost of the same.

However, the Whites had difficulties securing a builder to repair the deck, and in June 2003, Mr White was made redundant. While the Whites had the means to carry out repairs to the deck in November 2002, by mid-2003, their savings were gone. The repairs were never done.

The defendants argued that the Whites had not taken appropriate steps to mitigate their loss. The Weathertight Homes Tribunal found in favour of the defendants. The High Court considered the case on appeal.

The Court stated that it was necessary to assess all of the evidence relating to the Whites' circumstances, why they acted in particular ways, and the sequence of events. The relevant period of enquiry was up until June 2003, when Mr White became redundant and they were then unable to carry out the repairs. The Court found that the steps the Whites had taken in relation to builders were not unreasonable. They had persevered to obtain a particular builder and had tried to engage other builders. Further, it was not until February 2004 that the Whites were alerted to the fact that the problems were more significant and were not isolated to the one deck. The Court also placed emphasis on the defendants' ongoing and steadfast denial of liability and the uncertainty this created for the Whites.

The Court considered what the Whites should reasonably have done in light of the recommended deck work and what consequence this would have had on the damage. Justice Woodhouse noted that he was not referred to any evidence proving that, on the balance of probabilities, the Whites' failure to carry out the deck repairs in 2002-2003 meant that the extent of the damage was materially different.

The decision shows that it is imperative for defendants raising mitigation issues to provide clear evidence showing that the claimant's failure to take particular steps was unreasonable and in fact had a material impact on the damage.

The *White* case contrasts with the High Court decision of *Hartley v Balemi & Ors* (High Court, Auckland CIV-2006-404-2589, 29 March 2007, Justice Stevens) which upheld a Weathertight Homes Tribunal determination that the owners had failed to mitigate their damages.

### The *Hartley* case

Mr Hartley was a builder with 16 years' experience; Mrs Hartley was a real estate agent. The Hartleys purchased their home in March 2003. In April/May 2003, they first noticed leaks after a rainstorm. After further investigation they found signs of previous leaking. In September 2003, it was evident to the Hartleys that the house was leaking badly, and by early 2004, there were cracks in the cladding. A hearing eventually took place in the Tribunal in December 2004. By this time, the Hartleys had not taken any steps to remedy the leaks. It was suggested by the Hartleys that they could not afford to, and also that they did not know what work should be done.

The adjudicator was not satisfied that the owners lacked enough funds to carry out some remedial work and considered that they were in a position to take steps to prevent ongoing leaks. The adjudicator confirmed that he was not suggesting the owners should have arranged for immediate remedial works to be carried out without carefully considering the causes of the leaks and their options. In this case, it was clear

to the owners that their home was deteriorating, but they did not take reasonable steps to protect their investment. It would have been reasonable, the adjudicator held, to take some steps to prevent ongoing leaks and to engage a consultant to advise on how to minimise the leaks.

*Hartley* is a reasonably straightforward example of failure to mitigate. The line is not as clear in all cases. Take, for example, the situation where a claimant has engaged builders, consultants, and experts to carry out and supervise remedial works, but they are of questionable expertise. On one hand, it is expecting a lot of a claimant to question their experts' approach. But equally, why should a defendant bear the cost of a builder's inappropriate approach to remedial works and the claimant's failure to question it?

### The correct test?

Case law on this issue is unhelpful, but, based on principle, perhaps the correct test is whether the claimants should reasonably have known that their consultants' approach was unreasonable and likely to increase cost.

Defendants can also take preventative action. If a defendant is aware that a claimant is potentially failing to take steps to mitigate damage and/or has engaged inappropriate builders and consultants, it would be prudent to put the claimant on notice of these issues. This action may better support an argument at a later stage that the claimant should have known better and failed to take steps to protect their position and mitigate costs.

Given that public knowledge of the leaky building problem is much more widespread than it was even five years ago, arguments concerning mitigation are becoming more sophisticated and are likely to continue to do so. These are highly fact-specific cases, determined on general principles applied with a degree of subjectivity, in the emotionally charged and often stressful background where claimants are facing the unfortunate reality of a defective and leaking home. There is no doubt that further judicial analyses and comment would be helpful to claimants and defendants alike in this area. But with the rate of settlement in these cases high, the extent to which these arguments will be examined by the Courts remains to be seen.

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