IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2009-100-0000022

BETWEEN	**VANESSA EILEEN ABERNETHY and ALAN RICHARD ABERNETHY** Claimants
AND	**RICHARD COUGHLAN** First Respondent
AND	**TREVOR HUMPHREY** Second Respondent
AND	**NORTH SHORE CITY COUNCIL** Third Respondent
AND	**STOCKDALE INVESTMENTS AUCKLAND LIMITED** Fourth Respondent
AND	**CEDRIC IAN BEAZLEY** Fifth Respondent

Hearing: 24 and 26 June 2009
Final oral submissions: 1 July 2009
Closing written submissions: 8 and 9 July 2009

Appearances: Mr M Josephson and Ms K Webber for the claimants

Mr A McLean for the first, second and fourth respondents

Mr P Robertson for the third respondent

Mr Beazley was self represented.

Decision: 26 August 2009

DETERMINATION
Adjudicator: R M Carter

Introduction

[1] Mr and Mrs Abernethy own a townhouse at 5/6 City View Terrace, Birkenhead, Auckland. The townhouse was built in 1994 and they purchased it in 2003. In this claim they seek $334,846.10 because the townhouse is suffering damage from leaks, and needs to be re-clad.

[2] The first respondent Mr Coughlan is an architectural draughtsman. He drew the plans for the townhouse and obtained building consent. The second respondent Mr Humphrey administered the project.

[3] The plans were approved by the third respondent the North Shore City Council, which carried out inspections while the house was being built and then issued a Code Compliance Certificate.

[4] Both Mr Coughlan and Mr Humphrey were directors of the development company, Stockdale Investments Auckland Limited, the fourth respondent.

[5] Before Mr and Mrs Abernethy settled their purchase of the property on 5 September 2003, Mr Beazley, the fifth respondent, carried out inspections and prepared two reports on the townhouse's condition. Mr Beazley identified a number of defects which he considered had arisen largely because the previous owners had not carried out maintenance on the property. Mr and Mrs Abernethy arranged for repairs to be carried out, but further problems have arisen.

[6] Mr and Mrs Abernethy allege that the respondents were negligent in carrying out their respective duties, causing them loss. They seek the full amount of damages from all respondents.

Issues to be decided

[7] The principal questions I have to answer in this adjudication are:

- What were the main causes of leaks and damage?
- What is the reasonable cost of repairs?
- Is Mr Coughlan liable?
- Is Mr Humphrey liable?
- Is Stockdale liable?
- Is Mr Beazley liable?
- How much of the cost of repairs is compensable?
- What are the other damages?
- Did Mr and Mrs Abernethy contribute, and did they fail to adequately mitigate their losses?
- What apportionment of damages between liable parties should there be?
- What damages should liable parties pay? – Conclusion as to quantum

Further background and claim details

[8] The land on which the block was built was owned by Mr Coughlan, Mr Humphrey and two other people. The land was transferred to Stockdale for the development in early June 1994. The townhouses, including this Unit 5, were constructed by three labour only builders and other labour only contractors.

[9] The townhouse was built as part of a block of three three-level units. It is the unit at the eastern end of the block. At the back, the townhouse was built into an excavation or cut into a slope to the north of the property, and the front of the townhouse faces south, with a wide view over the Hauraki Gulf.

[10] During the course of construction a drainpipe had to be installed at the back. This was to carry and redirect storm water down from the property at the rear to take it beyond 5/6 City View Terrace.

[11] A Korean family purchased 5/6 City View Terrace when it was new and lived in it for almost nine years. Then, in 2003, Mr and Mrs Abernethy became interested in buying it.

[12] The pre-purchase inspector Mr Beazley was an employee of Futuresafe Building Inspections Limited, now in liquidation. Following on from Mr Beazley's reports and recommendations, Mr and Mrs Abernethy arranged for various repairs to be made as soon as they had purchased it. Some work was done before they moved in. Those costs, $26,527.08, are not part of the claim.

[13] Soon after settlement on 5 September 2003, the claimants noted a new problem, bubbling paint inside near the front door, and they lodged a claim with the Weathertight Homes Resolution Service in late October 2003.

[14] Mr Alan Light, WHRS Assessor, carried out an investigation and completed his first report on 28 July 2004. He found the claim was eligible as a leaky building and estimated the costs of repair work at $10,597.50, over and above what Mr and Mrs Abernethy had already spent doing the repairs Mr Beazley had recommended.

[15] Mr and Mrs Abernethy lived in the town house for 16 months until January 2005, when they left to take up residence and employment in Dubhai, and the property was let. In their absence, the property has been managed by Mr and Mrs Kime. For various reasons, the work Mr Light recommended, over and above what Mr Beazley recommended, was not done.

[16] Mr Light later carried out a further inspection and issued a supplementary report on 21 June 2007. He now estimated that the costs of remediation were $115,500.23.

[17] The statement of claim dated 17 March 2009 listed the following defects:

(a) Lack of sub-floor ventilation;
(b) Inadequate ground clearance;
(c) Lack of control joints to exterior cladding;
(d) Direct contact of the exterior fibre cement cladding with the ground;
(e) A flat topped timber capping to the deck barrier walls;
(f) Lack of saddle flashings to deck balustrades;
(g) Inadequate clearance between the cladding, decks and roof flashings;
(h) Inadequate jamb flashings;
(i) Inadequate head flashings;
(j) Gate post penetration to eastern wall.

[18] The claimants' claim against the first respondent Mr Coughlan was for negligence as the designer, specifically lack of details and specifications, giving rise to defects and damage. At the hearing the claim was widened to allege that Mr Coughlan was also negligent as a project manager, and a developer.

[19] Against the second respondent Mr Humphrey, the claimants alleged negligence as the project manager. At the hearing they also alleged that he had failed in his duty as a developer as well.

[20] Against the third respondent the North Shore City Council, the claimants alleged firstly negligence and secondly negligent misstatement.

[21] Against the fourth respondent Stockdale, the claimants alleged negligence as a developer.

[22] Against the fifth respondent Mr Beazley, the claimants alleged firstly negligence. Secondly they alleged negligent misstatements, and thirdly a breach of the Fair Trading Act 1986, by Mr Beazley.

[23] The total amount of the claim is now $334,846.10, comprising:

(a) $201,568.06 for repair costs
(b) $39,100.00 for professional fees
(c) $30,225.00 for consequential losses
(d) $3,953.04 for costs incurred mitigating loss
(e) $60,000.00 for general damages

[24] This figure is inclusive of GST but excludes interest and costs.

Adjudication hearing

[25] The hearing took place on Wednesday 24 June and Friday 26 June 2009. Soon after the hearing opened on 24 June, Mr Robertson, counsel for the North Shore City Council, advised that the Council had reached a settlement with the claimants for $90,000.00, and Mr Robertson withdrew from the hearing.

[26] Mr Josephson on behalf of the claimants and Mr McLean on behalf of the first, second and fourth respondents then made opening submissions.

[27] Also on 24 June, some parties gave oral evidence further to their witness statements, and other evidence was taken as read, as follows:

- Mrs Abernethy, claimant, gave evidence;
- Mr Abernethy's written evidence was taken as read;
- Mr Kime, their property manager, gave evidence;

- The evidence of Mr Cartwright, former council officer, a witness for the claimants, was taken as read;
- Mr Beazley, fifth respondent, gave evidence;
- Mr Coughlan, first respondent, gave evidence; and
- Mr Higham, a witness for the third respondent, North Shore City Council, whom Mr McLean wished to question, gave evidence.

[28] On Friday 26 June 2009, Mr Humphrey, second respondent, gave evidence by teleconference.

[29] Also on 26 June, Mr Roxburgh, an expert witness who had been engaged by the Council, gave evidence at Mr McLean's request; and Mr Light, WHRS assessor, Mr O'Hagan, an expert engaged by the claimants, and Mr McLintock, an expert engaged by the first, second and fourth respondents, gave their evidence concurrently.

[30] Mr Josephson and Mr McLean addressed or made closing submissions on Wednesday 1 July 2009. Mr Beazley also filed a final written submission. Mr Josephson advised that it was part of the settlement agreement that the claimants would represent the Council in cross claims against the other respondents and on the question of apportionment.

[31] Supplementary closing written submissions were received from counsel on Wednesday 8 July and Thursday 9 July 2009, addressing the cross claim and apportionment issues, and the first and second respondents' application that the Tribunal not consider the additional claims against them.

What were the main causes of water ingress and damage?

[32] The written and oral evidence of Mr Roxburgh and of Mr Light, Mr O'Hagan and Mr McLintock addressed the defects listed in the claim.

Lack of sub-floor ventilation

[33] There was disagreement amongst the experts as to the extent of damage caused by the absence of vents in the foundation blocks. The WHRS assessor, Mr Light, took the view that the lack of sub-floor ventilation has been an ongoing significant cause of damage to the sub-floor, floor and framing of the dwelling. Mr Roxburgh, the expert engaged by the Council, like Mr Light, considered that it would have been prudent to place plastic sheeting over the soil in the rear sub-floor as a vapour barrier.

[34] On the other hand, Mr McLintock, engaged by the first, second and fourth respondents, was of the view that the volume of exterior water striking the dwelling at the base of the rear was such that sub-floor ventilation would not have prevented damage. Mr McLintock's evidence related to the large volume of surface water in the vicinity of the north wall under the ground level deck at the back of the house. The other experts commented upon this. All the experts and Mr Beazley have identified that as a problem.

[35] There was disagreement as to how much of this water under the deck flowed from the chamber that was installed at the back of the section to re-direct ground water being piped from a cesspit in the section at the rear, 3 Pupuke Road, across 5/6 City View Terrace's section and away. Mr McLintock stated that he saw the sink-hole or chamber overflowing and that was caused by lack of maintenance of the chamber.

[36] Mr Roxburgh wrote that he agreed with Mr McLintock that the soak pit ought to have been adequate to cope with any excess ground water. However it appears that this chamber was designed and installed solely to deal with water being piped from the section above, not the water on this property's section. That is Mr O'Hagan's view. He stated in his witness statement in reply that there is a lack of sub-soil drainage at the rear wall to deal with the accumulating water.

[37] In any event, there was consensus that the long-term saturation of the soil under the rear ground level deck shows there is a problem with drainage on the sloping ground at the back of the unit.

[38] I conclude that the damage at the rear of the property, to the sub-floor framing, the floor and to a degree the framing and cladding, is in part due to surface and subsoil water at the base of the building arising from inadequate drainage. I conclude that the lack of sub-floor ventilation is also partly responsible for the repairs necessary at the rear of the house.

Inadequate ground clearance

[39] There is inadequate ground clearance at two parts of the house. One is where the cladding is in contact with the concrete near the front door, but there is no evidence that this has caused damage by way of wicking, probably because the area is somewhat sheltered.

[40] The other area where there is inadequate clearance is where the cladding at the rear of the property, the north side, abuts the stringer, the long base board, for the deck. The lack of clearance between the stringer and the cladding has exacerbated the problem of the exterior water that has been lying against that stringer.

Lack of control joints to exterior cladding

[41] Mr O'Hagan stated in his witness statement that there was a lack of horizontal control joints to the exterior cladding at inter story level at the floor joist centres, and that vertical control joints should have been created on the east and south walls at 5.4 metres.

[42] Mr Light's view was that it is impossible to tell if there are horizontal control joints because at that time, the coating was applied over the control joints. He said it was possible that vertical control joints could have been obscured later and that sometimes cracks indicate that control joints are working. Mr Light placed less emphasis on the alleged lack of vertical control joints than Mr O'Hagan did, as a cause of leaks and damage.

[43] The experts' evidence shows that there appears to be a horizontal control joint to the exterior cladding at the rear of the property, the north wall, but there is uncertainty as to whether proper vertical control joints, called relief joints, were installed on that face.

[44] Mr O'Hagan was of the view that the vertical control joints had not been installed on the north wall because there was no indication of them when he felt underneath. The lack of vertical control joints has probably contributed to cracking on this wall.

[45] On the east wall, it is possible that a lack of vertical control joints has contributed to leaks and damage.

[46] Mr O'Hagan's view that there is a lack of vertical control joints to the front south wall causing damage contrasts with Mr Light's view. He emphasises the failure of the balustrades as the cause of damage on that face.

Direct contact of the exterior fibre cement cladding with ground

[47] This defect at the front door is referred to above.

Flat topped timber capping to the deck barrier wall

[48] The timber capping to the deck barrier walls has deteriorated so that the capping and balustrade walls need replacing. This has caused considerable damage. However the damage is mainly to the front south wall as distinct from the walls of the house itself where the balustrade tops penetrate.

Lack of saddle flashings to deck balustrades

[49] The damage where the deck balustrades and the timber capping meet and penetrate the walls is limited.

Inadequate clearance between the cladding, decks and roof flashings

[50] The area where the cladding abuts the surface of the decks is sheltered, so the damage is minimal. However the floors of the south face decks themselves are damaged. The damage at the south west (front left) roof junction with the upper deck area on the front of the building is likewise limited notwithstanding a barely adequate flashing.

Inadequate jamb flashings and inadequate head flashings

[51] There is evidence that flashings were inadequate, or that sealant was used instead, or that the windows were installed with neither and that the windows were put in place and the plaster finish was relied on as a means of sealing them.

Gate post penetration through the eastern wall

[52] The gate post attached to the eastern, end wall was attached to the wall by penetrating the cladding. The post has been removed but little or no damage has arisen from the penetration.

Summary of defects

[53] Having regard to the experts' evidence, the major causes of water ingress and damage are lack of sub-floor ventilation; lack of a vertical control joint to exterior cladding at the back of the building, direct contact of the cladding with the deck stringer combined with inadequate drainage at the back of the building; inadequate installation of the window at the front of the east wall at the entrance; and the flat topped timber capping to the deck barrier walls or balustrades especially at the south front of the building.

What is the reasonable cost of repairs?

[54] The cost of repairs was discussed at the end of the hearing. Mr Light said that the amount for repairs in his supplementary report, $115,500.23, excluded margins which were routinely added in such cases. His figure was simply to restore the house to what it might have been. He agreed that a total re-clad was acceptable because targeted repairs would cost the same.

[55] The cladding materials used had a guaranteed life of 15 years and this building is now 15 years old. Mr O'Hagan pointed out that, if properly applied, the cladding material would last indefinitely. Mr O'Hagan said that when this material is used in the internal structure of a building, its guaranteed life is 50 years, not 15.

[56] The replacement cladding will be a different building material installed with a cavity and to contemporary standards. Mr and Mrs Abernethy will benefit from the unit being clad in brand-new materials, replacing materials that have now reached the limit of the period for which they were guaranteed to last.

[57] However I accept that in practice remediation must do more than restore the house but bring it up to today's standards, so that a Code Compliance Certificate can be issued for the new work. Mr O'Hagan stated that the amount claimed for repair costs, $201,568.06, was a competitive and reasonable tender price in today's market. I accept Mr Josephson's submission that the figure of $201,568.06 is the price that the claimants will have to pay to effect remediation, that that is the commercial reality. For those reasons there should be no deduction for betterment.

[58] I also accept that the $39,100.00 claimed for professional fees is reasonable. Added together, the repair costs of $201,568.06 and the professional fees of $39,100.00 amount to $240,668.06.

Was Mr Coughlan negligent and liable as architectural designer?

[59] The initial claim against Mr Couglan was that he was negligent as the architectural designer for failing to provide sufficient detail in the plans, and that he failed to provide specifications.

[60] Mr Higham gave evidence as to what was common practice at the time in 1994 concerning consented plans. The plans and specifications acceptable in 1994 would be in breach by today's standards. What was acceptable was provided for in the old 1990 NZS3604. However he did expect the building to be code compliant.

[61] He said that the plans for building consent were more thorough today. He said Councils rely on other people - architects,

builders etc. Council officers know of the need for such buildings to be maintained.

[62] Mr Higham said that substitution of materials, in this case Harditex for Hardibacker, was quite common without Council approval, but it should be installed according to the BRANZ Appraisal and in accordance with James Hardie's directions of 1993.

[63] He said the inspector could reasonably have assumed that vents would be installed in the foundations of the third unit because they had been installed in the other two units in the block. There was a lack of care on behalf of the block layer. But the vents were not on the plan and that was a want of care on the part of the designer.

[64] Mr Higham said that he would have asked for vents to be put in the plans in 1994, indicatively, but not with spacing measurements. That was overlooked.

[65] Mr Higham said that ground clearance should have been achieved. He said there was a better chance of compliance when one person was supervising the whole project – in the absence of such a person, a concrete layer could arrive and there was more chance it would not be done properly.

[66] Mr Higham said that flat top balustrades were not a cause of worry in those days and a single piece of timber was acceptable. People know better today. He agreed that a membrane could have been taken over the top.

[67] He said it was unacceptable for windows to be pressed against the Harditex, as if that would achieve waterproofness. We now know it needs a cover behind it or an in-seal or a sealant or flashing, he said. The texture went up to the window.

[68] Mr Higham referred to the Council's certification of this particular property having been audited and approved by the BIA (Building Industry Authority).

[69] Mr Coughlan said he had undertaken 4800 jobs from 1970 onwards - 95% of that work was in the North Shore City Council area. He said he was sure he would have been told if his work was inadequate. He used NZS3604 and if that was used, it was adequate. He said the Council application form had a checklist and that was all applicants had to do. In his witness statement Mr Coughlan stated that there was a general expectation that builders would be conversant with the requirements of NZS3604:1990 and the relevant technical literature provided by manufacturers of building products in common use.

[70] Mr Coughlan agreed that requirements were definitely higher now. He noted that Harditex had been taken off the market. He felt that they had been caught in the middle. He agreed that at the time the cladding had to be put up in accordance with James Hardie's instructions and BRANZ.

[71] Mr Coughlan said there was no more and no less detail in his plan here than in his plan for 'Sunset Terraces' (*Body Corporate 188529 & Ors v North Shore City Council & Ors (No.3*) (2008) 3 NZLR 479)*;* and he said he was cleared in respect of those plans by the Court.

[72] There was one common base and there were floor elevations for the middle and top floors. The basic floor plan was the same for each unit. The detail on the floor plan was no different from Sunset Terraces. He was using the same basic computer drawings he used in a Browns Bay case where he was also cleared.

[73] He said the specifications attached to the plans were used by all developers at the time. He said the specifications of the products were known to builders.

[74] He said the Hardibacker and Harditex systems were much the same. At the time Mr Humphrey and he would have decided to use one instead of the other. The builders would know the requirements for Harditex. The change was theirs to make, rather than the builders'.

[75] There was drainage provided behind the block walls within the base of the building behind the garages. An engineer was engaged.

[76] Mr Coughlan said the cesspit was put there to deal with water off the roofs and driveways of the rear property as all that storm water was running on to this unit's land. When he visited the site in 2005, water was leaking over the top of the chamber when he arrived. He said they could not get the lid off, and there was a cap on the overflow pipe. The cap was left there, as it was put there to prevent material flowing on down the pipe.

[77] He said that there was no obligation to maintain the building after 90 days. He said the owner normally maintained the building.

[78] Mr Coughlan said it was obvious that the property was not maintained when he got there in 2005. Mr Coughlan said that the down-pipe of the deck had been removed, there was a hole in the laundry wall, there was grass in the spouting and the gate had been nailed up. Koreans had lived there for nine years. Reports referred to lack of maintenance.

[79] I accept that the plans Mr Coughlan drew up by the standards of 1994 were acceptable except first, that they did not include provision for ventilation in the base of the three unit structure. Ironically the block layer did insert ventilation holes in the base of the

other two units in this three unit block, even though they were not on the plans, but not in unit 5/6 City View Terrace. Mr Light wrote that the Council and pre-purchase inspector should have noticed it.

[80] Mr McLean submitted that this was the block layer's fault, and the Council should have noticed that the vents were absent on this unit. However that does not absolve Mr Coughlan from his responsibility as designer for having failed to include ventilation holes in the plans. I accept Mr Higham's evidence on this point and, to that extent I find Mr Coughlan was negligent in tort to the claimants as future purchasers.

[81] Concerning the alleged failure to include James Hardie's instructions with the plans, Mr Coughlan said that the instructions were known by the tradesmen at the time. The specifications stated: "EXTERIOR WALLS: Selected plaster finish to Hardibacker Where shown on plan, exterior walls from top of base to eaves to be sheathed with selected hardibacker as shown on plans, fixed true in line, level and plumb at all angles."

[82] It is acceptable for the manufacturer's specifications not to be attached to the plans as long as the plans make reference to the manufacturer's instructions, but there was no such reference here. There is a complication because Hardibacker was replaced by Harditex. Even so, Mr Higham said it was acceptable for there to be such a change without Council approval.

[83] I gained the distinct impression that Mr Coughlan was relying entirely on the builders knowing what the James Hardie requirements were or having access to them for either Hardibacker or Harditex. In Sunset Terraces, the lack of finishing details in the drawings was found to be acceptable. But here I find that the fault was that the vents were left out of the drawings when they should have been included. If they had been included in the plans they would probably have been

incorporated into the building. Their absence has caused damage. This omission together with the absence of any reference to the manufacturer's instructions on the plans did cause or contribute to material losses of the plaintiffs. On balance, I find that Mr Coughlan was negligent in those respects. Having regard to Mr Higham's evidence, I do not find that Mr Coughlan was negligent in other ways.

[84] It appears that the deck at the back of the property was not provided for on the plans that the Council approved but there is little evidence before me about that particular aspect.

Was Mr Coughlan negligent as a project manager?

[85] In supplementary final submissions, Mr McLean applied on Mr Coughlan's, and Mr Humphrey's, behalf for the new claims against them not to be considered, on the grounds that while they were foreshadowed in the claimants' opening, they were not articulated until closing submissions. Mr McLean acknowledged that the District Court Rules provide for such amendments to any pleading as are necessary for determining the real controversy between the parties. It must generally be shown that it is in the interests of justice, will not prejudice the other party and will not cause significant delay. Mr McLean did address the additional claims. Mr Josephson and Ms Webber submitted on behalf of the claimants that the Tribunal is not a pleadings-based jurisdiction, and there was no prejudice to the first and second respondents; the real controversy should be considered; and the respondents should have the opportunity to reply.

[86] I agree that there is no prejudice to the respondents and the claims should be considered. Even though they were articulated late in the proceedings, the relevant issues were covered in the evidence.

[87] The only evidence of Mr Coughlan's activities came from him and Mr Humphrey.

[88] There is insufficient evidence that Mr Coughlan acted as a project manager. I accept Mr McLean's supplementary closing submissions on behalf of the first, second and fourth respondents dated 8 July 2009 in this respect. In particular I accept that Mr Coughlan did not personally control, direct or supervise the construction.

[89] As Mr McLean has pointed out, that has been conceded by the claimants in closing submissions - that is why the claimants allege that Mr Coughlan was negligent for having failed to appoint someone to supervise the construction on site.

Was Mr Coughlan negligent as a developer?

[90] Mr Coughlan said that four people shared ownership of this site and it was transferred to Stockdale on 2 June 2004. I understood from him that this company was formed solely for the construction of these last three units in an overall development, but it appears the company already existed.

[91] Mr Coughlan said he had no on site role directly in construction. He said Mr Humphrey would visit the site in the morning and possibly go back in the afternoon. Mr Humphrey would walk across the site. There were three builders on site who had 'done their time' i.e. they were tradesmen.

[92] Mr Coughlan said the property was fully inspected at the time, and the Council would definitely have made contact to point out any shortcomings. They paid the Council a fee for approving the plans and inspections and the Council would have checked if anything was wrong.

[93] When asked if he had abdicated responsibility to the Council, Mr Coughlan said that that was what the Council was for.

[94] He said they did not sell the units off the plans and so did not issue practical completion certificates. They received money for sales, paid down the mortgage and what was left over went to the shareholders.

[95] I do not accept that Mr Coughlan was a developer, personally and apart from his role as a director of Stockdale. There is no evidence that he carried out a role other than as designer, and as a director. I accept Mr McLean's submissions referred to above in this respect also.

[96] In particular I have had regard to Heath J's judgment in *Body Corporate 199348 v Nielsen* (HC AK CIV-2004-404-3989 3 December 2008) which discussed the concept of control in development cases but stated that in building cases each case turns on its own facts. Mr Nielsen did assume a personal responsibility which made him liable, but I find that Mr Coughlan did not.

[97] The claimants alleged an error of omission, namely that Mr Coughlan and Mr Humphrey did not appoint a site supervisor who actually controlled the construction operations, and that this was a breach of duty to the claimants that renders Mr Coughlan and Mr Humphrey personally liable. I accept Mr McLean's submission that there are no judgments finding a director negligent and personally liable for omitting to appoint such a person.

[98] In summary I find Mr Coughlan as the designer jointly and severally liable to the claimants in the sum of $60,310.86, as set out in paragraphs 32 to 58, this section, and paragraph 138 onwards including 183/I.

Was Mr Humphrey liable as project manager?

[99] Mr Humphrey said his role was that of a quantity surveyor. He acted as a co-ordinator. He organised materials and subcontractors but he did not control the site. That was part of the terms of arrangement with Mr Coughlan. The labour-only contractors were independent in their work and were used to taking responsibility. They worked from start to finish without overseers. He was never employed at that time as a site manager.

[100] Mr Humphrey said he obtained quotes, for the windows etc, and arranged delivery dates. He did a lot of the work as and when required, a lot of it on his cell phone. He would telephone the suppliers.

[101] When the problem was discovered with the water flowing from 3 Pupuke Road, the Council instructed what the remedy was and a drain layer was engaged.

[102] Concerning the question of whether anybody was responsible for the quality of building work, Mr Humphrey said the Council inspectors were (responsible) in those days - they passed work or rejected it.

[103] Mr Humphrey said he was a builder by profession and did quantity surveying for this job as it was simple, quoting for the building elements. It was important to keep costs to a minimum as they had a mortgage. He only took the same amount as Mr Coughlan took for drawing the plans and obtaining consent. Mr Humphrey said he had to earn a living. He was paid, from memory, $6,000.00. He did other work at the same time at other jobs to support himself. The earlier units built on that general site were on the same basis.

[104] He said that construction went ahead smoothly as there were experienced contractors. He did not remember who they were. The industry changed from waged workers to labour-only contractors. There was no reason to treat such contractors any differently than plumbers or drain layers - they were only labour-only too.

[105] The building contractors installed the cladding. Mr Humphrey said he did not recall the change from Hardibacker to Harditex. He said that he was not an expert on the difference.

[106] I accept Mr Humphrey's evidence that Stockdale and its directors left it to the three labour-only builders and other contractors to run the site, and I accept Mr Humphrey's evidence that he was not managing the project in the sense that he was personally controlling or supervising the site. He was engaged by Stockdale to work part-time administering the project by engaging labour only contractors and ordering supplies to be delivered at the times the contractors on site said that they were required. This was a three unit development and Mr Humphrey carried out his duties part time.

[107] However I consider that Mr Humphrey's appointment to the position of project manager did impose on him a duty of personal responsibility and care. He was paid as an employee of the company to carry out this task.

[108] In *Body Corporate 185960 & Ors v North Shore City Council & Ors* ('Kilham Mews') (22 December 2008) HC, Auckland, CIV 2006-404-3535, Duffy J endorsed the view of Adjudicator Dean that project managers must carry the burden of responsibility for not taking adequate steps to ensure that those under them achieved the required standards. Duffy J stated that was a sensible approach, and that if someone is charged with the responsibility for managing a residential project, the likelihood of careless workmanship and

defective construction resulting from poor and careless management would be reasonably foreseeable to that person.

[109] Based on that principle, I find that as the project manager or administrator Mr Humphrey was responsible for supervising workmanship unless someone else was appointed to that role. This position went beyond his role as a director of the company (just as Mr Coughlan's position as designer went beyond his role as a director.) I do not consider that the fact Mr Humphrey worked part-time as project manager is sufficient to conclude that he did not owe a duty of care in that capacity. Accordingly I find that Mr Humphrey was in breach of his duty of care as project manager in not taking steps as project manager to ensure the workmanship on site was adequate.

Was Mr Humphrey liable as a developer?

[110] I do not accept that because he was a director of Stockdale, who managed the project as above for Stockdale, that that made Mr Humphrey a developer. Stockdale had no chief executive, so the directors acted on its behalf. But that does not make him (as a director) personally liable as a developer. Mr Humphrey said that was the way things were done in 1994, and there is no evidence to the contrary. Companies such as Stockdale were used for the very purpose of limiting the liability of the directors behind such companies, in this case Mr Coughlan and Mr Humphrey.

[111] In summary I find Mr Humphrey as the project manager jointly and severally liable to the claimants in the sum of $60,310.86 as set out in paragraphs 32 to 58, this section, and paragraph 138 onwards including 183/II.

Was Stockdale Investments Auckland Limited the developer and negligent?

[112] No lengthy argument was advanced that Stockdale was not a developer. Stockdale was the developer, "at the centre of and directing the project", as Harrison J stated in *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914, and was responsible to future purchasers accordingly. Where there are defects in the building which have caused damage through leaks, Stockdale is responsible for the leaks and damage, where they arise from its negligence.

[113] I find Stockdale as the developer jointly and severally liable to the claimants in the sum of $60,310.86 as set out in paragraphs 32 to 58, this section, and paragraph 138 onwards including 183/III.

Was Mr Beazley negligent in his duty as a pre-purchase inspector to Mr and Mrs Abernethy?

[114] In her evidence, Mrs Abernethy stated that Mr Beazley gave her a verbal estimate that the repairs he recommended would cost $10,000.00. Mr Beazley and Mrs Abernethy met only once, and Mr Beazley did not recall giving this figure. Mrs Abernethy said that it was a 'ballpark' figure, and agreed that she took a chance that the costs would turn out to be greater. Mr Josephson submitted that she meant the costs to carry out the repairs Mr Beazley recommended.

[115] Mrs Abernethy said she did not recall any conversation with Mr Beazley about damage to the decking at the back before purchase. It was not in his brief to look at drainage.

[116] Concerning the relatively short time between settlement and when her WHRS claim was lodged, (less than two months), Mrs Abernethy said she had arranged for some painting work to be done

before they moved in. It was not long after settlement when bubbles appeared inside near the front door – these had not previously been identified. She understood they were coming up against the ten year time limit and she did not want to waste time.

[117] After Mr Light's first report was received, Mrs Abernethy said that multiple experts were telling them different things about the problem at the rear of the property. One contractor Mr Kime contacted, Mr Clayton, was also concerned and recommended that an engineer be engaged. He was not prepared to do the work - he was not confident to do it without a professional in drainage being consulted. Mrs Abernethy said that Mr O'Hagan was engaged in June 2007 by Mrs Abernethy's mother.

[118] Mrs Abernethy said she had never seen any water coming from the drain, across the lawn, only under the deck.

[119] Mrs Abernethy said that she and her husband had purchased properties before unit 5/6 City View Terrace. They owned seven properties including a holiday home and they intended to live in 5/6 City View Terrace. The other five are let. The first property was purchased in about 1996 when Mrs Abernethy was at university, and the other four in the 2000 to 2002 period. She had seen the media coverage about the leaky homes problem.

[120] She talked to Mr Beazley to make sure it was not one the press had been talking about. None of their other properties were of the same type of construction.

[121] Mr Kime said that in January 2005 (when he and his wife took over the management of the tenancy when Mr and Mrs Abernethy left for Dubhai) he did not know that the claim had been lodged with WHRS. He said he contacted the Abernethys in November 2005

about paint blistering inside the front door and also moisture by the back door.

[122] He consulted Mr Clayton in late 2005. Mr Clayton pointed out water under the deck. Mr Clayton visited the site and pulled out the boards of the deck and said he thought there was a much bigger problem. One engineer, John Syme, could not act due to a conflict of interest, and Mrs Abernethy's mother engaged Mr O'Hagan.

[123] Mr Beazley said he recalled the meeting with Mrs Abernethy. He reluctantly agreed that the purchase rested on his advice. He said that he recommended invasive testing but he was not allowed to do it by the owners - he did not receive written consent from the owner - and so he carried out semi-intrusive testing. He said he would have preferred removing interior panels at his second inspection. However on probing the framing from inside the house, he found the framing was sound. He said that without invasive testing one could not draw a conclusion about the state of the building - it was a lot more difficult. He said the ground beneath the deck was laden with water at the first look.

[124] He arranged for a plan to be drawn up in his employer's office to deal with the surface water flow with the Council's approval.

[125] Mr Beazley said that (at the time) there were cracks only in the eastern wall. Mr Beazley said that his suggestion of $10,000.00 was for repairs for lack of maintenance and had to be looked at in context.

[126] In response, Mrs Abernethy said she thought what was recommended (in the way of testing) was achieved. This was the first time she had heard that Mr Beazley had carried out semi-intrusive testing only. Mrs Abernethy was not aware that Mr Beazley did not receive written consent to do invasive testing. She went to her lawyers and she thought they obtained consent, as long as any

damage was repaired should the Abernethys not go ahead and buy the house.

[127] Mrs Abernethy was not sure whether she or her lawyers contacted Mr Beazley the second time to obtain the additional report.

[128] Mr Beazley, in his first report, recorded a number of leaks. That report in fact and in its tone implies that the property was suffering only from deferred maintenance. The first report Mr Light prepared in 2004 also stated that the property had not been properly maintained. All the experts agreed that the widespread failure of the first owners to maintain the building between 1994 and 2003 had caused damage.

[129] In Mr Beazley's first and more particularly his second report, which was provided before settlement, there are many findings and references to moisture levels above, some well above, acceptable levels and to water penetration. Mr Light found the building was a 'leaky building' 11 months later. But Mr Beazley had also found that there were elevated moisture readings. And the amount Mr Light gave to repair the building in his first report in 2004, over and above what Mr and Mrs Abernethy had already spent, was one tenth of his estimate three years later.

[130] Further, in his supplementary report in 2007, Mr Light stated that cracks were apparent in the south, east and north elevations that had not been visible in 2004. Mr Beazley cannot be expected to have found in 2003 what the WHRS assessor did not find in 2004. Repairs had been carried out by the claimants by that stage in 2004 (after the purchase in 2003) but the clear implication is that the building Mr Light inspected in 2004 was in better underlying condition than it was three years later. Mr Beazley noted cracks in the east wall in 2003, and the cracks were filled and covered. There is no evidence that Mr Beazley missed any cracks in 2003.

[131] Mr OHagan was critical of Mr Beazley's reports in his witness statement, saying that they failed to stress the seriousness of the cracks and because the second report only suggested that the framing be dried out, he downplayed the moisture readings, failed to highlight the defects listed in the claim and incorrectly stated the cladding was stucco when it was texture coated cement.

[132] In his closing written statement Mr Beazley repeated that his second report was not an invasive report as he did not have permission to remove any wall linings or flooring. He advised the Abernethys to remove wall linings and flooring so that areas could dry out and the timber and joists could be inspected but he stated that there is no evidence that these areas were left to dry out or further inspected.

[133] He was not instructed to comment on the property's compliance with the Building Act and he could only report on what he saw. Mr Beazley stated that Mr Kime saw paint bubbles in the entry hall in 2005, two years after Mr Abernethy saw them. Apparently nothing was done in the interim to stop this spreading. Little concern was shown for the rear of the building where the majority of ingress was occurring, Mr Beazley asserted.

[134] I have taken into account that Mr Beazley wished to remove internal panels to inspect the sub-floor but he did not receive permission to do so. Mr Beazley did not apparently identify lack of ventilation in the sub-floor at the back of the house – there is no reference to it in either report – but he did find the floor at the back door itself was sodden and that there was excess surface water at the back of the house underneath the ground level deck.

[135] I find that Mr Beazley was negligent in not identifying the lack of ventilation holes in the base of the building, but I do not find that there was a widespread failure on his part in the discharge of his duty

to the claimants as they allege. I do not find that his conclusion that these were maintenance issues was a negligent failure - there was a widespread lack of maintenance and neglect - or a negligent misstatement or a breach of the Fair Trading Act on his part. On balance I do not accept that Mr Beazley was negligent as a pre-purchase inspector in his advice to Mr and Mrs Abernethy, given his brief and the limitation of not doing invasive testing, except for his failure to identify the lack of ventilation to the under floor space.

[136] Mr Beazley's liability relates to that failure. Even that is mitigated to a degree by his belief that he was unable to remove interior panels to inspect the joists.

[137] In summary I find Mr Beazley as pre-purchase inspector jointly and severally liable to the claimants for the limited amount only of $9,046.63, as set out in paragraphs 32 to 58, this section, and paragraph 138 onwards including 183/IV, arising from and limited to his failure to identify one important defect, the absence of vents, which could have been remedied in isolation.

How much of the cost of repairs is compensable?

[138] At the end of the hearing Mr Light commented that this situation was a result of system failure (meaning the building system), and neither Mr O'Hagan nor Mr McLintock, the other two experts with him, demurred.

[139] I do not consider that all the defects are the result of negligence. I conclude that the remediation to repair parts of the building is required because of the way such buildings were designed, approved and built at the time, or that negligence is only part of the reason.

North wall

[140] It is unknown exactly how the north rear wall (indeed all walls) was constructed because control joints both horizontal and vertical were plastered over at that time. I accept Mr O'Hagan's evidence that a vertical control joint was probably not installed on the back wall, and should have been. There are also a number of windows in this wall.

[141] The respondents argued that a large part of the damage to the back of the house arises from the chamber at the back of the section overflowing with water piped from the property behind, which has accumulated under the deck just above ground level, causing additional damage to the cladding and framing at the rear of the property. There was also other surface water resting against the rear of the property. Mr Light considered that these were secondary considerations.

[142] The claimants argued that the respondents should be liable for the damage caused by the problems with the chamber which they said was inadequate for its task, but that claim was introduced rather late in the proceedings, and it has not been proven. I accept Mr Light's position that a significant cause of the damage at the rear has been the lack of ventilation, but I also accept Mr O'Hagan's view that the deck stringer needs to be replaced because of the amount of external surface water lying against it.

[143] The surface water lying against the rear of the house has clearly been a contributing cause of the damage to the rear north wall. This is an extraordinary cause, not of itself the result of negligence on the first, second and fourth respondents' parts. However it is external water penetrating the building. I have concluded that for that reason, and because of the lack of vents, the probable lack of a vertical control joint, and the number of windows, the whole cost for repairing the north wall should be compensable.

East wall

[144] The eventual failure of the east wall is in part due to the failure to install the windows near the entry way correctly. That is proven to have caused damage. The cracks in the east wall may be the result of a lack of control joints, and a lack of maintenance. All these factors may have led to timber shifting. (This house has yet to be repaired so some of the causes are unknown. Also it is not known how much long term damage was caused by the previous owners' neglect in the last year before they sold the property when a repaint was overdue.)

[145] So while the need to replace the east wall is not wholly the result of the first, second and fourth respondents' proven negligence, given the importance of the windows on this wall at the entry way, I find their negligence contributed to the extent that the whole of the cost of replacing the east wall should be included in the compensable figure.

South wall

[146] Mr Cartwright's written evidence was primarily directed at and critical of the Council. It included the criticism that there needed to be details of junctions of the deck balustrades with the building structure. Also Mr O'Hagan was of the view that the cappings should have been built differently (as they now are). However I accept Mr Higham's evidence that this was how balustrade tops were built at the time, with one flat topped piece of timber as a capping penetrating the walls, without flashings.

[147] Accordingly, because the balustrades and the associated junctions, built in a way that was acceptable at the time, are the substantial causes of damage on the front south face of the building, the resulting repairs to the front south face should not be included in the compensable figure. The front of the balustrades to the decks on

the front south wall in fact form a large part of the front south wall. This widespread damage is not the result of negligence on the part of any of the parties.

[148] There are two windows, one exposed and the other set back, at the first and second stories on the south face. In his witness statement Mr O'Hagan wrote that the junctions between cladding and jamb flashings on all windows have cracked allowing moisture ingress and that on the windows on all elevations the head flashings have failed allowing moisture ingress. In his statement in reply, he wrote that from his investigations the windows did not have jamb flashings.

[149] Having regard to Mr Light's evidence, however, I do not find that actual damage to the south face from the windows or a lack of vertical control joints on that face has been proved, just as it is difficult to determine all the causes of damage on the east wall. In the case of the east wall the proven cause of damage was negligence, while on the south wall, the proven cause of damage - the balustrades - was not. In these circumstances, where there is a proven non-negligent cause of widespread damage to the south wall, it would be unfair and inequitable to include the costs of repairing the south wall in the compensable damages.

West wall

[150] The quantity surveyor's Kwanto's estimate of remedial costs did not include the costs of remediation of the west wall dividing this unit from the middle unit, but costs to repair the west wall have been included in Boss Projects Ltd's quotation, on which the claim is now based.

[151] There is limited damage to this wall arising at its junction with the roof at the front, but the expert evidence indicated that this junction and flashing, while not ideal, were adequate by the standards

of the time. There was discussion about whether this wall was now sufficiently fire resistant because of the moisture, but this damage is not from negligence. Fire resistance, of itself, is not a matter for the Tribunal to deal with. There is one small window low down on the west dividing wall at the back but it was not mentioned. Also the repair of this wall is apparently the responsibility of this unit owner so it is sensible to repair this wall at the same time as the others. For these reasons I find that the necessity to repair the west wall is not the result of the respondents' negligence.

[152] In summary, for the reasons I have set out above, I conclude that the costs of repairing the north and east walls should be compensated for but that the costs of repairing the south and west walls should not be included.

[153] In the quantity surveyor Kwanto's figures and Boss Projects Ltd's quote, the costs of repairing the north or rear of the building, including the sub floor area, as a proportion of the total remediation costs, is 35%. In the quantity surveyor's figures and Boss Projects' quote, the cost of repairing the east side of the building as a proportion of the total remediation costs is 15%. Combined with the 35% of costs to repair the north wall, that is 50%.

[154] Accordingly, of the $240,668.06 for repairs and professional fees (being costs associated with the remediation itself), the compensable proportion should be 35% (north wall) plus 15% (east wall): 50%, $120,334.03.

[155] As I have stated above, Mr Coughlan is liable for failing to include vents in the plans for the sub-floor area and to refer to the manufacturer James Hardie's directions, and Mr Beazley is liable for having failed to notice or record the lack of vents. Mr Humphrey failed in his duty to ensure that someone on site took responsibility for workmanship.

What are the other damages?

[156] I accept the figure of $30,225.00 for consequential losses.

[157] However I do not accept that a figure of $60,000.00, for general damages, $30,000.00 each for Mr Abernethy and Mrs Abernethy, is reasonable.

[158] This is because they have not lived in the house for over four and a half years of the six years since they bought it in September 2003. They occupied the house only for 16 or 17 months until January 2005.

[159] The High Court has given weight to the detrimental effects of occupation on owners of leaky homes. The Abernethys have been spared much of that. They have continued to bear the burden of coping with the implications of its being a leaky building. This has involved stress, inconvenience and worry.

[160] Accordingly the amount claimed for general damages should be significantly reduced to $7,500.00 for Mrs Abernethy, who has born the major share of the burden, and $5,000.00 for Mr Abernethy. That is consistent with my accepting their claim for $30,225.00 for consequential losses, which is for reduced or lost rental income including lost rent while repairs are being carried out.

[161] I also accept the claim for $3,953.04 for costs incurred mitigating loss.

[162] Adding those figures, the overall claim should be reduced for the above reasons to $167,012.07. This is made up of $120,334.03 towards repairs and professional fees, $30,225.00 for consequential losses, $12,500.00 for general damages, and $3,953.04 for costs incurred mitigating loss.

Did Mr and Mrs Abernethy contribute, and did they fail to adequately mitigate their losses?

[163] I have had regard to Mr and Mrs Abernethy's evidence and their valuer's report, and their solicitor's memorandum of 31 July 2003 to the vendors' solicitor. This states that Mr and Mrs Abernethy had received Mr Beazley's first report and had concerns about a downpipe, the condition of and numerous cracks in the exterior cladding, and some areas of potential water leakage. They asked through their solicitors for consent for invasive tests to be carried out. As it has turned out, Mr Beazley did not receive such consent. But nonetheless, having regard to his second report, I find that there was an element of contributory negligence by the Abernethys. They knew that the building was built of risky materials; that it had been badly neglected by the vendors; and that it was likely moisture had already penetrated the building envelope.

[164] It was not Mr and Mrs Abernethy's fault that the building was in such a poor condition when they bought it, but nor was that the respondents' fault either. Mr and Mrs Abernethy did take a calculated risk that such a building would not turn out to be leaky.

[165] For those reasons, notwithstanding that the precautions and steps they took were reasonable, Mr and Mrs Abernethy must share in the above costs of its having turned out to be a 'bad buy'. They should not be penalised for having obtained pre-purchase reports; but neither does their having done so absolve them from having to take some responsibility for their decision to purchase this townhouse. I find Mr and Mrs Abernethy were also negligent, for those reasons.

[166] The question also arises whether the overall figure for damages should be reduced because they did not mitigate their losses by immediately taking steps to have ventilation installed and sheeting laid over the ground in the sub-floor area after the first

WHRS report was received. Mr and Mrs Abernethy have addressed a number of relatively minor issues since Kwanto the quantity surveyor's engagement, amounting to the $3,953.04.

[167] Nevertheless, Mr and Mrs Abernethy decided to live abroad in January 2005 when the problems with the house that Mr Light had identified in July 2004 were still unresolved. Even though Mr Kime was appointed, he apparently did not know when they left New Zealand that the house was, officially, leaky. Mrs Abernethy did arrange with Mr Kime to obtain quotes but they received conflicting advice as to what they should do. Two contractors were unwilling to undertake work because they were uncertain how the house should be further repaired. The first engineer engaged was let go because of the conflict of interest, before Mr O'Hagan was engaged in 2007.

[168] As a result, the recommendations in Mr Light's first report have never been implemented or fully implemented, including installing sub-floor vents. Nor has the problem with drainage been addressed by the laying of new pipes across the back of the section.

[169] While they needed to be sure of what needed to be done, Mr and Mrs Abernethy's decision to live abroad must be seen as a factor in the delay in addressing the problems and damage that were coming to light before they left.

[170] Taking all those factors into account, especially their assumption of risk given the materials and previous lack of maintenance, and the delay, the figure of $167,012.07 should be reduced by 10%, $16,701.21, giving a final figure of $150,310.86. The first respondent, the second respondent, at least by implication and at least to the extent of $90,000.00 the third respondent, and the fourth respondent are all jointly and severally liable to the claimants for this amount. Mr Beazley the fifth respondent's liability is more limited.

[171] However following Duffy J's judgment in *Body Corporate 185960 and Anor v North Shore City Council and Ors* (HC AK CIV-2006-004-003535 28 April 2009), the claimants cannot recover in total more that the amount of $150,310.86 determined. For that reason and the reasons below, the $90,000.00 which the Council has paid or agreed to pay the claimants must be deducted from this amount, leaving $60, 310.86 still to be recovered.

Should there be an apportionment of damages between the parties found liable, and between them and the third respondent the North Shore City Council? What should the apportionment be?

[172] When the Council withdrew, the Tribunal was left with the impression that it had reached a final settlement. It was only when final submissions were presented that Mr Josephson advised, surprisingly, that it was part of the settlement agreement that the claimants would represent the Council in pursuing cross-claims against the other liable parties and in making submissions as to what the apportionment of liability between them should be.

[173] I invited written submissions on apportionment in the closing supplementary submissions. Mr Josephson and Ms Webber submitted that in other cases the Council's liability was 20%, with other parties liable for the balance.

[174] Mr McLean submitted that in this case, where the builders are absent and where no-one who actually built the house is a respondent, the Council's liability ought to be higher than that, in the region of one third. Mr McLean submitted that if all the respondents were equally responsible for failing to detect the defects, the contributions should be equal as well. On this basis he submitted that the contributions should be Mr Couglan, Mr Humphrey and Stockdale one third; the Council one third; and Mr Beazley one third.

[175] However, because the Council withdrew after it had settled, the adjudication hearing did not deal with the Council's actions and potential liability.

[176] Under section 17 of the Law Reform Act 1936, any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which he or it would otherwise be liable. Section 17(2) provides that the amount of contribution shall be what is found to be just and equitable having regard to the relevant responsibilities of the parties for the damage. It is likely that the same criteria are to be applied under section 72 of the Weathertight Homes Resolution Services Act 2006.

[177] Under section 72(2), the apportionment between respondents is to be in relation to any liability determined. But when the Council left I was not asked, and I am not in a position, to determine formally whether the Council itself is liable and what the Council's liability should be. Also the Tribunal has the discretion under those sections to make an apportionment.

[178] The Council took a commercial risk in settling with the claimants. It would not be fair on the other liable parties for the Tribunal to now attempt to apportion some of the liability the Council took upon itself to put an end to the claim against it, to them. I consider that the only fair and practical course in the circumstances is for me to leave the Council's settlement out of the apportionment.

[179] I find that the first, second and fourth respondents all breached their respective duties of care owed to the claimants to the extent described and they have all been found liable for the total amount of $150,310.86. The first, second and fourth respondents are jointly and severally liable for the total established amount of the claim. However for the reasons above, $90,000.00 must be deducted from that.

[180] They are concurrent tortfeasors and therefore each is entitled to a contribution from the others towards the amount of their liability, according to the relevant responsibilities of each for the same damage as determined by the Tribunal.

[181] Having regard to all the evidence, I consider that Stockdale as developer bears the greatest responsibility for the losses, and Mr Coughlan as the designer and Mr Humphrey as the project manager bear a greater share of the responsibility than Mr Beazley as pre-purchase inspector. A fair and equitable apportionment is - Stockdale 45%, Mr Coughlan 20% and Mr Humphrey 20%. Mr Beazley's share is 15%.

What damages should liable parties pay? - Conclusion as to quantum

[182] In summary I have concluded that the claimants have established their claim to the extent of $150,310.86 calculated as follows:

Contribution to re-cladding work	$120,334.03
Consequential losses	$30,225.00
General damages	$12,500.00
Costs mitigating loss	$3,953.04
Sub total	$167,012.07
Less 10% contributory negligence and failure to adequately mitigate	$16,701.21
Total established claim	$150,310.86

Conclusion and orders

[183] For the reasons I have set out, the claim by Vanessa Abernethy and Alan Abernethy is proven to the extent of $150,310.86. That amount is reduced by deducting $90,000.00 the Council has

undertaken to pay, leaving a balance to pay of $60,310.86. I make the following orders.

I. Richard Coughlan is ordered to pay Vanessa Abernethy and Alan Abernethy the sum of $60,310.86 within 30 days of the date of this determination. Richard Coughlan is entitled to recover a contribution of up to $48,248.69 from Trevor Humphrey and Stockdale Investments Auckland Limited including up to $9,046.63 from Cedric Beazley, for any amount Mr Coughlan pays in excess of $12,062.17.

II. Trevor Humphrey is ordered to pay Vanessa Abernethy and Alan Abernethy the sum of $60,310.86 within 30 days of the date of this determination. Trevor Humphrey is entitled to recover a contribution of up to $48,248.69 from Richard Coughlan and Stockdale Investments Auckland Limited including up to $9,046.63 from Cedric Beazley, for any amount Mr Humphrey pays in excess of $12,062.17.

III. Stockdale Investments Auckland Limited is ordered to pay Vanessa Abernethy and Alan Abernethy the sum of $60,310.86 within 30 days of the date of this determination. Stockdale Investments Auckland Limited is entitled to recover a contribution of up to $33,170.97 from Richard Coughlan and Trevor Humphrey including up to $9,046.63 from Cedric Beazley, for any amount Stockdale pays in excess of $27,139.89.

IV. Cedric Beazley is ordered to pay Vanessa Abernethy and Alan Abernethy the sum of $9,046.63 within 30 days of the date of this determination.

V. To summarise the decision, and without limiting I to IV above, if the four respondents meet their obligations under this

determination, this will result in the following payments being made by the respondents to the claimants, and I so order:

Richard Coughlan, first respondent	$ 12,062.17
Trevor Humphrey, second respondent	$ 12,062.17
Stockdale Investments Auckland Limited, fourth respondent	$ 27,139.89
Cedric Beazley, fifth respondent	$ 9,046.63

VI. As regards the summary in order V immediately above, I order that if Stockdale Investments Auckland Limited cannot pay, and without limiting I to IV above, the payments to the claimants are to be $25,632.12 by Mr Coughlan, $25,632.12 by Mr Humphrey and $9,046.63 by Mr Beazley.

[184] If any of the parties listed above fails to pay his or its apportionment, the claimants may enforce this determination against any of them up to the total amount they are ordered to pay in paragraph 183.

DATED this 26 th day of August 2009

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R M Carter

Tribunal Member

Statement: The Tribunal has ordered that the first, second, fourth and fifth respondents are liable to make a payment to the claimant. If these respondents take no steps to the pay the claimants the amounts ordered, the claimants can take steps to enforce the determination in accordance with law.

These steps can include making an application for enforcement through the Collections Unit of the Ministry of Justice for payment of the full amount which each party has been found liable to pay.

There are various methods by which payment may be enforced. These include:

- An attachment order against income
- An order to seize and sell assets belonging to the judgment debtor to pay the amounts owing
- An order seizing money from bank accounts
- A charging order registered against a property
- Proceeding to bankrupt or wind up a party for non-payment.