IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI-2007-100-000013

BETWEEN	**MOHAMMED REZA-REZAEI ABYANEH and KEVIN WAYNE HARBOURNE as trustees of the REZAEI ABYANEH FAMILY TRUST** Claimant
AND	**AUCKLAND CITY COUNCIL** First Respondent
AND	**ASAD ALI** Second Respondent
AND	**SAID HAROUN ALI** Third Respondent
AND	**MOHAMMED FAROOK** Fourth Respondent
AND	**H C SENIOR AUCKLAND LTD** (in Liquidation) Fifth Respondent

Hearing:	29 & 30 April 2008 1, 2, 21 May 2008 18 June 2008
Appearances:	C Patterson (29, 30 April and 1 May 2008) and E Grove (2 May and 18 June 2008) Counsel for Claimants S Macky, Counsel for First Respondent T Bates, Counsel for Second Respondent S Haroon Ali, self represented, Third Respondent M Farook, self represented, Fourth Respondent
Decision:	22 July 2008

FINAL DETERMINATION
Adjudicator: S G Lockhart QC

INTRODUCTION

[1] The claimants are Mohammed Reza-Rezaei Abyaneh and Kevin Wayne Harbourne as trustees of the Rezaei Abyaneh Family Trust.

[2] Mohammed Reza-Rezaei Abyaneh (hereafter referred to as "Mr Abyaneh") purchased a section located at 23/25 Maui Grove, Newmarket, with the intention of building a home on it. The land purchased by Mr Abyaneh was a two unit site and Mr Said Haroun Ali, the third respondent, was engaged to design two houses to be built on the section, a request which was subsequently changed as only one house was built.

[3] Mr Said Haroun Ali who was an architect who had previously designed a house for him at 72 Grand Drive, Remuera, in July 1997. On the recommendation of Mr Said Haroun Ali, Mr Abyaneh requested Paradise Builders Ltd (PBL) to quote for the cost of the building. Subsequently a "labour-only" price contract to build the property was entered into between Mr Abyaneh and PBL. Mr Asad Ali, the second respondent, was a director of PBL and was the person who carried out the construction work.

[4] Mr Asad Ali, the builder, recommended to Mr Abyaneh that he employ the fourth respondent Mr Mohammed Farook to complete the plastering work for a contract price agreed to between Mr Mohammed Farook and Mr Abyaneh.

[5] A building consent was lodged with the Auckland City Council, the first respondent on 24 February 2000 and was issued on 2 May 2000. Both Mr Mohammed Farook, the plasterer and Mr Said Haroun Ali the builder completed the work that they contracted to do towards the end of February 2001.

[6] The house that was built was described by Mr Abyaneh as a three storey timber framed construction supported on a foundation of steel piles. The roof is clad with a butynol rubber membrane covering enclosed by parapet walls clad in solid plaster. The external cladding also consists of solid plaster on a 4.5mm fibre cement backer. The window and door joinery consists of aluminium. On the northern elevation there are enclosed decks with solid balustrade walls clad in solid plaster.

[7] It is alleged by the Claimant Trust, and largely accepted by all parties, that there has been substantial damage to the house as it is not watertight. This is due to a number of construction defects being:

(a) Inadequately waterproofed and flat topped parapets;
(b) Inadequately waterproofed and flat topped balustrades;
(c) Inadequate window flashings; and
(d) That claddings were positioned down to ground level.

[8] As a result of these construction defects it is agreed that moisture ingress has occurred which has caused decay and damage to: -

(a) The timber framing of parapet walls and the roof substrate and roof rafters;
(b) The wall framing of the deck balustrade;
(c) The timber framing below the windows;
(d) Timber base flates; and
(e) The timber roof substrate.

[9] As a result of the defects, substantial repair work is required both for the construction of the house and for the damage caused to it. The repair work required includes: -

(a) Removing all existing wall claddings from external walls and deck balustrades;
(b) Removing and replacing windows with new flashings, deeper jamb liners and providing air seals;
(c) 10% replacement wall framing;
(d) Treating retained frame elements in-situ with brush applied preservative treatment;
(e) Stripping flat roof membrane to main roof;
(f) Replacing roof and roof coverings;
(g) Providing and installing new cladding on cavity battens;
(h) Providing new purpose made cap flashings to all parapet walls and deck balustrades;
(i) Installing new nib wall to either side of garage door on the front elevation.

THE CLAIM

[10] The claimants at paragraph 12 of their statement of claim dated 19 September 2007 seek the sum of $371,579.34 for the costs estimated to carry out the remedial work. That figure is calculated as follows: -

(a)	Recladding costs	$268,021.13
(b)	Roof repair and replacement	$38,981.25
(c)	Preliminary & General	$6,759.00
(d)	Margin	$14,625.00
(e)	Contingencies	$6,750.00
(f)	Design fees	$19,772.55
(g)	Project management fees	$14,829.41
(h)	Building consents	$1,850.00
		$371,579.34

[11] The claimants in their statement of claim initially sought orders from the first, second and third respondents for repair costs, repair funding costs, temporary repair costs, costs of alternative accommodation and general damages amounting to:

(a) $371,579.34 (repair costs);
(b) Repair funding costs to be quantified;
(c) $9,000.00 (temporary repair costs);
(d) $21,600.00 for alternative accommodation;
(e) $10,000.00 for general damages.

[12] However, on the final sitting day on 18 June 2008 the claimants claim was amended by Mr Abyaneh to $372,104.34 being:-

(a) $371,579.34 - Repair Costs; and
(b) $525.00 - Temporary Repair Costs.

Following the circulation to all parties of a report from Kwanto Ltd who had reviewed the quantum analysis of Mr G Bayley, the Tribunal received submissions from the third respondent, Mr Said Haroun Ali on 10 July 2008. The Tribunal has considered Mr Said Haroun Ali's careful submissions but however the Tribunal affirms that the calculation for the claimants' claim as being $372,104.34.

[13] The claimants presumably as an alternative claim for breach of contract sought an award against the fourth respondent, Mr Mohammed Farook to $333,123.02 being: -

(a) $332,598.02 - Repair Costs; and
(b) $525.00 - Temporary Repair Costs as produced by Mr Abyaneh on 18 June 2008.

No submissions were made in respect of this particular claim on behalf of the claimants and for that reason the amount claimed in

paragraph 12 above of $372,104.34 was accepted by the Tribunal as the claimants' claim.

[14] As a result of the dwelling being a leaky building it is alleged by the claimants that the four respondents are each liable for the claimants' losses as follows: -

(i) First respondent, the Auckland City Council (Council) is liable because it: -

(a) Issued a building consent on 2 May 2000 when the plans/specifications provided by Mr Said Haroun Ali, the third respondent, were inadequate because they lacked the necessary detail to ensure that the building when constructed complied with the Building Code;

(b) In its 12 inspections of the building work the Council failed to identify the defects in paragraph 7 above, when a reasonable and prudent building inspector would have identified those defects;

(c) Issued an interim code of compliance certificate when reasonable grounds did not exist for the Council to be satisfied that the building complied with the Building Code.

(ii) The second respondent, Mr Asad Ali, the builder is liable for the claimants' losses because he built a house that contains the defects/damage outlined in paragraphs 7 and 8 above.

(iii) The third respondent, Mr Said Haroun Ali, the architect is liable for the claimants' losses because he prepared plans/specifications that were not of the standards of a reasonable and prudent architect which led to the defects/damage in paragraphs 7 and 8 above.

(iv) The fourth respondent, Mr Mohammed Farook, the plasterer is liable for the claimants' losses, apart from the roof repair costs, because he performed his plastering role deficiently which resulted in the defects/damage in paragraphs 7 and 8 above.

Was Mr Abyaneh the Developer of the Property?

[15] The first respondent the Auckland City Council (the Council) and the second respondent, Mr Asad Ali alleged that Mr Abyaneh was a commercial developer in relation to the construction of the house at 25 Maui Grove.

[16] The Council therefore submitted that the claimant's claim against the Council failed because:

(a) no duty is owed by a Council to an owner/builder; and
(b) if a cause of action is available to the claimants, the first named claimant Mr Abyaneh is liable as a developer.

[17] The evidence that the Council relied upon to establish that Mr Abyaneh was a developer is outlined below.

Evidence Relating to Mr Abyaneh as the Developer

48A Sanft Avenue

[18] In 1996, Mr Abyaneh applied for a building consent to develop a property at 48A Sanft Avenue, Mt Roskill. During the construction of that property Mr Abyaneh personally made telephone calls to book seven of the ten inspections that were performed.

[19] This property at 48A Sanft Avenue was sold by Mr Abyaneh on 16 July 1997 for $290,000 even though the code compliance certificate had only been issued on 10 June 1997 (one month before). On the basis of Mr Abyaneh applying for the building consent, followed by his contact with the Council relating to inspections and together with the sale of the property one month after the code compliance certificate was issued, the Council submitted that Mr Abyaneh was clearly operating as a developer.

72A GRAND DRIVE, REMUERA

[20] One month after he had sold 48A Sanft Avenue Mr Abyaneh applied to the Auckland City Council on 22 August 1997 for a building consent for a property at 72A Grand Drive, Remuera. When making that application Mr Abyaneh described himself as the applicant and the owner.

[21] According to the Council's electronic records, Mr Abyaneh appears to have been in charge of the progress of the building work at 72A Grand Drive as he personally booked the inspection dates for eight of the thirteen inspections undertaken by the Council. Mr Abyaneh would have to have had full information of the building process to discuss these issues with the Council's representative who made the inspection.

[22] On 11 January 1999, the Council advised Mr Abyaneh in writing that the final inspection of the building consent had been completed by the Council and that two matters had to be resolved before a code compliance certificate could be issued. That certificate was issued on 27 April 1999 and the property was sold on 29 June 1999.

[23] During the construction period in which Mr Abyaneh made telephone contact with the Council to book inspections of the

dwelling, it is again claimed by the Council that Mr Abyaneh's conduct was consistent with the role and duties of a project manager of a building being built.

[24] On 19 April 1999 the property at 72A Grand Drive was sold by Mr Abyaneh for $450,000. When Mr Abyaneh gave evidence he acknowledged that that amount provided a profit to him personally, (Transcript: Page 63, lines 8-10). It must also be noted that a code compliance certificate was issued for the property at 72A Grand Drive, Remuera on 27 April 1999 just eight days after the property had been sold.

25 MAUI GROVE, NEWMARKET – Property for which Mr Abyaneh claims damages

[25] Based on the plans and specifications drawn up by Mr Said Haroun Ali, the third respondent, Mr Abyaneh applied to the Auckland City Council on 24 February 2000 for a building consent to build two houses on land owned by him at 25 Maui Grove, Newmarket. That building consent was issued on 2 May 2000 whereby the Council approved the plans and specifications for both houses. However, Mr Abyaneh later decided to only build one house. Consequently the section that was set aside for the second house was sold as a vacant site.

[26] The construction period for the building in respect of which damages are claimed was a four month period from 15 May 2000 to 28 September 2000. It was confirmed by Mr Abyaneh in evidence that he entered into a contract with PBL for the building of the dwelling.

[27] The evidence as acknowledged by Mr Abyaneh clearly established that the construction work was performed by sub-contractors of whom some were on "labour-only contracts". In his

evidence, Mr Abyaneh accepted the responsibility of ordering and arranging the delivery of all materials (Transcript: Page 67, lines 17 – 19; page 142, lines 13-19).

[28] During the entire construction period Mr Abyaneh was on site on a regular basis either early in the morning or late afternoon and on occasions during the lunch break. Mr Abyaneh also undertook the responsibility to contact and arrange the availability of the sub-contractors when they were required to undertake their work (Transcript: Page 83-84) and arranged the direct payment to sub-contractors.

[29] More significantly Mr Abyaneh alone undertook the responsibility of making telephone calls to request the Council to book a date and time for various inspections to be carried out. To make such arrangements Mr Abyaneh must have had accurate knowledge of the progress of the building, as it was he who booked all fourteen inspections needed to be undertaken.

[30] The code compliance certificate was issued on 29 May 2001, and in October 2001 the house was placed on the market for sale by Bayleys at auction but no sale eventuated. In October 2002 the house was again marketed for sale but on this occasion by Barfoot and Thompson, which resulted in Mr Abyaneh entering into a sale and purchase agreement for a purchase price of $830,000.00. However this sale did not proceed.

[31] The purchaser withdrew from the sale and purchase agreement after obtaining a valuation assessment pursuant to the special conditions of the agreement. That valuation report was provided to Mr Abyaneh's solicitor, Mr Kevin Wayne Harbourne, who subsequently became a joint owner of the property on 2 December 2004 when the property was transferred to the Claimant Trust

naming Mr Kevin Wayne Harbourne and Mr Abyaneh as Trustees of that Trust.

[32] Significantly however the valuation report which caused the proposed purchaser of the property to withdraw from the sale in November 2002 contained adverse comments regarding leaky issues with the dwelling and that it was now necessary to carry out remedial work to some of the windows.

[33] The reference to leaky building issues in that 2002 valuation report is consistent with the statement made by Mr Alvey, the WHRS assessor in his report stating that when he spoke with Mr Abyaneh, he advised Mr Alvey that "leaking problems became apparent within a few months" of the construction being completed. Mr Abyaneh, when cross-examined on this issue denied that he had said that even though he acknowledged that he had received a copy of Mr Alvey's report a short time after he had been interviewed by Mr Alvey and further that he had never attempted to contact Mr Alvey to correct the statement attributed to him.

[34] Commencing in late 2003 and continuing in early 2004 Mr Abyaneh arranged and completed the retro fitting of sill flashings and also installed side fixed balustrade cappings and parapet cappings. According to Mr Abyaneh this work approximately cost $520.00. But two experts, Messrs Alvey and Bayley calculated that in their estimation, in order for the work to be carried out satisfactorily, the cost for that work would have to be in the range of $4,000.00.

[35] It is important to note however, whatever the cost was, all the experts agreed (as held in Document 214) that the remedial work that was then carried out on the property by Mr Abyaneh caused significant damage to the property, being damage that cannot be attributed to any of the respondents.

[36] On 1 August 2005 Mr Abyaneh then lodged a claim with the WHRS and inspections of the property was carried out by the assessor Mr Neil Alvey on 27 September 2005 and 20 October 2005.

[37] According to Mr Alvey, Mr Abyaneh would not permit any destructive testing to be applied and apparently only after considerable persuasion was Mr Alvey allowed to carry out some moisture testing - although not as much as he wanted to do.

[38] It also has to be recorded that when Mr Alvey arrived at the property on 27 September 2005 he observed that the property was again on the market and on this occasion the real estate agents were Ray White Limited. This was the third occasion in four years that the property had been placed on the market.

Submissions regarding Mr Abyaneh as the Developer

[39] The first and second respondent as part of their defence, alleged that the claimant cannot claim damages arising from the construction of the building, as the claimant was the developer of the building.

[40] The second respondent contends that Mr Abyaneh, as trustee of the Claimant Trust was involved in all the construction processes by undertaking the following responsibilities: -

- He applied for the building consent;
- He selected all the contractors;
- He visited the site during construction;
- He paid all contractors directly;
- He paid for all materials;
- He selected the engineer and paid him directly;
- He made all calls to the Council for inspections;

- He contracted directly with all the contractors and negotiated the terms;
- He contracted with Mr Said Haroun Ali, the architect and provided him with instructions as to what he wanted built.

[41] In support of this submission reliance is placed on the following excerpts from the cross-examination of Mr Abyaneh which support that he was at all relevant occasions undertaking the role and responsibility as a developer: -

- Mr Abyaneh accepted that he contracted directly with the builder, the plasterer, and the roofer (Transcript: Page 47, line 20 to page 48, line 18).
- Mr Abyaneh admitted that it was him that engaged the engineer directly (Transcript: Page 49, line 23-24).
- Mr Abyaneh admitted to visiting the site during construction on the way to the shop, on the way back to his house in the evening and sometimes in the middle of the day (Transcript: Page 49, line 11).
- Mr Abyaneh admitted that he paid for the materials that came onto the site (Transcript: Page 51).
- Mr Abyaneh admitted that he engaged the architect to generate the plans, paid the architect, entered into a carpentry contract with PBL and paid PBL directly, contracted directly with Mr Mohammed Farook and paid him directly, contracted directly with the fifth respondent, HC Senior Auckland Ltd, and paid them directly. (Transcript: Pages 75, line 23; page 76, line 21). H C Senior had been involved in the roofing work, but is now in liquidation, and no order was made against that company.

[42] Counsel for the second respondent, Mr Asad Ali, submitted that the evidence referred to in para 41 above established that Mr

Abyaneh through his actions must be held to be a developer as his conduct came within the definition of "developer" as outlined by Harrison J in *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914, 922 at para [32].

> " The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops."

[43] It is claimed on behalf of the second respondent, Mr Asad Ali that Mr Abyaneh also fulfilled the roles of both head-contractor and project manager. Mr Abyaneh's position as project manager imposes on him a duty to exercise reasonable skill and care during the construction of the property, in order to discharge his duties not only to all the respondents but also to subsequent purchasers which would involve the Abyaneh Family Trust.

[44] In support of the allegation that Mr Abyaneh was the head-contractor, counsel for the second respondent at para [14] of his closing submissions dated 9 June 2008 submitted that: -

> "He entered into a series of subcontracts with the various subcontractors, and in the absence of hiring anyone to carry out project management and/or supervision, [Mr Abyaneh] became the party responsible for the coordinating of all these trades. His evidence is that he chose all of the subcontractors used on the house, that he paid for all materials they used and that he paid these subcontractors direct. With his status of Head Contractor came the burden of duties owed to future purchasers in tort, to which he ultimately owes to his family trust."

Therefore in respect of the dwelling at 25 Maui Grove it was submitted at para [16] that Mr Abyaneh also acted as the project manager because in relation to inspections carried out by the Council it is submitted that: -

> "The Council records in fact establish that Mr Abyaneh was the only party that called for these inspections, see documents 37 and 38 of

> the De Leur bundle. He has also given evidence of the fact that he regularly turned up on site during the course of the day to assess progress. Whilst at the point Mr Abyaneh attempts to assert that the Second Respondent was the Project Manager, this evidence contradicts his previous evidence to the effect that document 192 of the De Leur bundle records the only work that PBL was contracted to complete. Within this document is no mention of project management work. Further, there is the evidence of Mr Ali in his examination in chief at page 144 line 7-25, and page 145 line 1, where he states that had he been asked to carry out the project management of this contract then he would have charged significantly more, in the vein of $20,000 more."

[45] A definition of a person who comes within the category of a project manager was given by Adjudicator Carden in *Burke Family Trust v Wellington City Council & Ors* [2 October 2006] unreported, WHRS, DBH 02643, paragraph 10.21 as being: -

> "For a project manager to have a duty of care to subsequent purchasers that manager must have significant involvement in the actual project on which the claim is based. That person must take responsibility for construction decisions."

Mr Abyaneh's Denial of Developer and/or Head-Contractor and/or Project Manager Roles

[46] Mr Abyaneh denies that he acted as a commercial developer in respect of the property at 25 Maui Grove, Newmarket although he accepted that he had been involved in two previous property developments, and that he had initiated sales of both properties within a comparatively short period of time after their construction had been concluded.

[47] In explanation, Mr Abyaneh alleged that in respect of both the properties at 48A Sanft Avenue and at 72A Grand Drive, it was his intention to live in both of these respective properties but did not do so due to a change of circumstances, (in respect of 48A Sanft Avenue there was a dispute with a co-developer who refused to allow Mr Abyaneh to move into the property and due to Mr Abyaneh's ill health which he believed was caused by environmental issues

surrounding the property at 72A Grand Drive, that property was also sold).

[48] Mr Abyaneh also acknowledged that his original intention was to build two separate units on the 25 Maui Street site, the second being a home for his parents when they immigrated to New Zealand. However because of the death of his parents that did not occur. Accordingly, Mr Abyaneh while he had applied for consent to build two dwellings, he only proceeded with the construction of the house for which a claim has now been made, and subsequently sold the remaining section.

[49] The construction of that building was completed in September 2000 and as acknowledged by Mr Abyaneh an unsuccessful attempt was made to sell that property by auction in October 2001. The property was again placed on the market in 2002 but again that proposed sale did not eventuate. The property was then transferred to the Claimant Trust in December 2004.

Decision regarding Mr Abyaneh as the Developer

[50] The Tribunal is satisfied that Mr Abyaneh was involved to a very major extent in the construction of the property at 25 Maui Grove. The explanations that Mr Abyaneh has given for the attempted sales of the property do raise doubts as to whether or not he was solely a developer. But even if it is found that Mr Abyaneh was the developer of the dwelling in question, the duty of care owed by the Council to the Claimant Trust as a subsequent purchaser remains. The subsequent purchaser in this claim is the Claimant Trust and not Mr Abyaneh personally. Therefore in following Heath J's decision in *Body Corporate 188529 & Ors v North Shore City Council & Ors* [30 April 2008] unreported, HC, Auckland, CIV 2004-404-003230, Heath J, para [220] (*Sunset Terraces Case*) the Council owed a duty of care to the Claimant Trust to exercise reasonable skill

and care in performing its statutory duties under the Building Act 1991 even though one of the trustees of that Trust was a developer of the property.

Knowledge of Water Ingress and Damage

[51] The property was transferred to the Claimant Trust on 2 December 2004. It is alleged by the Council that Mr Abyaneh himself had full knowledge at the date of transfer that there were "water ingress problems" to the property.

[52] On 27 September 2005, Mr Alvey carried out a "first site" inspection of the property in the company of Mr Abyaneh. During the visit, Mr Alvey noted the answers made by Mr Abyaneh in relation to Mr Alvey's questions and subsequently compiled a WHRS Assessor's report dated 23 October 2005. A copy of which was sent to Mr Abyaneh. Under the heading "Claimant's Comments" it read: -

> "2.1 Indication of water entry and damage
>
> Within a few months of the dwelling being completed water started to enter the house through the windows and roof parapets and deck balustrades. Cracking to the cladding also became apparent.
>
> 2.3 Action taken by the owner to remedy
>
> Approximately two years ago I had sill flashings installed to all the windows, cap flashings installed to the parapets and balustrades and repairs to the cladding cracks carried out."

[53] Mr Abyaneh, in evidence, claimed that he did not speak the words attributed to him and that "he had either been misunderstood by the WHRS Assessor or that his comments had been mis-recorded (Transcript: Page 9, para 5; page 11, para 20; page 78, para 5 and 10). Further, Mr Abyaneh explained that he may have "mis-spoken" because he was not expecting the WHRS Assessor to come to the property on that particular day (Transcript: Page 11, para 15; page 130, para 5 and 10).

[54] The allegation that Mr Abyaneh made the statement as recorded by Mr Alvey gains support from the fact that Mr Abyaneh must have been aware that a potential sale of the dwelling failed in November 2002 due to a valuation report obtained by the prospective purchaser, which contained information relating to “leaky building issues”, and that report also drew attention to remedial work being required for some of the windows.

[55] All that information also raises doubts concerning the accuracy of the evidence in which Mr Abyaneh claimed that he was “not aware of any leaking to the dwelling until about 2004”.

[56] Moreover, prior to the date of transfer Mr Abyaneh acknowledged that:

(a) He was concerned about a dampness issue but did not consider it a serious problem (Transcript: Page 25, para 20);
(b) He was aware of cracking to the plaster and thought water may be entering through a control joint and not through cracks in the plaster (Transcript: Page 22, para 10-20);
(c) He was aware that capping on top of parapets and flashing to windows were missing having been advised of that by the third respondent and was warned by the third respondent that as a result there was a potential for leaks; and
(d) That it was necessary after the property was transferred to the Abyaneh Trust to have metal cap flashings and new window flashings installed.

The above information must have been a strong indication to Mr Abyaneh that there were “leaking problems” with the dwelling at 25

Maui Grove or at the very least there was a strong potential that water damage would occur.

[57] The position of the other trustee of the Claimant Trust, Mr Kevin Wayne Harbourne, is uncertain but he must have had some knowledge of the "leaking problem" as he had been the recipient of the correspondence from the prospective purchaser's solicitor cancelling the purchase. Subsequent to receiving that letter it appears that some remedial work was carried out by Mr Abyaneh which could have led both Mr Abyaneh and Mr Kevin Wayne Harbourne to believe at the time the transfer to the Claimant Trust was made that the cause of the "leaking problem" had been attended to.

[58] It is evident therefore that Mr Abyaneh, one of the trustees was aware that there were some leaking issues before the time of transfer to the claimants. In a different capacity the other trustee, Mr Kevin Wayne Harbourne, had also in the past been made aware of the issues. Two years prior to the transfer, as Mr Abyaneh's solicitor, Mr Harbourne would have received the letter from the proposed purchaser's solicitor advising that the sale of the property was now not proceeding because of "leaking problems".

[59] The issue therefore that needs to be determined is whether the claimants' knowledge, at the time of the transfer to the Trust was sufficient to break the chain of causation. Whilst Mr Abyaneh was the owner there had been some leaking but he did not believe that the house fell within the category of being a "leaky home". In addition he arranged to have further work done which he believed this work addressed these issues. It was only subsequent to the transfer to the trust that further leaking occurred and the trust became aware of the full extent of the problems.

[60] I would conclude that the extent of the knowledge of the claimants at the time of transfer was not sufficient to break the chain of causation. This is not a situation akin to that of Mr and Mrs Sangha in the *Sunset Terraces Case* where with detailed knowledge of the problems they negotiated a reduced purchase price. However the degree of knowledge coupled with Mr Abyaneh's involvement in the construction of the property do help to establish contributory negligence on the part of the claimants.

[61] Consequently the Tribunal holds that the extent of the knowledge of the Trust was not sufficient enough to break the chain of causation with the respondents.

LIABILITIES OF THE PARTIES

[62] It was claimed by the second respondent that he should not have been personally joined as a party, as the relevant contract that was entered was between Mr Abyaneh and PBL, and not him personally. That is correct, but the evidence adduced during the hearing clearly established that the construction work was physically performed by the second respondent personally, and having made that finding the second respondent must be held to have a degree of personal liability for actual construction defects. In the decision of Baragwanath J in *Dicks v Hobson Swan Construction Ltd* (in liquidation) 7 NZCPR 181, Mr McDonald, a company director, was personally liable in tort due to his involvement in the construction of a house because he did not merely direct but actually performed the work in the construction of the house, and therefore had to accept responsibility for that work. In reaching that decision, Baragwanath J stated that he was following the decision in *Morton v Douglas Homes Ltd* [1984] 2 NZLR584. Applying both those decisions, the Tribunal holds that Mr Asad Ali, the second respondent, should therefore be

held liable for his breach of duty relating to the work performed by him.

[63] In respect of the liability of the architect, Mr Said Haroun Ali, he was found liable solely on the basis of the assessment by both Messrs Alvey and Templeman that he was responsible for not providing “more details relating to the sill flashings” in the plans drawn by him. The Tribunal carefully considered the closing submissions (both written and presented orally) by the third respondent, but has reached the decision to accept to a minor extent the criticism of the plans made by the two experts. This is a minor fault on the part of Mr Said Haroun Ali, which can be gauged by the fact that it has been assessed as merely 10% of 9% of the amount of the total claim being, $372,103.34.

[64] The findings of liability on the part of both the first respondent, Auckland City Council and the fourth respondent, Mr Mohammed Farook are based on the information contained in the reports of the experts and then applying the calculation contained in Document 214.

EXPERTS FINDINGS

[65] The Tribunal acknowledges the contribution made by the four experts Messrs Bayley, Alvey, Templeman and Wilson for their efforts in compiling Document 214, which contains details relating to the causes of water ingress to the property at 25 Maui Grove and also identifies the individual parties who they have considered are responsible for such causes. It is also acknowledged that the format of Document 214 was helpfully prepared by Mr Bates, counsel for the second respondent.

[66] All parties had and exercised the right to cross-examine each of the four experts who after the hearing was concluded on 21 May 2008 retired and decided the details stated in Document 214.

[67] Document 214 not only contains information as to the causation which resulted in the water ingress and identifies the party or parties involved but in addition calculates the respective liability of the claimant and each respondent in a percentage detail. The details of Document 214 which were signed by all four experts as being their agreed decision is set out below. Having considered their evidence, the Tribunal is satisfied that Document 214 is an accurate summary of the causes of the damage, the parties responsible, and the percentage allocation that is stated therein.

CAUSES OF WATER INGRESS							
PARTY RESPONSIBLE							
CAUSES	1st Resp	2nd Resp	3rd Resp	4th Resp	5th Resp	Claimant/6th Resp	% repair costs
Parapets							
1 5-10 degree fall in the plaster cap						✓	5
2 Inadequate paint film thickness - discontinuities						✓	15
3 Hairline cracking to plaster parapet top						✓	5
4 Inadequate lap to the butynol roofing membrane at corner of parapets					✓	✓	0.625
5 Metal parapet cap flashing fixed with significant gaps between metal parapet cap flashing and the external face of the plaster						✓	20
Balustrade Wall and Deck Construction							
6 Top of balustrade wall is flat				✓			5
7 No underlying butynol membrane	✓				✓		0.625
8 Retro fitted metal cappings have allowed water to enter via the gap between the capping and the plaster						✓	10
9 Downpipe from the upper story roof discharges onto the deck						✓	0.625
10 Significant ponding to the failed deck surface due to inappropriate falls						✓	0.625
11 Water has entered the base of the balustrade wall via capillary action due to no up stand					✓	✓	0.625
Flashing of Windows and Door Openings							
12 Retro fitted window still flashings with inappropriate adhesive to create a weathertight seal between the plaster, the window frame and the metal flashing						✓	16
13 No sill flashing							9
Entrance Canopy							
14 Substrate to the entrance canopy membrane roofing deflecting abnormally					✓	✓	0.625
15 Base of columns is in contact with the ceramic tiled surface						✓	0.625
External Ground Levels Adjacent to Garage							
16 Driveway in contact with solid plaster cladding - capillary action						✓	0.625
Main roof membrane							0.625
17 roof membrane laps have pulled apart, overlap at joint inadequate					✓	✓	5
5a Mesh Fixing Steps - Penetrations				✓		✓	5

214

[68] It will be observed that point 13 in Document 214 does not contain details of the parties responsible for the 9% of repair costs caused by “no sill flashing”. To obtain that the, Tribunal sought further information from each of the four experts which is contained in Procedural Order No.20 (dated 24 June 2008). That information was circulated to all parties. After taking into consideration all the available information relating to the liability of each respondent, the Tribunal apportioned the repair costs between the parties as follows.

Mr Abyaneh	60%	$20,097.61
First Respondent	10%	$3,398.09
Second Respondent	10%	$3,398.09
Third Respondent	10%	$3,398.09
Fourth Respondent	10%	$3,398.09

Allocation of Responsibility

[69] Set out below is the breakdown of the parties’ responsibilities including that of Mr Abyaneh, which is expressed by a percentage figure. The chart below also contains the Tribunal’s decision after applying the findings of the experts relating to the amount for which Mr Abyaneh must accept responsibility, and the amount that each respondent is required to pay to the Claimant Trust towards the proposed repair costs.

[70] It will be noted that the Tribunal has assessed that the total figure for the cost of the proposed repairs is $372,103.34. That figure was reached after consideration was given to the three different amounts that had been given as the cost of repairs. The amount calculated by Mr Bayley being $206,830.87, and Kwanto $381,395.25. The claimants had claimed $372,103.34, a sum that had not been seriously disputed by the respondents and the Tribunal

elected to accept that sum as the cost of the required remedial work which is yet to be done.

[71] The following calculation sets out the total sum to complete the remedial work, and the amount required to be paid by each respondent and the balance being the responsibility of the claimants.

	R1	R2	R3	R4	R5	Mr Abyaneh	%Repair Costs	$ Amount
1						$ 18,605.17	5	$ 18,605.17
2						$ 55,815.50	15	$ 55,815.50
3						$ 18,605.17	5	$ 18,605.17
4						$ 2,325.65	0.625	$ 2,325.65
5						$ 74,420.67	20	$ 74,420.67
5A				$ 9,302.59		$ 9,302.59	5	$ 18,605.17
6				$ 18,605.17			5	$ 18,605.17
7	$ 2,325.65						0.625	$ 2,325.65
8						$ 37,210.33	10	$ 37,210.33
9						$ 2,325.65	0.625	$ 2,325.65
10						$ 2,325.65	0.625	$ 2,325.65
11						$ 2,325.65	0.625	$ 2,325.65
12						$ 59,536.53	16	$ 59,536.53
13	$ 3,348.93	$ 3,348.93	$ 3,348.93	$ 3,348.93		$ 20,093.58	9	$ 33,489.30
14						$ 2,325.65	0.625	$ 2,325.65
15						$ 2,325.65	0.625	$ 2,325.65
16						$ 2,325.65	0.625	$ 2,325.65
17						$ 18,605.17	5	$ 18,605.17
Totals	$ 5,674.58	$ 3,348.93	$ 3,348.93	$ 31,256.69		$ 328,474.26	100	$ 372,103.34

SUMMARY and CONTRIBUTION

[72] I find that the first respondents breached the duty of care that it owed to the claimant. It is a joint tortfeaser or wrongdoer and is liable to the claimants in tort for its losses to the amount of $15,721.37 as outlined in this decision.

[73] I find that the second and third respondents breached the duty of care that each owed to the claimant. Each of them is a joint tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent of $13,335.72 as outlined in this decision.

[74] I find that the fourth respondent breached the duty of care he owed the claimants. He is a joint tort-feaser and is liable to the claimants in tort for their losses to the extent of $41,303.48 as outlined in this decision

[75] Under section 72(1) of the Act the tribunal can determine "any liability to any other respondent". In addition 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 it would otherwise be liable.

[76] The basis of recovery of contribution provided for in s17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort…. any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is…liable for the same damage, whether as a joint tortfeasor or otherwise…

[77] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[78] Whilst the respondents are liable for the amounts as set out above each of the respondents, as concurrent tortfeasors, is entitled to a contribution toward those amounts from each of the other respondents according to the relevant responsibilities of the parties for the same damage, that I have determined.

[79] The contributions towards the amounts awarded based on he proportions of liability that I have determined in this decision should be:

First respondent:	$ 5674.58
Second respondent:	$ 3348.93
Third respondent:	$ 3348.93
Fourth respondent:	$ 31256.69
Total amount of this determination	$43,629.13

CONCLUSION AND ORDERS

[80] For the reasons set out in this determination, I make the following orders:

(a) The first respondent the Auckland City Council is in breach of the duty owed to the claimants and are ordered to pay the claimants the sum of $15721.37.

(b) The second respondent Asad Ali is in breach of the duty of care owed to the claimants and is ordered to pay the claimants the sum of $13,335.72.

(c) The third respondent Said Haroun Ali is in breach of the duty of care owed to the claimants and is ordered to pay the claimants the sum of $13,335.72.

(d) The fourth respondent Mohammed Farook is in breach of the duty of care owed to the claimants and is ordered to pay the claimants the sum of $41,303.48.

(e) As a result of the breaches referred to in (1)–(4), the first second, third and fourth respondents are concurrent tortfeasors, and each is entitled to a contribution toward the amount that I have found each liable for in loss and damages to the claimants from each and every of the other liable respondents, according to the relevant responsibilities of the parties for the same damage that I have determined.

(f) In the event that the first respondent pays the claimants the sum of $15,721.37, it is entitled to a contribution from the second, third and fourth respondents of up to $10,046.79 in respect of the amounts each respondent has been found jointly liable for breach of the duty of care.

(g) In the event that the second respondent pays the claimants the sum of $13,335.72, he is entitled to a contribution from the first, third and fourth respondents of up to $9,986.79 in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(h) In the event that the third respondent pays the claimants the sum of $13,335.72, he is entitled to a contribution of up to $9,986.79 from the first, second and fourth respondents in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(i) In the event that the fourth respondent pays the claimants the sum of $41,303.48, he is entitled to a contribution of up to $10,046.79 from the first second and third respondents in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(j) To summarise the position therefore, if all respondents meet their obligations under this determination, this will result in the

following payments being made by the respondents to the claimants:

First respondent:	$ 5674.58
Second respondent:	$ 3348.93
Third respondent:	$ 3348.93
Fourth respondent:	$ 31256.69
Total amount of this determination	$43,629.13

DATED this 22nd day of July 2008

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S G Lockhart QC

Tribunal Member

NOTICE

The Tribunal in this determination has ordered that one or more parties is liable to make a payment to the claimant. If any of the parties who are liable to make a payment takes no steps to pay the amount ordered the claimant can take steps to enforce this determination in accordance with law. This can include making an application for enforcement through the Collections Unit of the Ministry of Justice for payment of the full amount for which the party has been found jointly liable to pay. In addition one respondent may be able to seek contribution from other respondents in accordance with the terms of the determination.

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

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

This statement is made as under section 92(1)(c) of the Weathertight Homes Resolution Services Act 2006.