WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO: TRI-2008-101-000098

BETWEEN	**DAVID & BRENDA AITKEN** Claimant
AND	**JAN & GABRIELLE LAUDERMILK** First Respondent
AND	**DAI JONES** Second Respondent
AND	**BRENT RULE** Third Respondent
AND	**MARLBOROUGH DISTRICT COUNCIL** Fourth Respondent
AND	**CONTOUR ROOFING (NELSON) LTD** Fifth Respondent
AND	**PHIL FROST (REMOVED)** Sixth Respondent
AND	**TONY SMALL (REMOVED)** Seventh Respondent
AND	**DARIN HOSKING (REMOVED)** Eighth Respondent
AND	**GARY FYFE** Ninth Respondent

Hearing: On the papers

Appearances: Claimants, in person
G Malone, for First Respondent
Q Davies, for Second Respondent
Third respondent, in person
C Frame, for Fourth Respondent
D Freemen, for Fifth Respondent
Ninth respondent, in person

Decision: 29 May 2009

INTERIM DETERMINATION
ADJUDICATOR: R PITCHFORTH

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INTRODUCTION

[1] The claimants are David Laurence Aitken and Brenda Mary Aitken. They are the owners of a house at 5564 Waitara Bay, RD 2 Picton. The house has suffered a number of leaks. Some have been repaired and others require further remedial work.

[2] The claim is made under the transitional provisions under Part 2 of the Weathertight Homes Resolution Services Act 2006.

[3] The claimants seek redress from the parties they believe to be responsible for the leaks. The other parties seek indemnity from other respondents who they say were responsible for the leaks.

[4] Some of the respondents that were joined to these proceedings have been removed. The following are therefore the remaining respondents to this claim:

- The first respondents, Mr Jan Ernest Laudermilk and Ms Gabrielle Wilhelmine Iris Laudermilk (the Laudermilks), who were the first occupiers of the house. The Laudermilks were also the shareholders in EquusLoco Ltd, a farming company that owned the property. That company has now been removed from the register;
- The second respondent, Mr Dai Jones, who designed the house;
- The third respondent, Mr Brent Anthony Rule, the builder;
- The fourth respondent, Marlborough District Council, was the territorial local authority responsible for issuing consent and code compliance certificates for the house;
- The fifth respondent is Contour Roofing (Nelson) Ltd; and
- The ninth respondent is Mr Gary Fyfe.

[5] On 31 October 2008 and 9 December 2008 I held preliminary conferences and issued Procedural Orders 1 and 2 as part of hearing this dispute.

[6] On 4 March 2009 I, along with the case manager and the WHRS assessor, John Lyttle, attended at the property for a site inspection in the presence of those parties or their representatives that wished to attend.

THE HOUSE

[7] The dwelling is a single level stand-alone building constructed on a concrete raft slab.

[8] The house is in the Keneperu Sound on a level platform with a westerly aspect. The predominant weather is from the northwest and south east. It is exposed to extreme weather conditions that include strong wind and rain.

[9] The house was built in 2000 and its Code Compliance Certificate was applied for in August 2003.

History of house

[10] The property was owned by EquusLoco Limited (EquusLoco), which contracted for the construction of the house. The Laudermilks say that as directors of EquusLoco, they undertook all necessary actions in relation to the construction of the house.

The Plans

[11] The third respondent, Mr Brent Rule had discussions with the Laudermilks about a possible house and advised them about the weather conditions and the need for large soffits. Mr Rule introduced the Laudermilks to the second respondent, Mr Dai Jones, an architectural designer.

[12] Mr Jones' contract with EquusLoco was to provide drawings for a building consent. There was no provision in that contract for Mr Jones to supervise the work.

[13] Mr Jones drew up the plans and Mr Rule commenced building in late 1999 finishing about eight months later. Mr Jones did not supervise the construction.

[14] Changes were made to the plans though it is not known whether Mr Jones knew of this or whether further consents were obtained for such changes. One such item was the skylight.

[15] The changes to the plans and specifications noted by Mr Jones when he became aware of the dispute were:

- Six rib Coloursteel was substituted for the specified metal tile roof;
- The skylight replaced the clerestory;
- Equus Thermexx was used even though the walls were specified as Insulclad;
- Tiles were laid on the specified concrete terrace;
- The house was designed with a step down but was built on one level thereby changing the ground clearances;
- A column was substituted for a post outside the bedroom; and
- Some of the walls in the lounge were deleted and a steel beam was substituted in the roof space.

[16] Mr Jones says that his role is similar to that of the architectural draughtsperson in the *Sunset Road decision*.[1]

[17] One of the peer reviews Mr Jones produced in regards to his work on the claimants' house was Mr Colin Selwyn Hill of Hill Miles Architecture, a registered architect with appropriate qualifications.

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[1] I have assumed he is referring to *Sunset Terraces, Body Corporate 188529 & Ors v North Shore City Council & Ors (No. 3)* [30 April 2008] HC, Auckland, CIV 2004-404-3230, Heath J.

[18] Mr Hill found that the documents prepared by Mr Jones were minimal but typical of documents prepared by architects and architectural designers at this time for clients who were prepared to pay the minimum fee for documentation and designs in order to obtain a building consent and contract a builder themselves to construct a dwelling.

[19] Mr Hill says that it was not common for documents at this time to contain standard roof flashing and construction details around windows and other envelope penetrations (these details are however now required by today's standards).

[20] Mr Hill says that both the designer and the local authority were entitled to assume that a competent contractor would construct the dwelling to the code requirements from the documents submitted for consent. Mr Hill therefore says that the documents prepared by Mr Jones are at an acceptable standard.

[21] Mr Haack, a builder, says that the documents are typical of the era about 2000.

[22] Mr Todd of David Todd Limited is a life member of Architectural Designers New Zealand Inc having been a member since 1988. He qualified in 1979 and has been self-employed as an architectural draughtsman since 1984.

[23] Mr Todd says that the documentation is typical of the plans and specifications that were submitted in 2000 and earlier. He further says that the expectation when nominating a proprietary cladding system with a named company as the registered applicator is that the proprietary cladding system would be installed in accordance with the manufacturer's instructions. Mr Todd therefore stated that the designer and council would expect best trade practices would be used to complete the work.

[24] Given the level of detailing normally provided, Mr Todd stated that it was accepted practice that a builder knew how to construct a flat valley, and if not, they would have requested more information.

[25] Mr Todd also says that a designer cannot be expected to be responsible for changes made without consultation after the plans have been prepared.

[26] Mr Jones says he had no other involvement in the work. Mr Jones was paid $1, 200.00 for the plans.

Liability of Mr Jones

[27] I find that the plans as submitted for consent purposes were adequate and that the proposed dwelling could have been constructed as a weathertight building. Mr Jones is therefore not liable and the claim against him is accordingly dismissed.

Laudermilks Occupation

[28] The Laudermilks occupied the house until October 2003 during which time they saw no evidence of leaks. Mr Laudermilk says he has no knowledge of the problems reported in the WHRS assessor's report.

[29] Mr Rule says that about two years after completion of the building Mrs Laudermilk complained of a leak in the garage after a severe storm. However Mr Rule was not able to find a leak. Instead he found that the gutters were full of rotting vegetable matter. Mr Rule therefore recommended regular cleaning.

Code Compliance Certificate

[30] Mr Rule met the council building inspector, Mr Hight, on site on 25 July 2003 for the purposes of obtaining a Code Compliance Certificate. Mr Hight accepted the ground clearances for the cladding and only required that

the hot water cylinder be strapped and for the cylinder's frost caps to be on hunter valves.

Sale of the property

[31] EquusLoco sold the property to the claimants by a contract dated 23 July 2003. Settlement followed on or about 1 December 2003.

[32] EquusLoco ceased trading after the sale and was removed from the Register on 1 December 2008.

Leak complaints

[33] Mr Rule visited the site a year or so later following a complaint by Mrs Aitken that it was leaking. The following are the findings made by Mr Rule during that visit:

- There were two fist-sized holes in the gibboard below the end of the box gutters. Mr Aitken told him told Mr Rule that he regularly cleaned the gutters
- The skylight was leaking
- Mr Rule noted that the roof had been walked on and some repairs attempted. He says Mr Aitken said that he had done them
- One wall appeared wet. Mr Rule found that soil had been placed against the Insulguard. Mr Rule recommended a channel be constructed so that there would be at least 150 mm between the Insulguard and the ground. There is no report showing damage from soil against a wall
- There was dampness in the columns and so Mr Rule recommended that a stopped end on the box gutters be fitted to eliminate overflow. He also suggested that the columns be fixed by pouring a base of concrete and tile to match the existing tiles.

[34] Mr Rule says he then met with Mr Graham Roberts, the Chief Building Inspector, and advised him of what had been found. He also told Messrs Jones and Fyfe.

[35] Mr Rule says that this is not a leaky home and any damage is due to lack of maintenance.

DAMAGE

[36] The WHRS assessor found that:-

- the cladding system was non-compliant with the New Zealand Building Code Clauses E2 (relating to external moisture) and E3 (relating to internal moisture);
- the building did not comply with clause B2 (Durability), as with the levels of moisture entry, the durability was inadequate so that reconstruction or major renovation would be required well before the times specified in the Building Act (1991 and 2004);
- the clearance between the cladding and the finished ground surface did not meet the specified requirements of the New Zealand Standard 3604:1999 Code of Practice for Light Timber Frame Buildings not Requiring Specific Design;
- the western and eastern elevations of the cladding ran down into the ground surfaces instead of a clearance of 75 mm required by the Rockcote Insulating Wall Cladding System, Technical and Installation Manual, December 1999; and
- the flashing detail for the skylight did not comply with the Instructions for the Installer of Velux Skylight and Flashing. An additional flashing was fitted against the skylight due to the positioning of the ribs of the roofing with the side of the skylight. The additional flashing stopped at the bottom edge of the skylight providing and inadequate cover on the bottom flashing.

CAUSES OF LEAKS

[37] The WHRS assessor found a number of causes of the water entering the house.

Boxed Gutter/Roofing Junctions

[38] The ends of the boxed gutters above the garage and toilet had not been constructed so as to stop the entry of moisture into the house. The upstand at the top-end of the slope were not adequately sealed to stop moisture entering in between the butynol rubber and metal cladding. During heavy rain, water accumulates at the top of the slope increasing the hydrostatic pressure on the junction and forcing water between the junction of the butynol rubber and the metal roof cladding.

[39] As a result, the leak over the garage is causing both cracking in the sheet joints and buckling of the sheets. Furthermore, the entry of moisture through the ceiling of the guest toilet has caused a hole in the plasterboard thereby peeling the paint.

[40] Roof repairs to date have cost $2,503.72

[41] Removing damage ceilings cost $1,054.69

[42] Ceiling repairs costs $1,081.75

[43] Mr Rule rejects the suggestion that there is any defect, as the ceilings that have been repaired were not subsequently damaged by the leaks in the roof.

[44] The Council denies responsibility for the box gutter and roof junctions as it submits that it would not be a defect that a council inspector would typically be expected to pick up on inspection. Instead the Council submits that it is a workmanship issue thereby implying, I assume, that they are not responsible for the standard of workmanship. They also say that the detail was concealed. I discuss this proposition below.

[45] The Council says that the problem is one of lack of maintenance relying on Mr Rule's statements and the lack of maintenance he reported in relation to the previous owners.

[46] I find that there is no proof of lack of maintenance, and that this argument is merely speculation. Instead I find that the problem is clearly a construction fault which was not concealed. The fault was obvious to anyone who is reasonably skilled and who looked at the gutter.

Liability of Contour Roofing (Nelson) Limited

[47] Contour Roofing (Nelson) Limited say that their contract was to partly lay butynol into a partly completed gutter. When they attended the site they were not able to complete the work because the roof structure was not complete and no iron was laid on the roof. They were present on site for only four hours and they were not asked to return. Because they did not return, Contour did not issue a warranty.

[48] I therefore find that this small amount of work has not contributed to the damage and loss and accordingly the claim against Contour Roofing (Nelson) Ltd is dismissed.

Skylight

[49] The inadequate flashings were inadequate and therefore allowed moisture to enter into the ceiling linings.

[50] The Council says that it could not have detected this issue of workmanship unless it was on site at the time of installation. The Council therefore denies liability on the grounds that an inspector would not be expected to pick up the lack of detail and that the problem occurred as a result of the claimants attempting to carry out repairs in the vicinity of the skylight acerbating the problem.

[51] I therefore find that the Council should have noted that the skylight was not part of the plans and specifications and at least required proof of proper installation.

[52] The skylight has been repaired.

Spouting/Wall junctions

[53] Water is able to enter at the junction of the metal and plaster increasing with the flow of water down the wall/apron flashing junction. This is due to the spouting and fascia being fitted prior to the plaster coating making it difficult to seal due to the differential movements between the building materials.

[54] The water entry has caused cracking in the sheet joints of the plasterboard on the ceiling and beam below the skylight.

[55] The Council says that the sealant was permitted under the Building Act 1991 and the Building Regulations 1992 and was only expected to have a life span of 5 years. The Council argues that the claimants have failed to maintain the seals so the sealant, at the time of final inspection, i.e. 25 July 2003, having been worn down over a period of time due to a lack of maintenance, would have been close to needing replacement.

[56] If the wear and tear had been in the state suggested, that is, near the end of its life, I find that the Council should have referred to it and required the sealant to be brought up to at least the five year standard.

Columns

[57] There were insufficient ground clearances especially where the deck tiles have been fitted against the column base. Water was therefore getting trapped in the crack between the deck tiles and column bases and was increasing the capillary action. As a result of the roof junction above column 1 allowing moisture into the base of the column, decay was caused in the timber framing and ply at the base of the columns.

[58] The ninth respondent, Mr Fyfe, says that the columns were built with untreated timber with no damp course between the bottom plate and the foundation. According to Mr Fyfe, the leak therefore occurred from the bottom up and not through the polystyrene.

[59] Mr Fyfe says the Building Code at that time allowed for sealant to be used at the junction between polystyrene, the texture, the fascia and the gutter.

[60] Mr Fyfe also says that the paths were laid and the landscaping done after he had left the site.

[61] It is not clear who laid the tiles above the level of the base of the columns. The Laudermilks will have consented if not caused this to be done.

[62] The Council says there was adequate ground clearance when they were last on site, namely 25 July 2003 when the Code Compliance Certificate was sought. At the time of inspection, the Council says that the cladding was clear of the ground and the claimants carried out landscaping works that have cause the defects to exist. The Council therefore submits that they therefore cannot be held responsible.

[63] This was clearly not the case as the evidence indicates that the terrace and tiles were in place at the time of the Council's inspection of 25 July 2003.

[64] The columns have been repaired.

Wall Cladding

[65] Future damage is expected as the cladding surface begins to wear and cracks appear between different building materials. Moisture will then enter the house.

[66] Mr Fyfe says that the paths were constructed after the cladding was installed which became apparent at the site visit when the path could be seen to have been installed over the bottom of the cladding.

[67] The Council says that there was adequate clearance at the time the council was last on site, namely 25 July 2003 when the Code Compliance Certificate was sought. They suggest that the claimants carried out the work subsequently.

[68] There is no evidence to support this contention.

[69] The assessor has suggested work to make the walls code compliant to remediate the problem. The path by the garage is not code compliant and needs to be replaced.

Garage Door

[70] There are gaps between the door and the doorframe allowing entry of moisture during driving rain.

[71] The plasterboard is in a crumbly condition and the paint is peeling at the edge of the doors. It is a small localised area.

[72] The Council says that this is a workmanship issue that they would not have detected. I accept that submission.

[73] The assessor itemised the repairs required to make the house weathertight.

RESPONDENTS' REPLIES

LIABILITY OF MR Fyfe

[74] Mr Fyfe has taken little part in these proceedings. He says that he has no liability and has therefore asked to be removed from these proceedings.

[75] Mr Fyfe says that the Equus coating was applied in accordance with the specifications and building code requirements of the day. He further says that there is no complaint about the system.

[76] Mr Fyfe says that the work he did was compliant when it was completed. This was before the laying of the terrace concrete and the path by the garage. At the time the work was done there was nothing covering the cladding.

[77] There is no evidence that any work done by Mr Fyfe was in itself the cause of a leak and damage. Accordingly, Mr Gary Fyfe is hereby removed.

LIABILITY OF THE COUNCIL

[78] The fourth respondent, the Marlborough District Council acknowledges that it owes a duty of care to the claimants as subsequent owners of the house. However the Council submits that its actions or omissions have not caused the losses claimed. Instead it argues that the claimants' losses are due to lack of maintenance and the claimants' actions.

Lack of pre-purchase inspection report

The Council argues that the claimants bought the house when the 'leaky building syndrome' was well known but they took no steps to protect themselves by obtaining a pre-purchase inspection. Mr Rule also made the same submission. The Council therefore submits that the claimants are therefore responsible for contributory negligence. In support of that submission that the Council referred to the decision in *Sunset Terrace* (supra) where Heath J said:

> ***(d) Pre purchase inspections***

> [576] The Council alleges that the individual proprietors failed to arrange pre-purchase inspections to be carried out by a building consultant or other qualified expert before their respective purchases of their unit.
>
> [577] To my knowledge, there has never been an expectation in New Zealand (contrary to the English position) of a potential homeowner commissioning a report from an expert to establish that the dwelling is soundly constructed. Indeed, it is a lack of a practice to that effect which has led Courts in this country to hold that a duty of care must be taken by the Council in fulfilling their statutory duties. Both *Hamlin* and the Building Industry Commission report run counter to [the Council's] argument on this point.
>
> [578] I find that there was no duty to that effect on the purchasers, so the allegation of contributory negligence cannot be made out. The same reasoning applies to the issues raised in Particulars (c) and (f) of the claims.

[79] On that basis, I therefore find that the claimants were not negligent in not obtaining a pre-purchase report.

Leaks

[80] The Council referred to the WHRS assessor's report and says that it has no position as to whether the leaks set out by the assessor are established.

Plans and specifications

[81] The Council denies that the standard of the plans and specifications was such that the Council could not be satisfied at the time that it processed it that it was not entitled to issue a consent. In support of that submission the Council cited the decisions of the High Court in *Sunset Terraces* (supra) and *Body Corporate 189855 & Ors v North Shore City Council & Ors* [25 July 2008] HC, Auckland, CIV2005-404-00556125, Venning J (*Byron Avenue*).

[82] I have already found that the plans were suitable for consent purposes and accordingly the Council cannot be liable for that stage of the development.

Inspections

[83] The Council denies that the level of inspections fell below the standard of a reasonable council at the time of construction and referred to the decision of *Askin v Knox* [1989] 1 NZLR 248.

[84] The Council says that it carried out a sufficient number of inspections. However the council says that it is not a clerk of works as it is not on site every day and as such, it is not in a position to view each and every aspect of the construction work. Reference was made to *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, 241 and *Stieller v Porirua City Council* [1986] 1 NZLR 84, for the proposition that the council is not an insurer or guarantor of building work.

[85] In *Stieller* the Court of Appeal at p 94 said that the construction of houses with good materials in a workmanlike manner is a matter within the Council's control. At p96, the Court of Appeal stated say that the contract between the owners and builders therefore does not relieve the Council of the duty to ensure the observance of its bylaws.

[86] The Council says there is no evidence to show that their standards fell below the standards applied by other council officers elsewhere in New Zealand. Whether or not other local authorities enforce their bylaws is not a reason for failure to enforce them in this Council's district.

[87] In its summary the Council says that it acted diligently on the inspections that it carried out and ought not to attract any responsibility for the losses occurred.

[88] In relation to the issuing of the Code Compliance Certificate, the Council also denies that it owes a duty of care to the claimant but that if a duty of care was owed, then it acted reasonably. The Council says that this is because the issuing of a Code Compliance Certificate is an administrative action that does not require and inspection to be carried out at the property.

[89] Section 43 of the Building Act 1991 states:

> **43 Code compliance certificate**
>
> (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that—
>
> (a) The building work to which the certificate relates complies with the building code;

[90] The Council also referred to *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504, in which Venning J rejected the proposition that a motel was covered by *Hamlin* principles.

[91] The present claim is distinguishable from the situation in *Three Meade Street* as it is not a situation where the claimants are seeking a guarantee that a commercial building is free from defects.

[92] In *Dicks v Hobson Swan Construction Ltd (In Liquidation)* (2006) 7 NZCPR 881, Baragwanath J discussed the Council's responsibility:

> [109] But that is not what Parliament specified in s 34(3) (para [70] above). I reject the notion that councils were permitted to pay lip service to the legislation. Rather their task was to implement it. *Hamlin* decides that the Courts will enforce that obligation by providing injured parties with a cause of action in negligence.
>
> [110] The council's power to charge fees and its duties to determine whether a certificate of compliance should be issued and, if not, to issue a notice to rectify point to a legislative policy the council should carry any loss caused if it neglects its duty to inspect. Mrs Dicks should be able in accordance with the principles of *Stieller* and *Hamlin* to rely on it to perform that duty. For the council to be able to cast on her the obligation to suspect that it had breached the duties it was bound to perform would be perverse.
>
> [111] Sir Jack Beatson and Professor Taggart have castigated the "oil-and-water" approach of ignoring the relationship between common law rights and their regulation by (in this case) both statute and code. Professor Taggart adds:
>
>> Failure to view property rights and restrictions in a holistic way … is blind to the fact that property rights are socially constructed.

> *Hamlin* exemplifies the approach for which Beatson and Taggart argue; to accept the council's argument would infringe it.
>
> [112] In point of simple logic the building code's “performance-based” criteria required any substitute for proven technology itself to be proven. Turner P's test, whether independently of any actual proof of current practice common sense dictated particular precautions, requires consideration of both what risk is in prospect and the cost and difficulty of dealing with it.
>
> [113] As to risk, the need for the exclusion of water was well-known. Under the previous regime it had required the substantial precautions of cavities and/or side flashings.
>
> [114] Nothing apart from inadequate foundations could be as insidious as entry into a house of water, which will ultimately have the same effect as inadequate foundations.
>
> [115] What of dealing with that risk? The council suggested that whether the presence of seals was detectable or not by the inspector depended on the fortuity of whether they had been painted when the inspector happened to arrive.
>
> [116] While “proprietary seals” was accepted as an alternative to cavities and/or side flashings, it would have occurred to a reasonable council officer considering in a quiet office the significance of abandoning cavities and flashings that they could not simply be regarded as the equivalent of a coat of paint. It was the task of the council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present. That was the standard required by Hardie Boys J in *Morton v Douglas Homes* in relation to foundations. The council accepts that flashings warranted specific precaution to check to ensure their presence; so too must their substitute.
>
> [117] I have concluded that the absence in this case of both any instructions and of any system to discern whether seals were in place infringes Turner P's test. There has been a simple abdication of responsibility by the council. If there is need to apply an *Anns* operational test I accept Mr Jordan's explanation that it would be easy to do so simply by the use of a key to probe the joint. But while it is unnecessary for the decision of the present case, I am of opinion that like the respondent in *Wilsons and Clyde Coal Company Ltd v English* the council should in addition be held liable at the organisational level.

[93] The Council is responsible to ensure that the work reaches the level required by the building code. In this case the observations would have been easy to make as little was hidden and therefore the Council failed to ensure that the Building Code was complied with.

[94] The claimants allege negligence on the part of the Council in issuing a Code Compliance Certificate based on the inspections made. Those inspections failed to pick up the changes referred to by Mr Jones and the obvious faults referred to above. The Council however suggests that these changes were not enough to put it on notice.

[95] I find that the changes were sufficient to put the Council on notice and therefore they should not have issued the Code Compliance Certificate. I therefore conclude that it was not reasonable for the Council to issue a Code Compliance Certificate without dealing with those issues. To do so was negligent.

CONTRIBUTORY NEGLIGENCE

[96] The Council submits that the claimants have caused the problems by landscaping round the house leading to soil being placed up against the cladding and failing to provide maintenance, for instance, to clear the gutters and apply sealant. However there is no evidence that landscaping has either caused the leaks nor that the current owners do not properly maintain the building. The Council's submission regarding contributory negligence therefore fails.

COSTINGS

[97] There was some concern expressed about costings as the claimants had constructed an addition to the house. It was suggested that the accounts for the additions were included in the costs for repairs.

[98] The claimants have produced all the accounts and it is clear that they have been separated out. The Council has therefore misread the invoices, confusing those supplied in support of the claim and those supplied to assuage doubts about the allocation of costs between the repairs and the extension.

[99] The WHRS assessor's report identified repairs costing $9,465.00 as follows:-

• Boxed gutters/roof junction	$ 3,950.00
• Skylight	$ 1,050.00
• Spouting and wall junctions	$ 1,595.00
• Ground clearance	$ 2,870.00

[100] The claimants produced accounts of the following:-

• M C Richards, replacement of gibboard, March 07 37.5 hours	$ 1,054.69
• Westaco Construction 13 September 07 – 164 hours	$ 5,989.50
• Al's Plastering 5 November 06	$ 7,230.35
• Paul Foster, Jib stop and paint March 07	$ 1,081.75
• Nelson Marlborough Roofing 25 Feb 08 12 hours	$ 1,998.59
• Nelson Marlborough Roofing 19 March 08 3 hours	$ 505.13
TOTAL	$17,860.01

[101] Further quotes have been provided for the balance of the work identified at the on site meeting. That work includes:

• Building work	$7,732.00
• Work to the heat pumps	$1,324.00
TOTAL	$9,056.00.

[102] The claimants, as part of their contract with the repairers, agreed to supply meals and accommodation for the workers on site.

[103] The claimants also seek $3,101.47 by way of reimbursement for:

• Accommodation for workers on site	$1,650.00
• Concrete and steel on columns	$ 900.00
• Incidental materials	$ 551.47

[104] The Laudermilks contest some of the costs and comments on the costs of the extensions, which are outside this case. They oppose the Marlborough roofing invoices on the grounds that the work undertaken did not repair the problem and was not in line with the assessor's recommendation.

[105] The Laudermilks also submit that Westaco's invoice for $5989.50 should be disallowed as the other invoices cover all the work identified by the assessor.

[106] However in relation to the miscellaneous costs, the Laudermilks argue that at most the charge for $551.47 for materials and $50 for gravel and cement could be allowed, as the other charges are motel rates for workers living on site. I accept that the concrete truck came for more than one purpose and therefore the cost of the transport of the concrete should be reduced to half, namely $326.25.

[107] The Laudermilks also seek to disallow the cost of replacing the concrete path and moving the heat pumps, as no damage can be shown to have resulted from the fact that the path extended higher than the ground level of the garage. They also argue that, contrary to the WHRS assessor, there is no potential for future damage.

[108] The Laudermilks also contest the weathertight nature of the defect in the garage door and argue that the $364.00 for the door flashing should not be allowed.

[109] In summary, the Laudermilks submit that the claim should be in line with the WHRS assessor's report and the most that could be claimed is:

• *M C Richards, replacement of Gib*	*$1,054.69*
• *Al's Plastering 5 Nov 06*	*$5,430.35*
• *Paul Foster (Gib stop and paint) Mar 07*	*$1,081.75*
• *Further work quotes*	*$3,412.50*
• *Reimbursement claim*	*$ 601.47*
Total	*$11,580.70*

[110] The Council however submits that the costs should be $19,400.

[111] Some of the Council's figures do not match the amounts claimed. For instance:-

- the claim for Al's Plastering Ltd is for $5,317.50
- The claim for $900 is for concrete and delivery
- Other sums making up the account for $3,101. 47 were:
  - Three gib sheets $75.27
  - Timber for column $172.20
  - Hardiflex for columns $254
  - Nails, gibstopping compound, paint $50.00

[112] Material from Mr Al Turner of Al's Plastering Ltd indicate that the remedial work consisted of spraying one side of the garage, installing four kick-out flashings, recladding 600 mm base of columns and repairing some minor holes in the existing cladding. From the total account, Mr Turner estimates that the remedial work was valued at $1, 800,00 and the travel costs were about $500.00.

[113] I find that the following amounts are the proper costs of remediating the leaks in the house (all amounts are inclusive of GST):

• M C Richards, replacement of gibboard, March 07	$1,054.69
• Westaco Construction 13 September 07	$5,989.50
• Al's Plastering 5 November 06	$2,300.00
• Paul Foster, Gib stop and paint March 07	$1,081.75
• Nelson Marlborough Roofing 25 Feb 08	$1,998.59
• Nelson Marlborough Roofing 19 March 08	$ 505.13
• M C Reimbursement claim	$ 601.47
• Accommodation for workers on site	$1,650.00
• Concrete and steel on columns	$ 900.00

- Less share of concrete travel ($326.25)
- Incidental materials $ 551.47
- Further works $7,732.00
- Removal and replacement of heat pumps $1,324.00

$25,362.35

RESPONSIBILITY BETWEEN THE PARTIES

First Respondents: Laudermilks (Previous Owners)

[114] The Laudermilks say that they were not negligent and accordingly expected to be indemnified by all the other respondents.

[115] The Laudermilks say that EquusLoco Limited, (which is not a party) was a farming company and contracted with Mr Jones and Mr Rule for the construction of a farmhouse.

[116] The Laudermilks say that neither the company nor the Laudermilks were the builders of the house, the developers, nor were they intending to build the house for sale. The company entered into a contract to construct a farmhouse for the Laudermilks as directors. They therefore submitted that as directors, they relied on the designer and the builder to build the house and the Council to ensure that the building was built to the required standard.

[117] Mr Rule says that part of the problem is that this is a $360,000 house built using $1,200 plans. Methods of construction chosen, such as face fixed polystyrene, were acceptable at that time.

[118] The Laudermilks submit that there is no principle that directors of a company incur a personal duty of care to third parties. They rely on *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 in stating that by creating a limited liability company, they were making it plain to all the world that limited liability was intended.

[119] There has been much discussion about the topic since then. For instance, in *Body Corporate 183523 v Tony Tay & Associates Ltd*, [30 March 2009] HC, Auckland, CIV-2004-404-4824 Priestley J said, after reviewing the intervening cases :-

> [156] Although all those cases revolve around their individual facts, as a general rule directors facing claims in respect of leaky buildings will be exposed in situations where the companies involved are one person or single venture companies or in situations where there are factual findings that the director was personally involved on site and building supervision or architectural and design detail.

[120] The Laudermilks say theirs was not a single-venture company but a long-term farming company. The only input they had was the payment of bills. The Laudermilks deny that they were involved in any changes from the consented designs.

[121] It seems unlikely that they did not notice the differences between the plans and the house as built. The items mentioned by Mr Jones as changes were sufficiently obvious to be noted. I would not have expected Mr Rule to make the changes without consultation. I therefore infer that the changes were made with the consent, if not the request, of the Laudermilks. The Laudermilks therefore have some responsibility for the design of the house.

[122] If it turns out that the Laudermilks, rather than Mr Rule, laid the tiles, they will also have responsibility for the consequences of that decision.

[123] The house was built and given a Code Compliance Certificate by the Council and therefore the Laudermilks say they believed on reasonable grounds that the building had been built to the required standard. The Laudermilks therefore submit that they owe no duty of care such as that outlined in *Chase v de Groot* [1994] 1 NZLR 613; *Watkin v Wilson* [1985] 1 NZLR 666; *Ware v Johnson* [1984] 2 NZLR 518; and *Young v Tomlinson* [1979] 2 NZLR 441.These cases are usually cited as justification for the

proposition that, in the words of Todd (ed) *The Law of Torts In New Zealand* [2] :-

> **6.3.01 *Liability in contract***
>
> In a contract for sale of land, the basic rule in the absence of express stipulation is caveat emptor.

[124] However, Todd continues:-

> ***6.3.02 Liability in tort***
>
> (1) *Creating a defect*
>
> In considering the liability of lessors and vendors in tort, it is necessary to distinguish between those who know of a dangerous defect in premises and let or sell the premises without warning and those who actually create such a dangerous defect. As regards the former, the common law originally granted immunity from suit…
>
> As for the builder/owner, the no liability rule was rejected by the English Court of Appeal in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) and later in the House of Lords in *Anns v London Borough of Merton* [1978] AC 728 (HL)… Any doubts about the matter were removed in *Mt Albert Borough Council v Johnson*.

[125] It would depend on the level of involvement the Laudermilks had in the building as to whether they are liable in tort.

[126] The Laudermilks submit that the company was not a developer and the property was not built for the purposes of sale. The reference is to s 7 of the Building Act 2004 that introduced the term.[3] The definition was required as there is a new offence under s 354 prohibiting a residential property developer from selling a building without a Code Compliance Certificate. This issue is not relevant in the present case.

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[2] (Thomson, Wellington, 2005).

[3] **residential property developer** means a person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
(a) builds the household unit; or
(b) arranges for the household unit to be built; or
(c) acquires the household unit from a person who built it or arranged for it to be built.

[127] More help can be gained from the judgment in *Body Corporate No 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914, where Harrison J said:-

> [31] The word "developer" is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.
>
> [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.

[128] EquusLoco Limited was clearly the developer in this case, while the Laudermilks were the directors of that company. The Laudermilks as occupiers of the house, and as those involved in the planning of the house and changes to the plans, the Laudermilks were involved in the work on behalf of the company, not just as directors. They did or authorised work which was not code compliant. The Laudermilks therefore owed a duty of care to the claimants. They breached that duty of care and are therefore liable to the claimants.

[129] The Laudermilks say that if they did owe a duty of care they were not negligent as they engaged suitably qualified designers and builders and relied on the Council to ensure that the building was built to the required standard. They therefore submitted that they had no reason to believe that this had not been achieved.

[130] I have already found that the building is not built in accordance with the plans and the differences are sufficient for an owner to notice during the course of construction. The Laudermilks knew, or ought to have known, that these changes were made. They clearly had control over the way in which the building was built and therefore they were negligent.

[131] The Laudermilks say they never undertook any groundwork on site nor did they place any soil against the cladding. That seems to be the case with the exception of the path and terrace.

[132] As they are liable, they seek an indemnity from the other respondents.

The Council

[133] The Council denies any duty of care to the Laudermilks on the grounds that the Laudermilks were developers constructing the house for profit. The Council cites *Three Meade Street Ltd* (supra) in support of this contention in arguing that they therefore have no duty to indemnify the Laudermilks.

[134] The Council however seeks indemnity or contribution from the Laudermilks and Mr Rule.

[135] The Council also submits that their responsibility should be confined within a range of 10% to 25% of the amount claimed.

[136] Without further information from Mr Rule and the Laudermilks, it is difficult to make the allocations.

[137] Therefore if the remaining respondents wish me to make an allocation of contribution, they should make an application to the Tribunal by 12 June 2009 with replies by 26 June 2009.

SUMMARY

[138] The ninth respondent, Mr Gary Fyfe is removed.

[139] The claim against the second respondent, Mr Dai Jones, is dismissed

[140] The claim against the fifth respondent, Contour Roofing (Nelson) Limited, is dismissed.

[141] The first, third and fourth respondents, Jan Ernest Laudermilk and Gabriele Wilhelmine Iris Laudermilk, Brent Anthony Rule and the Marlborough District Council, are jointly and severally liable to the claimants, David Laurence Aitken and Brenda Mary Aitken, for the sum of $25,362.35 inclusive of GST. If these respondents wish me to make an allocation of contribution, they must make an application to the Tribunal by 12 June 1009 with replies by 26 June 2009.

DATED the 29th day of May 2009.

Roger Pitchforth
Tribunal Member