IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-0000110

BETWEEN	**WILLIAM & GILLIAN ALLAN** Claimants
AND	**CHRISTCHURCH CITY COUNCIL** First Respondent
AND	**EUROPEAN PLASTER & DESIGN LIMITED** Second Respondent
AND	**BERNARD LAWRENCE O'FAGAN** Third Respondent
AND	**BRENT HOBBS (REMOVED)** Fourth Respondent
AND	**JOHN LINDSAY JAMES CURTIN (REMOVED)** Fifth Respondent
AND	**PETER SLOANE (REMOVED)** Sixth Respondent
AND	**ALEX O'DONNELL** Seventh Respondent

Hearing:	16 June 2009
Closing Submissions:	26 June 2009.
Appearances:	S Dwight for Claimants D Heaney SC for First Respondent G Brodie for Second and Seventh Respondent Third Respondent, in person
Decision:	21 July 2009

DETERMINATION

I. INTRODUCTION

In this claim the remediation work has been completed. A feature of the damage is that it is principally confined to parapets and corbels. A major issue in contention is whether a full reclad was required or would have targeted repairs been adequate.

II. BACKGROUND

[1] Mr and Mrs Allan were looking for a newer home to purchase in 2004. They had previously only lived in old homes. This house was only four and a half years old. Mr and Mrs Allan took possession on 9 July 2004, having paid $407,000.

[2] In 2006 the neighbours at 28 Courtenay Street told the Allans they had been unable to sell their house due to a negative building inspection report that revealed elevated moisture levels. The Allan's immediately engaged Property Check Christchurch to undertake moisture readings which identified possible water ingress problems. Property Check advised the claimants to lodge a claim with the Weathertight Homes Resolution Service and this was done on 24 July 2006. An assessment was carried out by Mr Glennie and he filed a report dated 30 October 2006.

[3] Mr and Mrs Allan decided to undertake repairs prior to the determination of this claim. They entered into an agreement with Ruben Homes to undertake repairs for a sum of $114,984.00. Work commenced in May 2008 supervised by Mr Humm the claimants' expert. Repairs were completed in September 2008 at a cost of $122,606.78.

The Parties

[4] The parties in this case are :

- Mr and Mrs Allan, the claimants and owners of the property.
- Christchurch City Council, the first respondent;
- European Plaster and Design Limited, second respondent being the plasterer, external membrane applicator;
- Bernard O'Fagan, director of Tui Projects & Developments Limited (in liquidation) a development company;
- Alexander O'Donnell, seventh respondent, plasterer and director of the second respondent.

List of Evidence

[5] Outlined below is a list of all the evidence before the Tribunal comprising written and oral components. The following persons gave oral evidence at the hearing-

Experts

(a) Mr Glennie WHRS Assessor
(b) Mr Richardson
(c) Mr Casey
(d) Mr Anticich
(e) Mr Humm

Others

(f) Mr W Allan
(g) Mrs G Allan
(h) Mr A Edwards
(i) Mr J Blanken
(j) Mr N Flay
(k) Mr G Calvert

(l) Mr A O'Donnell

(m) Mr B O'Fagan

Written evidence before the Tribunal:

(i) WHRS documents

(ii) Experts' conference agreement

(iii) Assessor's report

(iv) Procedural orders

Claimants Written Evidence

(v) Witness statement of William Allan dated 18 May 2009

(vi) Witness statement of Gillian Allan dated 18 May 2009

(vii) Brief of evidence of Murray Humm, Expert

(viii) Moisture damage report by Murray Humm

(ix) Witness statement of Murray Humm in reply to respondent's evidence dated 4 June 2009

(x) Witness statement of Noel Casey in reply to respondent's witness statements

(xi) Witness statement of Arthur Edwards in reply to respondent's witness statements, dated 5 June 2009

(xii) Documents relied on:1994 Rockcote Manual,1998 Rockcote Manual, BRANZ appraisal certificate photographs of 24 Courtenay Street

First Respondent's Evidence

(xiii) Witness statement of G Calvert dated 25 May

(xiv) Witness statement of G Calvert in reply dated 8 June 2009

(xv) Witness statement of A Richardson dated 25 May 2009

(xvi) Witness statement of J Blanken dated 25 May 2009

(xvii) Witness statement of N Flay dated 25 May 2009

Second and Seventh Respondents

(xviii) Witness statement of A O'Donnell dated 29 May 2009

(xix) Statement of M Anticich dated 29 May 2009

(xx) Report of M Anticich dated 16 February 2009

(xxi) Revised report of M Anticich.

Hearing

[6] At the commencement of the hearing the Tribunal briefly outlined the hearing process and explained to the parties, one of whom was self represented:

- the inquisitorial slant to the proceedings, with the adjudicator summarising the issues and leading the questioning of the witnesses;
- the evidence being by way of witness statements but subject to cross-examination;
- the timetabling of witnesses;
- the experts being heard as a panel with Mr Humm (the claimants' expert now living in Bahrain) participating via Skype.

Experts' Conference Agreement

[7] The experts' conference is a key component in ensuring the more speedy resolution of weathertight homes claims. The conference, from which counsel are excluded, enables experts to openly debate technical matters and the resulting signed findings agreement is binding on the parties.

[8] The findings at the experts' conference held on Friday 12 June 2009 were:

- It was a leaking building.

- The experts considered five main areas of leaking but unanimously concluded the three following areas were no longer an issue, namely ground clearance, lack of control joints and window sealants.
- The primary areas of leaking were parapets and corbels. The causes were in dispute but included faulty diverters, lack of sealants and plastering defects.
- The second area of proven water damage related to the garage roof. There was contention amongst the experts as to whether there was a leaky home problem or whether this roof problem was attributable to maintenance issues.
- The third area related to a small flat roof and whether deterioration arose from external ingress or internal moisture from the laundry resulting in popping of screws in the substrate below the butynol membrane.

[9] At the hearing various counsel questioned the experts on matters resolved at the experts' conference. However there was no major change in the opinions of the experts which had been recorded at the experts' conference.

Experts' Evidence at Hearing

[10] The summary of the experts' evidence at the hearing is set out below.

Water ingress around parapets and corbels

[11] The experts, Mr Glennie and Mr Casey, agreed that the moisture entry is around the spouting and fascias where they penetrate the EIFS system. Messrs Richardson, Anticich and Humm agreed penetration was around the end of spoutings but did not consider that was the fault of the fascia.

[12] Mr Anticich considered 80% of the water penetration was due to faulty diverters (also described as diverter flashings). Mr Glennie noted some diverters were not properly installed causing water to go into a corner. In the course of the expert panel evidence Mr Humm agreed the diverters were one cause of the leaks. Mr Anticich invited him to put a percentage of the contribution made by the faulty diverters but Mr Humm said he was unable to go beyond that saying it was a contributing factor indicating it was a matter for the Tribunal to determine.

[13] There was a debate amongst the experts as to the role of the sealant and its possible failure to have contributed to the leaking. Mr Anticich considered there was no evidence either way – Mr Humm agreed. Mr Glennie thought there was sufficient evidence to attribute at least some of the blame to the faulty application of sealants.

[14] A question was raised about the framing not being treated. The specifications required treated timber. The use of untreated pine for external framing is a latent weakness but is not a causative factor in the leaking.

[15] There was unanimous agreement that there was insufficient plaster cover in certain areas. However there was disagreement as to whether or to what extent this contributed to the leaks.

Lack of ground clearance

[16] Mr Glennie said this had not caused damage. Mr Humm agreed but noted that the incorrect ground clearance had resulted in a requirement for the installation of a drainage channel around the perimeter of the foundations to comply with the cladding manufacturer's specifications as well as the Building Code. Messrs Casey and Richardson also agreed there was no evidence of damage.

Lack of control joints, windows

[17] The experts unanimously agreed there was no evidence of water ingress due to the lack of control joints, nor in relation to the allegations of a failure to install sill flashings to the windows.

Claim against Christchurch City Council – First Respondent

[18] The claimants allege the Council was negligent in the manner it carried out its inspections and in issuing a Code Compliance Certificate.

Code Compliance Certificate

[19] Council referred to the requirement precedent for the issuing of the Code Compliance Certificate that the building complied with the Building Code and the Building Consent in terms of Section 43 (3) of the Building Act 1991. The well-known authority of *Invercargill City Council v Hamlin*[1] was relied on.

[20] In light of the inspection failures outlined below the Tribunal is inexorably driven to the conclusion that the Council would not have issued a Code Compliance Certificate if the inspections had been up to scratch and thus was negligent in this regard.

Inspection failures

[21] The particular allegations of negligence in the inspection process are as follows:

- The embedding of the spouting in the plaster and lack of sufficient end clearance;
- Insufficient plaster cover at some spouting to cladding junctions;

[1] [1994] 3 NZLR 513.

- Lack of ground clearance;
- Lack of slope to parapets and lack of capping;
- Lack of movement control joints;
- Formation of diverter flashings;
- Lack of any gap to the window sill.

[22] *Plaster in spouting.* The Council strongly argued this was not a matter which could have been seen on inspection as the spouting was at an elevated location and beyond what a reasonable inspector could see from a position on the ground. In one instance this defect was observable from the ground. The refusal of Council inspectors to mount ladders is not an excuse for failing to carry out adequate inspections. In this case, although it was a potential leaky element, this failure is not as significant as it otherwise could have been. This point is further elaborated upon in relation to the claim against the second respondent.

[23] *Ground clearances.* The allegation the Council was negligent in failing to record insufficient ground clearances due to signing off the Code Compliance Certificate before paving and landscaping had been completed has no merit. There is no failure by the Council in this regard.

[24] *Parapet slopes*. The alleged fault in failing to inspect and note a lack of slope to the garage parapets is dealt with more fully below in relation to the claim against the second respondent. Succinctly, there is no substance to this claim.

[25] *Sills*. The lack of gaps to the window sills was rejected as a causative factor by the experts, but further this could not have been seen on inspection. Therefore no fault can be attributed to the Council in this regard.

[26] *Roofing membrane*. It is alleged that the lack of roofing membrane or capping would have been visible on inspection. This is another matter

that does not require determination as there is no evidence of water ingress relating to the roofing membrane or capping.

[27] *Thin plastering*. On the issue of insufficient plaster cover, this should have been noted on inspection as the substrate of polystyrene could be seen. This has not led to any current leaking but could lead to future leaking and so this defect does amount to neglect by the inspector.

[28] *Lack of control joints.* With regard to the lack of movement control in the joints the Tribunal agrees with Mr Heaney SC's submission that although there was a breach of the Code's requirements concerning one wall that did not have the required control joint. There has been no cracking and the absence of the control joint was not causative of leaks. There may have been an inspection failure.

[29] *Diverters*. The most substantive allegation relates to the deformation of diverter flashings. The Council's position is that the building was fortunate that there were diverter flashings, as they were not commonly seen at that time. Unfortunately, these diverter flashings were improperly formed and therefore failed to carry out the task that they were designed to do.

[30] The first respondent's first line of defence was that there was no defect in the diverted flashings. This has already been rejected in the findings of the Tribunal. The second line of defence was as the assessor had commented that the diverters appeared to be functional, this absolved the Council of liability. However he clarified his evidence on this point and agreed that there were major problems with some of the diverters. Here there was a major inspection failure.

Claim Against European Plaster & Design Limited – Second Respondent

[31] The claimants make a number of allegations as to the negligence of the second respondent in erecting the cladding (see [103] of Counsel's Closing Submissions). The Tribunal treats this point as really referring to the plastering, there being no evidence the second respondent installed the cladding itself.

[32] The claimants continue to argue that there was negligence with regard to lack of ground clearances despite the fact that the experts had unanimously agreed that this was not a cause of water ingress. The Tribunal accepts the experts' conclusions in this regard. Further, inadequate ground clearances were not the responsibility of the plasterer. Other particulars in the claimants' allegations against the second respondent were an alleged failure to comply with the Rockcote installation manuals and good trade practice in the following respects:

- embedment of the spouting into the plaster and or insufficient end clearance to allow the cladding to be finished properly;
- insufficient application of plaster above the spouting at some parapet extensions resulting in exposed polystyrene;
- failure to install sill flashings to the windows;
- failure to install a 5mm gap under the window;
- failure to ensure that the parapets were sloped and either capped or with a roofing membrane "carried over".

<u>The "Embedment "of Spouting into the Plaster</u>

[33] This was an area of major contention between the experts. Undoubtedly this reflected poor workmanship and should not have occurred. The question is, "Did it contribute to water ingress?"

[34] Mr Anticich was unequivocal in his evidence. He said there was no indication of moisture penetration at this point. Mr Anticich impressed as a witness. He relied on observable factors to indicate whether or not there had been leaking in the particular area of the spouting. He noted that if there had been such leaking one would have expected to have seen bubbling of the plaster which is caused by moisture getting in behind the plaster and resulting in such bubbling. There was a total absence of such phenomena. He also noted the lack of water staining and cracking which one would expect to see if there had been actual leaking at the spouting and/or facia junctions.

[35] He also emphasised the point that the spouting ends had not penetrated the polystyrene, stating that polystyrene itself is fairly impermeable to water. In response to a question from counsel Mr Anticich observed that if one places a piece of polystyrene in water, it floats as it is extremely buoyant and does not become waterlogged.

[36] Counsel for the claimant argued in her final submissions that Mr Anticich was not a reliable expert as he considered “the embedment of the spouting into the plaster was acceptable practice as long as it was properly sealed”. Mr Anticich did not say it was good practice. He did say it had not caused leaking in this instance. (As noted above, technically the spouting was not embedded in the plaster, rather the plaster was layered on top of the spouting endings giving the impression of embedment.)

[37] Having listened closely to the evidence the Tribunal has come to the conclusion that on the balance of probabilities it is unlikely this fault has contributed to water ingress. In other cases where water ingress has occurred as a result of plaster being layered over spouting, the plaster has more fully enclosed the spouting endings resulting in capillary action and water penetration. This is not the situation here. Of critical significance is the lack of any evidence of major damage to framing in the immediate vicinity of the defect.

[38] However the Tribunal does consider it has been proven on the balance of probabilities there is the possibility of future damage over a longer timeframe thus establishing a ground of negligence.

Other Alleged Faults of Second Respondent

[39] The claimants submitted that European Plaster & Design Limited was negligent in failing to install sill flashings to the windows. The windows had jamb flashings. I make no determination on the sill flashings as all the experts agreed no damage was occasioned by alleged faults concerning flashings. It is noted the house appears to have been meeting the performance requirement of E2 of the Building Code concerning the windows.

[40] As held earlier the allegation of a failure to ensure that the parapets were sloped has no substance. There was no requirement for sloping as suggested by counsel and further the parapets themselves were relatively steeply angled meaning that there was little likelihood of water being retained on the tops of the parapets for any period of time.

Claim Against Mr O'Fagan – Third Respondent

[41] Mr O'Fagan was the sole director and principal shareholder of Tui Projects and Developments Limited (in liquidation), the company that originally purchased the land and developed the site.

[42] The claimants in final submissions make adverse comment on the failure of the third respondent to take steps other than to seek removal. The Tribunal does not see this as a matter of significance. Mr O'Fagan did attend the hearing and gave evidence.

[43] Mr O'Fagan's evidence indicated he was very much involved in the project management and the direction of this particular development. The degree of his involvement was corroborated by the evidence of Mr Sloane who filed an affidavit dated 17 March 2009 in support of an application for Mr Sloane's removal. At paragraph 12 of his affidavit, Mr Sloane stated, "Mr O'Fagan made all significant construction decisions."

[44] Mr O'Fagan acknowledged that he did carry out visits to the site. He confirmed it was a small company. He said his role included the following:

- controlling the timing and coordinating the development process from subdivision to the issuing of titles;
- entering into contracts with various trades;
- negotiating pricing;
- making decisions relating to the development during the course of the building of the project;
- being the project manager.

[45] The claimants submit Mr O'Fagan's position was similar to that of Mr Dalziel in *Chen & Ors v Christchurch City Council & Ors*[2] –who was described as follows:

> "29. The Tribunal considers Mr Dalziel was the orchestrator and conductor of the entire project. He assumed the supervising responsibility of the architect when he directed the architect to confine himself to doing the drawings. When he employed the carpenter on a labour only basis, Mr Dalziel assumed the risks and responsibility a builder/project manager would have otherwise had under a full building contract. He assumed the risk which otherwise may have been carried by such a contractor."

[46] Under questioning from Mr Heaney SC, Mr O'Fagan confirmed he chose not to have the architect carry out supervision work. He thereby took on this responsibility. He also confirmed he did not engage the builder

[2] (8 April 2009) WHT, TRI 2008-101-74, 103-105, 112 & 113, Adjudicator C Ruthe.

pursuant to a contract including a management component. Mr O'Fagan took umbrage at the suggestion that by doing this he was cutting corners. The Tribunal accepts he was not doing a cheapskate job but he was certainly saving significant costs. As noted in the *Chen* decision, by doing this he assumed the risks otherwise carried by a supervising architect and a project-managing builder.

Is Mr O'Fagan personally liable?

[47] Various criteria have been set down by the Courts in relation to the liability of directors. There is the assumption of personal responsibility test enumerated in *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd*[3] at [97] – [100]; *Body Corporate 189855 & Ors v North Shore City Council & Ors (Byron Ave)*[4] at [290]; *Body Corporate 188273 & Ors v Leuschke Group Architects Limited*[5] at [55]; and *Williams v Natural Life Health Foods Ltd*[6] .

[48] Another criteria is control of a project as enunciated in M*orton v Douglas Homes Limited*[7] and *Hartley & Anor v Balemi & Ors*[8] at [80] to [94].

[49] Mr O'Fagan's own evidence said he was very much the driving force of this small limited purpose company. His role is akin to that described by Priestley J in *Body Corporate 183523 & Ors v Tony Tay & Associates Ltd & Ors*[9] stated:

> "[156] Although all those cases [*Drillien, Hartley, Nielsen, Kilham Mews, Byron Ave*] 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 are one person or single venture companies or in situations where there are factual findings that the director was personally involved in site and building supervision or architectural or design detail."

[3] [2005] 1 NZLR 324 (CA).
[4] (25 July 2008) HC, Auckland, CIV 2005-404-5561, Venning J.
[5] (2007) 8 NZCPR 914 (HC), Harrison J.
[6] [1998] 1 WLR 830 (HL).
[7] [1984] 2 NZLR 548 (HC).
[8] (29 March 2007) HC, Auckland, CIV 2006-404-2589, Stevens J.

[50] Mr O'Fagan, in his evidence, said his company had been involved in a number of projects before being put into voluntary liquidation. The Tribunal draws the inference that this was a limited purpose company as described by Priestley J in *Tony Tay* (supra).

[51] The Court of Appeal in *Trevor Ivory Limited v Anderson*[10] emphasised the importance of examining the factual matrix in each case before determining if there was personal responsibility. Having undertaken such an examination of the facts the Tribunal considers Mr O'Fagan has personal liability particularly in light of his direct and pivotal involvement in project managing this project.

Claim Against A O'Donnell – Seventh Respondent

[52] Mr O'Donnell was at all material times a director of the second respondent. The claimants based their claim against Mr O'Donnell solely on his role as director. His own evidence was the plastering work was undertaken by one of his senior employees. The claimants referred to the decisions in *Trevor Ivory* and *Body Corporate 183523 v Tony Tay & Associates Limited (supra*). They submit Mr O'Donnell was effectively the company.

[53] In *Trevor Ivory* Cooke P stated at p520:

> "If a person is identified with a company vis-à-vis third parties, it is reasonable that prima facie the company should be the only party liable."

His Honour then observed:

> "Without venturing further into what some would see as unduly theoretical, if not heterodox, I commit myself to the opinion that, when he formed his company, Mr Ivory made it plain to all the world that limited liability was intended … such a limitation is a common fact of business and, in relation to economic loss and duties of care, the consequences should in my view be accepted in the absence of special circumstances."

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[9] (30 March 2009) HC, Auckland, CIV 2004-404-4824, Priestley J.
[10] [1992] 2 NZLR 517 (CA).

He further said:

> "It is elementary that an incorporated company and any shareholder are separate legal entities, no matter that the shareholder may have absolute control. For New Zealand the leading authority on the point is the decision of the Privy Council in *Lee v Lee's Air Farming Limited* [1961] NZLR 325".

[54] The principles in *Trevor Ivory* were reaffirmed in the recent Court of Appeal decision in *Body Corporate 202254 & Anor v Taylor (Siena Villas)*[11], where William Young P in his judgment delivered on behalf of himself and Arnold J extensively reviewed *Trevor Ivory* and the decision of the House of Lords in *Williams.* William Young P carefully examined the evidence relating to Trevor Ivory Limited*.* At [23] it was noted the company was a one-man company owned and controlled by Mr Trevor Ivory.[12] His Honour then cited Lord Steyn's judgement in *Williams* at 837 – 838:

> "Postulate a food expert who over ten years gains experience in advising customers on his own account. When he incorporates his business as a company and he so advises his customers… Surely, it cannot be right to say that in the new situation his earlier experience on his own account is indicative of an assumption of personal responsibility towards his customers. In the present case there were no personal dealings between Mr Mistlin and the plaintiffs. There were no exchanges or conduct crossing the line which could have conveyed to the plaintiffs that Mr Mistlin was willing to assume personal responsibility to them."

[55] His Honour went on to state:

> "[37] … In this case, the developer was Strata Grey Lynn and not Mr Taylor. There is no authority which supports the proposition that Mr Taylor, as director of the development company, owed a personal and non-delegable duty of care to those who might acquire the units in Siena Villas Development. To impose such a duty on him would be flatly inconsistent with *Trevor Ivory* and *Williams.*"

[56] His Honour observed it would require <u>something special</u> to justify putting the case in the "one man band" class.

[57] What is the factual matrix here? It is certainly similar to that in *Siena Villas*. European Plaster & Design Ltd was incorporated to create a separate legal entity such as described by Cooke P in *Trevor Ivory* (supra).

[11] [2008] NZCA 317 (CA).
[12] Ibid paras [29]-[34].

Mr O'Donnell acted no differently than Mr Taylor of *Siena Villas,* or Mr Ivory in the *Trevor Ivory* case in setting up a company that made it plain to all the world that this was the vehicle undertaking all plaster cladding business transactions, a vehicle still operating today (c.f. Mr O'Fagan's company that was put into voluntary liquidation after a limited number of projects were completed.)

[58] The claimants refer to evidence given by Mr O'Donnell that he visited the site and carried out inspections. He carried out these inspections as an employee of the company. He has not been joined as an employee. It was the company's responsibility to inspect, not his personal responsibility. It has not been proven that Mr O'Donnell acted in any way that would impute personal liability.

III. TOTAL CLAIM

[59] The claimants final claim was as follows:

(i)	Remediation costs	$120,248.80
(ii)	Expert building consultant's fee	$3,582.46
(iii)	Contract works insurance for remediation work	$1,259.86
(iv)	Interest on borrowings including bank fees to 16 June 2009	$10,954.79
(v)	Accommodation costs during remediation	$4,371.75
(vi)	Property check report	$280.00
(vii)	Application fee	$400.00
(viii)	Expert witness costs Mr Humm	$1,700.00
(ix)	Expert witness costs Mr Casey	$3,424.00
(x)	General damages for distress inconvenience etc	$40,000.00
(xi)	Legal costs	$8,811.75
	Total	**$195,033.41**

[60] Uncontested elements of the claim include contract works insurance $1,259.86 and accommodation costs of $4,371.75.

IV. GENERAL DAMAGES

[61] The claimants are seeking $20,000 each in relation to general damages. Mrs Allan's evidence was that she had found it very stressful having discovered her home was a leaking building and she felt strain managing the remedial process. Mr Allan also mentioned anxiety.

[62] Ms Dwight, counsel for the claimants referred to the following decisions in support of her contention that general damages in the range of $20,000 to $25,000 is the norm in all claims under the Weathertight Homes legislation. The cases referred to were: *Tabram & Anor v Slater & Ors*[13] where $12,500 was awarded; *Body Corporate 183523 v Tony Tay & Associates Limited*[14] ; *Body Corporate 191608 & Ors v North Shore City Council & Ors*[15], *Body Corporate 185960 & Ors v North Shore City Council & Ors (Kilham Mews)*[16]; *Body Corporate 188529 v North Shore City Council & Ors (Sunset Terraces) (No.4)*[17].

No Opposition by Counsel

[63] It is recorded that none of the respondents made any submissions opposing an award of general damages.

[64] In *White v Rodney District Council & Ors*[18] accepted the claimants had suffered stress, anxiety, inconvenience and disruption but took into account the time of discovery of the leaks and delays in taking remedial action. In that case $10,000 was awarded to each owner/occupier.

[13] (17 April 2009) WHT, TRI 2007-100-41, Adjudicator S Pezaro.
[14] See n 9 above.
[15] (19 February 2009) HC, Auckland, CIV 2008-404-2358, Asher J.
[16] (22 December 2008) HC, Auckland, CIV 2006-404-3535, Duffy J.
[17] HC, Auckland, CIV 2004-404-3230 (30 September 2008), Heath J.
[18] (4 March 2009) WHT, TRI 2007-100-64, Adjudicator K Kilgour.

[65] In *Crocombe v Devoy*[19] Lang J.referred to the need for evidence. This was also the approach of Stevens J in *Hartley v Beleni & Ors.*[20]

Other factors to be taken into account

[66] In these High Court decisions certain factors were taken into account in determining general damages awards. These are reformatted as questions.

[67] First is there evidence of excessive dampness within the building? No. Secondly is there evidence of fears by the claimants of not being able to meet the cost of repairs? In fact they were able to borrow money to effect repairs. Thirdly did they face the prospect of a potential loss of their home? Fourthly, in 2004 the claimants chose to purchase a monolithically clad home - a recent building innovation with no proven record of durability unlike traditional cladding systems. By the choice they made they demonstrated they were not totally risk adverse and were willing to take on the possible risks associated with any product just out of a prototype stage.

[68] No psychological or medical evidence was produced to indicate that any stress suffered was solely or principally attributable to the leaks.

[69] The Tribunal also considers there must be some proportionality between the physical damage to the home and the amount of general damages awarded. In this case the damages award is $58,800 so to make an award of $40,000 for general damages would be totally disproportionate. Taking all relevant factors into account the Tribunal awards the claimants the sum of $7,500 each.

[19] (29 November 2006) HC, Tauranga, CIV 2005-470-905, Lang J.
[20] See above n 8.

V. REMEDIES

Full Reclad or Targeted Repairs

[70] The law as to establishing the quantum of pecuniary loss "is diminution of value which is normally measured by the reasonable cost of repair " McGregor on Damages" (17th ed) p[48], 2-041 citing *Darbishire v Warran* [1963] 1 WLR 1067, CA at 1071, per Harman LJ. (See also The Law of Torts in New Zealand (5th Edition, S Todd, general editor) at p1120. The Claimants have completed a full reclad of the property. The key issue is whether this is the proven level of the reasonable cost of repair. Counsel for the claimants enumerated a number of points she submits indicated a full reclad was the only viable option available to the claimants. These points included the following:

(a) difficulty in getting a building consent;

(b) unavailability of builders to undertake targeted repairs;

(c) the Casey risk matrix ;

(d) legal precedent established in *Kilham Mews*[21];

(e) good practice/future risk;

(f) cost of the whole reclad similar to targeted repair.

[71] The reasons for the claimants opting for a full reclad was their desire for reassurance that they had done everything to mitigate possible future risk. Mr Humm was coy on reclad noting in his brief at [14] that targeted repairs would not necessarily identify all points of moisture damage.

Building consent

[72] The claimants say the Council would not have or were unlikely to have consented to targeted repairs. The claimants rely on Mr Calvert's

evidence where he said it was not possible to categorically state a building permit would be granted for targeted repairs until such time as the Council had seen the application and supporting documents. This is not an accurate summation of this evidence.

[73] Mr Calvert, in his evidence gave the best articulated outline the Tribunal has heard concerning the legal requirements imposed on a Council as regards targeted repairs and the Council's procedures to ensure compliance with those obligations. He gave evidence that the Christchurch City Council frequently granted building permits for targeted repairs.

[74] He pointed out the Council cannot commit itself in advance to saying a particular targeted repair would be allowed without having had the opportunity to consider the application for the permit and supporting documentation to ensure the proposed works are Code compliant. This is perfectly understandable. The Tribunal has no difficulty in finding that the Christchurch City Council would have favourably considered targeted repairs provided the proposed repairs complied with the Building Code and other related requirements.

Lack of builders

[75] Difficulty in obtaining and contracting builders to undertake targeted repairs was raised by counsel. Mr Edwards, the builder who carried out the reclad, said he would not touch targeted repairs. He said the risk was too great if the repairs failed. His position is respected. However the Tribunal cannot accept there were/are no builders available in the Christchurch region who would undertake targeted repairs. The Tribunal prefers the evidence of Mr Calvert who said targeted repairs have been approved and undertaken by builders in the Christchurch region.

[21] See above n 16.

Casey matrix

[76] The claimants rely on the Casey matrix as an indicator of when a cavity would be required to ensure weathertightness. Mr Casey said that he conducted a risk matrix assessment which came out at 7 meaning that a cavity should be formed behind the cladding necessitating a full reclad. The Tribunal put it to Mr Casey that in his evidence he had said the breaking point was in excess of 7 and on his calculations this building only just reached 7. He said it was prudent to reclad rather than carry out targeted repairs. The Tribunal accepts whilst a full reclad is a superior solution, the issue is whether it is the only solution which would enable the claimants to be put back into the position they would otherwise have been in had it not been for the leaks.

Similarity in costs

[77] In suggesting costs of targeted repairs and full reclad were simular it is assumed Ms Dwight was alluding to Mr Casey's estimate of $101,076.28. Mr Richardson estimated targeted repairs as being in the order of $65,893.84. Mr Glennie the assessor had estimated targeted repairs as being in the order of $63,682.37.

[78] Mr Heaney SC submitted the assessment of the quantum of targeted repairs when first seen and inspected by Mr Glennie was the figure to rely upon. The difference between Mr. Richardson's estimate and that of Mr Glennie is inconsequential. Mr Richardson's figure is adopted by the Tribunal as most accurately estimating the cost of targeted repairs. This being so, plainly a difference in costs of $54,000.00 cannot be seen as insignificant.

Kilham Mews principle

[79] In *Kilham Mews* (supra) Duffy J observed "*I accept the evidence of the plaintiffs' experts that the damage is too widespread to permit targeted*

repairs". Mr Heaney SC submits the damage in this case was minor and isolated to the corbels. This is correct, and quite distinguishable from the *Kilham Mews* facts.

Targeted repairs

[80] It is significant that the assessor originally considered targeted repairs to be the appropriate course to follow. Mr Anticich and Mr Richardson were strongly of the view targeted repairs were appropriate. Mr Heaney SC submitted Mr Humm was perhaps influenced by having been involved in the remediation of the other two units where damage was significantly greater, as well as supervising this remediation thus leading him to taking an ultra cautious approach. After considering all relevant matters the Tribunal has come to the conclusion targeted repairs represented the reasonable cost of repair and should be used for calculating loss.

Betterment- adjustment re targeted repairs

[81] The legal principles governing betterment are to be found in such cases as *J & B Caldwell Ltd v Logan House Retirement Homes Ltd*[22]*; Harbutt's Plasticine Ltd v Wayne Tank & Pump Ltd*[23] and *Byron Ave* (supra) at [374].

[82] Mr Richardson's a schedule of targeted repairs included repainting work he considered amounted to betterment as the building was well due for a repaint. The Tribunal accepts this is betterment and Mr Heaney SC submission the sum of $7,125.68 for painting should therefore be deducted. This means the net recoverable cost by the claimants as being no more than $58,768.16. (It is noted the actual painting costs incurred with the full

[22] [1999] 2 NZLR 99.
[23] [1970] 1 QB 447.

remediation was $19,670.00 so the deduction made here on the basis of a partial reclad is proportionate and appropriate).

VI. CONTRIBUTORY NEGLIGENCE

[83] The first respondent argues that there should be a deduction made in this case for contributory negligence. The submission is based on Mr and Mrs Allan deciding to buy a house in a heated market and having ignored publicity about leaky buildings especially concerning monolithically clad houses. Mr Allan when questioned on this matter said he was aware of some publicity but believed it related to apartments in Auckland and problems with higher precipitation in the North Island. The first respondent relies on the decision of Venning J in *Byron Avenue* where the Court held contributory negligence of 25% was an appropriate deduction. The evidence of the Allans' is accepted namely that they were not sufficiently aware of the degree of risk they were taking when purchasing their monolithically clad home as to amount to contributory negligence on their part. There was no evidenced produced before the tribunal to establish that information on leaky monolithically clad buildings was widely known in Christchurch. There has been no contributory negligence.

VII. PROVEN CLAIM

[84] The claimants proven claim is as follows:

(i)	Remediation costs being rounded to $65,900 (less betterment $7125)	$58,785.00
(ii)	Contract works insurance for remediation work	$1,259.86
(iii)	Interest on borrowings including bank fees to 16 June 2009 (calculated on 50% of interest claimed on original claim of $120,248.00)	$5,477.39
(iv)	Accommodation costs during remediation	$4,371.75

(v)	General damages for distress inconvenience etc	$15,000.00
	TOTAL	**$84,894.00**

APPORTIONMENT/CONTRIBUTION ISSUES

[85] As a result of the negligence referred to above, the first and third respondents are jointly and severally liable for the entire amount of the claim. This means these respondents are concomitant tortfeasors and therefore each is entitled to a contribution from the other according to the relevant responsibilities of the parties. Section 17 of the Law Reform Act 1936 governs issues of liability as between joint tortfeasors and s72 (2) of the Weathertight Homes Resolution Services Act 2006 is the statutory provision empowering the Tribunal to apportion liability.

[86] What yardstick should be applied? In *Patel v Auckland City Council & Ors*[24]

> "[34] …The touchstone is what a Court finds 'to be just and equitable having regard to the extent of that person's responsibility for damage.'
>
> [35] The question of contribution for apportionment of liability is an exercise in judgment. It is not a mathematical exercise. In *British Fame (Owners) v MacGregor (Owners)* [1943] AC197 (HL) at 201, Lord Wright (from whom other members of the House did not demur on this point) emphasised that the assessment was directed at the degree of fault and was different in kind from 'a mere finding of fact in the ordinary sense'. His Lordship described the question as one of 'proportion, of balance and relative emphasis', through weighing different considerations. It was acknowledged that the assessment of contribution involved 'an individual choice or discretion, as to which there may well be differences of opinion by different minds.'"

First respondent's submissions on apportionment

[87] The first respondent submitted the Council ought not to be liable for more than 10% of any loss and further submitted liability between the developer and Mr O'Donnell should be 60% against Mr O'Donnell and 40% against Mr O'Fagan. This was based on the assumption the

[24] (16 June 2009) HC, Auckland, CIV 2009-404-301, Heath J.

embedment of spouting and the plastering was the bulk of the liability. As indicated, the Tribunal has found otherwise. In this case the diverters were the major cause of leaks. The diverter/flashing installer is not a party. His responsibility must therefore be met by the developer. The Tribunal considers the third respondent to be liable for 75% of the claim.

[88] The Council's negligence due to various inspection failures is set at 20%. Based on the evidence I find the first respondent is entitled to a contribution of 80% by the third respondent.

[89] The third respondent is entitled to the contribution of 10% from the first respondent and 15% from the second respondent.

[90] The Tribunal has already determined that 80% of the causation of leaking can be attributed to the failed spreaders. These were installed by the roofer. Unfortunately the roofer is not a party to these proceedings and this responsibility therefore falls to the developer/project manager namely Mr O'Fagan. Mr O'Fagan as developer would have been held liable for 20% were it not for the responsibility he has for the roofer's negligence. He is held to be 70% liable overall.

[91] The plastering company, being the second respondent is held to be liable for 10% for the reasons given earlier.

VIII. RESULT

[92] For the reasons set out in this determination, the Tribunal makes the following orders:

(i) The first respondent Christchurch City Council breached the duty it owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $84,894.00;

(ii) The second respondent, European Plaster & Design Limited breached the duty it owed to the claimants and it is jointly and severally liable to pay the claimants the sum of $84,894.00;

(iii) The third respondent, Bernard Lawrence O'Fagan, breached the duty it owed the claimants and is therefore jointly and severally liable to pay the claimants the sum of $84,894.00;

(iv) The fourth respondent, Brent Hobbs, was previously removed.

(v) The fifth respondent, John Lindsay James Curtin, was previously removed.

(vi) The sixth respondent, Peter Sloane, was previously removed.

(vii) The seventh respondent, Alex O'Donnell, has not been found negligent and accordingly claims against that party are dismissed.

IX. CONCLUSION AND ORDERS

[93] The claimants claim is proved to the extent of $84,894.00. For the reasons set out in this determination the following orders are made:

(i) Christchurch City Council is ordered to pay the claimants the sum of $84,894.00 forthwith. It is entitled to recover a contribution of up to $67,916.20.

(ii) European Plaster & Design Limited is ordered to pay the claimants the sum of $84,894.00 forthwith. It is entitled to recover a contribution of up to $76,304.60.

(iii) Bernard Lawrence O'Fagan is ordered to pay the claimants the sum of $89,894.00 forthwith. He is entitled to recover a contribution of up to $25,468.20.

[94] To summarise, if all the respondents meet their obligations pursuant to the above Orders it will result in the following payments being made by the respondents to the claimants:

The first respondent	$16,978.80
The second respondent	$8,489.40
The third respondent	$59,425.80
Total	**$84,894.00**

The matter of costs will be subject to a separate application, the claimants to obtain a date from the case manager.

DATED this 21st day of July 2009

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C Ruthe

Tribunal Member