IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI-2008-101-000100

BETWEEN	**MARK LEYLAND CHAPMAN** Claimant
AND	**WESTERN BAY OF PLENTY DISTRICT COUNCIL** First Respondent
AND	**FLORA CREATIVE LIMITED** Second Respondent
AND	**BLUEPRINT DESIGN LIMITED (REMOVED)** Third Respondent
AND	**BRIAN AND ROSEMARY COUSINS (REMOVED)** Fourth Respondent
AND	**PAUL HAMILTON CLARKE** Fifth Respondent
AND	**GRAEME BLISSETT** Sixth Respondent
AND	**PETER DAWSON (REMOVED)** Seventh Respondent
AND	**GLEN BRADDOCK** Eighth Respondent
AND	**PETER FLETT** Ninth Respondent

Hearing: Tauranga - 19 August 2009

Appearances: Lisa Gerrard, Counsel for the Claimant
Paul Robertson, Counsel for the First Respondent
Karen Shaw, Counsel for the Fifth Respondent
Nathan Smith, Counsel for the Sixth Respondent
Glen Braddock, the Eighth Respondent
Peter Flett, the Ninth Respondent

Decision: 11 November 2009

DETERMINATION
ADJUDICATOR: R PITCHFORTH

Contents

INTRODUCTION

[1] This is a case concerning a poorly built monolithically clad house with various leaks. Some of the defects caused leaks and some defects were the result of negligence. The main cause of the low quality of the construction was lack of skilled supervisory management, no control over proper sequencing of work and work necessary for the weathertightness of the home being badly done or omitted.

[2] This decision provides for compensation to the claimant for remedial works relating to the damage from leaks as a result of the defects.

THE PARTIES

[3] The parties are:

- The claimant, Mr Mark Leyland Chapman, an airline pilot;
- The first respondent, Western Bay of Plenty District Council (Council), the territorial authority;
- The second respondent, Flora Creative Limited formerly Landmark Homes Ltd (Landmark), a duly incorporated company having its registered office at C/- Coopers Ltd, Level 6, Harrington House, Harrington Street, Tauranga, builders;
- The fifth respondent, Mr Paul Hamilton Clarke, a director of Landmark who was joined on the application of the Council;
- The sixth respondent, Mr Graeme Blissett, who was employed by Landmark and joined on the application of the Council;
- The eighth respondent, Mr Glen Braddock, who was employed as a labour-only contractor by Landmark. Mr Braddock was joined on the application of the Council; and
- The ninth respondent, Mr Peter Flett, who was the director of a plastering company, Coastal Coatings 2000 Ltd, which was a subcontractor. Mr Flett was also joined on the application of the Council.

[4] All the other respondents have been removed from these proceedings.

[5] Mr Chapman claimed in negligence against the Council and Landmark.

[6] No responses were received from the Council or Landmark but the Council filed briefs of evidence.

[7] No formal claims were made by the claimant against Mr Clarke, Mr Blissett, Mr Braddock or Mr Flett. The council made allegations of negligence against each of them during the hearing. It made more formal claims in its closing submissions. These parties were not always fully aware what allegations were being made against them before the hearing. The council provided extensive argument in support of its allegations of negligence in closing submissions.

[8] Mr Clarke and Mr Blissett provided briefs of evidence.

[9] Mr Braddock and Mr Flett provided responses.

FACTUAL BACKGROUND

The Dwelling

[10] In June 2000 the second respondent, Landmark, entered into a contract with the previous owners of the dwelling, Mr and Mrs Cousins to design a house, prepare a set of plans and specifications and construct the building at 263B Tanners Point Rd, RD 1 Kati Kati, Bay of Plenty.

[11] Even though Landmark took no part in the hearing, the fifth respondent, Mr Clarke as director of the company, appeared as a party and

described the activities of Landmark at the time of construction from 2001-2002.

Landmark's Building Operations

[12] According to Mr Clarke, building projects to be undertaken by Landmark would begin with prospective home purchasers talking to a New Home Consultant, that consultant would not be skilled in building but would sell a concept that the buyer found acceptable. In normal circumstances the purchaser would deal almost exclusively with the consultant with one of the company's designers assisting with concept drawings.

[13] Mr Clarke, who was a Registered Master Builder despite having no building experience, would provide a price. Once the design was settled Landmark would arrange for a consultant designer to design the house. Mr Clarke would approve all plans and specifications.

[14] When designs had been prepared an application for building consent would be filed and then the company would enter into a contract with someone to build the house.

[15] A labour-only contractor would normally be employed on an hourly rate to build the house. The labour-only contractor would be supplied with all materials identified by the company as being necessary to complete the work. Most materials were cut to size or issued in specific quantities which the labour-only contractor was expected to use in assembling the house.

[16] A member of Landmark's staff would contact the labour-only contractor from time to time to see how the building was progressing. Such contact was usually by telephone and made approximately once every ten days.

[17] Evidence was given that it was unusual for a member of Landmark's management staff to attend the site during construction. They relied on the

purchaser and the Council to ensure that the building was being constructed at a sufficient standard and in accordance with the plans and the Building Code.

[18] This house could have been built adequately if, during the building process, reference had been made to the various James Hardie manuals. The management should have supplied the manuals on site, supervised their use and made it clear that all difficulties should be referred back to the project supervisor if further advice was needed. It appears this was not done.

[19] It would also have been possible to build the house adequately if the building process had been supervised in the way that Landmark claimed it would be.

[20] Mr Clarke gave evidence as to how he managed Landmark, which included looking after the company's finances, human resource issues, signing contracts, liaising with contractors, solicitors, accountants and oversaw credit issues. Mr Clarke was in day-to-day control of all the company's activities. The evidence was that he kept a tight control on his staff and monitored their activity

[21] At the time the dwelling was constructed, the sixth respondent, Mr Blissett was the 'Construction Manager' and was mostly office bound while dealing with about 35 houses a year. His job consisted of working out quantities required for construction and checking that Carters Construction supplied the correct materials and quantities to the labour-only contractors. Other contractors, such as the plumber, provided their own materials. He was not instructed to project manage any construction.

[22] This way of managing a building business was the basis of a franchise method sold to other similar companies and also for obtaining Grade 3 recognition from Master Build Services Ltd.

[23] A letter from Master Build Services was produced in support. It indicated that Landmark was regraded to Grade 3 on 21 July 1995. This was

granted on the basis that Landmark had had no claims against the 288 Master Build Guarantees that were issued by it. The membership was transferred from the second respondent to Landmark Homes BOP Limited, Mr Clarke's new company, which has taken over the Landmark business.

[24] Mr Clarke said in evidence that the Landmark system is still highly regarded and is known to provide quality homes.

[25] Mr Sherman of the Western Bay of Plenty District Council said that because Landmark produced a good product the Council relied on this reputation when deciding on the level of detail of the inspections.

[26] It is clear from this method of operating that no one was supervising the labour only contractors, the quality of the work or its compliance with the consent or the building code. Mr Clarke had the role, he did not perform it.

Construction of the claimant's dwelling

[27] After entering into a contract with Mr and Mrs Cousins, Landmark under the control of Mr Clarke, constructed the house, managed the project and engaged a labour-only contractor and subcontractors. The work started in July 2000.

[28] Landmark prepared plans and 18 sheets of details.

[29] Mr Blissett, on instructions from Mr Clarke, and as an agent for Mr and Mrs Cousins, submitted an application to the Council for building consent in relation to the construction of the house.

[30] There were variations to the plans but on 14 July 2000 the Council issued a building consent for the construction of the house to Mr and Mrs Cousins.

[31] Mr Braddock was engaged as a labour-only contractor to build the house to the plans and specifications. His contract with Landmark made it clear that he was employed as a labour-only carpenter. He had no discretion.

[32] Landmark also provided a kitset for Mr Braddock to use to erect the dwelling. Mr Braddock was only allowed to use the materials supplied by Landmark to build the house.

[33] A schedule of 25 tasks was supplied by Mr Clarke to Mr Braddock relating to the work to be undertaken. Some of the tasks included in the schedule relate to the issues raised in this dispute. Despite that schedule being prescriptive, it did not mention some matters now of concern – such as, the fitting of the windows.

[34] Help was not readily available. During construction Mr Blissett, as the Construction Manager, was only able to be contacted between 8 and 9 am.

[35] At this stage all concerned should have been using the James Hardie manual with the plans. The manufacturer's recommendations were not followed. Mr Braddock had a general understanding of the contents of the manuals.

[36] A Landmark quality control checklist was produced in evidence. There was no proof that it had been used or that the level of supervision of Mr Braddock that it implied had been exercised.

[37] If the checklist had been used effectively it is likely that most of the defects would have been detected during construction.

[38] The Council inspected the house during construction of the dwelling and on completion on the following dates:

- 27 July 2000: foundations

- 8 August 2000: block fill
- 14 August: footings
- 13 October 2000: preline
- 15 November 2000: drainage
- 18 December 2000: concrete slab
- 22 December 2000 and 13 March 2001: final inspection (failed)
- 6 April 2001: final inspection

[39] On 11 April 2001 the Council issued a Code Compliance Certificate.

[40] On completion, Landmark issued Mr and Mrs Cousins with a Registered Master Builder Construction Certificate.

Purchase of the dwelling

[41] The claimant purchased the property for $550,000.00 by agreement for sale and purchase dated 29 August 2003.

[42] On October 2003 the Master Build Guarantee was transferred to the claimant.

[43] On 10 November 2003 the claimant became the registered proprietor of the land and began living in the house.

[44] On 22 January 2007 the claimant attempted to sell the property. The contract did not proceed as the buyers' pre-purchase inspectors found weathertight issues with the house.

[45] The claimant was then alerted to problems and proceeded to take advice resulting in the present claim.

[46] An assessor's report was applied for on 28 February 2007 and obtained on 24 April 2007.

[47] Remedial work was done on the house and was completed in March 2008. A Code Compliance Certificate was issued on 27 May 2008.

DAMAGE TO THE DWELLING

WHRS Assessor's Report

[48] The assessor's report identified the major issues to be:-

- The monolithic cladding
- The planted EPS sill banding of the aluminium windows
- The installation of the aluminium joinery
- The pergola beam penetration
- Ground clearances at the exterior entrance to the basement living areas

[49] No party disagreed with this assessment.

[50] The assessor found a number of sources of leaks. They were:-

- Cladding fixing and jointing and failure of the mid-story jointing, cracking plaster coating, absence of small areas of plaster coating and paint and inadequate detailing and painting of the coating;
- Failure of the mid-story joint;
- The 'planted-on' EMFS sill detail;
- Aluminium joinery, no sealant behind, flashing and perhaps stop ends;

- Failure to adequately seal or flash the penetration of the pergola support beam. (The beam was not drawn as penetrating the cladding);
- Cracking between the textured coating and the aluminium joinery caused by expansion and contraction at differing rates. The joints are failing to remain durable. Omission of sill under-flashings and inseal strips or flexible sealant to the side jambs allows water penetration to absorb into unprotected fibre-cemented sheeting and transfer to the concealed substructure. Nail fixing of EPS sills is allowing secondary water ingress;
- Lack of clearances allows secondary absorption of rainwater splash-back into the cladding materials and transfer into the framing by capillary action; and
- Poor workmanship – nailing foam band to wall.

[51] The assessor recommended that the building be reclad and that additional damage be exposed and repaired.

Evidence Obtained during Repairs

[52] Mr Hodgson, a building surveyor, acted as engineer for the remedial work to be done. He obtained a schedule of quantities and estimates for the work, appointed a builder, and supervised the remedial work. During such remedial work, Mr Hodgson carefully maintained a full record of the repairs, which included a photographic record, and usefully listed the defects in his evidence. With this list, Mr Hodgson found that not all the defects he listed had actually caused damage.

[53] During remediation Mr Hodgson and an engineer inspected the framing after the cladding was removed and any unsound structure was replaced. Mr Hodgson prepared a detailed report showing the damage to the timber beneath the cladding. The damage varied from minor evidence of leaks to completely decayed timber. The problems were widespread. Mr

Cartwright, an expert called by the claimant, gave similar evidence intended to show the Council's negligence in each of these matters. Both the assessor and Mr Hodgson found that the timber framing was wet, would not remain durable, and that there was timber decay.

[54] Although Mr Hodgson was able to identify the defects noted by the assessor, he also noticed other defects that the assessor had missed when he repaired the property. The Council has helpfully re-sorted these into categories. The Tribunal adopts this adapted list of defects for the purposes of the decision.

[55] Although there is little disagreement as to the damage, the parties do differ on liability.

Repairs

[56] In general terms, the assessor's report was not disagreed with.

[57] Both the assessor and Mr Hodgson recommended recladding the dwelling.

[58] The cost of remedial work was $258,315.09.

[59] The claimant alleges that the builder, Landmark, and the Council owed him a duty of care and were negligent as a result of which he suffered loss.

[60] At the hearing the claimant claimed $343,653.21 being:-

- $252,387.11 for remediation costs,
- consequential costs of $9627.37,
- general damages of $44,000.00 and
- interest costs of 37,638.73

Leaks

Window and joinery issues

Lack of capillary breaks at head flashings

[61] The James Hardie Installation Guide at figure 14 on p 11 recommends a 5 mm gap as one option. This was not achieved partly because the manufacturer's recommendations were not referred to or followed.

[62] Mr Braddock says that the Harditex sheet was always finished 3-5mm above the head flashing to ensure a capillary break and that the plasterer was responsible for filling and sealing around the head flashings and windows to ensure a weathertight finish. The plasterer was asked to ensure the cladding was correct before plastering. Mr Braddock says he had no supervisory role over the plasterers so he therefore cannot be responsible for the defect.

[63] The capillary gap was plastered over. Mr Flett's company did the plastering work. This was observable by the Council inspector who should have noticed it. Mr Clarke would have known of it if proper management systems were in place.

[64] There was no evidence of damage from this defect.

Head flashings improperly installed

Head flashings lacked adequate projections beyond jamb line

[65] The head flashings over windows do not extend out sufficiently – i.e., they extend 20mm rather than 30mm. Mr Blissett ordered the head flashings in lengths and was not involved in cutting them too short.

[66] Parties not involved in the installation may not have noticed the difference in length.

[67] It is not clear that this has caused damage.

[68] However, the Council should have noted the lack of sealing and the other parties should have ensured the work was properly done.

[69] The notch in the Harditex was left unsealed and should have been sealed. This caused damage.

[70] Mr Braddock says he made notches at each end of the Harditex sheet so that he could adjust the head flashing to ensure the correct capillary break. The flashing was installed so that the building paper came down over the up stand of the flashing. It was for the plasterer to seal around the window so he has no liability.

[71] Mr Braddock should have ensured that the slots at the ends of the flashings were sealed.

[72] The plasterer should have ensured that the slots were sealed before they applied the texture coating either by doing it himself or arranging for Mr Braddock to do it.

[73] Mr Clarke failed to provide proper management.

Head flashings lacked stop-ending, particularly on raking windows

[74] There were no stop ends on the head flashings and there was no requirement for stop ends at that time.

[75] The Council was not responsible for enforcing non-existent requirements. Good trade practice would have required them from Mr Clarke as the Construction Manager of the project.

[76] Mr Braddock did not know about stop ends and they were not specified in the James Hardie manual. The flashings were installed in accordance with the requirements of the manual.

[77] There was no negligence in failing to supply stop ends.

[78] In relation to the raking windows Mr Braddock says that there was no specification in the James Hardie manual and no detail in the plans.

[79] Mr Braddock submits that the labour only builder should not be liable when there are no specifications or detailing. At the hearing Mr Braddock agreed he should ask the employer in these circumstances but he did not.

[80] Mr Braddock was negligent in this instance for proceeding when he should have sought assistance.

[81] The labour only builder was given no instructions concerning the raked window, a matter about which the James Hardie manual gives no advice. Mr Clarke should have provided more details to allow the work to be done properly.

[82] Water has entered the building and caused damage as a result of these deficiencies.

Lack of adequate jamb seals behind joinery facings

Exposed cove sealants at window jamb sections

[83] Mr Braddock explained how this situation arose. The windows were installed with a 2mm gap between the back of the window tab and the

Hardibacker. A bead of silicone was to have been applied behind and against the edge of the window. This method was chosen because of the size of the windows being installed and the awkwardness of installing windows with beads of silicone behind the window staying intact.

[84] The plasterer was to seal the window before the texture coating was applied. In fact the sealant was only applied to the side of the window.

[85] No sealant was found behind the joinery facings. Water has tracked around the windows in the vicinity of the window jambs and caused damage.

[86] Unless the Council was present when the windows were installed, it would not know about the lack of sealant. There is no evidence that it knew or ought to have known of the problem.

[87] Mr Clarke should have ensured that the sealant was properly applied. He could have been present or arranged for Mr Blissett to be on site sufficiently often to inspect critical work. He should have ensured that the installation guide was followed. This is an example of a lack of project supervision and the difficulty of relying on labour only contractors to cooperate and communicate without giving them any formal power, authority or responsibility. Mr Clarke should have provided or arranged for proper management. Lack of supervision is a major cause of the problem.

No form of sill flashings were utilised

[88] At the time of construction there was no building code requirement for sill flashings. Sealant was commonly used: see E2/AS1 par 3.0.2. The James Hardie installation guide did not require sill flashings but said that they gave good long-term protection.

[89] No actual damage was proved.

[90] All parties were only required to comply with acceptable solutions. They have done so and there is no liability.

Improper reliance on sealants at critical junctions where the sealants have not been as durable as the building elements to which the sealing abuts and have therefore failed.

[91] Sealant was used throughout the house. The requirement for sealant was that it should be maintained including replacement as necessary. The durability requirements of the code were based on regular maintenance.

[92] The sealant has failed causing leaks and damage.

[93] There was no proof of the required maintenance.

[94] The Council could not oppose sealants as they were believed at the time to meet the performance requirements of the building code.

[95] Mr Clarke was responsible for instructing Messrs Blissett and Braddock to ensure that sealant was properly applied. He did not.

[96] The owner is responsible for maintenance generally and sealants in particular. The consequences of lack of maintenance increase the propensity to leak.

[97] I have assessed the percentage of liability for lack of maintenance at 10% to recognise this element. Proper maintenance would have slowed down the decay process.

All drainage plain building wrap (building paper), where installed, was incorrectly installed behind the head flashings.

[98] The head flashings should have deflected the surface water.

[99] Mr Braddock says the building wrap has only been shown to be behind two head flashings and they were in areas protected by soffits so would not leak.

[100] No direct proof of damage from this defect was shown.

Style of window

[101] Although not specifically listed as a fault by the assessor, it is clear from Mr Hodgson's report and photos that Landmark had supplied Mr Braddock with windows with a minimal projection of aluminium facing over the weatherboards. They were however deemed fit for purpose at the time.

Cladding and Building Issues

Building wrap was not installed in some locations

Improper piecing-in of fibre-cement sheet backing

Poor corner jointing of cement board cladding

Poorly formed junctions of the cladding at the base of the cladding

Fibre cement sheets fixed hard back against masonry foundation lacking required clearances

[102] Small pieces of Harditex were used in some places. This is acceptable if care was taken in jointing them. Poor workmanship and lack of building wrap has led to defects.

[103] Mr Hodgson reported leaks.

[104] The Council's inspection regime does not require it to inspect each sheet of Harditex to ensure that it is properly applied and jointed. Mr Clarke should have ensured that good trade practice was followed.

[105] Mr Braddock says that there was no wrap in only one area, over the border joist. It played no part in water penetration. He also says that the deck was built before the texture coating occurred. Fibre cement was installed and sealed to protect the border joist on the house. Ten mm packers were then bolted down between the deck and the border joist on the house to ensure adequate drainage. The fibre cement was sealed and the bolt holes filled with silicone before building the deck with proper clearances to allow drainage. Mr Braddock says that the setting out for the framing was 6 mm against concrete floors and block walls. Movement can be due to timber shrinkage.

[106] The company or Mr Clarke exercised no quality control. It became more likely that there would be defects.

[107] Mr Flett's company should have noticed that the Harditex surface was not appropriate and should have made good before it started plastering.

Improper positioning of horizontal sheet-cladding junctions

Unsealed butt joints on inter-story PVC 'H" flashing

Poorly detailed decorative polyform band collected and retained moisture at the mid floor junction

[108] The James Hardie Installation Manual recommends various ways of forming horizontal control joints.

[109] The assessor did not find a problem upon visual inspection. The joint had been formed by a band covering the junction.

[110] In the course of remedial work it was discovered that the band had not been properly constructed.

[111] Mr Braddock points out that the polystyrene decorative banding covering the junction was sealed top and bottom not allowing the moisture to escape. The banding acted like a sponge and forced moisture into the junction.

[112] The Council and the assessor both accepted the control joint upon visual inspection. It is unlikely that the Council would have been alerted to any irregularity.

[113] Mr Braddock sealed the bottom of Harditex sheets with primer which was standard practice

[114] The plasterers plastered over the bottom of the board. This defect is attributable to the plasterers.

[115] Mr Clarke should have ensured that details were provided to those building the dwelling to ensure that construction was carried out properly.

Planted EPS sill bands to the windows

Improper installation of the decorative polystyrene window sills

[116] Plant-ons are a decorative feature and not usually considered of interest by a building inspector.

[117] Mr Hodgson was able to show that the partial encasement of the aluminium section in the coatings caused cracking with dissimilar expansion and contraction. The polyform can then become saturated and acts as a

reservoir slowly transferring moisture through the porous fibre cement sheet backing and into the structure.

[118] Mr Clarke provided his employees with no instructions as to the installation of the plant-ons.

[119] Mr Braddock left it for the plasterer to do.

[120] The plasterer and Mr Clarke are responsible for this problem.

Aluminium window facings (at sills) embedded in coatings

[121] Window facings are embedded in the texture coating. Water should be kept out by sealant or flashing behind window reveals. Any cracks should be remedied during normal maintenance.

[122] There was no proof of leaks or negligence.

Pergola

Pergola beam attachments penetrating cladding were not flashed with an appropriate boot flashing or suitable metal saddle flashings

[123] The pergola was designed so that the beam did not penetrate the cladding. Mr Clarke should have ensured that the building was built as required by the plan.

[124] The pergola beams were flashed using sealant, which was appropriate at the time. There were no other flashing requirements.

[125] There is damage near the pergola penetration points. Mr Hodgson was able to push his wrecking bar though the full depth of the rotten stud with hand pressure only.

[126] The Council would have been satisfied with the sealant if seen at inspection. They did not notice that the pergola was not constructed in accordance with the plans.

[127] Mr Clarke did not obtain design advice or ensure that the seal was permanent.

[128] Mr Braddock constructed the pergola beam contrary to the plans. This was negligent.

[129] No supervisor or manager noted this variation from the plans. Mr Clarke should have done this.

Ground clearances

Insufficient clearance of timber decking away from wall claddings

Insufficient ground clearances in parts

[130] There are areas of high ground levels.

[131] There is no clear evidence of when the pavers were laid.

[132] The claimant should have had access to the cautionary notes in the master services handbook warning against piling soil or other garden materials against the walls.

[133] Mr Clarke or his employees should have checked the ground levels before leaving the site.

[134] Mr Braddock says the site was laid out with a 50mm allowance for topsoil.

[135] The evidence relating to when these levels were raised is inconclusive. There is no proof of negligence on behalf of any of the respondents.

Roof issues

Inadequately installed apron flashings lacking effective cover and 'kickouts'.

[136] Apron flashings have been installed without sufficient cover. There are no kick outs in place. They were not a building code requirement at the time.

[137] The Council was not empowered to require kick out flashings.

[138] Mr Clarke employed the roofer and should have supervised the work.

[139] The plasterer should not have applied the plaster when the flashings were not in place.

Inadequate projection of roof tiles into guttering

[140] Mr Hodgson gave evidence (para 5.181) that water may have run behind the guttering over the fascia board and down the face of the wall cladding.

[141] The defect does not seem to have caused damage. It would have become obvious if the gutters were blocked so the occupant would know that they should clean the gutters.

[142] The council says that it would be unlikely to have found this problem in a large house with a complicated roof.

[143] Mr Clarke should have ensured proper supervision during the construction of a difficult roof.

General

Insufficient sub-floor ventilation

[144] It was alleged that there was insufficient sub floor ventilation.

[145] Mr Braddock built it to the requirements of the day and the Council passed it on inspection.

[146] There is no proof of negligence against any respondent.

CAUSES OF ACTION AGAINST RESPONDENTS

Liability of the Council

[147] The claimant says the Council breached its duty of care in failing to satisfy itself on reasonable grounds that the provisions of the Building Code and all relevant professional standards would be met if the house were constructed in accordance with the plans and specifications. They should not have approved the plans.

[148] The Council admitted that it owed a duty of care to the claimant when it processed and issued the application for the building consent, undertook inspections and issued the code compliance certificate. It denies a duty of care to any other occupant.

[149] The plans were not of the type which would be acceptable today, but were usual and adequate at the time. The building could have been constructed in a weathertight manner based on the plans.

[150] The Council was not negligent in approving the plans.

[151] The claimant says that the Council breached its duty of care as set out in s 43(3) of the Building Act 1991 as it could not be satisfied on reasonable grounds that the house met the requirements of the Act and the Building Code. If it had exercised reasonable care and skill the Council would have noticed the defects. The Council either failed to notice the defects or failed to issue a notice to rectify. The defects caused moisture ingress. They allege that the Council encouraged poor workmanship.

[152] The Council says that the workmanship issues could not have been detected in the course of council inspection no matter how thorough they were. The Council was entitled to be reasonably satisfied that the house met the performance requirements of the building code when it issued the Code Compliance Certificate.

[153] The Council relied on Landmark to maintain quality. This was a procedure adopted after extensive experience with Landmark. The council was accordingly less thorough with its inspection process.

[154] The Council was not required to act as a clerk of works. However they did allow some practices which they should not have done. Inspections were less thorough because of the expectation that Landmark were high quality builders. They were not. The council misjudged the competence of this large scale provider.

[155] I find that this amounted to negligence. However, not all the failures led to leaks nor were all the leaks related to the council's negligence.

Council's affirmative defences – Contributory Negligence

[156] The Council pleaded that the claimant was contributorily negligent in purchasing a large texture coated house without making any enquiries. The

nationwide publicity about dangers inherent in houses of that construction should have alerted the claimant.

[157] Failure to obtain a pre-purchase report is not contributory negligence. This was dealt with in *Sunset Terraces*[1] at paras 577-578. Similarly, failure to obtain professional advice prior to purchase is not contributory negligence – see *Morton v Douglas Homes Ltd*.[2]

[158] In *Sunset Terraces*, Heath J. said:-

> [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 Ms Grant'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.

[159] In *Morton v Douglas Homes Ltd* the High Court stated at 580 that:

> [E]ven if, contrary to my view, Mrs Morton and Mrs Friend were at fault in not obtaining professional advice, that did not in any way contribute to the damage they have suffered.

[160] There is no requirement placed upon prospective owners to obtain pre-purchase reports. Mr Chapman was buying a nearly new house

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[1] Body Corporate 188529 & Ors v North Shore City Council & Ors (No. 3) [2008] 3 NZLR 479 (HC), Heath J.

[2] [1984] 2 NZLR 548 (HC) at 580.

constructed by a well-known company with a good reputation, which was subject to a Master Build Guarantee and with a Code Compliance Certificate. The house was of tidy appearance.

[161] Mr Chapman was not to know that the company's reputation was unwarranted and the guarantee would not help him.

[162] I do not find the claimant was negligent in the way the house was purchased.

[163] The Council does not accept without justification the remedial costs alleged by the claimant.

[164] The Council says that the claimant has not maintained the building. This matter has been dealt with.

Contribution

[165] The Council seeks contribution from the other respondents.

Liability of the Builder, Landmark

[166] The claimant says that the builder failed to exercise reasonable care in the construction of the building in that it failed to ensure that the construction conformed to the Building Code. The defects resulted in the ingress of moisture.

[167] Landmark did not contest these allegations. Based on the evidence, I find that Landmark is liable to the claimant for the amount of the claim as detailed below.

Liability of Mr Paul Hamilton Clarke

[168] The Council alleges that Mr Clarke was negligent in that he:-

- was the manager of the business responsible for the systems put in place to ensure that Landmark produced quality homes;
- personally checked and approved the plans and should have appreciated the need for additional design input;
- engaged labour only contractors and ought to have ensured that they were competent;
- organised the project management.

[169] Mr Clarke, in his role as controller of a small company, signed off the building contract, the MasterBuild contract, variation orders, plans specifications, arranged subcontractors, visited the site at least once, liaised with the owners over construction issues, signed the deck variation drawing, calculated dimension of driveway, negotiated and signed off agreement following foundation misplacement, signed a Master Builder 'Construction Certificate" certifying the work of the sub trades and wrote to the owners advising them of completion and provided a maintenance list.

[170] By engaging labour-only contractors it was inevitable that there would be problems due to inadequacies in the drawings and the lack of quality control. Mr Clarke's actions led directly to the defects caused either by inadequate design or inadequate project management.

[171] Mr Clarke, although exercising firm control over the company and its operations, was under the handicap of being unqualified and accordingly could not satisfactorily supervise building work. Even if he had the skills, exercising management by occasional phone calls was not sufficient. He did not use his quality control forms or conduct an inspection. The evidence was that he paid subcontractors without checking that the work was done or done to the proper standard for a quality product.

[172] He employed Mr Blissett but so managed his employee's time that Mr Blissett undertook no building management duties.

[173] Mr Clarke argued that engaging labour only contractors would not make him liable as a director. He had engaged Mr Braddock in the past and would not have any reason to doubt his competence at the time of contracting. Mr Clarke said he provided no mechanism for supervision.

[174] Mr Clarke was negligent in not providing the day to day management of the project or not appointing a competent person to do so.

[175] The James Hardie manuals should have been available on site and referred to. This should have been required by management.

[176] There should have been a viable mechanism in place for dealing with matters which were not made clear on the plans. There was no such mechanism. For example, the design which Mr Clarke had approved did not have sufficient detail as to the way in which the raking window was to be constructed. He did not check that Mr Braddock knew how to deal with the design nor did he give instructions as to how Harditex was to be installed round this window. He failed to provide expected project management. He discouraged enquiry by restricting the contractor to access of one hour per day. This was careless management.

[177] During his evidence Mr Clarke indicated that his quality control system was that if the builders on site, the council inspectors and the client did not complain the quality was high. Landmark held itself out to be a builder of good quality. To achieve that outcome either luck or a quality management programme would be necessary. There was no quality management programme. Mr Clarke should have supplied that management.

[178] A year after this house was built Landmark employed Frans Bouckan to ensure quality standards and Mr Blisset's role was extended to include regular contact with the owners, builders and sub-trades. None of this

necessary management was in place at the time of the construction of this house.

[179] The Council started its argument with the usual quote from *Morton v Douglas Homes Limited* at p595:

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with who he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

[180] The Council followed this line in *Sienna Villas*[3] and *Body Corporate 199348 & Ors v Nielsen*.[4] In the latter case the Judge said at para [57] :-

> There was no evidence to suggest that Mr Greg Nielsen had put into place any quality control measures to ensure building work was completed to a standard required for the Council to issue a code compliance certificate. Nor was there any evidence that Mr Greg Neilson gave appropriate direction on site or check workmanship in a manner which could have identified any work not completed in accordance with approved plans and specifications.

[181] I find that Mr Clarke was in precisely the same position.

[182] Duffy J in *Kilham Mews*[5] said at para [102] :-

> [102] In principle, I can see no reason why someone who takes on the task of managing the construction of a residential development should not incur the same liability as is imposed on contractors, architects and engineers. In this regard a project manager is no different from any other contractor or subcontractor who

[3] Body Corporate 202254 & Anor v Taylor [2008] NZCA 317 per Chambers J.

[4] (3 December 2008) HC, Auckland, CIV 2004-404-3989, Heath J.

[5] (22 December 2008) HC, Auckland, CIV 2006-404-3535.

> performs a role in the construction process that is capable of affecting the quality of the result…

[183] Mr Clarke's argument was that he did nothing so he could not be negligent or liable.

[184] Mr Clarke relies on *Drillen v Tubberty*[6] for the proposition that a director may leave it to building subcontractors to get on with the building work themselves without supervision and not be liable. That was a case discussing the evidence needed for summary judgment.

[185] Faire AJ said:

> [40] For present purposes it is only necessary to make two points as to the scope of the assumption of responsibility requirement.
>
> [41] First, where the liability of directors for breach of a personal duty of care in negligence is at issue, whether there has been a personal assumption of responsibility has particular prominence as the focus of the enquiry, as held in *Trevor Ivory.* This extends to cases involving directors' liability for defective buildings. At 523 Cooke P referred to *Morton,* which involved precisely this situation, and accepted that: on the particular facts there was an assumption of responsibility.
>
> [42] Secondly, the case law subsequent to *Trevor Ivory* referred to by Mr Fardell (as set out at [30]) has affirmed personal assumption of responsibility as a requirement of directors' personal liability in respect of a variety of duties of care. Notably, in *Mahon v Crockett* (1999) 8 NZCLC 262,043, the Court of Appeal acknowledged at [9]-[12] that the requirement of assumption of responsibility, as articulated in *Trevor Ivory,* generally applies to tortious causes of action against directors.
>
> [43] Assumption of responsibility in negligent construction cases in respect of the task undertaken is not, by itself sufficient to ground liability. There must be something further as was explained by Glazebook J in *Rolls Royce* at [100].

[6] (2005) 6 NZCPR 470 (HC) Faire AJ.

[186] Mr Clarke says that placing too much store on labour only contractors and thinking that quality control procedures put in place were working were failures of the company, not Mr Clarke personally.

[187] Mr Clarke also relies on *Body Corporate 183523 & Ors v Tony Tay & Associates Ltd & Ors*,[7] particularly at para 146 where Priestley J stated that:

> [146] Clearly the teams, the personnel, the systems of control, supervision and quality checks which TTA had in place with the Ellerslie Gardens project, were inadequate. Clear construction defects, errors and design defects, particularly as they related to the Harditex cladding and to the balcony, window, and weather proofing aspects resulted. TTA failed to detect the defects which should have been evident at the time. But in none of these Ellerslie Gardens functions involving TTA is there any evidence that Mr Tay personally was actively engaged or directly involved.

[188] However, this paragraph follows Priestley J's discussion of the depth of organisation in that case, a depth that was clearly missing in the present case.

[189] Mr Clarke was negligent in that being the person responsible for the management of the projects he did nothing, allowing the system to construct a house which ultimately leaked.

Liability of Mr Graeme Blissett

[190] The Council alleges that Mr Blissett was responsible for:-

- Purchasing appropriate materials;
- Ensuring the correct sequence of work
- Ensuring good trade practice
- Requesting/arranging additional design input as necessary.

[7] (30 March 2009) HC, Auckland, CIV 2004-404-4824.

[191] Mr Blissett's response is that he had no involvement with this building project and it was not his role to do so.

[192] Mr Blissett relied on the affidavit of Mr and Mrs Cousins and their photographic evidence of those involved in the building, the fact that he had no role in relation to plans, specifications, authorisations of variations, and progress payment claims.

[193] Mr Braddock did not recall him visiting the site.

[194] None of the correspondence indicates that Mr Blissett was involved.

[195] Mr Blisset's uncontested evidence was that he was managing supplies for up to 35 houses and spent most of his time checking the Carters materials lists.

[196] There is no evidence of involvement, a duty of care or negligence by Mr Blissett. The claim against him is therefore dismissed.

Liability of Mr Glen Braddock

[197] Mr Braddock was a labour only contract builder employed for carpentry duties. He was not empowered to be a site supervisor and did not supervise other trades

[198] The Council alleges that Mr Braddock was responsible for the building work he undertook and the building work undertaken by those whom he employed.

[199] Mr Braddock accepted that he had wrongly installed the pergola and raking window.

[200] He disputes any responsibility for the silicone beading behind the windows or elsewhere. It is expected to fail after about 5 years and Mr Braddock claims that that is not his responsibility.

[201] The length of the head flashing detail would not affect the weathertightness.

[202] Ground levels were dealt with after Mr Braddock left the site.

[203] Mr Braddock's level of autonomy was slight. The matters he does accept that he was careless about were limited.

[204] Based on the evidence outlined above and his limited responsibility I put Mr Braddock's liability at 10% of the net cost of remediation.

Liability of Mr Peter Flett

[205] The Council alleges that Mr Flett was responsible for:-

- Supervising his men to ensure that they applied the texture coating in accordance with the recommendations from James Hardie
- The construction of the decorative polystyrene horizontal band and the construction of the decorative polystyrene sills.

[206] Mr Flett's evidence was that he was an investor director in Coastal Coatings Ltd. He knew nothing about plastering and exercised only his role as a director. He learned to price work, organise staff gangs for work and purchase materials. He would visit sites only to deliver materials, ensure his staff were there working and at inspections where, if the work was approved, the company would be paid.

[207] His business was relatively large, plastering work was supervised by skilled employees, and his role was, where necessary, to collect outstanding accounts. He relied on Mr Clarke to indicate if there were quality issues.

[208] Mr Flett has learned subsequently that some cladding was not properly fixed. That being the case, the plaster system could not make the building waterproof. Mr Clarke should have dealt with this before asking for the plastering to be done.

[209] Mr Flett had a limited role in the plastering. The defects in the plastering which were the result of negligent work by the company were limited.

[210] The assessor referred to the lack of paint which is a necessary part of the plaster system. Mr Flett does not seem to have been responsible for this.

[211] Most of the damage due to plastering defects was the responsibility of Coastal Coatings Limited. However, Mr Flett's failure to manage the company so that the items that should have been sealed were noted is his responsibility. I put Mr Flett's liability at 10% of the net cost of remediation.

QUANTUM

[212] The cost of the remedial work originally claimed was $258,315.09. The claimant reduced the claim by $5,927.98 during the course of the case.

[213] The respondents contested some of the cost of the work. This aspect of the dispute was encapsulated in a helpful memorandum of the meeting between Messrs Ewen and White on 25 May 2009.

[214] Kwanto charged $3,337.50 for quantity surveying and related work. The respondents contested the sum of $3,375.00 being the schedule for the tender which was not used. As the construction was on a charge-up basis

and the quantity surveyor's services were not used for the remediation I agree that this sum should be deducted.

[215] Yelden Builders' charges were $195,144.94. The respondents contest the following items.

[216] The builders charged $15,705.26 to reconstruct the shower unit. The work is described as repairs to floor, inner walls (excluding exterior wall framing and interior tiling and pipework).

[217] Normally the cost of interior fittings such as a shower would not be included. The shower was leaking but this was not as a result of weathertight issues. However, it is clear that the weathertight repairs would have destroyed much of the tiling on the outer wall.

[218] The interior damage would have required the expenditure of $3,305.26 in any event for plumbing and bathroom installation. That claim is disallowed. The replacement of the exterior wall due to leaks was part of the process. I allocate 50% of the cost of the repair to the exterior. The sum of $6,200.00 therefore should be deducted from the claim.

[219] The claim for a new light fitting, $275.96, is disallowed on the grounds it is unrelated to the leaks.

[220] The claim for $1,778.63 for pipe rail panels is disallowed. These are a safety feature outside the building and had no effect on weathertightness issues.

[221] The painting cost was $16,500.00. There is an element of betterment in painting the new cladding. In the ordinary course of events the claimants would have been faced with the cost of painting in any event. Based on the evidence I accept the submission that the expected life expired was 75% and therefore the sum of $12,375.00 should be deducted

[222] It was submitted that a 15% builders' margin was high. The claimant says that was what they agreed to and therefore that should be awarded. A 10% margin is more usual. There was no evidence to show that the claimant's builder was more successful than average when dealing with procurement. The margin is reduced to $2,873.00.

[223] The amount to be deducted is therefore $28,809.85

[224] The total amount of the claim for remediation was $252,387.11

[225] With adjustments the cost of remediation is now $223,577.26

[226] The claimant sought $3,068.50 for future work being $2,250 for a shade sail to replace the pergola and $818.50 for Venetian blinds. The other parties did not agree that they were weathertight issues. I agree.

[227] Consequential costs covering moving, rental, cleaning and similar items amounting to $9,627.37 were not contested.

Interest

[228] The Chapmans had two loans a TSB mortgage for $170,000 and a family loan of $40,000 from 1 January 2008 reducing to $35,000 from 1 February 2008 until 30 September 2008. This loan exceeds the amount of the damages awarded.

[229] The claimant will need to recalculate the interest based on the allowed net amount of the claim.

General damages

[230] The claimant sought $44,000.00 for general damages.

[231] The grounds for such an application are based on the claimant's analysis of the cases and its distillation of four principles.

[232] The first is that the court assumes that a level of distress arises out of the fact of discovering and living in a leaky home. Mr Chapman certainly will have suffered from some distress when he discovered the leaky home. However, it was not sufficient to trigger the requirement that he tell his employer that his stress may affect his flying. He also spent much of the time away from the site; either living at his parent's home or away at work.

[233] Second the process of remediation will be a source of stress arising out of a sense of uncertainty as to the outcome. Of the remedial work and the dislocation created by the need for the remedial works. In this case Mr Chapman had appointed competent contractors to do the work and was off site so there was no dislocation apart from living in rental accommodation.

[234] Third, awards may be given on evidence given by the plaintiff's alone; there is no requirement for corroborating evidence. The only evidence I have is that of the claimant. None of the evidence indicates why he was so stressed that an award should be made in the amount claimed. Although other evidence is not required, the claimant will have to accept the consequences of not calling specialist evidence to show extraordinary stress.

[235] Fourth, respondents rarely challenge evidence of claimants since it is so personal that there is not counter evidence that can be led to contradict it. I accept that often respondents do not challenge small claims as the cost of professional advice and expert witnesses in support may exceed the value of the claim. There is often an element of compassion. However, if challenged, the claimant is put to the proof. Mr Chapman's evidence of stress was slight.

[236] In relation to Mr Chapman's claim it was submitted by the Council that:

- the house had little water ingress problem,

- he elected to move out while repairs were carried out and the cost of accommodation has been claimed,
- the claimant worked away from home and was therefore not subject to the day to day stress of living in a leaky house.

[237] I do not think that the cases show that if a person successfully claims for remediation of a leaky house that person, and those that they claim on behalf of, whether or not they are parties to the claim, being family members, fellow trustees or those with some other interest, whether an occupant of the leaky property or not, are entitled to substantial damages on their unsupported evidence. A claim for $44,000 would, one would expect, be supported by expert evidence of extraordinary distress caused by the respondents' negligence.

[238] In Dicks V Hobson Swan Construction Ltd (In Liquidation) and Ors [8] Baragwaneth J did not canvas the evidence on which he based the following decision.

> *General damages*
>
> [123] Mrs Dicks has undergone distress from at least December 2003 when it was confirmed that this is a leaky home. While Hobson Swan would be liable for a longer period there is not expected to be significant recover from the liquidation and the point is really academic. I am not satisfied that the flooding prior to 1996 was the result of breach of duty by the Council. Awards of the order of $15-20,000 have been made in comparable cases, including *Chase v De Groot* [1994] 1 NZLR 613 (two years disturbance $15,000), *Snodgrass v Hammington* CA 254/93 22 December 1995 (distress from subsidence $15,000 to one plaintiff and $5,000 to another), *Battersby*

[8] HC Ak CIV 2004-404-1065 22 December 2006

v Foundation Engineering Ltd HC AK CP 26/97 5 July 1999 Randerson J (total loss of cliff top property of family with four children $20,000).

[124] Adopting an intermediate 1995 figure of $17,500 and adjusting it for inflation
to 2005 figures ($17,500/93 x 113) yields a figure of $21,263. Making allowance
for a further year general damages will be fixed at $22,500.

[239] The claimant in this case was not faced with a house falling off a cliff or similar distressing circumstances.

[240] In *Body Corporate 188529 and Ors v North Shore City Council and Ors*[9] Heath J said:-

(c) Claims for general damages

[27] Claims for general damages are made by all of the individual plaintiffs against the developers. Each individual plaintiff claims $25,000 as distress damages. I have determined this particular aspect of the case based on submissions from counsel for the plaintiffs. I emphasise, however, that the issue has not been argued, as the developers have not participated in the hearing. For that reason, the awards I am about to make should not be regarded as a precedent for quantum in cases of this type. Nor should it be regarded as authority for the view that each householder is entitled to a separate award of distress damages, as a matter of course.

[241] As Heath J points out, in that case the respondents had not take part in the hearing so this cannot be regarded as a precedent.

[9] HC AK CIV 2004-404-3230 30 September 2008

[242] In *Body Corporate 188529 and Ors V North Shore City Council and Ors* Venning J said :-

> **General damages**
>
> [396] In addition to the claims for special damages, the individual unit owners that are not trustees or corporates also claim for general damages. A sum of $25,000 is sought in each case. Where there are two owners a combined figure of $50,000 is sought.
>
> [397] While accepting that general damages could be appropriate in relation to certain specific claimants Ms Thodey submitted that the award of $25,000 would be seen as at the top of the scale. Counsel referred to Todd *Law of Torts* New Zealand 4th ed and a number of other authorities, the most relevant being *Dicks v Hobson Swan Constructions Ltd (in liquidation) & Ors* ($22,500.00); *Battersby v Foundation Engineering Limited* HC AK CP26/97 5 July 1999 Randerson J ($20,000.00); *Chase & Anor v De Groot & Ors* HC DUN CP141-90 6 September 1993 Tipping J ($15,000.00); *Bronlund v Thames Coromandel District Council* CA190/98 26 August 1999 ($20,000.00) upheld.
>
> [398] Given the nature and extent of the problems associated with this development, the distress and anxiety would be worse for those living with the problems day by day. They are Ms Hough and Ms Kim. The figure of $20,000.00 would be appropriate in their case (subject to an adjustment for contributory negligence on the part of Ms Kim.)
>
> [399] I accept that other individual owners, even though they may have rented out the units, will be affected by the distress and anxiety associated with the defects in the dwelling. In the case of individual unit owners in that category the appropriate figure (again subject to any adjustment for contributory negligence) would be $12,500.00 to take into account they are not living at the property, but will still be affected by anxiety about it. In the case of joint

owners, a global figure of $20,000.00 for the two is appropriate given they share the burden. I note that none of the joint owners live in the units.

[243] Venning J does not provide details of the various stressors on the parties in the judgment but there are clearly a number of factors taken into account including the stress of being part of a group of owners whose future ownership of the dwelling is dependent on the cooperative behaviour of others. The level of expertise of those giving evidence is not disclosed.

[244] In *Body Corporate 183523 And Anor V Tony Tay & Associates Limited And Ors* Priestley J discussed the individuals' plights and said:-

General Damages

[198] All second plaintiffs claim second damages in respect of emotional harm, distress, and anxiety flowing from their discovery that they owned units which were subject to these dreadful defects. The knowledge that there are health risks would have been particularly distressing.

[199] The damages claimed by the second plaintiffs are $25,000 per unit with, in respect of one second plaintiff who owns two units, the sum increasing to $50,000.

[200] Counsel accepted that there was a distinction to be drawn between the compensable damage under this head to a unit owner who was an actual occupier and a unit owner who had purchased the unit for investment and as a consequence had seen the value of that investment diminish.

[201] This Court has awarded general damages under this head to previous plaintiffs in leaky building claims. In *Dicks* (*op cit* [65]) Baragwanath J awarded $22,500 to the owner/occupier plaintiff. In *Sunset Terraces* (Judgment (No.4) 30 September 2008 at [27]) Heath J, although stressing that the damages figure had no precedent value (a City Council was the primary defendant)

general damages were awarded of $25,000 to each individual plaintiff. In *Byron Ave* Venning J, observing the distinction between owner occupiers and investment owners which I regard as a valid distinction, awarded $20,000 jointly to owner/occupiers and $12,500 to owners who did not reside in the units. In *Kilham Mews* $25,000 was ordered to each owner/occupier and $15,000 to non-residential owners.

[202] I believe general damages are properly claimed. Particularly for owner/occupiers (the evidence of Mr and Mrs Podolanskis graphically describes the ensuing distress and anxiety) I consider an award is justified. In respect of owners holding the property as an investment there is clearly anxiety and distress but not occurring at a daily level. There is nonetheless the inconvenience of dealing with disgruntled tenants and the worry occasioned by a clear diminution of the value of investment. I reject the proposition, however, that an investment unit owner of two properties is entitled to double the figure of the owner of one. The distress and anxiety relates to an investment across the board and is not tied to any dollar figure. The distress caused to the owner of a leaking home worth $200,000 would be just as great in principle as the distress caused to the owner of a leaking home worth $2,000,000.

[203] Subject to Mr Josephson advising me by memorandum if the nomenclature is incorrect, in respect of all second plaintiffs who are owner/occupiers, (units C, D, and X) there is a general damages award of $25,000 for *each* plaintiff. In respect of the balance of claiming second plaintiffs there is a general damages award of $15,000 jointly. Judgment is accordingly entered against the first and second defendants.

[245] It is to be noted that damages were only given to owners who were parties to the claim, the defects were bad and there was harm to health. The value of the claimants' investments had been diminished. Evidence was given of the stress and anxiety though it is not detailed. It was not a case of

asserting that general damages are due solely because the claimant is the owner of a leaky home. Similarly, as is clear from the Kilham Mews judgment referred to, there was not in this case pressure from disgruntled tenants or worries about diminution of investment.3

[246] In line with other tribunal decisions, such as *Allan & Anor v Christchurch City Council & Ors*[10] and *Chee & Anor v Stareast Investment Limited & Ors*[11] the Council submits that no more than $5,000.00 would be appropriate.

[247] In this case the claimant was inconvenienced, did not live in the dwelling during repairs, was not stressed by being present while it was being repaired and is being compensated for the cost of alternative arrangements. His work and lifestyle were not affected apart from financial matters for which interest is being sought as damages.

[248] The amount of stress was at the lower end of the scale. I award $5,000.00

[249] The tribunal does not have jurisdiction to award damages to those who are not parties to the claim. Therefore only Mr Chapman's circumstances can be considered.

Summary of Quantum

[250] The net result of these submissions is that the amounts claimed are adjusted as follows:

Remedial works as shown	
in statement of claim	$258,315.09
Reduction see memo 25 May 09	-$5,927.98
Net amount claimed	$252,387.11

[10] (21 July 2009) WHT, Wellington, TRI 2009-101-110, Adjudicator C Ruthe.

[11] (21 July 2009) WHT, Wellington, TRI 2008-100-91, Adjudicator C Ruthe.

Claim item	Amount claimed	Amount ordered.	
GE 20 Schedule	$3,375.00	$0.00	
GE 21 a Shower	$3,305.26	$0.00	
GE 21 b ensuite	$12,400.00	$6,200.00	
GE21 c light fitting	$275.96	$0.00	
GE 21 d panels	$1,798.63	$0.00	
GE 21 f paint (less betterment value)	$16,500.00	$4,125.00	
GE 21 g contractors margin	$4,353.00	$2,873.00	
total	$42,007.85	$13,198.00	-$28,809.85
Remedial works allowed			$223,577.26
Uncontested consequential cost			$9,627.37
General damages allowed			$5,000.00
Sub total			$238,204.63
Lack of Maintenance 10% discount			-$22,357.73
Items not liable			
No stop ends			
No sill flashings			
Window Control joints			
Ground clearances			
Kick out flashings			
facings embedded in coatings			
Sub floor ventilation			
Damage from use of allowed sealants			-$50,000.00
Allowed amount of claim			$165,846.90

SUMMARY OF DECISION

[251] The second respondent, Landmark, was negligent in the construction of the dwelling in the ways set out in the assessor's report. This was not contested.

[252] Paul Clarke, the fifth respondent, was negligent because he failed to manage the construction of the house properly.

[253] Graeme Blissett was not involved with the construction of the house and was not negligent. The claim against him is dismissed.

[254] Glenn Braddock was liable for his work in relation to working in an unsupervised manner when he should have known to ask for help. He was negligent in respect of the pergola and raked windows. I put his share of responsibility at 10%.

[255] Peter Flett was a company director who did not manage the quality of the work closely. I put his share of the liability at 10%.

[256] The Council is not expected to be a clerk of works. Many of the items which caused leaks were not readily observable by the Council.

[257] The matters which it should have dealt with and did not are at the lower end of the range. In the light of the claimant's evidence, mainly that of Mr Hodgson, I put the Council's share of liability at 10%.

[258] The builder, Landmark, should be liable for 90% of the damage.

[259] Paul Clarke, the director of Landmark, should be jointly liable with Landmark for 90% of the damage.

Apportionment between parties

[260] Section 92(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal may determine any liability of any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[261] Under s 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.

[262] The claim by Mark Leyland Chapman is proven to the extent of $165,846.90.

[263] The balance is jointly and severally owed by the following parties. However, the amount is apportioned as follows:-

Allowed amount of claim	$165,846.90
Council not liable for:-	
No sealant behind windows	
Pergola damage	
Harditex installation deficiencies	-$25,000.00
Maximum Council liability	$140,846.90
Distribution of liability	
Allowed claim	$165,846.90
Council liability 10%	-$16,584.69
Mr Braddock's liability 10%	-$16,584.69
Mr Flett's Liability 10%	-$16,584.69
Landmark and Mr Clarke’s joint liability 70%	$116,092.83

[264] For the reasons set out in the this determination I make the following orders:-

[265] Flora Creative Limited and Mr Clarke are jointly and severally liable for the full amount of the claim allowed, namely $165,846.90. They are to pay this sum to Mr Chapman forthwith. They are entitled to recover the amount paid over the sum of $116,092.83 as a contribution from the Western Bay of Plenty District Council. They are also entitled to recover up to $16,584.69 each from Messrs Braddock and Flett.

[266] The Western Bay of Plenty District Council is jointly and severally liable to Mr Chapman to the extent of damage which it could have prevented, namely the sum of $140,846.90. It is to pay this sum to Mr Chapman forthwith. It is entitled to recover the amount paid over the sum of $16,584.69 from Flora Creative Limited and Mr Clarke. It is also entitled to recover up to $16,584.69 from each of Mr Braddock and Mr Flett.

[267] Messrs Braddock and Flett are each liable for 10% of the allowed damage, namely $16,584.69. They are to pay these sums to Mr Chapman forthwith.

[268] If the respondents meet their obligations under this determination this will result in the following payments being made by the respondents to the claimants.

First respondent, Western Bay of Plenty District Council	$16,584.69
Second respondent, Flora Creative Limited (Jointly with Mr Clarke)	$116,092.83
Fifth respondent Paul Hamilton Clarke (jointly with Flora Creative Limited)	$116,092.83
Eighth respondent Glen Braddock	$ 16,584.69
Ninth respondent Peter Flett	$ 16,584.69

[269] If any of the parties listed above fails to pay its or his apportionment this determination may be enforced against any of them up to the total amount that they are ordered to pay in this determination.

TIMETABLE FOR SUBMISSIONS ON INTEREST

[270] None of the above amounts take into account the interest on the amount allowed in this claim, namely $165,846.90.

[271] The claimants may make submissions on the amount of interest to be paid on this sum from March 2008 (being the time from which their loans exceeded the amount allowed) to the end of October 2009.

[272] Any further submissions from all parties should be filed by 20 November 2009 and responses by 27 November 2009.

DATED the 11th day of November 2009.

Roger Pitchforth
Tribunal Member