IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2008-100-000091

BETWEEN	**JOSEPH CHEE and MARGARET CHEE** Claimants
AND	**STAREAST INVESTMENT LIMITED** First Respondent
AND	**MANUKAU CITY COUNCIL** Second Respondent
AND	**PATRICK HUNG** Third Respondent
AND	**T.Q. CONSTRUCTION LIMITED** Fourth Respondent
AND	**BRIAN CHARLES TAYLOR** Fifth Respondent
AND	**SPOUTING AND STEEL ROOFING WORLD LIMITED** Sixth Respondent
AND	**RAYMOND PHILLIP BROCKLISS** Seventh Respondent
AND	**CSR BUILDING PRODUCTS (NZ) LIMITED** Eighth Respondent

Hearing: 2 & 3 June 2009

Final submissions: 19 June 2009

Appearances: Claimants – self represented
First and Third respondents – DK Wilson
Second respondent – D Heaney SC & F McGregor
Fourth and Fifth respondents – W Endean
Sixth respondent – no appearance
Seventh respondent – R Brockliss
Eighth respondent – H Thompson

Determination: 21 July 2009

DETERMINATION

Adjudicator: C Ruthe

CONTENTS

I. INTRODUCTION

[1] This claim has been brought by the claimants in person. One standout feature is the relative lack of moisture penetration into this leaky home. Hence much of the proposed remediation work is directed to preventing future possible leaks rather than the low level damage recorded to date. This house was constructed, not by fly by nighters, but by reputable companies who cumulatively had decades of successful work in the Auckland building scene.

[2] It is a case where:

- the developer's competence in managing and supervising the building work is considered by the experts to be of significance;
- the Council asserts it only had a duty to carry out inspections from the ground, ergo, it could not have known about alleged roofing or cladding defects;
- a major zone of contention is whether targeted repairs are appropriate or whether a full reclad is the proper solution.

[3] Procedurally the claim was heard in an inquisitorial manner. There had been an expert's conference in the week prior to the hearing and this helped refine the technical issues. The experts were heard as a panel on the first day of the hearing. Mr Heaney SC New Zealand's most experienced counsel in weathertight claims for the Council noted that what was being dealt with in a day had taken over a week in High Court proceedings dealing with issues of similar complexity.

II. BACKGROUND

[4] Mr and Mrs Chee together with their three children arrived in Auckland from Malaysia in October 2001 for the purpose of purchasing a home as they were migrating to New Zealand. After two weeks of house hunting they decided to purchase a newly built house at 131B Bucklands Beach Road, Bucklands Beach, Auckland.

[5] The purchase settled in November 2001 with the claimants moving in permanently in May 2002. The first signs of water penetration through the outer envelope of the house were noticed in August 2003 with leaks from the upstairs balcony resulting in water damage to the living room below. Other leaks were subsequently noted.

[6] The house itself is a two-storied detached dwelling with a pitched concrete tiled roof, the external walls comprising of light timber framing with a direct–fixed monolithic external cladding system comprising of fibre cement sheeting (Harditex) to which has been applied a texture coating system.

[7] Mr Chee was wreathed in incredulity as he recounted the surprise he felt when he tapped on the walls of his new house a few weeks after purchase only to hear a ring of hollowness and not the solid thump of concrete or brick. He had discovered that his house had a veneer of solidity over a framework of untreated pine-matchstick material.

[8] On 1 November 2007 the claimants applied for a WHRS assessor's report and this was completed on 29 November 2007 becoming the foundation document for this claim. The WHRS assessor concluded that the criteria set out in section 14 of the Weathertight Homes Resolution Services Act 2006 had been met.

III. THE PARTIES

[9] The roles or alleged roles of the players were:

- Stareast Investment Limited, (Stareast) the first respondent, the alleged developer and vendor of the property pursuant to a sale and purchase agreement dated 12 November 2001.
- Manukau City Council, the second respondent, the territorial authority that issued building consent, carried out inspections and issued the Code Compliance Certificate.

- Mr Patrick Hung, the third respondent, at all material times director and shareholder of Stareast, and allegedly was also a developer, as Stareast was not incorporated until 6 October 2001 after the development commenced.
- TQ Construction Limited (TQ), the fourth respondent, the building company engaged to erect the structure.
- Mr Brian Taylor, the fifth respondent, a director of TQ, alleged to have been personally in charge of the project.
- Spouting and Steel Roofing World Limited, the sixth respondent, the fascia and spouting supplier and installer.
- Mr Raymond Brockliss, the seventh respondent, a director of Excel Coatings Limited Fosroc texturing system applicator.
- CSR Building Products (NZ) Ltd (known as Monier), the eighth respondent, the supplier and installer of the concrete roof.

IV. EVIDENCE

[10] In Weathertight proceedings the evidence starts accumulating from the very beginning with the filing of the assessor's report with the claim. Outlined below is a list of all the evidence before the Tribunal.

The following persons gave oral evidence at the hearing:

Experts

(i) Mr Philip Browne, WHRS assessor

(ii) Mr Clinton Smith, claimants' expert

(iii) Mr Geoffrey Bayley, Council's expert

(iv) Mr Alan Light, TQ and Mr Taylor's expert

(v) Mr Simon Paykel, CSR Building Products (NZ) Ltd's expert.

Others Witnesses

(vi) Mr Joseph Chee, claimant

(vii) Mr Dawson, builder for the claimants

(viii) Mr Patrick Hung, for first and third respondents

(ix) Mr G Smith, for first and third respondents

(x) Mr B Taylor, for fourth and fifth respondents

(xi) Mr Brockliss, seventh respondent

Written evidence before the Tribunal including:

WHRS Documents

Experts' conference agreement

Assessor's report and Addendum report, and Supplementary Addendum report

Procedural Orders 1 to 12.

Claimants' written evidence

Witness statement of Joseph Chee

Supplementary Witness statement of Joseph Chee

Witness statement of Margaret Chee

Statement of Evidence of Clinton Smith

Reply Brief of Evidence of Clinton Smith

Witness statement of Mark Dawson

First and Third Respondents

Brief of Evidence of Patrick Hung

Brief of Evidence of Glenn Smith

Brief of Evidence of Barry Stacey

Second Respondent

Brief of Evidence of Geoffrey Robert Bayley

Fourth and Fifth Respondents

Brief of Evidence of Alan Lloyd Light

Brief of Evidence of Brian Taylor

Brief of Evidence of Ian Conrad Holyoake

Dry-Build Report

Seventh Respondent

Witness statement of Raymond Phillip Brockliss

Eighth Respondent

Statement of Evidence of Simon Paykel.

V. CHRONOLOGY OF EVENTS

(i) September 2000: Mr Hung applied for building consent;

(ii) October 2000: Manukau City Council (Council) issued building consent to Mr Hung;

(iii) 6 October 2000: Stareast Investment Limited (Stareast) incorporated;

(iv) 20 October 2000: the purchase of the subject dwelling was assigned from Mr Hung to Stareast;

(v) November 2001: claimants and Stareast entered into an agreement for the sale and purchase of the subject dwelling;

(vi) May 2002: claimants return to New Zealand and take up residence in the house;

(vii) August 2003: claimants discovered leaks from upstairs deck into the downstairs living room;

(viii) January 2004: discovery of further leaks from deck;

(ix) August 2007: discovery of further leaks from deck;

(x) 1 November 2007: claimants apply for WHRS assessor's report.

VI. A LEAKY BUILDING – WHERE DOES IT LEAK?

[11] All five experts agreed the building leaked. There was no unanimity as to causes, responsibility, causation or appropriate steps for remediation. The experts' conference compiled an agreed leaks list. Each of the areas of alleged leakage will be related to the claims against each of the respondents respectively.

Lack of Cavity

[12] The first issue considered at the experts' conference and at the hearing was the alleged lack of cavity battens. At the hearing there was considerable discussion in the course of the expert panel as to the presence or absence of a cavity.

[13] Mr Chee in his comprehensive submissions argues that cavity battens were specified in the building consent documentation and it was unlawful not to install them. He relies on dicta of Baragwanath J in *Dicks v Hobson Swan Construction Ltd (in liq) & Ors*[1] at para [69] to the effect that it is unlawful to carry out any building work except in accordance with a building consent. This is, without question, the law. What are the facts?

[14] The consensus amongst the experts was that the plans did show battens, but as the battens were not shown as being between the Harditex and the building paper, they did not create a cavity in the technical sense. The Tribunal concludes there was no cavity designed for the purposes of enabling moisture penetration to drain away, and therefore the failure of the builder to construct a cavity was not a negligent omission. Further all experts agreed that at the time of construction, the Building Code had no requirement for a cavity. Its absence was not a failure. The only expert that did not initially accept this position was Mr Smith but he conceded under cross-examination that the Council could not have insisted on a cavity.[2] Additionally, the lack of a cavity has neither caused nor been the source of any water ingress.

Deck

[15] The deck is a major area of water ingress. Mr Paykel considered it was responsible for 75% of the proven water ingress and all the other experts including the assessor agreed that this was the area that showed the highest moisture readings.

[16] There were a number of issues relating to the water penetration in the deck but the principal contributor was the way in which the balustrade had been affixed perforating the waterproof membrane on the deck floor. All experts concurred that the balustrade itself had been

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[1] (2006) 7 NZCPR 881 (HC)
[2] See Transcript, Day 1, Hearing at 12:33:21.

framed up without providing for any slope to hasten water run off. However at the time the balustrade was constructed this was accepted practice. The fault would have been that of either the builder and/or the plaster/membrane applicator. However the Tribunal does not consider that this was a causative factor in the leaking.

Front - East Elevation

[17] There were two faults on this elevation. The first was the lack of clearance between the cladding and the ground levels.

[18] *Ground levels*: The evidence before the Tribunal, and observed by the adjudicator, was the failure of the driveway installer to either install a drain between the end of the driveway and the building, or alternatively to lay the driveway so that it finished at 150mm below the cladding rather than abutting it. The only party to these proceedings potentially liable is the Council for failing to require that this matter be rectified after its final inspection and not withholding the issuing of the Code Compliance Certificate until the clearances complied. The estimated contribution of this fault to the leaking problems of this house is 5% according to Messrs Paykel and Bayley, and 6% according to Mr Light, with Mr Smith estimating the contribution of this fault at 7% (These percentages are rough indicators of possible liability and not to be read as percentages of mathematical precision).

[19] *Curved window*: The second fault concerns the installation of the curved window on the east elevation. Mr Paykel considered the builder was at fault for not having sought details and the Council was at fault for not having obtained sufficient information as to the flashing and waterproofing of the windows. The estimated contribution of the fault between the experts varied between 2% and 6%. There was disagreement as to window seals. Mr Bayley said they were not sealed. Mr Paykel said that the windows were sealed in accordance with good building practice at the time. The Tribunal accepts that on the balance of probabilities, the evidence of Mr Bayley, taken in conjunction with Mr Browne's moisture readings, is sufficient to prove there was

inadequate sealing resulting in likely future damage. The Tribunal assesses this fault as a 5% contributing factor to the leaky building syndrome.

Horizontal Control Joint

[20] The junction between the horizontal polystyrene with other building elements has created problems particularly in relation to where it abuts the lead flashing. The experts estimated contribution of this fault to leaking in the order of 5%. Mr Paykel suggests the builder, plasterer, developer, project manager and the Council share liability. Mr Bayley, the Council's expert, says it is the responsibility of the development company/developer, the building company, the roofer, and texture coater. Mr Light says it is the roofer, texturer and developer. Mr Smith says it is Council and the texture coating applicator.

Roof Junction

[21] There was unanimity that there was a leak problem in this area. Mr Bayley puts this contribution at 3%, Mr Paykel at 5%, Mr Smith at 5% and Mr Light at 5%. Mr Paykel says that this is the responsibility of the builder, plasterer, developer, project manager and the Council. Mr Bayley says it is the developer, building company and roofer. Mr Light says that responsibility for this defect lies with the roofer, the developer as well as the texture coater.

Vertical Control Joints

[22] It emerged in the course of the hearing that vertical control joints were installed. The experts failed to agree as to contribution. If there was any it is so insignificant it does not need to be taken into account.

Roof

[23] Damage to the roof comprises two defects. The first is a split in the lead flashing below the bedroom window. The roofer says that they were not the last people on the roof and so cannot be held responsible, as it could have been caused by any other subsequent tradesman working on the site. Evidence heard indicated that it was less likely for it

to have been other tradesmen and the Tribunal accepts this evidence. Mr Paykel and Mr Bayley stated it was the responsibility of the developer. Mr Smith says it is the builder and roofer. The expert consensus puts this fault at approximately 5% save for Mr Bayley who puts it at 21%.

[24] The second is faulty installation of the valley trays, a defect that comes within Mr Bayley's 21% figure. The Tribunal has come to the conclusion that the roof leaks have contributed 10% to the damage to the house. The facts are not sufficiently clear to enable the Tribunal to make an accurate apportionment between the two roof faults though the faulty trays are more to do with future rather than existing damage. The eighth respondent, CSR Building Products (NZ) Limited accepts it installed the trays.

Fascia-guttering

[25] Mr Smith, expert for the claimants, indicated that the fascia and wall junctions were responsible for 5% of the overall leaking. The other experts disagreed.

VII. CLAIM AGAINST STAREAST INVESTMENT LIMITED, FIRST RESPONDENT, IN CONTRACT

[26] The first respondent, through its counsel accepted that it had obligations to the claimants under clause 6.2 in the sale and purchase agreement. Stareast's position was that the issue as to whether there was non-compliance with the Building Act was an evidential matter as the other aspects of the warranty, such as obtaining a building consent and the issuing of a code compliance certificate, had been satisfied. On the evidential point, the proven areas of leaking have established that in this building there was non-compliance with the Building Act and therefore the claim against Stareast under this head succeeds.

VIII. CLAIM AGAINST STAREAST INVESTMENT LIMITED IN TORT - WHO WAS THE DEVELOPER?

[27] To use the words of Harrison J in *Body Corporate 188273 & Ors v Leuschke Group Architects Limited & Ors*[3], the word "developer" is not "a term of art".

> "[31] The word "developer" is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability and appropriate circumstances.
>
> [32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit..."

[28] In *Body Corporate 199348 & Ors v Nielsen*[4] having set out the above quote in *Leuschke*, Heath J went on to say that:

> "[67] I agree with those sentiments. It is the particular function that gives rise to the policy reason for imposing a duty of care on the developer. Whether someone is called a "site manager", a "project manager", a "developer" (or some similar title) does not matter. The duty is neither justifiable nor inapplicable because a particular label is used to describe a person's function in the development process."

[29] The first question is: Was Stareast Investment Limited a development company? Mr Hung's own evidence is that he and his wife purchased the land on which an existing house was already constructed, with the view to immediate subdivision. To quote his own words:[5] *"Prior to settlement of the purchase, steps were being taken to commence the development."* In his opening submissions Mr Wilson conceded that Mr Hung was a developer. This was a company principally engaged in property development including the construction and marketing of the Bucklands Beach Road property.

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[3] (2007) 8 NZCPR 914 (HC).
[4] (3 December 2008) HC, Auckland, CIV 2004-404-3989.
[5] Mr Hung, Brief of Evidence, para [5].

[30] Having made the concession that Stareast was a development company, Stareast then went on to try and distance itself from quality control responsibilities. Mr Hung, a director of that company under questioning attempted to deny that the company was the developer. He said that at no point did he nor the company physically carry out any building work. Mr Hung accepted that the company engaged contractors but said that its role was limited to receiving invoices, checking them and making payment as required. Mr Hung says that he only went to the site to make sure work was done before signing the cheques. He says that he went to the site approximately once a week but this was dependent on the frequency of invoices being received.

Non-Supervisory Role of the First Respondent, Stareast ?

[31] Mr Hung says that the project was solely under the direction of TQ Construction Limited. He says evidence of TQ Construction Limited being the developer/builder/site manager was that TQ Construction Limited obtained all the building materials from Wiri Timbers or Benchmark Building Suppliers. Stareast Investment Limited relied on TQ to select or recommend suitable sub-contractors in relation to block laying, brick laying, concrete laying, concrete saw cutting etc ergo TQ was the supervising builder.

[32] Further, Mr Hung says, there was a written contract in which TQ agreed to supervise the work as well as providing labour. This document was forwarded to TQ under covering letter dated 14 October 2000 for signing and return. But this purported only copy was kept and destroyed by TQ, presumably as a cover up exercise.

[33] The letter stated as follows: "*We enclose as requested herewith a copy of the contract duly signed by us for your files"* (emphasis added). Strikingly, it did not say that the contract was being sent for signing by TQ. Nor did it request its return after signing.

[34] Mr Hung said that the invoices were inaccurate and should have referred to supervision that had been done. Earlier in his evidence he said it had been his role to check invoices, inspect progress and make payment upon satisfying himself that he was paying for completed work. The Tribunal accepts he was careful in this regard and if there had been inconsistencies between work done and invoices he would have taken action immediately. His evidence now that the invoices were erroneous does not contain a scintilla of truth.

[35] Mr Brian Taylor denied the allegation that either TQ Construction or himself personally was the head contractor, project manager, or controller of the construction of the dwelling. He says the company entered into a labour-only contract for the sum of $19,500.00 plus GST. He produced all the invoices from TQ to the developer each stating they were for labour supplied.

[36] Mr Taylor produced copies of invoices from subcontractors engaged by the first and third respondents. These were as follows: painter - Buckland's Beach Painters Limited, electrician – Fong Electrical Limited, gas fitter – Dynamic Gas Solutions, concrete work - Auckland Concrete Drives, Cascade Carpets Limited, fencing - Jack Premier Fencing, drain layer - Black Adder Security Limited, balustrade supply, exterior painting - Auckland Scaffolding, plasterer – Excel Coatings Limited, Mohan Waterproofing Limited, Spouting and Steel Roofing World Ltd, roofing – Monier Roofing, Allwin Steel Enterprises Ltd (being exhibits 1 to 17). Mr Hung's explanation was to the effect that these seventeen examples were mere exceptions to the rule of all subcontractors working for or under TQ as head contractor/project manager. Mr Hung's ability at spin would make the doyen of spin-doctors proud.

[37] In the construction industry where builders take on supervisory project management functions, it is generally pursuant to a contract which provides for a fee and a margin on all the subcontracts reflecting the risks and responsibilities of such supervision, the margin generally in

the region of 8% to 10% (though the claimants' builder in this claim charges 18%). There was no such provision here. The evidence establishes the contract with TQ was for labour only.

[38] The Tribunal has found that both the first and third respondents were the developers of this property. In *Mount Albert Borough Council v Johnson*[6] at [241], the Court of Appeal held that a developer had an absolute duty which is non-delegable. Cooke J stated that a development company has a duty to see that proper care and skill are exercised in the building of houses and that it cannot be avoided by delegation to an independent contractor.

[39] In Patel v Offord & Ors[7], Heath J stated:

> "[29] A 'developer' owes a non-delegable duty to an owner of a property: see *Mount Albert Borough Council v Johnson*. That duty extends, in some cases, to directors or corporate developers: *Morton v Douglas Homes Limited* (HC) at 595".

IX. CLAIM AGAINST THIRD RESPONDENT – MR HUNG

Does Mr Hung Have Personal Liability?

[40] Mr Hung said he was not and is not personally liable. He says neither he nor his wife had any technical building knowledge and so as director he was not going to be in a position to personally check the quality of workmanship. He said he had no hands-on role.

[41] 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 New Zealand Ltd v Carter Holt Harvey Ltd* [8] at [97]–[100]; *Body Corporate 189855 & Ors v North Shore City Council & Ors (Byron Ave)*[9] at [290]; *Leuschke*[10] at [55]; and

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[6] [1979] 2 NZLR 234 (CA).
[7] (16 June 2009) HC, Auckland, CIV 2009-404-301.
[8] [2005] 1 NZLR 324 (CA).
[9] (25 July 2008) HC, Auckland, CIV 2005-404-5561 per Venning J.
[10] See No. 3 above.

Williams v Natural Health Foods Ltd.[11] There is also the "control of a project" test as enunciated in M*orton v Douglas Homes Limited*[12] and *Hartley & Anor v Balemi & Ors*[13] at [80]-[94].

[42] Mr Hung's own evidence is that he was very much the driving force of this small limited purpose company. Priestley J in *Body Corporate 183523 & Ors v Tony Tay & Associates Ltd & Ors*[14] stated that:

> "[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 involved 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 and design detail…"

[43] Mr Hung argued that, as he did not have the expertise, he could not be held to be the project manager or developer. The question is not whether a person or company has the technical capacity to adequately undertake supervision and project management, but whether the facts establish that Mr Hung orchestrated this development irrespective of competence. The assertion of a lack of expertise does not let him off the hook of responsibility. He and the company undertook the supervisory functions of project manager and presented themselves as so doing to all the world.

[44] The Court of Appeal in *Trevor Ivory Ltd v Anderson*[15] emphasised the importance of examining the factual matrix in each case before determining whether a director was personally responsible. Having undertaken this review the Tribunal concludes that Mr Hung is personally liable as well as his company. The question of the scope of Mr Hung's liability, if any, is dealt with under the section "Contribution Issues" below.

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[11] [1998] 1 WLR 830 (HL).
[12] [1984] 2 NZLR 548 (HC).
[13] (29 March 2007) HC, Auckland, CIV 2006-404-2589 per Stevens J.
[14] (30 March 2009) HC, Auckland, CIV 2004-404-4824.
[15] [1992] 2 NZLR 517.

X. CLAIM AGAINST FOURTH RESPONDENT, TQ CONSTRUCTION LIMITED - THE BUILDING COMPANY

[45] The claimants made general allegations of breaches of duty of care by TQ without specifying which faults have given rise to leaks.[16] The Tribunal treats this part of the claim as one seeking recovery against TQ if the Tribunal were to hold that TQ were the developers and it has held to the contrary. Therefore this part of the claim fails.

[46] The Tribunal having held TQ had no responsibility for the oversight of any subcontractor, it follows that the company is not liable in either contract or tort for any of the failings of the subcontractors. TQ's only other potential exposure to liability would be if there were evidence of specific breaches of the terms of its labour-only contract, such as failing to carry out its obligations in a workmanlike manner, not meeting good practice standards, or being negligent.

[47] TQ denies any construction failure. The fifth respondent, Mr Taylor identified and commented on the company's role concerning the lack of cavity battens, lack of clearance between the cladding and deck, balustrade, cladding, roof flashings, diverters, installation of polystyrene reveals, installation of windows, vertical control joints, cladding and ground clearances, timber used, defective roofing, and installation of fascia.

[48] With regards to cavity battens TQ says battens were not supplied so the company assumed Mr Hung did not want them installed. There was some debate as to whether they were specified for the purposes of creating a cavity or simply as a filler for aesthetic reasons. Aesthetics wins the debate. The consensus of expert opinion, save for Mr Smith, was that as the drawings showed the building paper hard up to the cladding there was no intention to create drainage cavities; nor was there any Building Code requirement to do so. The failure to install battens is irrelevant. Further the absence of a cavity is not a causative factor in any

leaking. It only enables any penetrating moisture to escape. It is not a causative factor.

[49] The balcony handrails were not installed by TQ and so faults arising therefrom are not its responsibility. The leaks were a result of penetrations through the waterproof membrane caused by the hand railing installer who then failed to carry out adequate sealing. With regard to horizontal control joints, TQ says that they were installed in accordance with the manufacturer's instructions. This is accepted. It is further accepted that TQ was not responsible for the roof flashings or the vertical flashings. It was also not responsible for any problems relating to polystyrene reveals as this was the responsibility of the plasterer.

[50] With regard to windows, TQ admits to installing them but says the windows themselves were faulty. They were supplied by Mr Hung. The mitre joints were letting in moisture. As for the leaking around the windows, TQ says that this was a result of deficiencies in the plastering work by plastering over drain-holes at the bottom of the windows resulting in tracking. The Tribunal accepts TQ has no responsibility concerning leaks around the windows; nor is it responsible for the quality of the windows.

[51] TQ says there were adequate ground clearances on the outside when it left the site. These were compromised by work carried out for the construction of the concrete driveway and pebbled garden. TQ says that Manukau City Council's inspectors approved the ground levels at the time of the final inspection of the house confirming there were adequate clearances at the time. Having seen the property, the Tribunal accepts this is correct.

[52] The claimants say that TQ is liable for the choice of framing timber, being untreated pine. However such timber was code compliant and so this is a groundless allegation. TQ also has no responsibility for

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[16] See Claimants' Amended Statement of Claim, paras [57]-[60].

the defects in the roofing; nor did it have responsibility for the installation of the fascia, as this was work done by the fascia supplier, Spouting and Steel Roofing World Ltd.

[53] On allegations of faulty workmanship Mr Taylor's evidence was clear and not challenged. TQ says first that there was very limited leaking to the building but, secondly and more importantly, it was not responsible for those areas identified as leaking or potentially leaking in the assessor's reports or in any of the experts' evidence. The Tribunal therefore concludes that there is no liability on the part of TQ.

[54] TQ obtained a report from Drybuild Infrared Solutions, which identified only two areas where there were excessive moisture levels. The claimants took issue with this company not being called for questioning. There is no substance to this complaint. The technology used by the company was akin to the accuracy of a non- evidential breath-testing device in blood alcohol cases. The methodology used by the assessor was accurate and his figures on moisture levels are those that can be relied upon.

XI. CLAIM AGAINST FIFTH RESPONDENT, MR TAYLOR

[55] The fifth respondent, Mr Taylor is a director of the fourth respondent, TQ. Having concluded the company is not liable to the claimants in tort, it follows that Mr Taylor is also not liable. If the Tribunal were to be wrong in holding TQ had no liability, it would have held Mr Taylor was not liable as a company director in any event for the following reasons.

[56] First, the evidence is that TQ was involved on other construction sites contemporaneously with Mr Hung's project It being a building company of moderate size, more akin to a small chamber orchestra rather than a one man band. Secondly, the company had been in existence for many years carrying on business and trading as a building company and known in the building industry as such. The fact that TQ is

not the size of Fletcher Building is irrelevant to the issue of determining its status and obligations. Thirdly, it was not a single project company set up with a view to early liquidation at the end of a project. Fourthly, the evidence is the building contracts the company entered into were always between TQ and the contracting party, and not between Mr Taylor and the contracting party.

[57] The issue of personal liability of directors was given a lengthy consideration in the Court of Appeal decision in *Trevor Ivory*, a case that has received considerable judicial commentary since. Cooke P stated:[17]

> "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… [S]uch 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... 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 Ltd*."

[58] The principles in *Trevor Ivory* were reaffirmed in the recent Court of Appeal decision in *Body Corporate 202254 & Ors v Taylor (Siena Villas)*[18] 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.*

[59] William Young P carefully examined the evidence relating to Trevor Ivory Limited. At para [23] it was noted that the company was a one-man company owned and controlled by Mr Trevor Ivory.[19]

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[17] *Trevor Ivory Ltd v Anderson*, above n 15, p520.
[18] [2008] NZCA 317.
[19] Ibid paras [29]-[34].

[60] William Young P quotes from principles each delivered by Lord Steyn in *Williams*:[20]

> "[28]…Postulate a food expert who over ten years gains experience in advising customers on his own account. Then 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…"

[61] 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 the Siena Villas Development. To impose such a duty on him would be flatly inconsistent with *Trevor Ivory* and *Williams.*"

[62] His Honour then observed it would require something special to justify putting the case in the "one man band" class observing that to attempt to define in advance what might be sufficiently special, would be a contradiction in the terms.

[63] The factual matrix in *Siena Villas* was similar to that in this case. TQ was deliberately incorporated to create a separate legal entity such as referred to in Cooke P's decision cited above. Mr Taylor of TQ acted no differently than Mr Taylor in the *Siena Villas case,* 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 of all relevant business transactions. Limited liability was intended as this phrase was used in the sense of liability limited to the company thereby excluding personal liability in the contract. It has not been proven that Mr Taylor should be in any way personally liable.

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[20] Ibid [28].

XII. CLAIM AGAINST SIXTH RESPONDENT, SPOUTING AND STEEL ROOFING WORLD LIMITED

[64] The sixth respondent, Spouting and Steel Roofing World Limited, was joined at the request of the fourth and fifth respondents and a removal application being declined on 2 February 2009. The sixth respondent did not participate in the hearing. In the Amended Statement of Claim dated 31 March 2009, the claimants allege at paragraph 18(d) that concerning the fascia/gutter, there was no seal between the plaster and fascia to ensure wind-driven moisture did not enter the dwellinghouse in contravention of the building consent.[21]

[65] The claimants alleged the fascia of the guttering around the entire house had failed resulting in moisture ingress and damage. The sixth respondent was the spouting and fascia installer.

[66] Mr Smith, expert for the claimants, indicated that fascia and wall junctions were responsible for 5% of the leaking overall. However Mr Paykel considered that this was not a contributing factor. Mr Bayley considered there was no leaking in this area, attributing a "nil" value in his defects' liability list. The Tribunal considers there is sufficient evidence to indicate that potential leaking in this area is likely to contribute to those issues in the future and therefore attributes 5% of the leaks to this fault.

XIII. CLAIM AGAINST SEVENTH RESPONDENT, MR BROCKLISS, IN TORT

[67] Mr Brockliss is a director of Excel Coatings Limited.[22] He was joined pursuant to Procedural Order No. 7 made on 2 February 2009 on the basis that he was a director and shareholder and he personally carried out or supervised the plastering work performed by Excel Coatings Ltd. Excel Coatings Ltd was not a party to these proceedings.

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[21] WHRS Assessor's Report, page F10: "Colour steel fascia and gutter with plaster finish to the seal between Harditex".
[22] See Amended Statement of Claim, para [74].

[68] The real question is whether Mr Brockliss is personally liable. In this case Mr Brockliss gave evidence that he was not personally involved in the work his company undertook at the site. Further this particular contract, with all contracts undertaken for cladding work, was with Excel Coatings Ltd and not with Mr Brockliss personally.

[69] The legal criteria for establishing personal liability of a director set out above regarding the fifth respondent, Mr Taylor are equally applicable to Mr Brockliss. In his case, after due deliberation and no doubt after receiving appropriate legal advice, a company was incorporated to trade with the world at large as a cladding applicator. It was a successful and reputable company. It undertook work as a subcontractor to Fletcher Building for a period of 10 years. The world had no difficulty in perceiving and accepting this company as a separate legal entity from Mr Brockliss.

[70] Mr Brockliss said the company was proud of its reputation in the industry for high standards of quality in workmanship. Applying the criteria set out in *Trevor Ivory* and *Sienna Villas*, a claim against Mr Brockliss in person cannot be sustained.

XIV. CLAIM AGAINST EIGHTH RESPONDENT, CSR BUILDING PRODUCTS (NZ) LIMITED (MONIER TILES)

[71] One of the areas of leaking or potential leaking is identified as a split in the lead flashing and poorly installed valley trays. With regard to the roof junction identified by Mr Smith at photo 13, there was little agreement as to leak causation. However there was unanimity that the problem was caused by a lack of co-ordination of the trades - this being the responsibility of the developer. It is noted there were no elevated moisture readings at the roof junction. However Mr Bayley and Mr Smith said that there was likely to be future damage. Mr Light said there was no damage and no likely future damage.

[72] With regard to the valley trays, there was agreement among three of the experts namely Messrs Smith, Browne and Bayley there should be new valley trays. Messrs Light and Paykel considered that repairing existing valley trays would be sufficient. Mr Paykel said there was no damage directly attributable to problems with the roof. The Tribunal considers there was negligence in the roofing installation by the eighth respondent exposing the claimants to loss by way of likely future damage.

XV. CLAIM AGAINST SECOND RESPONDENT, MANUKAU CITY COUNCIL

Building Permit Failures

[73] The claimants' first allegation is that the Council consented to plans, which contained insufficient details particularly in relation to the construction of the waterproofed deck and the installation of the curved window. The claimants say the Council breached its duty of care owed to them by approving the building consent in the form in which it did.

[74] Upon this ground the claimants fail. There is no evidence that would enable the Tribunal to conclude that at the time of the granting of the consent the drawings and specifications were inadequate. Rather the evidence of the experts is that the plans and specifications were sufficient and therefore the Council was not negligent in issuing the initial consent.

Inspection Failures

[75] The real issue relates to inspection failures. The claimants say the evidence shows the Council has failed in the following way in being negligent:

- There was an inadequate number of inspections carried out;

- The inspections were not carried out at a proper time to ensure that key weathertight details came under scrutiny;
- Failure to inspect with sufficient thoroughness to identify defects;
- Failure to have a system of inspection in place to ensure that key weathertightness details came under scrutiny;
- Failure to identify the defects.

[76] The claimants rely on the observations of Venning J in *Byron Avenue* where the Court held at [97] that:

> "[97]… The less detail the Council required at the consent stage, the greater the onus was on the inspector to ensure compliance at the inspection stage…"

[77] With regard to the deck, the claimants referred to Heath J's decision in *Body Corporate 188529 & Ors v North Shore City Council & Ors (No. 3) (Sunset Terraces)*[23] - a case in which waterproofing was a critical issue. His Honour stated:

> "[447] Waterproofing of a building is a critical issue with which the Code deals. … If waterproofing of the decks and the tops of inter-tenancy and parapet walls could not be adequately checked in any other fashion, a pre-coating inspection was necessary."

[78] In the present case leaks have arisen as the result of the puncturing of the waterproof membrane when the balustrades were installed. The Council's submission is that, as this could not have been seen on an inspection, it is not liable. The Tribunal does not accept this is the correct approach.

<u>An Appropriate Inspection Regime?</u>

Balustrades

[79] The Council should have had an appropriate regime capable of identifying waterproofing issues. If it could not visually identify whether or not there had been any compromise to the waterproofing membrane it had a duty to at least make inquiry of the installer and/or developer as to

[23] (30 April 2008) HC, Auckland, CIV 2004-404-3230.

how the handrails were installed. Anybody visiting the site would see that the balustrade was attached to the parapets. The balustrade was not loose. There was a method of attachment to the structure of the house. Anybody familiar with the building process would have anticipated screws, nails or some bolting system being used. This should have immediately raised alarm bells vis-à-vis probable penetration of the waterproof membrane, particularly so where this was effectively the roof to the room below. Indeed penetration of the waterproofing membrane was an inevitable consequence of the affixing. The Council was negligent in this regard.

Lack of Cavity

[80] The Council has no liability in relation to the cavity matter.

Ground Levels

[81] The claimants, as noted, were very thorough in the preparation of their case. Concerning ground clearances they produced evidence by way of invoices showing that the concrete driveway was completed approximately two months before the final inspection. This means that the lack of ground clearance at the time of the inspection would have been glaringly obvious to any inspector who should have made some comment. The Council was negligent but it is consequential with regard to assessment of loss.

The Roof

[82] The Council says in carrying out inspections, it does not go up ladders. Not getting up ladders is not an excuse or reason for not carrying out adequate inspections. If an adequate inspection had been carried out the fault in the valley trays could have been observed, as could have the fascia wall junctions.

XVI. QUANTUM

[83] The claimants' claim based on a full reclad is as follows:

Cost of repair work (quoted by MTDB Build)	$332,832.00
Advance Building Solution Limited	$10,000.00
Alternative Accommodation for 18 weeks @ $750 per week	$13,500.00
Removal of contents, storage and return (quoted by Allied Pickfords)	$6,567.91
Cleaning of interior after repair (quoted by BRP Home Services)	$474.75
Landscaping – to fix damaged garden (quoted by VIP Home Services)	$400.00
Project management fees (quoted by National Homes)	$18,946.91
General damages for distress, inconvenience and loss of enjoyment of life	$50,000.00
NZ Leak & Heat Loss Detection Limited	$393.75
Remedial work for roof	$10,000.00
Total amount claimed	**$443,115.32**

[84] In *Byron Ave*, Venning J made the following observations regarding quantum:

> "[370] In a case of this nature 'the measure of the loss will… be the cost of repairs, if it is reasonable to repair, or the depreciation and the market value if it is not" *Hamlin* at p526*".*

Damages are awarded in order to enable the claimant to be placed in the same position they would have been in were it not for the negligence of the parties who caused damage. Any remediation beyond that which is necessary amounts to betterment.

[85] These are the issues :

- Can the defects be remedied by targeted repairs?
- Is a full reclad required?

- If a full reclad is required, is the quantum sought by the claimant appropriate?
- If there is a targeted repair – what is the appropriate quantum?

Targeted Repairs

[86] The claimants submit the only solution is a full reclad. They rely on their expert Mr Smith, as well as WHRS Assessor Mr Browne whose final view was a full reclad being the preferred solution, having earlier opted for targeted repairs. Mr Bayley, the Council's expert, initially supported the view that a full reclad was the appropriate solution but changed his mind after hearing the evidence of Mr Brockliss. Mr Light was firmly of the view that targeted repairs were the appropriate route.

[87] The assessor undertook three reports of this property, the first being dated 15 November 2007 followed by an addendum report dated 20 November 2007 and finally a supplementary addendum report dated 24 June 2008. In the first two reports Mr Browne recommended targeted repairs.

Moisture Readings

[88] The following moisture readings were recorded:

- North elevation – probe location N1 – bottom plate at bottom of cladding moisture reading 10%.
- East elevation – probe location E1 Master bedroom, moisture reading 23%.
- E2 - master bedroom floor joist at control joint 15%, E3 - bedroom two 8%, E4 - bedroom two window stud 10%, E5 - stairs 11%, E6 - garage bottom plate 11%, E7 - deck balustrade top plate 95%.
- South elevation S1 - balustrade top plate 33%, S2 - balustrade bottom plate 15%, S3 - plate above family room 10%, S4 - balustrade 20%, S5 - balustrade top plate 95%, S7 - balustrade bottom plate 15%, S8 - living room window stud

12%, S9 - living room bottom plate 15%, S10 - master bedroom bottom plate 13%, S11 - master bedroom bottom plate 13%, S12 - deck bottom plate 9%, S13 - deck bottom plate 10%, S14 - master bedroom rouge floor 18%, S15 - living room cut out 17%.

- West elevation - probe location W1 - dining room stud 10%, W2 - balustrade top 19%, W3 - toilet bottom plate 13%.

[89] Moisture readings under 18% are of little or no concern. In fact Councils allow timber framing to be used if it has a moisture content of up to 18%.These moisture levels are directly relevant to the issue of whether there should be a reclad. As can be seen, the high moisture levels were located in very specific locations. There is not a problem throughout the house.

[90] In his supplementary addendum report of 24 June 2008 Mr Browne undertook a new set of moisture readings on each elevation. The significant fact is that on the north elevation there was no increase in moisture content. None of the probes showed a reading in excess of 15% and all of the readings ranged between that figure and 8%. On the east elevation the deck balustrade was still at 95%. The only other slightly high reading was 23%. On the west elevation the readings ranged between 10% and 19%.

[91] It is significant that areas of elevated readings are in limited areas of the structure and not pervasive throughout the house, something one would expect to see in a home requiring a full reclad. Of equal significance is the failure of the later tests to show significantly increased moisture levels.

[92] Mr Browne in his first report recommended at [15.6.1.6] targeted remedial work. He is a qualified and well-respected quantity surveyor. He estimated targeted repairs at [15.7] as being in the order of $40,000 for existing damage with future damage assessed at $9,000. In an addendum report issued approximately a week later on 20 November he

made an allowance for a further $19,000 for window repairs in the location of bedroom 2.

[93] He moved from recommending targeted repairs to a full reclad due to the appearance of further cracking in the cladding, though these cracks have not led to water penetration. A cautious approach to repairs is commendable. However for the Tribunal to hold a full reclad is the only reasonable solution there must be sufficient evidence. In this case the evidence suggests targeted repairs will restore the claimants to the position they would otherwise have been in save for the leaks.

Damages

[94] In determining damages in this case the claimants should be put in the position they would have been in if the house had been properly built in accordance with the Building Code. It is not open to the Tribunal to make an award simply on the basis that a full reclad solution is the best long-term solution.

Legal Test of Reasonableness

[95] The test of reasonableness of targeted repairs was canvassed in *Allan Anor* v *Christchurch City Council & Ors* [24]. In *Brown v Heathcote County* [25] Hardie Boys J stated,

> *"It should be added that reasonableness is to be gauged with reference to the defendants interests as well as those of the plaintiff".* He was following the House of Lords decision in *Banco de Portugal v Waterlow & Sons Ltd* [26] .

[96] A major factor persuading the Tribunal that targeted repairs is reasonable and appropriate is a lack of any significant change in moisture levels between the two readings. One would have anticipated an increase if there was an ongoing developing systemic problem. That

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[24] 17 July 2009, WHR TRI 2008-101-110, Determination para [70] C Ruthe.
[25] [1982] 2 NZLR 584 at 615 Hardie Boys J.
[26] [1932] C 452 at 506.

is not the case here. This house is getting on to 9 years of age, it has not been repainted, yet the readings are relatively low.

Quantum on Full Reclad if Targeted Repairs Disallowed by Council

[97] This decision for targeted repairs is dependent on the Council approving the same.

[98] For the sake of completeness the Tribunal has considered the level of damages to be awarded if a full reclad is required. The quantification of cost of repairs contained in the MTDB building quote, including project managing fees amounting to $361,778, is excessive. Mr Heaney SC in his submissions pointed to the claimants' builders' mark-ups being in the order of 18% and that $83,000 of its quantum was made up of preliminary and general margin and contingency costs. There is no justification for such costings. The Tribunal accepts Mr Browne's estimate of $216,000 as being a more accurate quantification of the cost of targeted repairs. This includes repairs for current damage in the sum of $142,000 together with $74,000 for future likely damage.

Targeted Repairs – Quantum

[99] Mr Bayley, a quantity surveyor, prepared a schedule directed solely to targeted repairs. Mr Bayley's costings are:

Deck	$25,300
Control joint	$6,300
Flashing	$7,000
Ground clearance	$4,200
Cladding future likely damage	$22,900
Roof	$24,500
Total	$90,200

[100] It is recorded that the eighth respondent being the roofer does not consider the roofing defects would cost that much to remedy. The Tribunal accepts that this is the case but is not assisted by the eighth respondent not having adduced its own costings.

[101] On the question of the quantum of targeted repairs, the claimants rely on Mr Smith's response to the supplementary statement of Mr Bayley in which he gave an estimated target repair cost of $266,882.00 including GST.

[102] The difference between $90,000 and $266,882 is striking. The Tribunal considers that whilst Mr Bayley's figures are light, (e.g. his calculations were done on a reclad pricing rate of $80 per m^2). Mr Smith's figures are too high. In fact Mr Smith's figures for targeted repairs exceed Mr Browne's costings of a full reclad. Mr Browne estimated repair costs for current damage at $142,000, and $74,000 for future likely damage. Taking all the relevant factors into account, the Tribunal considers that an appropriate figure for targeted repairs is $130,000.

Other Losses

[103] In addition to the remedial costs the claimants seek the following:

(a)	Alternative accommodation for 18 weeks at $750 per week	$15,000.00
(b)	Removal and storage costs	$6,567.91
(c)	Cleaning	$474.75
(d)	Landscaping	$400.00
(e)	NZ Leak & Heat Loss Detection Ltd	$393.75
	Total	**$23,236.41**

[104] None of the parties have challenged these figures so all these costs will be allowed save for the removal of the contents. There is no need to shift the entire household contents where targeted repairs are being undertaken.

Targeted Repairs – Conditional

[105] The Tribunal having concluded on the evidence before it that targeted repairs are appropriate makes this finding conditional upon the Council issuing the appropriate building consent. The claimants have the right to come back to the Tribunal to seek damages in the same of $216,000.00 (see [97]) to cover the costs of a full reclad if the Council refuses to issue a building permit. This approach was followed in *Heng v Walshaw & Ors*.[27]

General Damages

[106] The claimants seek general damages. As a matter of law they argue the authorities are now consistently awarding general damages at an average rate of $25,000 per claimant. The claimants' rely on the decisions in *Dicks v Hobson Swan Construction Limited & Ors*, *Sunset Terraces (No.4)*[28], and Body Corporate 185960 & *Ors v North Shore City Council & Ors (Kilham Mews).*[29]

[107] The essence of the claimants' submission was that upon occupying owners proving firstly that they are persons (P) and secondly that the home is leaking (L), the automatic consequence is an entitlement to $25,000 general damages. The formula is as simply stated as Einstein's theory of relativity being $e= mc^2$. The suggested formula here is P + L = $25,000.

[108] None of the respondents have made any submissions in opposition to the claim for general damages. For instance there has been no reference to the House of Lords decision on general damages in *Farley v Skinner*.[30]

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[27] (30 January 2008) WHRS, DBH 00734.
[28] *Body Corporate 188529 & Ors v North Shore City Council & Ors (No. 4)* (30 September 2008) HC, Auckland, CIV 2004-404-3230 per Heath J.
[29] (22 December 2008) HC, Auckland, CIV 2006-404-3535 per Duffy J.
[30] (2002) 2 AC 732.

[109] The only submissions made have been by the second respondent, Council, concerning the quantum of general damages. Neither Mr nor Mrs Chee was questioned on this aspect of their evidence. There was no submission to the effect of a requirement of some corroborative evidence as held in *Crocombe* v *Devoy*[31]*.*

[110] No counsel mentioned the evidential matters raised in the decision in *Hartley v Balemi & Ors* at para [174], and the observations concerning forensic issues and expert evidence.

[111] Mr Chee in his statement said he now suffers from dermatitis as a result of an allergy to dust mites. There is no evidence before the Tribunal of any correlation between dust mites and leaky homes. Mr Chee refers to various articles that make some reference to potential health problems as well as saying his wife suffers from dizzy spells. He says that he and his wife feel tense, worried and anxious as well as angry and cheated. They had plans to sell the house but were unable to do so and missed the peak of the market. One does wonder whether the anger and tension relates to profit foregone rather than the leaks themselves.

[112] The Council submits there must be a relationship between the severity of the leaks and the quantum given for general damages. The Tribunal agrees. In this case the damage to the house is considerably less than is frequently seen in leaking building cases. As noted from the moisture reading reports there are very few areas where there has been major moisture penetration.

[113] If there were to be an automatic formula that could itself result in injustice to the respondents in this case, an award of $50,000 when the cost of remediation has been set at $115,000 appears quite disproportionate. It is noted the degree of moisture penetration has not

[31] (29 November 2006) HC, Tauranga, CIV 2005-470-905 per Lang J.

been major and is very restricted in its area. Further, as noted, Mr Chee's sense of anger has arisen from lost opportunity to sell the property at a profit when the market was at its peak and this variety of stress has never been compensated by the courts as it is essentially concerned with commercial matters.

[114] There is no evidence of excessive dampness in the building. There has been no evidence of fears that the claimants could not meet the cost of the repairs nor that they would lose their home. Finally with targeted repairs there should not be any significant impairment in quality of life for the brief period that repairs are undertaken. In all the circumstances the Tribunal considered an appropriate award is in the sum of $5,000 for each claimant.

Summary of Damages

[115] The Tribunal concludes that the following amounts have been proven and the total award is as follows:

Damages	$115,000.00
General Damages	$10,000.00
Other Losses	$16,768.40
Total	**$141,768.40**

All amounts are inclusive of GST rounded to $141,800.00.

XVII. RESULT

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

(i) The first respondent, Stareast Investment Limited breached the duty it owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $141,800;

(ii) The second respondent, Manukau City Council breached the duty it owed to the claimants and it is therefore jointly and severally liable to pay the claimants the sum of $141,800;

(iii) The third respondent, Patrick Hung, breached the duty he owed the claimants and is therefore jointly and severally liable to pay the claimants the sum of $141,800;

(iv) The fourth respondent, TQ Construction Limited has not been found negligent and accordingly claims against that party are dismissed;

(v) The fifth respondent, Brian Charles Taylor, has not been found negligent and accordingly claims against that party are dismissed;

(vi) The sixth respondent, Spouting & Steel Roofing World Limited, breached the duty it owed the claimants and is therefore jointly and severally liable to pay the claimants the sum of $141,800;

(vii) The seventh respondent, Raymond Phillip Brockliss, has not been found negligent and accordingly claims against that party are dismissed;

(viii) The eighth respondent, CSR Building Products NZ Limited, breached the duty it owed the claimants and is therefore jointly and severally liable to pay the claimants the sum of $141,800.

XVIII. CONTRIBUTION ISSUES

[117] As a result of the negligence referred to above, the first, second, third, sixth and eighth 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 contribution from the other according to the relevant responsibilities of the parties.

[118] 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.

[119] What yardstick should be applied? In *Patel v Offord & Ors* Heath J stated that:

> "[34]…The touchstone is what a Court finds 'to be just and equitable having regard to the extent of that person's responsibility for the 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'."

[120] The plastering company was not joined so therefore no damages can be apportioned against that company. Its apportionment would have been 5%. That loss must be borne by the developer.

[121] As noted in this case the balustrades are a major cause of the leaks. The balustrade installer is not a party. The developer must meet his responsibility.

[122] The Tribunal considers the first respondent, Stareast Investment Limited to be liable for 65% of the total claim.

[123] With regard to the roofing defects, the experts' apportionment of the contribution of the roofing defects to leaks of the home varied between 5% and 21%. Having considered the evidence, the eighth respondent's responsibility is set at 10%.

[124] The Council's negligence is considered to be in the normal range and is set at 20%.

[125] The negligence of the fascia installers is considered to be 5% and its contribution is set accordingly.

[126] Based on the evidence I find that the first and third respondents are entitled to a contribution of 35% from the second, sixth and eighth respondents.

[127] The second respondent is entitled to a contribution of 80% from the first, third, sixth and eighth respondents.

[128] The liability of the third respondent is 65% of the claim.

XIX. CONCLUSION AND ORDERS

[129] The claimants' claim is proved to the extent of $141,800.00. For the reasons set out in this determination the following orders are made:

(i) Stareast Investment Limited is ordered to pay the claimants the sum of $141,800 forthwith. It is entitled to recover a contribution of up to $49,630 from the second, third, sixth and eighth respondents;

(ii) Patrick Hung is ordered to pay the claimants the sum of $141,800 forthwith. He is entitled to recover a contribution of up to $42,540 from the first, third, sixth and eighth respondents;

(iii) The Manukau City Council is ordered to pay the claimants the sum of $141,800 forthwith. The Manukau City Council is entitled to recover a contribution of up to $113,440 from the first, third, sixth and eighth respondents;

(iv) Spouting & Steel Roofing Limited is ordered to pay the claimants the sum of $141,800 forthwith. It is entitled to recover a contribution of up to $134,710 from the first, second third, and eighth respondents;

(v) CSR Building Products (NZ) Limited is ordered to pay the claimants a sum of $141,800. It is entitled to recover a contribution of up to $127,620 from the first, third and sixth respondents.

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

(i)	First and third respondents	$92,170
(ii)	Second respondent	$28,360
(iii)	Sixth respondent	$7,090
(iv)	Eight respondent	$14,180
	Total	**$141,800**

[131] The issue of costs is reserved and the parties are invited to make submissions by 3 August 2009.

DATED this 20th day of July 2009

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C Ruthe

Tribunal Member