IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-000107

BETWEEN	**GERARD MICHAEL CROSSWELL and CHRISTINE DAWN CROSSWELL as trustees of the CROSSWELL FAMILY TRUST** Claimants
AND	**AUCKLAND CITY COUNCIL** First Respondent
AND	**ROBERT MEDEMBLIK** (Now Removed) Second Respondent
AND	**GRANT MALONE** Third Respondent
AND	**ROSS SUTHERLAND** **(Now Removed)** Fourth Respondent
AND	**STEPHEN BASKETT and CRAIG BRACKEN** (Now Removed) Fifth Respondents
AND	**CARL RUFFLES** Sixth Respondent
AND	**ABLE PLASTERING LIMITED** (Now Removed) Seventh Respondent
AND	**PARRIS PLUMBERS LIMITED** (Now Removed) Eighth Respondent
AND	**ROSS ROOFING LIMITED** Ninth Respondent
AND	**KEITH MCLEAN and BARBARA MCLEAN** (Removed) Tenth Respondents

Hearing: 20 and 21 July 2009

Appearances: S Wroe for Claimants
D Heaney SC and S Mitchell for First Respondent
R Butler and E Tompkins
No appearances for Third and Sixth Respondents

Decision: 17 August 2009

FINAL DETERMINATION
Adjudicator: S G Lockhart QC

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INTRODUCTION

[1] Mr and Mrs Crosswell ("the claimants") on 17 April 1998 purchased from Mr Grant Malone ("the third respondent"), a house built at 13A John Rymer Place, Kohimarama, by the third respondent.

[2] The claimants on 13 December 2005, established a Trust and transferred their house to the Trust on 5 January 2006 via a deed of debt.

[3] The claimants in April 2006, decided to sell the house and on the recommendation of a real estate agent engaged JLA Limited to conduct invasive testing and produce a report as to the condition of their house.

[4] On 1 May 2006, the claimants received the invasive testing report which indicated there was evidence of moisture ingress occurring at:

(a) The entry to the lower level stairwell;
(b) The garage wall;
(c) The wall beside the windows in the lower lounge; and
(d) The lining of the rear wall of bedroom four.

[5] The Trust immediately filed a claim with the Weathertight Homes Resolution Service ("WHRS") under the Weathertight Homes Resolution Services Act 2002. In October 2006, the claimants engaged Pacific Environment NZ Limited ("Pacific Environments") to prepare architectural plans for a total reclad of the house, including a drained cavity.

[6] The remedial work to the house began on 6 August 2007 and concluded on 14 February 2008. During the remedial work the claimants and their family lived in rental accommodation. The claimants then filed with the Weathertight Homes Tribunal ("the Tribunal") a claim for damages to recover the cost of repairing their house and additional costs, a claim which has now been heard by the Tribunal and the decision now delivered.

THE ADJUDICATION RESPONDENTS

[7] Before the adjudication hearing commenced, the second, fourth, fifth, seventh, eighth and tenth respondents, had all at different

stages and for a variety of reasons, been removed from the proceedings.

[8] Two additional respondents, for reasons best known to themselves, did not attend the adjudication hearing, even though they had been repeatedly reminded of its commencement date and were both advised that the Tribunal had jurisdiction to hold them liable if either or both were found responsible for any of the damage caused to the claimants' house.

[9] The two respondents who did not attend the adjudication were:

(a) The third respondent, Grant Malone, the alleged developer and builder of the property which was sold by him to the claimants; and
(b) The sixth respondent, Carl Ruffles, a plasterer who had undertaken and completed the plastering work at the house currently owned by the claimants.

[10] As a result, only two respondents participated at the adjudication hearing being:

(a) The first respondent, the Auckland City Council ("the Council"), the territorial authority; and
(b) The ninth respondent, Ross Roofing Limited ("RRL") a duly incorporated company having its office at 2 The Furlong, Takanini, which was involved with the roofing work when the house, bought by the claimants, was being built.

PURCHASE OF HOUSE BY CLAIMANTS

[11] On 4 March 1998, the claimants inspected with a real estate agent the property at 13A John Rymer Place, Kohimarama and on 2 April 1998 signed a sale and purchase agreement with the vendors, Grant and Helen Malone.

[12] The claimants then obtained on 6 April 1998 an evaluation and a LIM report for the property and on 17 April 1998 the claimants entered into a settlement agreement and thus obtained possession of the property.

[13] The property at 13A John Rymer Place had been built by the vendors, Grant and Helen Malone. The construction had commenced in June 1996 and a final inspection was performed by the Auckland City Council on 20 February 1997, followed by the issue of a Code Compliance Certificate by the Auckland City Council on 18 March 1997.

[14] In late 1998, the claimants contacted Mr Grant Malone, the third respondent, the previous owner and builder, as they had noticed that there was dampness in the carpet and in the architrave lining in the lower level of the lounge floor area. The claimants then made contact with Mr Malone who visited the property accompanied by another building representative. The claimants have no knowledge of the type of repairs that were performed or the manner in which they were conducted but the repairs undertaken by Mr Malone was sufficient to stop the leaks at that time.

[15] The claimants acknowledged that they had also noticed leaks in the house between June 2002 and April 2003, but later they were satisfied that further repairs carried out in 2003 corrected any problems.

PROPERTY TRANSFERRED FROM CLAIMANTS TO TRUST

[16] The claimants then established the Crosswell Family Trust on 13 December 2005 and the two trustees were Mr and Mrs Crosswell who transferred the property to the Trust on 5 January 2006 by a deed of debt from them.

[17] Immediately prior to the establishment of the Crosswell Family Trust being created, the claimants in August 2005 noted that they had carpet mould in the front lounge and that the architrave adjacent to the fireplace had been blistering. In addition waterproofing repairs were required for the external power meter-box on the eastern elevation. In September 2005, the Crosswells noticed that a leak had appeared in the master bedroom wardrobe area and that on 11 October 2005, Auckland Roofkraft Limited were engaged because an internal underside flashing was required to be attached to the roof line extension of the downpipe to the guttering in order to prevent given moisture.

[18] Later in October 2005, the claimants also observed that water was entering the lounge at the base of the vented chimney. An inspection of the ridge capping revealed a separation of the butynol capping from the plywood substrate which permitted water to penetrate the house.

[19] On 29 November 2005, repairs again were needed and a further replacement to the sheet metal capping was required for the chimney. Scaffolding was then hired so that access could be obtained. All this work was completed within a fortnight prior to the establishment of the Crosswell Family Trust.

Additional Repairs after Trust Formed

[20] On or about March 2006, two months after the house had been transferred to the Trust, the claimants noticed that the moisture was entering the house through an intersection of the roof.

[21] On 31 March 2006, Edwards and Hardy (Auckland) Limited inspected the intersection of the roof apex with a view to repairing the problem. The claimants had also arranged for the house to be repainted in April 2006 with the intention of selling the house.

[22] On 5 May 2006, Edwards and Hardy carried out the repairs. These repairs included bedding and pointing of the mortar joints on the upper apex, and work behind the chimney. On June 2006, Edwards and Hardy submitted an invoice for those repairs to the claimants.

Attempted Sale of the Property

[23] In late April 2006, the claimants contacted a real estate agent with a view to selling the property. The real estate agent recommended that the claimants obtain a pre-sale inspection report so that the potential purchasers could be satisfied that there was no risk of weathertightness issues in the house despite its monolithic cladding. This recommendation was not made due to any specific leaks that may have been present at that time.

[24] As stated in paragraphs 2 and 3 above, JLA Building Consultants (Auckland) Limited ("JLA") conducted invasive testing and advised the claimants on 1 May 2006 that there were indications or evidence of moisture ingress in the house. The claimants then arranged for the Crosswell Family Trust to apply to the WHRS under the 2002 Act. The WHRS report dated 18 July 2006 recommended a full reclad.

[25] On 4 June 2006, water penetration at the intersection of the roof and also at the upper level of the ridge tiles occurred during a period when heavy wind and driven rain caused moisture entry. Roofing repairs were completed by rebedding the upper level point ridges.

[26] In October 2006, the claimants engaged Pacific Environments to complete architectural re-design plans for recladding the house which was not completed until 8 February 2008 when the claimants were able to move back to live in their house. The first respondent, the Auckland City Council, issued a Code Compliance Certificate on 24 April 2008.

THE CLAIMANTS' CLAIM

[27] Prior to the commencement of the adjudication hearing, a meeting of the parties' experts was held. This meeting resulted in an agreement being reached by all of the parties attending the adjudication (i.e. the claimants, the first and ninth respondents).

[28] All parties agreed that the sum for all the remedial work which had been completed and all consequential costs totalled $324,419.00. In addition to that sum, the Tribunal was required to decide the additional claim by the claimants for both interest accrued and general damages, and whether the claimants can recover the costs for installing the eaves as part of the remedial work.

Claimants' Claim for Eaves

[29] The claimants claim the sum of $27,785.00 for the cost of the eaves being included in the construction as the claimants relied on advice given to them by an architect who was not called to give evidence and therefore not cross-examined.

[30] The first respondent, Auckland City Council (Council) opposed the claim for the cost of the eaves and evidence was given by three experts all of whom were cross-examined. All three experts confirmed that the addition of the eaves was not necessary in order to obtain a building consent to complete the remedial work.

[31] In *Lester v White* [1992] 2 NZLR 383 at para 499, Greig J had stated:

> "A plaintiff can be entitled to no more than the costs of the cheapest remedy for the damage caused."

However, this Tribunal is of the opinion that the correct approach is to determine whether the claimants have used a reasonable priced solution to repair the damage which has been caused by a respondent. In this particular case, the correct issue is whether or not it was necessary for the claimants to have the eaves added to the house, bearing in mind that eaves are not necessary for a building consent.

[32] Mr Wilson, an advisor to the claimants, confirmed that the claimants would not have had any difficulty in engaging a builder to undertake the construction of a design which did not require eaves extensions.

[33] Taking all matters into consideration, the Tribunal has reached the decision to decline the award for the costs of providing eaves. Accordingly the claim by the claimants for the cost of the eaves is refused.

CONTRIBUTORY NEGLIGENCE

[34] Contributory negligence is based on the premise that a claimant who sues another person for harm that he or she has

suffered, but has failed to take reasonable care in looking after his or her own interests, may have any damages awarded reduced to reflect the claimant's share in the responsibility of the harm and damage suffered. Specifically, section 3(1) of the Contributory Negligence Act 1947 provides:

> **3 Apportionment of liability in case of contributory negligence**
>
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

[35] The Council submits that the Trust cannot sue for damages because the claimants have not personally arranged to assign any rights they may have had against any of the respondents. Nor is there any evidence that the claimants suffered any loss as a result of the sale of the property to the Trust.

[36] On that basis, it is claimed on behalf of the Council that the Crosswell Family Trust cannot sue them. However in the alternative, the Council argues that if this submission is not accepted, it will be necessary for the Tribunal to consider whether the Trust has been contributorily negligent.

[37] The Tribunal does not accept the proposition that the Trust is prevented from claiming against the Council because it was not until May 2006 before the extent of the seriousness of the damage was fully known and that a full reclad would need to be done. The Tribunal however does hold that there was an element of negligence on the part of the claimants in not taking earlier steps to ascertain the extent of any damage to the house particularly to the roof.

Purchase with Knowledge

[38] The first and ninth respondents both allege that the claimants "should have obtained a pre-purchase report" prior to transferring the house by selling the property to the Trust and that if such a report had been obtained the claimants would have known of the damage to the house.

[39] The Trust acquired the house occupied by the claimants on 6 January 2006 after the Trust had been formed on 13 December 2005. The house had, for a considerable period, been leaking. The claimants had first noted in November 1998, that the carpet and the architectural lining in the lower level of the lounge floor were damp. The claimants also acknowledge that over a period of three months in September, October and November 2005, remedial work had to be done because of water leaks. There is no doubt that the "minor leaks" observed in 2003 and 2004 continued in 2005 with remedial work being done within a fortnight of the formation of the Crosswell Family Trust (see paras [18]-[19] above).

[40] By 1 May 2006 because of high moisture levels and also because there was evidence of moisture penetration, the JLA Building Consultants Limited recommended that invasive testing be carried out.

[41] The Council alleges that the house owned by the claimants had been leaking for a number of years and that it was a "leaky home" at the date that the Trust was created. As the Council observes:

> (pp.97) "Mr Crosswell's evidence establishes that no substantial repairs were undertaken between the time the trust acquired the house in January 2006 and the date upon which the current Weathertight Homes claim was lodged. All of the repairs that were undertaken, that are now claimed for, were for repairs to building elements which damage and defects existed prior to January 2006."

[42] It is correct that both Mr and Mrs Crosswell must have known from different leaks on different dates from mid 2002 through to November 2005 that there had been occasions when leaking problems had occurred in the house which required repairing.

Publicity for Leaky Homes

[43] Mr Crosswell also acknowledged that he was aware that "there was an emerging focus in the media" in connection with leaky homes in Auckland but that "he had taken what he believed to be prudent actions to address the identified areas of water ingress".

[44] The Tribunal is of the opinion that a prudent propety/house owner in the position of Mr and Mrs Crosswell in December 2005 and January 2006 when the Trust was being created, should have taken steps as trustees to protect the interest of the Trust when it was acquiring the house.

[45] Indeed, counsel for the claimants acknowledged:

> "99. We accepted that by late 2005 the growing publicity surrounding leaky homes would have prompted many purchasers of a dwelling with monolithic cladding to obtain a pre-purchase report if they knew nothing about the dwelling and had not been living in it for the past 7 years. It is quite a leap to say that individuals in the claimants' situation could reasonably be expected to obtain such a report."

Contributory Negligence - Findings

[46] In the present case it is the Tribunal's view that with the knowledge acquired by the claimants over a number of years of having water ingress into their house and also being aware of the publicity in the press, they should have realised the necessity to have

a pre-purchase inspection carried out on the house which they were transferring to the Trust.

[47] The evidence does establish that both the claimants as trustees should have been aware that steps were needed to protect the interests of the Trust and the failure to take such steps amounted to negligence on their part.

[48] In *Body Corporate 189855 v North Shore City Council* [25 July 2008] HC Auckland, CIV 2005-404-5561 ("*Byron Avenue*"), Venning J considered the issue of contributory negligence in regards to the knowledge of the defects held by certain trustees. At para [349] Venning J held:

> [349] In the circumstances, the trustees acted with disregard for the interests of the trust by failing to take any steps at all to enquire into or to protect their position when they knew (through Ms Clark) that the building had defects and the Council had refused to issue a code compliance certificate. Their claims against the Council must be reduced on the grounds of contributory negligence. The appropriate reduction in their case is 25 percent.

[49] The Council in their written submissions stated that:

> "103. The extent to which the trust has been contributorily negligent is a question of fact. The tribunal can gain assistance from other cases in determining what might be an appropriate deduction for contributory negligence.

[50] The Tribunal finds that the action of the claimants in failing to obtain a pre-purchase inspection report when they had been aware of intermittent water leaks over a number of years coupled with their acceptance that they were aware in late 2005 of "the growing publicity surrounding leaking homes" establishes that the claimants were

negligent in failing to take further steps to protect their position when they knew that the building had defects which had caused leaks.

[51] The decision of Venning J in *Byron Avenue* assessed contributory negligence in a similar case at 25%. In the present case the Tribunal therefore considers that the appropriate reduction for the claimants' contributory negligence is 20%.

GENERAL DAMAGES

Can a Trust seek General Damages?

[52] The claimants have made a claim for general damages for the stress and anxiety caused to them. In the last amended claim filed by the claimants on 8 May 2009, the sum of $60,000 was claimed but in the written closing submissions the amount for general damages was reduced to $50,000. The Tribunal assumes that an amount of $25,000 is claimed for each.

[53] The basis and the essence of any claim for general damages is whether any mental distress is caused to an individual. Both the claimants, Mr and Mrs Crosswell, underwent a very difficult period when they and their children had to move out of their home and seek other accommodation.

[54] The claimants relied on the decisions both in *La Grouw v Cairns*, CIV 2002-404-156 and also *John Gray Family Trust* as cases in which it had been in 2004 and 2005 respectively that courts had held that trustees in some circumstances could receive general damages.

[55] However, the claimant in this case is not an individual, as the claimant is Gerard Michael Crosswell and Christine Dawn Crosswell, as trustees of the Crosswell Family Trust and in the jurisdiction of this

hearing only an owner can be a claimant. This means that individual trustees in the capacity as a tenant or an occupier are precluded to seeking redress for general damages.

[56] This is so because the point or the reason of a Trust is to create a legal persona who is quite distinguished from the person or persons who are the beneficiaries. The reason family trusts are created is to protect the assets of the beneficiaries creditors and also to isolate a trust from any other property interest or obligations of each of the trustees.

[57] The Privy Council in *The Contradictors v Attorney General*, 15 PRNZ 200 (PC) made it very clear that trustees and beneficiaries certainly have different interests.

[58] Moreover the decision of Venning J in *Byron Avenue,* after granting the trustees of the Clark Family Trust a judgment against the Council and two other respondents dismissed any claim for general damages stating:

> "I make no allowance for general damages for the trustees."

[59] Both Adjudicator C B Ruthe and Adjudicator Pitchforth have recently followed the decision of Venning J with Adjudicator Pitchforth deciding:

> "[108] Mrs Hearn gave evidence of her experiences and asked for damages. However Mrs Hearn was not a party in her own right. She was a witness giving evidence as one of the trustees. Moreover, the trust was not in a position to suffer anxiety or stress.
>
> [109] I therefore conclude that I do not have jurisdiction to make an award in favour of one who is not a party, and so Mrs Hearn's claim for general damages fails."

[60] This Tribunal is therefore bound to follow the ruling of the High Court by Venning J just as it has been followed by two adjudicators.

[61] The claim by Mr and Mrs Crosswell for general damages is therefore refused.

QUANTUM CONCLUSION

[62] The following is the amount that the claimants are entitled to claim for:

(a) The agreed sum fixed by the experts' decision:

Repairs	$324,419.00
Interest to 17 August 2009	$41,797.98
Subtotal	$366,216.98
Less 20% (contributory negligence)	$73,243.40
Total	$292,973.58

LIABILITY OF FIRST RESPONDENT – AUCKLAND CITY COUNCIL

[63] The first respondent owed a duty of care to ensure that when the house was being built that upon completion it could obtain a Code Compliance Certificate.

[64] Sections 43(3) and 76(1) of the Act imposed a duty on the Council to ensure that not only were inspections of the property carried out but also that the house was being built, in accordance with the building regulations and that the work was being conducted by suitably qualified personnel. In addition during the Council's inspections all reasonable steps were to be taken to ensure that the

building work was being inspected, and being completed in accordance with the building consent.

[65] The Council did receive advice that the cladding system, which initially had been approved, would not be used during the construction of the house. Having received such a notification, the Council should then have issued a written document requiring that an application needed to be submitted to the Council to obtain an appropriate amendment and if necessary alter the building work on site until the issue relating to the cladding system had been resolved.

[66] As a result, the departure from the specified cladding system did allow some moisture ingress to enter the house which caused damage.

[67] Also the inspections carried out on behalf of the Council, failed to ensure that defects, while inspecting the construction of the house, were noticed and rectified.

[68] A conference of experts was convened prior to the hearing. At that conference all the experts agreed that the major defects causing the dwelling to leak were:

- Lack of suitable weathertight flashings to joinery openings
- Defects in installation of roof flashings and fascias. In particular there was a lack of kick outs to apron flashing terminations and fascia / spouting was buried into the cladding
- Lack of cladding clearances prevented moisture getting out. It also contributed to water wicking up via capillary action primarily in the eastern elevation
- Defects in the installation of the southern elevation deck, in particular inadequate handrail fixing, membrane installed inappropriately and inadequate slope.
- Flat topped parapet walls

[69] The experts also agreed that there were other defects but these were either only a minor contribution to the damage to the dwelling or had been remedied by the earlier remedial work. These defects included:

- Lack of vertical and horizontal joints
- Ineffective upstand to barge flashing / gutter
- Lack of flashing or sealant between different cladding forms
- Installation of meter box to wall framing

[70] Despite all building inspectors failing to notice the effects set out above, the Council issued a certificate of Code Compliance for the house.

[71] According to the views of the experts at the conference, the defects in the construction of the house which have been listed, resulted in moisture ingress that caused damage to the interior of the house.

[72] In the opinion of the Tribunal, the Auckland City Council failed to carry out adequate and satisfactory building inspections. For example, rather than deflecting water, the parapets directed the water behind the plaster from the tops of the features. The colour steel fascia and the spouting system was buried into the stucco plaster and the stucco plaster system was finished against the weatherboard panels without an appropriate back flashing system or waterproofing the apron flashings were poorly finished at wall ends, and kick out flashings were not provided.

[73] In addition weathertight flashings had not been installed at jamb and sill level of the windows, the southern elevation deck had not been constructed in a weathertight manner, and the membrane directed water behind the plaster cladding system.

[74] All these defects should have been observed when inspections were carried out and the faults ordered to be corrected. As Baragwanath J stated in *Dicks v Hobson Swan Construction Ltd (in liq) & Ors* (2006) 7 NZCPR 881:

> "[110] The Council's power to charge fees and its duties to determine whether a Certificate of Compliance should be issued and, if not, to issue a notice to rectify point to a legislative policy the Council should carry any loss caused if it neglects its duty to inspect. Mrs Dicks should be able in accordance with the principles of *Stieller* and *Hamlin* to rely on it to perform that duty. For the Council to be able to case on her the obligation to suspect that it had breached the duties it was bound to perform would be perverse.
>
> …
>
> [116] … It was the task of the Council to establish and enforce a system that would give effect to the Building Code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present."

In *Dicks* the High Court held the Council liable at the organisational level for not ensuring an adequate inspection regime.

[75] In a more recent decision of *Body Corporate 188529 & Ors v North Shore City Council & Ors (No 3) (Sunset Terraces)* [2008] 3 NZLR 479, Heath J stated that:

> "[409] …The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard.
>
> …
>
> [450] …[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[76] It is apparent from these cases that the definitive test is not only what a reasonable Council officer, judged according to the standards of the day, should have observed. A council may also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying critical waterproofing issues.

[77] The failure of the Council's inspections caused considerable water ingress, and was therefore negligent on their part.

[78] The Tribunal holds the errors by the Auckland City Council related to major defects and accordingly concludes the Council is jointly and severally liable for the full amount established.

LIABILITY OF THE THIRD RESPONDENT – GRANT MALONE

[79] The claimants allege that the third respondent, Grant Malone, was the developer and the builder of the house bought by the claimants. His then wife, Helen Heenen, was a respondent earlier in the proceedings having been joined as a second named third respondent. When Helen Heenen made an application to be removed from the proceedings, her then husband, the third respondent Grant Malone, assisted his wife to be removed and filed a sworn affidavit stating:

> "I was the builder of the property at 13a John Rymer Place, Kohimarama (the property).
> I confirm that my wife at the time Helen Heenen had no involvement in the design, planning or the construction of the property."

All parties therefore agreed that Helen Heenen should be removed from these proceedings and as a result, Mr Grant Malone is the only named third respondent.

[80] Mr Malone was named as a party by the claimants when they issued and served on 22 September 2008 their first statement of claim for an award of damages. By letter dated 12 October 2008, Mr Malone then advised the Tribunal that he was "not intending on getting legal representation" and that he "could not afford to employ a lawyer" and would be responding to requests by himself.

[81] At the request of Mr Malone, the Tribunal issued joinder applications for the fourth respondent, Ross Sutherland, the fifth respondents, Stephen Baskett and Craig Bracken, the seventh respondent, Able Plastering Limited and the eighth respondent, Parris Plumbers Limited, all of whom were later removed from the proceedings due to Mr Malone failing to file any response to their applications for removal.

[82] The last communication that the Tribunal received from Mr Malone was dated 3 March 2009 and shortly after that date Mr Malone had not had any correspondence sent to him and also refused to accept telephone calls.

[83] A party's failure to act do not affect the Tribunal's powers to determine the claim. Section 74 of the Act provides that the Tribunal's powers to determine a claim are not affected by:

> (a) The failure of a respondent to serve a response on the claimant under section 66; or
> (b) The failure of any party to:
>   (i) make a submission or comment within the time allowed; or
>   (ii) give specified information within the time allowed; or
>   (iii) attend, or participate in, a conference of parties called by the Tribunal; or
>   (iv) do any other thing the Tribunal asks for or directs.

[84] Moreover section 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act and determine the claim based on available information:

> If any failure of the kind referred to in section 74 above occurs in adjudication proceedings, the Tribunal may-
> (a) draw from the failure any reasonable inferences it thinks fit;
> (b) determine the claim concerned on the basis of information available to it; and
> (c) give any weight it thinks fit to information that-
> (i) it asked for, or directed to be provided; but
> (ii) was provided later than requested or directed.

Based on sections 74 and 75, the Tribunal therefore makes the following considerations and determines Mr Malone's involvement and responsibility based on the available information.

[85] Mr Malone engaged the fourth to tenth respondents to work on the construction of the house. The following information dated 12 October was sent to the Tribunal by Mr Malone:

> **With regard to the construction of the house and other subcontractors involved I would like to respond by making the following points.**
>
> - The house was built to the plans and specifications which were supplied to me by Robert Medemblik, in the understanding that a quality house, meeting the building code would be constructed. These plans were approved by the Auckland City Council.
> - The house was built with untreated timber which was approved by the Building Industry Authority.
> - My purpose in changing the cladding was to construct a better quality house.
> - In making changes to the dwelling I followed all council instructions.
> - The engineer involved in the construction of the house and in amending the bracings needed for the revised cladding was David Tyler.
> - I can't remember who supplied and laid the roof tiles. It was either Ross Roofing or Monier.

- I can't remember who installed the flashings.
- I can't remember the firm who did the solid plastering on the exterior of the house.
- I can't remember who waterproofed the deck in readiness for tiling.

[86] It was accepted by all parties that Mr Malone was the builder of the property. As a result, it is clear law in New Zealand that regardless of the specific terms of a building contract, builders owe a duty of care to people whom they should reasonably expect to be affected by their work. Builders, developers and head contractors can thus be liable under the tort of negligence at the suit of owners of buildings which have been constructed in a negligent, defective, or unworkmanlike manner. *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 406, 417-418 (CA).[1]

[87] Chambers J succintly summarised the law in *Body Corporate 202254 v Taylor* (2008) 12 TCLR 245; [2008] NZCA 317 as being clear that if a builder carelessly constructed a residential building, thereby causing damage, the owners of the building could sue the builder in negligence (at [125]).

[88] Mr Malone did owe a duty to use care and skill to ensure that the approved documents for the building of the house contained sufficient information. However at that time, the specifications manufacturer's literature, BRANZ Appraisal certificates on document information, and industry standards in respect of construction methods, were not fully available.

[89] The plans that were provided and made available by Mr Malone were lacking important details and were not amended or altered by the third respondent particularly:

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[1] See generally *AC Billings & Sons Limited v Riden* [1958] AC 240; *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 392-394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, 240-242 (CA); *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and [1996] 1 NZLR 513 (PC); and *Dicks v Hobson Swan Construction Ltd (in liq) & Ors* (2006) 7 NZCPR 881 at [32].

Roof and Internal Box Gutters

(a) There were no details as to how the parapets at the front of the house were to be constructed;

(b) There were no construction details about how the roof and wall junctions were to be constructed to provide for weathertightness, given that no overhangs or eaves were provided;

The Joinery

(c) There were no details identifying how weathertightness was to be achieved at the junctions of the joinery units with the cladding;

(d) There were no details about how the glass blocks were to be installed or flashed to achieve a weathertight finish;

The Wall Cladding

(e) A Harditex cladding system was specified, but the James Hardie Technical literature had not been included in the application for Building Consent;

(f) There were no details about how the vertical or horizontal (mid floor) movement control joints were to be formed, or located, to prevent uncontrolled cracking;

(g) There were no details of the cladding junctions between the weatherboard panels and the Harditex;

(h) There were no details about how the cladding was to be terminated at ground level;

(i) There were no details of what finish was to be applied to the wall claddings forming the gable ends to provide a weathertight finish;

The exterior balcony

(j) There were no construction details relating to the balcony leading from the upper level bedroom;

(k) There was insufficient detail of the floor of the balcony;

(l) The height differentials between the balcony surfaces and the finished floor levels were not shown;

(m) There were no details on the construction of the balcony barrier;

(n) There were no details of the termination of the wall cladding at the level of the balcony floor;

(o) There were no details on the junction between the balcony barrier floor and the adjoining wall cladding;

(p) There were no details about the waterproofing membrane, or the finishing of that membrane to the deck;

(q) There were no details about how the balustrade was to be fixed to the deck.

[90] The Tribunal is satisfied that the deficiencies referred to above caused, or contributed in time, to moisture ingress to the house which eventually caused damage to such an extent that a reclad was required.

[91] In addition, Mr Malone who was the builder of the house, owed a duty of care and skill to carry out the building of the house and failed to remedy defects occurring in the construction as follows:

(a) No flashings had been installed at the junctions between the stucco cladding and the aluminium joinery;

(b) The slope on the southern elevation deck was insufficient;

(c) The screws fastening the guardrail to the horizontal top surface of the deck penetrated the membrane and terminated in the wood framing;

(d) There was insufficient clearance between the framing timber and the surrounding ground level.

[92] The faults listed above also resulted in moisture ingress entering into the house that ultimately caused damage to the house and required remediation.

[93] The carelessness and negligence of Mr Malone during the building of the house is in the opinion of the Tribunal, the major reason for the defects which ultimately caused water damage to the house which then required complete reclad. This is because:

- Mr Malone, was previously the owner of the land on which the house bought by the claimants was built.
- Mr Malone assisted in the building of the house.
- He lived in the house for two years before it was sold to the claimants.
- He employed the second respondent, Robert Medemblik, to design the house.
- Mr Malone also engaged the fourth, fifth, seventh, eighth and tenth respondents (all of whom were later removed from the proceedings) to work on the construction of the house.
- In addition, Mr Malone also engaged Carl Ruffles (plasterer), the sixth respondent, and RRL Group Limited (Roofer) the ninth respondent, all of whom completed work on the house.

[94] Although the claimants allege that Mr Malone was both the builder and the developer of the house, in *Patel, Raman & Offord & Ors* [16 June 2009] HC, Auckland, CIV 2009-404-000301, Heath J stated on appeal:

> [31] In my view, it was unnecessary for the Adjudicator to make any finding that Mr Patel was a "developer", of the type to which the *Mount Albert Borough Council v Johnson* duty attached. The finding was unnecessary for the reasons set out in *Nielsen*, at paras [66] and [67]. All that was required was for the Adjudicator to weigh in the balance the tasks undertaken by Mr Patel in relation to work undertaken negligently by other actors and then to determine relative contributions to the damages awarded.

[95] Having regard to the involvement of the third respondent in the construction of the claimants' house, the Tribunal determines that

the third respondent, Mr Malone is jointly and severally liable for the full amount of the claim as established.

LIABILITY OF THE SIXTH RESPONDENT – CARL RUFFLES

[96] The sixth respondent, Carl Ruffles is a plasterer. Mr Carl Ruffles was joined as the sixth respondent by the third respondent, Mr Malone. The claimants allege that Mr Ruffles owed a duty of care to the claimants to use reasonable care and skill during the construction of the house.

[97] After Mr Ruffles was joined as a respondent, he instructed counsel who advised the Tribunal that the proposed adjudication hearing date for 20 July 2009 was acceptable. Even then, he did not attend the adjudication hearing although he was reminded of the hearing date and he was served with all the same documents which were circulated to all other parties in the period prior to the commencement of the hearing.

[98] A party's failure to act do not affect the Tribunal's powers to determine the claim. Section 74 of the Act provides that the Tribunal's powers to determine a claim are not affected by:

> (a) The failure of a respondent to serve a response on the claimant under section 66; or
>
> (b) The failure of any party to:
>
> (i) make a submission or comment within the time allowed; or
>
> (ii) give specified information within the time allowed; or
>
> (iii) attend, or participate in, a conference of parties called by the Tribunal; or
>
> (iv) do any other thing the Tribunal asks for or directs.

[99] Moreover section 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act and determine the claim based on available information:

If any failure of the kind referred to in section 74 above occurs in adjudication proceedings, the Tribunal may-

(a) draw from the failure any reasonable inferences it thinks fit;
(b) determine the claim concerned on the basis of information available to it; and
(c) give any weight it thinks fit to information that-

(i) it asked for, or directed to be provided; but
(ii) was provided later than requested or directed.

Based on sections 74 and 75, the Tribunal therefore makes the following considerations and determines Mr Ruffles' involvement and responsibility based on the available information.

[100] The claimants allege that when the construction of the house had concluded there were considerable defects in the plastering work carried out by the sixth respondent, Carl Ruffles. These defects were:

(a) Appropriate weathertight flashings had not been put in place prior to the application of the plaster at the junctions between the different claddings;
(b) The joinery units were not appropriately sealed and flashed prior to the application of the texture coating;
(c) The plaster was not applied prior to the installation of the fascia and spouting system; and the coating was not taken up behind these features to protect the absorbent cladding backing and substrate;
(d) The cladding system was taken hard down to adjacent surfaces including the finished ground;
(e) The plaster was installed over the butyl rubber membrane to the southern elevation deck and the gable parapets;
(f) The plaster cladding was not installed in accordance with the manufacturer's technical literature.

[101] The claimants in opposing the application by Mr Ruffles relied on the information contained in the Hampton Jones Responsibility Report, particularly page 8 which demonstrated the saturated timber substrate, a result of an inadequate joinery flashing system.

[102] That application was opposed by the first respondent, Auckland City Council. The grounds for opposing the removal were:

> *Plaster cladding to ground and lack of joints at timber framing to masonry junction*
>
> (a) These defects are generally all at the bottom plate/bottom of wall locations.
>
> The trades that are responsible for the issue of plaster being continuous at foundation level are the plasterer and builder.
>
> *The stucco plaster system had been finished against the weatherboard panels without the appropriate back flashing system, or another means of waterproofing.*
>
> (b) In the event that the junction between the weatherboards and plaster cladding caused water ingress the trades responsible would be the plasterer and the builder/carpenter.
>
> *Unsealed penetrations through the cladding*
>
> (c) It was the plasterer or the builder's responsibility to seal or flash any penetrations through the plaster cladding.
>
> *No horizontal or vertical movement control joints (mid floor) had been provided in the stucco plaster cladding*

(d) There is a complaint that the plaster cladding did not have any horizontal or vertical movement control joints throughout.

Installation of control joints in the cladding would be work undertaken by the plasterer. The absence of control joints amounts to a failure by the plasterer to install the cladding in accordance with required standards and practice.

[103] All that work from (a) to (f) above was the result of work or the responsibility of Mr Ruffles or by his employees working under his control.

[104] On 22 June 2009, Mr Ruffles sent the following letter to the Tribunal which the Tribunal accepted as a request to be removed from the proceedings:

> "I completed the plastering of this dwelling to the specifications of the owner/builder Grant Malone. He was very happy with my work and at no time have I had any phone calls or contact with him to suggest that there are or ever were any problems with the dwelling. During the process of plastering this dwelling I was never given any inspection feedback from the council and I only liaised with the owner/builder Grant Malone via inspections. To achieve a code of compliance this dwelling would have to have attained a set standard through the council inspectors, at no time have I ever been contacted to bring the plaster off the ground level or to form expansion joints by either the builder Grant Malone or by council inspectors. If I had been contacted or directed to do the above tasks I most certainly would have, however this was never recommended by either the builder, Grant Malone or the council inspectors. Despite the above mentioned concerns the dwelling appears to have several design faults of which I have no responsibility and it is obvious that the design faults such as lack of flashing detail around windows, junctions and parapets have been the significant cause of water ingress in the dwelling. As a result of this water ingress the plaster cladding will crack extensively and consequentially compound the situation. Efforts to remedy the problems by the removed respondents Able Plastering Ltd demonstrate

> that the problems were more design related, such as flashing issues, rather than cladding related. I have been involved with re-cladding and remedial repairs on such homes for the past 6 years, contracting through Sansom Construction and I have observed that it is a consistent omission of flashing detail that prevails with water ingress."

Further on 20 June 2009, Mr Ruffles made an application to be removed from the proceedings.

[105] The Tribunal accepts the grounds stated by the Council above and determines that the water ingress which came from the top of the building was caused because of the flashings at the intersection of the wall plaster and the spouting fascia systems were buried into the plaster. The water ingress was caused because the roof flashings were unable to divert water into the spouting, and as a result it permitted the water to travel into gaps which had been left unsealed and which in turn allowed the water to enter the wall framing and then followed on behind the plaster cladding to enter the building.

[106] The plaster wall cladding should have been installed after the roof coverings have been put in place. It appears that the plasterer did not require the spouting/fascia to be installed after the plaster cladding and as a result when the plastering was done, it was to the spouting/fascia and in doing so it was buried, which meant that the junction was not sealed.

[107] The Tribunal finds that the above defects in the plastering would have been or should have been observed by Mr Ruffles and the defects then should have been rectified. The evidence establishes that the failure to remedy the defects in the plastering resulted in moisture ingress entering into the house.

[108] Mr Ruffles was the person who was engaged as the specialist contractor who should have not only completed all the cladding and plastering work for the house, but also should have carried out his

work in a tradesmanlike manner. However there were a number of defects in the plastering work which were left without being remedied.

[109] In order to be liable for particular damage to the house, the respondents must have breached a duty of care owed to the claimants as subsequent purchasers of the house. It is clear law in New Zealand that the builder of a dwellinghouse owes a duty of care to a subsequent purchaser of that dwellinghouse not to create any latent defects: Bowen. A local authority also owes a duty of care to ensure that houses aware that houses are built in accordance with the local bylaws: Hamlin [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC). As Todd says in *The Law of Tort in New Zealand* (5th ed 2009 Brookers Ltd) at 6.4.02(1):

[110] *Hamlin* accordingly recognises that builders and local authority inspectors owe a duty of care to subsequent owners in building or inspecting dwellinghouses. The duty similarly can be owed by other persons whose negligence contributes to a building defect, such as architects, engineers and developers. And negligent repairers of an existing defect can be liable concurrently with the original wrongdoer – Johnson v Watson [2003] 1 NZLR 626 (CA).

[111] Based on those principles, it is an objective standard of care owed by those involved in building a house. Therefore, the Tribunal must examine what the reasonable builder, council inspector, architect or indeed a plasterer would have done.

[112] Based on these principles and the information available to the Tribunal, the Tribunal is therefore satisfied that the sixth respondent, Mr Carl Ruffles, although he was not present at the adjudication hearing and thus did not give evidence nor could it be cross-examined, was significantly responsible for negligent and careless plastering work in the construction of the house bought by the claimants.

[113] The Tribunal determines that given Mr Ruffles' involvement in the work that has led to the defects stated above, he is therefore jointly and severally liable for the full amount of the claim.

LIABILITY OF THE NINTH RESPONDENT – ROSS ROOFING LIMITED

[114] The ninth respondent, Ross Roofing Limited (RRL), was responsible for the construction work of the roofing and therefore owed a duty of care to use reasonable care and skill when carrying out the roof construction of the house which was subsequently purchased by the claimants.

[115] RRL has filed a very extensive 40-page written response in reply to the submissions filed by both the claimants and the first respondent, the Auckland City Council.

[116] The claim against RRL is that it owed a duty of care to use reasonable care and skill in carrying out the roofing work so that it complied with the obligations under the Building Act.

[117] The claimants allege that RRL failed to meet a duty of care as:

(a) The upstand to the guttering/spouting along the barge on the northern elevation was crushed during the installation of the roofing material, and therefore did not provide a kerbed edge to deflect moisture down to the spouting at the end of the barge detail; and
(b) The apron flashings were poorly finished where they terminated at the wall ends, and that no "kick outs" or other means of deflection were provided.

[118] It was also alleged that RRL was negligent in failing to notice that there was no deflection present to divert the water and thus the moisture ingress was able to enter the building and thus cause damage.

[119] The Tribunal has carefully considered each of the matters claimed on behalf of RRL and the Tribunal is satisfied that the only issue that can result in a finding against RRL is the allegation that it failed to either provide a means of preventing moisture entering the property or alternatively warning the third respondent, Mr Malone, of the probable danger if a means of deflection were not provided.

[120] It cannot be disputed that RRL was contracted to install the roof. To do so, RRL had to provide and install lead apron flashings. On behalf of RRL it was initially claimed that "kick-out" flashings were not part of the contract that it had with the third respondent, Mr Malone. Consequently RRL did accept that there was responsibility to provide apron flashings but it still disputed as to whether the lead apron flashings should have been in place before the cladding plasterer performed his duties.

[121] It was accepted on behalf of RRL that the roof was laid in two stages, the first being on 22 August 1996 when the top level was laid, and then the lower level being laid on 2 October. According to Mr Ross, after this work had been completed "senior staff" made a visit to the site to "audit" the work that had been done.

[122] When the "audit" was carried out, a checklist notes that all "relevant areas" have been successfully completed including the "lead dressing down".

[123] Thus, the individuals working in respect of the roof were on the site on three different occasions and thus should have been aware that the "diverters" had not been installed although RRL had been

contracted to install the flashings in order to comply with the Building Code relating to external moisture i.e. E2.

[124] RRL does not dispute that it was contracted to install the roof and to also install the lead apron flashings which are sometimes referred to as "kick out" flashings. RRL accepted that it was required to provide apron flashings but claimed that the terminations of the lead apron flashings should have been finished before the cladding applicator and the plasterer had completed their work.

[125] RRL suggested that it was unlikely that their contractors/workmen would have created diverters at the end of the terminations as they would have thought that that work would be arranged by either the builder, the Council, the cladder or the plasterer.

[126] However, RRL had been contracted to install the flashings so as to achieve compliance with clause E2 of the Building Code, which relates to dealing with external moisture. But in the end there was no means of deflection provided thereby resulting in damage to the property occuring.

[127] RRL acknowledges that in accordance with the contract that it had with Mr Malone, it had responsibility to install the roofing, but RRL denied that its responsibility extended to providing a satisfactory termination flashing. That denial cannot be correct having regard to the advice of BRANZ that "it had long recognised" that flashings should divert water from the structure by proper flashings. A BRANZ bulletin issued in February 1993 stated:

> "A flashing functions property when it diverts water away from any function or point where water may enter the building structure."

That requirement was simply not followed nor was any care taken by RRL in order to carry out the advice of BRANZ and the requirements of the Building Code.

[128] Moreover, the Council alleges that RRL was at fault because:

> "The apron flashing for the roof was lead and it was installed at frame upstage by the ninth respondent, but the ninth respondent did not terminate the downhill end of the leak flashings."

[129] The Tribunal finds that because there was no termination at the downhill end of the leak flashings, this allowed moisture to run down the parapet walls and thus from the roof which then travelled into the structure of the house.

[130] Mr S P Wilson, a registered building surveyor who gave evidence on behalf of the Council, stated when he was being cross-examined by counsel for RRL that he was able to identify on the set of red coloured elevations, that every single elevation of water that had ingressed the property was due to the shortcomings of the flashings created by RRL. The water caused damage, which it was alleged, was the reason why a reclad was required.

[131] However, there were three other respondents i.e. being the first respondent (Auckland City Council), the third respondent (Mr Malone, the builder) and the sixth respondent (Mr Carl Ruffles, the plasterer) all of whom were involved with the completion of the building and yet none of them, and especially Mr Malone, either simply did not notice that there were no "kick-outs" or that there would be other means of a deflection being installed.

[132] Taking into account that there were three other responsible individuals who also should have drawn attention to the lack of a deflector being installed and also had made arrangements or discussed with RRL the necessity of a deflector being installed.

[133] There can be little doubt that there was negligence on the part of the ninth respondent, Ross Roofing Limited, but at the same time there were other parties who should have queried lack of a deflector.

[134] Having regard to the experts' conclusion that defects in the roof flashings and fascias would have required a full reclad the joint and several liability of RRL is therefore assessed as 100% of the amount established.

CONTRIBUTION ISSUES

[135] The Tribunal has found that the first, third, sixth and ninth respondents breached the duty of care they each owed to the claimants. Each of the respondents is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent outlined in this decision.

[136] Section 72(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can 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.

[137] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[138] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from

> any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

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

[140] As a result of the breaches referred to above the first, third, sixth and ninth respondents are jointly and severally liable for the entire amount of the claim. This means that they are concurrent tortfeasors and therefore each is entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

[141] It has been well established that the parties undertaking the work should bear a greater responsibility than the Council. In recent cases the apportion attributed to the Council has generally been between 15% and 25%. There are no specific circumstances in this claim which dictate a greater or lesser amount should be awarded in this case and accordingly I set the Council's contribution at 20%.

[142] The contribution of the third respondent Mr Malone is set at 50% as the work he did was the dominant cause of damage.

[143] The contribution of the sixth respondent, Mr Ruffles, is set at 20% as the failure to remedy the defects in his negligent plastering work resulted in significant moisture ingress. The contribution of the ninth respondent, Ross Roofing Limited, is set at 10%.

[144] I therefore conclude that the first respondent, is entitled to a contribution of 80% from the third, sixth and ninth respondents in

respect of the amount for which he has been found jointly liable. The third respondent is entitled to a contribution of 50% from the first, sixth and ninth respondents. The sixth respondent is entitled to a contribution of 80% from the first, third and ninth respondents. The ninth respondent is entitled to a contribution of 90% from the first, third and sixth respondents.

CONCLUSION AND ORDERS

[145] The claim by Gerard Michael Crosswell and Christine Dawn Crosswell as trustees of the Crosswell Family Trust is proven to the extent of $292,973.58. For the reasons set out in this determination, I make the following orders:

I. The Auckland City Council is to pay Gerard Michael Crosswell and Christine Dawn Crosswell as trustees of the Crosswell Family Trust $292,973.58 forthwith. The Auckland City Council is entitled to recover a contribution of up to $234,378.87 from Grant Malone, Carl Ruffles and Ross Roofing Limited for any amount paid in excess of $58,594.71.

II. Grant Malone is ordered to pay Gerard Michael Crosswell and Christine Dawn Crosswell as trustees of the Crosswell Family Trust the sum of $292,973.58 forthwith. Grant Malone is entitled to recover a contribution of up to $146,486.79 from the Auckland City Council, Carl Ruffles and Ross Roofing Limited for any amount paid in excess of $146,486.79.

III. Carl Ruffles is ordered to pay Gerard Michael Crosswell and Christine Dawn Crosswell as trustees of the Crosswell Family Trust the sum of $292,973.58 forthwith. Carl Ruffles is entitled to recover a contribution of up to $234,378.87 from the Auckland City

Council, Grant Malone and Ross Roofing Limited for any amount paid in excess of $58,594.71.

IV. Ross Roofing Limited is ordered to pay Gerard Michael Crosswell and Christine Dawn Crosswell as trustees of the Crosswell Family Trust the sum of $292,973.58 forthwith. Ross Roofing Limited is entitled to recover a contribution of up to $263,676.21 from the Auckland City Council, Grant Malone and Carl Ruffles for any amount paid in excess of $29,297.37.

[146] To summarise the decision, if the four respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

First Respondent - Auckland City Council	$58,594.71
Third Respondent – Grant Malone	$146,486.79
Sixth Respondent – Carl Ruffles	$58,594.71
Ninth Respondent – Ross Roofing Limited	$29,297.37

[147] If any of the parties listed above fail to pay its or his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [145] above.

DATED this 17th day of August 2009

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S G Lockhart QC

Tribunal Member