

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI 2014-100-000036
[2016] NZWHT AUCKLAND 5**

BETWEEN	JANET WILSON STARIK AND GEORGE ANDREW DEEB AS TRUSTEES OF THE HERBERT STARIK FAMILY TRUST Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	PENINSULA HOMES LIMITED Second Respondent
AND	KEVIN BRYAN PERRY Third Respondent
AND	SCOTT DAVID PERRY Fourth Respondent
AND	GARY MURTAGH Fifth Respondent
AND	JAMES HARDIE NEW ZEALAND Sixth Respondent

Hearing: 2–5, 12 and 26 February 2016

Appearances: A K Hough for the claimants
J K Stewart and I J Stephenson for the first respondent
K B Perry for Peninsula Homes Limited and in person
S D Perry in person
K T Glover for the fifth respondent
J A McKay and T J O'Brien for the sixth respondent

Decision: 13 September 2016

FINAL DETERMINATION
Adjudicator: P R Cogswell

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BACKGROUND

[1] The residential dwelling at 15 Bushglen Court, Browns Bay, Auckland was a leaky building. The property is owned by the Herbert Starik Family Trust.

[2] At the time the claim was filed, Herbert Starik was one of the trustees. He was Janet Starik's husband. He died in November 2015, before this claim was heard. The remaining trustees bring the claim.

[3] Mr and Mrs Starik agreed to purchase the house from Peninsula Homes Limited in April 1999, before construction was complete. On settlement in June 1999 the Herbert Starik Family Trust (the claimants) were nominated as purchaser and Mr and Mrs Starik and their family moved into their new home.

[4] In 2004, Mr and Mrs Starik were concerned that the building was showing signs of water ingress. The claimants applied to (what was) the Department of Building and Housing for an assessor's report.

[5] Following investigation, the assessor determined that the building was suffering from damage as a result of water ingress and the claim was found eligible.

[6] Between September 2014 and March 2015, the claimants undertook substantial remedial work.

[7] The claim is for the cost of the remedial works, consequential losses, general damages and interest.

THE PARTIES

[8] There are six respondents to this claim.

[9] The parties, in the order that they are listed in this claim, are as follows:

- (a) Auckland Council – this is the territorial authority responsible for the process and issue of the building consent, conducting inspections of the building work and issuing the code compliance certificate (CCC) at completion of the original works. It is alleged that the Council performed those duties negligently.

- (b) Peninsula Homes Limited – this company is alleged to have developed the property by the purchase of the land and the construction and sale of the building on that land. It is alleged against Peninsula Homes that it had a non-delegable duty of care to ensure that the building complied in all respects with the Building Act 1991 and the New Zealand Building Code, that it did not leak and cause loss to the claimants.
- (c) Kevin Bryan Perry – whilst various causes of action were initially advanced against Kevin Perry, in closing counsel for the claimants confined the claims against him to a claim that he was the project manager. Kevin Perry is alleged to have been responsible for the supervision and oversight of workmanship and responsible for directing or allowing changes to the consented plans, both failings resulting in weathertightness defects.
- (d) Scott David Perry – it is alleged that Scott Perry was the head contractor responsible for the construction of the building. He is alleged to have negligently carried out building work but also to have failed in his supervisory function in relation to building work undertaken by Gary Murtagh. Those breaches are alleged to have resulted in the building being constructed with defects.
- (e) Gary Murtagh – Mr Murtagh is an experienced builder, but in relation to the construction of the building, it is alleged that he was a sub-contractor and owed duties of care to the claimants.
- (f) James Hardie New Zealand – against James Hardie New Zealand it is alleged that its representative, Chris Pickering, attended the property during construction to give advice as to construction techniques and, more importantly, that he reviewed and approved the construction that had been carried out to date.

[10] The claimants advance claims directly against Auckland Council, Peninsula Homes and Mr Kevin and Mr Scott Perry. The respondents seek rights of contribution from each other if they are found liable.

ISSUES

[11] The issues that I need to determine in this claim are:

- (a) Are there weathertightness defects and did those defects cause damage?
- (b) What is the reasonable cost to repair damage caused by the weathertightness defects?
- (c) What are the consequential losses?
- (d) Are any of the respondents responsible for the claimants' losses?
- (e) What contribution should be assessed between liable respondents?
- (f) What general damages should be awarded?
- (g) Did the claimants fail to mitigate their loss?
- (h) What interest is claimable?

ARE THERE WEATHERTIGHTNESS DEFECTS AND DID THOSE DEFECTS CAUSE DAMAGE?

[12] This property was the subject of four separate assessor's reports:

- (a) Assessor's report dated 12 August 2004 by Alan Light.
- (b) Addendum report dated 31 October 2007 by Mr Light. This report updated current damage and included future likely damage. This report recommended a full re-clad of the northern and southern elevations. Estimated cost of targeted repairs: \$53,091.03.
- (c) Second addendum report dated 29 November 2011 by Frank Wiemann. This report recommended a full re-clad of all areas clad with texture-coated fibre-cement cladding. Estimated cost of repairs: \$170,200.

- (d) Report issued 9 February 2015 after the Tribunal directed Mr Wiemann to investigate roof issues that became apparent during the remedial work.

[13] The reports conclude that:

- (a) There were weathertightness defects in the construction of this building.
- (b) Those defects allowed water to enter the building.
- (c) That water entry caused damage to the building; and
- (d) A full re-clad of all affected texture-coated fibre-cement clad areas and replacement of damaged timber and internal items was required.

[14] By the time this claim was in adjudication Mr Light no longer had a contract as a WHRS assessor. In November 2015, Peninsula Homes made a request to engage Mr Light as its expert witness. The Tribunal advised that as Mr Light was no longer under contract to WHRS he may perform this role.

[15] Mr Wiemann was subsequently appointed as the WHRS assessor. Mr Wiemann's reports note the following departures from the consented plans:

- (a) No tiles were installed over the deck membranes.
- (b) Several windows were installed which were not on the plans.
- (c) A flat roof was installed on the north elevation over the living area.
- (d) Flat texture-coated fibre-cement balustrade tops were installed instead of timber capping.

[16] The conclusion reached in the Wiemann report was that the building required a full re-clad of all areas with texture-coated fibre-cement cladding. Damaged timber had to be replaced and changes to details (for example the incorporation of adequate falls and level differences to decks and flashings to balustrades) had to be incorporated. The Wiemann report noted that either the current damage existed or likely future damage could be expected at all wall

areas clad with texture-coated fibre-cement. Mr Light's evidence was that a full re-clad was required in 2011.¹

[17] The Wiemann report notes that the various destructive tests undertaken uncovered water ingress at a variety of locations. The majority of those defects were systemic, meaning that they occurred at more than one location and were not isolated instances. The Wiemann report identified the following defects:

- (a) Inadequate installations of head flashings.
- (b) Inadequate installation of sealant at window and door jambs.
- (c) Lack of sill flashings at windows and doors.
- (d) Lack of control joints in fibre-cement cladding.
- (e) Inadequate installation of membrane on decks and outlet.
- (f) Inadequate clearance of fibre-cement cladding to deck surfaces.
- (g) Inadequate step down from internal floor level to deck surface.
- (h) Inadequate weatherproofing of flat balustrades; and
- (i) Lack of kick-outs to apron flashings at wall-roof junctions.

[18] The Wiemann report also identified, by reference to certain defects, relevant technical information applying at the time of construction.² Such information can be used as a guide in assessing standards of good trade practice and compliance with the Building Act and the Building Code.

[19] In preparation for the hearing, the Tribunal convened an experts' conference. The experts' conference was attended by:

- (a) Frank Wiemann, the WHRS assessor.
- (b) Andrew Gray, the claimants' expert.
- (c) Simon Paykel, the Council's expert.
- (d) Alan Light, Peninsula Homes' expert.

¹ Brief of Evidence of Alan Light, 16 December 2015 at [25].

² Wiemann report, 29 November 2011, at 19–30.

(e) Dianne Johnson, James Hardie's expert.

[20] The defects identified by the experts were:³

Defect Number	Description of Defect
1	Unsealed and/or poorly sealed gap/junction between the end of the head flashing and the cladding
2	Inadequate flashing at junction of timber deck and fibre cement clad external wall
3	Poorly installed deck membrane outlet and overflow (master bedroom deck)
4	Top fixed handrail through balustrade tops
5	Flat-topped balustrades
6	Lack of relief joints to Harditex cladding
7	Unsealed roof-wall junctions
8	Unsealed, un-taped and/or un-plastered cladding
9	Poorly formed and lapped metal barge/fascia cap joints and junctions
10	Unsealed vertical cladding/brick veneer junctions
11	Insufficient cladding/deck clearances
12	Incorrectly located roofing nail penetration
13	Insufficient cover over the bottom edge of the plywood substrate (gutter junction) from the metal drip edge

[21] The experts agreed that the following four defects necessitated a full re-clad of the affected walls and repairs to the decks affected by those defects:

³ Experts' Conference Summary Spreadsheet dated 28 January 2016.

- (a) Defect one – unsealed and/or poorly sealed gap/junction between the end of the head flashing and the cladding – all elevations.
- (b) Defect three – poorly installed deck membrane at outlet and overflow (master bedroom deck) – north elevation.
- (c) Defect seven – unsealed roof-wall junctions – north, north-east, east and west elevations.
- (d) Defect nine – poorly formed and lapped barge/fascia cap joints and junctions – north, east and west elevations.

[22] In total these defects caused the need for a full re-clad of all fibre-cement clad walls.

[23] I deal with each of those four key defects in turn below.

The key defects

Defect one – unsealed and/or poorly sealed gap/junction between the end of the head flashing and the cladding

[24] This defect is depicted in Mr Gray’s brief of evidence.⁴

[25] This defect is a systematic defect across the whole building and gives rise to a requirement to re-clad 100 per cent of the affected walls.

[26] The defect is unsealed or poorly sealed gap junctions between the end of the head flashings and the cladding. This is the juncture between the joinery units and the Harditex cladding used on the building. The defect does not affect joinery units related to the brick cladding part of the building.

[27] Mr Gray’s evidence is that this construction was contrary to:

- (a) James Hardie Harditex Technical Information;⁵
- (b) BRANZ Bulletin 304;
- (c) BRANZ Bulletin 366;

⁴ Brief of Evidence of Andrew Simon Gray, 20 November 2015 at photographs 16–18, 27–30, 38–44, 49–51, 70–77, 83–85 and 111.

⁵ James Hardie Technical Information, Harditex, February 1996, at 6, figure 13 (Flashings).

- (d) BRANZ House Building Guide Figure 7.2;
- (e) Clause E2 February 1998;
- (f) Clause B1 July 1995 amendment 3;
- (g) Clause B2 February 1998 Second edition;
- (h) NZS 3604:1990 section 2.4.1 (good trade practice).

[28] The experts were agreed that the installation was not in accordance with the technical literature.⁶ There are two potentially relevant Harditex technical information booklets. They are the *James Hardie Technical Information* booklet dated February 1996 and the *James Hardie Technical Information* booklet dated June 1998.

[29] It is possible that either or both of those versions of the booklets were available when this building was being constructed. The evidence on this was inconclusive, but given the timeframe when it appears that the windows were installed,⁷ June 1998, I am inclined to the view that the earlier version of the James Hardie booklet was on site during construction. The 1996 booklet prescribes the relevant window or door head detail at figure 13 and the 1998 version of the booklet set out the relevant window or door head detail at figure 14. Neither version of the booklets was followed in construction.

[30] The technical information instructs the installer to notch the Harditex to fit the head flashing, make a neat tight-fitting cut and then seal the area with silicone paintable sealant.

[31] The literature also prescribed a 75 mm flashing upstand. This was not used. A smaller upstand was only permissible if an in-seal strip was used. It was not used.

[32] In the case of the 1996 information, the installer must seal the back of the Harditex sheet for 200 mm and take the texture coating over the edge of the sheet. This does not appear to be a requirement in the 1998 version, unless the sheet is taken hard down onto the head flashing, which it was on this house.

⁶ James Hardie Technical Information, Harditex, above n 5.

⁷ Common Bundle of Documents at D153 and D154.

[33] The sheets as installed were not sealed to 200 mm. As they were fitted hard down onto the flashing, both the 1996 and 1998 versions prescribed the use of a proprietary inseal strip. That was not done either.

[34] The experts, other than Mr Light, were of the opinion that these departures were causative of water entry into the building and damage. I accept the evidence of the majority of experts.

[35] Mr Wiemann also identified a further potential departure from the technical information. Both the 1996 and 1998 versions of the technical information allowed a reduction in the height of the head flashing upstand from 75 mm to 45 mm if, but only if, an inseal strip was used between the Harditex and the head flashing.

[36] In the current case, the height of the head flashing upstand was reduced from 75 mm, but no inseal strip was installed. Mr Wiemann's opinion was that the main reason for water ingress was the unsealed ends of the head flashings, but that there were other discovered areas of incorrect installation that may have contributed to water ingress and damage. Those areas are the lack of the inseal strip, the building paper not being installed correctly (being installed behind the head flashing) and the Harditex sheet being installed hard down onto the head flashing and then plastered.

[37] Mr Light, on the other hand, advanced an argument that the two Harditex manuals provided options, but were not necessarily prescriptive of what had to occur. He made the point that the 1998 version of the manual did not appear to require the sealing of the back of the sheets for a height of 200 mm above the head flashing. That appears to have been correct, but only if the bottom edge of the sheet was back-sealed.

[38] Mr Light's proposition was that bringing the cladding down hard onto the head flashing and then sealing the remaining gap with texture coating and paint was itself a method of sealing head flashing junctions at that time. He described it as a "low risk application". This was not accepted by Mr Gray and moreover would be contrary to the Harditex literature.

[39] In later discussion with Mr Light he did accept the proposition that in terms of the 1996 technical information, the back-sealing, by which I mean the painting of a product onto the back of the sheet as opposed to the installation of

an inseal tape, would have prevented the wicking mechanism that he spoke of. He specifically accepted that the back-sealing of the sheets as set out in the 1996 data would have prevented damage. He accepted that the back-sealing to 200 mm up the back of each sheet in the location of the head flashing was not done on this project.

[40] Given his comment that this detail being undertaken would have prevented damage to the building, it follows that the absence of the back-sealing was also a causative defect. Mr Light accepted that there was a requirement to apply a silicone paintable sealant in the notched area forming the end of the head flashing. Mr Gray's evidence was that the sealant had only been applied to one location of all the locations that he examined as part of his remedial undertaking.

[41] Mr Light also took issue with the need to replace framing timbers in this location. His argument was that superficial degradation occurring at the end of the head flashings was not damage and that the framing timber did not need to be replaced.

[42] Mr Wiemann pointed out that there was damage to the cladding material itself, there was damage to fixings, there was rust, corrosion and damage to the building to various degrees. There was discolouration and mould growth including rot in some of the framing timber and at times visible deterioration of the material itself. Overall, whilst the degree of damage may change between locations, Mr Wiemann's strong view was that the failures were systemic throughout the locations of the head flashing details and that it caused damage to various degrees, but was in itself and alone enough to require a full re-clad of the affected areas of the building.

[43] Clause E2.3.2 of the Building Code provides:

Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to building elements or both.

[44] As the claimants submit, reference to "could cause" makes it clear that the mischief targeted is potential undue dampness and/or potential damage. I accept that the evidence satisfied this test in relation to the damage associated with defect one. I am also required to take account of future likely damage in

terms of s 50(1)(e) of Weathertight Homes Resolution Services Act 2006 (the Act). The evidence of damage in these areas satisfies this test.

[45] The experts were of the view that the key point was that the ends of the head flashings needed to be sealed and they consistently were not. This was the point at which water was able to enter the building and cause damage.

[46] There were, therefore, four departures from the James Hardie literature and they allowed water into the building damaging it. They were:

- (a) No silicone applied to head flashing notch.
- (b) Harditex sheets down hard onto head flashing and not back-sealed.
- (c) No inseal strip used; and
- (d) Flashing upstand not 75 mm.

[47] I conclude therefore that the head flashing detail was not constructed in terms of the applicable technical literature at the time. I also accept that those departures were causative of water entering the building and damage to the structure.

Defect three – poorly installed deck membrane outlet and overflow (master bedroom deck)

[48] This defect is depicted in Mr Gray's brief of evidence.⁸

[49] The location of this defect is the northern elevation upper master bedroom deck.

[50] Mr Gray's evidence is that this construction was contrary to:

- (a) BRANZ Bulletin 345.
- (b) Clause E2 February 1998.
- (c) Clause B1 July 1995 amendment 3.
- (d) Clause B2 February 1998 Second edition.

⁸ Above n 4, at photographs 19–24.

(e) NZS 3604:1990 section 2.4.1 (good trade practice).

[51] The consented plans specified a butynol waterproofing product and an internal outlet to this deck. That was not followed.

[52] As built, the butynol was substituted for an unknown liquid applied membrane and the outlet was not built as drawn and consented. The coating was not adequately applied and lacked thickness and reinforcing with sufficient upstands. In addition, there was a gap between the outlet overflow and cladding where the membrane was not dressed adequately, which allowed water to enter into the building at that point.

[53] The effect of this defect was to allow a significant volume of water ingress resulting in significant widespread damage below the outlet and membrane junction. Damage occurred to the north elevation walls and floors below and adjacent to the balcony up to the internal corner of the flat membrane roof.

[54] When considering the northern elevation of this building this defect combined with the previous defect had the result that the entire northern elevation of the building required to be re-clad and affected framing timber remediated.

[55] There are two key defects in this area.

[56] The first is that there has been a change from an internal to an external outlet from this main bedroom deck. That change was not the subject of an amendment to the consented plans.

[57] The formation of the outlet of the scupper lacked adequate sealing and also lacked a drip edge which would have prevented the water from running back into the building envelope and causing damage, which occurred.

[58] Mr Light contended that this defect would have been preventable had regular maintenance been carried out. The other experts did not agree with this proposition.

[59] Given the serious defects in the construction of the scupper outlet detail, I do not accept that owner maintenance would have prevented the ingress of water and damage to the building. Given the location of the scupper

outlet detail (Mr Gray's photo "North elevation" western end shows the location), it is not reasonably possible for a homeowner to access the lower external face of the scupper outlet to apply sealant to the bottom of the outlet and the cladding.

[60] The second defect is the failure to form the upstand around the internal perimeter of the deck balustrade walls correctly. There was no adequate wooden upstand formed between the studs in the balustrade area which meant that the liquid applied or sprayed applied membrane was unable to form a 150 mm upstand of membrane material to prevent damage to the interior face of the decking balustrade. The membrane was applied to an inadequate substrate. It was then concealed by the installation of the Harditex sheeting.

[61] The consented plans specified a butyl rubber membrane. That product is a sheet material and easier to fold. The problem created was that the roll on or spray on membrane was not able to be applied to a sufficiently constructed upstand such that a 150 mm upstand of waterproofing membrane on the internal face was able to be achieved.

[62] The failure to form a 150 mm upstand for the sprayed on or rolled on membrane was a defect that existed around the entire internal perimeter of the deck junction. In addition, the poorly formed scupper and overflow outlet which was inadequately waterproofed and lacked a critical drip edge to shed water to the outside of the building were contributing factors to the overall failure in this area.

[63] These defects allowed water to enter the building at this elevation and cause damage to the cladding and framing in that elevation. The defects were clearly breaches of the Building Act, Code and standards of good trade practice.

Defect seven – unsealed roof-wall junctions

[64] This defect is depicted in Mr Gray's brief of evidence.⁹

[65] Both Mr Gray and Mr Wiemann are of the view that this defect has caused water ingress and damage to the cladding and the timber framing in the locations identified. Mr Paykel and Ms Johnson say that not all flashing has

⁹ Above n 4, at photographs 25–26, 45-48, 86 and 87.

allowed water ingress to cause damage to these locations, but the defects will be rectified as a result of the remediation of other defects.

[66] Mr Gray and Mr Wiemann considered that this defect gave rise to the requirement to re-clad 100 per cent of the wall of the areas affected. This could be more particularly described as 95 per cent of the west facing fibre-cement clad walls (south of the entrance), 90 per cent of the north elevation fibre-cement clad walls and 90 per cent of the east facing fibre-cement clad wall.

[67] There are four instances of roof-wall junctions in this building. There are three different ways that those junctions have been formed.

[68] They are, first, the top of the raking barge cap is finished flush on the outside of the wall – this occurs on the north location.¹⁰ Secondly, the north east corner above the torch on membrane roof. The end of the apron flashing is formed with a torch on membrane flashing behind the cladding.¹¹ Finally, on the east and west elevations, the end of a raking apron flashing is terminating in behind the cladding.¹²

[69] The areas where these unsealed roof-wall junctions occur are first, the north elevation below and adjacent to the deck overflow. Secondly, the north east corner above the torch on membrane roof and thirdly, the east and west elevation above both entrance ways.

[70] Mr Gray's evidence was that the construction was contrary to:

- (a) BRANZ Bulletin 304;
- (b) Clause E2 February 1998;
- (c) Clause B1 July 1995 amendment 3;
- (d) Clause B2 February 1998 Second edition;
- (e) NZS 3604:1990 section 2.4.1 (good trade practice).

[71] To summarise the difficulties arising at these junctions, they are flashings not being formed in a way which diverts water away from the cladding

¹⁰ Above n 4, at photographs 25–26.

¹¹ Above n 4, at photographs 45–48.

¹² Above n 4, at photographs 86–87.

but rather allowing water to enter behind the cladding in the locations identified and, therefore, onto the framing, as a result of which damage has occurred. In general terms, the apron flashings were not adequately turned out to deflect moisture from the end of the flashing. As a result, damage to the framing occurred at these locations.

[72] By reference to photograph 25 of Mr Gray's report, there was a lack of any provision to flash or weatherproof these vertical junctions between the fascia end and the cladding. All experts bar Mr Light were of the opinion that these defects caused damage to the building.

Defect nine – poorly formed and lapped metal barge/fascia joints and junctions

[73] This defect is depicted in Mr Gray's brief of evidence.¹³

[74] This defect occurs in three locations in the property, the east, west and northern elevations.

[75] The areas affected by this defect are 85 per cent of the north elevation fibre-cement clad walls, 95 per cent of the west facing fibre-cement clad walls and 50 per cent of the east facing fibre-cement clad walls. The experts were agreed that this was one of the significant construction defects in this building.

[76] The defect is described as the transitional junction where the metal barge changes direction and in all three locations the lower section was lapped over the higher section of the barge. Water is able to enter between the lap joint, run down the curved bottom edge channel of the fascia and exit at the next joint and enter behind the cladding through the unsealed cladding joints.

[77] Mr Gray's evidence was that the construction was contrary to:

- (a) Clause E2 February 1998;
- (b) Clause B1 July 1995 amendment 3;
- (c) Clause B2 February 1998 Second edition;
- (d) NZS 3604:1990 section 2.4.1 (good trade practice).

¹³ Above n 4, at photographs 25–26, 55–57, 81–82 and 95.

[78] Mr Gray's evidence was that the water was able to enter through the lap joint, run down the fascia because the fascia has a hook on the bottom of it like a channel. It then ran down and exited at the next joint in the sheet. At that point water is on the cladding which is where it finds the unsealed vertical joints discussed in relation to defect 8.2 below. Those joints connect as a channel running down the wall allowing water to enter the framing. That is evidenced by the blown up photograph between photographs 56 and 57 of Mr Gray's report and photograph 57.¹⁴

[79] Mr Gray's testing of the framing timber in these locations indicated the presence of damage to the framing timber. His evidence was that it was poor trade practice for the installer of the fascia system to lap over and not under. That is, the laps in the fascias were installed the wrong way and there was also no sealant at the joints. Good practice in Mr Gray's opinion on a roof was always to lap over and not under so that water flowed over the lap joint away and not the other way round. As the fascias were lapped the wrong way round and lacked any sealant at the lap joint this allowed water to enter the framing.

[80] For his part, Mr Paykel considered that the junction would have leaked in any event even if it had been lapped the correct way but he puts the cause of moisture ingress down to a lack of sealant applied by the installer. Mr Light agreed with that proposition. So too did Ms Johnson.

[81] The areas affected by this defect are 85 per cent of the north elevation fibre-cement clad walls, 95 per cent of the west facing fibre-cement clad walls and 50 per cent of the east facing fibre-cement clad walls. The experts were agreed that this was one of the significant construction defects in this building.

[82] While he had not investigated these areas himself, having heard the evidence of the experts Mr Wiemann was in agreement as to the mechanism of failure. Mr Paykel expanded his views by reference to photograph 82 by noting that water making its way into the fascia would drop to the "hook" at the end of the fascia itself and run down until it meets the unsealed junction of another piece of fascia or cladding. It would then be allowed to access cladding and through that timber framing. This issue also reinforces the need to have sealed the cladding sheets, as access to unsealed junctions in the cladding sheets

¹⁴ Above n 4, at section 1, 28, photographs 56–57.

would exacerbate the problems being caused. As Mr Paykel put it, there were two defects intertwined here.

[83] Overall the conclusion on this defect is that the fascia product was not installed correctly. The evidence was that the roofing contractor would likely have installed this product, not any of the current respondents.

The further defects

[84] The experts' conference identified a number of other defects. They are discussed below:

Defect two – inadequate flashing at junction of timber deck and fibre cement clad external wall

[85] This defect is depicted in Mr Gray's brief of evidence.¹⁵ It is a significant defect in relation to the area it affects.

[86] This deck is located on the north elevation below the master bedroom deck. In the original consented plans approval was given to an enclosed plywood deck in this location. In the course of construction, the approved plans were departed from and a Kwila slatted deck was installed instead.

[87] The effect of this defect was damage to the deck and building framing requiring a full re-clad of the northern elevation of the building.

[88] Mr Gray's evidence was that this construction was contrary to:

- (a) James Hardie Harditex Technical Information;¹⁶
- (b) BRANZ Bulletin 353;
- (c) BRANZ Bulletin 345;
- (d) BRANZ House Building Guide Figures 4.6, 4.8, 4.9a, 4.9b, 7.2;
- (e) Clause E2 February 1998;
- (f) Clause B1 July 1995 amendment 3;

¹⁵ Above n 4 at photographs 1–12 and 96–105.

¹⁶ Above n 5 at 6, Figure 14 (Ground Clearances).

- (g) Clause B2 February 1998 Second edition;
- (h) NZS 3604:1990 section 2.4.1 (good trade practice).

[89] This deck was constructed with timber piles, bearers, joists and slat decking. The deck is attached to the dwelling by way of the joists fixed to a timber ribbon plate which is fixed directly to the cladding.

[90] A strip of fibre-cement sheet cladding was installed between the ribbon plate and dwelling boundary joist to pack out the wall then a narrow strip of timber was laid flat over this junction and an unknown waterproofing product applied over the timber and up the face of the bottom plate.

[91] The walls were then clad in Harditex sheets with the bottom edge of the cladding hard down on the deck surface and then another strip of decking laid against the cladding.

[92] The strip of cladding between the ribbon plate and the boundary joist was left unstopped, un-plastered and unpainted. Water ingress occurred through the unsealed cladding joints clamped between the ribbon plate and the boundary joist and through the membrane where it either failed to adhere to the substrate, was not adequately applied or was punctured by the cladding fixings into the bottom plate.

[93] According to Mr Gray it appears that the builder has formed an enclosed plywood deck and installed a membrane that went underneath the cladding. Then the builder has removed this plywood deck but instead of taking all the plywood off including the membrane and starting again, the builder has cut the plywood back from the edge face of the building wall about 100 mm or so and then continued with the slatted timber deck. This formed a junction between the remaining plywood and the timber slats. This was a departure from the consented plans. This change allowed the unsealed junction where the plywood was cut to be exposed to moisture ingress. Moisture migrated under the membrane to the unsealed fibre-cement used as packing and into the framing.

[94] There are three issues with the method of construction of this deck. They are, first, the membrane failed to adhere to the substrate. Secondly, the bottom of the cladding sheets where they attached to the bottom plate were

nailed straight through the membrane. Thirdly, water ingress was able to occur between the underside of the membrane where it joined the timber decking under that plate and go straight to the back of the wall to the substrate where there was unsealed and uncoated fibre-cement sheet.

[95] The effect of this poor detailing is that a significant volume of moisture ingress occurred at this junction that resulted in significant widespread damage to the lower level flooring and framing.

[96] The experts, with the exception of Mr Light, were agreed that this resulted in the need for a full re-clad of the north elevation, together with remediation of any damaged timber framing. Mr Light considered that a targeted repair could have been achieved as it was a discrete area of failure. I do not accept that.

[97] The results of this defective detail are illustrated in Mr Gray's report.¹⁷ Significant damage is ascertainable in this area. In Mr Gray's opinion it was, "shocking workmanship".

[98] The decision to change the way the deck was built has created a series of defects that then allowed water into the building and caused damage. Those changes include cutting back the plywood deck and forming an unsealed junction 100 mm out from the external wall, not installing a sufficient method of deflecting water from the transition of the wall plane to the deck surface and failing to ensure that the deck/cladding interface was protected from water coming from the deck. The Kwila fillet installed at the wall-deck junction did not assist and in fact acted to prevent the cladding having any drainage gap at its bottom.

[99] These decisions to vary the consented plans caused or allowed defects to arise that led to damage and the need to remediate this significantly damaged wall and the framing associated with it.

Defect four – top fixed handrail through balustrade tops

[100] This defect is depicted in Mr Gray's brief of evidence.¹⁸

[101] Mr Gray's evidence was that this construction was contrary to:

¹⁷ Above n 4, at photographs 96–99.

¹⁸ Above n 4, at photographs 31–37, 58–69 and 108–109.

- (a) James Hardie Harditex Technical Information;¹⁹
- (b) Clause E2 February 1998;
- (c) Clause B1 July 1995 amendment 3;
- (d) Clause B2 February 1998 Second edition;
- (e) NZS 3604: 1990 section 2.4.1 (good trade practice).

[102] Two issues are in play in relation to this defect. The first was that there was a departure from the consented plans and the second was that there was a failure to seal the penetrations through the top of the balustrade tops when fixing the handrail straight to the top of the balustrade tops. This occurs in both of the top decks in the property. The relevant technical literature was not followed.

[103] There was some debate about whether or not there was evidence of damage at either or both of the locations. Much time was spent interpreting the timber analysis reports. However, two points need to be noted in relation to that issue. The first is that both areas would have been remediated as a result of the 100 per cent re-clad required of the northern elevation of the building arising from other defects (defects one to three).

[104] The second is that, following discussion between the quantity surveyors and other experts, a deduction for timber framing replacement was agreed. The claimants have therefore acknowledged that there may be some debate as to the extent of timber framing replacement required as a result of this defect and acknowledged that by agreeing a deduction from their overall claim. There seems to be little point, therefore, in dealing with the issue about the lack of damage in an area which was first, overwhelmed by other defects in the building and, secondly, where the parties had reached agreement on a deduction for disputable areas of timber replacement.

[105] The experts agreed that the fixing methodology adopted was not in accordance with the relevant literature. However, repairs to this area would be incorporated in the overall remedial works.

¹⁹ Above n 5, at Figure 68.

[106] Should I need to determine that issue definitively I would find that Mr Gray has established that there was damage attributable to the fixing of the handrails through the balustrade tops. That fixing was not done in accordance with good trade practice or the relevant trade literature and there is evidence of damage arising from that defect.

Defect five – flat-topped balustrades

[107] This defect is depicted in Mr Gray's brief of evidence.²⁰

[108] In addition to defect four discussed above, both the subject areas were constructed with a flat top. By reference to the Harditex Technical Information,²¹ the literature called for a fall of a minimum of one in 10 for the construction of a parapet top (and by inference, a balustrade top).

[109] Mr Gray's evidence was that this construction was contrary to:

- (a) James Hardie Harditex Technical Information;²²
- (b) BRANZ House Building Guide Figure 7.6;
- (c) Clause E2 February 1998;
- (d) Clause B1 July 1995 amendment 3;
- (e) Clause B2 February 1998 Second edition;
- (f) NZS 3604:1990 section 2.4.1 (good trade practice).

[110] Mr Gray says that this was another breach of the relevant technical literature and also causative of damage because it allowed water to sit on the top of the balustrade caps and then enter the framing below. The construction of the flat top balustrades is a departure from the James Hardie Technical Information. The building consent for the balustrades prescribed a flat top with a timber cap and then a handrail. This was another departure from the consented plans.

²⁰ Above n 4, at photographs 31–37, 58–69 and 108–109.

²¹ Above n 5 at Figure 68.

²² Above n 5, at Figure 68.

[111] There were inconsistent findings as to the existence of a membrane on the top of the balustrade under the cladding - membrane was discovered on the northern deck, but not the southern deck.

[112] There is some debate as to whether the construction of the flat top balustrade in itself caused damage, Mr Gray is of the opinion that water ingress and damage occurred to both decks as a result of the departure from the consented plans and relevant literature.

[113] The other experts considered that there are difficulties in establishing moisture ingress as a direct result of the flat top balustrade alone. Mr Wiemann's opinion is that there is evidence of moisture ingress but no confirmed decay damage at the bedroom two deck, but he considers that there is evidence of damage to the master bedroom deck balustrade.

[114] Again, the issue is difficult to separate from the intervention of water coming from other sources and the installation of the handrails without adequate sealing to those flat topped balustrades. This defect is of less overall causal potency in the scheme of the defects in this building.

[115] To put it another way, the flat top has not itself caused the moisture to get in, but because there are penetrations through the flat top, the entry of water has been exacerbated by the flat construction. This combined with the lack of a membrane over one of the subject areas has allowed water to enter the building envelope and cause damage to the structure.

Defect six – lack of relief joints to Harditex cladding

[116] This defect is depicted in Mr Gray's brief of evidence.²³

[117] At issue here was whether the lack of relief or control joints caused the failure of the cladding system and, more particularly, whether or not the cracks evident in the subject locations allowed water to ingress the building and cause damage. The consented plans were silent on the need for relief joints.

[118] Mr Gray's evidence was that this construction was contrary to:

- (a) James Hardie Harditex Technical Information;²⁴

²³ Above n 4, at photographs 13–14, 52–54, 78–80 and 106–107.

- (b) BRANZ House Building Guide Figure 8.12;
- (c) Clause E2 February 1998;
- (d) Clause B1 July 1995 amendment 3;
- (e) Clause B2 February 1998 Second edition;
- (f) NZS 3604:1990 section 2.4.1 (good trade practice).

[119] The location of the defect was the east and west elevations of the building. Mr Gray observed cracking on that east elevation, so pulled the Harditex sheets apart and he could see water staining all the way through the thickness of the depth of the sheet and on the building wrap.²⁵

[120] Mr Gray's evidence was that in relation to the east elevation wall, he identified that on the wall plane which exceeded 5.4 metres there was cracking at the vertical sheet joints and evidence of water ingress at those locations. This he put down to a lack of a control joint which would have managed movement in the cladding in that location.²⁶

[121] The other location where a control joint was required in terms of the literature was on the west elevation above the garage. That wall plane also exceeded 5.4 metres and was constructed without a control joint. Mr Gray's evidence is that his testing at that location where there was a crack in the cladding demonstrated that moisture was able to ingress through the building envelope and cause damage to the timber framing.

[122] It was accepted by Ms Johnson that in the east elevation the length of the clad wall was longer than 5.4 metres and therefore, a relief joint was required to comply with the relevant James Hardie Technical Information.

[123] Mr Paykel was of the view that the east and west locations had cladding lengths of greater than 5.4 metres and that cracking was present in those areas. However, he did not consider that there was any evidence that the walls had allowed moisture to ingress and cause damage.

²⁴ Above n 5, at 7–9, Figures 15 and 16 (Relief joints) and Figures 23 and 24.

²⁵ Above n 4, at section 1, 27, photograph 54.

²⁶ Above n 4, at photographs 52–54.

[124] Mr Wiemann was of the view that the lack of relief joints was a contributing factor only and did not cause significant damage on its own.

[125] Mr Light's opinion was that this was not a defect which caused damage and that the relevant technical literature required cracks to be dealt with as a part of regular maintenance.

[126] The effect of this defect would have been a need to re-clad affected walls to the north elevation, the west facing fibre-cement clad walls (south of the entrance) and the east elevation fibre-cement clad walls.

[127] The issue here is that the repairs required to reinstate the cladding as a result of other defects would have addressed any defects arising from the failure to provide relief joints in the two identified locations.

[128] In contrast to Mr Gray's approach, Mr Wiemann was of the view that these two defects in isolation would not cause the need to re-clad those wall elevations. He did concede, however, that any solution short of removing cladding and properly forming a control joint in this location would be unlikely to succeed in preventing the problem continuing in the future. In terms of s 50(1)(e) of the Act, the failure to form relief joints is a deficiency that is likely in the future to enable the ingress of water. Such defects and their future likely damage are recoverable.

[129] Ultimately it must follow from Mr Wiemann's opinion that to properly remediate this defect would require re-cladding of these two wall elevations. That is because it would not be possible to "retro fit" a control joint in these areas. As there is evidence of water damage obtained by Mr Gray, this means that the problem would need to be dealt with and the only way that could be dealt with was by the re-cladding proposed by Mr Gray.

[130] Mr Gray was firmly of the view that the existence of the cracking in these locations is a discrete head of damage. That is because the cladding has to perform in a certain way. Had there been a relief joint in the two locations, then his evidence was that there may not have been evidence of cracking of a sheet joint which is not meant to crack in terms of the construction methodology. Because the formed joint cracked, that means that the system has failed, it has failed to perform in terms of the Building Act and Code and was required to be remediated.

[131] Mr Light's evidence was that there was a generally accepted wall elevation maximum size obtained by calculating the height and length of the required wall and that in terms of their practical experience and knowledge, applicators worked out that calculation. He argued that as a rule of thumb a wall plane of 16.2 square metres was generally able to be constructed without a control joint. The difficulty that he faces in that argument, however, is that nowhere is this proposition set out in the relevant literature.

[132] What is set out is that a control joint was required every 5.4 lineal metres and that was not done in this case. Mr Gray's evidence is that there was damage associated with the omission of that prescribed detail. I accept his evidence.

Defect eight – unsealed, un-taped and/or un-plastered cladding

[133] This defect is depicted in Mr Gray's brief of evidence.²⁷

[134] There are two discrete types of defect here. The defects are described as defects 8.1 and 8.2 in the experts' summary spreadsheet.²⁸

[135] Defect 8.1 is located at the northern deck on the external corner where there is unsealed, un-taped and no PVC joint to the external corner.

[136] Mr Gray's evidence is that defect 8.1 is evidenced by his photographs 10 to 12. The damage occurred because the corner was not taped or jointed. It could not be so because the sheet that runs back through behind the ribbon plate was clamped with the ribbon plate itself and so it was not possible to form corner junctions. The Harditex Technical Information provided a detail for corner finishing.²⁹ In relation to this defect, that corner detail was not followed.

[137] The conclusion to be reached in relation to this defect is that the discrete failure of the corner detail adjacent to the lower deck is very minor in the overall scheme of things given the far more significant defect occurring in that area. It is likely of little if any additional impact to issues of damage in that area.

²⁷ Above n 4, at photographs 10–12, 92 - 95 and 97–103.

²⁸ Above n 3.

²⁹ Above n 5 at Figure 25.

[138] The second defect, defect 8.2, is located at the junctions at the top of the cladding behind the metal fascia on all elevations. This junction should have been taped, sealed or plastered.³⁰

[139] Mr Gray's evidence was that the construction was contrary to:

- (a) Plaster Systems Multiplast technical data sheet March 1996;
- (b) BRANZ appraisal Cert 322-multiplast;
- (c) Clause E2 February 1998;
- (d) Clause B1 July 1995 amendment 3;
- (e) Clause B2 February 1998 Section edition;
- (f) NZS 3604:1990 section 2.4.1 (good trade practice).

[140] In relation to this defect, the junction at the top of the cladding behind the metal fascia, the joint between the two sheets up behind the fascia was unsealed, being un-taped and un-plastered. It effectively formed a channel at a very weak point in the system because there was little or no cover from the texture coating to that joint as it disappeared underneath the fascia. This allowed water to run down the fascia and into that unsealed joint. This is evidenced in photograph 93 where there is water staining on the building wrap below the cladding-fascia junction.

[141] Mr Gray did say that in relation to the perimeter of the building where the cladding-vertical fascia junction existed he only found evidence of water ingress at one such junction.³¹

[142] Mr Gray's evidence is that both defects caused damage to the building. The other experts were of the view that there was inconclusive evidence to support a finding that the second of these two defects caused water entry into the building and subsequent damage. Mr Light considers there was insufficient evidence to support a finding that the first of the defects caused damage to the building either. He continued that in relation to the second of the defects it was

³⁰ Above n 4, at photographs 92–94.

³¹ Above n 4, at photograph 93.

common practice at the time to have unsealed Harditex behind the fascia because the wicking mechanism was not understood at that time.

[143] The affected areas requiring repair included 100 per cent of the north elevation of the fibre cement clad walls, 50 per cent of the east facing fibre cement clad walls and 95 per cent of the west facing fibre cement walls. Once again, the remediation of other more significant defects would have lead to these areas being re-clad in any event.

[144] Ms Johnson made the point that again in this construction project there was a departure from the plans in that the consented plans stated that there was to be a timber fascia and what was installed eventually was a different product, a metal proprietary fascia.

[145] Mr Wiemann's opinion of the need to seal the top edges of the cladding was that it would have been prudent to have done so. His opinion was that it was a widespread difficulty although a minor issue in the context of the overall building. His opinion was that there were other locations where damage had been evidenced from this issue and that the pieces of fibre-cement which he located which were uncoated, indicating a sequencing problem.

[146] Mr Paykel made the point that it was very difficult to have sealed these cladding items because the metal fascia systems used in this building were always installed before the cladding was put in place. That is, the cladding sheet was slipped up behind the fascia. Mr Paykel's view was that it was physically impossible to get up behind the fascia once the sheet had been installed.

[147] Mr Gray's opinion was that, as regards the prior installation of the metal fascia, that that was simply a matter of ensuring that a sufficient gap was provided to enable the cladding sheet to be slipped up behind with a coating on. In other words, that came down to the planning and advice to the fascia installer about the appropriate gap to provide to ensure that the cladding was able to be coated before it was slipped up underneath the fascia. This would be something done by the project manager or head contractor.

[148] Were it significant to the overall determination, I would find that the departure from the consented plans and the failure to seal the junctions led to a defect which caused or would likely in future cause damage. This defect was

caused by a combination of changing the consented plans without providing for the sealing of what then became a vulnerable junction and a sequencing and project management issue as the fascia supplier was not given adequate information to provide a sufficient gap to allow sealed cladding to be pushed up behind it.

Defect 10 – unsealed vertical cladding/brick veneer junctions

[149] Ultimately in discussion with the experts including the quantity surveyor present, Mr White, it was agreed that the quantification of the amount of damage arising from this defect was \$2,330. As a result of the discussions amongst the experts as to the quantum of the claim, the reduction in the amounts included a reduction for this defect. Accordingly, I do not need to consider that defect any further, as it does not form part of the quantum of the claim before the Tribunal.

Defect 11 – insufficient cladding/deck clearances

[150] In discussion with the experts, it was agreed that this defect was the same defect as discussed and considered as defect two above. Accordingly, it was not further considered at the hearing.

Defect 12 – incorrectly located roofing nail penetration

[151] This defect is depicted in Mr Gray's brief of evidence.³²

[152] This defect caused a reasonable amount of damage. The defect arises from an incorrectly located roofing nail and can be shown in Mr Gray's report.³³ The damage arising from that defect can be shown where there is clear water staining and damage to the roof substrate below the fixing nail which was installed incorrectly.³⁴ Photograph 116 shows further evidence of damage arising from that incorrectly located roofing nail.

[153] Mr Gray's evidence was that this construction was contrary to:

- (a) Clause E2 February 1998;
- (b) Clause B1 July 1995 amendment 3;

³² Above n 4, at photographs 114–116.

³³ At photograph 114.

³⁴ At photograph 115.

- (c) Clause B2 February 1998 Second edition;
- (d) NZS 3604:1990 section 2.4.1 (good trade practice).

[154] The experts were agreed that this defect would have arisen from the roofing installer installing the shingle mats which formed the roofing materials.

[155] This is clearly a workmanship defect. It is also one that would have been all but impossible for anyone other than the roof installer to identify. The damaged area would have required remediation.

Defect 13 – insufficient cover over the bottom edge of the plywood substrate (gutter junction) from the metal drip edge

[156] This defect is depicted in Mr Gray’s brief of evidence.³⁵

[157] Mr Gray identified two defects with the installation of the metal drip edge to the perimeter of the roof. The roof substrate was plywood. It is not clear that it was treated.

[158] Mr Gray’s evidence is that this construction was contrary to:

- (a) NZS 4408:1998 at 6;
- (b) Clause E2 February 1998;
- (c) Clause B1 July 1995 amendment 3;
- (d) Clause B2 February 1998 Second edition;
- (e) NZS 3604:1990 section 2.4.1 (good trade practice).

[159] The first of the defects is that the drip edge was installed but then small “tags” were cut out of the drip edge and lifted to accommodate the bracket for the gutter which would subsequently be installed. In forming those tags, the cutting into and lifting of the metal drip edge allowed an opening for any moisture to track into the end grain of the plywood.

[160] There were inconsistent views amongst the experts as to the causative effect of the installer of the drip edge cutting small tags into it to enable the

³⁵ Above n 4, at photographs 117–120.

brackets for the spouting to be formed. There were areas where those tags had been formed but where there was no water damage evidenced

[161] The second issue identified is where a poorly folded drip edge corner junction has been created.³⁶

[162] In the course of the remedial works, the Council inspectors viewed the roof works and determined that they wanted the plywood substrate of the roof replaced about five or six hundred millimetres back from the edge. Accordingly, Mr Gray took the approach that it was prudent for that to be done, as there was evidence of water damage and that obtaining independent testing to challenge the Council on that point would have been outweighed by the cost of simply replacing the plywood as the work was being undertaken.

[163] It needs to be noted that there was already roofing work being undertaken where the asphalt shingles at the transition with vertical walls were being uplifted to incorporate new flashings. So, work was being undertaken to the roof area anyway. There was some debate amongst the experts about what caused the staining to the underside of the plywood.

[164] Mr Paykel's opinion was that it was more than likely that the roofer would have installed the plywood substrate, the drip edge and the asphalt shingles. He conceded that it was possible that the builder installed the plywood.

[165] To summarise Mr Paykel's view, it is that there is no damage, but there is moisture staining which was consistent along all roof elevations which indicates splash back from the gutters to the underside of the plywood. He noted that at the time of construction it was acceptable to use untreated plywood without providing protection to the underside of the plywood.

[166] The assessor's view was that it was likely the staining arose from the splash back of water running off the roof in heavy rain and reaching the underside of the plywood. This could be a function of the location of the spouting either being set too high or not deep enough.

³⁶ At photograph 118.

[167] On the evidence before the Tribunal it would appear that the defect was one caused by the roofer engaged to install the spouting and probably the drip edge as well.

Summary on defects

[168] Taken overall, the evidence establishes that this building suffered from serious weathertightness defects arising from its construction. Those defects led to the need to fully re-clad all Harditex areas with associated repairs.

[169] The building consultant experts were in general agreement that the 13 defects identified at the experts' conference were defects in construction that breached the relevant requirements of the Building Act, the Code and/or good trade practice and caused damage to the structure of the building requiring repair.

[170] In relation to those 13 defects, the first, third, seventh and ninth defects were significant enough in themselves and separately to necessitate the re-cladding and associated repair works that were undertaken. Defect two was also a significant defect that caused substantial damage to the northern elevation.

[171] Having considered the evidence in relation to the defects in this building, I conclude that:

- (a) The building was constructed with the defects recorded in the key defects table which is the agreed outcome of the experts' conference.
- (b) The defects amounted to breaches of the Building Act, the Code and the relevant technical literature, including the James Hardie technical literature, as recorded in the key defects table prepared at the experts' conference.
- (c) The defects caused damage to the building.
- (d) Defects numbered one, two, three, seven and nine resulted in the need to re-clad all the Harditex clad areas of the building as well as the need to conduct repairs to the decks.

A comment about damage

[172] One of the repeated grounds of defence to the claims made against them by Kevin and Scott Perry was that the claimants had failed to demonstrate through evidence that damage to the dwelling had resulted from water ingress. There are several instances of direct challenge to the evidence of damage and consequent need to repair the building. Examples are framing around the windows and framing in the upper deck balustrades.

[173] Those objections overlook the fact that there are intersecting discrete areas of damage sufficient to conclude that all affected elevations of the Harditex clad areas of this building required remediation.

[174] There is evidence in relation to all of the significant defects that water has penetrated the external building envelope and caused or has the potential to cause damage to the cladding and associated substrate. An example of this is the evidence of water ingress associated with the failure to seal the top of the Harditex sheets prior to their installation behind the metal fascia. In that case, there is evidence of water staining to the building wrap and timber framing. That is evidence of the penetration of water that could cause damage to that building in the future, if it has not already.

[175] I accept Mr Gray's evidence that there is evidence of defects in the original construction which caused water ingress and exposed the building to both actual damage and potential undue dampness and damage to building elements. Accordingly, the requirements of the Building Act and performance criteria of the Code were not met when this building was constructed.

[176] Mr Gray also produced a report from Beagle Consultancy dated 19 January 2016.³⁷ Of the 20 samples discussed in that report, 16 of them were characterised as either showing advanced decay, early stages of decay or fungal growths. Those showing fungal growths only were noted as likely being exposed to conditions conducive to decay or close to such conditions such that future decay was not unlikely in the absence of suitable remediation.

[177] The report also notes that there were inconsistent findings as to the level of treatment in the samples tested. Some samples showed treatment to

³⁷ Common Bundle of Documents at F171.

H1.2 but some did not. Those that did not were either untreated or may have lost their treatment through leaching.

[178] Read against the requirement for me to consider deficiencies that are likely in future to enable the penetration of water into the building and damage, the report evidences that the claimants have proven that the building had failed to meet the requirements of the Building Act and Code and that damage was occurring or would likely occur in the future to the building if it was not remediated.

[179] All of the building experts accepted that a full re-clad of this building was required together with repairs to the decks.

[180] Peninsula Homes, through Mr Light, then made several challenges in the hearing to the evidence of damage to timber framing and the need to replace that.

[181] That argument cannot succeed. First, I prefer the evidence of the other building experts to the effect that there was evidence of damage to timber framing requiring its replacement. I also have the benefit of the Beagle Consultancy report discussed above. There is evidence that there were defects that would have let water into this building in the future.

[182] The second reason why Peninsula's argument cannot be accepted is that the claimants have already accepted a \$4,148.23 deduction from their claim. This has the effect that in terms of the Council's expert quantity surveyor's analysis of the remedial costs, areas where the Council's expert contended there was excessive timber replacement have been removed from the claim.

[183] Accordingly, even if I am incorrect in holding that the claimants demonstrated that it was reasonable to replace the timber framing that they did, the claimants have already conceded the expert for the Council's view on increased timber replacement. That is a reasonable concession to make and effectively removes that part of the argument raised by Peninsula in relation to excessive timber replacement.

[184] In addition, Mr Gray's evidence³⁸ was that the timber replacement undertaken was done so in terms of and in accordance with the Council's requirements when the remedial works were underway. Effectively therefore the claimants were required to replace the amount of timber framing that they did in order to achieve a Code compliant building at the outcome of the remedial works. They cannot be criticised for that. It was a necessary consequence of the need to undertake remedial works caused by the weathertightness defects.

WHAT IS THE REASONABLE COST TO REPAIR DAMAGE CAUSED BY THE WEATHERTIGHTNESS DEFECTS?

[185] The claimants spent over \$340,000 repairing their house. Their claim initially sought judgment for that sum together with other amounts.

[186] Both the claimants and the Council retained expert quantity surveyors who reviewed the remedial repairs evidence and analysed what amounts they considered were properly recoverable. They discussed their views and came to a consensus, for which I am grateful.

[187] By agreement between the quantity surveyors the sum of \$297,862.12 was agreed as being the reasonable repair cost. This figure accounted for all betterment and other issues raised by the respondents, for example, allegations of excessive timber framing replacement.

[188] In the hearing, I was advised that this figure was agreed to between the claimants, the Council, Mr Murtagh and James Hardie. Only Kevin and Scott Perry and Peninsula Homes sought to challenge the agreed repair costs. However, none of those parties engaged an expert quantity surveyor to assist me in analysing the other quantity surveyor's evidence. In those circumstances, I prefer the evidence of the quantity surveyor experts. I have no other expert quantity surveying evidence that calls that figure into question.

[189] The summary of the agreed repair cost is set out below:

Item	Description	Agreed deduction
1	External Painting	\$ 16,177.28
2	Internal Painting	\$ 4,964.55
3	Weatherboard cladding upgrade	\$ 14,013.49

³⁸ Transcript of Proceedings at 630.

3a	Minus claimant deductions	- \$ 1,200.00
4	Bedroom two extension	\$ 3,636.15
4a	Minus claimant deduction	- \$ 1,402.00
5	Timber decking to master bedroom balcony	\$ 3,434.89
6	Floor finishes	\$ 387.27
7	Increased timber replacement	\$ 4,148.23
8	Areas not requiring re-clad	\$ 2,330.16
	Total deductions	- \$ 46,490.02
	Original repair cost	\$ 344,352.14
	<i>Less deductions</i>	\$ 46,490.02
	Revised repair cost	\$ 297,862.12

[190] Accordingly, I find that the sum of \$297,862.12 represents the reasonable cost of the repairs actually performed. The claimants are entitled to judgment for their remedial costs in that amount.

WHAT ARE THE CONSEQUENTIAL LOSSES?

[191] Under s 50(1) of the Act, the Tribunal is able to grant any remedy that could be claimed in a Court of law in relation to, or for the consequences of, building defects and damage caused by the penetration of water into the building concerned. That includes the recovery of amounts which are additional to, but consequential on, the need to remediate a building affected by water ingress.

[192] The evidence of Mrs Starik sets out the claim for those consequential losses.³⁹

[193] Those losses include amounts claimed for:

- (a) Contractor's risk insurance held during the remedial works.
- (b) Storage of furniture and belongings whilst remedial works were carried out.

³⁹ Brief of Evidence of Janet Wilson Starik, 20 November 2015 at [45]–[49].

- (c) The filing fee on this claim.
- (d) Costs paid to the claimant's building consultant Veron to investigate and advise on issues with the property.
- (e) A range of other smaller amounts which are set out in table form.⁴⁰

[194] Having reviewed the amounts sought I find that they are all recoverable as losses consequent on the need to undertake remedial works to the property.

[195] The claimants are entitled to judgment for consequential losses of \$9,174.87.

ARE ANY OF THE RESPONDENTS RESPONSIBLE FOR THE CLAIMANTS' LOSSES?

Claim against Auckland Council

[196] The claimants seek judgment against Auckland Council on the grounds that it owed a duty of care to them when:

- (a) Issuing the building consent.
- (b) Inspecting and certifying the work carried out pursuant to that building consent.
- (c) Issuing the CCC for all work under the building consent.

[197] The claim is an orthodox one. The law is settled that a Council owes such a duty when carrying out its statutory and regulatory functions.⁴¹

[198] The claimants allege that in breach of that duty of care, the Council:

- (a) Failed to put in place an adequate regime of inspections to ensure that the building was built in accordance with the Building Code.
- (b) Failed to identify the defects in the course of its inspections.

⁴⁰ Above n 39 at Schedule 1, Table 4.

⁴¹ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [220].

- (c) Failed to take reasonable steps to ensure the defects were rectified and the building complied with the Building Code.
- (d) Issued the CCC notwithstanding the defects and that there were not reasonable grounds for it to be satisfied that the work complied with the Building Code.
- (e) Failed to ensure that the building was constructed in accordance with the Building Code.

[199] The claimants go on to allege that as a result of those breaches:

- (a) The building was built with the defects.
- (b) The building required the repairs undertaken by them.
- (c) They have or will suffer economic loss; and
- (d) They have and will continue to suffer stress, anxiety, inconvenience and loss of enjoyment arising from the discovery of the defects, the damage and the need to carry out the repairs.

[200] The claimants seek from the Council judgment for the remedial costs, together with consequential losses, general damages and interest.

[201] The Council accepts that it owed a duty of care to the claimants. The Council accepts that the property was constructed with defects and that it should have identified some of those defects.⁴² It also accepts that certain repairs undertaken at the property were a necessary result of those building defects.

[202] Mr Paykel conceded that the Council should have performed more building inspections than it did and not issued a CCC because of the existence of the defects and the consequent non-compliance with the Building Code.⁴³ He agreed that the Council should have identified defects two to seven during construction and that the failure to do that necessitated the full re-clad of the Harditex areas of the building affected by those defects.

⁴² Transcript of Proceedings at 838, 6–8.

⁴³ Transcript of Proceedings at 788, 1–15 and 840, 4–14.

[203] The concessions made by Council are appropriate. It clearly failed to identify a number of defects which, separately, caused extensive damage to the building and necessitated the need to re-clad affected areas and replace affected timber framing. It also failed to identify unapproved variations from its consented plans.

[204] I find that the Auckland Council is jointly and severally liable to the claimants for the sum of \$297,862.12 plus consequential losses of \$9,174.87 and general damages and interest as set out below.

Claim against Peninsula Homes Limited

[205] Peninsula Homes Limited was incorporated on 28 February 1996. Kevin Perry is its sole director. There are 1,000 shares in the company. 999 of them are owned by a trust of which Kevin Perry is a trustee and the sole remaining shareholder is Kevin Perry in his own name. At the time this property was built, it would appear this ownership and management structure was in place.

[206] It is alleged that Peninsula Homes was the developer of the property. It is alleged that it:

- (a) Acquired the property.
- (b) Applied for building consent to build the home at the property.
- (c) Selected, engaged and paid for materials and tradesmen and built the building at the property.
- (d) Received producer statements; and
- (e) Sold the property with the intention of making a profit.

[207] In undertaking these roles, Peninsula Homes is alleged to have been a developer and, therefore, owed the claimants a non-delegable duty to exercise due care and skill in its role as developer. It is settled law that a developer owes a non-delegable duty of care to owners.⁴⁴

⁴⁴ *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

[208] Peninsula Homes admits that it held the role of developer in relation to the construction of this building.⁴⁵

[209] Peninsula Homes applied for the building consent for the construction of the building on the property. It did so through its managing director Kevin Perry. It described itself as a Master Builder and gave a reference number for its Master Builder's License of 8943. It was the owner of the land at the time the application for building consent was made. Examples of letterhead in the common bundle record that Peninsula Homes described itself as a "design and build" company.

[210] The documents included in the common bundle of documents make it clear that Peninsula Homes and, in particular, its managing director Kevin Perry was the first and only point of contact with the Council as regards the building consent and all matters relating to the construction. All warranties granted by the suppliers or sub-trades were granted to Peninsula Homes.

[211] In addition, the specification provided by Peninsula Homes in support of its application for building consent records further obligations imposed on Peninsula Homes when undertaking the development. The specification included obligations to:⁴⁶

- (a) Ensure all work and materials were in accordance with the New Zealand Building Code and that all work was carried out in a thoroughly tradesman-like manner.
- (b) Establish a list of the Council's inspections and notify the Council 24 hours before a scheduled inspection item was available for inspection.
- (c) Have a competent foreman constantly upon the works.
- (d) Ensure all workmanship was in accordance with best trade practice and carried out by skilled tradesmen.
- (e) Ensure the tradesmen undertaking the installation of the cladding obtained the manufacturer's written installation instructions and adhered rigidly to those instructions.

⁴⁵ Transcript of Proceedings at 79, 2–3.

⁴⁶ Common Bundle of Documents at D36.

- (f) Ensure any plumbing or roofing work was carried out by skilled workmen or specialists to provide full weathertightness and ensure that the roof system was without defects or water leaks.

[212] I consider that in addition to the obligations imposed by law on a developer, the specification gives guidance as to the scope of the duty of care Peninsula Homes owed to the claimants. The specification formed part of the consented plans. Peninsula Homes was obliged to build in terms of the consent, which incorporated the specifications. The claimants acquired the property while Peninsula Homes was still building it. The claimants were entitled to assume that Peninsula Homes would construct the building in accordance with the consented plans, which included the specification.

[213] The evidence before the Tribunal establishes that there are significant defects in the building and that those defects caused damage to the building. In breach of its non-delegable duty of care, Peninsula Homes:

- (a) Allowed the dwelling to be constructed with the defects.
- (b) Failed to have a competent foreman constantly upon the works.
- (c) Failed to exercise reasonable care and skill in ensuring that the building was constructed to a proper and workman like standard.
- (d) Failed to exercise reasonable skill and care in overseeing the construction of the building by the builders, tradespersons engaged by it.
- (e) Failed to ensure the building was completed in accordance with:
 - (1) The plans and specifications – there are departures from the consented plans which were not approved by Council and which resulted in defects and damage.
 - (2) The Building Act and the Code.
 - (3) Any applicable manufacturer's specification – as an example there are departures from James Hardie's technical literature in relation to the installation of Harditex cladding around the

head flashings to the window joinery and in relation to the construction of the balustrades.

- (e) Failed to identify and/or failed to ensure that any of the defects identified were repaired.

[214] The consequence of these breaches of the duty of care is that the building was built with the defects, those defects caused damage and as a result remedial work was required which led to losses suffered by the claimants.

[215] It is no answer for Peninsula Homes to look to others to shift the blame for the failure of the building to meet the Building Act and Code. It had a non-delegable duty of care. Accordingly, Peninsula Homes is liable to the claimants for breach of the duty of care owed to them as the developer of this property.

[216] I find that Peninsula Homes Limited is jointly and severally liable to the claimants for the sum of \$297,862.12, plus consequential losses of \$9,174.87, general damages and interest as set out below.

[217] The claimants also advanced an additional cause of action against Peninsula Homes alleging that it was the project manager/builder. Given my findings above, I do not need to determine those claims.

Claim against Kevin Bryan Perry

[218] In their statement of claim the claimants advanced three separate causes of action against Kevin Perry, claiming negligence as a developer, negligence as a project manager and negligence as a builder. In closing, the claimants were content to confine the claim against Kevin Perry to one of negligence as a project manager. I approach the determination of the claim on that basis.

[219] It is alleged that Kevin Perry was the person who:

- (a) Project managed, supervised and inspected the construction of the building.
- (b) Made decisions on the construction of the building as project manager or supervisor.

- (c) Engaged, instructed and supervised sub-contractors who constructed the building.

[220] Project managers of residential construction are subject to a duty to ensure that those under them achieve the required standards in construction.⁴⁷

[221] For his part, Kevin Perry seeks to confine the responsibility for any of his conduct to being the acts or omissions of Peninsula Homes and not himself personally. The issue to be considered is whether Kevin Perry assumed a personal responsibility such that he is personally liable to the claimant for any breaches of the functions he undertook in the course of construction.

[222] Whether a director assumes a personal responsibility is a question answered by the particular facts of the case.⁴⁸

[223] A director of a company that commits a tort is not immune from liability. Harrison J explained this in *Body Corporate number 188273 v Leuschke Group Architects Ltd*.⁴⁹

The starting point is that a director of a corporate entity may assume a personal responsibility to third parties for his acts or omissions while performing that office. That is because an individual who commits all the elements of a tort or other cause of action will be held directly liable for the consequences, whether solely or concurrently with his principal according to the rule of attribution and irrespective of whether or not he was acting as a director or pursuant to any other agency. The status of director does not carry any special immunities from personal liability.

[224] Whether a director assumes personal responsibility is a question of fact, as to the degree of control that person exerts, as set out in the case of *Morton v Douglas Homes Ltd*⁵⁰ Stevens J outlined the application of the degree of control test in *Hartley v Balemi* as follows:⁵¹

... personal involvement does not necessarily have to mean that physical work needs to have been undertaken by the director – that is just one potential manifestation of actual control over the building process. Personal involvement and the degree of control may also include, as in *Morton* itself, administering the construction of the building. Therefore the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the

⁴⁷ *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-404-3535, 22 December 2008 at [106].

⁴⁸ *Trevor Ivory v Anderson* [1992] 2 NZLR 517 (CA) 523.

⁴⁹ *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC) at [52].

⁵⁰ *Morton v Douglas Homes Ltd* [1984] 2 NZLR 613.

⁵¹ *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007 at [92].

process or any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence liability, should that duty of care be breached.

[225] Accordingly, the fact that a person who commits acts or omissions in relation to building work is a director of a company is not necessarily determinative of his or her own personal liability. The conduct must be looked at on a case by case basis.

[226] The evidence before the Tribunal makes it clear that Kevin Perry was the pivotal point of contact in relation to the construction of this building and was the person with whom and to whom all contact regarding construction was made.

[227] He undertook a role in addition to that of a traditional company director of managing a company's affairs, because he became so intrinsically involved in the construction process that he became individually a tortfeasor. Kevin Perry:

- (a) Arranged the purchase of land and the building consent.
- (b) Made purchasing and contracting decisions.
- (c) Directed the trades engaged by Peninsula Homes.
- (d) Carried out sequencing of works.
- (e) Controlled decision making.
- (f) Liaised with and called in the territorial authority.
- (g) Made or allowed changes to designs and materials.
- (h) Assisted on building decks and installing Harditex cladding.
- (i) Met with Mr and Mrs Starik prior to purchase of the property.
- (j) Was responsible for getting sub-trades on site and telling them where to work and when.
- (k) Organised contractors and checked their work to a point (although not to a technical level).

- (l) Was the single point of contact for the Council on all inquiries relating to the construction.
- (m) Was on site regularly, for several hours at a time and at least on 45 separate occasions based on his diary records.
- (n) Led the sequencing of all the works on site with assistance from others.
- (o) Liaised with the architect in respect of the project, including making changes he wanted to the original design.
- (p) Was in charge of organising materials and dealing with the design.
- (q) Was there to assist the builders with the Harditex cladding by assisting on installation (on a piece-meal basis).
- (r) Helped to install joinery units to enable the builders to finish off the installation of Harditex cladding.
- (s) Assisted with some construction work, albeit on a limited level.

[228] Under cross-examination Kevin Perry admitted that he was the project manager during the original construction of the dwelling⁵² and that his role was to ensure work was to a high standard.

[229] The claimants submit that the specification also assists in delineating the scope of Kevin Perry's common law duty as a project manager. The claimants contended that there were three significant obligations borne by Kevin Perry as project manager:

- (a) Ensuring work complied with the Building Act and Code.
- (b) Ensuring work was performed in a tradesman like manner; and
- (c) Ensuring the work was performed strictly in accordance with the manufacturer's instructions.

⁵² Transcript of Proceedings at 98 at 18-21, 98 at 15-30, 101 at 6-13, 128 at 31, 129 at 1.

[230] The specification required all work to be performed strictly in accordance with the consented plans. Changes to the consented plans should have been the subject of a variation to the consent, if that was required. It was Kevin Perry's obligation to deal with these aspects of construction. It was not Scott Perry or Mr Murtagh's obligation.

[231] The traditional role of project manager would have encompassed ensuring that the project proceeded in accordance with a logical sequence with the appropriate trades being on site at the required times and ensuring that the completed project was in accordance with the Building Act, the Code and also the consented plans. Kevin Perry held this role during the construction of the building.

[232] He was regularly on site and all queries and clarifications were sought from or through him. In addition, the specification stipulated that there would be a "competent foreman" constantly upon the works. Kevin Perry directed numerous changes to the building as the design was being developed.⁵³

[233] The evidence of Scott Perry was that, should there be any query raised during construction, it was to Kevin Perry that any questions were asked and clarification sought.

[234] Kevin Perry assumed the role of project manager. He assumed personal responsibility when he:

- (a) Engaged builders who had no experience with the installation of the James Hardie cladding product and therefore failed to ensure that the James Hardie product was installed in strict compliance with the technical literature available.
- (b) Decided to make changes to the consented plans and failed to have those changes the subject of amended consent documents. Examples here are the change to the main deck from a plywood deck to a Kwila deck, the change to the upper bedroom deck drainage outlet from a central outlet to an external (poorly formed) scupper outlet, the change from a timber fascia to a metal fascia and the decision to construct additional windows to those on the

⁵³ Common Bundle of Documents at D170.

plans (thereby incrementally increasing the damage to the framing of the building); and

- (c) Failed to have a foreman take overall control of a complex construction project.

[235] Both Scott Perry and Mr Murtagh gave evidence that they reported to Kevin Perry in relation to the progress of construction and any decisions made in the course of construction.

[236] Scott Perry was engaged by Peninsula Homes, seemingly as a labour-only contractor. He had no experience with the Harditex product that was to be used on site. Mr Murtagh was also engaged on a similar basis, being a labour-only builder. Mr Murtagh also had no experience with the Harditex product. Despite this obvious lack of experience with one of the key building components, Kevin Perry decided not to hire a project manager or foreman, but to undertake that role himself. It may have been that that role fell to him by default, but that is what happened. He could have avoided that responsibility by hiring others.

[237] Kevin Perry also made the decision to change the specification from a timber fascia to a metal fascia. Part of the defects analysis relates to the change of the fascia detail and the installation of unsealed Harditex cladding behind the metal fascia. This resulted from the installer not leaving sufficient room for a sealed product to have been installed behind the metal fascia. This is a sequencing issue which arose from not only the change of the product (as consented) but also the need to properly inform the fascia supplier of the required dimensions for installation. These are the types of details that would typically be carried out and confirmed by the project manager or foreman. Kevin Perry elected to adopt this role.

[238] In its cross-claim, the Council referred to the evidence of its expert which identified construction defects for which Kevin Perry was responsible in his role as a project manager. They are defects arising from failings in the coordination of sequencing of the works and led to the defects numbered one, two, three, five, six, seven, eight and eleven.

[239] To summarise, the evidence establishes that Kevin Perry did not look for contractors experienced with the installation of the Harditex product, elected

to use contractors who had never worked with the Harditex product before and failed to hire a project manager or foreman with the requisite technical expertise in this area. This was a relatively complex building, with various intersecting wall planes and products.

[240] Further, he was the person who had the final say on making un-consented changes to the consented plans, changes to the lower plywood deck by replacement with a Kwila deck, the change to the outlet design for the upper bedroom deck to that of a scupper outlet and the change from a wooden fascia to a metal fascia.

[241] This, together with other sequencing issues, allowed or contributed to the defects caused by Scott Perry's building work, the defects contributed to by sub-trades and for those defects to lead to the serious damage suffered by the building.

[242] Kevin Perry says that he cannot be held responsible because he had no expertise and relied on others including the Council. But, by electing to control the building of the home, he assumed a duty to ensure that the building works were carried out in a proper and workmanlike manner in accordance with the consent and with the Building Act and Code.⁵⁴

[243] He accepted in cross-examination that the building was constructed with the key defects identified by the experts and that those defects each represented breaches of the Building Act, the Code and technical literature. He also accepted that he was the project manager.⁵⁵

[244] Standing back, I have reached the view that Kevin Perry is liable to the claimants as a project manager. He elected, for whatever reason, perhaps financial, to proceed with a complex construction project with labour-only contractors that had no experience in the cladding product being used, made decisions to change the consented plans without obtaining a consent variation from the Council and in all general respects was the "go to" person in overall charge of the project. In that role, he was under an obligation to ensure that the Building Act and Code were complied with, the building constructed in terms of the consented plans and that the building was built without defects, which

⁵⁴ *Lake v Bacic* HC Auckland, CIV-2009-004-1625, 1 April 2010 at [34].

⁵⁵ Transcript of Proceedings at 98, 15–30.

ultimately caused damage to the building and loss to the claimant. He failed to discharge that duty.

[245] I find that Kevin Bryan Perry is jointly and severally liable to the claimants for the sum of \$297,862.12, plus consequential losses of \$9,174.87 and general damages and interest as set out below.

[246] In closing in relation to Kevin Perry, I note that the Council advanced additional cross-claims against him as developer and builder. Given my finding that Kevin Perry is liable to the claimants as project manager, it is unnecessary for me to determine those cross-claims.

Claim against Scott David Perry

[247] The sole claim advanced by the claimants against Scott Perry is that he was negligent as a builder. It is alleged that he:

- (a) Performed a role in the construction of the building as a builder and/or helped in the construction of the building as a builder;
- (b) Carried out physical work in constructing the building; and
- (c) Made decisions about construction of the building and oversaw and then issued instructions to sub-contractors as the builder.

[248] In that role, Scott Perry owed the claimants a duty to exercise reasonable care and skill in performing his obligations as a builder responsible for constructing the building. That duty extended to an obligation to build in a way which met the Building Act and Code and which did not allow defects to be created which would cause damage to the building and economic loss to the claimants.

[249] In breach of that duty of care, Scott Perry is alleged to have:

- (a) Allowed the building to be constructed with the defects.
- (b) Failed to exercise reasonable skill and care in ensuring the building was constructed to a proper and workman like standard.
- (c) Failed to exercise reasonable skill and care in overseeing the construction of the building.

- (d) Failed to ensure the building was completed in accordance with:
- (1) The plans and specifications.
 - (2) The Building Act and the Code.
 - (3) Any applicable manufacturers' specifications.
- (e) Failed to identify and/or failed to ensure than any of the defects identified were repaired.

[250] These breaches of duty are alleged to have resulted in the building being built with defects which required the repairs and which caused the claimants' loss.

[251] The claim against Scott Perry is in all respects an orthodox claim where the law is well settled. Cases such as *Bowen v Paramount Builders (Hamilton) Limited*⁵⁶ make it clear that contractors are subject to a duty to use reasonable care to prevent damage to persons to whom they should reasonably expect to be affected by their work. That class of person clearly included the claimants.

[252] There is no dispute that Scott Perry was a builder engaged to construct the claimants' home. He claims to have been hired as a labour only contractor, but there is no contract in existence. That may perhaps reflect the more informal nature of the engagement given the family connection with Kevin Perry.

[253] The fact of Scott Perry being a labour only contractor is not determinative of the existence of a duty of care. He was clearly an experienced builder having several years experience and having built homes previously. He was retained as the primary builder responsible for the work product.

[254] In *Boyd v McGregor* the High Court had this to say about labour only builders owing a duty of care.⁵⁷

Competent builders and thus the appellants would have known that once the defects concerning flashings, sealant and their workmanship around the windows generally was covered up, the owners would be vulnerable in the sense of being unable to discover the lack of weathertightness that resulted. Competent builders and thus the appellants should have had the skills required in carrying out the work that the appellants undertook so as to achieve weathertightness, a fundamental requirement of all statutory

⁵⁶ *Bowen v Paramount Builders (Hamilton) Limited* 1 NZLR 394 (CA).

⁵⁷ *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010 at [60] - [61].

obligations and infringing on building and good practice. Being unable to ascertain the defects, the owners could not protect themselves against them.

The cases demonstrate the extent of the appellants' involvement in the building also required to be taken into account. In that regard, an objective assessment must lead to the conclusion that, weathertightness of a building – whether domestic or commercial – is so inherently part of competent building that those who undertake building work are required to achieve weathertightness as a necessary component and should be visited with responsibility to those who erect buildings or have them erected. Thus they should be held liable if their work fails that fundamental function.

[255] That case involved builders of three and five years' experience. Scott Perry had 16 years' experience before carrying out building work on the claimants' home. He was an experienced builder.

[256] Scott Perry, under the overall supervision of Kevin Perry in his role as project manager, carried out work to all of the areas in which there are significant defects. Those areas included:

- (a) The installation of Harditex cladding.
- (b) The decks to the house including framing the handrails.
- (c) The windows (including flashings) and window jambs.
- (d) The Butynol flat roofs and fillets associated with such.

[257] Significantly in this case, Scott Perry had no previous experience in the installation of Harditex cladding. As is apparent from the technical literature provided with the product, adherence to the installation instructions was critical. The need to strictly adhere to the technical information was reinforced by the terms of the specification forming part of the consented plans. The specification required the work to be performed strictly in accordance with the manufacturer's instructions. It was not.

[258] The evidence of the building experts makes it clear that there are construction defects for which Scott Perry was responsible, including defects numbered one, two, three, five, six, seven, eight and eleven.

[259] The experts, with the exception of Mr Light, were of the view that the original construction contained building defects which were breaches of the Building Act, the Code and breaches of the Harditex technical literature. Each

of those were areas where Scott Perry worked on or had control over as the head builder.

[260] Scott Perry accepted the existence of these defects in his evidence and that they represented breaches of the Building Code and the relevant James Hardie technical literature.⁵⁸

[261] In addition to the workmanship breaches, Scott Perry was party to three significant departures from the consented plans. They were:

- (a) The decision to change the construction of the main deck which led to the inadequate junction of the plywood and Kwila decking, the junction of the timber deck and the fibre cement clad wall and the poorly installed deck membrane.
- (b) The decision to alter the drainage from the upper bedroom deck from a central drainage point to an external scupper outlet drainage system, which was inadequately formed; and
- (c) The decision to change the timber fascias to a metal fascia system.

[262] Each of those decisions resulted in construction defects and caused damage to the building. If a builder decides to depart from statutory, regulatory and good trade practice requirements where competent builders would not have departed from them, this is a good indication of an assumption of responsibility.⁵⁹

[263] The evidence makes it clear that in all respects Scott Perry was in charge of the physical construction of this building. I go on to discuss Mr Murtagh's involvement below. However, it is clear that Scott Perry took responsibility for the installation of the cladding system chosen by Peninsula Homes, but installed that system with several defects which caused damage. It is also clear that he was involved in various departures from the consented plans which resulted in construction defects.

[264] I find that Scott Perry was the experienced builder with overall control of the physical construction of the building. He either personally performed work

⁵⁸ Transcript of Proceedings at 203 at 16–26 and 204 at 20–28.

⁵⁹ *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010.

that contained significant building defects or in his overall control role failed to prevent them occurring.

[265] Peninsula Homes was entitled to and did rely on his experience in the construction of this home. It is no excuse for him to say that he had no experience with the installation of the Harditex product. Should he have had concerns about installation methodology, then he was experienced enough to have known that he should have sought clarification or arranged for Peninsula Homes to retain somebody with the requisite experience. His involvement in allowing departures from the consented plans also imposes liability on him.

[266] Scott Perry is, therefore jointly and severally liable to the claimants for the sum of \$297,862.12, plus consequential losses of \$9,174.87 and general damages and interest as set out below.

Claim against Gary Murtagh

[267] Mr Murtagh was joined as a party to this claim on the application of Scott Perry. In this jurisdiction, he is treated as a co-respondent.

[268] Both the Council and Mr Kevin and Mr Scott Perry have advanced claim concerning Mr Murtagh's involvement in and liability for the defective building works.

[269] It is alleged against Mr Murtagh that he failed to take reasonable care when undertaking building work and, as a consequence of which defects were created which caused damage to the building and loss to the trustees.

[270] The claims advanced against Mr Murtagh are orthodox. They include that as a builder he was subject to a duty to use reasonable care to prevent damage to persons whom he should reasonably expect to be affected by his work.⁶⁰ Secondly, it is alleged that if he took it upon himself to depart from statutory, regulatory and good trade practice requirements where competent builders would not so have departed, that was an indication that he had assumed personal responsibility.

⁶⁰ *Bowen v Paramount Builders* [1977] 1 NZLR 394 (CA).

[271] Nomenclature is not determinative of the claims against Mr Murtagh.⁶¹ It does not matter whether he is to be termed an experienced builder, a labour-only contractor, an employee of Peninsula Homes or a labourer. No contract was produced to the Tribunal that determines the issue. The issue for determination is what role was he engaged to perform in the construction and, as a consequence of that, what obligations were imposed on him.

[272] The evidence at the hearing makes it clear that Kevin Perry had overall responsibility as project manager for the outcome of this construction project and that Scott Perry was the builder in overall control of the physical construction work.

[273] Mr Murtagh, who gave evidence that he had come to Auckland for work but had been unexpectedly left without work, took on the opportunity offered by Peninsula Homes on a piecemeal basis. His engagement was for an uncertain period and involved an uncertain scope of work. The construction had commenced when he started work and continued after he left. I do not consider that it is necessarily an indicator of liability that he was an experienced builder and note that in relation to the installation of Harditex he had no relevant experience at all and made this known to Scott Perry.

[274] The evidence indicates that it was Scott Perry who assumed the lead role in determining how the Harditex cladding was to be installed. I accept Mr Murtagh's evidence that he was in an assistant role only and this is consistent with him not being required to review and understand the technical literature available in relation to Harditex installation methodology. I accept that he did not see the technical literature and was not required to make himself familiar with it. Rather, he followed Scott Perry's lead.

[275] Rather than being a case of him "not being bothered" as Kevin Perry suggested, I find that the position was that Scott Perry had control in all respects of the physical construction and that Mr Murtagh was not required to nor did he avail himself of the technical literature required to install the product. Rather, his engagement was to help out around site, often times doing work which no doubt Scott and Kevin Perry did not wish to undertake, and assist as and when directed.

⁶¹ *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-004-3535, 22 December 2008 at [103].

[276] Mr Murtagh:

- (a) Did not undertake functions such as sourcing materials or supervising others, rather that role was undertaken by Kevin and Scott Perry.
- (b) He did receive direction and supervision, I find that it was Scott Perry who supervised the installation of the Harditex cladding and that it was Kevin and Scott Perry who determined to make variations to the consented plans regarding the deck construction and other changes; and
- (c) He was not independent from the persons who engaged him.

[277] That is not to say that I accept that Mr Murtagh was free to close his eyes to obvious construction defects. He cannot simply stand by and allow obvious defects to be constructed and later rely on an argument that he had a restricted role only.

[278] However, in relation to the installation of the Harditex, that role was clearly controlled by Scott Perry. Mr Murtagh had no previous experience of this cladding system before and having heard him give his evidence I am sure that he would have made this clear to Kevin and Scott Perry as the construction was proceeding.

[279] His limited role in the “installation” of the Harditex cladding was confined to cutting the sheets as prescribed by cutting details provided to him by Scott Perry and assisting with the lifting required to get them into place. It was for Scott Perry to ensure that the technical information was followed on installation.

[280] Even if his work in helping “tack in” the Harditex sheets can be described as “installing” Harditex, he was only ever doing that pursuant to the direction and under the guidance of Scott Perry.

[281] The role occupied by Mr Murtagh was very much like the role occupied by Mr Jones and Mr Rudd in *Carrington v Easton*⁶² in that case, the head

⁶² *Carrington v Easton* [2013] NZHC 2023.

contractor sought to advance a claim against Mr Jones and Rudd who were both labour only contractors.

[282] The Court considered the issue of whether Mr Jones and Mr Rudd owed the owners a duty of care. In determining whether a labour only contractor owed the owners a duty of care, Venning J stated that the Court will look to the assumption of responsibility, any special skill the contractor has, or may hold himself out as having, the need for promotion of standards and whether there are other means of protection. Assumption of responsibility for the task is not sufficient of itself in such cases.⁶³

[283] Of significance in the *Carrington* decision was the fact that both Mr Jones and Mr Rudd had not worked on the renovation of a weatherboard home before and were at all times “effectively hammer hands working at the direction and under the supervision of Mr Easton”.⁶⁴ Mr Easton was in control of the site. He ordered and supplied materials and equipment to them and directed their work.

[284] The parallels to the current case are significant. Mr Murtagh worked on site at the direction of and under the control of Mr Kevin and Mr Scott Perry. Mr Murtagh was required to act on Mr Kevin and Mr Scott Perry’s directions and Mr Murtagh did not hold himself out to having any expertise or experience in relation to the installation of Harditex cladding. He made this known to the Perrys at the very outset of his engagement.

[285] In circumstances identical to the present, Venning J held that the labour only contractor did not owe the owners a duty of care having regard to the fact that he did not in the circumstances assume any responsibility to them beyond applying his labour at the direction of the head contractor. The labour only contractors assumed no responsibility for compliance with the plans and specification and the owners did not rely on them.⁶⁵

[286] Accordingly, I hold that Mr Murtagh did not owe a separate duty of care to the claimants.

⁶³ At [38].

⁶⁴ At [79].

⁶⁵ At [82].

[287] If I am wrong in that, I also hold that if he was imposed with a duty of care of some sort, Mr Murtagh was not in breach of it when he carried out his work on the claimants' home for the following reasons:

- (a) Defect one – due to my finding that Scott Perry had overall responsibility for the installation methodology and that Mr Murtagh was involved only in cutting and assisting with the initial placement of the cut sheets, I do not consider that he can be liable for defect one.
- (b) Defects two and 11 – the changes to the consented plans regarding this main deck occurred after Mr Murtagh had left the site and he is not therefore responsible for decisions and construction undertaken by Kevin and Scott Perry in his absence. He is not liable for defects two and 11.
- (c) Defect three – Mr Murtagh denied having undertaken any work in relation to this deck. He certainly was not involved with the decision to alter the drainage design to that of an external scupper outlet. Even if Mr Murtagh was in error in relation to this construction and he had been involved in the installation of pre-cut Harditex sheets to this area, then there are two reasons why he is not liable for this defect. The first is that Scott Perry was responsible for the Harditex installation. The second reason is that there was no evidence at all that Mr Murtagh was involved with the installation of the membrane or the construction of the scupper outlet. Any work he undertook in this area was the installation of framing only and under the supervision of Scott Perry and to his instruction.
- (d) Defect five – there is no evidence that Mr Murtagh was still on site when Harditex was installed on to the flat top balustrades. He is not therefore liable for that defect.
- (e) Defect six, seven and eight – I have already outlined that Scott Perry was the person with overall control for the installation of the Harditex sheets. Mr Murtagh was not asked to nor did he acquaint himself with the technical requirements for installation.

Relief joints, sealing of roof wall junctions and general preparation of the plastered cladding were all functions of Scott Perry's supervisory role. Whilst I have no doubt that had he been instructed to he would have carried out further preparatory work or become involved more fully with the installation itself, he was not asked to do so and did not. In the absence of evidence that his role included being acquainted with and ensuring installation in accordance with James Hardie's technical information, Mr Murtagh's role remained that of an assistant to Scott Perry. This proposition was accepted by the Council's expert Mr Paykel.⁶⁶ It follows from the above that Mr Murtagh is not liable for defects six, seven or eight.

- (f) Defects nine – 13 - There is no evidence at all that Mr Murtagh was involved in any of the work that created defects nine to 13.

[288] Mr Murtagh worked at the direction of Scott and Kevin Perry and was not engaged as an independent contractor. He was under the supervision of Scott and Kevin Perry at all times.

[289] This control is reflected in the fact that, despite the fact he found it unpleasant and menial, he continued with the task of cutting the Harditex sheets on site to the plans provided to him by Scott Perry. One would have expected if this was an equal engagement of independent contractors that Mr Murtagh would have insisted on Scott Perry "having his turn" to do this task.

[290] Further, the project was already well advanced when Mr Murtagh arrived and continued after he left. He would not have known what further work to any particular area he had assisted on was yet to be done, or remedial steps taken to deal with later discovered defects. He was not aware at the time he was engaged how long he would be required for and this was very much a stop gap opportunity for him pending finding permanent work in Auckland.

[291] He did not have any input into the design, the selection of materials or the engagement or supervision of any subcontractors. He did not review the plans in detail and did not become acquainted with the Harditex technical information and was not asked or required to do so.

⁶⁶ Transcript of Proceedings at 816–817.

[292] In all the circumstances, I find Mr Murtagh not liable to the claimants and he is not liable to the other respondents under their cross-claims against him.

Claim against James Hardie New Zealand

[293] Peninsula Homes raises a cross-claim against James Hardie New Zealand. The cross-claim relates solely to allegations that a representative of James Hardie, Chris Pickering, attended the property during construction, inspected the installation of the James Hardie Harditex cladding product and approved its installation. Peninsula Homes says that it relied on the advice of Mr Pickering, and through him, James Hardie.

[294] Peninsula Homes alleges that Chris Pickering went to site after Kevin Perry rang a James Hardie helpline number. It is alleged that he attended the site and gave Kevin Perry his business card, reviewed the construction to date and advised that it was all in accordance with the relevant literature.

[295] Heath J in *Body Corporate 188529 v North Shore City Council* stated:⁶⁷

[466] Since *Hedley Byrne & Co Ltd v Heller and Partners Ltd* a false statement made by one person to another on which the recipient relies on his or her detriment will be actionable at the suit of the recipient, if the person making the statement was negligent in making it.

[467] The *Hedley Byrne* principle has been adopted as part of New Zealand law: see, generally, *Scott Group Ltd v MacFarlane* and *Kendall Wilson Securities Ltd v Barraclough*. The elements of the cause of action are:

- a) A statement (amounting, in law, to a representation) was made by one person to another.
- b) The maker of the statement was (or reasonably ought to have been) aware that the statement would be made available to and relied upon by a particular person (or class of person) for the purpose of a particular transaction or type of transaction.
- c) The statement was false.
- b) The statement was made negligently.
- c) The recipient of the statement did, in fact, rely on it, to his or her detriment, to enter into a transaction of the type contemplated.

(citations omitted)

⁶⁷ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

[296] Mr Pickering attended the Tribunal in answer to a witness summons. Kevin Perry put to him his recollection that Mr Pickering attended the site and commented on how well the James Hardie product Harditex had been installed. Further, that he commented on the use of stainless steel nails and Insul-Tape. Finally, that he gave “an assurance to my builders and my company that we had nothing to worry about.”⁶⁸

[297] Mr Pickering outlined the role that he occupied during his four year employment with James Hardie. That was essentially a sales role although he did have occasion to attend site during the course of construction. His evidence was that any site visit was simply to ensure that ordered product had been delivered and to ensure that the technical literature accompanying the product was available to the builders. He expressly disavowed any role in giving technical advice to builders, insisting that should technical advice have been sought from him that he would have referred the enquiry to James Hardie’s technical team. He would not give that guidance himself.

[298] He said that he had no particular expertise in construction, having had a background in the Air Force. Whilst he was familiar with the technical literature, he had no particular expertise and would refer any questions about construction back to the technical literature or to James Hardies’ technical team. He would occasionally photograph particular areas of concern raised on site and refer that to the technical team to resolve.

[299] Mr Pickering had no recollection at all of having visited the building site. He interpreted diary notes produced to the Tribunal to the best of his recollection as being a record only of a telephone discussion with Kevin Perry and later discussions about the use of or warranty issues arising from Hardie Glaze, which is a James Hardie product used for shower lining. He did not accept that his diary notes evidenced that he had attended site.

[300] In relation to Kevin Perry’s questioning about his business card, he advised that the technical manuals had a business card holder in the front of them so that the person’s business card could be provided together with the manuals. It is possible that Kevin Perry acquired Mr Pickering’s card that way.

⁶⁸ Transcript of Proceedings at 63, 7–10.

[301] It was expressly put to Mr Pickering that he arrived on site, inspected the cladding and gave Peninsula Homes and the builders an assurance that the cladding was installed as per the manufacturer's guidelines. Mr Pickering's evidence was that he had no recollection of doing that.⁶⁹

[302] In order for Peninsula Homes or any other respondent to succeed against James Hardie in this claim, they would need to prove that, through the actions of Mr Pickering, James Hardie assumed a legal liability to them or the subsequent owners of the property.

[303] There is no contract between the claimant and James Hardie or between James Hardie and Peninsula Homes. Any liability arising would need to arise by virtue of the imposition of a duty of care held to be owed.

[304] The claimant brings no claim against James Hardie. Rather, the remaining respondents seek to advance cross-claims for contribution against it.

[305] In order for me to find that James Hardie is liable, I would need to find that a duty of care arose from the actions it took in attending the building site, inspecting the construction and giving Peninsula Homes or the builders approval to the construction methodology in place.

[306] James Hardie accepts that, if Mr Pickering assumed responsibility for inspecting the cladding and after having done so provided express comfort that the cladding work complied with the technical literature, it could owe a duty of care to the claimant to ensure that the relevant statement was not made negligently. James Hardie says that attendance on site or even looking at the cladding work in progress is not enough, there must be an actual assumption of liability.

[307] Certainly, Peninsula Homes and the Perrys are of the view that Mr Pickering occupied this role. Their recollection is that he attended site, inspected the construction and having done that, expressly gave them his approval as to the construction to date. They say that they relied on that advice. Should that be the case, then it is conceivable that James Hardie assumed a legal responsibility to not make negligent statements.

⁶⁹ Transcript of Proceedings at 84, 6–11.

[308] However, the evidence simply does not justify such a finding. There is no, or little, documentary evidence of any relevance. The existence of Mr Pickering's business card goes no further than his explanation that it may have been attached to technical literature delivered to site.

[309] His diary notes are inconclusive as to whether they recorded a site visit or simply a telephone discussion with Kevin Perry.

[310] I am left with the impression that perhaps Mr Pickering may have attended site, but he simply cannot recall. However, given the ambit of his role at James Hardie and his evidence that any technical queries would be referred to a specific technical team at James Hardie, I am unable to conclude that Peninsula Homes has proven that Mr Pickering attended site and gave advice to it as alleged. There is no evidence of any assumption of responsibility by Mr Pickering on behalf of James Hardie.

WHAT CONTRIBUTION SHOULD BE ASSESSED BETWEEN THE LIABLE RESPONDENTS?

[311] In this determination, I have found the following parties to be jointly and severally liable for the full amount of the claim:

- (a) Auckland Council.
- (b) Peninsula Homes Limited.
- (c) Kevin Bryan Perry.
- (d) Scott David Perry.

[312] I have also found that:

- (a) Gary Murtagh is not liable to any party in this claim.
- (b) James Hardie New Zealand is not liable to any party in this claim.

[313] Section 72 of the Act requires me, in addition to determining the liability of any party to the claimants, to also determine any matter of contribution between the respondents.

[314] In doing so, I take into account s 17 of the Law Reform Act 1936. Section 17(2) of the Law Reform Act 1936 provides:

In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[315] The effect of s 17(1)(c) of the Law Reform Act 1936 is that where two respondents are liable for the same damage they may seek contribution from one another. I am required to determine issues of contribution in this claim, as the parties referred to at [311] are liable for the same damage.

[316] In *Body Corporate 326421 v Auckland Council* the Court stated:⁷⁰

As with contributory negligence, the Court must have regard to the comparative causative potency of the respective negligence and the comparative culpability of blameworthiness of the defendants ...

[317] At the end of the day the apportionment process is a matter of judgment, proportion and balance.⁷¹ The considerations include the causal potency of the tortfeasor's contribution to the defects and damage.

[318] I approach this apportionment exercise having considered the extent to which each respondent was responsible for the defects in the building. That is, the causal potency of their wrongful conduct.

[319] In the case of the Council, the law is relatively settled that a 20 per cent apportionment is appropriate where there are other respondents available to contribute to the losses. Cases such as *Mt Albert Borough Council v Johnson*⁷² make this clear.

[320] In the present case, I have set the contribution at 20 per cent. This is to reflect the Council's negligence in the conduct of its inspection process failing to observe the three key departures from its consented plans. Those departures were serious in terms of the damage they caused and were also readily observable departures. They should have been noted. Had they been noted,

⁷⁰ *Body Corporate 326421 v Auckland City Council* [2015] NZHC 862 at [320].

⁷¹ *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [87].

⁷² Above n 44, at [210].

then further enquiry may have resulted and the defects discovered and perhaps remedied before they damaged the building.

[321] In the case of Peninsula Homes Limited, it bears a non-delegable duty of care to ensure that the building when constructed is done so without defect. It failed in that duty. It is jointly and severally responsible with the other respondents for the full amount of the loss. But separately, as amongst the other respondents I find that its share of the total loss is 30 per cent. This reflects the causality of any wrong doing it did by comparison to the other respondents.

[322] Kevin Bryan Perry in his role as project manager allowed or permitted significant departures from the consented plans and building defects to be created at the building which caused significant damage and loss to the claimants. He elected to occupy the role of project manager, failed in that duty and, accordingly, I attribute to him an apportionment of 20 per cent of the total loss.

[323] Scott David Perry was the builder in overall control of the physical construction. Almost all of the building defects arose from his acts or omissions. Certainly of the significant defects, all of those defects are his responsibility. Considering the existence of the defects and his contribution to them I find that his contribution was larger than that of Kevin Perry and so on balance of all factors including causal potency, I conclude that he is liable to pay 30 per cent of the overall losses.

[324] Taking these issues into account, and assuming that each of the jointly and severally liable respondents pays their share of the damage apportioned to them, then I apportion the liability between the respondents as follows:

- (a) Auckland Council – 20 per cent;
- (b) Peninsula Homes Limited – 30 per cent;
- (c) Kevin Perry – 20 per cent;
- (d) Scott Perry – 30 per cent.

WHAT GENERAL DAMAGES SHOULD BE AWARDED?

[325] Section 50(2) of the Act specifically provides the Tribunal with jurisdiction to award general damages for mental distress and the like.

[326] Mrs Starik in her evidence⁷³ sets out in detail the distress and inconvenience caused to her and her late husband arising from the discovery of the significant building defects in their home and the process of going about investigating and then carrying out remedial works to it.

[327] There can be little doubt that the discovery of significant weathertightness defects in a person's home is stressful. No party took any significant issue with the claim made for general damages, the issue is rather at what level the Tribunal should set general damages at.

[328] Having considered the evidence of Mrs Starik and the relevant authorities on the grant of general damages in this jurisdiction, I award the sum of \$25,000 to the claimant by way of general damages.⁷⁴

[329] This quantum takes into account:

- (a) The stress, anxiety and inconvenience associated with the discovery and remediation of a leaky home.
- (b) The length of time it took to achieve completion of the remedial project from the first discovery of the defects.
- (c) The impact on the overall quality of life of Mr and Mrs Starik while they lived through the investigation and remediation of the building defects.

[330] I have not increased the amount of general damages beyond that figure as a result of the fact that, whilst it did take some time to investigate and remediate the building, the building did remain in a liveable condition throughout much of its life before remediation, with all rooms available for use and no undue inconvenience by way of prohibited access to living areas.

⁷³ Above n 39 at [55]–[56].

⁷⁴ *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 at [153].

DID THE CLAIMANTS FAIL TO MITIGATE THEIR LOSS?

[331] Several of the respondents raised an affirmative defence that the claimants failed to mitigate their loss. The claimants must take all reasonable steps to mitigate their loss and cannot recover any losses that should have been avoided. The onus is on the respondents to establish what reasonable steps could and should have been taken by the claimants and that these steps were not taken.⁷⁵

[332] In *White v Rodney District Council*, Woodhouse J stated:⁷⁶

The “duty of taking all reasonable steps”, ... requires consideration of all the circumstances of the case, should not be assessed applying hindsight and does not impose a high standard of reasonableness on the claimant ...

[333] The respondents say that the claimants unreasonably delayed undertaking the repair work to the home in circumstances where they were aware of building defects from at least 2004.

[334] It is argued that the effect of this delay is that there was increased damage to the house resulting from the building defects.

[335] I do not accept this argument. There are two reasons for that.

[336] First, I consider that it was not until the release of the Weimann report that the full extent of the defects was known. That was in 2011. The remedial works were undertaken in 2014. That is not an unreasonable period of time to arrange for the remedial scope of works, engage a building consultant expert, engage contractors, arrange finance and carry out the significant remedial works required.

[337] Secondly, Mrs Starik was cross-examined in relation to their financial position and why they had not carried out the repairs earlier. However, that cross-examination did not result in any further evidence being brought to light to support an argument that the claimants unreasonably delayed the repair work. The claimants could not afford to carry out the work. She gave evidence that they were unable to afford the repairs in 2007 when the second Light report was released.

⁷⁵ *White v Rodney District Council* (2011) 11 NZCPR 1 at [26].

⁷⁶ At [27].

[338] They revisited the funding of repair works following the release of the Weimann report in 2011. As Mrs Starik said, banks were at that time unwilling to consider lending money for leaky home repairs. It was not until 2013 that they were able to obtain funding to undertake the repairs. Then, they carried out the work.

[339] The process of carrying out the repairs resulted in the Starik's taking out two additional mortgages to pay for the repair works and Mr and Mrs Starik themselves investing all their life savings in the work.

[340] I also do not accept the other arguments advanced in cross-examination by Kevin and Scott Perry that there was a failure to maintain the house.⁷⁷ No amount of washing or repainting could resolve the substantial building defects that existed in the house. In any event, the claimant removed the claimed costs of repainting the house, so the respondents are not being asked to meet that cost.

[341] Mr Light also attempted to suggest that the defective junctions discussed as defect seven should have been sealed as part of normal maintenance for the life of the building. Mr Light argued that these defects were remediable by regular maintenance, which included the application of silicone sealant.

[342] Given the serious nature of the defects, in particular, the apron flashings terminating behind the cladding and drawing water into the building, I do not accept that this was a regular maintenance item that should have been dealt with by the home owner or that the application of sealant could possibly have resolved the failure of the flashing installation in these areas.

[343] Accordingly, I reject the failure to mitigate argument.

⁷⁷ Transcript of Proceedings at 352 at 15–20, 419 at 2, 426 at 1–2, 661 at 11–26, 662 at 5–12, 666 at 1–6.

WHAT INTEREST IS CLAIMABLE?

[344] Interest is payable on losses incurred by the claimants.⁷⁸

[345] The amounts that bear interest are the total sum of \$307,036.99 being the agreed repair costs of \$297,862.12 plus the consequential losses totalling \$9,174.87.

[346] The 90 day bill rate at the date of hearing as published by the Reserve Bank was 2.64 per cent per annum. Accordingly interest accrues on the recoverable amounts at 4.64 per cent per annum on the total sum of \$307,036.99.

[347] Interest of \$20,179.00 and \$507.38 accrued on the remedial costs and consequential losses to the date of hearing. They accrue to the date of this determination at the rate of \$39.03 per day. There are 200 days from 26 February 2016 to the date of this determination giving a total further interest sum of \$7,806.00. Total interest is, accordingly, \$28,492.38.

[348] The claimants also sought interest on their bank funding. I decline to award that sum. There are two reasons for that. First, to order interest under the Act and interest on the claimants' borrowings would be to award interest upon interest. That is prohibited by s 16(2) of Schedule 3, Part 2 of the Act.

[349] Secondly, the claim for bank funding interest includes interest on amounts for remedial work which are not awarded in this determination. So, to award the total amount of the bank funding interest claimed would be to award the claimants interest on amounts for which judgment is not given.

ORDERS

[350] Having heard the evidence presented at this hearing, the expert evidence and having considered the submissions of the parties, I find as follows:

- (a) The Auckland Council, Peninsula Homes Limited, Kevin Bryan Perry and Scott David Perry are jointly and severally liable to the claimants for the full amount of the loss.

⁷⁸ Weathertight Homes Resolution Services Act 2006, Sch 3, pt 2, s 16.

- (b) Gary Murtagh and James Hardie New Zealand are not liable to the claimants or any other party.

[351] The full amount of the claim established is \$360,529.37. That sum is comprised as follows:

Remedial Costs	\$297,862.12
Consequential Losses	\$9,174.87
General Damages	\$25,000.00
Interest	\$28,492.38
TOTAL	\$360,529.37

[352] I apportion the liability between the liable respondents as follows:

- (a) Auckland Council – 20 per cent;
- (b) Peninsula Homes Limited – 30 per cent;
- (c) Kevin Bryan Perry – 20 per cent;
- (d) Scott David Perry – 30 per cent.

[353] Auckland Council is ordered to pay to the claimants the sum of \$360,529.37 forthwith. Auckland Council is entitled to recover a contribution of \$288,423.50 from the other liable respondents for any amount paid in excess of \$72,105.87.

[354] Peninsula Homes Limited is ordered to pay to the claimants the sum of \$360,529.37 forthwith. Peninsula Homes Limited is entitled to recover a contribution of \$252,370.56 from the other liable respondents for any amount paid in excess of \$108,158.81.

[355] Kevin Bryan Perry is ordered to pay to the claimants the sum of \$360,529.37 forthwith. Kevin Bryan Perry is entitled to recover a contribution of \$288,423.50 from the other liable respondents for any amount paid in excess of \$72,105.87.

[356] Scott David Perry is ordered to pay to the claimants the sum of \$360,529.37 forthwith. Scott David Perry is entitled to recover a contribution of \$252,370.56 from the other liable respondents for any amount paid in excess of \$108,158.81.

[357] If all the liable parties meet their obligations in full under this determination, this will result in the following payments being made in this claim:

Auckland Council	\$72,105.87
Peninsula Homes Limited	\$108,158.81
Kevin Bryan Perry	\$72,105.87
Scott David Perry	\$108,158.81
TOTAL	\$360,529.37

[358] Interest is to run at the rate prescribed by the Act from the date of this determination until the date of payment to the claimants.

DATED this 13th day of September 2016

P R Cogswell
Tribunal Member