IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000049
[2010] NZWHT AUCKLAND 19

BETWEEN	COLIN PITTS HARRIS, DIANE JUNE HARRIS, PAMELA ANNE HOVELLE and PATRICE MAREE ALMOND as Trustees of the ESTUARY TRUST Claimant
AND	KIM VELTMAN First Respondent
AND	DAVID MAXWELL CHAPMAN Second Respondent
AND	NIGEL GREAVES (Removed) Third Respondent
AND	ROGER JAMES FRANKS Fourth Respondent
AND	BRUCE JAMES HUNTER Fifth Respondent
AND	MATHEW PALMER (Removed) Sixth Respondent

Hearing:	1, 2 & 3 June 2010
Appearances:	Claimants - David Bigio First Respondent – self represented Second Respondent – Michael Keall Third Respondent – Mandy Rusk Fifth Respondent – self represented
Decision:	8 July 2010

FINAL DETERMINATION
Adjudicator: P A McConnell

CONTENT

INTRODUCTION

[1] Colin Pitts Harris, Diane June Harris, Pamela Anne Hovelle and Patrice Maree Almond are the owners of a property at 3A Estuary Views, Shelly Park. They own the property as trustees of the Estuary Trust. The dwelling was purchased in March 2006 as a home for Mr and Mrs Harris. The house was approximately five years old at the time of purchase.

[2] Approximately a year after Mr & Mrs Harris moved into the property they realised they had a leaky home and lodged a claim with the Weathertight Homes Resolution Service in August 2007. The assessor concluded that defects in the construction had caused leaks resulting in damage to the cladding and framing and that significant remedial work was required. The claimants however have chosen to rebuild rather than carry out the remedial work. The claim they make against the respondents named however is in relation to the estimated costs of the remedial work and not the actual costs of the reconstruction of the home.

[3] The claimants allege that Kim Veltman, David Maxwell Chapman, Roger James Franks and Bruce James Hunter are responsible for the defects and the resulting damage. Mr Veltman was the architect who designed the dwelling. The claimants allege Mr Chapman, one of the previous owners, was the developer, project manager or head-contractor and as such was responsible for supervision of the construction work. Mr Franks, either personally or through his company was responsible for the supply and installation of the Thermalite product that was used to clad the lower level of the dwelling. Mr Hunter installed and plastered Insulclad to the upper level of the dwelling.

THE ISSUES

[4] The issues I need to decide are:

- What are the defects that caused the leaks?
- What are the appropriate remedial costs and damages?
- Did the opportunity for intermediate inspection negate the imposition of a duty of care?
- Did Kim Veltman breach any duty of care he owed the claimants? In deciding this issue, I need to consider whether Mr Veltman's plans complied with the standards of a reasonably competent builder of the day. I also need to decide whether the dwelling could have been built weathertight by a reasonably competent builder based on the plans, specifications and other material referenced in those plans.
- Does Mr Chapman owe the claimants a duty of care as either a developer, project manager or head-contractor? If so, did he breach that duty of care and has that breach caused or contributed to the dwelling leaking?
- Does Mr Franks owe the claimants a duty of care? If so did he breach that duty of care? In dealing with these issues I will need to decide whether Mr Chapman contracted personally with Mr Franks or with Mr Franks' company. I will also need to decide the effect of the guarantee given by Mr Franks and whether there is any work for which Mr Franks, or his company, was responsible that has contributed to the leaks and subsequent damage?
- The liability of Mr Hunter. In particular, did the work done by Mr Hunter contribute to the dwelling leaking?
- What contribution should each of the liable respondents pay?

MATERIAL FACTS

[5] Mr Chapman and his wife purchased the section at 3A Estuary Views in or about 1999. They applied for a building consent

to construct the dwelling on 5 August 1999 with the dwelling being built between then and December 2000 when the Code Compliance Certificate was issued. Mr Chapman managed the project to the extent that he prepared the initial specification documents which he gave to Mr Veltman on which the design was based. He chose the external cladding materials and on the issuing of the building consent engaged a labour-only builder to carry out the carpentry work and other contractors to carry out specific work on the dwelling. He ordered the building materials including the pre-cut and pre-nailed frames. He did not engage any other person to supervise the construction or the subcontractors.

[6] In the seven years before purchasing the section at Estuary Views, Mr or Mrs Chapman had purchased and built three other properties which had been developed in a similar way. Mr and Mrs Chapman lived in each of these properties for short periods. The Estuary Views property was Mr and Mrs Chapman's family home from the time it was built until it was sold to the claimants in May 2006.

[7] The dwelling at 3A Estuary Views was a two-storey building with a timber framed construction supported by steel reinforced concrete foundations and ground bearing slabs. It had a floor area of approximately 348 square metres. The dwelling had a monolithic appearance with extensive tiled patio areas existing at the rear of the dwelling. These were partially covered by balconies which extended to three sides of the dwelling. A mixture of cladding materials was used on the exterior of the dwelling. The cladding material to the ground floor was a light weight masonry veneer system made of an autoclaved aerate concrete known as Thermalite which was finished with a texture coated plaster finish. The upper level had an External Insulation Finishing System (EIFS) cladding known as Insulclad and was also finished with a textured plaster. The plaster finish also

extended over a polystyrene band which had been installed at the junction between the two cladding materials.

[8] The window and door joinery was powder-coated aluminium with the joinery units recessed back from the front face of the cladding. The roof had a nominal pitch of approximately 15 degrees and was clad with pressed steel tiles. There were also flat butyl rubber membrane roofs on parts of the dwelling.

[9] Two of the claimants, Mr and Mrs Harris, purchased the house through the Murray Trust, in March 2006. The trustees of the Murray Trust were Mr and Mrs Harris together with their solicitor, Mr Walker, and a family friend, Jean Bullick. In March 2007 an agreement was reached whereby the property was transferred from the Murray Trust to the Estuary Trust. The trustees of the Estuary Trust are the claimants in this claim. The property however was purchased as a home for Mr and Mrs Harris and remained their home until they moved out to allow the deconstruction and reconstruction work to take place. They will move into the new home being built on its completion.

[10] Mr and Mrs Harris did not obtain a builder's report or carry out any technical pre-purchase inspection before they bought the property. They visited the home on a number of occasions and asked questions of the agent and some of both Mr and Mrs Chapman as to the method of construction including such issues as to whether there was a cavity installed and whether the property was built with untreated timber.

[11] They proceeded with the purchase of the property based on their observations that it was a well built and well presented home and on the information they had obtained from the real estate agent and the vendors. Included in the agreement for sale and purchase

however was a clause by which Mr and Mrs Harris acknowledged that:

> "No representation has been made by the vendor or agent on which the purchaser is relying as to the watertightness or integrity of any materials or any part of the structure of the building and the purchaser entered into this contract solely in reliance on the purchaser's own judgment."

[12] The first indication Mr and Mrs Harris had that there were any problems with the dwelling was when they arranged for a shade sail to be erected on the north side of the house. In error the installer attached the sail to the concrete blocks around one of the pillars and the block pulled away. The sail installer noticed the area inside the pillar was wet. Mr and Mrs Harris at that stage thought this was an isolated issue which Mr Harris could adequately repair.

[13] As Mr Harris had not got around to doing these repairs in May 2007, he got Peter Bonham of New Zealand maintenance to provide a quote for the repair work that needed to be done. Mr Bonham's advice was that further investigation was needed. An inspection was then carried out by Keith Whitlow of Plastertech Systems and Dry Build was also contracted to undertake a thermal imaging inspection. The Dry Build report disclosed some heightened moisture readings and recommended that a full invasive inspection may be carried out to check the damage. As a consequence of that recommendation the claimants filed an application with the Weathertight Homes Resolution Services on 20 August 2007. That report concluded that there were significant issues with the dwelling and recommended that the property be completely reclad.

[14] Mr and Mrs Harris then began investigating repair options and obtained various quotes and estimates which varied between $600,000 and $900,000. They decided to demolish and rebuild the house rather than carry out remedial work due both to the cost of the remedial work and because they would not be living in a formerly leaky home. They are however only claiming the estimated costs of

what the remedial work would have been. The actual cost they have incurred in the demolishing and rebuilding are significantly greater than the amount being claimed.

WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS?

[15] Warren Nevill, the Tribunal's assessor, and Stuart Wilson, the claimants' expert, gave evidence of the defects in the dwelling that caused the leaks. They were in general agreement about the causes of leaks. Their evidence was not significantly disputed by any of the other parties.

The Inter-storey Band

[16] Defects in the flashing and construction of the inter-storey band are the primary causes of water ingress. The most significant issue in relation to the inter-storey band was that the junction between the Insulclad and Thermalite had been constructed in such a way that it was not watertight. It failed to enable movement between the different cladding materials and also failed to provide for any moisture that had entered into that area being deflected to the exterior face of the cladding. The join was reliant on a silicone joint to the top of the plant on polystyrene band to prevent moisture entry. That silicone joint failed in a number of locations allowing moisture to enter causing saturation of the masonry below. This in turn was absorbed by the timber framing which was in contact with the masonry in some locations.

[17] The Z flashings that had been installed was flat and in places had back fall which meant that the plastic moulding held moisture and allowed it to enter at the joints and access the building paper and timber frame.

[18] Mr Veltman, the architect, had provided a specific design for the inter-storey junction. Mr Wilson's view was that there had been

an attempt by those involved in construction to follow the detail as drawn. He accepted however that the plant on polystyrene band had not, in most locations, been installed over the junction as stipulated in the drawing. Mr Nevill also accepted that the flashing as installed was smaller and less effective than that which was designed. Both Mr Wilson and Mr Nevill were however of the opinion that the flashing detail even as drawn, was not adequate as it did not provide an appropriate means for any water to be diverted to the outside of the dwelling.

Balcony and Deck Defects

[19] The major defect in relation to the first floor balcony and deck area was that the membrane had been crudely trimmed back at the edge of the deck so that moisture was able to freely enter into the deck substrate. Moisture from these leaks had also transferred to the main walls adjacent to the deck causing further significant damage. It was agreed that the membrane had not been installed in accordance with the design or technical specifications and that this was a workmanship issue.

[20] Mr Wilson's opinion was that the metal balustrades also caused significant leaking. The metal balustrade system had been installed with fixings through the horizontal surface of the decks which penetrated the tile service and waterproofing system. This allowed paths for moisture to enter which resulted in further decay to the timber substrate. Mr Nevill accepted that this was a possible cause of damage but considered there were other more significant issues with the decks and accordingly it would be difficult to tell what contribution, if any, the fixing of the balustrade had on the actual damage. No specific design details were provided for the fixing of the metal balustrades.

Joinery Flashings

[21] The experts were in agreement that the method of installation of the joinery on the upper level of the dwelling contributed to the dwelling leaking. Mr Wilson's opinion was that the contribution was approximately 50% of the total repair costs mainly because this defect affected the upper level only. The specific issue with the installation of joinery was that it had been installed with flashings which were reliant on a soaker placed between the jamb and sill flashings. In some locations it was apparent that the soaker had been installed with no sealant or glue to adhere the soaker to the jamb and sill flashings. This was contrary to the product technical literature for Insulclad at the time of construction. This defect resulted in moisture tracking down between and behind the polystyrene backing sheets rather than being deflected towards the exterior face of the cladding. This meant any moisture was trapped at the boundary joists leading to decay damage in those locations.

Defects to Flat Roof Areas

[22] Mr Wilson and Mr Nevill were also in agreement that the butyl rubber membrane to the flat roof areas over the entry canopy and the garage-house walkway were finished in such a way that moisture was directed behind the fascias and cladding systems. No drip edge was installed to deflect moisture away from the structure. In addition the intersection of the membrane roofs with the main walls of the dwelling did not have any form of deflection or kick out to direct the moisture away from the main walls which resulted in the moisture being directed behind the plaster.

[23] It is likely that if this had been the only defect in the dwelling it could have been remedied by targeted repairs. Mr Wilson assessed the contribution of this defect at 20%.

Ground Clearances

[24] A more minor contributing factor to the dwelling leaking was that there were instances at the base of the dwelling where the exterior ground levels were in close contact to the exterior cladding material. This resulted in moisture wicking up as it was absorbed by the masonry veneer and being transferred into the bottom plate. It also meant that water coming in from above could not readily escape through the bottom of the cladding.

[25] The experts agreed that this was a minor contributing issue and that the other defects would have contributed more significantly towards the damage in the bottom plate. It was also accepted that if this had been the only defect, targeted repairs to those areas would have been an appropriate remedy. Mr Wilson assesses this defect at 10% of the total repair costs.

Insulclad Clearances

[26] The experts agree that the cladding on the upper level of the building had been taken hard down to and below adjacent surfaces in some locations. This prevented any moisture that entered from above from escaping and also allowed moisture to be absorbed by capillary action from the adjacent surfaces. The moisture that was absorbed was able to be transferred to the substrate resulting in deterioration to the untreated timber framing. This was largely an issue in relation to the deck areas and in Mr Wilson's opinion was due to the lack of appropriate step down between internal and external floor levels. The cladding also extended down below the level of the tiles installed on the decks resulting in any moisture that had entered the cladding from above being directed beneath the tiled surface.

[27] Mr Wilson was of the opinion that if this had been the only defect to the dwelling it could have been remedied by a targeted

repair and he assessed the cost of such a repair at 10% of the total repair cost.

Penetrations through the Cladding System

[28] Both experts accepted that there were penetrations through the upper level cladding system that lacked appropriate seals or flashings. No confirmed moisture entry had occurred as a result of the penetrations, however they consider it to be in the area of future likely damage. The experts consider that this was the responsibility of the Insulclad installer. They attributed 5% of the total repair costs to this defect.

Summary of Defects

[29] The two major causes of leaks to this dwelling related firstly to the inter-storey junction and band and secondly to the construction of the decks. Both of these defects on their own would most likely have required a recladding of the dwelling as part of the remedial work. The third significant defect with the dwelling related to poor installation of joinery flashings.

[30] There were other less significant defects which contributed to the leaks. These included:

- Defects in the flat roof areas;
- Ground clearances where the base of the Thermalite cladding was in close contact with the ground;
- Cladding on the upper level of the building in some locations being taken hard down to and below adjacent surfaces;
- Unsealed penetration through the cladding system.

WHAT IS THE APPROPRIATE LEVEL OF DAMAGES

[31] All parties accepted the remedial scope as included in both the assessor's report and the reports from the claimants' expert was necessary. The assessor's quantity surveyor's estimate of the cost of the proposed remedial work was however significantly lower than that estimated by the claimants' quantity surveyor. Prior to the hearing some respondents indicated they disputed the amount claimed for remedial work. The Tribunal in its investigative role requested the assessor to do an analysis of the differences between the two lots of costings. This analysis was circulated to all parties prior to the hearing.

[32] At the conclusion of the hearing however, all respondents stated that they were not disputing the remedial costs as revised by the claimants in the course of the hearing, to remove the double claiming for landscaping costs. Given the consensus reached I accept the remedial costs have been established to the extent of $680,509.00

Consequential Costs

[33] In addition to the remedial costs the claimants are seeking costs of packing, removing, storing and replacing household goods and for rental accommodation and associated costs while the remedial work has been carried out. In addition they are seeking $22,000.00 for landscaping as the landscaping costs have now been excluded from the remedial scope.

[34] The claimants acknowledge that the 39 weeks for which they were claiming alternative accommodation was for the estimated time of the rebuild. The experts agreed that if the house had been remediated rather than rebuilt the timeframe for the remediation would have been approximately 6 months. I accordingly conclude that the rental accommodation costs should only be allowed for a

period of 30 weeks rather than 39 weeks which would reduce the amount claimed for rental to $5,670.00. This reduction is appropriate as the claim has always been made on the basis of what the cost would have been if they had carried out remedial work rather than a rebuild. I allow the full amount for storage as I accept the claimants' evidence that it was significantly cheaper for them to book a longer period of storage paying in advance than paying for storage on a month-by-month basis.

[35] The amount of consequential costs has accordingly been established to the extent of $47,672.00.

General Damages

[36] The claimants were originally claiming $50,000 for general damages. At the hearing however this was reduced to $25,000 in light of the recent Court of Appeal decision in *Sunset Terraces*[1] and *Byron Avenue*.[2] Mr and Mrs Harris both gave evidence of the impact having a leaky home had on their lives and health over the past few years. Rather than buying a low maintenance home and being able to take early retirement, Mr and Mrs Harris have had endless difficulties and problems with the property which has delayed Mr Harris' plans for retirement. I accept a general damages award of $25,000 is reasonable as there is nothing about this claim to suggest the level of general damages should be lower than what the Court of Appeal has concluded should be the general rate awarded to owner-occupiers of dwellings.

Summary in relation to Quantum

[37] I am satisfied that the quantum in this claim is proven to the amount of $753,181.00. The amount is calculated as follows:

[1] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.
[2] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

Remedial work as agreed	680,509.00
Consequential losses	$47,672.00
General damages	$25,000.00
TOTAL	**$753,181.00**

DID THE OPPORTUNITY FOR INTERMEDIATE INSPECTION NEGATE THE IMPOSITION OF A DUTY OF CARE

[38] Mr Keall submitted that the claimants had the opportunity to undertake an intermediate inspection and this should negate against the imposition of a duty of care. He submitted that there are two ways in which the question of intermediate inspection may be relevant to the imposition of a duty of care. The first relates to the consideration of sufficient proximity and the second is that a duty of care does not extend to anyone who purchased in circumstances where they ought to have used their opportunity of an inspection in a way which would have given warning of the defects. Mr Chapman relies on the second of these. He submits that Mr and Mrs Harris were generally aware of the leaky home phenomenon at the time they purchased the property. He further submits that Mr and Mrs Harris were given the opportunity to inspect the property as the agreement for sale and purchase that they signed had specific clauses in it to do with a pre-purchase inspection which Mr Harris deleted. Mr Chapman also submits that there was a second opportunity for intermediate inspection prior to the transfer of the property from the initial purchasing trust to the Estuary Trust after the initial defects were discovered in November 2006.

[39] *Body Corporate No 189855 v North Shore City Council* (*Byron Avenue*)[3] is authority for the fact that a duty of care does not extend to anyone who "purchases with actual knowledge of the defect or in circumstances where he or she ought to have used their

[3] HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J.

opportunity of inspection in a way which would have given warning of the defect." Venning J however goes on to say that a defendant who wishes to avoid liability on the ground of lack of reliance based on the possibility of intermediate examination by the plaintiff has a significant hurdle to overcome.

[40] The other way a question of intermediate inspection can be relevant is if a claimant acts with such disregard for their own interest as to make their conduct the sole cause of damage. This may have the effect of breaking the chain of causation.

[41] Heath J in *Sunset Terraces*[4] however concluded that there has never been an expectation in New Zealand law, contrary to the position in England, that a homeowner should commission a report from an expert to establish that the dwelling is soundly constructed. He concluded that there is no duty on purchasers to obtain a pre-purchase inspection and accordingly the allegation of contributory negligence for failure to do so could not be made out.

[42] The conclusions by both Venning J and Heath J were not questioned in the appeals to the Court of Appeal. William Young P in the appeal decision on *Sunset Terraces* states at [166]:

> "... And I also think, it will be a rare case indeed where the significance of the opportunity for intermediate inspection breaks the chain of causation."

[43] Mr Harris accepted that with the benefit of hindsight, he was stupid in not getting expert advice prior to signing the agreement for sale and purchase. Mr and Mrs Harris did however make reasonable enquiries as to the quality and nature of the construction of the dwelling. There was little to put the claimants on notice that further examination was appropriate other than the dwelling had the

[4] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008.

appearance of being a monolithically clad home. Furthermore no evidence was presented by any of the respondents to establish that a pre-purchase inspection would have identified the significant defects with this dwelling.

[44] The claimants obtained a Land Information Memorandum from the territorial authority and this did not include anything that would have placed them on notice of potential problems. I therefore reject the argument that the claimants have either been the sole cause of their loss or that by failing to obtain a pre-purchase inspection they have broken the chain of causation. Furthermore I conclude that it does not make Mr and Mrs Harris contributorily negligent.

THE LIABILITY OF KIM VELTMAN

[45] Mr Veltman was contracted by Mr Chapman to design the dwelling and to do the drawings in order to obtain building consent. He had no involvement during the building of the dwelling. The claimants submit that Mr Veltman owed them a duty of care to exercise all reasonable skill in preparing the plans and specifications. They further submit that Mr Veltman was negligent in providing consented plans that failed to detail proper weathertightness details in relation to several features. They allege the plans contained details, particularly in relation to the inter story band, that did not comply with the Building Code. Such negligence they submit was a significant contributor to the lack of weathertightness identified by the experts.

[46] Mr Veltman accepts he owes the claimants a duty of care. He however submits he met that duty of care and was not negligent. In particular he submits that the defects in the dwelling were not caused by design defects but by deviation from the plans and manufacturer's details by those involved in construction. Alternatively the defects were a result of poor building practices by

the subcontractors involved in the construction. Mr Veltman submits that his plans and specifications were in accordance with the general practice of the day and that the standard of care needs to be established by reference to the general practice at that time.

[47] It is well established that the standard of care required of an architect in discharging his or her duties is the reasonable care, skill and diligence of an ordinarily competent and skilled architect.[5] Mr Bigio appears to be suggesting that the scope of duty and liability of an architect extends to providing every detail necessary for the proper and complete construction of a dwelling in any set of plans and specifications prepared for a dwelling house. This is not however the test that the courts and therefore Tribunal applies in determining whether an architect has breached any duty of care.

[48] In *Body Corporate 188529 v North Shore City Council*[6] (*Sunset Terraces*), Heath J concluded that an architect or designer is entitled to assume that a competent builder would refer to manufacturer's specifications or established literature for construction where there was insufficient detail in the plans. In that case, even though the plans were skeletal in nature, did not contain references or detail relating to manufacturer specifications, and the specifications were poorly prepared and contained outdated references, the Court was satisfied that the dwelling could have been constructed in accordance with the Building Code. Heath J stated:

> "[545]...*I am satisfied, for the same reasons given in respect of the Council's obligations in relation to the grant of building consents, that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturers' specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer. In other respects, the*

[5] *Eckersley v Binnie & Partners* [1955-1995] PNLR 348 and *Saif Ali v Sydney Mitchell & Co* [1978] 3 ALL ER 1003.
[6] [2008] 3 NZLR 479.

deficiencies in the plans were not so fundamental, in relation to either of the two material causes of damage, that any of them could have caused the serious loss that resulted to the owners.

[546] In particular, the allegation in relation to inadequate waterproofing detail for the decks and the absence of any detail in the plans demonstrating how the tops of the wing and the parapet walls were to be waterproofed are answered fully by the reasons given for rejecting the negligence claim against the Council based on its decision to grant a building consent."

[49] Heath J in considering the Council's liability in relation to the issue of building consent concluded that the Council, in exercising its building consent function, was entitled to assume that the developer would engage competent builders and trades people to carry out the work. The same assumption can also reasonably be made by the designer.

[50] The relevant question to address therefore is whether the claimants have established that at the relevant time either the particulars drawn, or the matters that were not detailed, fell short of what was required of a reasonably competent architect at the time these plans were drawn. If so, the question then is whether the act or omission was causative of loss.

[51] The specific allegations made against the designer for details where it has been established that there is water ingress are:

- Lack of weathertightness detail in the inter-storey junction, in particular the detailing of a flashing that did not discharge water away from the dwelling and the flat top to the polystyrene strip;
- The drawings did not detail a gap between the untreated timber framing and the masonry;
- Failure to provide appropriate detailing for the fixing of the metal balustrades;

- Inappropriate detailing of wall to balcony joins.

[52] There was no specific evidence called by the claimants as to the general standard of the day for designers. As was relatively standard for the time the plans were accompanied by largely generic type specifications. The plans and specifications did however contain references to appropriate manufacturer's specifications and other documentation which provided more detail on specific construction items.

[53] Mr Bigio submitted that the polystyrene band was an entirely decorative feature. There was no evidence to support this submission and in fact Mr Veltman's evidence was that the band, appropriately affixed, plastered and painted, was designed to provide a waterproof barrier to the inter-story junction. His evidence was that at the time the dwelling was designed such a detail was considered to be an appropriate and weathertight detail. He also stated that Thermalite blocks beneath the band did not need to be plastered as that would have made it more difficult to affix the band so that it provided a watertight barrier. The claimants did not call any evidence from an architect to dispute the evidence given by Mr Veltman as to whether or not the provision of a polystyrene band was in accordance with good design practice at the time.

[54] Mr Nevill also did not specifically give evidence on whether the detailing of the polystyrene band was in accordance with good design practice at the time this house was constructed. His opinion however was that the band would most likely have failed even if the dwelling had been constructed in accordance with the drawings. His view was that the band had not been positioned as it has been drawn to give protection to the inter-storey join in most locations. He also agreed with Mr Veltman that the flashing as built was different from the flashing as designed. His opinion however was that the flashing,

even as designed, would inevitably fail as it did not direct water to the outside.

[55] Mr Wilson's view was that an attempt had been made to construct the inter-storey band in accordance with the drawings. He however believed that the design as drawn would have failed as even in locations where the band was installed over the joins there had been water ingress and subsequent damage. Mr Wilson was also of the view that Mr Veltman was negligent by failing to provide a sloped top on the polystyrene band. Mr Veltman's opinion however was that the technical literature provided for a slope to the top of the polystyrene band. The experts also agreed that the sample of the band that was brought into the hearing did have a slope.

[56] Mr Bigio submitted that where a detailed plan was drawn, that took precedent over the manufacturer's technical literature. For that reason Mr Veltman was negligent in failing to specify a slope on the top of the band. In my opinion however, Mr Bigio is interpreting building plans as a lawyer and not as a builder. Mr Hunter said that he would have followed the technical literature by placing a slope on the band even though the design was not drawn. Mr Hunter was an approved Insulclad installer and had experience in affixing polystyrene bands.

[57] Based on Mr Hunter's evidence, I do not accept Mr Veltman was negligent in failing to specify a slope to the top of the polystyrene band in his drawings as a slope was provided by the manufacturer's specifications and a reasonably competent builder would have applied those details when affixing the band.

[58] There is also insufficient evidence before me to establish that Mr Veltman fell short of the reasonable care, skill and diligence owed by a competent and skilled architect at the time by detailing a polystyrene band over the junctions between the two cladding

materials as the primary method of weathertightness. In any event the band as installed was not located where it was drawn as in many locations it was below the join rather than covering it.

[59] I however accept that Mr Veltman fell short of his duty of care in designing a flashing to go underneath the band that did not deflect water to the outside. However, as neither the band was installed as drawn, nor was the flashing constructed as drawn I conclude that there is an insufficient causative link between the design work done by Mr Veltman and the damage to the property.

[60] The allegation that Mr Veltman failed to detail a separation between the untreated framing and the masonry is not established. Mr Veltman produced enlarged plans which showed a separation had been drawn. I accept this separation would have been apparent on the plans on site which most likely would have been the normal A2 size drawing.

[61] I accept the allegation by the claimants that Mr Veltman's drawings showed the Insulclad being taken down to the horizontal surfaces of the decks. Mr Veltman however stated that rather than following this detail as drawn the builders should have followed the technical literature provided by the material manufacturers as were specified in the plans. Mr Hunter in giving evidence also stated that he would have followed the technical literature rather than the more general drawings for this detail. I accordingly conclude that Mr Veltman was not negligent in failing to draw appropriate clearances as these matters were detailed in the technical information referred to in the plans and specifications. Mr Veltman was also not negligent in failing to provide details for the fixing of the metal balustrades. He was entitled to rely on the manufacturer's specifications in this regard.

[62] In conclusion therefore I accept Mr Veltman owed the claimants a duty of care. They have however failed to establish that any breach of that duty of care has been causative of the dwelling leaking. They called no evidence to establish that the plans and specifications prepared by Mr Veltman were not prepared with the reasonable care, skill and diligence of an ordinary competent architect by reference to the general practice of the day. In addition there is insufficient evidence before me on which I could conclude that the dwelling could not have been built weathertight by a competent builder from the plans and specifications if the builder had referred to the manufacturers technical information and other details referred to in the plans. The claim against Kim Veltman is accordingly dismissed.

DOES MR CHAPMAN OWE THE CLAIMANTS A DUTY OF CARE AS EITHER A DEVELOPER, PROJECT MANAGER OR HEAD-CONTRACTOR?

Was Mr Chapman a Developer or Project Manager?

[63] The claimants allege that Mr Chapman was the developer, project manager or head-contractor. Mr Chapman however submits that he was a lay owner of the property only whose involvement was limited to hiring others to design and construct the dwelling for his own domestic use. He denies he was a developer, project manager or head contractor and denies he owes the claimants a duty of care.

[64] The Building Act 2004, although not definitive gives some useful guidance as to the definition of "a residential property developer". For the purposes of that Act, a residential property developer is defined at s 7 as:

> "A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
> (a) Builds the household unit; or

(b) Arranges for the household unit to be built; or

(c) Acquires the household unit from a person who built it or arranged for it to be built."

[65] A helpful definition of a developer can also be found in *Body Corporate 188273 v Leuschke Group Architects Ltd:*[7]

> "[32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops."

[66] Harrison J also observed that the word developer is not a "term of art or a label for ready identification", unlike a local authority builder, architect or engineer. He regarded the term as "a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances". It is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of care on the developer. Whether someone is called a site manager, project manager or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[67] Mr Keall however submitted that the position of Mr Chapman was no different to that of Mr Riddell in *Riddell v Porteous*.[8] Mr Keall said that case rejected the proposition that an owner who hires various contractors became the head contractor, supervisor or clerk of works. I do not however accept that *Riddell v Porteous* is authority for the proposition that all owners who employ builders to build a

[7] HC Auckland, CIV-404-404-2003, 28 September 2007, Harrison J.
[8] [1999] 1 NZLR 1.

house for them are not developers, head contractor or project managers. In that case judgment had already been entered against the Riddells in the District Court under the contractual claim. Accordingly the only issue to be considered on appeal was whether the Riddells had a cross-claim against the builder, Mr Porteous. The Court of Appeal in *Riddell v Porteous* concluded that it was Mr Porteous, the builder, who was responsible for the departures from the plans and any defective building work that was responsible for the leaks.

[68] *Riddell v Porteous* also supports the claimants' submissions that the factual matrix of each case needs to be determined on its facts when assessing liability. Accordingly a full examination of the role Mr Chapman played in relation to the construction is required to determine whether he owes the claimants a duty of care as a developer, project manager or head contractor. If I do determine that Mr Chapman owes the claimants a duty of care in order to determine whether Mr Chapman breached any duty of care owed, I will then need to decide whether there is any causative link between his role and the leaks in the dwelling.

[69] The following factors are relevant in considering Mr Chapman's role in the construction process:

a) Mr Chapman purchased the land at Estuary Views in order to build a house on that land;

b) In the 7 years prior to the purchase of Estuary Views, Mr or Mrs Chapman had purchased three other sections, built a home on them and then sold them. The three previous properties had all been in Manor Park Drive. No 55 was purchased in 1992, a dwelling built on it and it was sold in 1994. In August 1994 a building permit was lodged for No 77 Manor Park Drive. That was sold in

October 1995. In February 1996 a section at No 83 Manor Park Drive was purchased in the joint names of Mr and Mrs Chapman, a building permit was obtained in March 1996 and it was sold in July 1998. Mr Chapman stated that these properties were developed in a similar way to the Estuary Views property;

c) Mr Chapman acknowledged he prepared the detailed project plan for the designer, Mr Veltman. Whilst Mr Chapman's evidence was that this was a document that lay people commonly prepare I do not accept that submission. The instructions contained technical details in relation to both design and construction and also materials to be used that went beyond a lay person's knowledge of building practices;

d) Mr Chapman decided two different cladding materials should be used. Initially the project brief indicated that either plastered concrete block or plastered Thermalite block would be used on the ground floor and Insulclad on the top floor; Mr Chapman then gave specific instructions by fax dated 6 May 1999 to make changes to the project brief. Then by fax dated 7 May 1999 Mr Chapman advised that he wished the Thermalite block to be used on the ground floor, Insulclad on the top floor and that a band would be installed where the two systems joined;

e) Mr Chapman made decisions to depart from the plans such as removing the guttering from the upstairs decks.

f) Mr Chapman arranged for the building consent and other necessary consents;

g) Mr Chapman chose the contractors including several on labour-only contracts. He engaged them, met them on site, and reviewed their invoices before paying them;

h) The builder, Mr Greaves, was employed on a labour-only contract. Mr Chapman separately arranged for the pre-cut and pre-nailed framing to be provided and he supplied all materials apart from framing nails from Mr Greaves' nail gun;

i) It was Mr Chapman who decided to use untreated timber for the framing. I do not however accept Mr Bigio's submission that this was necessarily contrary to the detailed plans and specifications. The plans provided that timber with appropriate treatment was to be used. There was no evidence that untreated timber was not appropriate at the time of the construction of this dwelling;

j) Mr Chapman arranged the timing of when various contractors were to be on site. In his own evidence he also met with the contractors on site before they started their jobs;

k) His own evidence also suggests that he followed up with the various contractors engaged if they were not carrying out the work within the timeframe stipulated. He gave evidence of ringing Mr Franks when the Thermalite block work was not started within the timeframes he had envisaged;

l) As Mr Chapman arranged and organised the different contracts he either decided that the Insulclad on the top of the dwelling was to be installed prior to the Thermalite or at very least allowed this sequence of events happen;

m) Mr Chapman convened a meeting on site between Mr Franks and Mr Hunter, the two contractors engaged to install the different cladding materials;

n) Mr Chapman employed no one to supervise the construction of the dwelling. He exercised overall control, management and supervision of the construction of the house;

o) I accept on the evidence presented that Mr Chapman was on site on almost a daily basis. Whilst his evidence was that he was on site less often, all the contractors who gave evidence at the hearing record Mr Chapman regularly being on site coordinating and giving instructions as well as meeting with various of the other contractors;

[70] I accept that Mr Chapman relied on the experts he contracted to do work on the property. He was entitled to rely on the expertise of both Mr Hunter and Mr Franks, in relation to the construction work they were contracted to carry out. The liability by Mr Hunter and Mr Franks, or his company, for any defective work they did would not be negated by any role Mr Chapman had in the construction. However that does not mean that Mr Chapman does not also owe the claimants a duty of care in relation to his role.

[71] I do not accept Mr Keall's submissions that Mr Chapman's qualifications and experience was limited to accountancy work for Malcolm J Limited (MJL) and that he had no experience of supervising or directing construction work. This was the fourth property Mr Chapman had built in this way. It was clear from his answers to several of the questions that Mr Chapman had quite detailed and specific knowledge of a number of aspects of the

building process. It was also clear that even though he was primarily an accountant with MJL, he had acquired some specific and detailed knowledge in relation to construction, materials and also construction practices during the 15 years he was employed by that company. In his own evidence he acknowledged attending presentations by people such as Mr Franks on building products. He also instructed Mr Greaves on a method for calculating square metres of concrete in order to cost concreting jobs. He was aware of what departures could be made from consented plans without obtaining specific consent from the Council.

[72] Mr Chapman owned the property and he was also the person who was in control of the consent, design, construction, approval and ultimately the marketing process. He was the person sitting in the centre of, and directing the project for his own financial benefit. He was the person who decided on and engaged the builder and all other subcontractors and professionals involved in the construction. He was responsible for the implementation and completion of the construction process and had the power to make all important decisions. The only issue that could point to Mr Chapman not being a developer is the fact that the property was built as a home for Mr and Mrs Chapman and they lived in the property for six years prior to selling it.

[73] If this had been the only property Mr Chapman had arranged to have constructed in such a way it may have been sufficient for me to conclude that Mr Chapman was not a developer who owed a non-delegable duty of care to subsequent owners. However this was the fourth property Mr Chapman had constructed in this manner in 8 years. This significant factor coupled with the other considerations listed at [69] above is sufficient to establish that, even if on a part time basis, Mr Chapman was in a business of buying sections, arranging for houses to be built on those sections and then ultimately selling them for his own financial benefit. With this particular

property, other than the money saved by not employing a professional to supervise or project manage, the financial benefit was deferred. I accordingly conclude that Mr Chapman was a developer of the property at Estuary Views and as such owes the claimants a non-delegable duty of care.

[74] Even if I am wrong in my conclusion that Mr Chapman was a developer he was clearly the project manager and head contractor. In that capacity he would also owe the claimants a duty of care although the scope of that duty may be more limited. I therefore need to determine whether Mr Chapman breached the duty of care owed and if so, whether any breaches have caused or contributed to the claimants' loss.

Did Mr Chapman Breach the Duty of Care Owed?

[75] The most significant issue in relation to this property was defects in the junction between the two cladding materials and the inter-storey band. Mr Chapman was the person who decided there would be two different cladding materials used on the property. He was also the person who contracted two different contractors to install the different cladding materials. As the project manager he met with the different contractors on site and arranged to meet both Mr Franks and Mr Hunter on site. Whilst Mr Chapman says he was largely a bystander in that conversation this was not necessarily accepted by the other people who gave evidence as to what took place. In any event Mr Chapman, even as project manager, had the responsibility to ensure the sequencing of work was done correctly. Mr Chapman and Mr Hunter accepted that the Insulclad was installed to the upper level of the dwelling prior to the Thermalite to the lower level. The expert's opinion was that this made it very difficult for the Thermalite to be installed appropriately and was directly causative of the main defects they believe existed in relation to the installation of the Thermalite blocks.

[76] Whilst various accounts of the conversation between Mr Franks, Mr Chapman and Mr Hunter were given, it is clear that the key subject matter of that discussion was either how the inter-storey band would be formed or how the polystyrene band would be affixed. It also appears that at least some parties involved in the construction had some concerns or queries in relation to how the plans should be implemented. As the person with overall responsibility for the construction of this dwelling, Mr Chapman had a responsibility to refer the matter back to the architect if there was any lack of clarity in relation to the design details for this feature.

[77] Mr Chapman was also responsible to ensure that the transition between two trades was done in a way that caused the dwelling was built weathertight. He failed to do this. The evidence also suggests that someone other than Mr Franks or Mr Hunter affixed the polystyrene band. Mr Frank accepted that it was one of his products and that he was likely to have been contracted to install it but he said that he did not visit the property again to install the band after doing the initial installation of the Insulclad and its plastering. He accepted that he installed the flashing and he further accepted the deficiencies in the installation of the windows. He however said he had no recollection of installing the band and in any event it could not have been his work because it was affixed in a way significantly different from the way he would have affixed it. I therefore accept Mr Frank's evidence that he did not install it. Mr Chapman must therefore have contracted someone else to install it.

[78] In these circumstances as either the project manager or developer Mr Chapman was responsible to ensure that the inter-storey band was installed in accordance with the plans and the Building Code. He failed to do this. The damage which resulted from the defects in the inter-storey band would have required a complete reclad. Mr Chapman is therefore liable for the full amount of the quantum as claimed.

[79] Whilst Mr Chapman as developer would have a non-delegable duty, as project manager he would not be responsible for the departures from the plans and the defective building work carried out by Mr Hunter or Mr Franks' subcontractors. Therefore as project manager I conclude he would have no responsibility for the defects in the joinery flashings. Mr Chapman however does have some responsibility for the defects with the balcony and deck defects. Mr Chapman specifically directed changes to the way the decks were developed from what was included in the plans. He therefore should have insured that in making these changes the trades people who completed the work on the decks did so in a way that complied with appropriate construction practices. He also is responsible for the ground clearance issue as the landscaping and tiling work was done after the work of those directly involved in the construction of the dwelling.

[80] In conclusion therefore I accept that Mr Chapman owed the claimants a duty of care as the developer and the project manager. I further conclude he breached that duty of care and that those breaches resulted in defects which required the dwelling to be completely reclad. Even if he was only the project manager and not the developer the extent of his duty of care would have required a complete reclad as they related to the inter-storey band and the decks. The claimants have accordingly established the claim against Mr Chapman and he is jointly and severally liable for the full amount as set out in paragraph 37.

THE LIABILITY OF MR FRANKS

Does Mr Franks Owe the Claimants a Duty of Care?

[81] Roger Franks was the director of Thermalite-Block Limited (TBL) the company that supplied the Thermalite block used on the lower level of the dwelling. Mr Franks or TBL were contracted by Mr

Chapman to supply and install the block work. Subcontractors were contracted to do the installation. Mr Franks also signed the guarantee dated 3 November 2000 warranting that the Thermalite had been installed properly. The guarantee referred to a non-existent company Thermalite New Zealand Limited. TBL was not named on the guarantee and Mr Franks did not sign it in his capacity as director or employee of TBL.

[82] It is not alleged that there are any defects in the actual blocks which have caused water ingress. The allegations are in relation to the installation only. Mr Franks submits he has no personal liability as he was not involved in the installation of the blocks or the supervision of that installation and he was always contracting through TBL. That company contracted suitably skilled and qualified trades people to carry out the work.

[83] Mr Chapman and the claimants submit that Mr Chapman contracted personally with Mr Franks for the supply and installation of the blocks. Mr Franks however stated that Mr Chapman knew that he was contracting with his company because of prior dealings between his company and Mr Chapman. The claimants and Mr Chapman also allege that as the paperwork surrounding the contract with Mr Franks only refers to "Thermalite-Block" without the use of the term "Limited" following it, the contract was between Mr Franks personally and Mr Chapman.

[84] While I accept that Mr Franks was somewhat sloppy in his book keeping, I conclude that Mr Chapman knew, or should reasonably have known, that he was contracting with TBL and not with Mr Franks personally. I accept that due to Mr Franks' previous dealings with Mr Chapman through his employment at M J Lusby, Mr Chapman would have been aware Mr Franks was operating through a company. In addition I accept that the cheques paid by Mr Chapman for the work done were deposited into TBL's bank account.

Whilst this is not definitive proof the cheques were made out to the company I accept that it is more likely than not that this is the case.

[85] I therefore conclude that the contractual relationships were made between Mr Chapman and Mr Franks' company, TBL. There is no evidence that Mr Franks actually carried out the installation work and there was also insufficient evidence to establish that he directly supervised its installation. Mr Franks however gave a guarantee as to workmanship and that was in his personal capacity. In doing this he effectively assumed personal responsibility for the work TBL contracted to supply.

[86] I also accept that Mr and Mrs Harris knew of the existence of the guarantee prior to purchase and placed reliance on it. They made a number of enquiries in relation to the cladding material and installation prior to purchase and were advised that a guarantee in relation to the Thermalite had been provided and they were subsequently provided with a copy of this. I accordingly conclude that although Mr Chapman contracted with TBL, rather than Mr Franks, Mr Franks personally owed the claimants a duty of care as he gave a personal guarantee thereby assuming personal responsibility for TBL's work.

Did Mr Franks Breach the Duty of Care Owed?

[87] Both Mr Wilson and Mr Nevill in their initial reports suggested that there were a number of deficiencies with the installation of the Thermalite block. After the cladding was removed however, the concerns with the Thermalite block installation were reduced to the following:

- The Thermalite blocks were installed so that they came into contact with the timber joists in some locations thereby transferring moisture to the timber;

- The blocks were installed in such a manner that in places they pushed up the Z flashing installed at the inter-storey junction causing it to back fall thereby encouraging water to pond.
- The Thermalite was not properly installed in relation to the mortaring of the joints of the blocks at the top of the Thermalite block work.

[88] The alleged defects in the installation of the Thermalite blocks are largely confined to the upper portion of the block work and was most likely caused by the fact that the Insulclad and Z flashings were installed first with the Thermalite then needing to be pushed up and under the flashings. This not only made it difficult to ensure the mortar was appropriately applied at the top of the blocks but also had the effect of pushing the Z flashing up in some locations. It also contributed to the fact that the blocks were installed in some locations so that they came in contact with the timber joists.

[89] I accept these defects contributed to the damage caused by water ingress around the inter-storey join and also contributed to damage by not allowing water that came in from above to escape. These defects were not however the primary or major causes of water ingress. Neither Mr Franks nor TBL were responsible for either installing the flashings or the polystyrene band that was to be the major watertightness feature in relation to the join. There is also insufficient evidence to establish that Mr Franks was responsible for any decisions made in relation to the affixing of the polystyrene band other than providing his opinion on what were appropriate products to affix the band to Thermalite.

[90] During the course of the hearing there were also allegations that the ground clearance issues referred to in paragraphs 25 and 26 were in part the responsibility of the Thermalite installer. The claimants however accepted that this was unlikely to be the

responsibility of the installers of the Thermalite as it was a bare site construction and ground levels were not finalised until after the major construction work was completed.

[91] Based on the evidence presented it is possible that if the defects in the installation of the Thermalite were the only defects with this dwelling they may have been able to be repaired by targeted repairs and a complete reclad would not be necessary. No detailed evidence was presented on this point nor is there any evidence on which I could conclude that Mr Franks would only be liable for a portion of the costs when considering his joint and several liability. As the work of the Thermalite installation contributed to the damage which alone would have required a reclad of the property, I conclude Mr Franks is jointly and severally liable for the full amount established. As the contribution of this work is however relatively minor, his apportionment is set at 5%.

THE LIABILITY OF MR HUNTER

Does Mr Hunter Owe the Claimants a Duty of Care?

[92] Mr Hunter accepts that he installed the Insulclad to the upper level of this dwelling. He also accepts he installed the flashings behind the inter-storey band.

[93] Courts and tribunals have consistently held that builders, whether as head-contractors or labour-only contractors, of domestic dwellings owe the owners and subsequent owners of those dwellings a duty of care.[9] In addition courts in recent times have generally concluded other appropriately qualified subcontractors, such as plasterers and cladding installer involved in residential construction owe subsequent home owners a duty of care. In *Body Corporate 185960 v North Shore City Council,*[10] Duffy J observed that:

[9] Ibid
[10] HC Auckland, CIV 2006-004-3535, 22 December 2008, Duffy J.

> [105] "The principle to be derived from *Bowen v Paramount Builders* will apply to anyone having a task in the construction process (either as contractor or subcontractor) where the law expects a certain standard of care from those who carry out such tasks. Such persons find themselves under a legal duty not to breach the expected standard of care. This duty is owed to anyone who might reasonably be foreseen to be likely to suffer damage."

[94] In more recent claims involving leaky residential dwellings the terms "builder" or "contractor" as used in leading cases such as *Bowen* [11] have been given wide meaning to include most specialists or qualified trades people involved in the building or construction of a dwelling house or multi-unit complex. Given the nature of contracts in residential dwelling construction, attempts to differentiate between the respective roles of these persons in the contractual chain that deliver up dwelling houses in New Zealand, can create an artificial distinction. Such a distinction does not accord with the practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all those people.

[95] I accept that Mr Hunter was contracted to install and plaster the Insulclad and also the flashing underneath the polystyrene band. His position is no different from any other qualified tradesman contracted to do construction work on a dwelling and found to have owed a duty of care. I accordingly conclude that Mr Hunter does owe the claimants a duty of care. The issue that now needs to be addressed is whether Mr Hunter breached the duty of care he owed the claimants.

[11] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks v Hobson Swann Construction Limited*; *Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394, *Byron Avenue* n 6 above, *Heng & Anor v Walshaw & Ors* [30 January 2008] WHRS 00734, Adjudicator John Green.

Did Mr Hunter Breach the Duty of Care Owed?

[96] At the hearing Mr Hunter accepted that there were deficiencies in the installation of the joinery in the upper level of the dwelling and did not specifically dispute the evidence given by the experts that the manner of installation of the joinery was not in accordance with the technical literature or good building practices at the time. On the basis of the evidence given by Mr Nevill and Mr Wilson, I accept that deficiencies in the installation of the windows have been a cause of damage. I also accept that it was Mr Hunter's responsibility to ensure that any penetration through the Insulclad were appropriately sealed and that this is at least an issue of future likely damage.

[97] In conclusion, I find Mr Hunter was negligent and thereby in breach of the duty of care he owed the claimants. His negligence led to water penetration and resulting damage on the upper level of this dwelling and in the area of the inter-storey band. The areas for which he has some liability would have required a complete reclad as part of the remedial work. I accordingly conclude that he is jointly and severally liable for the full amount of the claim established.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY

[98] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

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

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

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[101] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[102] The difficulty with this claim is that some parties primarily responsible for the defects are not parties to the claim either because they could not be identified or because they were bankrupt or in liquidation. The work and materials guaranteed by Mr Franks, I accept were only a minor contributing factor to the dwelling leaking. The evidence also suggests that these defects were almost inevitable given the sequencing of work as decided by Mr Chapman. I would accordingly assess Mr Franks' liability at 5%.

[103] Mr Hunter was primarily responsible for defects and the installation of the inadequate flashing to the inter-storey band. He has no responsibility for the decks or the ground clearance issues and I also accept he did not install the polystyrene band. For this reason I assess his contribution to be 35% and Mr Chapman's to be 60%.

CONCLUSION AND ORDERS

[104] The claim by Colin Pitts Harris, Dianne June Harris, Pamela Anne Hovelle and Patrice Marie Almond is proven to the extent of $753,181.00. David Maxwell Chapman, Roger James Franks and

Bruce James Hunter are all jointly and severally liable for this amount. For the reasons set out in this determination I make the following orders:

i. The claim against Kim Veltman is dismissed.
ii. David Maxwell Chapman is to pay the claimants the sum of $753,181.00 forthwith. David Maxwell Chapman is entitled to recover a contribution of up to $301,272.00 from Roger James Franks and Bruce James Hunter for any amount paid in excess of $451,909.00.
iii. Roger James Franks is ordered to pay the claimants the sum of $753,181.00 forthwith. Roger James Franks is entitled to recover a contribution of up to $715,521.95 from David Maxwell Chapman and Bruce James Hunter for any amount paid in excess of $37,659.05.
iv. Bruce James Hunter is ordered to pay the claimants the sum of $753,181.00 forthwith. Bruce James Hunter is entitled to recover a contribution of up to $489,568.00 from David Maxwell Chapman and Roger James Franks for any amount paid in excess of $263,613.00.

[105] To summarise the decision, if the three liable parties meet their obligations under this determination, this will result in the following payments being made by the liable respondents to this claim:

Second respondent, David Maxwell Chapman	$451,909.00
Fourth respondent, Roger James Franks	$37,659.00
Fifth respondent, Bruce James Hunter	$263,613.00

[106] If any of the parties listed above fails to pay his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph 104 above.

DATED this 8th day of July 2010

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P A McConnell
Tribunal Chair